

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MWANZA**

AT MWANZA

CRIMINAL APPEAL NO. 8 OF 2022

(Originating from Criminal Case No. 80 of 2013 of District Court of Magu at Magu)

ISACK ALBANO @MLORI..... APPELLANT

Versus

REPUBLIC RESPONDENT

JUDGMENT

15TH & 22ND June, 2022

Kahyoza, J:

The district court of Magu convicted **Isack Albano @ Mlori** after a full trial with two offences; **one**, being in possession of ammunition contrary to sections 4(1) and 34(2) of the Arms and Ammunition Act, [Cap. 223 R.E. 2002]; and **two**, being in possession of ammunition contrary to sections 4(1) and 34(2) of the Arms and Ammunition Act, [Cap. 223 R.E. 2002]. The trial court imposed a custodial sentence of 15 years. It ordered the sentence to run concurrently.

Aggrieved, the appellant appealed to this Court contending raising twelve ground of appeal. I will not reproduce grounds of appeal as only one of the grounds of appeal is sufficient to dispose the appeal. The appellant complained in one of the grounds of appeal that the trial

magistrate erred in law and fact to convict him with the offence of unlawful possession of ammunition without DPP's consent.

Being hearing commenced Ms. Tibilengwa, Principal State Attorney conceded to the ground of appeal. She submitted that the appellant was charged with the offence under sections 4(1) and 34(2) of the Arms and Ammunition Act, [Cap. 223 R.E. 2002], which is an economic offence. For that reason, trial court had no jurisdiction to try the appellant without consent and a certificate conferring it jurisdiction from the DPP. She prayed the case to commence afresh.

The appellant had nothing substantive to reply. He opposed the State Attorney's submission. This is the first appellate Court; thus, tasked with a duty to rehear and re-evaluate the evidence together with a duty to consider the appellant's grounds of appeal. (**Alex Kapinga v. R.**, Criminal Appeal No. 252 of 2005 (CAT unreported)).

There is only one issue whether being in possession of ammunition contrary to sections 4(1) and 34(2) of the Arms and Ammunition Act, [Cap. 223 R.E. 2002] is an economic offence. The appellant committed the offence allegedly in 2013. The offence of being in possession of ammunition contrary to sections 4(1) of the Arms and Ammunition Act, [Cap. 223 R.E. 2002] was an economic offence. It is obvious that trial of

economic cases could be commenced only with consent from the DPP, as provided by section 26 (1) of the **Economic and Organized Crimes Act** [Cap. 200 R.E. 2002] (the Act) provides as follows: -

"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." (Emphasis added).

In addition, subordinate courts require not only consent from the DPP to try economic offences but also a certificate issued under section 12 of the Act. In the present case where the appellant was charged only with economic offence, the DPP had to issue a certificate conferring jurisdiction under section 12(3) of the Act. Section 12 (3) of the Act provides as 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 a 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 trial court not only tried an economic offence without consent but also without a certificate conferring jurisdiction as demonstrated above. The Court of Appeal faced with a similar situation in the case of **Abdulswamadu Azizi v. R.**, Cr. Appeal No. 180 of 2011 held that: -

"As pointed earlier herein above, in the instant case the appellant was charged with a combination of economic and non-economic offences, but the requirements of section 12 (3), 12 (4) and 26(1) of the Act were not complied with. There was no consent of the DPP and certificate of transfer of the economic offence to be tried by Bukoba District Court. For that reason, we are constrained to find that the trial and proceedings before the District Court of Bukoba in Criminal Case No. 153 of 2008 and the High Court Criminal Appeal No. 8 of 2010 at Bukoba were nothing but a nullity. That also leads us to the finding that even the conviction and sentence were null and void."

In fine, the trial court had no jurisdiction trial an economic offence for want of consent and certificate from the DPP, hence, the proceedings and the subsequent conviction and sentence were a nullity. Consequently, I quash the proceedings, set aside the conviction and sentence.

Next, I will consider whether to order a retrial. In **Fatehali Manji v R** [1966] E.A. 341 the then Court of Appeal of East Africa laid down the principle governing retrial. It stated-

"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 shall be ordered; each case must depend on its own facts and circumstances and an order of retrial should only be made where the interests of justice require."

The respondent's Principal State Attorney prayed for trial *de novo*.

I have considered the evidence on record and came to the conclusion that the evidence is wanting or to order trial *de novo* will be to give the prosecution a chance to fill gaps. It is not disputed that central to the evidence of the prosecution is the evidence that the appellant's house was recovered one homemade gun (pistol) and three gun bullets. Police conducted a search in the home of the appellant in the presence of independent persons but did not summon any of them to testify. ASP Vedasto Erasto (**Pw1**)'s evidence established that there were people who witnessed the search. Vedasto Erasto (**Pw1**) deposed that-

"We summoned tenants in the house and started search..."

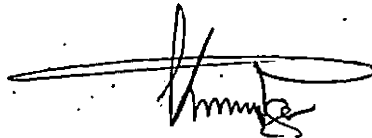
It is settled that no search of premises shall be effected without; **one**, search warrant; **two**, the presence of the owner of premises; **three**, the presence of an independent witness who is required to sign to verify his presence; **four**, issuance of receipt acknowledgment of seizure of

property. See **Samwel Kibundali Mgaya v. R.**, Cr. Appeal No. 180/2020 CAT unreported.

The prosecution did not summon an independent witness to testify. To order trial *de novo* will give the prosecution an opportunity to fill the gap.

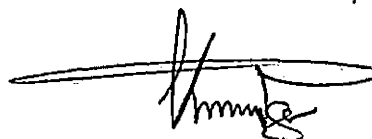
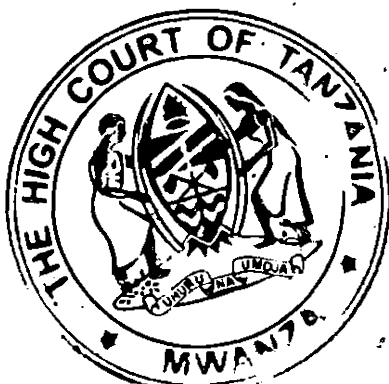
In the end, I allow the appeal, quash the conviction, and set aside the sentence. I order the appellant's immediate release from prison unless held there for any other lawful cause.

It is ordered accordingly.



**J. R. Kahyoza,
Judge
22/6/2022**

Court: Judgment delivered in the virtual presence of the appellant and Mr. Emmanuel Luvinga S/SA. Mr. Sweetbert (RMA) present.



**J. R. Kahyoza
JUDGE
22/6/2022**