IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: WAMBALI, J.A., SEHEL, J.A. And MAIGE, J.A.)

CRIMINAL APPEAL NO. 513 OF 2020

SALUMU S/O ANDREW KAMANDE..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Matogolo, J.)

dated the 4th day of September, 2020
in
DC. Criminal Appeal No. 62 of 2019

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JUDGMENT OF THE COURT

15th & 22nd March, 2023

SEHEL, J.A.:

This is a second appeal. It originates from the District Court of Mufindi at Mafinga (the trial court) where the appellant, Salumu s/o Andrew Kamande, was arraigned with two counts. The first count related to the offence of unlawful possession of Government trophy to section 86 (1) and (2) (b) of the Wildlife Conservation Act, No. 5 of 2005 (the WCA) read together with paragraph 14 of the First Schedule to sections 57 (1) and 60 (2) of the Economic and Organised Crime Control Act, Cap. 200 R.E. 2002 (now R.E. 2022) (the EOCCA) which is an economic offence.

The second count related to non-economic offence, namely, operating a motor vehicle on an unauthorised route contrary to Rule 19 (1) and 32 (1) (c) of the Transport Licensing (Road Passenger Vehicles) Regulations, Government Notice No. 218 of 2007 (the G.N. 218 of 2007).

After a full trial, the appellant was found guilty in both counts. Accordingly, he was convicted and sentenced, on the first count, to a fine of TZS. 640,000,000.00 or, in default, to serve twenty (20) years imprisonment. For the second count, he was sentenced to pay a fine of TZS. 300,000.00 or, in default, to serve six (6) months imprisonment. The custodial sentences to run concurrently. The appellant was aggrieved. He unsuccessfully appealed to the High Court of Tanzania at Iringa (the first appellate court). Hence, he filed this second appeal.

Before going into the merits of the appeal, we wish to give a brief background to the appeal. It all started as a traffic offence that on 31st December 2016, a traffic police officer with police number E. 7998 Corporal Kaisi (PW1), was driving his car. When he reached at Nyololo area, Mufindi District in Iringa Region, he saw a semi-trailer lorry speeding. He stopped it. While still there, he saw another motor vehicle, make Toyota Hiace with registration number T 377 DCX, speeding. It

was coming from Mbeya heading to Dar es Salaam. The said motor vehicle belonged to Deodatus Abel Chaula (PW2) as per the Motor Vehicle Registration Card, Exhibit P1 and it was being driven by the appellant. PW1 pulled it over, inspected the load capacity of the motor vehicle and performed a records check. In the process, PW1 discovered that the motor vehicle was overloaded since the load capacity was fifteen passengers but it had seventeen passengers. Further, the motor vehicle had no permit to ferry passengers from one point to another and that the driver did not possess the driving licence and the motor vehicle registration card. PW1 therefore decided to fine the appellant. A quarrel ensued between the appellant and PW1 on the amount of fine charged.

PW1 then decided to order all passengers in that motor vehicle to alight from the car with their luggage. All passengers complied. Thereafter, PW1 inspected the motor vehicle and in the car boot, he found unclaimed luggage. Upon inquiry as to whom it belonged; nobody came forward to claim it. According to PW1, one of the passengers opened it and they saw elephant tusks wrapped in a T-shirt. He seized the said elephant tusks and put in his car. When PW1 was busy placing the seized item in his car, the appellant switched on the engine of his

motor vehicle and drove off at a high speed for about half a kilometre. He then stopped and run away.

PW1 went after him and found the motor vehicle abandoned on the road side. He then reported the matter to the District Traffic Officer who advised him to report the matter to the Officer in Command from the Criminal Investigation Department (OC-CID). As he had to move the impounded motor vehicle with its passengers, PW1 sought assistance from a villager to drive it. PW1 drove his car while Kenneth, the villager drove the impounded motor vehicle. They first stopped at Nyololo stand. PW1 conversed for a while with his fellow police officers thereafter drove to Mafinga police station. He handed over the seized elephant tusks and the motor vehicle to the Criminal Record Office (CRO) at the reception desk.

On 1st September, 2016, Msafiri Mashiku Kasara (PW3), the Wildlife Officer stationed at Iringa Municipal Council went to Iringa Central police station to examine and conduct valuation of the alleged elephant tusks. He examined and valued the trophies and found that they were eight pieces of elephant tusks mined from two elephants, each elephant valued at United States Dollars (USD) 15,000 which was equivalent to Tanzanian Shillings (TZS.) 33,750,000.00 thus the total

value of the trophies was at USD 30,000.00 equivalent to TZS. 66,840,000.00. PW3 then recorded his findings in the Trophy Valuation Certificate, Exhibit P2.

The appellant was arrested on 4th January, 2017 at Iringa Municipal Council by the police officer number F. 8087 Detective Constable Ally (PW5). On the same date, he was transferred to Mafinga police station and interrogated by PW5. In the course of his interrogation, the appellant admitted the commission of the offence. To that effect, a cautioned statement, Exh.P6, was recorded. The following day, that is, on 5th January, 2017 he was taken before the Justice of Peace, one Sekela Edeni Kyungu (PW4) to record his extra-judicial statement, Exh. P3.

The prosecution case was also built upon the evidence of one of the passengers of the impounded motor vehicle, Gilbert Euphemia Mturi (PW6). PW6 told the trial court that he saw a driver of the lorry lifting up a luggage from the boot of the car and when that lorry driver opened it, they saw elephant tusks.

In his defence, the appellant admitted that on 31st August, 2016, he was arrested at Nyololo by PW1 when he was ferrying passengers from Tunduma to Dar es Salaam. He also admitted that when he was

protesting to pay the exorbitant fine, PW1 ordered him to open the boot of the car which he did. Thereafter, passengers were ordered to identify their luggage but one luggage was left unclaimed. The appellant further collaborated the prosecution evidence that upon the bag being opened, he heard people shouting, "elephant tusks". The said tusks were wrapped in a T-shirt. He however denied to have been found in unlawful possession of the elephant tusks since he said the bag did not belong to him.

The trial court found credence on the prosecution evidence. It dismissed the appellant's claim that the tusks did not belong to him on account that the elephant tusks were found in the motor vehicle which the appellant was driving. Accordingly, it found him guilty as charged, convicted and sentenced him as aforesaid. The first appellate court upheld both conviction and sentence as it was satisfied that the appellant was found with actual possession of the elephant tusks. He thus appealed to the Court.

In his memorandum of appeal, the appellant raised the following three grounds. **One,** the prosecution failed to establish the chain of custody. **Two,** the charge against the appellant was not proven to the

required standard by the prosecution. **Three**, the proceedings were marred with procedural irregularities.

At the hearing of the appeal, Mr. Jonas Burton Kajiba, learned advocate appeared for the appellant and the appellant was present in court. Ms. Blandina Manyanda, learned Senior State Attorney assisted by Ms. Veneranda Masai, learned State Attorney, appeared for the respondent Republic.

Before the hearing of the appeal could proceed, in terms of Rule 81 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules), Mr. Kajiba sought leave of the Court and was granted to argue additional ground of appeal that the first appellate court erred in law to uphold the decision of the trial court that had no jurisdiction to try economic case.

Thereafter, Mr. Kajiba began his submission by arguing the additional ground of appeal. Elaborating on it, he pointed out that the appellant was arraigned in the District Court of Mufindi at Mafinga on a charge comprised of two counts. He said, the first count was in respect of being found in unlawful possession of Government Trophy contrary to section 86 (1) (2) (b) of the WCA read together with paragraph 14 (d) of the First Schedule to and sections 57 (1) and 60 (2) of the EOCCA which is an economic offence. He further argued that, generally, the

jurisdiction to hear and determine cases of economic or corruption offences is vested to the Corruption and Economic Crimes Division of the High Court except where there is a certificate conferring jurisdiction on the District Court to try the same and there is a consent to that effect. He referred us to pages 3-4 of the record of appeal and contended that although in the record of appeal there is a consent of the Principal State Attorney in Charge to the prosecution of the appellant and a certificate conferring jurisdiction on the District Court of Mufindi at Mafinga but they were not endorsed to indicate that they were formally received or filed before the trial court. It was his submission that the consent and certificate ought to be filed before the Court and endorsed to be part of the court proceedings. To cement his submission, he referred us to the decision of the Court in the case of **John Julius Martin & Another v. The Republic**, Criminal Appeal No. 42 of 2020 [2022] TZCA 789; [08 December, 2022, TANZLII].

He further referred us to page 15 of the record of appeal where the Public Prosecution (PP) informed the trial court that he has received consent from the Director of Public Prosecutions (the DPP). He argued that, notwithstanding the information, the PP did not pray for the consent to be filed and or received by the trial court. It was his

submission that since the consent and certificate were not formally received by the trial court, the trial court did not have jurisdiction to try the appellant on the economic offence. In the circumstances, he urged the Court to nullify the proceedings and judgments of the trial court and that of the High Court, quash the conviction and set aside the sentences imposed on the appellant and beseeched us to release the appellant from custody. To support his argument that the proceedings were nullity, he cited to us the decision of the Court in the case of **Aloyce Joseph v. The Republic**, Criminal Appeal No. 35 of 2020 [2022] TZCA 771; [05 December, 2022, TANZLII].

On the way forward, he argued that, usually the Court would have ordered a retrial. He contended that there are anomalies whereby if the case will be returned for a retrial, the prosecution will have an opportunity to fill in the gaps to the appellant's prejudice. Mr. Kajiba mentioned two irregularities that, one, in admitting exhibits the trial court did not give a chance to the appellant to comment before the admission of the exhibits, and two, some exhibits were admitted without being read over to the appellant. In the circumstances, the learned counsel for the appellant urged the Court to nullify the proceedings of

the trial court and that of the first appellate court and implored us to release the appellant from prison.

On the part of the respondent, Ms. Manyanda conceded on the anomaly that the consent to prosecute the appellant and the certificate conferring jurisdiction on the District Court were not endorsed by the trial court. She also agreed that the record of appeal does not indicate that the two documents were formally filed and or received by the trial court. With that anomaly, she joined hands with the submission of the learned advocate for the appellant that the trial court had no jurisdiction to try the economic offence. That apart, the learned State Attorney argued that there is ample evidence to prove the charged offence against the appellant. She thus urged the Court to order a retrial.

However, upon reflection and after being probed by the Court, the learned Senior State Attorney relented and changed her stand. She agreed that the evidence is insufficient to establish the offence. She pointed out that there is no connecting chain from the retrieval of the alleged elephant tusks that were deposited at the reception desk to the valuation at Iringa Central Police Station and ultimately to the tendering in court as Exh. P3. She further pointed out that there is material contradiction on the evidence of PW1 who claimed that the luggage was

opened by one of the passengers whereas PW3 said it was opened by the lorry driver. In totality, she argued that it is not the fit case to order a retrial. At the end, she beseeched the Court to set free the appellant from prison.

From the submissions, we note that the counsel for the parties are in agreement that the District Court of Mufindi at Mafinga had no jurisdiction to try the appellant who was arraigned before it for, among others, an economic offence. Indeed, section 3 (1) and (3) (a) and (b) of the EOCCA confers jurisdiction to hear and determine cases involving corruption and economic offences to the Corruption and Economic Crimes Division of the High Court. Nevertheless, there is an exception to that statutory prescription that a certificate issued by the DPP or any State Attorney authorised by him, may confer jurisdiction on a subordinate court to try an economic offence case. Such a certificate may be issued pursuant to section 12 (3) of the EOCCA where an accused person is charged with a pure economic offence or under sub-section (4) of section 12 of the same Act where the accused person is charged with both economic and non-economic offences.

The law further, under section 26 (1) of the EOCCA, requires the consent of the DPP to prosecute an accused person to be issued before

commencement of any trial involving an economic offence. If an accused person is arraigned before the subordinate court for an offence falling under the EOCCA and in that subordinate court there is no consent to try him/her and no certificate to confer jurisdiction on that subordinate court, such subordinate court lacks jurisdiction to try the economic offence case and the entire proceedings becomes a nullity. There are numerous decisions of this Court to that effect including the case of **Aloyce Joseph v. The Republic** (supra), where the appellant was tried and convicted with an economic offence before the Resident Magistrate's Court of Arusha and the consent and certificate were attached to the charge. However, the record of appeal did not reflect that they were formally filed nor endorsed by the trial court. The Court therefore held that the proceedings of the trial court were a nullity.

Another decision of this Court is the case of **Maulid Ismail Ndonde v. The Republic**, Criminal Appeal No. 319 of 2019 [2021] TZCA 538; [29 September, 2021, TANZLII], the Court stated:

> *"... 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."*

See also **Maganzo Zelamoshi @ Nyanzomola v. The Republic**, Criminal Appeal No. 355 of 2016 (unreported) and **Matheo Ngua & 3 Others v. The D.P.P**, Criminal Appeal No. 452 of 2017 [2020] TZCA 153; [03 April, 2020, TANZLII].

In the present appeal, at pages 3 – 4 of the record of appeal, there is a consent to prosecute the appellant and certificate conferring jurisdiction on the District Court of Mufindi at Mafinga but the record does not reflect how they got into the court record to form part of the proceedings. We note that at page 15 of the record of appeal, the PP informed the trial court that he has received the consent from the DPP but the record is still silent as to whether the same was received to form part of the trial record. Since there is no clear indication discerned from the record of appeal as to how the consent and certificate find their way into the trial court record, we are in agreement with the counsel for the parties that the appellant was tried without a prior consent of his prosecution and there was no certificate issued to confer jurisdiction on the District Court of Mufindi at Mafinga. Given that there was no consent and certificate, the trial court lacked jurisdiction to try the appellant with an economic offence. Accordingly, we find that the trial court proceedings and that of the first appellate court were a nullity. In view

of that, we proceed to nullify the proceedings of both lower courts, quash the convictions and judgments of both lower courts and set aside the sentences imposed against the appellant.

Having done so, the next issue for consideration is whether or not a retrial should be ordered. On this, we wish to restate the general principle for ordering a retrial as stated in **Fatehali Manji v. The Republic** [1966] 1 EA 343 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 purpose of enabling the prosecution to fill up the 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 be blamed, it does not necessarily follow that a retrial shall be ordered;* ***each case must depend on its own facts and circumstances and an order of retrial should only be made where the interests of justice require."*** [Emphasis added].

Having closely considered the circumstances of the present appeal, we agree with the learned Senior State Attorney that this is not a fit

case for a retrial for the following reasons; **one**: the chain of custody of eight pieces of elephant tusks was broken from the moment they were seized thus there is doubt as to whether the items seized at Nyololo area were the same items examined and valued by PW3 and whether the seized items were elephant tusks which were later on tendered in evidence by PW3. It is no doubt that PW1 told the trial court that he seized elephant tusks but, after the seizure, he went around with the said exhibit. He first went to report to the DTO, then he went to Nyololo stand and ultimately to Mafinga Police Station. At Mafinga Police Station, he left the elephant tusks to CRO reception without mentioning the name of the person who received the said exhibit. There is thus no evidence as to who stored.

Indeed, the evidence shows that PW3 conducted examination and valuation of the alleged exhibit at Iringa Central Police Station. However, it is not clear who shifted the exhibit from Mafinga Police Station to Iringa Central Police Station. In that regard, it cannot be said with certainty that PW3 examined the same exhibit seized by PW1. We are aware that the nature of the exhibit involved in this appeal would not have easily changed hands, but given the chronological event we doubt whether it was the same exhibit seized, examined and tendered before

the trial court. Our concern is further compounded with the fact that, during trial, PW1 could not identify the exhibit he seized and he even did not mention the number of elephant tusks he seized. Therefore, it is not clear whether PW1 truly seized elephant tusks and how many elephant tusks were seized.

Two, there is fundamental discrepancy on the details contained in the Trophy Valuation Report, Exh. P2. It indicates that the number of elephant tusks seized were eight but the number of species killed were two. Definitely, this does not make logic that only two elephants were unlawfully killed while there were eight elephant tusks examined.

Three, there is also material contradictions on the evidence of PW1 and PW6. While PW1 claimed that the luggage was opened by one of the passengers, PW6, one of the passengers said it was opened by the lorry driver.

On the strength of the additional ground of appeal, we find merit to the appeal. Since this additional ground of appeal disposes the whole appeal, we do not see the need to determine the remaining grounds of appeal.

In the end, we allow the appeal and make an order that the appellant, **Salumu s/o Andrew Kamande,** be released from prison unless he is otherwise lawfully held.

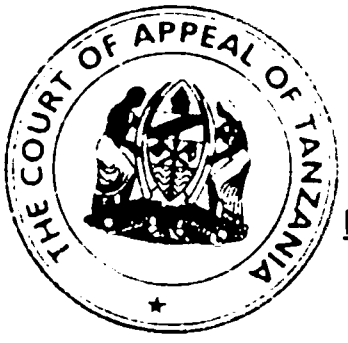
DATED at **IRINGA** this 22nd day of March, 2023.

F. L. K. WAMBALI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

This judgment delivered this 22nd day of March, 2023 in the presence of the appellant in person, Mr. Jonas Balton Kajiba, learned advocate for the appellant and Ms. Piensia Nichombe, 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