

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(BUKOBA SUB- REGISTRY)

AT BUKOBA

ECONOMIC APPEAL NO.16 OF 2023

(Arising from the District Court of Karagwe at Kayanga Original Case No. 14 of 2022)

PHILIPO SALVATORY 1ST APPELLANT

ONESMO S/O ISAYA 2ND APPELLANT

DANSTAN S/O ANGELO 3RD APPELLANT

SILA S/O BALTAZARI 4TH APPEALLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

29th February & 8th March 2024

A.Y. Mwenda, J

Before the District Court of Karagwe District at Kayanga, the appellants were arraigned for allegedly committing the following offences. On the 1st count, the 1st appellant was charged for allegedly unlawful possession of firearms contrary to section 20(1)(b) and (2) of the firearms and ammunition control Act, No. 2 of 2015 read together with para. 31 of the 1st schedules to section 57(1) and 60(2) of the Economic and Organized crime control Act [Cap 200 R.E 2019] as amended by section 16(b) and 13(b) of the written laws (miscellaneous amendment Act) Act No. 4 of 2016. Its particulars are that on the 15th day of April 2022 at Katetungwa area in Burigi Chato National Park within Karagwe

District in Kagera Region, the 1st appellant was found in possession of One (1) Muzzle loader Gun without any permit.

On the 2nd count, the 3rd accused was charged for Unlawful possession of Ammunition contrary to section 21 of the firearms and ammunition control Act, No. 2 of 2015 read together with para. 14 of the 1st schedules to section 57(1) and 60(2) of the Economic and Organized crime control Act [Cap 200 R.E 2019] as amended by section 16(a) and 13(b) of the written laws (miscellaneous amendment Act) Act No. 4 of 2016. Its particulars are that on the 15th day of April 2022 at Katetungwa area in Burigi Chato National Park within Karagwe District in Kagera Region, the 3rd accused was found with Twenty five (25) Ammunitions, 13 gun caps and 250 grams of gunpowder without any permit.

The 3rd count is in Unlawful Possession of Government Trophy against all appellants contrary to section 86(1) and (2) (c) of the Wildlife Conservation Act no. 5 of 2009 as amended by section 59(a) and (b) of the written Laws (Miscellaneous Amendments) (No.2) Acts No. 4 of 2016 read together with paragraph 14 of the 1st schedule to and section 57(1) and 60(2) of the Economic and Organized crime control Act [Cap 200 R.E 2019] as amended by section 16(a) and 13(b) of the written laws (miscellaneous amendment Act) Act No. 4 of 2016. Its particulars are that on the 15th day of April 2022 at Katetungwa area in Burigi Chato National Park within Karagwe District in Kagera Region, they were found in possession of Waterbuck meat valued at USD 850, equivalent to TShs1,992,400/=only, property of Tanzania Government without any permit.

The 4th count was against the 2nd and 4th appellant for Unlawful possession of Instrument for Commission of offence within a National Park contrary to section 24(1)(b) & (2) and 29(2) of the National Parks Act [CAP 282 R.E. 2019]. Its particulars are that on the 15th day of April 2022 at Katetungwa area in Burigi Chato National Park within Karagwe District in Kagera Region, the 2nd & 4th appellant were found in possession of Twelve (12) traps, two (2) Bush Knives into the said National Park without any permit.

On the last Count, all the appellants were charged for Unlawful entry into the National Park contrary to Section 21(1) (a) of the National parks Act No. 11 [CAP 282, R.E 2003] the particulars of which being that on the 19th day of April 2022 at Katetungwa area in Burigi-Chato National Park within Karagwe District in Kagera Region, entered into the the said National Park without any permit.

According to the records, after being arraigned before the trial court, they pleaded not guilty to all counts as such trial commenced. The prosecution side paraded several witnesses and tendered documentary and physical exhibits.

In defence, the appellant alleged among other things, that they did not commit the alleged offences as they were not, as the prosecution alleged, found in Burigi-Chato National Park. At the end of the judicial day, the trial court was satisfied that the prosecution discharged its duty properly. It subsequently convicted them and sentenced them in accordance to the law.

Aggrieved by conviction they preferred the present appeal with six grounds which read as follows.

- 1) That the trial magistrate erred in law and facts to convict and sentence the appellants on non-existing offence of unlawful entry into the National Park per section 21(1) (a) of the NPA No. 11 Cap 282.
- 2) That the trial magistrate erred in law and fact to convict and sentence the appellants as there were no clear evidence suggesting that the camp which is a point of arrest was within the statutory boundaries of Burigi Chato National Park
- 3) That the trial magistrate erred in law and facts by not considering the evidence of the appellants which raised a reasonable doubt to prosecution case which was not resolved in their favour.
- 4) That the trial magistrate erred in law and facts to convict and sentence the appellants as the appellants were not there when government trophies were disposed.
- 5) That the trial magistrate erred in law and facts to rely on exhibit P1, P2, P3, P4, P5 that were not read to appellants at trial.
- 6) That trial magistrate erred in law and facts to sentence the appellants who were arraigned before the court contrary to the law that requires the accused to be arraigned to trial court within 48 hours.

At the hearing of the present appeal, the appellants were present and enjoyed the legal services of Mr. FUMBUKA V. NGOTOLWA, ADV whilst the respondent

republic was represented by MS. GLORIA RUGEYE & MR. JAMAL ISSA, learned state Attorneys.

At the outset, Mr. Ngotolwa abandoned the 4th, 5th and 6th ground of appellant. In the cause of submitting, he argued the 1st ground separately and merged the 2nd and 3rd ground together.

Regarding the 1st ground of appeal, the learned counsel for the appellant submitted that on the 5th count, the appellants were charged under a provision which establishes no offence. He stressed that the said section is about penalty only. According to him, based on that point, the appellants could not be sentenced under Section 29 without, firstly, being convicted under section 21(1) (a) of the National parks Act No. 11 [CAP 282, R.E. 2003]. In support to this point he cited the case of MADUHU NHANDI@LIMBU V. REPUBLIC NO.419 OF 2017.

Regarding the 2nd ground of appeal, the learned counsel for the appellants submitted that the prosecution failed to establish that the appellants were found within the boundaries of Burigi-Chato National Park. He said that PW4 and PW 5 testified that on 15/04/2022 while on patrol within Burigi-Chato National Park, they arrested the appellants without describing the boundaries under which they were found. In support to this point he cited the case of MADUHU NHANDI@LIMBU V. REPUBLIC, CRIMINAL APPEAL NO.419 OF 2017. In further

support to this point he said even in the seizure certificate, the coordinates are not described.

On the 3rd ground of appeal, the learned counsel for appellants submitted that in the totality of the evidence, the prosecution failed to prove its case beyond reasonable doubt on ground that failure to establish the location where the appellants were arrested dents the evidence in respect of the remaining counts as it creates doubts. He then concluded by praying to the court, to allow the present appeal, quash the conviction and set aside the sentences imposed.

The republic responded through MS. GLORIA RUGEYE, SA. She informed the court that the republic supports this appeal on one ground only. That is the Consent and certificate conferring jurisdiction to the lower court are illegal. She stressed that under Section 3(3) of the Economic and Organized Crime control Act, [CAP 200 R.E. 2022], it is the High Court which is vested with jurisdiction to try Economic offences. According to her, Section 60 (2) and 12(4) of the said Act confers jurisdiction to subordinate courts to try Economic offences upon issuance of the Consent and Certificate of the Director of Public Prosecution. In this case, she said, the consent conferring jurisdiction to subordinate court to try the case was defective as it was issued under section 12(4) of Cap 200 R.E 2022 instead of section 60(4) of the same Act thereby making the said consent as good as no consent at all. To buttress her point, she cited the case of CHACHA CHIWA MARUNGU V. R., CRIMINAL APPEAL NO. 364 OF 2020.

Regarding certificate the learned state attorney said that the same ought to have listed all the charging provisions in it but according to her, the 5th count was not listed. Having so submitted she concluded in that since hearing was without consent and certificate, she prayed the matter to be remitted before trial court for retrial.

In rejoinder, Mr. NGOTOLWA, Advocate, joined hands with MS. RUGEYE's submission but differed at one point which she suggested retrial. The learned counsel rejoindered that any order for retrial will prejudice his clients as it will allow the prosecution to fill in gaps on their already weak case. He otherwise prayed the present appeal to be allowed and the appellant to be released from prison.

I have keenly examined and considered the records and submissions by both parties and the crucial issue for determination is whether the trial court was vested with jurisdiction to try economic offences which the appellants were arraigned and convicted with.

At the outset, it is important to point out that the Corruption and Economic Crimes Division of the High Court is vested to hear and determine economic crime cases. These powers are derived under Section 3(3) of the Economic and Organized Crime Control Act, [Cap 200 R.E. 2019]. Such powers may be exercisable by subordinate Courts upon issuance of consent by the DPP or any person authorized by him vide section 26(1) and 26(2) of the Economic and

organized Crime control Act, [Cap 200 R. E 2019]. These sections read as follows;

"S.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.

(2) The Director of Public Prosecutions shall establish and maintain a system whereby the process of seeking and obtaining of his consent for prosecutions may be expedited and may, for that purpose, by notice published in the *Gazette*, specify economic offences the prosecutions of which shall require the consent of the Director of Public Prosecutions in person and those the power of consenting to the prosecution of which may be exercised by such officer or officers subordinate to him as he may specify acting in accordance with his general or special instructions

Further to that, through a certificate conferring jurisdiction to the subordinate court by the Director of Public Prosecution or any state attorney, an order that any case involving an economic or non-economic offence be tried by such

subordinate court to the High Court as may be specified in the certificate may be issued.

In the present matter, the appellants were arraigned for economic and non-economic offences. These are unlawful possession of firearms contrary to section 20(1)(b) and (2) of the firearms and ammunition control Act, No. 2 of 2015 read together with para. 31 of the 1st schedules to section 57(1) and 60(2) of the Economic and Organized crime control Act [Cap 200 R.E 2019] as amended by section 16(b) and 13(b) of the written laws (miscellaneous amendment Act) Act No. 4 of 2016, unlawful possession of Ammunition contrary to section 21 of the firearms and ammunition control Act, No. 2 of 2015 read together with para. 14 of the 1st schedules to section 57(1) and 60(2) of the Economic and Organized crime control Act [Cap 200 R.E 2019] as amended by section 16(a) and 13(b) of the written laws (miscellaneous amendment Act) Act No. 4 of 2016, Unlawful Possession of Government Trophy against all appellants contrary to section 86(1) and (2) (c) of the Wildlife Conservation Act no. 5 of 2009 as amended by section 59(a) and (b) of the written Laws (Miscellaneous Amendments) (No.2) Acts No. 4 of 2016 read together with paragraph 14 of the 1st schedule to and section 57(1) and 60(2) of the Economic and Organized crime control Act [Cap 200 R.E 2019] as amended by section 16(a) and 13(b) of the written laws (miscellaneous amendment Act) Act No. 4 of 2016; and

Unlawful possession of Instrument for Commission of offence within a National Park contrary to section 24(1)(b) & (2) and 29(2) of the National Parks Act [CAP

282 R.E. 2019] and Unlawful entry into the National Park contrary to Section 21(1) (a) of the National parks Act No. 11 [CAP 282, R.E 2003].

With the said offences, the consent and the certificate conferring jurisdiction to the subordinate court from the Director of Public prosecutions/state attorney in-charge are mandatory.

In this matter, the said necessary papers were prepared, however, as it was rightly submitted by MS. GLORIA RUGEYE, SA, the same are defective in the following ways. One, regarding the consent paper, the same was issued by the District Prosecution officer under section 12(4) of the Economic and Organized Crime Control Act [Cap 200 R.E. 2019]. Going by the cited section i.e. S.12(4), one may note the same is specific for Certificate conferring jurisdiction. The same read as follows.

“S.12(4) The Director of Public Prosecutions or any State Attorney duly authorised 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 instituted or to be instituted before a court subordinate to the High Court and which involves a non-economic offence or both an economic offence and a non-economic offence, be instituted in the Court.

With the wording of the above section, the learned District Prosecution officer ought to have invoked section 26(2) of the Economic and Organized Crime Control Act (Supra) and not otherwise and as such, the said consent is as good as nothing in the eyes of the law.

