

TANZANIA / JUDGMENT

emmanuel chacha keryoba others vs republic 2023 tzca 17823 10 november 2023

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IN THE COURT OF APPEAL OF TANZANIA AT MUSOMA (CORAM: KWARIKO, J.A., GALEBA, 3.A. And KIHWELO. J.A.)¹ CRIMINAL APPEAL NO. 368 OF 2020 EMMANUEL CHACHA KERYOBA 1ST APPELLANT SIMION NYAMHANGA MERENGO 2nd APPELLANT JUMA MARWA MAHENDE 3rd APPELLANT VERSUS THE REPUBLIC RESPONDENT [Appeal from the Judgment of the High Court of Tanzania at Musoma] (Kahvoza, 3A dated the 17th day of July, 2020 in Consolidated Criminal Appeals No. 03, 07 and 08 of 2020 JUDGMENT OF THE COURT 1st & 10th November, 2023 KWARIKO, J.A.: In the District Court of Serengeti at Mugumu, the appellants herein together with two others namely, Mwita s/o Keryoba @ Chacha and Petro s/o Mwita @ Chacha, the first and fourth accused persons, respectively, who are not parties to this appeal, were jointly and together charged with three counts as follows: one, unlawful entry into the National Park contrary to sections 21 (1) (a) (2) and 29 (1) of the National Parks Act [CAP 282 R.E. 2002] (the NPA), as amended by the Written Laws (Miscellaneous Amendments) Act No. 11 of 2003; two, unlawful possession of weapons in the National Park contrary to section 24 (1) (b) and (2) of the NPA; and three, unlawful possession of Government trophies contrary to section 86 (1) and (2) (c) (iii) of the Wildlife Conservation Act No. 5 of 2009 as amended by the Written Laws (Miscellaneous Amendments) Act No. 2 of 2016 read together with paragraph 14 of the First Schedule to the Economic and Organised Crime Control Act [CAP 200 R.E. 2002] (the EOCCA), as amended by the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016. All five accused persons denied the charge and the case went on full trial. However, as the trial progressed, the prosecution withdrew the charge against the fourth accused under section 91 (1) of the Criminal Procedure Act [CAP 20 R.E. 2022] and he was accordingly discharged. Further, following closure of the prosecution case and before he could give his defence, the first accused jumped bail and thus the case proceeded against him in his absentia to finality. In the end, the trial court was satisfied that the case against all accused was proved beyond reasonable doubt in all three counts. They were accordingly convicted and hence, were sentenced to serve one year imprisonment each for the first and second counts, and for the third count, they were sentenced to serve twenty years imprisonment which terms were ordered to run concurrently. Dissatisfied, the appellants unsuccessfully appealed before the High Court of Tanzania at Musoma (the first appellate court). Still protesting their innocence, the appellants have come before this Court on appeal. At the trial, the prosecution case was built upon four witnesses whose evidence can briefly be recapitulated as

follows. On 6th December, 2018, Sabo Helbert @ Mahimbo (PW1) and Deogratius Richard (PW2) who were park rangers posted at Kogatende Ranger Post within Serengeti National Park, were on duty doing patrol. At about 23:00 hours they saw a light of fire at a ditch known as Korongo la Machochwe. They surrounded the area and managed to arrest the appellants and the co accused. Upon searching them, they were found in possession of one knife, two machetes and three animal trapping wires, together with three fresh hind legs of wildebeest. Upon interrogation, they admitted to have no permit to either enter in the National Park or possession of weapons therein and Government trophies. Thereafter, the five suspects and the exhibits were taken to Mugumu Police Station. At the police station, Wilbroad Vicent (PW3), a wildlife warden identified the Government trophies to be three hind limbs of the wildebeest which was valued at TZS. 2,600,000.00. Meanwhile, No. F 5834 DC James (PW4) who was assigned to investigate the case, among other things he prepared an inventory for the trophy whereby in the presence of the appellants, it being perishable item, a resident magistrate ordered for its destruction. During the trial, one knife, two machetes and three animal trapping wires were admitted as exhibit PE1 collectively, while, a trophy valuation certificate and an inventory form for the Government trophies were admitted as exhibits PE2 and PE3 respectively. In defence, the appellants denied the charge. They accounted that, on the material day when they were searching for a lost cow and a goat belonging to the second and third appellants, respectively, they were arrested by park rangers near the national park. They said that, they did not know the boundaries of the park. As shown earlier, the trial court having been satisfied that the charge against the appellants was proved beyond reasonable doubt, entered conviction and sentenced them accordingly. The first appellate court partly allowed the appellants' appeal. It observed that, all prosecution exhibits were wrongly tendered by the public prosecutor instead of the witnesses and they were thus expunged from the record. Save for the second count, the first appellate court was of the view that there was sufficient oral evidence to prove the first and the third counts. Thus, it upheld the appellants' conviction on those counts. Before this Court, the appellants, each filed a memorandum of appeal though containing five identical grounds. However, for what will transpire shortly, we find no pressing need to state them herein. At the hearing of the appeal, the appellants appeared in person, without legal representation, while the respondent Republic had the services of Mr. Abel Mwandalama, learned Principal State Attorney who was assisted by Ms. Monica Hokororo, learned Senior State Attorney, Ms. Janeth Kisibo and Mr. Yese Temba, both learned State Attorneys. In arguing their appeal, the appellants adopted their grounds without further clarification, electing for the respondent to reply to their grounds first. On the other hand, Mr. Mwandalama on behalf of the respondent informed the Court that they were supporting the appeal specifically on the basis of the fifth ground featuring in each memorandum of appeal to the effect that the trial court had no jurisdiction to try the economic case in the absence of a valid consent and certificate of transfer by the Director of Public Prosecutions (the DPP). He argued that, the State Attorney In charge who issued consent under section 26 (1) of the EOCCA for prosecution of the appellants had no powers to do so since under that provision, it is the DPP personally who is vested with powers to issue the requisite consent. The learned State Attorney argued further that, neither the consent nor the certificate transferring the case to the trial court mentioned the provisions of the law creating the economic offences, hence the trial

court had no jurisdiction to try the case against the appellants. He supported this contention with the decision of the Court in *Peter Kongori Maliwa & Four Others v. Republic*, Criminal Appeal No. 253 of 2020 (unreported). Mr. Mwandalama contended that the said omissions rendered the consent as well as the certificate of transfer invalid which vitiated the proceedings of the trial court and those of the first appellate court. In the event, he implored us to invoke our revisional powers under section 4 (2) of the Appellate Jurisdiction Act [CAP 141 R.E. 2019] (the ADA) and nullify the proceedings of the two courts below, quash the conviction and set aside the sentence imposed on the appellants. On what should be done next, Mr. Mwandalama was candid enough to state that the prosecution evidence is wanting, for, exhibits PI, P2 and P3 were tendered by the prosecutor instead of the witnesses. He added that the appellants were not involved when the order for disposition of the Government trophies allegedly found in their possession was made by the resident magistrate as recorded in the inventory (exhibit P3). Despite these shortcomings, he urged us to leave the matter to the wisdom of the DPP to decide whether or not to charge the appellants afresh. For their part, the appellants did not have anything useful to contribute in respect of the foregoing as the ground under consideration raises pure points of law. Each one of them only prayed to be released from custody having been there for a long time. We have considered the submissions made by the parties. We are in agreement that the State Attorney In charge erred in law when he issued the consent under section 26 (1) of the EOCCA. This is because the issuance of the consent under that provision is the prerogative of the DPP personally. However, the State Attorney In charge could have issued the consent under the provisions of section 26 (2) of the EOCCA for specified economic offences. For clarity, section 26 (1) and (2) thereof is reproduced as hereunder: "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." Flowing from the above disposition, it is clear that the consent was invalid and therefore, the appellants were wrongly prosecuted before the trial court. Similarly, the invalid consent rendered the certificate transferring the case to the trial court nugatory. Since we have found that the consent was invalid, we find no need to deliberate on its contents as urged by the learned Principal State Attorney. As regards the invalid consent, we find support in the case of *Peter Kongori Maliwa & Four Others* (supra), cited to us by Mr. Mwandalama, where the Court stated thus: "In this case, consent was issued by the State Attorney In charge instead of the DPP. That was a serious irregularity as the power to issue consent under section 26 (1) of the EOCCA is not delegable. It is absolutely vested in the DPP himself. As such, the consent under discussion having been issued by a person without mandate was incapable of authorizing the trial court to try the

economic offences." Likewise, in the instant case, where the State Attorney In charge issued the consent under section 26 (1) of the EOCCA, which powers are exercisable by the DPP personally, the purported consent was not valid. As such, the proceedings of the trial court were a nullity for lack of the requisite consent. The proceedings of the first appellate court were equally void as they originated in the null proceedings. We thus quash the conviction and set aside the sentence imposed on the appellants. The question which follows for our consideration is what would be the fate of the appellants. Mr. Mwandalama, while aware of the shortcomings in the prosecution evidence, he urged us to leave the matter to the wisdom of the DPP to decide whether or not to charge the appellants afresh. The shortcomings are as follows: one, all the prosecution exhibits were tendered by the public prosecutor instead of the witnesses. Two, the Government trophies in relation to which the conviction of the appellants was based had already been destroyed. Considering these inadequacies in the prosecution case, neither a retrial nor leaving the matter to the wisdom of the DPP to decide what to do next will not be in the best interest of justice to the appellants as the prosecution will get opportunity to fill in the gaps in their evidence. Eventually, we allow the appeal on the basis of each appellant's fifth ground of appeal. Having nullified the proceedings, quashed the conviction and set aside the sentence, we order the immediate release of the appellants from custody, unless they are lawfully held. DATED at MUSOMA this 9th day of November, 2023. M. A. KWARIKO JUSTICE OF APPEAL Z. N. GALEBA JUSTICE OF APPEAL P. F. KIHWELO JUSTICE OF APPEAL The Judgment delivered this 10th day of November, 2023 in the presence of the 1st, 2nd and 3rd Appellants in person, and Mr. Tawabu Yahya Issa, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original. 10

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