

TANZANIA / JUDGMENT

ghati mwikwabe sasi vs republic

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IN THE COURT OF APPEAL OF TANZANIA AT MUSOMA f CORAM: KWARIKO. J.A.. GALEBA, J.A.
And KIHWELO. J.A.1 CRIMINAL APPEAL NO. 305 OF 2020 GHATI MWIKWABE @
SASI APPELLANT VERSUS THE
REPUBLIC.....RESPONDENT [Appeal from the Judgment of the
High Court of Tanzania at Musoma] (Kahyoza, J.1 dated the 29th day of June, 2020 in (DO
Criminal Appeal No. 159 of 2019 JUDGMENT OF THE COURT October, & 9th November, 2023
KWARIKO, 3.A.: In this appeal, the appellant, Ghati s/o Mwikwabe (@) Sasi is challenging the
decision of the High Court of Tanzania at Musoma (the first appellate court) which dismissed his
appeal. Formerly, the appellant and Haruni s/o Marwa @ Mukunyi (the second accused) who is
not a party to this appeal, were arraigned before the District Court of Tarime at Tarime (the trial
court), jointly and together charged with the following i three counts: first, unlawful entry in 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; second, 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] (EOCCA) as
amended by the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016. The two denied
the charge and therefore they went on full trial. However, before he could give his defence, the
second accused jumped bail and thus the case proceeded against him in absentia. At the end of
the trial, both were convicted in all three counts and sentenced to one year, two years and twenty
years imprisonment for the first, second and third counts, respectively. The terms of
imprisonment were ordered to run concurrently. 2 Aggrieved by that decision, the appellant
preferred an appeal to the first appellate court which was dismissed for lack of merit. Undaunted,
he is now before this Court on a second appeal. The facts of the case which unfolded at the trial
from the prosecution were given by its five witnesses as follows. Jacob Bura Hema (PW2), Oscar
Kapande (PW3) and Joseph Mpangala (PW4) are park rangers who were stationed at Kenyangaga
Ranger Post within Serengeti National Park at the material time. While they were on patrol
within the park on 13th April, 2019, they saw human foot prints. They followed the lead and

managed to find the appellant and the second accused. The two were found in possession of two spears, one head and front leg of wild animal known as warthog which were covered by a jacket. However, they did not have any permit to either enter into the National Park, possess weapons therein or Government trophies. According to these witnesses, a certificate of seizure (exhibit P3) was prepared and signed by them and the suspects. Thereafter, the appellant and his co-accused were sent to Gibaso Police Station where a police officer No. H. 3079 PC Moses (PW1) received them together with the exhibits. On 14th April, 2019 Njonga Marco William (PW5) a District Game Officer, an expert in identifying and valuing Government trophies was summoned to the police station so as to identify and value the suspected Government trophy. He identified the same to be one head and one front leg of warthog valued at TZS. 1,041,930.00. A trophy valuation certificate was prepared which was tendered and admitted as exhibit P5. Similarly, two spears were admitted as exhibit PI while, one head and front leg of warthog were received in court as exhibit P2. In defence, after being addressed in terms of section 231 (1) of the Criminal Procedure Act [CAP 20 R.E. 2022] the appellant opted to remain silent as he had nothing to say and did not call any witness to defend him. As shown earlier, the trial court was satisfied that the case against the appellant and his co-accused was proved beyond reasonable doubt. They were accordingly convicted and sentenced as indicated earlier. This decision was upheld by the first appellate court. Before this court, the appellant has raised three grounds of appeal, but for reasons that will be apparent in the course of this judgment, we find it inexpedient to reproduce them herein. When the appeal was called on for hearing, the appellant appeared in person, unrepresented, while the respondent Republic had the services of Mr. Anesius Kainunura, learned Senior State Attorney together with Mr. Tawabu Yahaya Issa, learned State Attorney. When we invited him to argue his appeal, the appellant did not have much to say. He only adopted his grounds of appeal and elected for the respondent to begin his address. On his part, Mr. Kainunura supported the appeal on the grounds other than those raised by the appellant. He submitted that, under section 26 (1) of the EOCCA, it is the Director of Public Prosecutions (the DPP), who is vested with powers to issue consent for the prosecution of economic offences. He argued that, on the contrary, in this case, it was the State Attorney In charge who issued consent under section 26 (1) of the EOCCA for the trial of the economic case. He contended that, had the State Attorney In charge wished to issue consent for that purpose, he would have done so under section 26 (2) of the EOCCA. He argued that, this omission vitiated the proceedings as there was no proper consent of the DPP. Secondly, Mr. Kainunura submitted further that, the said consent and a certificate of transfer of the case to the trial court under section 12 5

- (4) of the EOCCA did not mention the provisions of law creating the economic offences rendering them invalid. He contended that, as the certificate of transfer was invalid, the trial court had no jurisdiction to try the economic offences. He urged us to invoke the provisions of section 4
- (2) of the Appellate Jurisdiction Act [CAP 141 R.E. 2019] (the ADA) and nullify the proceedings of the trial court and those of the first appellate court, quash the conviction and set aside the sentence imposed by the trial court. In support of his contention, Mr. Kainunura cited the decision of the Court in the case of Peter Kongori Maliwa v. Republic, Criminal Appeal No.

253 of 2020 (unreported). As for the way forward, Mr. Kainunura implored us to order a retrial of the case since the evidence on record is sufficient to ground the conviction. He supported his prayer by another decision of the Court in *Dilipkumar Magambai Patel v. Republic*, Criminal Appeal No. 270 of 2019 (unreported). Being a lay person, the appellant did not have anything to say in relation to the legal issues raised by the learned Senior State Attorney. We have dispassionately considered the submissions made by the learned Senior State Attorney. Under section 26 (1) of the EOCCA, no prosecution of any economic case can be commenced except with the consent of the DPP. However, under section 26 (2) of the EOCCA, the DPP is empowered to establish and maintain a system whereby the process of issuing the consent for prosecution of economic offences, may be done by specifying in the notice published in the Gazette economic offences requiring his consent in person and those which may be exercised by such officer or officers subordinate to him. Section 26 (1) and (2) of the EOCCA provides: "(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." Reading through this provision, it is clear in the instant case that, the learned State Attorney In charge had no powers to issue a consent under section 26 (1) of the EOCCA. If he had intended to issue the consent, he would have done so under section 26 (2) of the EOCCA and for specified economic offences. We thus agree with Mr. Kainunura that the consent having been issued illegally it was invalid. It follows that the appellant was wrongly prosecuted by the trial court. Accordingly, the invalid consent rendered the certificate conferring jurisdiction to the trial court ineffectual. In the Court's earlier decision of *Sandu John v. Republic*, Criminal Appeal No. 237 of 2019 (unreported), the Court referred to the decision in *Peter Kongori Maliwa* (supra) and observed thus: "Similarly, in the case under scrutiny since the ' Prosecution Attorney In charge purported to issue consent under section 26 (1) of the EOCCA which was not within her mandate, it amounted to no consent at all authorising the prosecution of the appellant by the trial court. In the event, the proceedings of the trial court were a nullity as it could not assume the jurisdiction without the requisite consent to prosecute the appellant as required by law. Ultimately, the proceedings of the first appellate court were also null and void as they emanated from nullity proceedings of the trial court. We therefore, conclude that the appellant was wrongly prosecuted at the trial court." Other cases are; *Chacha Chiwa Marungu v. Republic*, Criminal Appeal No. 364 of 2020 and *Peter Kongori Maliwa* (supra). Guided by the cited decisions, we are of the decided view that the lack of proper consent to prosecute the case vitiated its trial. Accordingly, through our revisional powers under

section 4 (2) of the AJA, we nullify the proceedings before the trial court as well as those before the first appellate court. We quash the conviction and set aside the sentence therefrom. Having found that the consent was invalid, we do not find reason to deliberate on the alleged shortcomings in respect of its contents. Having nullified the proceedings of the lower courts, the question which follows is whether we should order a retrial as urged by the learned Senior State Attorney. In view of the circumstances of the case, we think 9 that a retrial will meet the justice of the case. Accordingly, we order a retrial of the case according to law. Meanwhile, the appellant shall remain in custody pending his retrial. DATED at MUSOMA this 8th day of November, 2023. M. A. KWARIKO JUSTICE OF APPEAL Z. N. GALEBA JUSTICE OF APPEAL P. F. KIHWELO JUSTICE OF APPEAL Judgment delivered this 9th day of November, 2023 in the presence of the Appellant in person and Mr. Tawabu Yahya Issa, State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original. R. W. CHAUNGU DEPUTY REGISTRAR COURT OF APPEAL 10

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