IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CRIMINAL APPEAL NO 39 OF 2020

(*Originating from Economic Case No 11 of 2017 of Bunda District Court at Bunda)*

ZABLON S/O LISWA @ GUILYA .....APPELLANT

Versus

REPUBLIC ..... RESPONDENT

JUDGMENT

20th July & 25.th August, 2020

Kahyoza, J.

The district court of Bunda convicted **Zablon S/O Liswa @ Guilya** (the appellant) and other two accused persons, Huru Zozolo and Sayi Ntambi who jumped bail, with three counts; **first count,** unlawful possession of weapons in the National Park; **second count** unlawful possession of weapons in the National park; and **third count**, unlawful possession of government trophy. It sentenced them to pay a fine of Tzs. 100,000/= and Tzs. 200,000/= for the first and second counts respectively and to serve an imprisonment term of twenty years for third count.

Aggrieved by both the conviction and sentence, **Zablon S/O Liswa @ Guilya** appealed to this Court contending that the trial court convicted him without a consent and a certificate conferring

jurisdiction from the Director of Public Prosecutions (the **D.P.P**), the prosecution failed to call an independent witness to corroborate the evidence of Pw1, Pw2 and Pw3, that the court failed to consider the defence case, the conviction was based on wrong exhibits and the court did not analyze the evidence.

The issues for determination are-

1. Was the trial court conferred with jurisdiction to try the appellant?
2. Was the conviction justifiable without evidence of an independent witness?
3. Did the court consider the defence?
4. Was the exhibits tendered relevant to the case at hand?
5. Did the trial court analyze the evidence?

On the 12th January, 2017 at 12.30hrs Jacob Clement (**Pw1**), and Yohana Kayumba (**Pw2**), while on their routine patrol with two other park rangers namely Deus Daniel Lukumay and and Naigunga Timwa at Mbalagati river within Serengeti National Park, saw foot prints. The traced foot prints. The foot prints led them to the bush where they heard voices. They ambushed and arrested three people, the appellant, and the other accused persons. The appellant and the other accused persons who jumped bail introduced themselves.

Jacob Clement (**Pw1**), and Yohana Kayumba (**Pw2**) deposed that they found the appellant and his co-convicts in possession of dried pieces of wildebeest meat and a dried skin of wildebeest, and weapons, namely one bush knife, two knives and five animal trapping

wires. They took the appellant and his co-convicts with exhibits to KDU for identification and valuation of exhibits and later to police station and labeled weapons.

Yohana Kayumba (**Pw2**) tendered one bush knife, three knives and five animal trapping wires as exhibit PE. 1.

William Mallya (**Pw3**), wildlife officer identified and valued the trophy. He identified the two dried pieces of meat and the dried skin. They were all of wildebeest. William Mallya (**Pw3**), valued the trophy at USD 650 or Tzs. 1,421,500/=, which is the value of one wildebeest. William Mallya (**Pw3**), prepared a trophy valuation certificate which he tendered as exhibit and the court admitted it as exhibit P.2. He tendered dried pieces of meat and skin as exhibit P.3.

The appellant denied to have committed the offences. He deposed on oath that game officers arrest him at Warajura river where he was bathing.

It is from the above background the district court convicted the appellant and other accused persons who jumped bail with offences in three counts; **one,** unlawful entry into the National Park c/s 21(1)(a), (2) and 29(1) of the National Park Act (CAP. 282 R.E. 2002) as amended by the Act No 11 of 2003,; **two,** unlawful possession of weapons in the National Park contrary to section 24(1)(b) and (2) of the National Park Act (Cap 282 R.E. 2002)**;** and **three**, unlawful possession of Government Trophies, contrary to 86 (1) and (2) (c)(iii) of the Wildlife Conservation Act, No. 5 of 2009 (as amended) read together with paragraph 14 of the First Schedule to the Economic and Organized Crime Control Act [Cap. 200, R.E 2002] (the **EOCCA)**.

The appellant prayed the Court to adopt his grounds of appeal He had nothing to add to the ground to appeal.

Mr. Temba, the state attorney represented the respondent. He opposed the appeal. I will refer to his submission in course of considering the grounds of appeal.

Was the trial court conferred with jurisdiction to try the appellant?

The appellant alleged that the magistrate erred in law and fact to convict and sentence him without a certificate conferring jurisdiction to subordinate court to try economic offence and consent from the D.P.P.

Mr Temba countered the allegation. He submitted that the prosecution tendered a certificate and consent from the D.P.P. as required by law. He contended that the prosecution tendered the certificate and consent on the date when the accused persons appeared for first time before the trial court.

It is insignificant to point out here that the said economic offences are validly tried after obtaining a consent of the D.P.P as per section 26(1) of the **EOCCA** which stipulates that-

> "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."*

On the part of subordinate courts, they can competently try economic offences provided they obtain a consent of the D.P.P as per

section 26(2) of the **EOCCA** and a certificate of transfer issued by the D.P.P or any State Attorney authorized by him to do so in terms of section 12(3) or (4) of the **EOCCA** which provides as follows:

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

The above apart, section 12(4) of the same **EOCCA** provides for the issuance of a certificate of transfer of a case involving an economic offence in combination with a non-economic offence. It states -

> *"12(4) The Director of Public Prosecutions or any State Attorney duly authorized by him, may, in each case in which he deems it necessary or appropriate in the public Interest; by a certificate under his hand order that any case instituted or to be instituted before a court subordinate to the High Court and which involves a non-economic offence or both an economic offence and a non-economic offence/ be instituted in the Court."*

I examined the trial court record and discerned that the prosecution did on the 16/January/2017 submit D.P.P's consent and certificate conferring jurisdiction to the trail court. The trial court recorded in the proceedings that *"**Court**: consent and certificate from the state attorney in charge dully filed in court"*. However, on

further scrutiny I discerned that the D.P.P issued a certificate giving jurisdiction to the trial court to try economic offence under section 12 (3) of the **EOCCA.**

The appellant stood charged and convicted with both economic and non-economic offences. As pointed out that when an accused person is charged with both economic and non-economic offences the D.P.P has to issue a certificate conferring jurisdiction to subordinate court to try both offences under section 12 (4) of the **EOCCA** and not under section 12 (3) of the **EOCCA.** As the record bears testimony, the D.P.P in this case issued a certificate conferring jurisdiction to subordinate court to try both economic and non-economic offences under section 12 (3) of the **EOCCA. Thus,** the Certificate was defective for being issued under ***sub section (3) instead sub section (4)*** **of section 12** ***of the EOCCA.***

The Court of Appeal position in **Kaunguza Machemba vs. The Republic,** Criminal Appeal No.1578 of 2013 (CAT unreported), held that the appropriate section under which the certificate ought to have been made was section 12(4) of the Act which caters for both economic and non-economic offences. Further the Court declared the trial a nullity for lack of jurisdiction on the part of the trial District Court and naturally the first appellate court.

In the absence of a valid consent and certificate, as demonstrated above, the district court had no jurisdiction to try the case. Hence, the proceedings before the district court were a nullity.

This Court and the Court of Appeal have, many times, said that the issue of jurisdiction is fundamental and basic it goes to the very root of the authority of the court to adjudicate upon case. The Court of Appeal in **Fanuel Mantiri Ng'unda V. Herman Mantiri Ng'unda & 20 Others,** (CAT) Civil Appeal No. 8 of 1995 (unreported) held that:-

> *"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 certain and assured of their jurisdictional position at the commencement of the trial.... It is risky and unsafe for the court to proceed with the trial of a case on the assumption that the court has jurisdiction to adjudicate upon the case."*

The trial court had no jurisdiction to try the case at hand. The proceedings and the judgment were all nullity. I invoke my powers of revision under section 372 of the **Criminal Procedure Act**, Cap. 20 to quash the proceedings and set aside the conviction and sentence.

In the upshot, I uphold the first ground of appeal that the magistrate erred in law to convict and sentence the appellant without a valid certificate conferring jurisdiction from the D.P.P. I see no reason to canvass on the remaining grounds of appeal. The proceedings were a nullity.

Now, that I have quashed the proceedings and set aside the conviction and sentence, the issue is whether this Court should order a trial *de novo*. It is trite law that a retrial may 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 purposes of enabling the prosecution to fill in the gaps in its evidence at the first trial. This position was stated the famous case of **Fatehali Manji v. Republic** (1966) EA 343, where the Court considered the factors in deciding whether or not to order a retrial and stated thus-

> *"In general, a retrial may 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 purposes of enabling the prosecution to fill in the gaps in its evidence at the first trial.... Each case must depend on its own facts and an order for retrial should only be made where the interest of justice requires it."*

The Court of Appeal in **Marko Patrick Nzumila & Another v. Republic,** Criminal Appeal No. 141 of 2010 CAT (unreported) held that in considering whether to order for retrial a court should consider whether it fair to do so for both the accused person and the public. It stated-

> *"Failure of justice (sometimes, referred to as miscarriage of justice) has equally occurred where the prosecution is denied an opportunity of conviction. This is because, while it is always safer to err in acquitting than punishment, it is also in the interests of the state that crimes do not go unpunished.*

So, in deciding whether a failure of justice has been occasioned, the interests of both sides of the scale of justice have to be considered."

Given the seriousness and the rampancy of the offences the appellant and the other accused persons were charged with, and the evidence on record, I am of the considered view that the scales of justice heavily tips on a retrial. I will not order a trial. I leave it to the prosecution to decide to retry or otherwise. That decision must be made within 30 days from the date of the judgment. Should the prosecution fail to commence the proceedings against the appellant within that period stated, the appellant must be released from prison.

It is ordered accordingly.

J. R. Kahyoza
JUDGE
25/8/2020

Court: Judgment delivered in the presence of Mr. Temba S/A for the respondent via video link and in the absence of the appellant. He could not connect to virtual court. Copies to be sent to prison immediately. B/C Catherine Tenga present.

THE HIGH COURT OF TANZANIA
MUSOMA

J. R. Kahyoza, J.
25/8/2020