

**IN THE COURT OF APPEAL OF TANZANIA
AT TABORA**

(CORAM: MBAROUK, J.A., MANDIA, J.A., And MMILLA, J.A)

CRIMINAL APPEAL NO. 64 OF 2013

JIGANZA S/O NDAHYA.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania

At Tabora)

(Kaduri, J.)

date the 25th day of August, 2008

in

DC. Criminal Appeal No. 133 of 2004

.....

JUDGMENT OF THE COURT

17th & 26th September, 2013

MMILLA, JA.:

The appellant, Jiganza s/o Ndahya was charged with and convicted by the District Court of Shinyanga in Shinyanga Region of the offence of being in possession of Government Trophies contrary to section 67 (1) and (2) of the Wildlife Conservation Act No. 12 of 1974 read together with paragraph 15 (d) of the First Schedule to and section 56 (1) and 59 (2) both of the

Economic and Organized Crime Control Act No. 13 of 1984 as amended by Act No. 10 of 1989. He was sentenced to serve a term of 20 years imprisonment. His first appeal against both conviction and sentence to the High Court of Tanzania at Tabora. was unsuccessful, hence this second appeal.

The facts giving rise of this case were briefly that, on 15.8.2002 at about 3.00 pm, armed with a search warrant, the police searched the appellant's house from which they recovered Government Trophies which included one ostrich shell, a lion's skin, three pangolin's shells, and one horn of an antelope. The searched was witnessed by one independent witness named Christina Samwel (PW1) who was appellant's land lady. After that, the police took the appellant to Shinyanga Central Police Station together with the recovered Government Trophies. He was subsequently charged before the court with that offence. As aforesaid, he lost the case in both lower courts, hence this second appeal.

Before us, the appellant appeared in person and was not defended. He filed a memorandum of appeal which comprised of one substantive ground of appeal alleging that the trial court had no jurisdiction to try the

case as the DPP had not given his consent, nor issued the certificate of transfer which could have conferred jurisdiction to that court as envisaged by sections 26 (1) and 12 (3) respectively both of the Economic and Organized Crime Control Act Cap. 200 of the Revised Edition, 2002 (the Act).

On the other hand, the respondent Republic was represented by Mr. Hashim Ngole, learned Senior State Attorney who hastened to inform this Court that he was not opposing the appeal on the basis of the ground raised by the appellant. He submitted that the DPP's consent was a prerequisite under section 26 (1) of the Act, so also the absence of the certificate of transfer as demanded by section 12 (3) of that same Act. He submitted that given such anomalies, the proceedings before the trial court were a nullity for lack of jurisdiction, so were the proceedings of the High Court which were based on null proceedings from the lower court. He invited this Court to quash proceedings and judgments of both lower courts and set aside the sentence thereof.

On being probed regarding the fate of the appellant, particularly when it is considered that he has been behind bars for about nine (9) years now

since 24.8.2004 when conviction and sentence were passed, Mr. Hashim Ngole submitted that it will not be justice to order retrial. He urged the Court to leave the matter in the hands of the DPP.

In terms of the provisions of section 3 (1) of the Economic and Organized Crime Control Act, the jurisdiction to hear and determine cases involving economic offences under that Act is vested in the High Court. When that Court conducts trials of such nature, it transforms itself into an Economic Crimes Court. That is on the basis of sub-section (2) to section 3 of that Act.

However, in terms of section 26 (1) of that Act, that Court cannot proceed with trial of an economic offence unless and until the Director of Public Prosecutions will have given a written consent. Section 26 (1) of the said Act provides that:-

“(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.”

On the other hand however, section 12 (3) of that Act has conferred jurisdiction to subordinate court to try economic crimes cases provided that

the DPP issues a certificate of transfer, transferring such case to that particular subordinate court. Section 12(3) of that Act provides that:-

“(3) 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 involving an offence triable by the Court under this Act be tried by such court subordinate to the High Court as he may specify in the certificate.”

It follows therefore that in order for the case to be properly before the subordinate court two things have to be complied with; firstly, the presence of the DPP’s consent and secondly, the certificate of transfer issued by the same authority, that is DPP. Where these conditions are not met, any matter which may have been handled or tried by that subordinate court will be a nullity for lack of jurisdiction. There are a number of cases of this Court which dwelt on the point, including those of **Amri Ally @ Becha vs. Republic**, Criminal appeal No. 151 of 2009 CAT, Mwanza Registry, **Wagana s/o Mwita & Another vs. Republic**, Criminal Appeal No. 148 of 2009 CAT, Tabora Registry, and **Abraham Adamson Mwambene vs.**

Republic, Criminal Appeal No. 148 of 2011 CAT, Mbeya Registry (all unreported).

In the case of **Abraham Adamson Mwambene vs. Republic** (supra) the Court said that:-

"...We have regrettably noted, the mandatory requirement of section 26 (1) and 12 (3) and (4) of the Economic Crimes Act were flagrantly violated by both the prosecution and the trial court. We are accordingly constrained to agree with the appellant and Ms Gwaltu that the prosecution and trial of the appellant and his co-accused were a nullity *ab initio*."

In that case, the Court did, among other things, quash the proceedings and judgments of the two courts below and set aside the sentence imposed on the appellant and his co-accused. It did not order a retrial for reason that it was not possible for the witnesses to be traced on account that the offence was committed in 1998.

In our present case, the learned senior State Attorney has conceded that the provisions of sections 26 (1) and 12 (3) of the Act were not complied with. That means, as properly contended by both the appellant

and Mr. Hashim Ngole, the trial court had no jurisdiction to try that case. As a result, the proceedings and judgment before it were a nullity; so were the proceedings and judgment before the first appellate court because it was based on a nullity.

In the circumstances, we feel justified to allow this appeal. We accordingly quash the proceedings and judgments of both lower courts and set aside the sentence which was imposed by the trial court and upheld by the first appellate court. The question that remains however is; what will be the fate of the appellant?

It is a fact that the appellant has been behind bars for a period of about nine (9) years now. Since the offence was committed in 2002, which means as at this date the matter has been in court for about eleven (11) years; it will be justice if we order appellant's release from jail because in the first place, it will not be easy for the prosecution to trace the witnesses.

In the upshot, we decline to order retrial. In its stead, we order appellant's immediate release from prison unless he may be continually held for some other lawful course.

Order accordingly.

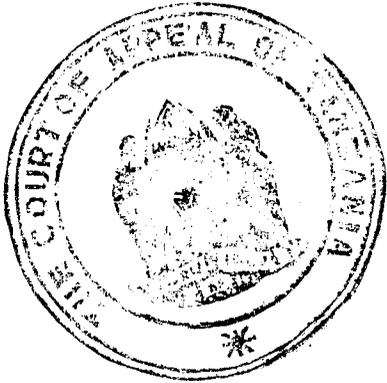
DATED at TABORA this 24th day of September, 2013.

M. S. MBAROUK
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.




Z. A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL