

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

CRIMINAL APPEAL NO. 39 OF 2019

(Arising from Economic case No. 79 of 2016 District court of Bariadi)

**SAMWEL MAHAKABA APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT**

JUDGMENT

25/2/2020 - 20/3/2020

G. J. Mdemu, J.

This appeal originates from the District Court of Bariadi, where the Appellant herein was charged with 10th counts. The 1st count is unlawful entry into the National Park contrary to section 21 (1) (2) (a) and section 29 of the National Parks Act, Cap. 282 read together with GN No. 235 of 1968. As to the 2nd count, the Appellant got charged with unlawful possession of weapons into the National Park Contrary to section 24 (1) (b) and (2) of the National Parks Act, Cap. 282 read together with GN. No. 235 of 1968. The 3rd to 6th Counts were on unlawful hunting in a National Park contrary to section 16 (1) (2) (c) of the National Parks Act Cap. 282 read together with paragraph 14 of the First Schedule to and section 57 (1) and 60 (2) and (3) of the Economic and Organized crimes control Act, Cap. 200 as amended by section 13 and 16 of the Written Laws (Miscellaneous Amendment) Act No. 3 of 2016. The other counts, that is, the 7th to 10th counts were on unlawful possession of Government trophies contrary to section 86 (1) (2)(c) (ii), (iii), (b) of the Wildlife Conservation Act, Cap. 283 as amended by section 59 of the written Laws (Miscellaneous Amendments) Act, 2 of 2016 read with Paragraph 14 of

the First Schedule to and section 57 (1) and 60 (2) and (3) of the Economic and Organized Crimes Control Act, Cap. 200.

According to the particulars of offence, on or about the 11th day of September, 2016 at about 10:00 hours at Nyalubolo area in Serengeti National Park, within Bariadi District in Simiyu Region the Appellant entered in the said area without written permit from the Director of the National Park and was also found in possession of Government trophies, to wit, five dry pieces of wildebeest meat, five dry pieces of Mbogo meat, dry skin of Swala, two skin of hyena, two knives one panga and four trapping wires. At the trial court, the Appellant was found guilty of the charge and four trapping wires. At the trial court the Appellant was found guilty of the charged offences and accordingly got sentenced to 20 years imprisonment in respect of the 2nd to 7th counts each, and as to the 1st count, the Appellant was sentenced to a fine of Tshs 200,000/= or two years prison term in default thereof. This was on 12th of December, 2017.

The Appellant appealed to this court on the following grounds of appeal;

1. *That the case not proved beyond reasonable doubt by the prosecution side.*
2. *That in respect of 1st count, the prosecution did not establish the allegation.*
3. *That in respect of 2nd count, the weapons alleged to have been in his possession was a fabricate story.*
4. *That the sentence of twenty (20) years in jail in 3rd up to 6th counts is manifestly enlarged and its contrary to the law.*

5. *That the sentence imposed by trial court was excessive in counts 7th up to 10th.*

When this appeal came for hearing on the 25th of February, 2020, the Appellant fended for himself whereas the Respondent Republic enjoyed the service of Mr. Nestory Mwenda, learned State Attorney. In his submission, the Appellant prayed to court to adopt his grounds of appeal as they are forming part of his submission. He had nothing useful to add.

In reply, Mr. Nestory Mwenda, raised one procedural issue relating to jurisdiction of the subordinate court in determining economic cases. He submitted that, the Appellant was charged with unlawful possession of government trophies and also unlawful entry in the National Park. The offences require consent of the DPP before trial commences. He further submitted that, at page one of the proceedings, the charge was read to accused person but was not required to plead for want of jurisdiction. The charge was then amended as at page 16 and 17 of the proceedings, and then read over to the Appellant in which, he pleaded to the charge. By then, there was neither consent nor certificate of transfer. He stated that the trial court under the premises had no jurisdiction to try an economic case without the consent of DPP and certificate of transfer. He cited the case of **Adam Seleman Njalamoto V. The Republic, Criminal Appeal No. 196 of 2016** (unreported) in which, at page 4 to 7 of the judgment it was observed that, prosecuting the Appellant without consent and certificate renders the trial a nullity. He submitted further that, the proceedings and judgment under the premises be nullified and the matter should go for retrial. As to retrial he prayed the court to order retrial because the evidence of prosecution is strong. He also cited

the case of **Godfrey Amabros Ngowi V. The Republic, Criminal Appeal No. 420 of 2016** to support his point that;

"The court should test the evidence and if it is of the view that retrial will allow the prosecution to fill gaps, should not order a retrial."

He thought, in the instant case, there are procedural irregularities warrants for retrial. In rejoinder, the Appellant had nothing to add. This was all from the parties.

Having gone through the submissions of both parties, and upon perusal of the records of District Court of Bariadi, it is not dispute that, the record is silent as to whether consent and certificate of the DPP was filed when the Appellant was called to plead. The proceedings, at pages 17 and 18 of the trial court shows as hereunder;

"Mafuru: The case is for preliminary hearing date. I pray to substitute a charge.

Court: Prosecution prayer granted.

Court: The charge read over explained to the accused person who asked to plead thereto.

ACCUSED'S PLEA

1st Count. Not true

2nd Count: Not true

3rd Count: Not true

4th Count: Not true

5th Count: Not true

6th Count: Not true

7th Count: Not true

8th Count: Not true

9th Count: Not true

10th Count: Not true

Court: *The accused person entered plea of not guilty."*

It is obvious that, the District Court here conducted the trial of the Appellant in economic offence without jurisdiction. As observed by Mr. Mwenda, such economic offences require consent and certificate of the Director of Public Prosecutions in order to be tried in the District court. The relevant provisions in the Economic and Organized Crime Control Act are the provisions of sections 12 (3) and 26(1) which reads as hereunder;

"12 (3) The Director of Public Prosecution or any State Attorney duly authorized by him, may in each case in which he deems it necessary or appropriate in the public interest, by certificate under his hand order that any case involving an offence triable by the court under this Act be tried by the court of a resident Magistrate."

As to consent of DPP, is stated under the provisions of section 26 (1) of the Act that;

"26-(1) Subject to the provisions of this section no trial in respect of an economic offence may be commenced under this Act save with the consent of the Director of Public Prosecutions"

Under the premises, I entirely agree with Mr. Mwenda that for want of consent and certificate, the District Court of Bariadi lacked jurisdiction to try

economic offences facing the Appellant. One remedy proposed by Mr. Mwenda, is a retrial. Before I go to that position, I should reproduce part of the judgment of the court of appeal in the case of **Adam Seleman Njalamoto** (supra) which referred the case of **Fatehali Manji VS. R (1966) E.A 343** cited to me by the Learned State Attorney. It reads as hereunder;

"In general, a retrial may be ordered only when the original trial was illegal or defective, it will not be ordered where the conviction is set aside because of insufficiency of evidence or for purposes of enabling the prosecution to fill gaps in its evidence at the first trial...each case must depend on its own facts and an order for retrial should only be made where the interests of justice require it."

With the legal position, there are two matters to consider in the instant appeal. First is that, of want of consent and certificate of transfer which, as alluded above, invites for a retrial. The **second** component is evidential tests which, according to the cited case above, should also be tested and as stated therein, if noted that the evidence is wanting and ordering a retrial will enable the prosecution to fill some gaps, then the court should refrain from so doing. My assessment to the evidence observed the following, **one**, there is variance between the charge in some counts and the evidence of PW1 and PW2.

According to the charge in the second count, the Appellant was found in possession of one knife, and five animal trapping wires without permit. The evidence of PW1 at page 19 of the proceedings indicates to the contrary as reproduced in part as hereunder;

*"So we took them back from where they came from (to bush they run from) and right there we found government trophies to wit, five dry pieces of wildebeest meat, five dry pieces of mbogo meat, dry skin of Swala "impala" two skin of hyena, "fisi" and **two knives, one panga and four trapping wires.**"*
(emphasis mine)

At page 21 of the proceedings PW2 also testified the same as PW1 did. The variance is that, whereas in the charge the Appellant was found possessing one knife and five animal trapping wires, the evidence of PW1 and PW2 who arrested the Appellant is to the effect that, the Appellant was found in possession of two knives and four animal trapping wires. In the evidence, PW1 and PW2 added a panga which is missing in the charge.

Two, according to PW1 and PW2, two persons, the Appellant and one Bugenzi Kilimbe Maduhu got arrested in the National Park on the fateful day. In their testimony, PW1 and PW2 testified to have arrested the two persons and went straight to the police station on 11/9/2016. The record is silent as to what went on, but on 10/11/2016 when the Appellant appeared in court for the first time, the second accused was at large. In my view, this anomaly is not a deliberate move but takes us to suspicion as to whether the Appellant was arrested by PW1 and PW2.

Three, the Appellant stated in his evidence that, PW1 and PW2 arrested them at Mwakatimbo Jungle Mbuga which is a different place stated by PW1 and PW2. This evidence of the Appellant has not been contradicted.

Four, the evidence of PW1 at page 19 shows that, they saw two people running in the bush, arrested them and they were found with government trophies to wit, five dry piece of wildebeest meat, five dry pieces of Mbogo meat, dry skin of swala “impala”, two skin of hyena, “fisi” and two knives, one panga and four animal trapping wires. The record also is silent on how that government trophies were carried or that the Appellant carried government trophies on his hands or under what mechanisms. This circumstances also takes us to suspicion. The evidence on record create doubt to the prosecution case. Obvious, when there is doubt in prosecution case, then such doubt be in favor of the accused.

In my view, ordering a retrial under the circumstances, and as stated in the case of **Fatehali Manji v. R (1966) EA 344** will give opportunity to the prosecution to fill the gaps in their case as analysed above. In the case of **Godfrey Ambros Ngowi** (supra) supplied to me by Mr. Mwenda, at page 10, the court of Appeal observed that;

“so the guiding principle in determining as to whether an order for retrial should be made or not, depends on the circumstances of each case. In many instances, the court has refrained from ordering a trial denovo for fear that, the same would give advantage to the prosecution to fill the gaps after the case had collapsed in the first instance.”

In the instant appeal, my fears have not been cleared and for reasons thereof, I refrain from ordering trial *denovo* as advised by the learned State Attorney. In that stance, I quash conviction and sentence in all counts and

order release of the Appellant from prison unless, for lawful cause, he is held thereto.

It is so ordered.



G. J. Mdemu
JUDGE
20/3/2020

DATED at SHINYANGA this 20th day of March, 2020.



G. J. Mdemu
JUDGE
20/3/2020