IN THE COURT OF APPEAL OF TANZANIA

AT MUSOMA

(CORAM: SEHEL, J.A., FIKIRINI, J.A. And ISSA, J.A.)

CRIMINAL APPEAL NO. 340 OF 2020

MWITA MOHERE..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Musoma)

(Kahyoza, J.)

dated the 27th day of August, 2020
in
Criminal Appeal No. 65 of 2020
.....

JUDGMENT OF THE COURT

23th April & 2nd May, 2024

ISSA, J.A.:

The appellant, Mwita Mohere was tried at the District Court of Serengeti at Mugumu (the trial court) with the following three counts; **first**, unlawful entry in the National Parks contrary to sections 21 (1) (a), (2) and 29 (1) of the National Parks Act, Cap. 282 (the NPA); **second**, unlawful possession of weapons in the National Parks contrary to section 24(1)(b) and (2) of the NPA; **third**, unlawful possession of Government Trophy contrary to section 86(1) and (2)(b) of the Wildlife Conservation Act, Cap. 283 (the WCA) read together with paragraph 14 of the First Schedule to the Economic and Organised Crime Control Act, Cap. 200 (the

EOCCA). After a full trial the appellant was convicted and sentenced to serve 1 year imprisonment for the first count, 1 year imprisonment for the second count and 20 years imprisonment for the third count. The sentences were ordered to run concurrently.

The appellant's arraignment before the trial court was a result of an accusation that, on 9.10.2018 at Korongo la Ingira area in Serengeti National Park (the national park) within Serengeti District in Mara Region, the appellant was found to have entered the park without permission and armed with a machete. He was also in possession of one leg of wildebeest valued at TZS. 1,417,000. The appellant pleaded not guilty to the charge. The prosecution fielded four witnesses to prove the charge, and after a full trial he was convicted as charged and sentenced as stated earlier.

The brief facts of the case were that, on 9.10.2018 at about 22.00 hours Deus Gilbert Mwakajegela (PW1), a park ranger of Tanzania National Parks (TANAPA) together with his fellow park rangers, Julius Kisanga (PW2), Nyakire Mruta and Emmanuel Bishalala were on patrol at Korongo la Ingira area within the national park when they saw a fire in the bush. They surrounded the area and managed to arrest the appellant who was in possession of a machete (Exhibit P1) and a fresh leg of wildebeest. They

took the appellant to Mugumu police station and filed a case against him. PW2 who was in the patrol team corroborated what was narrated by PW1.

PW3, a Wildlife Warden of Ikorongo/Grumeti Game Reserve was called by WP G 7277 DC Anastazia (PW4) to appear at Mugumu police station on 10.10.2018 in order to identify and value the Government Trophy which was in the possession of the appellant. PW3 did appear at Mugumu police station and identified one fresh leg of wildebeest which he valued at TZS. 1,417,000. He thereafter issued a trophy valuation certificate (Exhibit P 2). PW4, an investigating officer at Mugumu police station was assigned a case file of the appellant on 11.10.2018. She interrogated the witnesses and later prepared an inventory form (Exhibit P 3) for the disposal of the trophy. A magistrate from Serengeti District Court ordered a disposal of the trophy.

The appellant, in his defence, distanced himself from the accusation. He testified that he was arrested at 15.00 hours at Mbalimbali village centre in Serengeti District and taken to Mugumu police station. He added that, he was not found within the park and the case against him was fabricated.

The trial court convicted and sentenced the appellant on the strength of that evidence, which it found to have proved the case against the appellant beyond reasonable doubt.

Aggrieved with that decision, the appellant instituted Criminal Appeal No. 65 of 2020 at the High Court of Tanzania at Musoma (the first appellate court) which confirmed the findings of the trial court and dismissed the appeal. Undaunted, the appellant has instituted the instant appeal predicated on three grounds of appeal which for reason that will become apparent shortly we found unnecessary to reproduce them.

When the appeal was called on for hearing, the appellant appeared in person and was fending for himself. The respondent Republic was represented by Mr. Tawabu Yahya Issa and Ms. Beatrice Timothy Mgumba, learned State Attorneys.

Upon inquiry, the appellant opted for the Republic to submit first and he will later respond. Mr. Issa taking the floor submitted that, the Republic was supporting the appeal not on the grounds raised by the appellant, but on the procedural irregularities found on the proceedings before the trial court. He pinpointed two irregularities, namely: the defect on the consent of the Director of Public Prosecutions (DPP) to commence the trial under

the EOCCA and on the certificate conferring jurisdiction to the subordinate court to try economic and non-economic cases.

With respect to the issue of consent of the DPP to commence the trial under the EOCCA, Mr. Issa submitted that, the consent of DPP can be issued by DPP under section 26(1) of the EOCCA and this power cannot be delegated. He added that Section 26(2) of the EOCCA, on the other hand, vests similar power to other State Attorneys to issue the consent. In the instant case, the consent which is found on page 6 of the record of appeal has been issued under section 26(1) by State Attorney in Charge who had no power to issue the consent under that provision. Therefore, the consent issued was invalid. He buttressed his argument by the decision of the Court in **Peter Kongori Maliwa and 4 Others v. The Republic**, Criminal Appeal No. 253 of 2020 [2023] TZCA 17350 (14th June 2023, TANZLII).

Mr. Issa added that the same State Attorney in Charge also issued the certificate conferring jurisdiction to the Serengeti District Court to try the alleged economic and non-economic offences under section 12(4) of the EOCCA. He concluded that the certificate is defective as it failed to mention the economic offence provisions under which the appellant was charged. In particular, the certificate did not mention the provisions contravened with respect to the count of possession of Government

Trophy. The same anomaly is also apparent on the consent. It was his submission that, the omission is fatal and rendered both the consent and certificate invalid. He again buttressed his argument from the Court's decision in **Peter Kongori Maliwa** (supra).

Based on these procedural irregularities, Mr. Issa urged the Court to allow the appeal, but not to follow the normal tread of ordering a re-trial. He distanced himself from that approach as re-trial would allow the prosecution to fill up gaps existing in its case. He mentioned two instances of the gaps existing in the prosecution case. **One**, the prosecution did not tender the certificate of seizure, hence, retrial will allow them to correct the mistake. **Two**, the appellant was not involved in the disposal of the trophy. The learned trial magistrate at page 30 of the proceedings ordered the disposal of the trophy in the absence of the appellant. Further, the inventory (exhibit P 3) does not show the appellant's involvement in the disposal of the trophy which is contrary to the guidelines issued by the Court in **Buluka Leken Ole Ndidai and Another v. The Republic**, Criminal Appeal No. 459 of 2020 [2024] TZCA 116 (21st February 2024, TANZLII). He prayed for the Court to invoke section 4(2) of the Appellate Jurisdiction Act, Cap. 141 (the AJA) and set aside the conviction and sentence on all counts as the entrance in the park is no longer an offence

and in the absence of certificate of seizure, it would be hard to prove that the appellant was unlawfully found with the weapon in the park.

The appellant, in his reply, did not have anything of substance to say. He prayed for the Court to set him free.

In view of the above submission the issues we have to decide are whether the trial court acted without jurisdiction in entertaining the case before it and what is the remedy.

As mentioned earlier the appellant was charged with three counts: unlawful entry into the park, unlawful possession of weapon in the park and unlawful possession of Government Trophy in the park. Before going into the jurisdiction of the trial court, we feel we should say a word about the first count. The learned State Attorney submitted that unlawful entry into the park is no longer an offence in this country, which we fully agree. The reason for our agreement is that, section 21 (1)(a) and (2) of the NPA which used to create the offence of unlawful entry has been amended by Act No. 11 of 2003. Before the amendment the section states:

> *"21(1) Subject to the provisions of section 15, it shall not be lawful for any person other than –*
>
> *(a) the Trustees, and the officers and servants of the Trustees; or*

(b) a public officer on duty within the national park and his servants, to enter or be within a national park except under and in accordance with a permit in that behalf issued under regulations made under this Act.

(2) Any person who contravenes the provision of this section commits an offence against the Act."

But after the amendment made in the National Parks Act by Act No. 11 of 2003 the section provides:

"21 (1) Any person who commits an offence under this Act shall, on conviction, if no other penalty is specified, be liable –

(a) in the case of an individual, to an fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding one year or to both that fine and imprisonment.

(2) Any person who contravenes the provisions of this section commits an offence against this Act."

There is no doubt in our mind the act of unlawfully entering the national park or remaining there is no longer an offence under section 21 of the NPA as it stood in 2018 when the offence was committed. Therefore, the appellant was charged, tried, convicted, and sentenced for a non-existent offence of unlawful entry into Serengeti National Park. (See -

Dogo Marwa@ Sigana and Another v. The Republic, Criminal Appeal No. 512 of 2019 [2021] TZCA 593 (21st October 2021, TANZLII).

Turning to the issue of jurisdiction, we feel we should first state the law. The appellant was charged with the offence of unlawful entry into the park, unlawful possession of weapon and unlawful possession of Government Trophy. The first and second counts are non-economic offences while the third is the economic offence. The jurisdiction of the court to try economic offences has been conferred to the Corruption and Economic Crimes Division of the High Court under section 3(3) of the EOCCA, but the same Act under section 12(3) provided that the economic offences can be tried by a subordinate court if the DPP or any State Attorney duly authorised by the DPP directs by certificate under his hand that it should be tried by such subordinate court.

In cases where the charge involves both economic and non-economic offences section 12(4) of EOCCA provides that the certificate should be issued under that provision. (See - **Mhole Saguda Nyamagu v. The Republic**, Criminal Appeal No. 338 of 2017 [2019] TZCA 623 (5th April 2019, TANZLII). In the instant case, the certificate was correctly issued under section 12(4) of the EOCCA. Section 12(3) and (4) provides:

"(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.

(4) *The Director of Public Prosecutions or any State Attorney duly authorised by him, may, in each case which he deems it necessary or appropriate in 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 and economic and non-*economic offence, be instituted in the court."

The law also states that, for a trial to commence at respective subordinate court, there must be a consent from the DPP under section 26(1) of the EOCCA or a consent of officer subordinate to DPP under section 26(2) of the EOCCA. Section 26 provides:

"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 of which shall require the consent of the Director of Public Prosecutions in person and those 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 specific instructions.

(3) N/A"

In the case at hand, the consent was issued under section 26(1) of the EOCCA by the State Attorney in Charge instead of DPP. This was a serious irregularity and was an epicentre of the appeal before the Court. We have said time and again that the power under section 26(1) of the EOCCA is vested in the DPP himself and is not delegable. (See- **Peter Kongori Maliwa and 4 Others v. The Republic** (supra) and **Amiri Ally Shaban and Another v. The Republic**, Criminal Appeal No. 155B of 2023 [2024] TZCA 35 (14th February 2024, TANZLII). Therefore, the trial was conducted without the requisite jurisdiction as the consent was invalid. In **Amiri Ally Shaban** (supra) the Court added that: "*even the certificate issued in terms of section 12(3) of the EOCCA, in that regard lacks validity as it was issued based on invalid consent*".

In the instant case, the consent of the State Attorney in Charge and the certificate conferring jurisdiction to the trial court suffers another anomaly. They did not cite the provisions of law creating the offence of unlawful possession of Government Trophy. We join hands with the learned State Attorney that, the legal consequence of the omission is to vitiate the trial proceedings as the trial court acted without jurisdiction. (See - **Dilipkumar Maganbai Patel v. The Republic**, Criminal Appeal No. 270 of 2019 [2022] TZCA 477 (25th July 2022, TANZLII), **Rhobi Marwa Mgare and 2 Others v. The Republic**, Criminal Appeal No. 192 of 2005 (unreported) and **Chacha Chiwa Marungu v. The Republic**, Criminal Appeal No. 364 of 2020 [2023] TZCA 17311 (5th June 2023, TANZLII). In **Dilip Kumar Maganbai Patel** (supra) the Court stated:

> *"The consent and certificate conferring jurisdiction on the trial court were defective, though they were made under the appropriate provisions; section 12(3) and 26(1) of the EOCCA but referred to the provisions which the appellant was not charged with... The certificate and consent were therefore incurably defective and the trial magistrate could not cure the anomaly in judgment as suggested by the learned State Attorney for the respondent. The defects rendered the consent of the DPP and*

the certificate transferring the economic offence to be tried by the trial court invalid."

We, therefore, agree with the learned State Attorney that both the consent of the DPP and the certificate conferring jurisdiction to the trial court are invalid and hence the proceedings are a nullity. Therefore, in terms of section 4(2) of the AJA we nullify the proceedings of the trial court, quash the conviction and set aside the sentence thereof. The burning question left to answer is the way forward.

The learned State Attorney has urged us not to order retrial as that will allow the prosecution to fill up gaps in its case. We cannot agree more with the learned State Attorney for the following reasons. **One**, the first count as we have discussed earlier was not an offence in law, as our law does not incriminate entrance in the park. **Two**, in the second count which is unlawful possession of weapon; there is nothing on record suggesting that the appellant was found with a weapon. The certificate of seizure was not tendered in evidence and there is no oral or paper trail showing the chain of custody of the said weapon. **Three**, the record shows that the Government Trophy was destroyed in the absence of the appellant. The appellant was not produced before the magistrate who ordered the trophy to be destroyed. Hence, the appellant was denied his right to be heard as he was not involved in the disposal process. Further, the inventory which

was tendered in evidence did not follow the guidelines laid down in **Bukiha Leken Ole Ndikai** case (supra). **Lastly**, according to section 5 read together with the first schedule of the NPA it was not proved that Kongoro la Ingira where the appellant was alleged to have been arrested was within the Serengeti National Park.

In the circumstances, ordering a re-trial would give the prosecution a chance to fill in gaps and thus occasioning injustices to the appellant. That would be against the settled principle in the case of **Fatehali Manji v. The Republic** [1966] E.A. 343 where the erstwhile East African Court of Appeal stated:

> *"... In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered when the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for a retrial should only be made where the interests of justice require it."*

In the light of the foregoing discussion, a retrial will not serve the best interests of justice. Therefore, in the final result, we order the immediate release of the appellant from prison custody unless he is otherwise lawfully held.

Order accordingly.

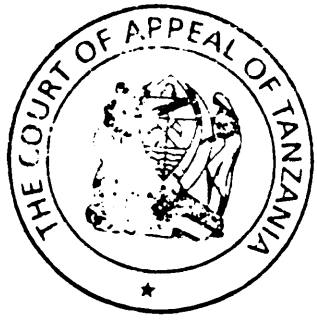
DATED at **MUSOMA** this 30th day of April, 2024.

B. M. A. SEHEL
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

A. A. ISSA
JUSTICE OF APPEAL

The Judgment delivered this 2nd day of May, 2024 in the presence of the appellant in person and Abdulkheri A. Sadiki, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL