

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(IRINGA DISTRICT REGISTRY)
AT IRINGA

ECONOMIC APPEAL NO. 26 OF 2021
*(Originating from Njombe Resident Magistrate
Court in Economic Case No. 07 of 2020)*

STEPHANO MLELWA S/O STIVIN APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

03/11 & 11/11/2021

JUDGMENT.

MATOGOLO, J.

The appellant one Stephano Mlelwa s/o Stivin was arraigned in the Resident Magistrate of Njombe Court of Njombe charged with two counts, the first count was unlawfully possession of firearm c/s 20 (1) (b) and (2) of the firearms and ammunition Control Act No. 2 of 2015 read together with paragraph 31 of the first Schedule to, and section 57 (1) and 60(2) of the Economic and Organized Crime Control Act [Cap. 200 R.E. 2002].

It was alleged in the particulars of offence that, on 25th day of May of 2018 at Mwembetogwa street within Makambako District in Njombe Region

was found in possession of one short gun with serial number Y.A 12002 without license.

The 2nd count is Unlawful possession of ammunition c/s 21(b) of the Fire arms and ammunition control Act no.2 of 2015 read together with paragraph 31 of the first schedule to and section 57 (1) and 60 (2) of the Economic and Organized Crime Control Act [Cap. 200 R.E. 2002].

It was alleged in the particulars of offence that, on 23rd day of May of 2018 at Mwembetogwa street within Makambako District in Njombe Region the appellant was found in possession of two live ammunition of caliber 12 bore without license.

The appellant pleaded not guilty to the charge. In order to prove their case the prosecution paraded five (5) witnesses namely ASP Yesaya Edward Sudi (PW1), H. 4735 D/C Amos (PW2), Silas Lameck Makweta (PW3), Tabia Shomary (PW4) and WP 9947 D/C Dorothy Laurent Silvester.

After a full trial the appellant was convicted and sentenced to serve twenty (20) imprisonment for each count.

The appellant was aggrieved with both conviction and sentence. He has come to this court with a petition of appeal of five (5) grounds appeal as follows:-

1. That, the trial Court wrongly heard to determine the charged offences without taking into account that has no jurisdiction in the sense that consent and certificate from the DPP were not filed.

2. That, the learned trial Magistrate erred both in law and facts to prepare Memorandum of facts not in dispute which was signed without being read to the appellant contrary to section 192 (3) of the Criminal Procedure Act [Cap. 20 R.E. 2019].
3. That, the learned trial Magistrate erred both in law and facts for failure to draw inference adverse towards the prosecution side as to why the appellant stayed in Police Custody from 23/05/2018 up to 21/06/2018 without reasonable explanation.
4. That, the trial Court wrongly held that the prosecution side proved this case beyond reasonable doubt without considering that "chain of Custody" was not tendered as exhibit before the Court of law.
5. That, the prosecution side failed totally to prove this case beyond reasonable doubts on the reasons that the appellant's names were not resolved also his room was searched during night hours contrary to the law.

The appellant prays that this appeal be allowed, conviction be quash and set aside the sentences meted against him and consequently order immediate release from prison forthwith.

At the hearing of this appeal, the appellant appeared in person (unrepresented) while Mr. Alex Mwita the Learned State Attorney appeared for the Republic.

The appellant in supporting his appeal he submitted that, he was dissatisfied with the decision of the District Court. He has appealed to this court and filed petition of appeal of five grounds. He had no any additional grounds. He prayed to this court to consider his grounds of appeal.

Mr. Mwita on his side supported the appeal.

He submitted that, in his grounds of appeal the appellant has put forward five grounds of appeal challenging the conviction against him. Among the five grounds, the 1st ground suffices to dispose of the appeal. Thus, his submission was based on the first ground of appeal.

Mr. Mwita submitted that, in first ground of appeal the appellant complains that the trial court erred to convict him because the offence which appellant was charged was heard before the trial court was conferred with trial jurisdiction as there was no consent and certificate from the DPP filed before it.

He went on submitting that, according to the trial court record, the appellant was charged with two counts. The 1st count being unlawful possession of the gun Contrary to Section 20(1)(b)(2) of the Arms and Ammunitions Act No. 2 of 2015 read together with paragraph 31 of the 1st schedule and S. 57 (1) and 60(2) of the Economic and Organized Crime Control Act, Cap. 200 R.E. 2002.

The second count is unlawful possession of ammunition Contrary to Section 20(2) of the Arms and Ammunition Act read together with S. 57(1) and 60(2) of the Cap. 200 R.E. 2002.

He submitted further that, it is alleged that the incident occurred on 23/05/2018, the appellant was charged in Economic Crime Case No. 2 of 2020.

In 2016 the offences of possession of guns and Ammunition were grouped as economic offences following amendments Act No. 3 of 2016.

Mr. Mwita was of a considered view that, as the charged offences were economic crime offences, for subordinate court to have jurisdiction to try this case, it must have consent and certificate by the DPP. As provided for by S. 26(1) of the Economic and Organized Crimes Control Act Cap. 200 R.E.2019.

The requirement of certificates is provided for under S. 12(3) of the same Act.

He said that, according to S. 26 (1) of the Act no trial can commence unless there is consent by the DPP.

He submitted further that under S. 12(3) requires certificate by the DPP before trial commences.

Mr. Mwita submitted that, according to the lower court proceedings from page 1 the appellant appeared before the trial court for the first time on 16/03/2020 when the charge was read to him to which he pleaded not guilty on both counts.

In the second page it is indicated that investigation was complete the case was scheduled for preliminary hearing and consequently the appellant was tried up to the end.

He submitted that, according to the trial court record there is nowhere indicated that the consent and certificate by the DPP was filed

before the trial court for that case the trial court tried the appellant without being vested with jurisdiction.

He submitted that, although in this appeal among the documents they have been served include the certificate by the DPP, but the record does not reveal if that certificate was formerly lodged in court before trial commences. He insisted that, the case was heard while the trial court had no jurisdiction.

Mr. Mwita submitted that, as the trial court tried this court without having trial jurisdiction he prayed to your honourable court to quash the proceedings and judgment of the trial court.

He said in the case of ***Mauld Ismael Ndonde vs. The Republic***, Criminal No. 319 of 2019 CAT at Iringa the Court of Appeal was faced with a similar situation, it nullified the proceedings and judgment and set aside conviction and sentence and ordered for immediate release of the appellant although in the ordinary case they would order a retrial but that would only help the prosecution to fill in gaps in their case.

Mr. Mwita concluded by submitting that, on part of the Respondent they would apply for a retrial, but they desist to apply for this basing on the above cited case, he prayed for the appellant to be released from the prison.

In a short rejoinder the appellant agreed with what was submitted by the State Attorney.

Having heard the respective submissions by the parties and having gone through Court records as well as having read the grounds of appeal, I

am of the opinion that the issue to be determined here is whether this appeal has merit.

As it was correctly submitted by Mr.Mwita that, the first ground of appeal suffice to dispose of this appeal as it is a legal issue which ought to be complied with, failure of which renders the trial court proceedings a nullity. Upon going through the trial court record it is plain clear that there was no any consent and certificate filed by the DPP

Section 26(1) and (3) of the Act, requires that consent of the DPP must be given before any trial involving an economic offence can commence. This was also held in the case ***Paulo Mathayo versus Republic [1995] T.L.R 144.***

However, the subordinate Court has jurisdiction to try the case provided that they obtain a consent of the DPP as provided for under section 26(2) of the Economic and Organizes Crime Control Act and a certificate of transfer issued by him or any other State Attorney authorized by him to do so in terms of section 12 (3) the EOCCA which provides that:-

"12(3) The Director of Public Prosecutions or any State Attorney duly authorized by him, may, in each case 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 subordinate to the High Court as he may specify in the Certificate"

The trial court proceedings is silent with regard to consent and certificate of the DPP.

As we have seen above according to section 26(1) and (2) of EOCCA (supra), it is mandatory that the consent of the DPP must be given before any trial involving an economic offence can be tried.

The trial magistrate was supposed to make sure that, before hearing the case the consent of the DPP and certificate were already filed in court to confer him jurisdiction to try the case.

But in the instant case on 16/03/2020 when the accused was sent to the court for the first time, the charge was read to him and a plea of guilty was entered against him. But there no where in the trial court proceedings showing that, the State Attorney addressed the court regarding the consent and the certificate, even the Magistrate himself has not reordered in the proceeding to show whether the consent of the DPP was obtained to confer the court with the jurisdiction to try the case. For that reason, I agree with the submission by Mr. Mwita that, the trial court records does not show that, when the charge was brought to the court was attached together with the Consent of the DPP and Certificate, nor were they filed in court later The trial court proceedings does not reveal on the said consent and Certificate by the DPP. It is my opinion the Certificate and Consent were not formerly lodged in court before trial has commenced.

In the case of ***Ramadhani Omary Mtiula versus Republic***, Criminal Appeal No. 62 of 2019 CAT at Iringa (unreported) at page 7 when the court referred its previous decision in the case of ***Fanuel Mantiri***

Nag'unda versus Herman Mantiri Ng'unda and 20 Others CAT Civil Appeal No. 8 of 1995 (unreported) it was held that:-

*"The question of jurisdiction for any court is the 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 ".*

Also, in the same case of **Ramadhani Omary Mtiula versus Republic**, (supra) at page 9 provides that;

"Thus, without the DPP's consent and certificate conferring the respective jurisdiction, the District Court of Songea embarked on a nullity to try criminal case No. 8 of 1995. On that account, since the first appeal stemmed from null proceedings this adversely impacted on the appeal before the High Court and the present appeal. This is because a judgment in an appeal from the proceedings which were a nullity is also a nullity"

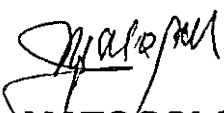
The same position applies to our instant case as the trial court made decision without jurisdiction, a judgment of the court without jurisdiction is a nullity and where a court takes upon to exercise a jurisdiction which it does not possess its decision amounts to nothing.

That said, I order that the proceedings of the trial court is hereby quashed, the conviction thereof is also quashed and sentence set aside. I order for the immediate release of the appellant unless lawfully held for other causes.

It is so ordered.

DATED at IRINGA this 11th day of November, 2021.




F.N. MATOGOLO
JUDGE.
11/11/2021

Date: 11/11/2021
Coram: Hon. F. N. Matogolo – Judge
Appellant: Present
Respondent: Radhia Njovu –State Attorney
C/C: Grace

Radhia Njovu – State Attorney:

My Lord I am appearing for the Republic. The appellant is present. The appeal is for judgment we are ready.

COURT:

Judgment delivered



F. N. Matogolo
F. N. MATOGOLO
JUDGE
11/11/2021