IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA AT ARUSHA

CRIMINAL APPEAL NO.4 OF 2022

(C/f Economic Crimes Case No. 2 of 2020 in the Resident Magistrates' Courts of Arusha at Arusha)

ALLY MGOA.....APPELLANT

Vs

THE D.P.P.....RESPONDENT

JUDGMENT

Date of last order: 18-7-2022

Date of Judgment: 24-8-2022

B.K.PHILLIP,J

Aggrieved by the judgment of the Resident Magistrates' Courts of Arusha at Arusha the appellant herein lodged this appeal on the following grounds;

i) That the learned trial Magistrate erred in convicting the appellant basing on a defective charge which is at variance with the evidence as regard to the place where the appellant was found committing the offence, since the prosecution never sought to amend the charge under section 231(1) of the CPA after noticing the variance between the charge and the evidence, the appellant should benefit from the omission.

ii) That the trial and conviction of the appellant offended section 29(1) of the Economic and Organized Crime Control Act (Cap 200 R.E 2002) and the Resident Magistrates' Court of Arusha had no legal jurisdiction to try the appellant as he was arrested within Manyara District.

iii) That, Exhibit P3 (the certificate of seizure) was unlawfully admitted in evidence and thus wrongly convicted the appellant , as it was not read out after admission. It should be expunged.

iv) That the learned trial Magistrate erred in law and fact in believing that the appellant committed the charged offence and proceeded to convict him by basing on evidence which is highly contradictory on material facts, thus unreliable it could not prove the charge beyond reasonable doubt.

v) That, the learned Honourable Magistrate erred in law and fact in believing that the guilty of the appellant for the offence charged was proved beyond reasonable doubts despite failure by the prosecution to call the investigator (St Sgt Eliyo) for unexplained reason, thus offending section 21(1) of the Economic and Organized Crimes Control Act (Cap 200 R.E.2019).

vi) That the Honourable Magistrate erred in law and fact as he failed to see that there is reasonable doubt on whether the trophy allegedly seized with the appellant was ever presented to Court , as the prosecution failed to call the Magistrate (Hon. Nguvava, RM) who allegedly ordered the destruction of the trophy.

vii) That the appellant was wrongly convicted as the prosecution failed to prove the charge beyond reasonable doubt.

A brief background to this appeal is that the appellant was charged with the offence of unlawful possession of Government trophy contrary of section 86(2) of the Wildlife Conservation Act No.5 of 2009 read together with paragraph 14 of the 1st schedule to, and sections 57 (1) 60 (2) both of

the Economic and Organized Crime Control Act , as amended by section 16 (a) and 13 (b) respectively of the Written Laws (Miscellaneous Amendments) Act No.3 of 2016. It was the prosecution case that on 25th day of December 2019, at Terati management Area within Simanjiro District in Arusha Region, the appellant was found in unlawful possession of Zebra meet valued at USD 1200 which is equivalent to Tanzanian Shillings Two Million Seven Hundred Sixty Thousand (2,760,000/=) the property of the Government of United Republic of Tanzania without a permit from the Director of Wildlife. In proving its case the prosecution paraded four (4) witnesses who testified before the trial Court on how the appellant was arrested at Terat reserve area, the seizure of the exhibit (Zebra meat), and the chain of custody of the exhibit as well as the legal process for its disposal.

In his defence the appellant denied to have been found in possession of Zebra meet. He told the trial Court that he was arrested at his home. Search was conducted at his house and nothing was found. Moreover, he alleged that he was in conflict with the arresting officer, Mr.Mbaraka Shida because he had sexual relationship with his second wife. Mr. Mbaraka had vowed to do something spiteful to him.

Upon evaluation of the evidence adduced by both sides the trial Magistrate found the appellant guilty and convicted him to 20 years imprisonment.

At the hearing of this appeal the appellant was unrepresented. He appeared in person whereas the learned Senior State Attorney Akisa Mhando appeared for the respondent. I ordered the appeal to be heard

by way of written submission following the appellant's prayer that the appeal should be argued by way of written submissions.

The written submissions were filed as ordered. However, the appellant submitted on two grounds of appeal only, that is, the 1st and 7th ground of appeal and the learned state Attorney's submission was in respect of the aforementioned grounds of appeal only. Thus, before proceeding with the analysis of the submissions made by parties herein, I wish to point out that the appellant opted to abandon the remaining grounds of appeal.

Submitting for the 1st ground of appeal, the appellant argued that particulars indicated in the charge sheet are at variance with the testimonies of the prosecution witnesses. He contended that the charge sheet indicates that he was arrested at Terati Management Area within Simanjiro District in Arusha Region, whereas PW3 in his testimony stated that he was arrested at in Manyara Region, Simanjiro District, Terrat reserved Area. He went on submitting that the value of the Zebra meet indicated in the charge sheet was Tshs 2,760,000/= whereas at page 26 of the typed proceedings PW4 testified that the value of the zebra meet was 2,789,000/=.At page 27 the same witness, PW4 told the trial Court that it should consider the value of the trophy written in the Exhibit P4 (Trophy valuation certificate) that is, Tshs 2,758,800/=. He contended that the prosecution side was supposed to pray for amendment of the charge sheet pursuant to section 234(1) of the Criminal Procedure Act, ("CPA").He insisted that since the charge sheet was not amended, then he should be acquitted.

With regard to the 7th ground of appeal, the appellant started his submission by pointing out that before entertaining a case, the Court has to make sure that it has jurisdiction to entertain it. He went on submitting that he was charged with an Economic Crime at Resident Magistrates' Court of Arusha at Arusha whereas there was no consent issued by the Director of Public Prosecution (DPP) as required under section 26(1) of the EOCCA for the Resident Magistrates Court of Arusha at Arusha to adjudicate Economic Crimes case. He contended that in absence of the consent by the DPP, the entire proceedings of the subordinate Court is a nullity together with the judgment thereto. He cited the case of **Jumanne Leonard Nagan@ Azori Leonard Nagana and another Vs The Republic, Criminal Appeal No. 515 of 2019** (unreported) to cement his arguments.

Furthermore, the appellant submitted that the provisions of section 38 (3) of the CPA was violated because he was not given a receipt upon the alleged seizure of the exhibits as required under section 38(3) of the CPA. Expounding on this point, he pointed out that receipt required to be issued to the accused person pursuant to section 38(3) of the CPA is different from the certificate of seizure which was tendered in evidence by the prosecution at the trial Court. In addition, he claimed that a search was conducted at his house without a search warrant. The appellant was of a strong view that the faults /irregularities he pointed out in his submission are sufficient to show that the prosecution failed to prove its case beyond reasonable doubts.

In response to the appellant's submission, the Senior learned State Attorney, Ms. Akisa Mhando, submitted as follows; that pursuant to section 26(1) of the EOCCA an economic offence can be tried by a subordinate Court only if the DPP or any state Attorney duly authorized consents for an economic offence to be tried by a subordinate Court by issuing a certificate allowing the subordinate Court to proceed with the hearing of the case. The said certificate of consent is lodged in Court pursuant to section 12(5) of the EOCCA. However, the DPP can delegate his aforesaid powers.

Furthermore, she conceded that in this case there was no consent of the DPP for the appellant to be tried at the Resident Magistrates' Court of Arusha. Relying on the case of **Jumanne Leonard Nagana** (supra) , she concluded that the proceedings of the lower Court are a nullity together with the judgment thereto. Thus , she urged this Court to nullify and quash the proceedings of the trial Court, set aside the conviction and sentence imposed to the appellant, and order the appellant to be prosecuted afresh.

In rejoinder, the appellant reiterated his submission in chief and went on submitting that the contravention of the laws and irregularities in the proceedings he has pointed out in his submission in chief are fatal. An order for the case to be prosecuted afresh will occasion a failure of justice.

Having analyzed the submission made by the appellant and the learned State Attorney , let me embark on the determination of the of the grounds

of appeal. I will starting dealing with the 7th ground of appeal for obvious reasons since it is concern with the jurisdiction of the trial Court. The issue on jurisdiction is crucial. It is a common ground that for an economic offence to be tried at the subordinate Court , there must be a consent of the DPP as submitted by both the appellant and the learned State Attorney. I do not need to reproduce the provisions of the law pertaining to the requirement for the consent of the DPP since that is not in dispute. The crucial issue here is whether or not in this case there was no consent of the DPP as submitted by the appellant and supported by the learned State Attorney. Upon perusing the Court's records, I noted that the consent of the DPP was issued as required by the law. The Court's record reveal that the certificate and consent were issued on 9th of January 2020. Both were signed by Mr. Innocent Eliawony Njau, Prosecuting Attorney In-charge of Arusha Region office. The certificate is titled as follows; *"Certificate of Order for trial of an Economic Offence in the Resident Magistrates' Courts of Arusha at Arusha"* whereas the consent is titled " *Consent of the Prosecuting Attorney In-incharge".* The consent states clearly that it is made pursuant to the provisions of section 26(2) of EOCCA, read together with part II of the Schedule to the Government Notice No.284 of 2014 whereas the certificate states that it is made pursuant to the provisions of section 12(3) of the EOCCA.

From the foregoing, it is the findings of this Court that the 7th ground of appeal has no merit since the DPP's consent and certificate for the Resident Magistrates' Court of Arusha at Arusha to try an economic offence were duly issued as required under the law.

Upon determination of the appellant's concern on the consent and certificate of the DPP, I noted that the appellant's 2nd ground of appeal raises an issue on the territorial jurisdiction of the Resident Magistrate's Court of Arusha to entertain the case since the facts of the case reveal that the offence charged against the appellant was committed in Simanjiro District in Manyara Region. As I have alluded earlier in this judgment, the appellant did not submit on the same and the learned State Attorney did not address it too. However, due to the centrality of the issue on jurisdiction, I have found myself compelled to deal with the 2nd ground of appeal and under the circumstances I called upon Ms. Akisa Mhando, learned senior State Attorney to address this Court on the same. For ease of reference and understanding the coming discussion, let me reproduce again the 2nd ground of appeal hereunder;

> *That the trial and conviction of the appellant offended section 29(1) of the Economic and Organized Crime Control Act (Cap 200 R.E 2002) and the resident Magistrates' Court of Arusha had no legal jurisdiction to try the appellant as he was arrested within Manyara District.*

In response to the 2nd ground of appeal, the senior learned State Attorney conceded that pursuant to the provisions of section 57 (1) of the EOCCA the offence charged against the appellant is an economic offence. She went on submitting that section 29(1) of the EOCCA, provides that upon being arrested, an accused person is supposed to be taken to before the District Court or Resident Magistrates' Court within whose local limits the arrest was made. However, she argued that since the appellant was charged of unlawful possession of Government trophy Contrary of section

86(2) of the Wildlife Conservation Act No.5 of 2009, thus, in making a determination on the Court's jurisdiction the provisions of the Wildlife Conservation Act No. 5 of 2009 (Henceforth " Wildlife Act") are applicable. Relying on the provisions of section 113 (1) of the Wildlife Conservation Act, the learned State Attorney , contended that the Resident Magistrates' Court of Arusha at Arusha had Jurisdiction to try the case against the appellant.

On his part the appellant insisted that he was charged with an economic offence. Pursuant to the provisions of section 29(1) of EOCCA, the Resident Magistrates' Court of Arusha had no jurisdiction to try the case because he was arrested in Manyara Region.

It is a common ground that according to the provisions of section 29(1) of the EOCCA, the appellant was supposed to be taken either to the District Court of Simanjiro or the Resident Magistrates' Court of Manyara because he was arrested in Simanjiro District in Manyara Region. Thus, the consent and certificate issued by the DPP to try the case in the subordinate Court was supposed to be issued in respect of either the District Court of Simanjiro or the Resident Magistrates' Court of Manyara.

For ease of reference let me reproduce section 29(1) of the EOCCA hereunder;

Section 29 (1) of the EOCCA: " *After a person is arrested , or upon the completion of investigation and the arrest of any person or persons, in respect of the commission of an economic offence, the person arrested shall as soon as practicable , and in any case within not more than forty –*

eight hours ***after his arrest , be taken before the District Court and the Resident Magistrates' Court within whose local limits the arrest was made,*** *together with the charge upon which it is proposed to prosecute him for him to be dealt with according to the law."*

(Emphasis is added)

It is not in dispute that the appellant was charged under the provisions of section 86 (1) and (2) (b) of the Wildlife Conservation Act. The issue in controversy is; which law is applicable in determination of the trial Court's jurisdiction?. As I alluded earlier in this Judgment, the learned Sate Attorney was of the view that in making decision on where the accused person is should be taken upon his arrest, the law applicable is the Wildlife Conservation Act, not the EOCCA whereas the appellant insisted that since the case is an economic case, then, the law applicable is the EOCCA.

It is noteworthy that according to section 57 (1) of the EOCCA all offences prescribed to the 1st schedule to the EOCCA are known as economic offences and triable by the Court in accordance with the provisions of EOCCA. For clarity and ease of reference let me reproduce the provision of section 57 (1) of EOCCA hereunder;

" With effect from the 25th day of September , 1984, the ***offences prescribed in the first Schedule to this Act shall be known as economic offences and triable by the Court in accordance with the provision of this Act"***

(emphasis is added)

From the above quoted provision of the law, I am of a settled opinion that any case that is titled as an economic crime case has to tried in accordance with the provision of the EOCCA. The provisions of section 29(1) of EOCCA provides clearly on the procedure in prosecution of economic offences. Since the offence charged against the appellant is an economic offence the procedure that was supposed to be followed in its prosecution is governed by the EOCCA in particular part IV, not the Wildlife Conservation Act. With due respect to the learned State Attorney, in my opinion her contention defeats the whole purpose of the legislature of declaring all offences prescribed in the first schedule of the EOCCA as Economic offences as envisaged in section 57 of EOCCA. In fact, there is no any legal justification to apply the provisions of the Wildlife Conservation Act in an economic offence while the EOCCA provides clearly the procedure in handling /prosecuting economic offences.

The above aside, for the sake of exhausting the arguments raised by the learned State Attorney, let me reproduce the provisions of section 113(1) (2) of the Wildlife Conservation Act hereunder;

Section 113 (1) " *Where a person* ***is tried for an offence under this Act,*** *by the Resident Magistrates' Court, the Court shall ,notwithstanding the provisions of any other written law as have jurisdiction to impose the maximum fine prescribed in respect of that offence.*

(2) Notwithstanding the provisions of other written law, ***a Court established for a District or area of Mainland Tanzania*** *may try , convict and punish or acquit a person charged with an offence committed in any other District or area of Mainland Tanzania."*

(Emphasis is added)

In my considered opinion the provisions of section 113 (1) (2) of the Wildlife Conservation Act relied upon by the learned State Attorney are applicable where a person is tried for an offence under the wildlife Conservation Act only. That is, the accused person is charged with an offence under the wildlife Conservation Act as a normal criminal case. The appellant in this case was not tried for an offence under the wildlife Conservation Act. He was charged of an economic crime pursuant to the provisions of section 57 of the EOCCA. That is why his case it titled as "Economic Crime Case".

In addition to the above, it is noteworthy that section 113 (2) of the Wildlife Conservation Act allows a person charged with an offence under the Wildlife Conservation Act to be tried in any District Court in Mainland Tanzania. This means that even if, for the sake of arguments, assuming that the appellant herein was charged with an offence under the wildlife Conservation Act, then, he was supposed to be arraigned at the District Court of Arusha not the Resident Magistrates' Court of Arusha because he was arrested in Manyara region not Arusha Region.

From the foregoing it is obvious that there is an error committed since the appellant was arraigned on charges of economic offence at the Resident Magistrates' Court of Arusha instead of either the District Court of Simanjiro or the Resident Magistrates' Court of Manyara. The issue now is ; does the aforesaid error affect the validity of the trial? In the case of **Makoye Masanya and three others Vs Republic, Criminal Appeal**

No.29 of 2014, (unreported), the Court of Appeal was confronted with a issue similar to the one in hand, where by the appellants were allegedly found in unlawful possession of Government trophy in Mwanuhuzi area in Meatu District in shinyanga Region, but were arraigned before the District Court of Bariadi on the offence of unlawful possession of Government Trophy contrary to section 86(1) (2) (b) of the wildlife Conservation Act No.5 of 2009 , read together with paragraph 14 (d) of the Economic and Organized Crimes Control Act, Cap 200, R.E 2002. In their appeal to the Court of Appeal among the issues for determination was whether or not the trial Court had territorial jurisdiction to try the case. Relying on the provisions of section 387 of the Criminal Procedure Act (CPA), the Court of Appeal had this to say;

" So, even if there was a District Court in Meatu ,the offence was committed in Meatu, and the appellants were arrested there, their trial in the District Court of Bariadi is not necessarily an incurable irregularity unless they can show that by so doing some injustice has been occasioned to them. The appellants have not suggested so in their grounds of appeal or in their oral submission in Court . We therefore reject that ground of appeal."

For ease of reference let me reproduce the provisions of section 387 of the CPA.

Section 387. " *No finding, sentence or order of the of any criminal Court shall be set aside merely on the ground that the inquiry ,trial or other proceedings in the course of which it was arrived at or passed took place in a wrong region ,district or local area unless it appears that such error has in fact occasioned a failure of justice".*

As regards the application of the CPA in economic offences, the relevant provision of EOCCA is section 28. The same provides as follows;

" *Except as is provided in this Part to the contrary the procedure for arraignment and for hearing and determination of cases under this Act shall be in accordance with the provisions of the Criminal Procedure Act"*

From the above quoted provision of the law, it is evident that the provisions of the CPA are applicable in economic cases with exception of the procedures for arraignment and hearing of the case which are specifically provided in part IV of the EOCCA. Therefore, section 387 of the CPA is applicable in the case in hand. In this case the appellant has not shown before this Court that by being tried at the Resident Magistrates' Court of Arusha at Arusha that error has occasioned a failure of justice to him. Pursuant to section 387 of the CPA and on the strength of the decision of the Court of Appeal in the case of **Makoye Masanya, (supra),** I hereby hold that the fact that the appellant's case was tried at the Resident Magistrates' Court of Arusha at Arusha instead of being tried either at the District Court of Simanjiro or the Resident Magistrates' Court of Manyara is not an incurable irregularity and cannot lead to the nullification of the proceedings and quashing of judgment of the trial Court, the subject of this appeal.

Having said the above, let me move to the 1st ground of appeal. With the regard to the applicant's concern on the search warrant and receipt, the evidence adduced by the prosecution witnesses (PW 2 and PW3) shows that the appellant was arrested at Terat reserved Area, during the patrol

conducted to apprehend poachers. So, under the circumstances, the issue of search warrant and receipt is unfounded, because there was no search conducted at the appellant's residence pursuant to the provisions of section 38(3) of the CPA as alleged by the appellant. The appellant was found ready handed with the exhibits in Terat reserved Area which were seized by the police. Thereafter a certificate of seizure was issued (Exhibit P3). The same was signed by the appellant and three witnesses.

With regard to the issue on variance between the charge sheet and the testimonies of the prosecution witnesses regarding the place of arrest of the appellant and the value of the zebra meet, the charge sheet indicates that the appellant was found at Terati Management Area Simanjiro District in Arusha Region in unlawful possession of zebra meet valued at USD 1200, equivalent to Tshs 2,760,000/=at the exchange rate of Tshs 2,299/=. At the hearing PW4 who conducted the valuation of the Zebra meet tendered in Court Exhibit P4 which shows that the value of the zebra meet was USD 1200 equivalent to Tshs 2,758,000/= at the exchange rate of Tshs 2,299/=.With the evidence explained herein above, I do not see any variance on the value of the Zebra meat worthy to be taken into consideration by this Court because the value of the Zebra meet is indicated in the charge sheet is USD 1200 and all prosecution witnesses stated that the value of the Zebra meet was USD 1200. The same figure is indicated in exhibit P4 (Trophy valuation Certificate).The difference of the value of the trophy pointed out by the appellant is in respect of the equivalence value in Tanzanian Shillings which is negligible because if

you multiply USD 1200 by Tshs 2,299/= the answer is Tshs 2,758,800/=.The same may be rounded off to Tshs 2,760,000/=.

In addition, it is true that Simanjiro is not in Arusha Region. However, in my opinion since the appellant has admitted that he was arrested in Simanjiro, the error in the charge sheet is not fatal since the appellant was able to defend his case effectively and he has not disclosed any injustice that has been occasioned to him due to the aforesaid error. What matters is that all prosecution witnesses testified in Court that the appellant was arrested in Simanjiro District in Manyara Region.

From the foregoing, the 1st ground of appeal is hereby dismissed. I have perused the court's records and am satisfied that the prosecution proved its case beyond reasonable doubts. In the upshot, it is the finding of this Court that this appeal has no merit. It is hereby dismissed in its entirety.

Dated this 24th day of August 2022

B.K.PHILLIP

JUDGE