IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CONSOLIDATED CRIMINAL APPEAL NO. 43 AND 52 OF 2022

(C/F Decision of the Resident Magistrate's Court of Arusha at Arusha in Economic Case No. 25 of 2021 before Hon. Ngoka, SRM)

THE DIRECTOR OF PUBLIC PROSECUTIONS.... APPELLANT/RESPONDENT

VERSUS

HAPPINESS D/O MICHAEL MOLLEL.....RESPONDENT/APPELLANT

JUDGMENT

16th & 24th June, 2022

N. R. MWASEBA, J.

Happiness D/O Michael Mollel, herein referred to as the respondent/ appellant, was sentenced to pay a fine of five (5) million shillings or to serve 20 years imprisonment in default upon conviction by the Resident Magistrate Court of Arusha at Arusha for one count of Unlawful Possession of Government Trophy contrary to Section 86 (1) (2) (b) of the Wildlife Conservation Act No. 5 of 2009, read together with paragraph 14 (2) and (6) of the 1st schedule to and Sections 57 (1) and 60 (2) of the Economic and Organized Crime Control Act, Cap 200 R.E

2002 as amended by Sections 16 (a) and 13 (b) respectively of the written Laws (Miscellaneous Amendments) Act No. 3 of 2016.

Aggrieved by the sentence the appellant/respondent herein preferred Criminal Appeal No. 43 of 2022 whereas the respondent/appellant being dismayed by both conviction and sentence preferred Criminal Appeal No. 52 of 2022. It was mutually agreed that the two appeals be consolidated. Both are subject of this judgment. Thus, the DPP and Happiness D/O Michael Mollel will be referred to as the appellant/respondent and the respondent/ appellant respectively.

Briefly stated facts relevant to this matter reveal that, on 18.12.2019 at about 11:00 hrs while he was in his office at Police central Arusha, PW1 (Inspector Fredrick Mapunda) received information from a police informer that there was a person at Namanga who was selling elephant tusks. He went to Namanga Police Station where he notified Inspector Mbaraka regarding the information he received. They went at the scene together with WP 10926 Neema (PW2), Inspector Mbaraka and DC Frez at around 17:00 hrs. Upon their arrival they informed Ward Executive Officer (WEO) who is a PW4 about the information and waited to arrest the accused. Later on, at 18:00hrs they saw the respondent/appellant herein carrying a *sulphate* bag, they called PW4 and upon arrival they

asked PW2 to search the respondent/appellant as she was a woman. After searching her, she was found with four pieces of elephant tusks a property of the government without a license from the Director of Wildlife.

Thereafter, a certificate of seizure was filled and both of them signed it including the respondent/appellant. Thereafter, she was taken at Police Central Arusha and the exhibits were handed over to PW1 (Juma Kahusa) a custodial who filled a handing over form and signed it together with PW2. He marked the exhibits before keeping them in police custody. On 19.12.2022 the said exhibits were evaluated by PW4 who found that they valued at the tune of USD 15,000 equal to TZS 34,485,000/=. The respondent/appellant was later arraigned before Arusha Resident Magistrate Court to answer her charge.

Defending herself, the appellant at the trial court denied the charge and alleged that she was arrested by the police officer on her way to the shop on 18.12.2022 at 19:30 hrs. She knows nothing about the possession of elephant's tusks as alleged by the prosecution.

The trial Magistrate acting on such evidence, got satisfied that the respondent/appellant committed the offence and proceeded to convict and sentence her as charged.

After the deliverance of the said decision both parties were aggrieved by it. Being dissatisfied with the amount of fine imposed to the respondent/appellant, appellant/respondent lodged an appeal No. 43 of 2022 under certificate of urgency armed with one ground as follows:

i) *That, the trial magistrate erred both in law and fact by delivering the sentence and ordering the respondent to pay a fine of Tshs. 5,000,000/=in contravention to the Wildlife Conservation Act, No. 5 of 2009.*

On her side the respondent/appellant herein also was aggrieved by both conviction and sentence of the trial court, she filed Criminal Appeal No. 52 of 2022 armed with four grounds a follow:

i) *That, the trial court erred in law and fact in convicting and sentencing the Appellant while it had no jurisdiction.*

ii) *That, the appellant was not given the fully right to be heard during the trial.*

iii) *That, the trial court erred in law and fact in convicting and sentencing the appellant herein while the Republic did not prove its case beyond reasonable doubt.*

iv) That, the Honorable Resident Magistrate erred in law and fact by convicting and sentencing the Appellant without properly evaluating the evidence adduced during the hearing.

At the hearing, the appellant/respondent was represented by Ms Eunice Makala, learned State Attorney whereas Mr Sylvester Kahunduka, learned Counsel, represented the respondent/ appellant. The appeal and cross appeal were disposed of orally.

Having gone through submissions made by both parties the issue for determination is whether the trial court had jurisdiction to conduct the trial basing on the Certificate issued by the Director of Public Prosecutions in Economic No 107 of 2019.

The said issue is linked with the first ground of appeal in respect of Criminal Appeal No. 52 of 2022, whereby Mr Kahunduka, learned counsel for the respondent/appellant avers that the trial court had no jurisdiction to entertain the matter at hand. He argued that at the trial court the respondent/appellant was charged with an economic offence and according to **Section 3 of Economic and Organized Crime Control Act** the jurisdiction to try economic cases lies to the High Court. He added that **Section 12 (3) Economic and Organized Crime Control Act** gives lower court mandate to try economic cases

upon the issuance of certificate from the DPP. It was his further submission that the consent brought in economic case No. 25 of 2021 which is subject for this appeal was for economic case No. 107 of 2019 which was dismissed after the prosecution entered Nolle against the respondent/appellant herein. Thus, it was his prayer for the court to quash and set aside the trial court's proceedings and judgment for being illegal and acquit the respondent/appellant herein. He prays for acquittal because ordering re-trial will be unfair to her as she has already served enough years in custody since economic case No. 107 of 2019 which was dismissed up to the present one. To support his arguments, he cited the case of **Mhole Saguda Nyamagu Vs The Republic**, Criminal Appeal No. 337 of 2016 (CAT- Unreported) and **Kaunguza S/O Machemba Vs The Republic**, Criminal Appeal no. 157B of 2013 (CAT-Unreported).

Objecting this ground, Ms Makala argued that the trial court prior to the hearing of the case was given consent by the DPP on 19.05.2021 and the certificate was there. The certificate was given to the respondent/appellant herein although it reads Economic Case No. 107 of 2019 the errors which are cured under **Section 388 of the Criminal Procedure Act**, Cap 20 R.E 2019.

I have heard the submissions from both sides with regard to the consent given to the lower court to determine this case. There is no dispute that the certificate conferring jurisdiction on a subordinate court to try an economic case was issued but in respect of Economic Case No. 107 of 2019. The same was filed together with the charge in Economic case No. 25 of 2021. The trial magistrate proceeded with the determination of the case after having such a certificate.

Section 12 (3) of Economic and Organized Crime Control Act provides that:

> "*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 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 is mine).

The above provision provides that certificate may be issued in each case. That means in each specific case. In our present case, the consent and certificate submitted by the prosecution Attorney in Charge of Arusha Regional office reads "Signed *at Arusha this 19th day of May, 2021,"* and it was in respect of Economic Case No. 107 of 2019 while the current case is Economic Case No. 25 of 2021. That means the said

certificate was given specifically for Economic case No. 107 of 2019 which is no longer before the court and not Economic case No. 25 of 2021. That means, there was no consent in respect of Economic case No. 25 of 2021. The learned State Attorney stated that it was an error which can be cured by **Section 388 (1) of the Criminal Procedure Act.** With due respect this cannot be cured under the above provision. The provision stipulates that:

> *"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." (Emphasis added)*

The above provision as emphasized bars the appellate court to reverse or alter the findings, sentence or order made by a court of competent jurisdiction 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. In this case the trial

court vested itself with the jurisdiction it did not have thus the above provision cannot apply here. In the premises this court do agree with the counsel for the respondent/appellant that the trial court had no mandate to entertain this case in the absence of valid consent and certificate hence lacks jurisdiction. Thus, to determine the case while it had no jurisdiction its effect is nullification of the proceedings, judgment and sentence.

Legally, after nullifying the proceedings the remedy is to order for retrial. Now the question here is whether an order for re-retrial may serve justice to both parties?

There are certain principles of law, which must be complied with prior to ordering *trial de novo*. In the case of **Peter s/o Mutabuzi Vs. R** [1968] HCD 149 the court held:

> *"Each case must depend on its own particular facts; re-trials should be ordered only "where the interests of justice require it and should not be ordered where it is likely to cause an injustice to an accused person."*

Also, in the case of **Fatehali Manji Vs Republic** (1964) E.A 343 the court provided the conditions for ordering re-trial as follows:

> *"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 purpose of enabling the prosecution to fill in gaps in its evidence at the first trial. Each case must be depended on its own facts and an order for retrial should only be made where the interests of justice require it."

I am aware that the respondent/appellant has been in remand when the Economic case No. 107 of 2019 was prosecuted against her, again she has been in custody when the Economic case No. 25 of 2021 of which its evidence therein does not incline me to order for retrial.

Accordingly, I invoke my revisional jurisdiction and declare the entire proceedings, judgment and sentence a nullity. The conviction is quashed, and sentence set aside. The respondent/ appellant should be set at liberty unless otherwise lawfully held.

It is so ordered.

DATED at **ARUSHA** this 24th day of June, 2022.

N.R. MWASEBA

JUDGE

24.06.2022