IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MWARIJA, J.A., GALEBA, J.A, And KENTE, J.A.)

CRIMINAL APPEAL NO. 247 OF 2019

MAJALIWA MAYOMBYA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Mwanza)

(Rumanyika, J.)

Dated the 27th day of May, 2019
in
Criminal Appeal No. 208 of 2018

JUDGMENT OF THE COURT

8th & 16th February, 2023

KENTE, J.A.:

The appellant Majaliwa Mayombya was charged with, and convicted by the Bukombe District Court (the trial court) on one count of sabotage contrary to section 3 (d) of the National Security Act, Chapter 47 of the Revised Laws read together with paragraph 11 of the First Schedule to the Economic and Organised Crime Control Act, Chapter 200 of the Revised Laws (hereinafter the EOCCA).

The particulars of the offence alleged that, the appellant on 7th January, 2017 at Kichangani area within the District of Bukombe in Geita

Region, wittingly destroyed (sic) the project undertaken by the Tanzania Electricity Supplies Company (TANESCO) in the said District by interfering with and supplying electricity to customers without a valid licence or permit. Upon conviction, he was sentenced to ten years imprisonment. His appeal to the High Court was in vain hence the present appeal in which he is challenging both the conviction and sentence.

In the determination of this appeal, we have found it not necessary to reproduce the grounds of appeal fronted by the appellant or to canvas at length the alleged facts from which the appellant's arraignment and conviction by the trial court emanate. The reason providing a rationale for this approach will soon be laid to bare. In the circumstances, we are confident that the following brief statement of the factual background giving rise to the present appeal with fill the bill as a preface to our judgment.

It was claimed that, on the material day the appellant's residence was searched by some members of the Police Force who were accompanied by the appellant's local leaders whereupon the following items allegedly belonging to TANESCO were recovered, namely: one piece of wire of 25 NM^2 , three lift pulleys, one piece of a draw – long crone, two pairs of spec, one piece of safety helmet, three pieces of safety belt,

two pieces of pier connector, three pieces of guy grip, four metres of stay wire, one piece of stay insulator, one foot of Asser aluminium, one piece of 95 mm tension, one strain clam, 250 pig-tail bolts and one piece of 10m wooden pollen. It would appear from the charges levelled against the appellant that the prosecution equated possession of the above-mentioned items with felony sabotage. Despite the appellant's explanation regarding how he came into possession of the said items, he was apprehended and arraigned as earlier mentioned.

Notably, at first, the appellant was arraigned in the District Court where he was charged with two counts to wit, unlawful possession of electronic goods suspected of having been stolen or unlawfully acquired contrary to section 57 (1) read together with paragraph 6 (1) (a), (b) (2) (a) and (b) of the First Schedule and section 60 (2) of the EOCCA and unlawful interference with properties which are used for the purposes of providing necessary services contrary to section 57 (1) read together with paragraph 19 (1) (2) (a) and (3) (a) of the First Schedule to the EOCCA. However, as alluded to above, sometimes later the prosecution had to completely change the nature of its claim against the appellant whereupon the first charge was abandoned and replaced by the one charging him with sabotage contrary section 3 (d) of the National Security

Act read together with paragraph 11 of the First Schedule to the EOCCA. Even though, the above-stated amendment of the charge did not take it away from the realm of economic offences which was the sole common denominator between the former and the new charge.

Commensurate with the preferred charges and in terms of section 26 (1) of the EOCCA, the Director of Public Prosecutions (the DPP) gave consent for the appellant to be tried for the offence falling under the said Act. As indicated, the appellant was subsequently tried and convicted by the trial subordinate court. Upon appeal, the learned Judge of the first appellate court could not agree with the appellant because, in his view, the charge against him was proved beyond reasonable doubt. He accordingly dismissed the appeal and sustained both the conviction and sentence.

At the commencement of the hearing of this appeal, we asked Ms. Sophia Mgassa who appeared along with Ms. Fortunata Guvete both learned State Attorneys to represent the respondent Republic and indicated that she was supporting the appellant's conviction and sentence, whether or not, the trial court was clothed with the requisite jurisdiction to entertain this matter. We asked this pertinent question in view of the well-known principle that, the question of jurisdiction for any court is

fundamental as it goes to the very root of the authority of the courts to adjudicate upon cases of a different nature. (See **Fanuel Mantiri Ng'unda Vs Herman Mantiri Ngúda & 20 others,** Civil Appeal No. 8 of 1995 (unreported)).

We also had in mind the fact that as a matter of law, economic offences are ordinarily triable by the Corruption and Economic Crimes Division of the High Court save that, in terms of section 12 (3) of the EOCCA, the DPP or any State Attorney duly authorised by him, may, where 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 Corruption and Economic Crimes Division of the High Court under the EOCCA as it were in the instant cases, be tried by such court subordinate to the High Court as the DPP may specify in the certificate. The totality of the above provision of the law is that, it is either the Corruption and Economic Crimes Division of the High Court or the subordinates court vested with the jurisdiction by the DPP under section 12 (3) of the EOCCA which have exclusive jurisdiction on matters pertaining to economic offences.

Startlingly however, our question appears to have caught the learned State Attorney flat-footed. But, after scanning the record of

appeal at full tilt, she gracefully conceded and appeared to change tack. In the submission that ensued, she finally called it a day for her erroneous stance on the propriety of the appellant's conviction and sentence by the trial court. Impressively, that approach did not come like a bat out of hell. It was preceded by the learned State Attorney's keen look at the record of appeal which revealed that, indeed there was no certificate issued by DPP in terms of section 26 (3) of the EOCCA vesting the trial court with the jurisdiction to entertain this matter.

Accordingly, it was the submission of Ms. Mgassa that, the appellant's trial by the Bukombe District Court was vitiated and therefore, a nullity for want of jurisdiction. Given the circumstances, the learned State Attorney earnestly entreated that we allow the appeal and invoke our revisional jurisdiction in terms of section 4 (2) of the Appellate jurisdiction Act, Chapter 141 of the Revised Laws (the AJA), to nullify the proceedings before the lower courts, quash the conviction and set aside the sentence of ten years imprisonment imposed on the appellant. With regard to the way forward, Ms. Mgassa implored us to order for a retrial contending that, the sentence of ten years imprisonment imposed on the appellant by the trial court and subsequently sustained by the first appellate court, was inadequate as the maximum sentence for the offence

of sabotage prescribed by law is life imprisonment. However, she could not pursue her argument when we asked her why then did the DPP let it go up in smoke and not cross-appeal to challenge the illegal sentence allegedly meted out on the appellant.

When we invited the appellant who had adopted his grounds of appeal and preferred to hear the learned State Attorney's response to his grounds of appeal before he could make a rejoinder, he had nothing substantial to either expound on his grounds of appeal or to comment on the propriety or otherwise of the proceedings before the two lower courts. He repeatedly protested his innocence throughout his brief submission.

Going by the factual background leading to the present appeal, the principal question we have to decide in this matter is whether or not the trial court was clothed with the jurisdiction required to entertain this matter so far as it related to an economic offence.

As it will be noted at once, in this country, jurisdiction of the courts is governed by statutory law and not what the litigants like or dislike. (See **Israel Misezero @ Minani V. R,** Criminal Appeal No. 117 of 2006 (unreported)). In the context of the present case, according to section 12 (3) of the EOCCA, a District Court or any other court subordinate to the High Court could exercise the powers vested in the Corruption and

Economic Crimes Division of the High Court if and only if the DPP or any State Attorney duly authorised by him had ordered for an economic offence to be tried by such a court as the DPP could specify in the certificate. It is needless to say that, in the absence of such a certificate duly issued by the DPP as it were in the instant case, the trial is rendered null and void.

Like the learned State Attorney, we are satisfied that her stance on this matter correctly represents the law of this country on that point. Applying both statutory and case law to the facts of the case now under review then, it should be common grounds that the appellant's trial by the Bukombe District Court was a nullity for want of jurisdiction. Speaking in a similar strain and quoting with approval what was stated by the erstwhile Court of Appeal for East Africa in the case of **Desai Vs. Warsama** [1967] E.A 351, we held in the case of **Ramadahani Omary Mtuyla Vs. Republic,** Criminal Appeal No. 62 of 2019 (unreported) that:

> *"As to the fate of a decision made without jurisdiction, a judgment of a court without jurisdiction is a nullity and where a court takes it upon to exercise a jurisdiction which it does not possess, its decision amounts to nothing".*

Another matter to be decided is the status of the impugned decision of the High Court. We consider it pertinent to state at this juncture that, deeply rooted in our jurisprudence is the principle to which we wholly subscribe that, the proceedings and judgment made by an appellate court based on null proceedings of the trial court are also a nullity. **Mhole Saguda Nyamagu Vs. Republic**, Criminal Appeal No. 337 of 2016 (unreported).

For the foregoing reasons, we agree with the learned State Attorney that indeed, the proceedings before the trial court, and, by extension before the High Court were vitiated by the patent absence of the DPP's certificate transferring the case to the trial court. In the ultimate event, this appeal succeeds and is accordingly allowed. We invoke our revisional powers under section 4 (2) of the AJA and revise the proceedings in the two courts below. We quash the appellant's conviction and set aside the sentence of ten years imprisonment meted out on him.

As to the way forward, applying the principles required to govern the court in the exercise of its discretion to order or not to order a retrial as notably observed in **Fatehali Manji Vs. R** [1996] 1 E.A 343, we are of the settled view that, an order for retrial will not be in the interest of justice in the circumstances of this case. With the current state of affairs,

the most important and irrefutable point to observe here is the fact that the appellant has already served a substantial part of the ten years custodial sentence imposed on him by the trial court and he has already been released from jail on a Presidential pardon.

Since it has been drawn to our attention that following the President's exercise of executive clemency the appellant has already been set at liberty, we make no order on that aspect as it will not serve any useful purpose.

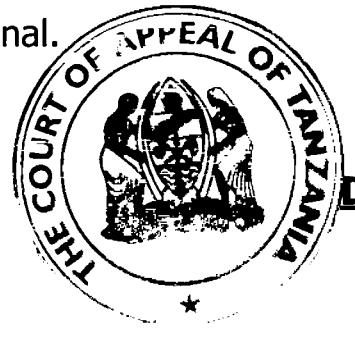
DATED at **MWANZA** this 14th day of February, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 16th February, 2023 in the presence for the appellant in person and Ms. Sophia Mgassa, learned State Attorney for the Respondent/ Republic, is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL