IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

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

CRIMINAL APPEAL NO. 153 OF 2021

SAMWEL SLAA @ SAREA.....1ST APPELLANT
BARIE TARMO @ KONGI.....2ND APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Gwae, J.)

Dated the 17th day of February, 2021

in

Criminal Appeal No. 2 of 2020

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JUDGMENT OF THE COURT

5th & 13th February, 2024

WAMBALI, J.A.:

The appellants, Samwel Slaa @ Sarea and Barie Tarmo @ Kongi appeared before the Court of Resident Magistrate of Arusha at Arusha where they were jointly and together charged with the offence of unlawful possession of Government Trophy contrary to section 86 (1), (2)(b) of the Wildlife Conservation Act, Cap 283 (the WCA) read together with paragraph 14 (d) of the First Schedule to, and sections 57 (1) and 60 (2) of the Economic and Organized Crime Control Act, Cap 200 (the EOCCA). It was alleged in the particulars of the offence that on 2nd October, 2015, at Qarulambo within Karatu District Arusha Region, the appellants were jointly and together found in unlawful possession of six (6) pieces of

elephant tusks valued at TZS. 65,040,000.00, the property of Tanzania Government. The appellants categorically denied the allegation; hence a trial was held.

The prosecution case was supported by the evidence of five witnesses; namely, TNP 840 CPL Ponsiano Magoda (PW1), E. 1436 DC Wendo (PW2), Mlungwana Abeid Mchomvu (PW3), A/Insp. Kaitila (PW4) and F. 6441 DC Humphrey (PW5). In addition, the prosecution tendered the certificate of seizure, six pieces of elephant tusks, Motorcycle with Reg. No. T. 893 BME, Trophy Valuation Certificate, cautioned statements of the first and second appellants and the Exhibit Register (P16) which were admitted as exhibits P1, P2, P3, P4, P5, P6 and P7 respectively.

The substance of the evidence of the prosecution case as found by the trial court and confirmed by the first appellate court was that the appellants were arrested on 2nd October, 2015 in possession of the said elephant tusks at Quralambo within Karatu District at around 23.00hours by PW1 and PW2 who posed as buyers. The arrest of the appellants followed the information from the informer to PW1, a park ranger, while he was on patrol on 27th September, 2015. Indeed, it is the informer who connected PW1 with the seller (the second appellant). A certificate of seizure (exhibit P1) was filled and signed by PW1, PW2 and the appellants. The appellants were thus sent to Karatu Police Station where they allegedly recorded the cautioned statements (exhibits P5 and P6

respectively) before PW4 and admitted to have committed the offence. It is however noteworthy that the said cautioned statements were discounted from consideration in evidence by the first appellate judge on account of irregularity in the process of recording them.

PW3 evaluated the six pieces of the said trophy and was satisfied that they were elephant tusks from two elephants whose value was USD 30,000.00 as each costed USD 15,000. The six pieces of elephant tusks and Trophy Valuation Certificate were admitted at the trial as exhibits P2 and P4 respectively. PW5 is on record to have received the six elephant tusks, entered them in the Exhibit Register (P16) for safe custody on 3rd October, 2015 after they were handed over to him by the Officer Commanding Criminal Investigation Department (OC CID) at Karatu Police Station.

In defence, the first appellant who was supported by two witnesses mounted the defence of alibi on the contention that he was not at the scene of crime on the alleged date. He stated further that he was arrested by armed persons who he later learnt that they were Police Officers after they sent him to Karatu Police Station and that they took from him TZS. 90,500.00. He maintained that he was charged with the said offence after he demanded to be given back his money from the said police officers. He thus denied to have been arrested in possession of the elephant tusks on the particular day. Similarly, the second appellant disputed the

allegation against him and stated that he was arrested while he did not know the real reason as he was not found in possession of the alleged elephant tusks.

At the climax of the trial, the trial Resident Magistrate was satisfied that the prosecution case was proved to the hilt. Hence, he convicted and sentenced the appellants to pay a fine of USD 300,000.00 each or to serve twenty years imprisonment. The appellants' quest to overturn the findings, convictions and sentences imposed by the trial court was in vain as the High Court (the first appellate court) dismissed their appeal. Still discontented, they lodged this second appeal.

The dissatisfaction of the appellants with the decision of the first appellate court is expressed through the memorandum of appeal stuffed with ten grounds of appeal. However, for the reason which will be apparent shortly, at the hearing, it became apparent that this appeal can be determined based on the first ground. The respective ground can be rephrased as follows:

> *"That the first appellate court wrongly confirmed the convictions and sentences of the appellants while the trial court had no jurisdiction to try Criminal Case No. 58 of 2015 for lack of certificate and consent of the Director of Public Prosecutions in terms of sections 12 (3) and 26 (1) of the EOCCA".*

At the hearing of the appeal, the appellants appeared in persons and urged us to consider their complaints in the memorandum of appeal especially the first ground on lack of jurisdiction by the trial court and thereby nullify the proceedings and set them free. They emphasized that despite lacking jurisdiction, the trial court wrongly convicted them as they did not commit the offence.

The respondent Republic was represented by Ms. Janeth Sekule assisted by Ms. Lilian Kowero and Ms. Upendo Shemkole, all learned Senior State Attorneys.

At the very outset, Ms. Sekule supported the appellants' appeal based on the complaint in ground one. She submitted that the trial court wrongly assumed the jurisdiction to try the economic case against the appellants without ascertaining that there were, before it, valid consent and certificate of the Director of Public Prosecutions or the authorized officer as required under sections 12 (3) and 26 (2) of the EOCCA.

She submitted further that while it is not disputed that the record of appeal contains copies of the consent and certificate of the State Attorney In-charge of Arusha Zonal Office, there is no indication that the said documents were properly filed and received by the trial court. She added that upon perusal of the said documents, there is neither endorsement by the trial court nor indication of the date when they were received. Besides, she argued, the record of appeal does not indicate that the State

Attorney who prosecuted the case prayed to introduce the said documents in the record as there is no order of the trial magistrate to signify acceptance of the same. In her submission, since the said documents were not properly filed in court before the trial started, the trial court lacked jurisdiction. She argued that the omission to present the consent and certificate of the Director of Public Prosecutions or his duly authorized officer rendered the trial court's proceedings a nullity. To support her submission, she referred the Court to its decision in **John Julius Martin and Another v. The Republic** (Criminal Appeal No. 42 of 2020) [2022] TZCA 789 (8 December 2023, TANZLII).

In the circumstances, the learned Senior State Attorney urged the Court to allow the first ground of appeal and thereby, in terms of section 4 (2) of the Appellate Jurisdiction Act, Cap 141 (the AJA), nullify both the proceedings of the trial and first appellate courts for being a nullity.

On the other hand, Ms. Sekule argued that ordinarily, after the Court has nullified the proceedings of the two lower courts for being a nullity, the prosecution would request it to order a retrial. However, she stated, in the case at hand, an order for retrial will cause miscarriage of justice as there is no sufficient evidence to sustain the appellants' convictions and sentences.

To support her stance, firstly, she argued that the chain of custody on the handling of the alleged seized elephant tusks from the time of

arrest until they reached Karatu Police Station was broken. To this end, she submitted that both PW1 and PW2, who arrested the appellants and sent them together with the elephant's tusks at Karatu Police Station did not mention the name of a police officer who they handed over the same. The only evidence on the record, she submitted, is that of PW5, the exhibit keeper, who testified that he was given the said six pieces of elephant tusks by the OC CID on 3rd October, 2015 in the morning when he reported to work. Nonetheless, she submitted that the evidence of PW5 was not supported by the evidence of PW1 and PW2, who as intimated above, did not say anything on the matter. She emphasized that in their testimony, PW1 and PW2 simply stated that they arrested the appellants and sent them to Karatu Police Station together with the alleged elephant tusks. Besides, she argued, the said OC CID was not called to testify concerning the person who handed over the said tusks to him, the date when he received the said elephant tusks and the person who he handed the same to him.

In her view, the said doubts weakened the prosecution case as the elephant tusks formed the substance of the charge against the appellants and therefore, the chain of custody had to be clearly demonstrated from the time of arrest to time when they were handed over to PW5. She added that the evidence of PW5 showing how he dealt with the elephant tusks from when he was handed to the date they were produced in court

during trial of the case, cannot be of assistance without showing the connection on how they were handled between the time of arrest on 2nd October, 2015 to the time they were presented to the Karatu Police Station and later handed over to him on 3rd October, 2015.

Secondly, Ms. Sekule stated that the seizure certificate (exhibit P1) cannot be relied upon in evidence as it was not read orver after it was cleared for admission at the trial. The omission, she argued, weakened the prosecution case as the said exhibit has to be discounted in evidence.

Lastly, she submitted that in view of the gaps in the handling of the seized elephant tusks and the omission to read over the seizure certificate, the remaining evidence on the record cannot sustain the appellants' convictions if a retrial is ordered. On the contrary, she stated, miscarriage of justice will be occasioned to the appellants. She thus concluded by imploring the Court to allow the appeal and set the appellants at liberty.

Having heard the parties' submissions, we wish to begin our deliberation by emphasizing that jurisdiction of the court is crucial for it to try a case. The court cannot therefore assume jurisdiction which it does not have or contrary to the requirement of the law (see **Fanuel Mantiri Ng'unda v. Herman Mantiri Ngúnda & Two Others** (1995) T.L.R. 155).

It is settled that in terms of section 3 of the EOCCA, it is the High Court, Corruption and Economic Crimes Division which is conferred with

the jurisdiction to try economic offences. However, in terms of section 12 (3) of the EOCCA, the Director of Public Prosecutions or a State Attorney duly authorized is mandated to issue a certificate conferring jurisdiction to courts subordinate to the High Court to try economic offences as he may specify in the requisite order. Moreover, under section 26 (2) of the ECCOA, the Director of Public Prosecutions may specify economic offences which shall require his consent or those which may be exercised by such officers who are subordinate to him.

It is thus apparent that a subordinate court cannot assume the jurisdiction to try an economic offence without the consent and certificate duly issued by the Director of Public Prosecutions or a State Attorney duly authorized.

It is noteworthy that the certificate and consent envisaged under sections 12 (3) and 26 (2) of the EOCCA must be duly lodged and acknowledged by the trial court before it assumes the jurisdiction to try an economic offence case. Failure to comply with those provisions renders the trial a nullity. For this position, see for instance, the decisions in **Maulid Ismail Ndonde v. The Republic** (Criminal Appeal No. 319 of 2019) [2021] TZCA 538 (28th September 2021, TANZLII), **Maganzo Zelamoshi @ Nyanzamola v. The Republic** (Criminal Appeal No. 355 of 2016) [2018] TZCA 543 (7th September 2018, TANZLII), **Aloyce Joseph v. The Republic** (Criminal Appeal No. 35 of 2020) [2022] TZCA

771 (5th December 2022, TANZLII) and **John Julius Martin and Another v. The Republic** (supra).

In the case at hand, we entirely agree with the complaint of the appellants and the concession of the learned Senior State Attorney in the first ground of appeal. It is not disputed that though the record of appeal contains copies of the certificate and consent issued by the State Attorney In charge of Arusha Zone on 13th October, 2015, there is no indication that they were duly filed and endorsed by the trial court on any respective date before the trial commenced. The record of appeal leaves no doubt that the appellants were arraigned before the trial court on the same date indicated in the certificate and consent, that is, 13th October, 2015 on which the charge was read over and they pleaded not guilty. However, on that date and the dates which followed until the completion of the trial, there is no indication in the record of appeal that the said documents were the subject of consideration by the trial court before it assumed jurisdiction to try the appellants. Besides, there is no recorded statement from the State Attorney who prosecuted the case notifying the trial court of the existence of those documents.

In view of the omission, it is apparent that the trial of the appellants started without the requisite certificate and consent of the Director of Public Prosecutions or a State Attorney duly authorized, contrary to the requirement of sections 12 (3) and 26 (2) of the EOCCA. Therefore, the

trial court proceedings were rendered a nullify. The same applied to the proceedings of the High Court on first appeal as they emanated from nullity proceedings. In the event, we allow the first ground of appeal.

As intimated earlier, this ground suffices to dispose off the appeal and therefore, we do not find it appropriate to consider the remaining nine grounds of appeal. However, before we nullify the proceedings of both courts below, the crucial question is what should be the way forward.

It was submitted by Ms. Sekule that in view of the broken chain of custody on handling of the alleged seized six pieces of elephant tusks and the procedural irregularity on the failure to read over the seizure certificate (exhibit P1), the remaining evidence on the record cannot sustain convictions of the appellants.

We entirely agree with the submissions of Ms. Sekule considering that even the cautioned statements of the appellants in which they allegedly confessed to have committed the offence charged were discounted by the first appellate court. We wish to add that the remaining evidence of PW1 and PW2 had material contradictions on the issue of who communicated with the second appellant before the arrest. It was the evidence of PW1 that he is the one who made the communication after he got the information from the informer. PW1 also stated that the said communication continued while they were on the way to the scene of crime while riding a motorcycle together with PW2. On the contrary, PW2

testified that the communication was done by one of the park rangers. Particularly, PW2 stated:

> *"There was communication going on between one of the park rangers...".*

It is thus surprising that PW2 could fail to recognize the name of the park ranger who communicated with the second appellant while they were both on the way to arrest them abord a motorcycle whose rider escaped after the alleged arrest and could not be traced to testify at the trial. More importantly, PW1 did not mention the number of the mobile phone which he used to communicate with the second appellant on the alleged date of the arrest. This matter was also raised by the first appellant in his defence. The contradiction is material and casts doubt on the credibility of both PW1 and PW2 with regard to the substance of the prosecution case on how the appellants were arrested.

Moreover, both PW1 and PW2 did not state in their evidence at what time they left the scene of crime and when they arrived at Karatu Police Station and handed over the said elephant tusks. As intimated above, both PW1 and PW2 did not say who they handed over the tusks. Unfortunately, the said OC CID, whose name was not disclosed by PW5 was not summoned to testify from whom and when he received the elephant tusks which he allegedly later handed over to PW5.

In addition, in his testimony, PW1 stated that when they went to arrest the appellants, they were initially four in the vehicle including two other park rangers, namely Macline Masomola and Pay Mbaryo. Later, PW1 and PW2 boarded the motorcycle and left the two in the vehicle at Endabashi. Unfortunately, the said two park rangers were not summoned to testify to support the allegation on how the appellants were arrested in connection with the offence and when they reached Karatu Police Station. We are of the considered view that their testimony was important because according to PW1, after the motorcycle rider escaped, they boarded the vehicle together with the appellants and the two persons when they went to Karatu Police Station.

We are of the view that failure of the prosecution to summon those material witnesses, namely, the OC CID and the two park rangers who would have filled some gaps in the evidence could have entitled the trial and first appellate courts to draw adverse inference on its case as we hereby do. Indeed, the absence of the OC CID evidence left the evidence of PW5 on the handing over to him of the six pieces elephant tusks on 3rd October, 2015 unsupported by any other evidence on the record as PW1 and PW2 said nothing on this matter.

Lastly, the remaining evidence of PW4 who recorded the appellants' cautioned statement has nothing of substance to support the prosecution case as the said statements were discounted by the first appellate court.

Moreover, once we discount the seizure certificate for being improperly relied in evidence as it was not read over after admission, the prosecution case is left with no foundation to ground the appellants' convictions.

In this regard, we agree with the learned Senior State Attorney that ordering a retrial will not be in the interest of justice. In the event, we allow the appeal, nullify the proceedings of both courts below, quash convictions and set aside the sentences imposed on the appellants.

Consequently, we order that the appellants be released from prison forthwith unless held for other lawful cause.

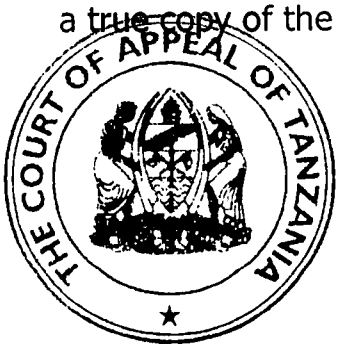
DATED at **ARUSHA** this 12th day of February, 2024.

F. L. K. WAMBALI
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

A. A. ISSA
JUSTICE OF APPEAL

The Judgement delivered this 13th day of February, 2024 in the presence of the 1st and 2nd appellants in person and Mr. Stanslaus Halawe, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL