

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
THE DISTRICT REGISTRY OF MBEYA
AT MBEYA
CRIMINAL REVISION NO. 1 OF 2021

*(Originating from the District Court of Mbozi at Vwawa, Economic Case No.
1/2021)*

THE REPUBLIC..... APPLICANT

VERSUS

SEMENI GWEWA MSWIMA..... RESPONDENT

JUDGMENT

Date of last order 22/06/ 2021

Date of Judgment 05.07.2021

A.Mambi, J.

This Judgment emanates from the revision filed by the Respondent (The Director of Public Prosecution). Earlier the Trial District Court of Mbozi convicted and sentenced the respondent on his admission.

Aggrieved, the applicant (DPP), filed an application for revision to set aside the decision of the trial court which was based on irregularities.

During Hearing the applicant (DPP) was represented by the learned State Attorney Ms. Tengeneza while the respondent appeared unrepresented. The learned State Attorney briefly submitted that they have filed their application under section 372 CPA, Cap 20 for this court to make revision of the decision of the trial court. She argued that, the respondent was charged with 61 counts and he admitted but the trial court wrongly convicted him. She argued that since there was no consent and certificate from the DPP, the trial court had no jurisdiction. She argued the trial court acted contrary to Section 26 of the EOCA. She was of the view that both conviction and sentence were illegal. She prayed the matter to be remitted to the trial court for proper proceedings.

The respondent in this case appeared unrepresented and he briefly submitted that he had nothing to add

I have considerably gone through the submissions of the learned state attorney, and proceedings of the trial court. The submission and arguments by the prosecution the issue as to whether there were irregularities on the proceedings emanating from the defective consent filed by the DPP at the trial Court to enable that court to entertain economic case. My thorough perusal from the trial records shows that the trial Court had no jurisdiction since the DPP had not yet filed the consent and certificate. It is clear that the trial court proceeded with the matter without having such proper mandatory legal document. Having gone through the records it appears that the matter

before the trial court involved an economic offence which fall under economic case under the Economic and Organized Crimes Act Cap 200 [R.E.2019]. I am aware of the provisions of the law that all economic offences the Economic and Organized Crimes Act Cap 200 [R.E.2019] requires consent and certificate of the Director of Public Prosecution (DPP) to enable the District Court to have power or jurisdiction to deal with these offences. However, it is on the records that the trial court entrained and determined the case on economic offences which are only triable by the High Court unless the DPP consents and gives certificate for those offences to be dealt with by the District Court. Reference can be made to the relevant law that by then was dealing with the economic offence and this is the Economic and Organized Crimes Act Cap 200 [R.E.2019]. Section 3 of this law provides that:

*“The jurisdiction to hear and determine cases involving economic offences under this Act is hereby vested in the **High Court**”. (emphasis supplied with).*

Section 3 can be read together with section 57 of the same law which provides that:

*“With effect from the 25th day of September, 1984, the offences prescribed in the First Schedule to this Act shall be known as **economic offences** and triable **by the Court in accordance with the provisions of this Act**”.(emphasis supplied with).*

Reading between the lines on the above provisions of the law it is a general position that the only court that has jurisdiction

to deal with economic offences is the High Court. However, there are exception that where the DPP consents and gives certificate, those offences can also be dealt with by the District Court. This is provided under section 12(3) of the Economic and Organized Crimes Act Cap 200 [R.E.2019] which provides that:

*“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**”.*(emphasis supplied with).

My simple understanding from the above provision of the law is clear that the District Court as a subordinate to the High Court has no direct power to deal with economic offences unless the DPP by certificate orders that a case involving economic offences triable by the High Court under the Economic and Organized Crimes Act Cap 200 [R.E.2019] be tried by such court **subordinate to the High Court (the District Court** in our case). It papers that the trial magistrate assumed that matter involved a normal criminal case that is why he might have thought that there was no need of DPP Consent. However, the trial records show that the respondent was charged with 61 counts some of which involve economic offences.

Now having seen the requirements of the law under the above section, the question is; did the DPP Consent and give certificate for this case to be tried by court subordinate that is the District Court of Mbozi? If no and the court went on with dealing with the case involving an economic offence what will be the consequence of such omission? I agree with the learned State Attorney that there was neither consent nor certificate by DPP to empower the trial court with jurisdiction to deal with the matter. This is as good as saying there was no Consent from the DPP to empower the trial court to deal with the matter that involved an economic offence. I thus agree with the Learned State Attorney that the trial court wrongly proceeded with the case while there was no consent and Certificate from the DPP. In this regard, **the trial court had no jurisdiction** to entertain economic offence under which the respondent was charged. This means that since the District Court entertained the matter to which it had no jurisdiction, all proceedings before both courts were nullity. This desires and raises some questions to be posed and answered by this court. One of the question is, were those omissions or irregularities curable or not? The other question to be asked and answered if all proceedings before the trial court were nullity what will be the fate or aftermath of this application? Indeed the trial Magistrate knowing that he had no direct jurisdiction to deal with the matter at his hand, he ought to have made a due diligence perusal of the file to see if there was

there was any certificate with the consent from the DPP as required by the law. This would have enabled him to be in a better position as to whether he would proceed with the matter or not. Worth making reference to the decision of the Court of in ***Ngoni - Matengo Cooperative Marketing Union Ltd v Ali Mahomed Osman (1959) EA 577*** (referred also in *Ibrahim Omary (Ex.D. 2323 Ibrahim) Versus The Inspector General Of Police, The Permanent Secretary, Ministry of Home Affair And The Attorney General, Civil Case No. 33 of 2001*) at page 580 which held that: -

*...This court, **accordingly, had no jurisdiction to entertain, what was before the court being abortive,** and not a properly constituted appeal at all. What this court ought strictly to have done in each case was to "strike out" the appeal as being incompetent, rather than to have "dismissed" it; **for the latter phrase implies that a competent appeal has been disposed of, while the former phrase implies that there was no proper appeal capable of being disposed of...*** (Emphasis supplied with.)

It was similarly held by the Court in ***Agness Loreu King'ori versus Solomon Loreu King'ori, Abel Loreu King'ori and Elia Loreu King'ori*** that;

*"in the circumstances, as the two Tribunals embarked on nullity before this court **there is no appeal** which is accordingly struck out".*

It is my considered opinion since all proceedings before the trial court were nullity, nothing can be said that there was valid judgement. My reasoning is based on the fact that since

the trial court had no jurisdiction there is no proper conviction and sentence against the respondent. In other words the respondent is wrongly placed before the prison for non-existed conviction and sentence as all the proceedings before the District Court are nullity.

Failure for the trial to consider such serious irregularities that I have observed meant that the trial court acted in contravention of legal principles which warrants this to interfere. See **BERNADETA PAUL v REPUBLIC 1992 TLR 97 (CA)**. In our case in hand it is clear from the record that the Trial Magistrate acted upon some wrong principle and made his judgment basing on the matter that he had jurisdiction.

In view of the foregoing shortcomings, it is evident that the respondent did not receive a fair trial in the trial court. It is a general rule that, the accused person must be given the benefit of doubt as underscored by the court in the case of **Director of Public Prosecutions v Elias Laurent Mkoba and Another [1990] TLR 115 (CA)**. This means that the trial magistrate was justifiably required to give the accused the benefit of the doubt in the circumstances. I entirely agree with the learned State Attorney that the court needs to intervene the decision of the trial court through revision under sections 272 and 273 of the Criminal Procedure Act, Cap 20 [R.E.2019]. Now having observed those serious irregularities, the question before me is to determine what should be the best way to deal with this matter in the interest of justice. In

my considered view the best way to deal with this matter is by way of revision. In this regard I wish to invoke section 272 and 273 of the Criminal Procedure Act, Cap 20 [R.E.2019] which empowers this court to exercise its revision powers to examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any subordinate court. This in accordance with section 372 of the Act. Section 373 further empowers the court that in the case of any proceedings in a subordinate court, the record of which comes to its knowledge, the High Court may in the case of conviction, exercise any of the powers conferred on it as an appellate court of appeal by sections 366, 368 and 369 and may enhance the sentence or order otherwise. The Court is also empowered in the case of any other order.

I wish to refer section **372** of the Criminal Procedure Act, Cap 20 [R.E.2019] as follows:

“372. The High Court may call for and **examine** the record of any criminal proceedings before any subordinate court for **the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed**, and as to the regularity of any proceedings of any subordinate court.

Furthermore, section 373 of the same Act provides that:

“(1) In the case of any proceedings in a subordinate court, the record of which has been called for or which has been

*reported for orders or which otherwise **comes to its knowledge**, the High Court may–*

(a) in the case of conviction, exercise any of the powers conferred on it as a court of appeal by sections 366, 368 and 369 and may enhance the sentence; or

*(b) in the case of any other order other than an order of acquittal, **alter or reverse such order...***

(1) of section 219 of this Act shall be deemed not to be an order of acquittal.

(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence; save that an order reversing an order of a magistrate made under section 129 shall be deemed not to have been made to the prejudice of an accused person within the meaning of this subsection.

(3) ...

(4) Nothing in this section shall be deemed to preclude the High Court converting a finding of acquittal into one of conviction where it deems necessary so to do in the interest of justice

(5)....”

Reading between the lines on the above provisions of the law empower this Court wide supervisory and revisionary powers over any matter from the lower courts where it appears that there are illegalities or impropriety of proceedings that are likely to lead to miscarriage of justice. Reference can also be made to other laws. In the regard I

will refer section 44 (1) (a) and (b) of Magistrates Courts Act Cap 11 [R.E. 2019] which clearly provides that:

“44 (1) In addition to any other powers in that behalf conferred upon the High Court, the High Court–

*(a) **shall exercise general powers of supervision over all district courts and courts of a resident magistrate** and may, at any time, call for and inspect or direct the inspection of the records of such courts and give such directions as it considers **may be necessary in the interests of justice**, and all such courts shall comply with such directions without undue delay;*

(b) may, in any proceedings of a civil nature determined in a district court or a court of a resident magistrate on application being made in that behalf by any party or of its own motion, if it appears that there has been an error material to the merits of the case involving injustice, revise the proceedings and make such decision or order therein as it sees fit:”

From the above findings and reasoning, I hold that from the above provisions of the law including various decision by the court, this court is right in exercising its supervisory and revisionary power on the matter at hand as noted by the learned State Attorney. The law is clear that it is proper for this court to invoke provisional powers instead of appeal save in exception cases.

Looking at the issues as to whether there were any irregularities in the decision of the trial District Court or not. It is clear as I observed earlier as well as noted by the learned State Attorney that the key documents were NOT filed which

meant that the trial court had no jurisdiction in the absence of the Consonant and certificate by the DPP.

Having observed that the trial court lacked jurisdiction and wrongly proceeded convicting and sentencing the respondent without the key document such as the consent from the DPP, I find that the proceedings and the Judgment before the District Court were nullity. To my surprise, the District didn't bother to note such immense irregularity and it instead went on entertaining an improper matter before it. One would have expected that the prosecution should have informed and reminded the trial court at the earliest stage before the court went on hearing the matter that it had no jurisdiction. In my consider view this was wrong as the Magistrate ought to consider all the documents to satisfy himself on the correctness. Had the Magistrate considered this irregularity he could have been in the better position to determine as to whether he had jurisdiction or not.

This means that since the District Court entertained the matter which it had no jurisdiction, meant that all proceedings before both courts were nullity. This desires and raises some questions to be posed and answered by this court. One of the question is, were those omissions or irregularities curable or not?.

From my findings and observations, I am satisfied that the respondent's trial and decision were not properly made as the District court failed to notice some irregularities which lead to

injustice on the part of the accused who is now the applicant. The question now is, should this court order retrial or trial de novo?. To answer this question, I wish to refer case of **Fatehali Manji V.R, [1966] EA 343**, cited by the case of **Kanguza s/o Machemba v. R Criminal Appeal NO. 157B OF 2013**, where the Court of Appeal of East Africa restated the principles upon which court should order retrial. It said:-

*“...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...**”*

I subscribe the position of the court above which stated that 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 applicant. I also wish to refer section 388 (1) of the *Criminal Procedure Act*, Cap 20 [R.E.2019 which reads as follows:

“(1) Subject to the provisions of section 387, no finding sentence or order made or passed by a court of competent

*jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or in any inquiry or other proceedings under this Act; save that where on appeal or revision, the court is satisfied that such error, omission or irregularity has in fact **occasioned a failure of justice**, the court **may order a retrial or make such other order as it may consider just and equitable**".*

The above provision of the law implies that this court can make any order **as it may consider just and equitable where** it is satisfied that such error, omission or irregularity has in fact **occasioned a failure of justice**. In my view an order of acquittal will be just and equitable since an order for retrial occasion into a failure of justice.

In terms of Section 388 (1) of *the Criminal Procedure Act*, Cap 20 [R.E.2019] it is the finding of this court that on the account of improper proceedings, conviction and sentence, this court is satisfied that such errors, omissions or irregularities are immense and has in fact occasioned failure of justice to the respondent.

Indeed the same provision that is sections 372 & 373 of the CPA Cap 20, empowers with discretionary powers to make any order that does not prejudice the rights of the accused (the respondent). The interpretation of the provision of the above law implies that where the court decides to make any order

whether acquittal or retrial or any order, the decision must base on the interest of justice.

In my considered and firm view, in our case at hand the irregularities are immense that does not favour this court to order for retrial and the interests of justice does not require to, since doing so will create more likelihood of causing an injustice to the respondent and I hold so. I have also considered and taken into account the time spent by the respondent in prisons since he was first convicted and sentenced including other matters.

Thus considering the circumstances, I consider quashing the conviction and setting aside the sentence ordered by the District Court. I also find it nullifying the proceedings and Judgment at the District Court would be appropriate for the interest of justice and I hold so.

In the premises, I nullify all proceedings from Judgment at the District Court which results in the immediate release of the respondent. I order that the respondent be released from prison forthwith unless he is held on other lawful cause.

Order accordingly.



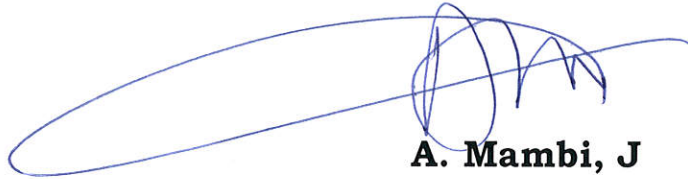
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A. Mambi, J

Judge

05.07.2021

Judgment delivered in Chambers this 5th day of July 2021 in presence of both parties.

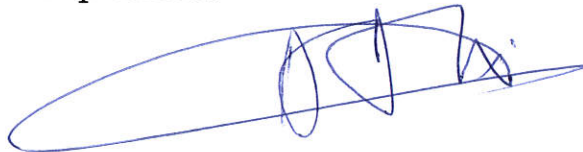
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A. Mambi, J

Judge

5.07.2021

Right of Appeal explained.

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A. Mambi, J

Judge

5.07.2021