

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MKUYE, J.A., MWAMPASHI, J.A. And MURUKE, J.A.)

CRIMINAL APPEAL NO. 117 OF 2022

**SOLOMON MAKURU MTENYA @ KUEHembe.....1ST APPELLANT
SIASA SHABANI ATHUMANI.....2ND APPELLANT
MUSSA ABDUL LIGAGABILE.....3RD APPELLANT**

VERSUS

**THE REPUBLICRESPONDENT
(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)**

(Kakolaki, J.)

dated the 26th day of November, 2021

in

Criminal Appeal No. 40 of 2020

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JUDGMENT OF THE COURT

30th April & 20th May, 2024

MKUYE, J.A.:

Solomon Makuru Mtenya @ Kuhembe, Siasa Shabani Athumani and Mussa Abdul Lugagabile (the 1st, 2nd and 3rd appellants herein) alongside with an accomplice (former 3rd accused) who was acquitted on appeal, were charged with economic offences before the Resident Magistrates' Court for Dar es Salaam at Kisutu on three counts, to wit, 1st count of leading organized crime contrary to paragraph 4 (1) of the First Schedule to and sections 57 (1) and 60 (2) of the Economic and Organized Crime Contral Act, Cap 200 R.E. 2002 (the EOCCA); the 2nd count of unlawful dealing in trophies contrary to sections 80 (1) and 84 (1) and Part 1 of the First Schedule to the Wildlife Conservation Act, No.

5 of 2009 (the WCA) read together with paragraph 14 (b) of the First Schedule to and sections 57 (1) and 60 (2) of the EOCCA; and the 3rd count of unlawful possession of Government trophy contrary to sections 86 (1) and (2) (c) (ii) and Part 1 of the First Schedule to the WCA read together with paragraph 14 (d) of the First Schedule to and sections 57 (1) and 60(2) of the EOCCA.

Upon the conclusion of the trial, the 1st, 2nd and 4th accused (the appellants herein) were convicted of all counts while the 3rd accused was convicted with the 2nd and 3rd counts only. In the 1st count, the 1st, 2nd and 3rd appellants were sentenced to five years imprisonment and in the 2nd count, they were each along with the former 3rd accused sentenced to three years. The 3rd count earned each of the appellants and the accomplice twenty years imprisonment.

The appellants herein, being aggrieved by the decision of the trial court, lodged an appeal to the High Court but was not successful except for the then 3rd accused who won his appeal and was acquitted. The appeal by the 1st, 2nd and 3rd appellants stood dismissed for lack of merit.

A brief background of the instant appeal is as follows:

PW1, F 5925 D/Cpl Selemani, was a police officer attached to the Anti-Poaching Unit. At some time, information was passed to them that a certain Ugandan national engaged himself in the illegal trophy activities. The team made surveillance which led to the arrest of the said person at Mlimani City. Upon interrogation, that person revealed the identity of his accomplices in the illegal trade. While the Ugandan person was still under their custody, he received a phone call and the same was placed on loud speaker. That is when the name of the 1st appellant featured in the phone conversation between the Ugandan national and him concerning the contraband which was ready for transaction at Kimara Stop Over. PW1 and his team overheard the 1st appellant informing that individual to meet at Kimara Stop Over for the "mzigo" which was ready. When asked as to what was it, that Ugandan individual disclosed that it was elephant tusks.

The Ugandan national and the Anti-Poaching Unit team headed to the agreed rendezvous and on arrival they managed to arrest the 1st appellant who divulged that the contraband was in a motor vehicle nearby. When they moved to the said vehicle, they found the 3rd appellant and arrested him. A search was conducted in the vehicle and six pieces of elephant tusks placed in the trunk, were recovered. The same were seized and a seizure certificate was prepared. The other

appellants were arrested in connection with the said contraband and each recorded his cautioned statement.

Upon being aggrieved by the decision of the first appellate court, they have now appealed to this Court armed with both substantive memorandum of appeal and a supplementary memorandum of appeal for the 1st appellant alone, both consisting of a total of twenty-three grounds of appeal. They also each filed written arguments in support of their grounds of appeal. However, for a reason which will become apparent shortly, we propose not to reproduce them except for the first ground of appeal in the 1st appellant's supplementary memorandum of appeal, as we think, it suffices to dispose of the appeal without necessarily discussing the other grounds. The said ground is to the effect that:

"The learned first appellate Judge grossly erred in law by upholding the appellants' conviction while the lower trial court had no jurisdiction to try an economic crime case".

When the appeal was called on for hearing, all the three appellants appeared in person without representation; whereas the respondent Republic was represented by Ms. Elizabeth Mkunde, learned Senior State

Attorney teaming up with Mses. Salome Assey, Mossie Kaima and Bupe Mwaikambo, all learned State Attorneys.

On being invited to expound their grounds of appeal each sought to adopt the memorandum of appeal and written statement of argument to form part of their submission. Nevertheless, the first appellant opted to expound his grounds of appeal.

In elaboration of the 1st ground in the supplementary memorandum of appeal, the 1st appellant took us to pages 8-9 of the record of appeal where there are consent and certificate of transfer of the case to be tried by the subordinate court. He argued that, although the Prosecutor as shown at page 17 of the record prayed to the trial court to file a consent and the charge sheet, there is no indication that the said consent and certificate of transfer of the case signed by the Director of Public Prosecutors (the DPP) were formally received as they were not endorsed by the trial court to form part of the proceedings. He was of the view that, since the same were not endorsed by the trial court the trial court had no jurisdiction to try the economic crime case.

While referring to us to the cases of **John Julius Martin and Another v. Republic**, Criminal Appeal No. 42 of 2020 [2022] TZCA 789 (8th December, 2022) and **Salum Andrew Kamande v. Republic**,

Criminal Appeal No. 513 of 2020 [2023] TZCA 133 (22nd March, 2023), he beseeched us to nullify the proceedings and judgments of both lower courts, quash the conviction and set aside the sentences meted out against the appellants and set them free.

As to the way forward he was of the view that ordering a retrial of the case was not a viable option as it will enable the prosecution to fill in gaps in the prosecution's case due to various anomalies. Elaborating such shortcomings, he submitted that **one**, the search was illegal, **two**, PW1, PW3 and PW7's evidence contains inconsistencies and contradictions and lack of coherence; **three**, identification of elephant tusks (Exh P3) was not established; **four**, the cautioned statement of 3rd appellant (Exh P7) was relied upon by the court without corroboration from an independent witness/source; and **five**, that there was no sufficient proof of the case.

In response Ms. Mkude argued that the trial court had jurisdiction to try the case vide a consent and a certificate filed in court on 14/11/2016 and that such documents were admitted as the trial magistrate had endorsed in the charge sheet as shown at page 7 of the record of appeal. The learned Senior State Attorney went on arguing that, on the same date the trial magistrate caused the charge to be read over to the accused persons (appellants herein) and the plea was taken.

Ms. Mkude insisted that the trial court had jurisdiction to try the case under section 26 (1) and 12 (1) of the EOCCA and that the case of **John Julius Martin** (supra) and **Salum Andrew Kamande** (supra) cited by the first appellant are distinguishable since in this case the documents were filed on 14/11/2016. To bolster her argument, she referred us to the case of **Peter Kabi and Another v. Republic**, Criminal Appeal No. 5 of 2020 [2022] TZCA (1st February, 2022).

The learned Senior State Attorney did not respond as to the way forward but made submission opposing the appeal generally with a conclusion that the appeal was not merited.

Ms. Kaima chipped in and insisted that the prosecution proved its case vide eight witnesses and three exhibits and urged the Court to find that the appeal has no merit and dismiss it.

The issue for this Court's determination is whether the trial court which tried this case had jurisdiction to trial an economic case titled Economic Case No. 31 of 2016).

Section 3 (1) (3) (a) and (b) of the EOCCA vests the High Court with the jurisdiction to try economic offences. However, such offences may be tried by the subordinate courts where the DPP or an officer

authorized by him issues a certificate directing such cases to be tried by that court as per section 12(3) of the EOCCA which states 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".

Again, section 26 (1) and (2) of the EOCCA requires the DPP or an authorized officer to issue consent to prosecute a person on an economic offence. The said provision states:

"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 of consenting to the prosecution of which may be exercised by such officer or officers subordinate to him as he may specify acting in accordance with his general or special instructions”.

It is noteworthy that, in order to give effect the provisions of section 26 (2) of the EOCCA, the DPP issued such order/direction through GN No. 284 of 2004 which came to be revoked later by GN. No. 496 H of 2021.

Having scrutinized the record of appeal at hand, it is notable at pages 8 and 9 there is a purported consent of the DPP and the certificate conferring jurisdiction to try the economic offence in the subordinate court as was submitted by both sides. Both documents indicate to have been issued by Biswalo Eutropius Kachele Mganga (as he then was) and were signed on 9/9/2016. However, they do not seem to form part of record of the proceedings in the trial court. This is so because it is not borne in the record that the said consent and certificate were formally admitted by the trial court as they do not have an endorsement of the trial court before the preliminary hearing was conducted.

Ms. Mkunde forcefully argued that the same were validly received basing on the fact that the charge sheet as shown at pages 1 and 2 of the record bearing the same date was admitted by the trial court on 14/11/2016. She urged us to be convinced that the endorsement in the charge sheet also related to the consent and the certificate.

We note that at pages 1 and 2 of the record of appeal as was stated by Ms. Mkunde, there is a charge sheet which was signed by a certain State Attorney on 9/9/2016 and lodged on 14/11/2016. The same was endorsed by purportedly the magistrate as it does not clearly show the rank of a person who signed it. Apart from that, it is notable at page 17 of the record that on 14/11/2016 the learned State Attorney prayed to file the consent and the charge sheet but there was no order of the trial court granting or denying it meaning that it was not even appreciated. As it is, the leaned Senior State Attorney's line of argument does not support her proposition.

As alluded to earlier on, it is quite clear that the consent and certificate were not formally received to form part of the trial record. The position we take is further fortified by the fact that when we perused the original hand written record, it was unveiled that the said documents were never filed in the trial court. This means that it is even not clear on how the documents found their way in the record of appeal.

It follows, therefore that, the trial court was not seized with the jurisdiction to entertain the matter ultimately, the omission was a fatal irregularity which vitiated the proceedings.

The Court was confronted with akin scenario in the case of **Salumu Andrew Kamande** (supra), and had this to say:

*"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 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 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”.

[Emphasis added]

See also: **Hashim Nassoro @ Almas v. Director of Public Prosecutions**, Criminal Appeal No. 312 of 2019 [2023] TZCA 17716 (4th October, 2023).

Also, in the case of **Maganzo Zelamoshi @ Nyanzomola v. Republic**, Criminal Appeal No. 355 of 2016 [2018] TZCA 543 (7th September, 2018), the Court observed that the consent and certificate of the DPP had not been formally filed in court and endorsed as such. In finding that the omission was a fatal irregularity, the Court stated that:

“We respectively, entirely subscribe to the submission of the learned Senior State Attorney. Without the requisite consent and certificate of the learned DPP, the entire proceedings of the trial court were a nullity; just as were the proceedings of the High Court which then had no legs to stand on. Acting on the authority of section 4 (2) of the Appellate Jurisdiction Act,

(AJA), we nullify the proceedings of both courts below”.

See also: **Maulid Ismail Ndonde v. Republic**, Criminal Appeal No. 319 of 2019, [2021] TZCA 538 (29th September, 2021), **Aloyce Joseph v. Republic**, Criminal Appeal No. 35 of 2020 [2022] TZCA 771 (5th December, 2022) and **Salumu Andrew Kamande** (supra).

Applying the above cited authorities, we are of a settled view that this matter is bound to suffer a similar consequence. Since, there is no evidence as to how the consent and certificate found their way in the trial courts record it means that the trial court entertained the matter without having jurisdiction to do so. This was a fatal omission resulting to vitiating the entire proceedings of both lower courts.

In this regard, we agree with the 1st appellant that the trial court entertained this matter without having the required jurisdiction to do so and we allow the 1st appellant’s first ground of appeal.

As to the way forward, given the circumstances of the case and in the interest of justice we find this is a fit case for ordering a retrial.

That said and done, we allow the appeal on the basis of the 1st ground of appeal in the supplementary memorandum of appeal. Consequently, in terms of section 4 (2) of the AJA, we quash the

proceedings and resultant judgments of both lower courts, set aside the sentences meted out against the appellants and order for an expedited retrial before another magistrate with competent jurisdiction as per the law. Meanwhile the appellants would remain in custody.

It is so ordered.

DATED at DAR ES SALAAM this 15th day of May, 2024.

R. K. MKUYE
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

Z. G. MURUKE
JUSTICE OF APPEAL

The Judgment delivered this 20th day of May, 2024 in the presence of the 1st, 2nd and 3rd appellants in person/unrepresented and Ms. Mossie Kaima, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



A handwritten signature in black ink, appearing to read "J. J. Kamala".

J. J. KAMALA
DEPUTY REGISTRAR
COURT OF APPEAL