

IN THE COURT OF APPEAL OF TANZANIA

AT SHINYANGA

(CORAM: MWARIJA, J.A., KITUSI, J.A., And MGEYEKWA, J.A.)

CRIMINAL APPEAL NO. 586 OF 2020

GAGA BUSALU 1ST APPELLANT

DOME GUENGA @ NGUMILA 2ND APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

(Appeal from judgment of the High Court of Tanzania

at Shinyanga)

(Mkwizu, J.)

dated the 14th day of August, 2020

in

Criminal Appeal No. 21 of 2020

JUDGMENT OF THE COURT

11th & 18th July, 2023

KITUSI, J.A.:

The two appellants were charged with and prosecuted for contravening provisions of the Wildlife Conservation Act No. 5 of 2009 (the Act) read together with Government Notice Number 275 of 1974 (GN. No. 275/1974), and those of the Economic and Organized Crime Control Act, Cap 200 R.E. 2002 (the EOCCA).

In the first count they were charged with unlawful entry into a Game Reserve contrary to section 15 (1) and (2) of the Act read together with G.N. No 275/1974, the prosecution alleging that on 20th September, 2016 at about 18.00 hours, the appellants were found

within Maswa Game Reserve having no written permit from the Director of Wildlife.

The second count was unlawful possession of weapon in a Game Reserve preferred under section 17 (1) and (2) of the Act read together with GN. No 275/1974 and paragraph 14 of the first schedule to and sections 57 (1) and 60 (2) and (3) of the EOCCA, as amended by sections 13 and 16 of the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016. In this connection it was alleged that on the same date and at the same time and place as in the first count, the appellants were found in unlawful possession of weapons to wit; one panga, one knife and ten animal trapping wires without permission from the Director of Wildlife.

In the third count the appellants were charged with Unlawful Hunting of Scheduled animals contrary to section 47 (a) of the Act read together with GN. No. 275/1974, also read together with paragraph 14 of the first schedule to and sections 57 (1) and 60 (2) and (3) of EOCCA as amended by sections 13 and 16 of the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016. The prosecution alleged that the appellants were found in possession of some parts of zebra, a scheduled animal, having Hunted it Unlawfully.

They were convicted on their own pleas of guilty and sentenced to a fine for the first count and to a jail term of 20 years each for each of the remaining counts. Their first appeal was unsuccessful, the High Court holding that the pleas were unequivocal.

This is the second appeal. It raises two grounds, but we are keenly interested in the first ground of appeal, which we reproduce below:-

"1. That, my Lord Justices, the trial magistrate and the High Court erred in law and in fact by allowing consent under section 26 (1) of the Economic and Organized Crime Control Act of 1984, Cap 200 (R.E. 2002) and Certificate under section 12 (4) of the Economic and Organized Crime Control Act of 1984 Cap 200 (R.E. 2002) which were invalid due to the fact that the documents did not relate to some of the offences charged."

We invited Ms. Rehema Sakafu, learned State Attorney representing the respondent Republic to address us on the above ground of appeal. She was being assisted by Ms. Rosemary Kimaro and Ms. Fransisca Ntemi also learned State Attorneys. The learned State Attorney did not mince words. She submitted that the consent of the Director of Public Prosecutions (DPP) issued under section 26 (1) of the

EOCCA and GN No. 284 of 2014 and the accompanying Certificate made under section 12(4) of the EOCCA are defective for not specifying the offences in respect of which they were issued. She urged us to nullify the proceedings, quash the judgments and set aside the sentences, and proceed to order a retrial. To support her position, the learned State Attorney cited to us our earlier decision in **Chacha Chiwa Marungu v. Republic**, Criminal Appeal No. 364 of 2020 (unreported).

On their part the appellants were against the idea of a retrial, submitting that they have been in prison for long enough, so the justice of the case requires that they be set free.

Jurisdiction is a point that may be raised at any stage even on appeal, and this is a common and settled position. We have consistently held so in many cases, the case of **Haruna Mtasiwa v. Republic**, Criminal Appeal No. 206 of 2018 (unreported), being one of them. The first ground of appeal raises the issue of jurisdiction so we have a duty to address it ahead of other issues.

Coming to the case at hand and the ground of appeal under discussion, jurisdiction to try economic offences is vested in the High Court in terms of section 3 of the EOCCA. However, as it is with every rule, there is an exception. By a Certificate under section 12 (3) or and

(4) of the EOCCA, the DPP may transfer a particular case to a subordinate court and express his consent under section 26 (1) of the EOCCA to the case being tried by that subordinate court. In this case the DPP purported to do so, but the appellants are faulting the validity of the Certificate and Consent that were issued.

We agree with the appellants as well as Ms. Sakafu that for omitting to specify the offences, the Consent and Certificate are defective. As the District Court of Bariadi could not assume jurisdiction without the consent and certificate, the proceedings before it were null. We have reached similar conclusion in a number of cases, including the case of **Chacha Chiwa Marungu** (supra), cited to us by Ms. Sakafu. Other cases are **Shenda Musa @ Shenda & Others v. Republic**, Criminal Appeal No.355 of 2020 and **Malegi Shenye @ Lusinga v. Republic**, Criminal Appeal No 152 of 2020 (both unreported).

Consistent with those previous decisions, we nullify the entire proceedings before the trial court as well as those before the High Court on first appeal. We quash the judgments and set aside the sentences resulting therefrom. Thus, the first ground of appeal is allowed.

The last question to consider is the way forward, that is, whether to order a retrial as submitted by Ms. Sakafu or order the appellants'

outright release, as prayed by them. We understand that in considering whether to order a retrial or not we have to bear in mind a number of factors. The guidance made in the case of **Fatehali Manji v. Republic** (1966) 1 EA 343, is always relevant. Key in that guidance, is to refrain from ordering a retrial if that step will give the prosecution an opportunity to fill in gaps in the evidence. An order of retrial should also be avoided if it will prejudice one of the parties, especially the accused.

Ms. Sakafu insisted that a retrial should be ordered because the prosecution has enough evidence to prove the charges against the appellants. We wonder whether we should order a retrial based on the unknown evidence in the prosecution's closet. When we prevailed on Ms. Sakafu on this, she left the matter to the Court.

This case presents a tricky scenario so we understand Ms. Sakafu's dilemma because the appellants pleaded guilty, therefore the prosecution had no opportunity to demonstrate whether they had enough evidence to prove the case or not. However, ordering a retrial in the peculiar circumstances of this case will be providing the prosecution with a blank cheque to reorganize their case and fill in gaps, which may prejudice the appellants against one of the principles in **Fatehali Manji** (supra).

For the foregoing reasons, we allow the appeal on the basis of the first ground of appeal. Having nullified the proceedings, quashed the judgments and set aside the sentence, we desist from ordering a retrial, and instead hereby order the appellants' immediate release if they are not otherwise being lawfully held.

DATED at SHINYANGA this 17th day of July, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

The Judgment delivered this 18th day of July, 2023 in the presence of the 1st and 2nd Appellants in person and Mr. Nyamnyaga Raphael Magoti, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.




R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL