IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: RUTAKANGWA, J.A., LUANDA, J.A. And ORIYO, J.A.)

CRIMINAL APPEAL NO. 305 OF 2009

THE D. P. P..... APPELLANT

VERSUS

1. **OWDEN KASANJA**
2. **RAMADHANI NYONYI**
3. **MRS. EVA MSAMO**
4. **ZUHURA MACHA MNYIMWA**
5. **LT. MATOKE MUSABI MUNIRO**
6. **ZUHURA MBULU**
7. **VITUS HENRY MHAGAMA**
8. **MAGRARETH JOYCE KUMALIJA**
9. **EVARIST MUZE**
10. **LUCAS MASIGAZWA**

.....RESPONDENTS

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

(Mushi, J.)

(dated 11th day of April, 2003)
in
Criminal Appeal No. 17 of 2001

RULING OF THE COURT

10TH & 18TH November, 2011

RUTAKANGWA, J.A.:

The respondents herein were arraigned in the District Court of Arusha District in 63 counts of Stealing by Persons Employed in the Public Service c/ss 265 and 270 of the Penal Code. They were all convicted as

charged in all the counts and sentenced to seven (7) years imprisonment on each count, all sentences being ordered to run concurrently. In one count (the 1st count), the 5th respondent was alone charged with and convicted of obtaining goods by false pretences. The 65th count covered all the respondents. This one, which was in the alternative, fell under the Economic and Organised Crimes Control Act, 1984 (the Act). They were being arraigned therein on a charge of Occasioning loss to a Specified Authority c/s 10 (1) of the 1st Schedule and sections 56 and 59 of the Act. As the respondents were convicted on the first 64 counts, the trial court did not enter any verdict on this last count.

The respondents were dissatisfied with the convictions and sentences. They preferred an appeal to the High Court. In its judgment, the High Court sitting at Arusha, allowed each respondents' appeal by quashing and setting aside all the convictions and sentences. The D.P.P. was aggrieved by the acquittals of the respondents, and in his turn lodged this appeal.

When the appeal came up for hearing, the appellant was represented by Mr. Ponsiano Lukosi, learned Senior State Attorney. On the side of the respondents, Mr. Alute Mughwai, learned advocate, appeared for the 1st, 2nd, 4th and 5th respondents, and Mr. Emmanuel Kinabo, learned advocate represented the 3rd, 7th, 8th, and 10th respondents. Mr. Method Kimomogoro, learned advocate, appeared for the 6th and 9th respondents.

Counsel for both sides appeared before us ready to argue the appeal on merit. However, before proceeding with the hearing, the Court on its own motion, invited them to address it first on the propriety of the trial of the respondents being conducted in the District Court of Arusha, as one of the charges against them involved an economic offence.

Ordinarily, all economic offences under the Act are triable by the High Court sitting as an Economic Crimes Court. However, under section 12 (3) of the Act, the D.P.P., after consenting to the prosecution being mounted against the suspect, has the power, by a certificate issued under his hand, to order an economic offence to be tried by a subordinate court, i.e. either

a Court of a Resident Magistrate or a District Court. Indeed, in this particular case, the D.P.P. did exercise these statutory powers. On 4th November, 1998, he did not only consent to the prosecution of the respondents for this economic offence. He also ordered that the offence "BE TRIED by a Court of a Resident Magistrate at Arusha." However, in utter disregard of this clear order, the offence was tried in combination with the other non-economic offences in the District Court of Arusha District.

In response to the Court's invitation, Mr. Lukosi readily and candidly conceded that in the light of the unequivocal certificate of the D.P.P. under s. 12 (3) of the Act, dated 4th November, 1998, the trial District Court lacked the requisite jurisdiction to try the case. He promptly urged us to nullify the proceedings in the two courts below and the judgments resulting therefrom and order a retrial in the appropriate court.

All learned advocates for the respondents, like Mr. Lukosi, forthrightly conceded the fatal defect in the trial of the respondents on account of lack

of jurisdiction by the trial court. They gladly accepted Mr. Lukosi's request to have the proceedings in and the judgments of the two courts below quashed and set aside. All the same, they were not in accord with Mr. Lukosi on his prayer for a retrial.

Counsel for all the respondents strongly contested the prayer for a retrial. This resistance was predicated on a number reasons. **One,** the undisputed fact that the case has been in the courts since 1990 and as such the respondents have become victims of psychological torture. **Two,** the new trial might be delayed by failure to easily locate the necessary witnesses for both sides and some of whom might have died. To the learned advocates, this eventuality will prejudice greatly the respondents, more of whom are now poor and age has taken its toll on them. **Three,** most of the respondents are living outside Arusha region. A retrial, they argued, would cause great inconveniences on them and their families, financially and psychologically. Under these circumstances, they reasoned with transparent honesty, a retrial would not be in the interests of justice.

Having considered the submissions of learned advocates for both sides on the issue of jurisdiction, we have found ourselves in full agreement with them that the trial District Court lacked the necessary jurisdiction to try the case. We accordingly nullify and set aside the proceedings in and the judgments of the two courts below. That has been the position taken by the Court on identical issues for quite some time now. If authority is needed for this, we shall quickly refer to the cases of **PAULO MATHEO V.R.** (1995) T.L.R. 144, **RHOBI MARWA & TWO OTHERS V. R.,** Criminal Appeal No. 192 OF 2005 and **AMRI ALLY @ BECHA V. R.** Criminal Appeal No. 151 of 2009 (both unreported). In the case of **SAMWEL MWITA & THREE OTHERS v. R.** Criminal Appeals No. 34, 35, 36 and 66 of 2009 (unreported), this Court made it clear that it is wrong for the prosecution to combine the offences the District Court had no jurisdiction to try with ones which it has jurisdiction unless sanctioned by law.

Admittedly, the issue of whether or not a retrial should be ordered in the particular circumstances of this case, has greatly taxed our judicial minds. In support of their stance, counsel for the respondents have

referred us to the cases of **FATEHALI MANJI V. R.** (1966) E. A. 344, **AHMED ALI DHARAMSI SUMAR V. R..** (1964) E. A. 481, **NJENGA AND ANOTHER V. R.,** (2006) 1 EA 297 (CAK), **REPUBLIC v. TAABERE & ANOTHER** (1985) LRC (Crim.) 8 at page 10, among others.

We have carefully read these cases. The overarching principle of law emerging from these cases, we have found out, was lucidly stated in the case of **FATEHALI MANJI** (*supra*). The Court said:-

> *"In general, a retrial **may be ordered only when the original trial was illegal or defective;** it will not be ordered where the conviction is set aside because of insufficiency of evidence or for purposes of enabling the prosecution to fill in gaps in its evidence at the first trial... each case must depend on its own facts and **an order for retrial should only be***

made where the interests of justice require it. "

(Emphasis is ours).

It may not be easy to say what the "interests of justice" entail. We shall not pretend to do so here. We shall contend ourselves with this observation. Regardless of who is involved in the case, it has always been the duty of the courts in determining cases before them to ensure that no failure or miscarriage of justice is occasioned to either side in the proceedings, be they criminal or civil. Adhering to this principle, this Court in the case of **MARKO PARTICK NZUMILA & ANOTHER v. R.,** Criminal Appeal No. 141 of 2010, significantly said:-

> *"... This is because, while it is always safer to err in acquitting than in punishment, it is also in the interests of the state that crimes do not go unpunished. So, in deciding whether a failure of justice has been occasioned, the interests of both*

sides of the scale of justice have to be considered."

(Emphasis is ours.)

Earlier before **MARKO P. NZUMILA** (supra) was decided, in **R.v SMURTHINAITE** (1994) 1 All E.R. 898 at page 903, Lord Taylor drawing inspiration form the decision of Lord Scarman in **R. V. SANG** [1979] 2 All E.R. 1222, had said:-

"... Fairness of the proceedings involves a consideration not only of fairness to the accused but also, as has been said before, fairness to the public."

We fully subscribe to and adopt these pronouncements, while being alive to the naked fact that accused persons are also part of the public, as we did in **MUSSA RASHID v.R.,** Criminal Appeal No. 348 of 2009 (unreported). After all, as observed in **R. v SANG** *(supra)* conviction of the guilty is a public interest, as is the acquittal of the innocent, "for in a just society all are needed." We agree, otherwise the scales of justice would never balance.

Having thus expounded the legal principles governing the issue of a retrial order, we find ourselves in a good position to provide an answer to the contrasting contentions of counsel for both sides. There is no gainsaying here that the original trial was illegal for the reason already shown herein. There is also no dispute that this illegality was caused by a mistake on the part of trial court for which the prosecution was not to blame. But as it was correctly stated in the case of **AHMED SUMAR v. R.,** *(supra),* this alone does not make a retrial unavoidable. Each case must be decided on the basis of its particular facts and circumstances.

We have already shown that settled law is to the effect that in a just society, where equality under the law is one of the cherished aspects of the national ethic, the conviction of the guilty is a public interest as is the acquittal of the innocent. This fact notwithstanding, it is equally settled that a retrial "should not be ordered where it is likely to cause an injustice to an accused person": see, **AHMED SUMAR** *(supra)* and **PASCAL CLEMENT BRAGANZA v. R.** [1957] E.A. 152.

Counsel for the respondents have given their good reasons why they believe that a retrial would work an injustice to the respondents. Mr. Lukosi countered these reasons calling them mere speculations because, he reasoned, the respondents' defences of alibi were based on documentary evidence and not oral evidence. If that be the case then, it cannot be seriously contended that the respondents would inevitably be at a disadvantage in seeking to establish their accounts of their movement at the times the offences were allegedly committed: see, **ALAN JAMES DOHYENY & ANOTHER v. R.** [1996] EWCA, Criminal Appeal 728. But that is one side of the coin. The other side concerns prosecution witnesses. Will they be readily available so as to ensure a speedy and inexpensive retrial of the respondents, so that they may be fairly prosecuted and not persecuted in breach of their basic human rights? We have no material before us to enable us answer this germane question satisfactorily. It is the appellant herein who can provide a conclusive answer to it. He knows the nature and quality of his evidence and how to obtain it. On our part, as there was no trial from the beginning, we have deliberately refrained from looking at the evidence at all in order to form an informed opinion that on

"consideration of the admissible or potentially admissible evidence a conviction might result" from a retrial.

All said and done, having considered the nature of the accusations against the respondents and the submission of counsel before us, we are settled in our minds that the interests of justice demand that the decision on whether or not to start the prosecution of the respondents afresh in the competent court be left in the hands of the D.P.P. Although he was the appellant before us, we trust his wisdom. We, therefore, leave it to the wisdom of the D.P.P. Exercising his wide discretion under Article 59 B (4) of the Constitution of the United Republic of Tanzania, 1977, and guided by the principles expounded above, we are confident that he will arrive at a decision that will cause no injustice to either side. In the meanwhile, the respondents are to continue enjoying their liberties as free persons.

It is so ordered.

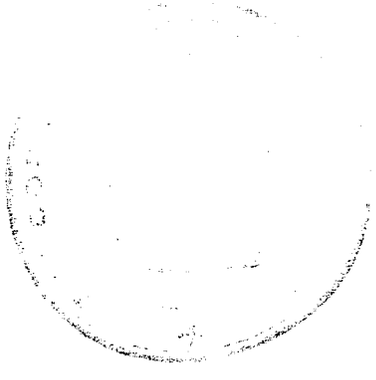
DATED at **ARUSHA** this 14th day of November, 2011.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

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



Z. A. Maruma
DEPUTY REGISTRAR