IN THE COURT OF APPEAL OF TANZANIA

AT SUMBAWANGA

(CORAM: WAMBALI, J.A., KENTE, J.A And MURUKE, J.A.)

CRIMINAL APPEAL NO. 389 OF 2019

ELIAS SIMWELA ..... APPELLANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS (DPP) ..... RESPONDENT

(Appeal from the decision of High Court of Tanzania at Sumbawanga)

(Mashauri, J)

dated the 28th day of August, 2019

in

Criminal Appeal No. 56 of 2019

.....

JUDGMENT OF THE COURT

25th September & 3rd October,2023

KENTE, J.A.:

This is a second appeal. The appellant together with one Peter Chimpamba @Beda (not a party to this appeal), were, on 28th May, 2019 each convicted by the Sumbawanga District Court of two offences with which they stood charged. In the first count, they were convicted of interfering with and disrupting the distribution and transmission of electricity contrary to paragraph 20 (1), (2)(a) and (3) of the First Schedule and section 57(1) and 60(3) of the Economic and Organised Crimes Control Act (Cap 200 R.E 2002 now R.E 2022). In the second

count, they were convicted of the offence of personating a public officer contrary to section 100(b) of the Penal Code (Cap 16 R.E 2002 now R.E 2022). Upon conviction in the above-mentioned two counts, the appellant and his co-accused were respectively sentenced to a term of seven and one year imprisonment which were ordered to run concurrently. A third person one Bruno Mwakyembe with whom the appellant and Peter Chimpamba stood charged was found not guilty of both counts and consequently acquitted.

On the first appeal, the High Court sitting at Sumbawanga (Mashauri, J as he then was), sustained the appellant's conviction and sentence in respect of the first count while allowing the appeal against the conviction and sentence in respect of the second count. Aggrieved but apparently unfazed by the decision of the High Court, the appellant preferred this appeal.

For the purposes of appreciation of the reasons giving rise to this appeal, we deem it appropriate to make a brief statement of the factual background from which the appeal arises.

Everything considered, the facts as borne out by the charge sheet and the undisputed evidence led in support of the prosecution case

provide the said background. The appellant's prosecution was contemporaneous with his employment as a technician by SINOTEC, a Chinese Company which had entered into a contract with Tanzania Electricity Supplies Company (TANESCO) in 2016 undertaking the construction of phase two of its (TANESCO'S) project implementation of the Rural Electrification Program with the view to improving access to modern energy services in Rukwa and Mbeya Regions. Among the appellant's duties was the installation of electricity poles and related equipment such as transformers during the performance of the above-mentioned contract.

Sometime in May, 2017 while acting in that capacity, the appellant is said to have installed five extra poles to the main power line thereby interfering with and disrupting, the distribution of electricity by TANESCO at Swaila Village in Nkasi District, Rukwa Region. The said poles were estimated to have the value of TZS 6,238,244.25 the property of TANESCO.

The facts that led to the appellant's conviction and sentence as placed before the trial court are discernible from the following summary of the evidence of Wilbrod Ndunguru (PW4) a Security Officer employed by TANESCO who first raised the alarm against the appellant. On 30th

June, 2017 while in the Regional Office at Sumbawanga, PW4 received a phone-call from one person from Swaila Village who was complaining that despite having paid all the charges required for new connection, he was yet to be supplied with electricity. Upon receiving the said complaint, PW4 went to the Customer Care Department where he found that the complainant's name was not listed in the Register of applications for new electricity meter connections. In reply, PW4 promised to visit the complainant on the following day.

True to his word, on the following day, that is on 1st July, 2017, PW4 went to Swaila Village where he met the said complainant together with some other villagers who had the same complaint. Having visited the complainant's home and the homes of other persons, PW4 realised that indeed they had already done what was required from them as to be entitled to new connection. However, PW4 recounted that, the poles he found in the complainants' neighbourhood were seemingly not installed by TANESCO as they were shoddily installed.

Upon further inquiry, PW4 was told by one Kanyata Katabi (PW3) that, together with some other persons, he had asked the appellant and his colleagues, all of whom they believed to be employed by TANESCO to connect their homes to the electricity supply line a request which

was endorsed and worked on by the appellant and his workmates, but apparently, without authorisation. According to PW4, the appellant and his fellow workers had gone on digging holes and installing five poles covering a 250 metres low voltage line which was however not in the TANESCO's electricity distribution map in Swaila Village. PW4 recounted that, the appellant's and his fellows' shoddy and unauthorised workmanship was believed not only to have interrupted with and dispruted TANESCO's distribution of electricity at Swaila Village but it also occasioned a loss of about TZS 6,000,000.00 to the said company. It is for the foregoing reasons that PW4 decided to report the matter to the leadership at the TANESCO District Office at Nkasi who took steps culminating with the appellant's arrest and prosecution.

In his defence, the appellant simply denied committing the offence narrating that, at the time which is material to the commission of the charged offence, he and his co-workers were assigned by their supervisor to make power poles replacement. He said that, however, they were issued with twenty instead of the required fifteen new poles. He went on telling the trial court that, having finished the replacement work, they remained with five poles which, upon seeking and obtaining permission from their employer, they proceeded to install in response

to a request made by some members of the village who were in need of electricity supply. Asked why and how did the present dispute arise, the appellant was quick to respond that the poles installation work was done well and that, what was to follow thereafter was supposed to be done by the Villagers at Swaila in collaboration with TANESCO. However, the appellant contended that, it was after TANESCO had disowned their involvement in the five poles installation arrangement that the affected villagers raised a complaint.

In convicting the appellant, the trial court believed the prosecution evidence that indeed, the appellant had posed to the villagers at Swaila as an employee of TANESCO and installed the five poles without authorisation. The appellants' defence version was found to be too weak to exonerate him from criminal liability in view of the strong evidence led by the prosecution witnesses. However, as stated earlier, the first appellate court reversed the trial court's finding on the second count of personating a public officer which it found as not proved to the required standard. The appellant's conviction and sentence in respect of the first count which charged him with an economic offence of enterfering with and disrupting the distribution and transmission of electricity were both sustained.

Before us, the appellant appeared in person, unaided. On their part, Mr. Pascal Marungu learned Principal State Attorney and Ms. Irene Godwin Mwabeza learned State Attorney who appeared for the Respondent/the DPP did not support the appellant's conviction. After the appellant had opted first to hear the respondent's reply to his grounds of appeal, Ms. Mwabeza who addressed the Court begun by pointing out some procedural irregularities in the prosecution case which she believed to have vitiated the trial as to render it null and void.

The learned State Attorney submitted and this is common ground that, the charge laid at the appellant's door had a combination of an economic and non-economic offence. Viewed in the light of the applicable law, Ms. Mwabeza submitted that, the consent and certificate conferring jurisdiction to the trial subornate court issued by one Prosper Rwegerera, a State Attorney Incharge then based at Sumbawanga were defective for having been issued under the wrong provisions of the law. Elaborating, the learned State Attorney submitted rightly so in our view that, the consent to the prosecution of the appellant and his co-accuseds was purportedly issued and signed by the State Attorney Incharge in terms of section 26(1) of the EOCCA instead of being issued by the Director of Public Prosecutions as required by law. Regarding the

certificate, Ms. Mwabeza submitted again correctly so that, it was issued by the State Attorney Incharge pursuant to Section 12(3) of the EOCCA instead of section 12(4) of the same Act.

Because of the above mentioned procedural shortcomings in the issuance of consent and certificate conferring jurisdiction on the trial court, the learned State Attorney implored us to nullify the proceedings before the two lower courts, quash the appellant's conviction and set aside the custodial sentence imposed on him. The prayer by Ms. Mwabeza was premised on her position that, the trial court in essence, was not clothed with the requisite jurisdiction to try the appellant for an economic offence. As a guidance, she referred us to our earlier decisions in the cases of **Samson Amon Kauga v. Republic**, (Criminal Appeal No. 446 of 2019) [2023] TZCA 121 (17th March 2023, TANZLII) and **Salum s/o Andrew Kamande v. Republic**, (Criminal Appeal No. 513 of 2020) [2023] TZCA 133 (22 March 2023, TANZLII).

Regarding the way forward, after having briefly reviewed the evidence led in support of the prosecution case, Ms. Mwabeza was decisively of the view that, an order for a retrial would not be in the interest of justice in the circumstances of this case as there was no sufficient evidence to support the appellant's conviction. Clarifying, the

learned State Attorney submitted that, there will be no use trying to cause the appellant's prosecution once again on the same subject-matter as by doing so, the DPP would for all purposes and intents, be flogging a dead horse.

We begin by stating that, there is no gainsaying that the first count which charged the appellant with the offence of interfering with and disrupting the distribution and transmission of electricity was an economic offence. It is as well not in dispute that, in terms of section 3(1) and (3) (a) and (b) of the EOCCA, the jurisdiction to hear and determine economic offences is vested in the Corruption and Economic Crimes Division of High Court. However, the above cited general statutory provision is not without exception as, by way of a certificate issued under section 12(3) of the EOCCA where the accused person is exclusively charged with an economic offence or offences as in this case, or, under section 12 (4) of the same Act if the accused is charged with a combination of economic and non-economic offences, the Director of Public Prosecutions or any State Attorney duly authorised by him, may direct that any case involving an offence triable by the Corruption and Economic Crimes Division of the High Court, be tried by a subordinate court.

It is the position of this Court and that has been well settled in our jurisprudence that, if an accused person is arraigned before a subordinate court and there is no consent to try him and, there is no certificate to confer jurisdiction on that subordinate court, such a subordinate court lacks jurisdiction to try the economic offence case and that, otherwise, the entire proceedings becomes a nullity. (See the case of **Aloyce Joseph v. Republic,** (Criminal Appeal No. 35 of 2020) [2022] TZCA 771 (05 December 2022, TANZILII) which was cited by the Court in **Salum s/o Andrew Kamande v. Republic** (supra).

We must state at once that, in the present case, the shortcomings in the consent and certificate as pointed out by Ms. Mwabeza are clear for all and sundry to see. We also wish to add that, as if that was not bad enough, whereas the impugned certificate shows that it was ordered for the appellant and his co-accused to be tried by the Resident Magistrate's Court for Rukwa at Sumbawanga, the trial was conducted by the District Court of Sumbawanga.

From the foregoing analysis, in terms of section 4(2) of the Appellate Jurisdiction Act (Cap 141 R.E 2019), we nullify the proceedings of the two lower courts, quash the appellant's conviction and set aside the custodial sentence imposed on him. In the

circumstances, it would be superfluous for us to order for a retrial as we agree with the learned State Attorney that it will not be in the interest of justice. Consequently, we order for the appellant's release from jail if he is not otherwise held for some other lawful cause.

DATED at **SUMBAWANGA** this 2nd day of October, 2023.

F. L. K. WAMBALI
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

Z. G. MURUKE
JUSTICE OF APPEAL

The Judgment delivered this 3rd day of October, 2023 in the presence of the Appellant in person and Ms. Marietha Augustine Maguta, learned State Attorney for the Respondent is hereby certified as a true copy of the original.

E. G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL