THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MWARIJA, J.A., KWARIKO, J.A. And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 35 OF 2020

ALOYCE JOSEPH ..... APPELLANT

VERSUS

TH REPUBLIC ..... RESPONDENT

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

(Mzuna, J.)

dated the 30th day of August, 2019
in
(RM) Criminal Appeal No. 126 of 2017

JUDGMENT OF THE COURT

29th November & 5th December, 2022

MWARIJA, J.A.:

The appellant, Aloyce Joseph was charged in the Resident Magistrate's Court of Arusha with the offence of being found in unlawful possession of Government trophy contrary to s. 86 (1) and 2 (c) (ii) of the Wildlife Conservation Act No. 5 of 2009 read together with paragraph 14 (d) of the First Schedule to, and s. 57 (1) of the Economic and Organized Crime Control Act, Cap. 200 of the revised laws.

It was alleged that on 19/9/2016 at Selela area within Monduli District in Arusha region, the appellant was found in possession of one

fresh olive baboon carcass valued at USD 110, equivalent to TZS.237,906.90 and two bushpig teeth value at USD 530, equivalent to TZS.1,146,279.81 the property of the Tanzania Government.

The appellant denied the charge and thus to prove its case, the prosecution relied on the evidence of five witnesses. On his part, the appellant, depended on his own evidence in defence.

The background facts giving rise to the appeal may be briefly stated as follows: On 19/9/2016 in the afternoon, Frank Martin (PW1), a Game Warden, Peter Nicodemas Layora (PW5), a Park Ranger and other Game Wardens who were on patrol at Mto wa Mbu area within Monduli District, received information from their informer that certain persons had been seen at Tindigani Selela area. Those persons were suspected to have been conducting illegal hunting. According to PW1's evidence, he went to the area in question together with PW5 and others. While there, they heard the dogs barking and monkeys screaming. He testified further that, he saw certain persons holding spears and together with his colleagues, decided to quietly follow the suspects. As they approached them, those persons managed to run away except the appellant whom was arrested. PW1 went on to state that, the appellant was found with one arrow, two teeth and a carcass suspected to be of bushpig and a baboon respectively.

The evidence by PW1 was supported by PW5 who added that, after having been arrested, the appellant was sent to KDU office where a certificate of seizure was prepared. The witness also identified in court, the two teeth, the carcass and the arrow which he said, were found in possession of the appellant.

The two teeth and the carcass were verified by PW4, Gabriel Charles, a Game Warden to be of a bushpig and a baboon respectively. According to the witness, the value of the two teeth was USD 420 while that of the carcass was USD 530. The baboon carcass was destroyed following an order of the court of Resident Magistrate dated 20/9/2016. The trophies and the arrow were admitted as exhibit P1 collectively while the court order for destruction of the baboon's carcass was admitted in evidence as exhibit P5. The witness also tendered the trophy valuation certificate and the same was admitted in evidence as exhibit P4.

The prosecution also led evidence through PW3, James Anthony Kassala, a Park Ranger that, the trophies and the arrow were handed over to him by a police officer by the name of Sule through a handing over certificate (Exh. P3). Another witness, Johson Kadeyele (PW2) who was also at the material time, a Game Warden testified that on 20/9/2016, he

recorded the cautioned statement of the appellant who, according to the witness, admitted that he was found with the Government trophies.

In his defence, the appellant denied that he was arrested at the scene with exhibit P1 collectively. He testified that, he was arrested on 17/9/2016 while on his way home having in his possession three tins of charcoal. He stated further that, he was taken to the KDU camp where he was kept for three days before being taken to the KDU office where his particulars were taken and thereafter, confined for six days before he was taken to court.

Having considered the prosecution and the defence evidence, the trial court was satisfied that the prosecution had proved its case beyond reasonable doubt. The learned trial Resident Magistrate relied on the evidence of PW1, PW2, and PW5 as well as exhibits P1 – P5. He also relied on the evidence of the appellant's cautioned statement. The appellant was, as a result found guilty and consequently sentenced to twenty (20) years imprisonment.

Aggrieved by the decision of the trial court, the appellant appealed to the High Court. His appeal was however, unsuccessful. Apart from its finding that the appellant's cautioned statement (exhibit P2) was wrongly admitted in evidence because, after the appellant's contention that he was

forced to sign it, a trial within a trial ought to have been conducted, it was of the view that the remaining evidence was sufficient to prove the charge.

The appellant was further aggrieved by the decision of the High Court hence this second appeal which is predicated on six grounds of appeal. Three grounds are contained in the memorandum of appeal and the other three were brought by way of a supplementary memorandum of appeal. For the reasons which will be apparent herein however, we do not intend to consider all grounds of appeal.

At the hearing of the appeal, the appellant appeared in person, unrepresented while the respondent was represented by Ms. Riziki Mahanyu assisted by Ms. Neema Mbwana, both learned State Attorneys. When he was called upon to argue his appeal, the appellant opted to hear first, the respondent's reply thereto and later on make a rejoinder, would the need to do so arise.

In his supplementary memorandum of appeal filed on 25/11/2020 the appellant raised a point of law concerning the jurisdiction of the trial court to entertain the case. He contended that, since the record does not show that the consent of the DPP to the prosecution of the appellant under rule 26(2) of the Economic and Organized Crime Control Act,

Chapter 200 of the Revised Laws (the EOCCA) and the certificate of the transfer of the case to the Resident Magistrate's court of Arusha under rule 12(3) of the EOCCA are not reflected in the trial court's proceedings, the trial court did not have jurisdiction to entertain the case.

Submitting in reply to that ground of appeal, Ms. Mahanyu argued that, both the consent and the certificate of transfer were attached to the charge sheet. As such, she contended that, even though the same were neither endorsed nor reflected in the proceedings, they had the effect of what they were intended for and therefore, while the trial court had the requisite jurisdiction, the DPP had consented to the trial of the appellant. The learned State Attorney then proceeded to reply to the other grounds of appeal arguing that the same were devoid of merit.

The appellant did not have any substantial arguments to make in reply to the arguments made by the learned State Attorney on the contention that the trial court did not have jurisdiction to entertain the case, understandably because the matter involved a point of law. As to his other grounds, he submitted that the same had merit and urged us to find that the prosecution did not prove its case beyond reasonable doubt.

We have considered the argument made by the learned State Attorney on the point of law at issue. With respect, we were unable to

agree with her that the mere presence of the DPP's consent and the certificate of transfer of the case to the Resident Magistrate's Court of Arusha entails that the appellant was properly charged and that the trial court had jurisdiction.

In the case of **Maganzo Zelamoshi @ Nyanzomola v. Republic,** Criminal Appeal No. 355 of 2016 (unreported) in which a similar point was at issue, the Court agreed with the submission made in that case by the learned Senior State Attorney that, when the consent of the DPP to commence a prosecution and the certificate to confer jurisdiction on the subordinate court are not formally filed in the trial court, the trial becomes a nullity. Similarly, in the case of **Maulid Ismail Ndonde v. Republic,** Criminal Appeal No. 319 of 2019 (unreported), the Court held that:

> *". . . the consent and certificate signed on 10th April, 2018 were not officially received by the trial court . . . Consequently, in the absence of the consent and the certificate of the DPP, the trial court lacked jurisdiction to try this case rendering the entire proceedings a nullity."*

Since in the case at hand, the consent and the certificate were not formally received by the trial court, the trial cannot be said to have been lawfully conducted. The trial court's proceedings were therefore, a nullity.

As a result, we hereby nullify them and quash the resultant judgment. Consequently, the proceedings and the judgment of the High Court, which stemmed from the proceedings which were a nullity, are also hereby quashed.

On the way forward, ordinarily an order of retrial would follow. The principle as regards the situations under which a retrial may be ordered was stated in the famous case of **Fatehali Manji v. Republic** [1966] E.A. 343 in which the following was stated:

> *"In general, a retrial may be ordered only where 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."*

Having gone through the evidence, we are of the considered view that, the tendered evidence is deficient and thus an order of retrial will enable the prosecution to fill the gaps in its evidence. As conceded by the learned State Attorney, while the appellant's cautioned statement was expunged by the High Court, the other documentary exhibits were

wrongly acted upon because the same were wrongly tendered by the learned State Attorney instead of being tendered by the witnesses. In a retrial, the anomaly in the process of admitting the exhibits may be rectified because without the documentary evidence, particularly the inventory, the proof that the appellant was found with the Government trophies may be difficult.

On the basis of the above stated reasons, we find that, in the particular circumstances of this case, an order of retrial is not appropriate. Consequently, we order that the appellant be immediately released from custody unless he is held therein for any other lawful cause.

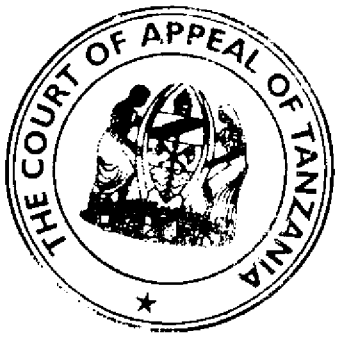
DATED at **ARUSHA** this 3rd day of December, 2022.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this day 5th of December, 2022 in the presence of the Appellant in person and Ms. Akisa Mhando learned Senior State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL