

**IN THE HIGH COURT OF TANZANIA**

**MUSOMA DISTRICT REGISTRY**

**AT MUSOMA**

**CONSOLIDATED CRIMINAL APPEALS NO 106 AND 107 OF 2020**

**1. MARWA MAHINDI @ KINGOI \_\_\_\_\_ 1<sup>st</sup> APPELLANT**

**2. MOME MATIKO @ MEME \_\_\_\_\_ 2<sup>nd</sup> APPELLANT**

**VERSUS**

**THE REPUBLIC \_\_\_\_\_ RESPONDENT**

*(Arising from the decision and orders of the district court of Serengeti at Mugumu, Hon. Mzalifu RM in economic case no 129 of 2017 dated 24.04.2020)*

**JUDGEMENT**

**20<sup>th</sup> and 30<sup>th</sup> October 2020**

**GALEBA, J.**

The appellants in this appeal were charged in the district court of Serengeti in economic case no 129 of 2017. Specifically, they were charged for unlawful entry into the national park and unlawful possession of 1 machete and 2 knives in the said wildlife conservation park. They were also charged for unlawful possession of one skin of a wildebeest and 2 fresh pieces of meat of the same animal. According to the prosecution, the appellant were further found in unlawful possession of 2 fresh pieces of buffalo meat. Consequent to the trial, the appellants were convicted and ultimately sentenced to 1 year imprisonment in respect of each of the 1<sup>st</sup> and 2<sup>nd</sup> counts and 20 years imprisonment in respect of the 3<sup>rd</sup> count. The appellants were aggrieved by that decision and they

separately filed the above appeals, which this court consolidated upon noting that both arose from the same judgment.

When I was preparing for hearing of this appeal, I noted that the certificate conferring jurisdiction onto the trial district court was drawn under section 12(3) of **Economic and Organized Crime Control Act [Cap 200 RE 2002] (the EOCA)**, while the charge against the appellants contained a combination of both economic and noneconomic offences.

When the appeals were ready for hearing, I asked Mr. Isihaka Ibrahim, learned state attorney for the respondent, if the trial court had jurisdiction to try the case in the first place, and if it did not, what ought to be the way forward. Mr. Ibrahim readily conceded that, in such circumstances, the trial court had no jurisdiction to try the case and that he would have prayed for retrial but looking at what happened in the trial court he would not move this court in that direction. He actually supported the appeals and sought release of the appellants.

In law, illegal entry and possession of weapons in the national park are not economic offences but unlawful possession of government trophies is an economic offence.

Legally, when a charge contains both economic and noneconomic offences, the certificate to confer jurisdiction upon a subordinate

court to try the case must be issued under section 12(4) and not 12(3) of the EOCA as it was done by the prosecution in this case.

Very recently in March 2020 in **Saidi Lyangubi Versus the Republic Criminal** Appeal No 324 of 2017 (unreported) at page 11 of the typed judgment the Court of Appeal held that;

*"... this is not the first time section 12(3) and 12(4) of the Act is coming under proper scrutiny in this Court. It was a subject of discussion in the cited case of Kaunguza Machemba vs The Republic (supra). In that case the appellant was arraigned in court to answer a charge comprising both economic and non-economic offences and the certificate conferring jurisdiction to try the case to the Shinyanga Resident Magistrates Court was issued under section 12(3) of the Act. The trial was declared a nullity by the Court."*

It is therefore clear that the consequences in our case, like in the above appeal, are to nullify the trial, which was also the proposal of Mr. Ibrahim. After declaring the trial a nullity the next following step is normally either **acquittal** or trial **de novo**.

Courts have always refused to order a trial **de novo** where there is no credible evidence necessary to lead to a valid conviction. See the decisions in **Shabani Iddi Jololo and 3 Others v the Republic**, Criminal Appeal No. 200 of 2006 and **Erneo Kidilo and Matatizo Mkenza v the Republic**, Criminal Appeal No 206 of 2017. For instance in **Erneo Kidilo** a prayer for retrial was refused because the trophy valuation certificate, the inventory form and the appellants' confession were all missing from the file.

In this case, no documents are missing but something more fatal is evident. The evidence of **PW1, Dricqu Abas Shaban, PW2, Yahya Seif** and **PW3 Wilbrod Vincent** were all not appended with a signature of a magistrate who recorded them contrary to the requirements of section 210(1) (a) of the CPA.

That omission to sign evidence of a witness or witnesses renders the proceedings irregular and the irregularity is an incurable defect as per **Yohana Musa Makubi and Another v the Republic**, Criminal Appeal No 556 of 2015 (unreported) at page 13. The fate of such evidence in law is to expunge it from the record see **Kanoni Busumagu and 2 Others v the Republic, Criminal Appeal no 360 of 2015 BETWEEN CA (UNREPORTED)**.

In this case it means, there is no way a retrial could possibly be ordered even if Mr. Ibrahim would have pressed for it because, legally there is no evidence on record. The only option that remains smiling for a hug is an acquittal of the two accused persons.

Based on the above reasons this court under the provisions of section **366(1)(a)(i) of the Criminal Procedure Act [Cap 20 RE 2019]** makes the following orders;

1. All the proceedings, the evidence tendered, the findings made, all orders convicting and sentencing the appellants and the judgment in the district court of Serengeti at Mugumu in economic case no. 129 of 2017 are all quashed and nullified.

2. This appeal is struck out for seeking to challenge a nullity.
3. The two appellants, **MR. MARWA MAHINDI @ KINGOI** and **MR. MOME MATIKO @ MEME** are hereby acquitted of the sentences meted upon them and they should be released from prison and set to liberty unless they are otherwise lawfully held.

DATED at MUSOMA this 30<sup>th</sup> October 2020



Z. N. Galeba  
**JUDGE**  
**30.10.2020**