About the Certificate conferring jurisdiction to the subordinate court, the same was issued in line of the proper provision of the law, i.e. Section 12(4) of the EOOCA [Cap 200 R.E. 2019]. However, in it, some of non-economic offences are not included. The said offences are Unlawful possession of Instrument for Commission of offence within a National Park and Unlawful entry into the National Park. Since the appellants were arraigned for both economic and non-economic offences, the District Prosecutions officer ought to have issued a certificate conferring jurisdiction to the district court to try both offences. The takeaway from above is that the appellants were charged, tried, and convicted by the District Court of Karagwe at Kayanga without being vested with jurisdiction to try economic offences. As such, the whole proceedings of Economic case No. 14 of 2022 was a nullity. See CHACHA CHIWA MARUNGU V. THE REPUBLIC(Supra).

Regarding consequences, the learned State attorney while relying on the decision of the Court of Appeal in CHACHA CHIWA MARUNGU V. THE REPUBLIC prayed this court to order a retrial of the said case. In the said authority cited by the learned State Attorney, the court held that:

“...ordinarily, under such a situation a retrial would be ideal.”

In fact, the above, is the legal position only if the interest of justice so demands. The principle has been that an order for retrial can be issued if, with the evidence available, the appellants would not be convicted. The back up to this position is in the decision of court of appeal in *FATAHELI MANJI V. R* [1966] E.A 343 where the court held inter alia that:

“In general, a retrial may be ordered only where 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 the purposes of enabling the prosecution to fill in gaps in its evidence at the first trial. Each case must depend on its own facts and an order for a retrial should only be made where the interest of justice require it.”

Guided by the above authority, this court has put the prosecution's evidence under scrutiny only to find it insufficient to support conviction on the following reasons:

One, the offence of unlawful entry to the National Park which is key in this matter was not proved. As it was submitted by the counsel for the appellants, there is no cogent evidence that the appellants were found within Burigi-Chato

National Park. The law has it that failure to ascertain the exact place where the appellants were arrested within the National Park's boundaries raises reasonable doubt which should benefit the appellants. In the case of MADUHU NHANDI@ LIMBU (supra), the Court of appeal while citing the case of CHEYONGA SAMSON NYAMBARE V. THE REPUBLIC, Criminal Appeal No. 510 of 2019(TANZLII) held as follows:

"Since Ikongoro game reserve boundaries are statutorily defined, the evidence on record must place the appellant inside the statutory limits of this reserve. It will not suffice to shift the burden to the accused person where PW.1 and PW1, the two prosecution witnesses merely narrate the game scouts arrested the appellant inside Ikonongo Game Reserve without demonstrating the area of the arrest of the appellant to within the statutory boundaries of that reserve."

In the present case, PW1 AND pw2 did not testify the exact location within the Burigí-Chato Game reserve where the appellants were arrested. Interestingly, even in the certificate of seizure, the coordinates were not stated thereby creating reasonable doubt which are resolved in favour of the appellants.

Two, the charging section for unlawful entry into the national park [i.e. Section 21(1) (a) of Wildlife Conservation Act] applied against the appellants establishes

no offence as the same is all about penalty. As such the appellants were charged tried, convicted, and sentenced for non - existent offence of unlawful entry into Burigi-chato National Park, see MADUHU NHANDI@ LIMBU (supra).

As for the remaining counts, since in them, the appellants are alleged to be found in possession of government trophy, firearms and ammunition within Burigi- chato National Park, the location which are not clearly ascertained, then this court is of the view that the evidence in respect of remaining counts is also doubtful.

In upshot, this court is of the view that with the doubt tainting the prosecution's evidence, the same is resolved in favour of the appellants as the prosecution did not prove the case against the appellant beyond reasonable doubt in respect of all counts that were placed against the appellants.

This appeal is hereby allowed, conviction quashed, and the sentences imposed are set aside. It is also ordered that the appellants should be set free unless they are held for some other lawful cause.

Right of appeal id fully explained.

It is so ordered.


A.Y. NWENDA
JUDGE
08.03.2024

Judgment delivered in chamber under the seal of this court in the presence of Mr. Ponsia Mjuni the learned counsel for the appellants and in the presence of Mr. Jamal Issa learned state attorney for the respondent (republic).




A.Y. MWENDA

JUDGE

08.03.2024