

TANZANIA / JUDGMENT

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IN THE COURT OF APPEAL OF TANZANIA AT MUSOMA fCORAM: LILA. J.A.. KENTE. J.A.. And MGONYA. J.A.^ CRIMINAL APPEAL NO. 534 OF 2020 JUMA KIRUMUSO @ MWITA. ...1CTAPPELLANT JUMA WEIBIRO @ KITIGOTI 2nd APPELLANT VERSUS THE REPUBLIC RESPONDENT (Appeal from Judgment of the High Court of Tanzania at Musoma) (Kisanya, 3.) dated the 9thday of September, 2021 in Criminal Appeal No. 52 of 2020 JUDGMENT OF THE COURT 08th & 15th July, 2024 LILA, J.A.: The appellants, Juma Kirumuso @ Mwita and Juma Weibiro@Kitigoti/ were arraigned before the District Court of Serengeti sitting at Mugumu in Economic Case No. 139 of 2019, to answer a charge comprising five counts; first Count: Unlawful entry into the National Park contrary to sections 21(l)(a), (2) and 29(1) of the National Parks Act [Cap. 282 R.E. 2002] as amended by Written Laws (Miscellaneous Amendments) Act No. 11 of 2003 (the NPA); second count: Unlawful possession of weapons in the National Park contrary to section 24(l)(b) and (2) of the NPA; third count: Unlawful possession of government trophies contrary to section 86 (1) and (2)(c)(iii) o f the Wildlife 1 Conservation Act, No. 5 of 2009 as amended by the Written Laws (Miscellaneous Amendments) Act, No.2 of 2016 (the WCA) read together with Paragraph 14 of the First Schedule to the Economic and Organized Crime Control Act [Cap. 200 R.E. 2002] (the EOCCA); fourth count: Unlawful possession of Government trophies contrary to section 86 (1) and (2)(c) (iii) of WCA read together with paragraph 14 of the first schedule to the EOCCA and; fifth count: Unlawful possession of Government trophies contrary to section 86 (1) and (2)(c) (ii) of WCA read together with paragraph 14 of the first Schedule to the EOCCA. The offences charged were said to have been committed on 20/10/2019 at Mlima Serena and were, respectively, in respect of unlawful entry into the Serengeti National Park without the permission of the Director, being found in unlawful possession of weapons to wit two knives, one "panga", and five trapping wires without permit. The last three offences were, respectively, about being found in unlawful possession of Government trophies to wit; one fresh skin of wildebeest and six pieces of fresh meat of wildebeest valued at TZS 1,430,000.00, one dried skin of Toppi valued at TZS 1,760,000.00 and one skin of impala valued at TZS 858,000.00, the properties of the United Republic of Tanzania. They pleaded not guilty to the charge and trial ensued culminating in their convictions as charged. For the first and second counts, they were 2 each ordered to serve two years' imprisonment and, for the third to fifth counts, they were each ordered to serve twenty years' imprisonment. The sentences were ordered to run concurrently. Their appeal to the High Court of Tanzania, Musoma Registry, failed. Still aggrieved, this is their second appeal. In view of the course we have adopted in deliberating this appeal, this brief background facts leading to the

present appeal suffices. To substantiate the allegations in the charge, the prosecution side marshaled four witnesses and the substance of their evidence is clear and straight forward. Mtenganyi Wambura, (PW1) and Oscar Kapande (PW2) together with one Stephano Matuni who did not testify, are Park Rangers who were stationed at Serengeti National Park. They claimed that, on 20/10/2019 at around 1700hrs, they were on patrol at Mlima Serena within the Serengeti National Park whereat they noted footsteps which they followed and found two people who they surrounded and arrested them. The two persons turned out to be the appellants. PW1 and PW2 said they found the appellants in possession of one "panga", two knives and five animal trapping wires (Exhibit P.2). They further said that they found the appellants in possession of Government trophies listed above for which, upon being inquired, they said they had no permit. They then, filled a 3 Certificate of Seizure (Exhibit P.1). They then took the appellants and exhibits to Police station at Mugumu. The aforesaid Government trophies were identified and valued by one Wilbrod Vicent (PW3), a Wildlife Warden, on 21/10/2019 at Mugumu Police Station after being called by DC Egwagwa. He identified them to be one dry skin of topi, six pieces of fresh meat of wildebeest, one skin of impala and one fresh skin of wildebeest. He said he identified wildebeest skin because it is slight grey, dark brown, the meat is reddish in color, meat fiber was compacted and, for a topi, it was chestnut brown in color and purplish to blue parches and skin of impala is reddish brown and the lower part is white. He then prepared a Trophy Valuation Certificate (Exhibit P.3). The meat being a perishable substance subject to decay or decomposition, a policeman one G.736 DC Egwagwa (PW4) who investigated the case, on 21/10/2019, prepared an Inventory Form (Exhibit P.E.4) and presented it before a magistrate who ordered the exhibit be disposed. On their part, both appellants disassociated themselves with the crimes charged. The 1st appellant claimed that he was arrested by Park Rangers while fishing at Rubama River and the exhibits allegedly found in their possession were in ranger's car. Similarly, the 2nd appellant claimed 4 to have been arrested by Park Rangers when he was at the auction and put in their car wherein, he met the 1st appellant. It is the prosecution case which found purchase in the trial court's view leading to the appellants' convictions as they were charged followed by imposition of sentences stated above. On first appeal, the High Court could not be moved a step to reverse the trial court's decision. Like the trial court, it found the charge was proved and dismissed the appeal in its entirety. Before us, the appellants are faulting the High Court decision on four points comprised in the memorandum of appeal by the 1st appellant and six points by the 2nd appellant. As the appeal turns on a ground not contained in any of the appellants' memoranda of appeal, we find it of no essence to belabour to recite the appellants' grounds of complaints. The appellants, who appeared in Court in person and unrepresented, simply adopted their respective grounds of appeal and urged us to order them be released from prison. Anxious to test the waters, they left it for the respondent Republic to respond to their grounds of complaints first reserving their right to rejoin if need be. The respondent Republic enjoyed the services of Mr. Tawabu Yahaya Issa who 5 joined forces with Mr. Isihaka Ibrahim Mohamed, both learned State Attorneys. They readily supported the appeal. As Mr. Issa took the floor to respondent to the grounds of appeal, we drew his attention to the consent issued by the State Attorney In charge (the consent) found at page 9 of the record of appeal and the Certificate Conferring Jurisdiction on a Subordinate Court to try an economic offence located at page 10 of the record of appeal.

Initially, he was of the view that they were proper but, on our prompting whether the two crucial documents indicated section 86(1) and (2)(ii) of WCA, to show that the State Attorney had consented to the prosecution of the appellant for the offences of unlawful possession of Government trophies which are economic offences charged in counts number 2 to 5 of the charge, he realized that there was no such indication therein. We consequently wanted to satisfy ourselves regarding their propriety. We accordingly invited him to address us on that issue which he did. Mr. Issa prefaced his arguments by stating the obvious that the mandate to try economic offences is, in terms of the provisions of section 3(1) of the EOCCA, vested to the Corruption and Economic Crimes Division of the High Court but, subordinate courts may try such if the Director of Public Prosecutions (the DPP) or an Officer authorized by him consents to pursuant to section 26(1) or (2) of EOCCA and transfers the case to such 6 court by a Certificate issued under section 12(3) of the EOCCA. In this case, he submitted, the consent was properly issued and signed by the Senior State Attorney InCharge under section 26(2) of EOCCA but, it does not indicate the economic offences predicated in the charge. To this anomaly, he readily conceded that it was a fatal omission rendering the consent invalid. As a result, going further, there was no consent for Serengeti District Court to try the case. Concluding, he urged the Court to exercise its powers of revision to nullify the proceedings before Serengeti District Court, quash the appellants' convictions, set aside the sentences meted against them as well as the proceedings and judgment of the High Court for having arisen from nullity proceedings and judgment of the District Court. Aware of the consequences of the above finding, Mr. Issa refrained from an order of retrial being made pointing out three deficiencies on record which weakened the prosecution case so much so that the charge remained unproved. It was his view, given opportunity like ordering a retrial, they may be corrected hence occasioning an injustice to the appellants. First; the offence of entering into a national park is non-existent arguing that the law was amended with the resultant effect that it turned to be not an offence. Two; the inventory Form (exhibit P.E.4) produced in court in lieu of Government trophies bore no comments by 7 the appellants to prove that they participated by being asked if they had comments in the process of disposing the Government trophies as emphasized in the case of *Buluka Leken Ole Ndidai and Another vs Republic*, Criminal Appeal No. 459 of 2020 (unreported). It deserves being expunged from the record with the effect that there shall be no substance of the economic offences (Government trophies), he concluded leading to the charges in counts 2 to 5 to collapse. Third and last is that, the legal boundaries of Serengeti National Park were not explained by PW1 and PW2 so as to establish that they arrested the appellants within the national park. The appellants were, for an obvious reason of being laypersons on legal matters, quite unaware and ignorant of the legal infractions advanced by Mr. Issa. They left it to the Court to decide and urged the Court to release them from prison. We have examined the record of appeal and given due consideration to the learned State Attorney's arguments. In this case there is no dispute, as rightly argued by Mr. Issa, that the consent issued by the Senior State Attorney found at page 9 of the record of appeal suffers from the above stated anomaly. It is now a requirement that a consent and certificate should specify that the DPP under section 26(1) of the EOCCA or an officer authorized by him in terms of section 26(2) of the EOCCA has consented 8 to the appellant's prosecution of economic offence(s). (See *Maganyi Sentau Maganyi vs Republic*, (Criminal Appeal No. 254 of 2020) followed in our recent

decision of Nduru John Ng'waya and Two Others vs Republic, Criminal Appeal Nos. 464, 465 and 466 of 2020, (unreported). In the former case, after examining the consent on the record before it, the Court insisted that: "The other irregularity is that the same does not indicate that the learned State Attorney Incharge had consented to the prosecution of the appellant and second accused person for the offence of unlawful possession of Government trophies under section 86(1) and (2) (ii) of WCA, it means therefore, that the appellant and second accused were charged under s. 86(1) and (2)(ii) of the WCA without requisite consent That is fatal irregularity vitiated the proceedings." In this case, there is no such indication rendering the consent invalid. Serengeti District Court, therefore, lacked the requisite jurisdiction to try the economic case. Since, section 26(1) of the EOCCA is categorically clear that a trial of an accused shall not be commenced in respect of an economic offence without the DPP's consent, the trial of the appellant before Serengeti District Court was a nullity. The obtaining obvious consequence is that the proceedings and judgment of it are a nullity. The High Court proceedings and judgment, too, cannot survive the wrath having the source from the trial court proceedings and judgment. This not being a ground of appeal, we invoke our powers of revision under section 4(2) of the Appellate Jurisdiction Act, Cap. 141 of the Laws and nullify the proceedings of both courts below, quash the convictions and set aside the sentences imposed on the appellants. Immediately begging for an answer is a crucial issue whether we should order a retrial of the appellant. Mr. Issa was not in favour of a retrial order being made assigning three reasons. We entirely agree with him. It is the law (section 135 of the Criminal Procedure Act, Cap. 20 of the Laws) that a charge should contain, among others, a statement of the offence showing the provisions of the law contravened. If a provision does not create an offence, as is the case with those cited in the first count herein, a charged offence (count) turns to be defective. Here in this case, the first count cited section 21(1) (a), (2) which, following its being amended by Act No. 11 of 2003, now creates no offence. (See Dogo Marwa @ Sigana and Another vs Republic, Criminal Appeal No.512 of 2019 [2021] TZCA 593 (21 October 2021) and followed in Mwita Mohere vs Republic, Criminal Appeal No. 340 of 2020 (unreported). The charge on this count was therefore superfluous. 10 The remaining counts are in respect of offences allegedly committed within Serengeti National Park. Section 5(1) of the NPA clearly prescribes the boundaries of Serengeti National Park to be as prescribed in the Schedule to the NPA. No evidence was led by PW1 and PW2 showing such boundaries. For this reason, the offences relating to the appellant's presence in Serengeti National Park stand unproved. We also agree with Mr. Issa on the authority he cited to us that the Inventory Form (exhibit P.E.4), is invalid for want of the appellant's comments with the result that it should be expunged from the record. In Buluka Leken Ole Ndidai and Another vs Republic (supra) case, the Court emphasized in the accused's participation during the process of disposal or destruction of an exhibit which is subject to quick decay one way being by asking him to comment on the exercise and recording of his comments on the inventory form. It is vivid that exhibit P.E.4 bears no such indication making it unreliable and subject of being expunged from the record of appeal. As physical Government trophies were not produced in court, expunge and therefore absence of exhibit P.E.4 makes it difficult to prove offences relating to such trophies as alleged in counts number 2 to 5 due to absence of the subject matter of the charges. Given the aforesaid weaknesses in the prosecution case, which may be rectified if availed an opportunity, we are

inclined to agree with Mr. 11 Issa that, in line with the spirit embraced in the case of Fatehali Manji vs Republic [1966] EA 343, the interest of justice is not in favour of retrial order. For the above reasons, we allow the appeal and order that the appellants be released from prison forthwith if no other justifiable cause holds them therein. DATED at MUSOMA this 12th day of July, 2024. S. A. LILA JUSTICE OF APPEAL P. M. KENTE JUSTICE OF APPEAL L. E. MGONYA JUSTICE OF APPEAL The Judgment delivered this 15th day of July, 2024 in the presence of the Appellants in person, and Ms. Beatrice Timothy Mgumba, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original. J. J. KAMALA DEPUTY REGISTRAR COURT OF APPEAL

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