IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: NDIKA, J.A., RUMANYIKA, J.A., And MURUKE, J.A.)

CRIMINAL APPEAL NO. 601 OF 2022

THE DIRECTOR OF PUBLIC PROSECUTIONS ..... APPELLANT

VERSUS

SEMENI GWEMA MSWIMA ..... RESPONDENT

(Appeal from the Ruling of the High Court of Tanzania at Mbeya)

(Mambi, J.)

dated the 5th day of July, 2021

in

Criminal Revision No. 1 of 2021

.....

JUDGMENT OF THE COURT

12th & 13th February, 2024

NDIKA, J.A.:

In exercise of its revisional jurisdiction under section 372 (1) of the Criminal Procedure Act, Cap. 20 at the instance of the Director of Public Prosecutions, the appellant herein, the High Court of Tanzania sitting at Mbeya (Mambi, J.) nullified the proceedings of the District Court of Mbozi at Vwawa ("the District Court") in Economic Case No. 1 of 2021 for want

of jurisdiction. Accordingly, the court quashed the convictions entered by the trial court against Semeni Gwema Nswima, the respondent, on sixty counts of uttering false document and stealing by agent upon the respondent's own pleas of guilty. Furthermore, the court set aside the resulting sentences. As a consequential order, the High Court declined to remand the case to the District Court for retrial, or rather recommencement of the proceedings, on the ground that doing so would offend the interests of justice. On that basis, the court released the respondent from custody.

Irked by the aforesaid consequential order, the appellant now appeals on two grounds:

1. *That, the Honourable Judge erred in law and fact by holding that it was not in the interests of justice to order a retrial.*
2. *That, the Honourable Judge erred in law and fact by ordering the release of the respondent while he was not tried by a court of competent jurisdiction.*

As the background to this appeal, we note from the record that the respondent was, at the material time, the Doctor in Charge of Mlowo

Dispensary, a government-run medical facility in Mbozi District, Songwe Region. On 7th May, 2021 the respondent appeared before the District Court in Economic Case No. 1 of 2021 facing sixty-one counts on a holding charge sheet. While the first sixty counts concerned the offences of uttering false document and stealing by agent laid under the Penal Code, Cap. 16, count sixty-one charged the respondent with the offence of money laundering contrary to sections 12 (d) and 13 (a) of the Anti-Money Laundering Act, Cap. 423 ("the AMLA") read together with paragraph 22 of the First Schedule to and sections 57 (1) and 60 (2) of the Economic and Organised Crime Control Act, Cap. 200 ("the EOCCA").

On his first appearance before the District Court on 7th May, 2021, the respondent pleaded guilty to all counts except count sixty-one, which, upon the prosecution's prayer for its withdrawal, was promptly marked withdrawn by the learned Resident Magistrate. The learned Magistrate, then, proceeded with the applicable procedure in the circumstances of the case, with the prosecutor reading out the facts of the case in respect of the sixty counts and tendering several documentary exhibits. The respondent having admitted the narrative of the facts along with the

tendered exhibits, the learned Magistrate convicted him on the sixty counts on his own pleas of guilty. After hearing the prosecutor's submission that the respondent was a first offender and considering his mitigating circumstances, the learned Magistrate imposed the following sentence:

> *"I sentence him to pay a fine of TZS. 800,000.00 or serve three years in jail on each offence/count relating to uttering false documents. He shall also pay a fine of TZS. 1,000,000.00 or serve four years in jail on each count relating to stealing by servant. Furthermore, he shall be required to [refund to the government TZS.] 30,000,850 .... All sentences to run concurrently."*

It is settled that section 3 (3) of the EOCCA confers exclusive jurisdiction upon the Corruption and Economic Crimes Division of the High Court ("the Corruption and Economic Division") to hear and determine cases involving economic offences, which are specified under paragraph 14 of the First Schedule to that Act. Nonetheless, a subordinate court, such as the District Court in the instant case, can seize and try a case involving

an economic offence only if the Director of Public Prosecutions transfers such a case, by a certificate, to a subordinate court pursuant to section 12 (3) of the EOCCA, which enacts as follows:

> *"**12.**-(3) The Director of Public Prosecutions or any State Attorney duly authorised 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 Court under this Act be tried by such court subordinate to the High Court as he may specify in the certificate."*

Furthermore, in terms of section 26 (1) of the EOCCA, every trial in respect of an economic offence may only be commenced before the Corruption and Economic Division, or a subordinate court upon which jurisdiction has been conferred under section 12 (3) of the EOCCA, once the Director of Public Prosecutions has issued his consent to the prosecution. For clarity we extract section 26 (1) of the EOCCA:

> *"**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."

Our jurisprudence instructs that any criminal proceedings commenced in violation of any of the aforesaid imperious provisions would be vitiated for want of jurisdiction – see **Rhobi Marwa Mgare and Two Others v. Republic**, Criminal Appeal No. 192 of 2005; and **Elias Vitus Ndimbo and Another v. Republic**, Criminal Appeal No. 272 of 2007 (both unreported). See also **Nico s/o Mhando & Others v. Republic**, Criminal Appeal No. 332 of 2008 [2012] TZCA 102 [26 March 2012; TanzLII] and **Romward s/o Michael v. Republic**, Criminal Appeal No. 38 of 2009 [2013] TZCA 449 [17 September 2013; TanzLII].

It is not in dispute that in the instant matter, neither transfer certificate nor consent of the Director of Public Prosecutions was issued to the District Court for the prosecution to proceed in that court. As rightly held by the High Court, the District Court embarked on a nullity having had no jurisdiction over the matter from the beginning of the proceedings because the case involved an economic offence on count sixty-one for

which neither transfer certificate nor consent of the Director of Public Prosecutions was issued.

We are cognizant that the District Court normally had jurisdiction to try the offences of uttering false document and stealing by servant separately in a normal criminal case. However, given that the said offences were most probably charged as predicate offences in terms of the provisions of the AMLA in an economic case along with the offence of money laundering, we emphasise that the District Court should not have proceeded in the absence of the requisite transfer certificate and consent of the Director of Public Prosecutions. On that basis, the purported withdrawal of the money laundering charge by the District Court, at the instance of the prosecution after the respondent had pleaded to the first sixty counts, was inconsequential. It did not convert the economic case into a normal criminal case for the court to clothe itself with the jurisdiction it did not have at the beginning of the proceedings.

At the hearing of the appeal, Ms. Prosista Paul, learned State Attorney, essentially argued the two grounds of appeal conjointly. She

censured the High Court for withholding a retrial order. She said that the High Court ignored the appellant's interest in having the charges against the respondent heard and determined by a court of competent jurisdiction. In support of her argument, she relied upon **Ramadhani Omary Mtiula v. Republic**, Criminal Appeal No. 62 of 2019 [2020] TZCA 1734 [19 August 2020; TanzLII] and **Dilipkumar Maganbai Patel v. Republic**, Criminal Appeal No. 270 of 2019) [2022] TZCA 477 [25 July 2022; TanzLII]. In conclusion, she urged us to quash the High Court's order and substitute for it an order that the matter be remitted to the District Court for it to recommence the proceedings according to the law. She did not, however, submit on the fate of the respondent as he awaits the proposed proceedings.

When queried by the Court on the fact that the respondent had already served jail time in default of payment of the levied fines, Ms. Paul argued that the said time was about two months. That it was a tiny portion of the imprisonment he ought to have served.

The respondent, who was self-represented, supported the High Court's decision. He insisted that restarting the proceedings before the District Court was not in the interests of justice as it would result him being persecuted, bearing in mind that following his convictions and sentences, he served time in jail having defaulted payment of the hefty fines imposed. He remonstrated that the convictions and sentences also resulted in his dismissal from his position in civil service.

Rejoining, Ms. Paul submitted that recommencement of the proceedings would be fair and just for both parties as they would have an opportunity to present their respective cases for them to be determined by a court of competent jurisdiction.

It is plain that what displeased the appellant is the decision of the High Court, revealed at page 116 of the record of appeal, withholding an order for recommencement of the proceedings. The court stated that:

> *"In my considered and firm view, in our case at hand the irregularities are immense that [do] not favour this court to order ... retrial and in the interests of justice [do] not require [so], since*

doing so will create more likelihood of causing an injustice to the respondent and hold so. I have also considered … the time spent by the respondent in prison since he was first convicted and sentenced including other matters." [Emphasis added]

Before making that finding, the High Court considered the guidance in **Fatehali Manji v. Republic** [1966] EA 343. In that case, the erstwhile Court of Appeal for East Africa observed, at 344, 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 the purpose of enabling the prosecution to fill up 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 blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where ***the interests of justice require it and should not be ordered where it is likely***

to cause an injustice to the accused person."

[Emphasis added]

What is vivid from the High Court's impugned decision is, with respect, that the court was overly preoccupied with concerns that restarting the proceedings would be prejudicial to the respondent. Certainly, the court made no attempt to weigh its fears in favour of the respondent against the appellant's interest in having the alleged offences prosecuted on behalf of the commonwealth. We are aware that when the High Court rendered its decision on 5th July, 2021, the respondent had been in prison for close to two months, having started serving the imposed jail terms, in default of payment of the fines, from 7th May, 2021. We respectfully agree with Ms. Paul that, such a short period of time would not necessarily be a reason against ordering recommencement of the proceedings.

On the other hand, we have considered the principle stated in **Pascal Clement Braganza v. R** [1957] EA 152 that re-trial should not be ordered unless the court is of opinion that on a proper consideration of the admissible, or potentially admissible evidence, a conviction might

result. We are unable, in the circumstances of this case, to make such an appraisal since the respondent did not stand trial in the court of first instance, hence not much evidence the prosecution intended to produce in support of the charges was presented.

In conclusion, we find merit in the first ground of appeal. So far as the second ground of appeal is concerned, we need not belabour on it because the impugned order for the respondent's release from prison was a natural outcome of the refusal of the order for recommencement of the proceedings against him.

In the final analysis, we agree with the learned State Counsel that the High Court wrongly directed that the respondent should not be presented before the District Court for recommencement of the proceedings against him. Nonetheless, on the totality of the circumstances of this matter as discussed above, we leave it to the discretion of the Director of Public Prosecutions to decide whether to mount a fresh prosecution against the respondent according to law. We took the same

path, for instance, in **Romward s/o Michael v. Republic**, Criminal Appeal No. 38 of 2009 [2013] TZCA 449 [17 September 2013; TanzLII].

It is so ordered.

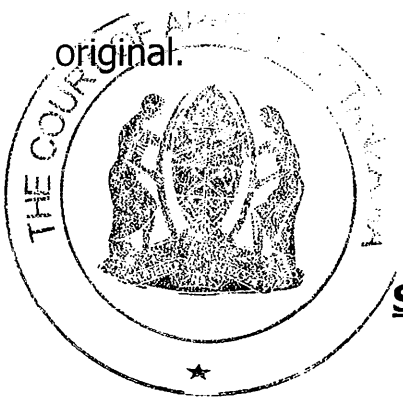
DATED at **MBEYA** this 12th day of February, 2024.

G. A. M. NDIKA
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

Z. G. MURUKE
JUSTICE OF APPEAL

Judgment delivered this 13th day of February, 2024 in the presence of Ms. Prosista Paul, learned State Attorney for the Respondent/Republic and the Respondent in person is hereby certified as a true copy of the original.



E. G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL