IN THE COURT OF APPEAL OF TANZANIA
AT SUMBAWANGA

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

CRIMINAL APPEAL NO. 312 OF 2019

HASHIM NASSORO @ ALMAS ..... APPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT

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

(Mashauri, J.)

Dated the 27th day of August, 2019

in

Criminal Appeal No. 3 of 2019

JUDGMENT OF THE COURT

27th September & 04th October, 2023

MURUKE, J.A.:

This is a second appeal. It originates from the finding, convictions and sentences of the Resident Magistrate's Court of Katavi at Mpanda, in Economic Case No. 53 of 2017, where the appellant, Hashim Nassoro @ Almas, was charged with four (4) counts. The first and second counts related to the offences of unlawful possession of Government trophies contrary to section 86(1) (2) (c) of the Wildlife Conservation Act, [Cap.283] (the WCA) read together with paragraph 14 of the First

Schedule and sections 57(1) and 60(2) both of the Economic and Organized Crime Control Act [Cap 200 R.E. 2002 - now R.E 2022], (the EOCCA). The third and fourth counts related to unlawful possession of fire arms and ammunition contrary to section 20(1)(b) and (2) of the Fire Arms and Ammunition Control Act No. 2 of 2015 read together with paragraph 31 of the First Schedule to and sections 57(1) and 60(2) of the EOCCA.

What transpired on the arrest of the appellant is found in the account of Assistant Inspector Madeu (PW1), a Police Officer based at Nsimbo, Tanganyika District - Katavi Region. While PW1 was at his working station, Adolf Joseph Kuba (PW4), a Park Ranger from Katavi National Park came asking for assistance of Police Officers to conduct search of Government trophies at Igalula village. The OC - CID, PW1 and PW4 both left and reached Igalula – village at 2:00 hours on 11th November, 2017. On arrival, they first met Nassoro Hashim and Cilivia Bilia who led them to the appellant's residence.

It was the prosecution's evidence that Nassoro Hashim (PW3) awakened the appellant pretending to be in need of a motorcycle pump, a request that was responded by the appellant by opening the door and coming out with a motorcycle pump. He was then arrested, and asked if

he owned a muzzle gun (gobore). He positively replied and showed that it was inside the house. After search was conducted, the following items were found; one muzzle loading gun, ten (10) pieces of iron bars, wild cat skin, duiker skin and a meat of a duiker.

After seizure of all the said items, the appellant, PW1 and other witnesses including Nassoro Hashim signed the Certificate of Seizure. The appellant was taken to Tanganyika Police Station.

Before the trial court, the appellant denied the charge, so the prosecution called 4 witnesses and tendered 8 exhibits, namely; certificate of seizure (P1), a muzzle loading gun (P2), ten pieces of iron bars (P3), wild cat skin (P4), duiker skin (P5), meat of duiker (P6), a chain of custody document (P7) and trophy valuation certificate (P8) to prove the case. The appellant, gave his evidence as DW1 and no exhibits were tendered by him. However, at the end of the case, the trial court found the appellant guilt, convicted and sentenced him to serve 20 years imprisonment on each count, the sentence which were ordered to run concurrently.

The decision by the trial court aggrieved the appellant, so he filed Criminal Appeal No. 03 of 2019 to the High Court at Sumbawanga to challenge both the convictions and sentences. Unfortunately, the appellant did not succeed as his appeal was dismissed by the first

appellate court on 27th August, 2019. Thus, in this appeal the appellant is challenging the decision of the High Court, raising six grounds contained in the memorandum of appeal.

When the appeal was called on for hearing, the appellant appeared in person, unrepresented whereas the respondent, the Director of Public Prosecutions (the DPP) was represented by Mr. John Mwesiga Kabengula, learned Senior State Attorney, assisted by Ms. Safi Kashindi Amani, learned State Attorney. When the appellant was called upon to argue his appeal, he opted to hear first, the respondent's reply thereto and later on make a rejoinder, if the need to do so would arise.

However, hearing of the appeal did not proceed on the appellant's preferred grounds as the counsel for the DPP raised an issue on the jurisdiction of the trial court.

Submitting in support of the point of law, Ms. Kashindi argued that the trial court lacked jurisdiction to hear and determine the appellant's case because the consent to prosecute and certificate conferring jurisdiction were not formerly filed and admitted by the trial court. Ms. Kashindi submitted further that according to section 3 of the EOCCA the jurisdiction to try economic offences is vested to the High Court Corruption and Economic Crimes Division. However, under section 12(3) of the

EOCCA, the Director of Public Prosecutions and any State Attorney duly authorized by him, may issue a certificate to the subordinate court to the to try the offence under the EOCCA. Moreover, according to section 26(1) and (2) of the EOCCA, consent of the DPP or an authorized officer by him respectively must be given to the subordinate court before the trial. However, Ms. Kashindi submitted that according to the record of appeal, there is no evidence that the consent and certificate were formerly filed and admitted by the trial court before the preliminary hearing started on 21/02/2018 though they are in record of appeal. She therefore argued that, even if the consent and certificate were properly before the trial court, yet they did not specify the provisions of the law that the appellant contravened. In her view, the omission resulted in the appellant's being tried without the requisite consent and certificate. In the circumstances Ms. Kashindi concluded by insisting that, the trial court lacked jurisdiction to determine an economic case against the appellant. To support her stance, she cited the Court's decisions in the case of **Dilipkumar Maganbai Patel v. Republic,** (Criminal appeal No. 270 of 2019) [2022] TZCA 477 (25 July 2022, TANZLII) and **Peter Kongori Maliwa and 4 Others v. Republic** (Criminal Appeal No. 253 of 2020) [2023] TZCA 17350 (14 June 2023, TANZLII)

On being prompted by the Court on the way forward, she replied that the remedy would have been to order a retrial after nullifying the proceedings. However, in her view, the evidence relied on by the prosecution, could not prove the case against the appellant beyond reasonable doubts. To buttress her argument, she stated that the search which led to the alleged retrieval of the government trophies, firearms and ammunitions was illegally conducted as it was not an emergency one. She added that the search order has no evidential value and is liable to be discounted. She emphasized that even the remaining oral evidence of the prosecution witnesses contains material contradictions which destroy the foundation of the prosecution case. Besides, she submitted, some of the government trophies were disposed of without the inventory being prepared as required by law. In the circumstances, Ms. Kashindi implored us to nullify the proceedings, quash convictions and set aside sentences imposed on the appellant in terms of section 4(2) of the Appellate Jurisdiction Act, Cap.141 R.E 2019 (AJA) and order the release of the appellant from custody. To her, ordering a re-trial would be contrary to the principle laid down in the case of **Fatehali Manji v. Republic** (1966) 1 EA 343 as the prosecution will fill gaps in its case.

Responding the arguments made by the learned State Attorney, the appellant reiterated his complaints that he was not found with the items mentioned in the charge sheet. He therefore concurred with Ms. Kashindi's submission and urged us to find that the prosecution did not prove its case beyond reasonable doubt, followed by an order to release him from custody.

According to the record of appeal and submissions made by the learned State Attorney, there is no dispute that what the appellant was facing at the trial court were economic offences. Thus, the issue before us is whether the trial court was clothed with the requisite jurisdiction to try and determine the case.

According to section 3 (1) (3) (a) and (b) of the EOCCA, the court with jurisdiction to try economic offences is the High Court. However, section 12(3) of the EOCCA, authorizes the DPP or an officer authorized by him to direct such cases to be tried by a subordinate court. It provides that:

> *"12(3) The Director of Public Prosecutions or any other 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 High Court under this Act, be tried by such court subordinate to the High Court as he may specify in the Certificate."

On the other hand, the law under section 26(1) and (2) of the EOCCA respectively, provides for a requirement of the consent to prosecute from the DPP or an officer authorized by him before such an offence is tried by the subordinate court. The section provides:

"26(1) 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.

(2) The Director of Public Prosecutions, shall establish and maintain a system whereby the process of seeking and obtaining of his consent for prosecutions may be expedited and may, for that purpose, by notice published in the Gazette, specify economic offences the prosecutions of which shall require the consent of the Director of Public Prosecutions in person and those the power consenting to the prosecution of officers subordinate to him as he may specify acting in accordance with his general or special instructions."

For the purpose of section 26(2), the direction of the Director of Public Prosecutions was provided through GN. No. 284 of 2014 which was later revoked and replaced by GN. No. 496H of 2021.

According to the record of appeal, it is apparent as correctly submitted by the learned State Attorney that, the Certificate and Consent did not form part of the trial court's record of proceedings because, the record of appeal does not indicate that both the Certificate and Consent were formerly filed and admitted by the trial court though they are in the record of appeal. Basically, there is no indication in the record of appeal that both the Certificate and Consent were endorsed by the trial court before the preliminary hearing and trial started. Even, assuming that the consent and certificate were properly introduced in the trial court's record of proceedings which is not the case, yet the same did not mention the provisions of the law that the appellant was alleged to have contravened as correctly submitted by the learned State Attorney.

It is not the first occasion that the Court has encountered such a situation where the consent and certificate are not formerly admitted by the trial court. Particularly, in the case of **Aloyce Joseph v. Republic** (Criminal Appeal 35 of 2020) [2022] TZCA 771 (5 December 2022, TANZLII) it was held that:

" 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."

In the same vein, in the case of **Salumu s/o Andrew Kamande v. Republic** (Criminal Appeal No. 513 of 2020) [2023] TZCA 133 (22 March 2023, TANZLII), the Court observed that:

"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 had 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 found 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".

It is a settled law that a certificate and consent of the DPP or State Attorney without reference to the relevant provisions of the law creating economic offences are incurably defective and renders the trial court's proceedings a nullity. This stance has been emphasized by the Court in various cases. For instance, in the case of **Chacha Chiwa Marungu v. Republic**, (Criminal Appeal No.364 of 2020) [2023] TZCA 17311 (5 June 2023, TANZLII), it was held that:

"Even if the said certificate and consent were made under the proper provisions of the law; sections 12(4) and 26 (2) of the EOCCA, since such consent and certificate of transfer did not make reference to the sections 17 (1) (2) and 86 (1) (2) (c) (iii) of WCA which when read together with paragraph 14 of the First Schedule to the EOCCA make them economic offences, then the said certificate and consent were incurably

defective. In this regard, the proceedings in the trial District Court in Economic Case No. 129 of 2019 and in the High Court Criminal Appeal No. 5 of 2020 were a nullity because the certificate and consent in question were incurably defective. So, the proceedings in the trial court which culminated in the conviction of the appellant and sentence was a nullity."

Furthermore, in the case of **Peter Kongori Maliwa & 4 Others v. Republic,** (Criminal Appeal No.252 of 2020) [2023] TZCA 17350 (14 June 2023, TANZLII), the Court held that:

"...both the certificate conferring jurisdiction to the trial court and the consent of the State Attorney In charge did not cite the provisions of law creating the respective economic offences. We, therefore, agree with the learned State Attorney that, the legal consequence of the omission is to vitiate the trial proceedings as the trial court acted without jurisdiction. Equally so, for the resulting proceedings of the first appellate court."

Section 26 (1) of the EOCCA, requires the Consent of the DPP to prosecute an accused to be issued before commencement of any trial involving an economic offence. Where an accused person is arraigned

before a subordinate court for an offence falling under EOCCA without there being a Consent to try him/her and no Certificate to confer jurisdiction to try the economic offence case, then that particular subordinate court lacks jurisdiction. Thus, we hold that since the consent and the certificate at pages 6-7 of the record of appeal were not endorsed and the trial court records does not show that they were formerly admitted, the trial court tried the case without jurisdiction. It is settled law in our jurisdiction that any decision reached by any court without jurisdiction is a nullity. In this regard, the Court in the case of **FANUEL MANTIRI NG'UNDA v. HERMAN MANTIRI NG'UNDA & 2 OTHERS** [1995] T.L.R. 155 held thus:

> *"The question of jurisdiction for any court is basic, it goes to the very root of the authority of the court to adjudicate upon cases of different nature ...* ***The question of jurisdiction is so fundamental that courts must as a matter of practice on the face of it be aware of it."***
> [Emphasis added]

Having concluded that the trial court lacked jurisdiction and thus its proceedings and those of the first appellate court were a nullity, 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 expounded in **Fatehali Manji v. 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]

On our part, having scrutinized the factual setting in the record of appeal, we agree with the submission by the learned State Attorney that because of the lapses in the prosecution case, namely, illegal search, material contradictions in the evidence of the witnesses and disposal of the exhibits without preparing the inventory, a retrial will not be in the interest of justice as it will occasion miscarriage of justice.

In the result, we accordingly invoke our revisional jurisdiction under section 4 (2) of the AJA to revise and nullify the proceedings of the trial and first appellate courts, quash the convictions and set aside the sentences. Consequently, we order the immediate release of the appellant unless he is otherwise held for another lawful cause.

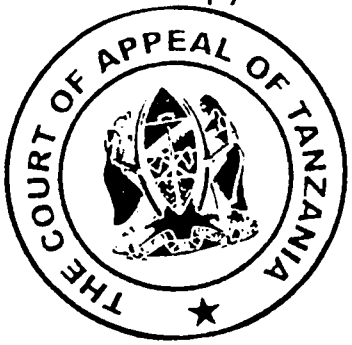
DATED at **SUMBAWANGA** this 03rd day of October, 2023.

F. L. K. WAMBALI
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

Z. G. MURUKE
JUSTICE OF APPEAL

The Judgment delivered this 04th day of October, 2023 in the presence of appellant in person and Ms. Marietha Augustine Maguta, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



E. G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL