IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 53 OF 2021

(Originating from District Court of Same at Same, Economic Case No. 10 of 2018)

SAID SALUM MOHAMED ..... 1ST APPELLANT

RAJABU AMIRI PONDA .....2ND APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

MUTUNGI .J.

The appellants Said Salum Mohamed and Rajabu Amiri Mponda were arraigned before the District Court of Same at Same (trial court) in **Economic Case No. 10 of 2018** on three counts. The same were, 1st count unlawful possession of Government Trophy c/s **86 (1) (2) (c) (ii) of the Wildlife Conservation Act, No. 5 of 2009** (WCA) read together with **paragraph 14 of the 1st Schedule to s. 57 (1) the Economic and Organised Crimes Control Act**, Cap 200 R.E. 2002 as amended by **S. 16 (a) of the Written Laws (Miscellaneous Amendment) Act, No. 3 of 2016**.

2nd count, unlawful possession of weapons in the National Park c/s **103 of the Wildlife Conservation Act No. 5 of 2009** read together with **paragraph 14 (d) of the 1st schedule to s. 57(1) the Economic and Organised Crimes Control Act, Cap 200 R.E. 2002** as amended by **s.16 (a) of the Written Laws (Miscellaneous Amendment) Act, No. 3 of 2016**. The last count being unlawful entry into the National Park **c/s 21 (1) (a) of the National Park Act, Cap 282 R.E. 2002** as amended by **Act No. 11 of 2003.**

A brief background leading to this appeal is to the effect that, on 8th September, 2018, the appellants while in possession of weapons, to wit twenty four wire snares, two bush knives, one knife and two spears unlawfully entered into Mkomazi National Park within Same District in Kilimanjaro Region. They were found within the Park possessing Government trophies to wit, one head and eight legs of Swala Impala valued at TZS 1,716,000/= the property of the United Republic of Tanzania.

The respondent marshalled a total of six witnesses and tendered seven exhibits to prove their case, while the defence had two witnesses, (the appellants). Eventually, the appellants were found guilty on all counts and sentenced to serve twenty years in prison for the 1st count

and one year imprisonment for each of the 2nd and 3rd counts. The sentences were to run concurrently. Aggrieved by the decision, the appellants preferred this appeal advancing ten grounds as follows: -

1. That, the trial magistrate erred in law and fact in failing to note and hold that, the prosecution witness who alleged to have witnessed the search and seizure failed to specify the place where the exhibits tendered were recovered.
2. That, the trial magistrate erred in law and fact in relying upon exhibit P1 in relation to the search and seizure while the same was conducted in violation of laws relating to search and seizure.
3. That, the trial magistrate erred in law and fact in relying on PW4, PW5, PW6 and Exhibit P5 in relation to the disposal order which was wrongly issued, tendered and admitted in court.
4. That, the trial magistrate erred in law and fact in failing to note and hold that the principles regarding chain of custody was not observed during investigation up to the trial as required by the law.
5. That, the trial magistrate erred in law and fact in convicting the appellants basing on suspicious evidence.

6. That, the trial magistrate erred in law and fact in failing to accord the appellants with a copy of the complainant statement making the whole trial against them an ambush.
7. That, the trial magistrate erred in law and fact in failing to comply with section 231 of the CPA when addressing the appellants after being satisfied that the prima facie case was established.
8. That, the trial magistrate erred in law and fact in failing to comply with section 312 (2) of the CPA when convicting the appellants.
9. That, the trial magistrate erred in law and fact in failing to note and hold that Exhibit P2, handover form and Exhibit P6, trophy valuation certificate were not read aloud before the court after they were cleared for admission.
10. That, the trial magistrate erred in law and fact in failing to hold and appreciate that the prosecution case failed to prove the charge against the appellants beyond reasonable doubt.

In light of the foregoing grounds, they prayed this Court allows the appeal, quashes the sentence and sets them free.

During hearing of this appeal, the appellants appeared in person and unrepresented whereas the respondent was represented by Mr. Innocent Eliawony Njau, senior learned State Attorney. The appeal was heard by way of filing written submissions.

The appellants jointly submitted in relation to the 1st ground that, PW1 and PW2's testimonies show, when the search was conducted, they found the appellants with two machetes, two spears, on knife, twenty four wire snares, one head and eight legs of impala. However, their testimonies do not give details on who was found with what and the exact place where the seized items were retrieved.

On the 2nd ground, the appellants argued, the trial court relied on the seizure certificate while the same was tendered and admitted without following proper procedures. They argued, no receipts were issued by PW1 as a seizing officer which is contrary to section 38 (3) of the **Criminal Procedure Act, Cap 20. R.E. 2019** (CPA). To cement this argument, they cited the case of **Selemani Abdallah and Others Vs. Republic, Criminal Appeal No. 384 of 2008** where the Court underscored the importance of issuing receipts after completion of a lawful search. They

also cited the case of **Patrick Jeremiah Vs. Republic, Criminal Appeal No. 34 of 2006** where the Court of Appeal held, failure to comply with section 38 (3) of the CPA is a fatal omission. That apart Exhibit "P1" was tendered by the prosecutor instead of the seizing officer which is contrary to the law and procedure as was in the case of **Thomas Ernest Msungu @ Nyoka Mkenya Vs. Republic, Criminal Appeal No. 78 of 2012** where it was held, by tendering the exhibit, the prosecutor assumed the role of a witness while he is not a kind of witness who can be cross examined upon oath or affirmation.

Submitting on the 3rd ground, the appellants argued, the trial magistrate erred in relying on exhibit P5, (the inventory form) in convicting the appellants while the same was acquired without following the procedures. They argued, it is not certain whether the seized trophies really existed as no photographs were taken as required by law. More so, since they were perishable exhibits, the law is clear upon disposition but in this case the whole disposition process was flawed. They did not witness the alleged disposition of the head and eight legs of Impala as ordered by the Magistrate. They added, even their signatures do not appear on Exhibit "P5" thus, they were denied the right to be heard. The appellants cited the case of **Mohamed**

Juma @ Mpakama Vs. Republic, Criminal Appeal No. 385 of 2017 CAT at Mtwara (unreported) which underscored the importance of accused's presence when filling the Inventory and taking photographs when there are perishable exhibits.

Regarding the 4th and 5th grounds, they submitted, the chain of custody of exhibits was also flawed. They argued, the law requires exhibits before storage, they should first be attached with exhibit labels as per **PGO No. 229**. The label should further reflect the force number, rank, name and signature of the handing over and receiving officers. However, PW1 and PW2's testimonies do not reveal these aspects, thus the trial magistrate erred in relying on Exhibit P2 and P4, (handing over forms) in convicting the appellants. More so, it is not clear how the seized weapons, (Exhibit P3) found their way back to PW1 who tendered them in Court while they were handed to PW3.

On the 6th, 7th and 8th grounds which were argued simultaneously, they stated they were never addressed in terms of section 231 of the CPA after the trial magistrate found the prosecution side had established a *prima facie* case against them. Also, she omitted to specify and mention under which law were they found guilty of which

is contrary to section 312 of the CPA. Neither were they furnished with the copy of complainant's statement as provided for by section 9(3) of the CPA.

Lastly on the 9th and 10th grounds, the appellants contended, the trial magistrate failed to note that Exhibit P2, (handing over form) and Exhibit P6, (the trophy valuation form) were never read aloud before the court after they were cleared for admission. As a result, they failed to cross examine on the same. Conclusively, the appellants averred the case against them was never proved at the required standard. They prayed this court allows the appeal, quashes the conviction, sets aside the sentence and sets them free.

On the other side of the coin, Mr. Njau submitted they support the appeal not on the grounds advanced by the appellants but rather on the jurisdiction of the trial court which convicted them. He asserted, all the three counts that the appellants were charged with, were on the same charge sheet involving economic and non-economic offences. He added, under the provisions of section 3 of the Economic and Organized Crime Control Act, Cap 200 R.E. 2002, the Court vested with exclusive jurisdiction to try economic cases is the High Court. However, by the

consent of the Director of Public Prosecution (DPP), the same can be tried in subordinate courts as per section 26 (1) and (2) of the same Act. More so, there should also be filed a Certificate of Order, conferring jurisdiction and allowing trial to commence at the subordinate court as provided for under section 12 (4) of the same law.

The Senior Attorney further explained, a Certificate of Order was never issued, while the consent from the DPP was not endorsed by the court officer showing when it found its way to the court. Although in the proceedings, the trial magistrate admitted the consent at the time of substitution of the charge but is nowhere to be found in the court record. In that regard, the learned state attorney argued, the trial courts proceedings and decision are a nullity as the court lacked jurisdiction to entertain the same. He cited the case of **Adam Selemani Njalamoto Vs. The Republic, Criminal Appeal No. 196 of 2016, CAT at Dar es Salaam (unreported)** and prayed that this Court allows the appeal, nullifies the proceedings and sets aside the conviction and sentence metted out by the trial court.

Mr. Njau concluded his submission by citing the case of **Fatehali Manji Vs. Republic, [1966] E.A 343** and prayed this Court be inspired to order a retrial, since the mentioned

irregularities were occasioned by both the trial court and the prosecution. Be as it may, the retrial will be in the interest of justice and the appellants will not be prejudiced in anyway.

In their brief rejoinder, the respondent insisted on their innocence and prayed this Court should not order a retrial as the respondent will utilize that opportunity to fill in the gaps in their case.

After going through both parties' submission and trial court's records, I will start with the issue of jurisdiction as raised by the respondent. The same is fundamental in all proceeding before any trial. On this I will discuss two issues;

(i) Did this case require consent and a certificate order from the DPP under section 26 (1) ad 12 (4) of EOCCA (the Economic and Organized Crimes Control Act, Cap 2013 R.E. 2019) respectively?

(ii) If the first issue is affirmative, what is the remedy?

Starting with the 1st issue, section 26(1) of EOCCA provides 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.*

Also section 12 (4) of the same law reads;

> *(4) 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 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.*

From the above quoted provisions and as rightly submitted by the respondent's Attorney, it is undisputed, this case requires both a consent from the DPP and a certificate order conferring jurisdiction to the trial court. This is so because the appellants were charged among others with the economic offences under paragraph 14 of the 1st schedule to s. 57 (1) of the EOCCA.

Although the consent document is mentioned by the trial magistrate that it was admitted before commencement of the trial, the same is nowhere to be found in the file record. I took time to peruse the record of the trial court, what I found as rightly argued by the respondent was a one-page

document headed, Consent of the Prosecuting Attorney In charge at the top and Certificate order for trial in the middle. In the case of **Abdulswamadu Azizi Vs. The Republic, Criminal Appeal No. 180 of 2011 CAT at Mwanza (unreported)**, the Court of Appeal held that;

> *"In the instant case, the counts against the appellant combined the economic and non-economic offences, but again no certificate of the DPP was issued. This Court in its various decisions had emphasized the compliance with the provisions of section 12 (3), 12 (4) and 26 (1) of the Act and held that the consent of the DPP must be given before the commencement of a trial involving an economic offence. For instance, See, the decisions in the cases of* ***Rhobi Marwa Mgare and Two Others Vs. The Republic****, Criminal Appeal No. 192 of 2005,* ***Elias Vitus Ndimbo and Another Vs. The Republic****, Criminal Appeal No. 272 of 2007,* ***Nico s/o Mhando and Two Others Vs. The Republic****, Criminal Appeal No. 332 of 2008 (all unreported)"*

In **Selemani Njalamoto Vs. Republic (supra)**, when deciding the effect of the lack of consent from the DPP the Court of Appeal had this to say;

"In view of this legal position, ***the appellant was prosecuted without consent*** *and a certificate of transfer by the Director of Public Prosecutions, in the result, we are of the view that the proceedings,* ***the conviction and sentences in the trial court and in the first appellate court were illegal and nullity"*** *(Emphasis mine)*

In the same stream undertaken by the Court of Appeal, I am inclined to hold, the proceedings and the judgment of the trial court were a nullity and illegal as the same commenced without the DPP's consent as required by law. Once the case was a combination of both economic and non-economic offences such transfer had to be done in terms of section 12(4) of EOCCA. In view thereof the trial court lacked the preliquisite jurisdiction. That is to say the first is issue is answered in the affirmative.

Turning to the second issue, as to what would be the remedy in the given scenario. I wish to be guided by the case of **Adam Selemani Njalamoto Vs. Republic (supra).**

"We are mindful that where the trial court fails to direct itself on an essential step in the course of the proceedings, it does not in our view, automatically follow that a re-trial should be

ordered, even if the prosecution is not to blame for the fault. ***Clearly of course each case must depend on its particulars."*** *(Emphasis mine)*

However, in the case of **Fatehali Manji Vs. Republic, [1966] E.A 343** discussing when to order a retrial, the Court of Appeal held;

"Generally 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 be blamed, it does not necessarily follow that a retrial should be ordered;* ***each case must depend on its own facts and circumstances*** *and an order for retrial should only be made where the interests of justice require it." (Emphasis mine)*

Merging the above authorities to the case at hand, it is worth pointing out, the consent by the DPP was not the only thing that the prosecution failed to execute. For instance, looking at the first count of unlawful possession of

Government trophies, the same was not proved to the required standard. I say so because the Government trophies allegedly found with the appellants were not physically tendered as evidence and the appellant had no opportunity to object as they were perishable Government trophies. **Section 101 of the WCA** and **paragraph 25 of PGO No. 229** gives direction on how to dispose perishable Government trophies by the Director and by police during their investigations respectively. The provisions read;

> *"101 (1)-Subject to section 99 (2), at any stage of the proceedings under this Act, the court may on its own motion or on an application made by the prosecution in that behalf order that any animal, trophy, weapon, vehicle, vessel or other article which has been tendered or put in evidence before it and which is subject to speedy decay, destruction or depreciation be placed at the disposal of the Director. "*

Paragraph 25 of PGO No. 229 (INVESTIGATION - EXHIBITS) applies, and states: -

> *"25. Perishable exhibits which cannot easily be preserved until the case is heard, shall be brought before the Magistrate, together with the prisoner (if any) so that the Magistrate may note the exhibits*

and order immediate disposal. Where possible, ***such exhibits should be photographed before disposal.*** *[Emphasis added]."*

The above procedure gives mandate to any nearby court to issue a disposal order, but in doing so, the accused person/s have to be present so that they cannot be curtailed their right to be heard on the matter. That was not the case in the current appeal. Page 44, 45 of the trial court's proceedings when PW6 testified, he stated;

"After handover I took the accused and the exhibits to Same District Court. I saw the Magistrate along with accused and the exhibits in presence of the court clerk.

The Magistrate ordered opening of the bag with exhibits and she saw them, then an inventory form was signed by the Magistrate which form came with. She ordered the disposal of the exhibits"

This clearly does not relate if the appellants were at all given room to be heard on the seized trophies. Facing a similar scenario, the Court of Appeal in the case of **Mohamed Juma @ Mpakama Vs. The Republic, Criminal Appeal No. 385 of 2017, CAT at Mtwara**, observed: -

"The above paragraph 25 envisages any nearest Magistrate, who may issue an order to dispose of perishable exhibit. This paragraph 25 in addition emphasizes the mandatory right of an accused (if he is in custody or out on police bail) to be present before the Magistrate and be heard. In the instant appeal, the appellant was not taken before the primary court magistrate and be heard before the magistrate issued the disposal order (exhibit PE3). While the police investigator, Detective Corporal Saimon (PW4), was fully entitled to seek the disposal order from the primary court magistrate, the resulting Inventory Form (exhibit PE3) cannot be proved against the appellant because he was not given the opportunity to be heard by the primary court Magistrate. In addition, no photographs of the perishable Government trophies were taken as directed by the PGO. Our conclusion on evidential probity of exhibit PE3 ultimately coincides with that of the learned counsel for the respondent. Exhibits PE3 cannot be relied on to prove that the appellant was found in unlawful possession of Government trophies mentioned in the charge sheet."

I fully subscribe to the above position and hold exhibit P5 cannot be relied upon to prove the 1st count against the

appellants. To put salt to the wound, the same was tendered by the Public Prosecutor (P.P) and not the witness, (PW4). On this I associate myself with the authority in the case of **Thomas Ernest Msungu (supra),** that the law is loud a Prosecutor is not a kind of a witness that can be cross examined upon oath or affirmation hence it was wrong for him to tender the same. In that regard, Exhibit P5, (Inventory form) is hereby expunged from the record and without it, the whole prosecution case is shaken.

In the circumstances, ordering a retrial, will be by any standards allowing the prosecution to fill in the gaps. Even though following the foregoing analysis it would not be in the interest of justice to order a re-trial.

In the circumstances, I nullify and quash the proceedings, judgment of the trial court and sets aside the conviction and sentence made thereof. I proceed to order the immediate release of the appellants unless held for same lawful cause.

It is so ordered

B. R. MUTUNGI
JUDGE
25/11/ 2021

Judgment read this day of 25/11/2021 in presence of the appellants and Mr. Innocent Njau (S.S.A) for the respondent.

B. R. MUTUNGI
JUDGE
25/11/2021

RIGHT OF APPEAL EXPLAINED.

B. R. MUTUNGI
JUDGE
25/11/2021