IN THE COURT OF APPEAL OF TANZANIA

AT SHINYANGA

(CORAM: MKUYE, J.A., GALEBA, J.A., And KAIRO, J.A.)

CRIMINAL APPEAL NO. 168 OF 2019

NGASA TAMBU ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania, Shinyanga District Registry at Shinyanga)

(Makani J.)

dated the 12th day of April, 2019

in

Criminal Appeal No. 48 of 2018

.....

JUDGMENT OF THE COURT

5th & 21st July, 2022

GALEBA, J.A.:

This appeal originates from Economic Case No. 5 of 2016 which was instituted in the Resident Magistrates' Court of Simiyu at Bariadi (the RM's court). In that case, the appellant Ngasa Tambu, was charged on eight counts, all for unlawful possession of Government Trophies contrary to the provisions of section 86 (1) and (2) (b) of the Wildlife Conservation Act, [Cap 283 R.E. 2002, now R.E. 2022], (the WCA) read together with paragraph 14 (d) of the First Schedule to and section 57 (1) of the Economic and Organized Crime Control Act, [Cap

200 R.E. 2002, now R.E. 2022] (the EOCCA). According to the prosecution, on 6th August 2016 the appellant, was found in unlawful possession of, many animal parts and birds. The charge sheet indicates that he was found in possession of a Buffalo's tail, skin and pieces of meat. He was also found, according to the respondent, with two dead Weaver Birds, two tails of Impala, three dried skins of Eland, together with a tail of Zebra, two hoots, two pieces of meat, one skull and two fore limbs of the latter animal. Other trophies which the appellant was arrested with as per the charge sheet were, one skin and a skull of a Black Jackal, one skin, one skull, one limb and five litres of oil, all of the animal, Hyena. He was, lastly, according to the prosecution, found in unlawful possession of one skull of a Velvet Monkey.

The matter was tried in the RM's court and having found that the appellant's defence could not shake the prosecution case, based on the evidence of five prosecution witnesses, the court found the appellant guilty on all the eight counts. It convicted, and sentenced him to twenty (20) years imprisonment in respect of each of the eight counts. However, the sentences were ordered to run concurrently. In alternative to each of the imprisonment terms imposed, various fines depending on the value of the animal were prescribed for payment.

The appellant appealed to the High Court to challenge the decision of the trial court, but he did not succeed. His appeal was dismissed for want of merit on 12th April 2019 and the decision passed by the RM's court was upheld. This appeal is seeking to reverse the concurrent decisions of the two courts below.

The appeal is based on six (6) substantive grounds, however, for reasons that will become obvious in a moment, we will not indulge in any discussion relating to any of the six grounds.

At the hearing of this appeal on 5th July 2022, the appellant appeared in person without legal representation. The respondent Republic had the services of Ms. Verediana Peter Mlenza, learned Senior State Attorney, assisted by Mr. Nestory Mwenda and Ms. Rehema Sakafu both learned State Attorneys.

At the outset and before we were to start hearing the substantive appeal, Ms. Mlenza rose to inform us that the respondent Republic was supporting the appeal based on a serious error of law which was committed by the respondent Republic in the RM's court. Elaborating her points, she referred us to page 7 of the record of appeal where there is a Certificate Conferring Jurisdiction on a Subordinate Court to

try an economic offence (the Certificate). She contended that the Certificate of the State Attorney In-charge, conferred jurisdiction on the District Court of Baridi at Bariadi (the District Court of Bariadi) to try the appellant of the offences charged, but the charge sheet at pages 1 to 5 was instituted by the Respondent in the RM's court of Simiyu, which court tried the case to finality. Accordingly, she added that the entire proceedings, from page 8 to 39 took place in the RM's court and even the judgment of the subordinate court is of the RM's court as per the original record although the judgement of the trial court in the record of appeal shows that the judgment was passed by the District Court of Bariad. Without any further ado, Ms. Mlenza, concluded that, in the circumstances, the RM's court tried the case without jurisdiction because the Certificate did not vest jurisdiction in that court. Because of that, she beseeched us to nullify the proceedings and the judgement, quash the conviction and set aside the sentences meted on the appellant. She also prayed that the proceedings of the High Court together with the judgment of that court need to be nullified and all orders upholding the decision of the RM's court be set aside.

As for the way forward, she submitted that ordinarily, she would have prayed that the original record be remitted to the District Court of

Bariadi for trial *de novo*, but that would not be in the interest of justice, in this case because, the proceedings in the RM's court was full of errors of law and many procedural irregularities. She contended that a retrial normally should not be ordered where doing so would create room or avail opportunity for the prosecution to go and bring better evidence or fill in the gaps in order to unjustifiably secure a conviction against the appellant. She informed us that there were three clear procedural errors apparent on the record of the RM's court which hindered her from praying for remitting the original record to the District Court for rehearing of the case.

One, she submitted that all documentary exhibits, the search warrant, the inventory and the Trophy Valuation Certificate were all received and admitted in evidence unlawfully because the same were not read over to the appellant for him to appreciate their substance immediately after admitting them in evidence. If we understood Ms. Mlenza well, which we think we did, her fear was that, if this Court was to order a retrial, then the prosecution would go to the trial court, tender the documents and then cause them to be read which would amount to filling the gaps, an undesirable eventuality forbidden by law.

Two, she contended that the procedures to destroy perishable exhibits were not complied with, because at page 9 of the record of appeal, it does not show that the appellant was given his right to comment or object to the exhibits, at the time the Government Trophies were destroyed. Further, she argued that the appellant did not sign the inventory, which omission offended the procedure of procuring orders for destruction of perishable exhibits. Citing the case of **Maduhu Nhandi @ Limbu v. R,** Criminal Appeal No. 419 of 2017 (unreported), the learned Senior State Attorney submitted that failure to actively involve the appellant in the process of preparation of the inventory and procurement of an order for disposal of exhibits, is tantamount to denying the appellant of his constitutional right to be heard.

Three, Ms. Mlenza argued that there was no clear established chain of custody from recovery of the Government Trophies to the time of their disposal. The learned Senior State Attorney added that there was neither paper trail nor any coherent oral evidence establishing how the exhibits left the appellant to the above destination. It was unclear and uncertain, if indeed, the exhibits that the appellant was arrested

with, are the very exhibits that were subject of the disposal, she warned.

Based on the above errors, the learned Senior State Attorney implored us, having nullified the proceedings and the judgment, quashed the conviction and set aside the sentences, this Court be pleased to acquit the appellant and free him from jail because ordering a retrial would be prejudicial to the prisoner.

In rejoinder, the appellant had no useful points to make, in the context argued by the learned Senior Stated Attorney, nonetheless, he expressed his desire to join his family upon his release from prison.

We have carefully gone through the record of appeal and have attentively heard the learned Senior Stated Attorney submitting in support of the appeal. Before we can agree with her or otherwise, we will make a few observations along her submissions, and we will start with section 12 (3) of the EOCCA which provides for powers of issuing a Certificate to the subordinate court before it can try an economic matter otherwise triable by the High Court. Section 12 (3) of the EOCCA under which the Certificate was issued provides as follows:

"(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.****"*

According to the above section, it is clear that, for reasons of public interest, the Director of Public Prosecutions (the DPP) or any State Attorney duly authorised by him, may under his hand, issue a Certificate vesting jurisdiction in any court subordinate to the High Court to try a specified matter. Based on the powers contained in that section on 9th August 2016 the following Certificate was drawn:

"THE ECONOMIC AND ORGANIZED CRIME CONTROL ACT NO. 13 OF 1984 (CAP 200 R.E. 2002)

(Under Section 12 (3))

CERTIFICATE

I, YAMIKO ALFREDY MLEKANO, Senior State Attorney In-charge, having been duly appointed by the DIRECTOR OF PUBLIC PROSECUTIONS under

section 12 (3) of the Economic and Organized Crimes Control Act, Cap. 200 [R.E. 2002], DO HEREBY ***in the Public interest Order*** *that the accused person namely NGASA S/O TAMBU who is charged with the offence of UNLAWFUL POSSESSION OF GEVERNMENT TROPHIES Contrary to section 86(1) (2) (b) of the Wildlife Conservation Act, No. 5/2009 read together with paragraph 14(d) of the First Schedule to and Section 57(1) of the Economic and Organized Crimes Control Act, Cap. 200.* ***BE TRIED by the DISTRICT COURT OF BARIADI DISTRICT at BARIADI***

SIGNED at BARIADI this 9th day of August 2016

sgd

Yamiko A. Mlekano

SENIOR STATE ATTORNEY IN CHARGE"

[Emphasis added]

According to the above certificate, it is clear that the jurisdiction to try the case was vested in the District Court of Bariadi, but as indicated above, the trial took place in the RM's court after the respondent Republic had lodged the charge in that court. Legally, a District Court and a Resident Magistrates' Court are two different courts

in the Court System. The two courts are created by two different sections of the Magistrates' Courts Act [Cap 11 R.E. 2002, now 2019] (the MCA). The District Court is created by section 4 (1), whereas the creation of the Resident Magistrates' Court is envisaged at section 5 (1) both of the MCA. In this matter, the State Attorney In-charge specified in the Certificate the court in which the jurisdiction to try the matter was vested; and it was the District Court of Bariadi and not any other subordinate court.

It is not the first time that this Court is finding itself in a situation akin to the present. It has happened on several occasions in the past, including in the cases of **Deus Mallya v. R,** Criminal Appeal No. 52 of 2010 and **Edwin Fabian Tallas and Another v. R**, Criminal Appeal No. 285 of 2014 (unreported). In **Edwin Fabian Tallas and Another** (supra), a certificate under section 12(3) of the EOCCA was vesting jurisdiction in the Resident Magistrates' Court of Kigoma, but instead of the case being tried in that court, it was heard and determined in the District Court of Kigoma. This Court nullified not only all the proceedings and decision of the District Court but also that of the High Court because, the trial court had no jurisdiction. So, in this case we are in agreement with Ms. Mlenza that the RM's court of Simiyu had no

jurisdiction to determine the case which was lodged before it, because there was no certificate vesting jurisdiction in that court.

It is elementary that if a court entertains a matter without jurisdiction to determine it, whatever the decision comes out of that attempt, is literally nothing, legally called a nullity - see **Israel Misezero @ Minani v. R,** Criminal Appeal No. 117 of 2006 (unreported) and **Desai v. Warsama** [1967] E.A. 351. Accordingly, the proceedings and the judgments of RM's court and of the High Court are both nullified, for no appeal could have proceeded from a nullity of the RM's court. The conviction of the appellant is quashed and the sentence imposed upon him is set aside.

The next issue for our determination, is whether we should order a retrial of the appellant or we should set him to liberty by freeing him from prison. Ms. Mlenza's view was to set the appellant to liberty because a retrial would be prejudicial to him due to the reasons she recounted.

In order to order a retrial or to decline it, the principle to follow is that stated in **Fatehali Manji v. R,** [1966] E.A. 343, where it was held that;

"...In general a retrial will 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 the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person. "

That is the principle we will follow, for it has been restated in many more decisions of this Court as a litmus paper to determine whether a retrial should be ordered or it should be declined. We will therefore navigate the points raised by Ms. Mlenza and see whether they meet the criteria for the appellant's forthwith and immediate release from prison as opposed to ordering his retention pending his retrial, and we will start with the first point.

The point related to the three exhibits which were tendered irregularly. Exhibit P1 was a search warrant which was tendered at

page 23 of the record of appeal. The other documents were exhibits P2 which were a Trophy Valuation Certificate and P3 which was an Inventory Form. The latter two were tendered at page 27 of the same record. All these documents suffered one common ailment. After they were cleared for admission at the trial, they were not read over to the appellant for him to appreciate the substance of the documents.

Before getting any further, we must observe that, by this Court's position, generally where a document is cleared for admission and indeed admitted, it must be read over to the person accused of the offence that the document is seeking to prove. See **Robinson Mwanjisi and Three Others v. R,** [2003] TLR 218, **Mwinyi Jamal Kitalamba @ Igonzi and Four Others v. R,** [2020] T.L.R. 508 and **Huang Qin and Xu Fujie v. R,** Criminal Appeal No. 173 of 2018 (unreported). If the document is not read, it is liable to be expunged. Accordingly, exhibit P1, the search warrant, exhibit P2, a Trophy Valuation Certificate and exhibit P3 an Inventory Form, are hereby expunged from the record.

That is not to say however, that in every case where a document is expunged then it automatically follows that, the oral evidence of the

witness who tendered the document cannot be relied upon to support the case, and even where possible to use it to convict the accused. See the case of **Huang Qin and Xu Fujie (supra)**. The rationale is that, it really depends on the evidential value relevance or weight that the expunged document was contributing to the oral account of the witness that remains on record. For instance, if a document was tendered and its contents were not recounted in the oral evidence received, chances are that the expunged document would go with the substantial amount of weight of that witness' evidence. Conversely, if a witness who tendered a document which has been expunged, captured or accounted for the contents of the document in his oral evidence, which remains on record, chances are that expunging the document would not affect that witness' evidence on record from his oral testimony. That is to say, it all depends, and each case must be decided according to the facts before the court and the context of the dispute subject of the resolution.

There is however one caveat. The position is slightly different and unique in case of a search warrant. For the exhibits recovered based on a search warrant, a search warrant must be legally tendered and pass all tests such that it should not suffer any threats or real expungements from the record. If it happens that a search warrant is expunged like it

has happened in this case, the exhibits recovered become automatically evidence illegally obtained. In that case, unless such evidence is admitted after observing the requirements of section 169 (1) and (2) of the Criminal Procedure Act [Cap 20 R.E. 2019, now R.E. 2022] (the CPA) also as per the decision in **Nyerere Nyague v. R**, Criminal Appeal No. 67 of 2010 (unreported), the evidence like the trophies in this case, would be expunged, for being illegally procured so they cannot be accepted in court to support a case. See also **Shabani Said Kindamba v. R,** Criminal Appeal No. 390 of 2019, the **Director of Public Prosecutions v. Doreen John Mlemba,** Criminal Appeal No. 359 of 2019 and **Badiru Musa Hanogi v. R,** Criminal Appeal No. 118 of 2020 (all unreported). The point we want driven home is that, as long as the search warrant has been expunged, whatever was recovered by using it without observing the provisions of the CPA referred to above, became illegally procured evidence which cannot be used by any court to convict any person. To put it plainly, minus the search warrant, which we already expunged, even if the other documents were to be valid on record, no conviction would be achieved against the appellant, in law.

The other point by Ms. Mlenza was that the appellant's rights were abused and violated at the time the inventory was being prepared and an order for disposal of the perishable exhibits was being made. She complained that there is no evidence on record to the effect that the appellant was present when the inventory was being prepared and an order for destroying the trophies made. Although we already expunged the Inventory form, exhibit P3, it is apparent on that document that there is no signature of the appellant, which implies that he was not given a right to comment or object to any thing including the trophies at the time the order to destroy them was being made. At page 45 of the record of appeal, the only signatures on the inventory form are that of the Magistrate who ordered that the trophies be destroyed and that of Yoel Yesaya acting Manager, Maswa Game Reserve. There is no signature of the appellant. In the case of **Juma Mohamed @ Mpakama v. R,** Criminal Appeal No. 385 of 2017 (unreported), having discussed the import of paragraph 25 of PGO No. 229 (INVESTIGATION - EXHIBITS), this Court observed as follows when dealing with the critical need of the accused's presence when the government trophies are being ordered to be destroyed:

"The above paragraph 25 envisages any nearest Magistrate, who may issue an order to dispose of perishable exhibit. ***This paragraph 25 in addition emphasizes the mandatory right of an accused (if he is in custody or out on police bail) to be present before the Magistrate and be heard. In the instant appeal, the appellant was not taken before the primary court magistrate and be heard before the magistrate issued the disposal order (exhibit PE3).*** *While the police Investigator, Detective Corporal Saimon (PW4), was fully entitled to seek the disposal order from the primary court magistrate,* ***the resulting Inventory Form (exhibit PE3) cannot be proved against the appellant because he was not given the opportunity to be heard by the primary court Magistrate****. In addition, no photographs of the perishable Government trophies were taken as directed by the PGO."*

[Emphasis added]

See also **Maduhu Nhandi @ Limbu** case (supra). There is one fine point we think is important to get across as we get closer to the conclusion of this judgment. Disposals or orders for destruction of perishable exhibits may be carried out under paragraph 25 of PGO No.

229 if such exhibits have not been tendered in Court. However, if they have been tendered in court already, their disposal are to be carried out under section 101 (1) of the WCA. Paragraph 25 of PGO No. 229 provides thus:

> *"25. Perishable exhibits which cannot easily be preserved* ***until the case is heard,*** *shall be brought before the Magistrate,* ***together with the prisoner (if any) so that the Magistrate may note the exhibits and order immediate disposal.*** *Where possible, such exhibits should be photographed before disposal."*
> [Emphasis added]

The disposal of exhibits in this case was carried out under the above paragraph 25 of PGO 229. Section 101 (1) of the WCA, provides that:

> *"101 (1)-Subject to section 99 (2), at any stage of the proceedings under this Act, the court may on its own motion or on an application made by the prosecution in that behalf order that any animal, trophy, weapon, vehicle, vessel or other article* ***which has been tendered or put in evidence before it and which is subject to speedy decay,***

destruction or depreciation be placed at the disposal of the Director."

[Emphasis added]

The point, however, is not the modality of, or the law applicable in carrying out or ordering a disposal of perishable exhibits. The critical concern is that the only evidence to show that there existed any trophy any time after destroying them is the document called Inventory, containing the order for destroying the trophies. Otherwise, if the offence of unlawful possession of government trophies is not admitted by a suspect, in the absence of both the physical Government Trophies, and an Inventory, a charge of unlawful possession of the trophies cannot be proved. In this case, we do not have both; we do not have trophies because they were destroyed unlawfully in the absence of the appellant, and we do not have the Inventory because despite it's being procured illegally, we expunged it a while ago. All that this means is that if we remit the matter to the trial court for trial *de novo*, we will be doing it knowing that it is impossible to try the appellant in respect of the offences in the charge sheet after the trophies were destroyed illegally, without according the appellant the right to be heard.

In this case even the gap, in the context of the inventory, cannot be filled because the inventory having been procured illegally without involving the appellant cannot be redone. The trophies were destroyed, they cannot be destroyed again in order to get another inventory. Briefly, the inventory form, exhibit P3 will remain unlawful with no ability to prove any case against any man as long as time endures. With no trophies and with no inventory, remitting the matter for retrial to the district court, this Court would be making an inconsequential order, an order in vain seeking to achieve sheer vanity.

There was another point, that the chain of custody of the trophies was not established. It is economy of energy and time, in our view, not to discuss this point, in view of the discussion on the first two points above. The issue of chain of custody of exhibits presupposed existence of such exhibits, which is not the case in this matter. In this case there is not a single exhibit.

For the above reasons, we agree with Ms. Mlenza that the appropriate way forward is not to remit the matter to the District Court for retrial. The interests of justice indicate that if we remit the matter for retrial in the District Court, it will be quite prejudicial to the

appellant. Accordingly, under section 4 (2) of the Appellate Jurisdiction Act [Cap 141 R.E. 2019], we hereby allow this appeal with an order that the appellant be released from jail forthwith and set to liberty unless, he is held in custody for any other lawful cause not related to the matter that gave rise to this appeal.

It is so ordered.

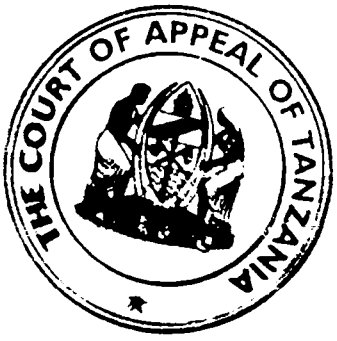
DATED at **SHINYANGA** this 21st day of July, 2022.

R. K. MKUYE
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

This Judgment delivered this 21st day of July, 2022 in the presence of Mr. Ngasa Tambu, the Appellant in person and Ms. Caroline Mushi, State Attorney for the Respondent, is hereby certified as a true copy of the original.



W. S. NG'HUMBU
For: **DEPUTY REGISTRAR**
COURT OF APPEAL