

IN THE COURT OF APPEAL OF TANZANIA
AT TANGA
KWARIKO, J.A., SEHEL J.A., And MAIGE, J.A.)

CRIMINAL APPEAL NO. 52 OF 2022

OMARY BAKARI @ DAUD APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the Judgment of the High Court of Tanzania, Tanga
District Registry at Tanga)**

(Mkasimongwa, J.)

dated the 23rd day of April, 2021

in

(DC) Criminal Appeal No. 45 of 2020

JUDGMENT OF THE COURT

29th April, & 9th May, 2022

MAIGE J.A.:

The appellant was, at the District Court of Lushoto (the trial court), charged with two counts namely; being found in unlawful possession of firearm contrary to sections 20(1) (a) (b) and (2) of Firearms and Ammunitions Control Act No. 2 of 2015 ("the FACA") read together with paragraph 31 of the First Schedule to and section 57(1) and 60(2) of the Economic and Organized Crime Control Act [CAP. 200 R.E.2002 now R.E. 2019] (the EOCCA), and being found in unlawful

possession of ammunition contrary to section 21 (a) and (b) read together with section 60(1) of the FACA read together with paragraph 57(1) and section 60 (2) of the EOCCA.

It was alleged in the charge sheet that, sometime on 31st December, 2018 (the material date) at Kwemtindi area within Lushoto District in Tanga Region, the appellant was found in possession of homemade gun make short gun and ammunition without a license or permit from the relevant authorities.

Upon trial, the appellant was convicted of both the offences and sentenced to five years imprisonment for the first count and twenty years for the second. His appeal to the High Court at Tanga District Registry (the first appellate court) was unsuccessful and thus the instant appeal.

So that we can appreciate the nature of the contention, a brief narration of the factual background of this appeal may be necessary. The appellant and Mariam d/o Bakari are irrefutably blood related in that they are brother and sister. The latter, while in her service as a domestic servant in Dar es Salaam, was suspected of stealing from her

employer TZS 10,000,000.00. On the material date, No. F. 6809 D/Cpl. Kasmir (PW1) and WP. No. 9594 D/Cpl. Ansila arrested the said Mariam in connection to the alleged theft. On interrogation, she admitted commission of the offence. She claimed however that, the said money was subsequently stolen from her by the appellant.

The appellant was arrested on the same day by the above two policemen in collaboration with Aufi Mussa Shekalaghe (PW2) and MG 191847 Ntemo Iddi Ntemo (PW3). He was searched and found with one locally made gun and ammunition (exhibit P1) which were seized as per exhibit P2.

The ballistic report in exhibit P3 based on the forensic examination by No. H. 4088 D/C Zakayo (PW4) indicated that the gun and ammunition in question do function properly and "*they may cause harm or death to human being when misused*".

In his evidence in defence, the appellant though admitted being arrested on the material date in connection with the alleged theft by her sister Mariam, he denied having been found in possession of exhibit

P1. Instead, he claimed to have been found in possession of TZS. 1,030,000.00.

In its judgment, the trial court found the prosecution evidence credible and probable. It thus convicted the appellant with the offences and sentenced him accordingly. Aggrieved, the appellant appealed to the first appellate court, the appeal of which was however dismissed for being without merit. Once again aggrieved, the appellant has instituted the current appeal wherein he is faulting the judgment of the first appellate court on a number of the grounds which for the reason which shall become apparent henceforward we find it unnecessary to mention.

When the matter came for hearing on 25/04/2022, the appellant appeared in person and was not represented. The respondent enjoyed the service of Mr. Waziri Magumbo and Ms. Donata Kazungu, both learned State Attorneys.

It transpired to the Court in the course of hearing that, there are some apparent serious anomalies in the proceedings of the trial court

which if not well accounted for would affect the substantial validity and credibility of the whole proceedings. The anomalies are as follows:

First, while the offence was, according to the record, alleged to have been committed on 31/12/2018, the charge upon which the appellant was convicted (the instant charge), was drawn on 14th January, 2020 and read over and explained to the appellant on the same day. There is an interval of more than a year in between. In the absence of plausible explanation, this was unusual.

Two, aside from the instant charge, there is another charge sheet (the extraneous charge) appearing at page 2 of the record which was issued on 28/01/2019 wherein the appellant stood charged with the offence of being found in possession of narcotic drug "cannabis sativa" c/s 17(1) (a) of the Drugs Control and Enforcement (General) Regulations 2016, the offence which was committed on the same day and place as it is the ones in question.

Still on the same point above, while the extraneous charge was drawn on 28/01/2019, the record shows at page 3 thereof that, the appellant was at the first time arraigned before the trial court, on

23/01/2019 in connection with Criminal Case No. 9 of 2019 whose charge was dismissed on 29/01/2019 and the appellant discharged therefrom.

Three, while the instant charge was issued on 14/01/2020 and read over to the appellant on the same day, the Certificate and Consent of the Director of Public Prosecutions (the DPP) conferring jurisdiction to the District Court to try the offence was issued on 3rd October, 2019.

When invited to address the Court on the above anomalies, the learned State Attorney prayed for a short adjournment so that he could establish what went up. We adjourned the matter to 29/04/2022. When the matter resumed on the said day, the learned State Attorney informed the Court that, before being charged with the instant charge, the appellant was on 3/01/2019 charged, in Economic Case No. 1 of 2018, with similar offences like the instant one (the initial charge). On the 14th day of January, 2020, she clarified, the said charge was withdrawn by way of *nolle prosequi* under section 91 (1) of the Criminal Procedure Code [CAP. 20 R.E.2019] and on the same day, the instant charge was lodged.

When asked by the Court whether certificate and consent issued by the DPP before the appellant being charged would suffice to confer jurisdiction on the trial court to try the case, the learned State Attorney conceded that, indeed they could not. She thus urged the Court to nullify the judgments and proceedings of the lower courts and leave the matter for the DPP to decide.

That being the case and indeed it is, we are in agreement with the learned State Attorney that, for the reason of the certificate and consent being issued prior to the initiation of the instant charge, the trial court had no jurisdiction to entertain the matter. The offence with which the appellant was charged is being found in unlawful possession of firearm and ammunition. These are no doubt economic offences which ordinarily are within the jurisdiction of the Corruption and Economic Division of the High Court. A subordinate court can only enjoy such jurisdiction if the DPP or any State Attorney duly authorized by him, issues a certificate directing that the offence be tried by the respective subordinate court and the certificate should be accompanied by the DPP consent. This is in terms of sections 26 (1) and 12(3) of the EOCCA. Section 26(1) provides as follows:-

"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."

Whilst section 12 (3) provides that:

"The Director of Public Prosecutions or any State Attorney duly authorized 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."

In this case, the DPP issued both the certificate and consent sometime in October 2019. At that time, the Economic Case No. 2 of 2020 was yet to be initiated. There was a charge which initiated Economic Case No. 1 of 2019. It was however withdrawn and the current one instituted. With the withdrawal of the initial charge, we agree with the learned State Attorney, the certificate phased out of

existence. So was the consent. For it to have jurisdiction to try the new charge, the trial court was, which was not, to have fresh consent and certificate from the DPP. There being none, it is obvious that, the trial court acted without jurisdiction. In law, therefore, the proceedings and the judgment of the trial court were null and void. Thus, in **Ramadhani Omary Mtiula v. R**, Criminal Appeal No. 62 of 2019 (unreported) where, like in the instant case, a subordinate court tried an economic offence without the relevant DPP's certificate and consent, the Court observed:

"Thus, without the DPP's consent and certificate conferring the respective jurisdiction, the District Court of Songea embarked on a nullity to try Criminal Case No. 8 of 1995. On that account, since the first appeal stemmed from null proceedings this adversely impacted on the appeal before the High Court."

Armed with the above authority, we are of the view that, as there was no consent and certificate from the DPP conferring jurisdiction to the trial court to try the case, the proceedings of the trial court as much as it is for the first appellate court were null and void. We henceforth invoke our revisional powers under section 4 (2) of the Appellate

Jurisdiction Act [CAP. 141 R.E.2019] and quash the proceedings and conviction of the trial court and set aside the sentence. Likewise, we quash the proceedings of the first appellate court and set aside the judgment thereof as they originated from a nullity.

On what should be the way forward after nullification of the judgments and proceedings of the lower courts, the learned State Attorney urged us to leave the matter to the wisdom of the DPP to determine whether or not the appellant should be re-arraigned. Much could be said. This however is not the first time we are dealing with the issue like this. We faced a similar issue in **Ramadhani Omary Mtiula v. R** (supra) where we observed, the observation of which we fully subscribe to, as follows:

"On the way forward, we agree with the learned Senior State Attorney and accordingly our revisional jurisdiction, and revise and quash and set aside the conviction and sentence. Considering the circumstance of the case we order the immediate release of the appellant unless otherwise held for another lawful cause".

In the strength of the above decision and considering the anomalies under discussion, we order the immediate release of the appellant from prison custody unless held there for some other lawful cause.

Order accordingly.

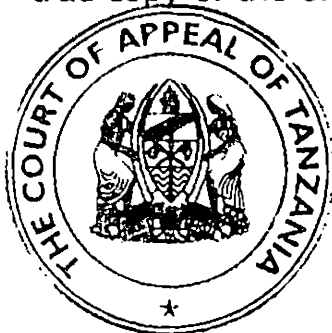
DATED at TANGA this 9th day of May, 2022.

M. A. KWARIKO
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

This Judgment delivered this 9th day of May, 2022 in the presence of Mr. Omari Bakari Daudi, the Appellant in person and Ms. Tussa Mwaihesya, State Attorney for the Respondent, is hereby certified as a true copy of the original.




R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL