IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: KILEO, J.A., JUMA, J.A., And MWARIJA, J.A.)

CRIMINAL APPEAL NO. 331 OF 2015

DIRECTOR OF PUBLIC PROSECUTIONS.....APPELLANT
VERSUS
YOHANA PETER NGOIRA
PELO S/O MOLEIMENT MUNGA @PELO..... RESPONDENTS

(Appeal from the Decision of the High Court of Tanzania
At Arusha)

(Maghimbi, J.)

Dated 5th December, 2014
in
Criminal Application No. 100 & 101 of 2014

JUDGMENT OF THE COURT

Date 12th&15th October, 2015

KILEO, J.A.:

Four persons including the appellants were arraigned in the Resident Magistrate's Court of Manyara at Babation a charge of unlawful possession of Government trophy contrary to paragraph 14 (d) of the 1st Schedule to and sections 57 (1) and 60 (2) of the Economic and Organized Crimes Control Act [Cap 200 R. E. 2002] read together with section 86 (1) and 2 (b) of the Wildlife Conservation Act No. 5 of 2009. The four persons were alleged to have, on 19th day of October 2014 at Ndedo village within Kiteto District in Manyara Region been found in unlawful possession of eight (8) elephant tusks weighing 32.6 kilograms valued at Tshs. 29,925,170/= the properties of Tanzania Government.

On 29/10/2014the magistrate handling the matter in the Resident Magistrate's Court advised the accused persons then before him as follows:

> *"Since consent has not been granted the accused person are not allowed to plea. As to bail the accused person should apply to the High Court."*

Following the above advice the appellants made separate bail applications to the High Court (Miscellaneous Criminal Applications Nos. 100 and 101 of 2014). The two applications were fixed for hearing before Maghimbi, J. who ruled in respect of each application that the offence with which the appellants were charged was not an economic crime. The learned judge ordered that the matter to be remitted back to the trial court for necessary amendments of the charge and proceed with trial accordingly.

Being aggrieved with the decision of the High Court, the DPP filed notices of appeal against that decision in respect of each of the appellants. Upon receipt of the Notices, the Registrar opened Criminal Appeal No 331 of 2015 which is the appeal currently before us. The two Notices, one for Yohana Peter Ngoira in respect of Misc. Criminal Application No 100 of 2014 and the other one for Pelo s/o Moloiment @ Pelo in respect of Misc. Criminal Application No. 101 of 2014 were consolidated in Criminal Appeal no. 331 of 2015.

When the matter was called on for hearing, Mr. Felix Kwetukia, learned State Attorney appeared for the appellant Republic. He was assisted by Ms. Alice Mtenga. The respondents appeared in person with no legal counsel.

Before submitting on the appeal Mr. Kwetukia prayed for leave, which was granted, to amend the memorandum of appeal so as to include the second appellant who, according to the learned state Attorney, had been left out by oversight. The prayer was made under Rule 4 (2) (b) of the Court of Appeal Rules.

The memorandum of appeal comprised of two grounds but at the hearing Mr. Kwetukia abandoned the second ground. The sole ground now before us is based on a legal point and it is to the following effect:

> *That, the learned Honourable Judge erred in law and in fact in holding that an offence of unlawful possession of Government Trophy; contrary to section 86 (1) and (2) (b) of the Wildlife Conservation Act, Number 5 of 2009 read together with paragraph 14 (d) of the 1st Schedule to, and sections 57 (1) and 60 (2) both of the Economic and Organized Control Act, (Cap 200 R. E. 2002] is not an economic offence.*

Mr. Kwetukia submitted that it was an error for the learned judge to hold that the offence that the appellants had been charged with was

not an economic offence. Referring to **Rhobi Marwa Mgare & Others v. R.**, Criminal Appeal No. 192 of 2005 (Unreported), he argued that the Wildlife Conservation Act No. 5 of 2009 did not amend paragraph 14 (d) of the 1st Schedule to, and sections 57 (1) and 60 (2) both of the Economic and Organized Crimes Control Act.The learned State Attorney insisted that unlawful possession of government trophy remained to be an economic offence.

The Respondents being laymen had nothing much to say in response to Mr. Kwetukia's submission on the legal point. They claimed that their prayer before the High Court was for bail and they asked that it be considered.

There is only one issue before us and it is whether or not possession of government trophy is an economic offence. Fortunately, the Court has explored this field before in the **Rhobi Marwa Mgare** case cited by the learned State Attorney. In that case the Court was called upon to decide on the competency of the District Court, in the absence of the consent of the Director of Public Prosecutions, to try a case of unlawful possession of firearms contrary to sections 4 (1) and 34 of the Firearms and Ammunitions Act No. 2 of 1991. Like the present case, the offence the Respondents were charged with was a scheduled offence under the Economic and Organized Control Act though under a different paragraph. The learned State Attorney in that case argued

that though the offences with which the appellants were convicted still appeared in the Economic and Organized Crimes Control Act, the Act no longer applied to such offences. The Court, in response to the argument by the learned State Attorney had the following to say:

> *"We think that the Act is still good law in this country. The purpose of the law is to provide for a special procedure of dealing with some offences notorious for their adverse effect on the economy of the country so the First schedule collects a list of those offences from various statutes, what this Court in* ***MAGOIGA MNANKA v. R****, Criminal Appeal No. 105 of 1988 (Mwanza) (unreported) described as "wide ranging mixed grill of crimes". Those offences were not removed from the parent statutes...."*

After a thorough consideration of the matter before it the Court in **Magoiga** (supra) held that an offence in the First Schedule to the Economic and Organized Crimes Control Act could only be removed by an Act of Parliament but not otherwise. Citing section 57 (2) of the Act the Court stated:

> *"From this provision it cannot be argued that the removal or non-application of the scheduled offences is a matter of inference or assumption, but must be expressed by an Act of Parliament or its resolution..."*

The Court also, in **Cretus Sambi @ Kimbwenga and Geofrey Chazya v. R.**, Criminal Appeal No.270 of 2010was faced with determination of the competence of the District Court in trying a similar offence as the one the subject of this appeal, of being in unlawful possession of government trophy. Reaffirming **Rhobi Marwa Mgare** the Court stated:

> *"...it is the High court of Tanzania sitting as an Economic Crimes court which has original jurisdiction over economic crimes that are identified under the First Schedule to that Act...."*

The statement above is borne out of section 3-(1) of the Economic and Organized Crimes Control Act which states:

> **"3-(1) The jurisdiction to hear and determine cases involving economic offences under this Act is hereby vested in the High Court."**

It is only when the Director of Public Prosecutions has exercised his powers under section 12 (3) that an economic case can be tried by a subordinate court. The section provides:

> **"12 (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."

The learned trial judge in her Order remitting the matter back to the Resident Magistrate's Court stated as follows:

> " *Looking at paragraph 14 (d) of the First Schedule of Economic and Organized Crimes Control Act Cap 200 R. E. 2002 as amended it does not embrace the offences u/s 86 (1) and (2) (b) of the Wildlife Conservation Act, No. 5 of 2009"*

From our discussion above it goes without saying that the learned judge's statement was made without proper appreciation of paragraph 14 (d) of the First Schedule and section 57 of Cap 200 R. E. 2002.

Paragraph 14 provides:

> *14. Offences against conservation of wildlife Act No. 10 of 1989*
> *A person is guilty of an offence under this paragraph who–*
> *(a) unlawfully captures, hunts or traps of animals in a game reserve or game-controlled area;*
> *(b) unlawfully deals in trophies or in Government trophies;*
> *(c) is found in unlawful possession of weapons in certain circumstances;*
> *(d) is found in unlawful possession of a trophy,*

contrary to sections 13, 14, 17, 38, Part VI, sections 70 and 78 of the Wildlife Conservation Act, or contrary to section 16 of the National Parks Act.

Section 57 provides:

> **"57 (1) With effect from the 25th day of September, 1984, the offences prescribed in the First Schedule to this Act shall be known as economic offences and triable by the Court in accordance with the provisions of this Act.**
> **(2) The Minister may, by order published in the Gazette, and with the prior approval by resolution of the National Assembly, amend or otherwise alter the First Schedule to this Act but no offence shall be removed from the First Schedule under this section except by an Act of Parliament."**

The learned judge stated that paragraph 14 (d) did not embrace offences under section 86 of the Wildlife Conservation Act, No. 5 of 2009. It is to be noted, however, as rightly pointed out by Mr. Kwetukia that section 70 of the law has the same wording as section 86 of Act No. 5 of 2009. In any case, as we have endeavored to show, it is only by an Act of Parliament that an offence can be removed from the First Schedule to the Economic and Organized Crimes Control Act.

the conclusion that the learned judge erred to hold that unlawful possession of government trophy contrary to section 86 (1) and (2) (b) of the Wildlife Conservation Act, No. 5 of 2009 was not an economic crime. In the circumstances we allow the appeal by the Director of Public Prosecutions. The learned judge's order remitting the applications for bail to the Resident Magistrate's Court is set aside and we order that the matter be remitted to the High Court for it to proceed with the application for bail of the applicants in accordance with the law.

Order accordingly.

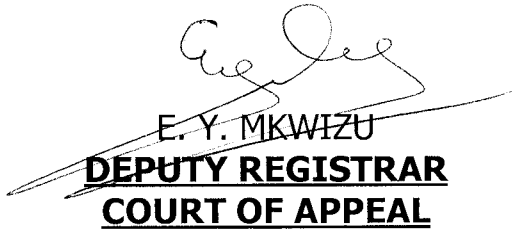
Dated at **Arusha** this 13th Day of October, 2015.

E. A. KILEO
JUSTICE OF APPEAL

I. H. JUMA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL