

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(TABORA DISTRICT REGISTRY)**

**AT TABORA**

**CRIMINAL APPEAL CASE NO. 54 OF 2022**

*(Arising from Economic Case No. 4 of 2021, Nzega District Court - S.C. Mushi - RM)*

**KAZILO NDOLENGE ..... APPELLANT**

**VERSUS**

**THE REPUBLIC..... RESPONDENT**

**JUDGMENT**

*Date of Last Order: 02/06/2023*

*Date of Judgment: 05/06/2023*

**KADILU, J.**

The appellant was charged with three counts. In the first count, he was charged with the offence of unlawful possession of ammunition contrary to Section 21 (a) and (b), Section 57 (1) and (2) of the Firearms and Ammunitions Control Act No. 2 of 2015 read together with Section 60 (2) of the Economic and Organized Crime Control Act [Cap. 200 R.E. 2019]. It is alleged that on the 7<sup>th</sup> day of April, 2021 at Kaselya area, Igilali Village within Nzega District in Tabora Region, the appellant was found in unlawful possession of two pistol bullets and a bullet shell without license.

The second count was unlawful possession of Government trophies contrary to Section 86 (1) and (2) (c) (iii) of the Wildlife Conservation Act No. 5 of 2009 read together with Section 57 (1), Section 60 (2) and paragraph 14 (d) of the first schedule to the Economic and Organised Crime Control Act [Cap. 20 R.E 2019] (*sic*). The prosecution alleged that on the 7<sup>th</sup> day of April, 2021 at Kaselya area, Igilali Village within Nzega District in

Tabora Region, the appellant was found in unlawful possession of Government trophies to wit three (3) pieces of common duiker horns (*sylvicapra grimmia*) valued Tshs. 1,150,000/= and a bush pig skin valued Tshs. 966,000 without permit.

The third count was unlawful possession of Government trophies contrary to Section 86 (1) and (2) (c) (iii) of the Wildlife Conservation Act No. 5 of 2009 read together with Section 57 (1), Section 60 (2) and paragraph 14 (d) of the first schedule to the Economic and Organised Crime Control Act [Cap. 20 R.E 2019] (*sic*). The prosecution alleged that on the 7<sup>th</sup> day of April, 2021 at Kaselya area, Igilali Village within Nzega District in Tabora Region, the appellant was found in unlawful possession of Government trophy to wit African hare skin (*lepus capensis*) valued Tshs. 172,500/= without permit.

At the conclusion of the trial, the appellant was convicted for four counts (*sic*) and sentenced to serve imprisonment for 20 years for each count. The sentences were to run concurrently. Dissatisfied with both the conviction and sentence, the appellant filed this appeal consisting of three (3) grounds as follows:

- 1. That, the trial Magistrate erred in law and facts for convicting the appellant in four counts while he was charged with three counts only.*

2. *That, the trial Magistrate erred in law and facts to convict the appellant for the charged offences while the proceedings were tainted with irregularities.*
3. *That, the trial Magistrate erred in law and facts by convicting the appellant for a case which was not proved beyond reasonable doubt as required by the law.*

On the day of hearing the appeal, the appellant was represented by Mr. Fadhili Kingu, the learned Counsel whereas the respondent Republic was represented by Mr. Joseph Mwambwalulu assisted by Ms. Joyce Nkwabi, both the learned State Attorneys. Submitting on the first ground of appeal, Mr. Fadhili stated that on 16/6/2021, the charge sheet against the appellant was amended whereby the appellant was charged with three counts, but in the judgment of the trial court the appellant was convicted and sentenced for four counts. Mr. Fadhili said that the fourth count of unlawful possession of ammunition was added by the court.

Regarding the second ground of appeal, Mr. Fadhili submitted that the trial court's proceedings were surrounded by irregularities. Pointing out some of the irregularities, he told the court that the appellant's names in the charge were different from those contained in the DPP's certificate conferring jurisdiction to the trial court. He added that the case number in the charge differed from the case number in the DPP's consent. Mr. Fadhili explained that the effect of such irregularity is to take away the trial court's jurisdiction to try the matter. He referred to the case of ***Dilipkumar Maganbai Patel***

**v R.**, Criminal Appeal No. 270 of 2019, Court of Appeal of Tanzania at Dar es Salaam.

The other irregularity relates to the DPP's certificate and consent. The learned Advocate asserted that these documents were not admitted and endorsed by the trial court. He elaborated that the omission touches the root of the case and impairs jurisdiction of the trial court as it was held in the case of **John Julius Martin & Another v R.**, Criminal Appeal No. 42 of 2020, Court of Appeal of Tanzania at Arusha. It was further contended by Mr. Fadhili that during the trial, the court asked questions to the appellant before he was sworn and become a witness.

The learned Advocate continues to point out that the appellant was not afforded an opportunity to cross-examine PW2 after he was recalled as a witness. In yet another irregularity, Mr. Fadhili referred to page 70 of the trial court's typed proceedings in which the State Attorney informed the court that the appellant was not conversant with Kiswahili language. Notwithstanding, the proceedings are silent as to who was appointed the interpreter and the appellant was never asked if he had any conflict of interest with the interpreter. On this point, Mr. Fadhili made reference to the case of **Mussa Mwaikunda v R.**, TLR [2006] 87.

At page 67 of the proceedings, it shows that the appellant told the court that he did not know the document being tendered, but the court ruled that the same is not an objection known in law. The trial court did not

conduct an inquiry to ascertain the matter raised by the appellant. According to Mr. Fadhili, the effect of this irregularity is that exhibit P8 was not admitted properly so, it has to be expunged from the court's record. He referred to the case of ***Iddi Abdallah @ Adam v R.***, Criminal Appeal No. 202 of 2014, Court of Appeal of Tanzania at Mwanza.

On the third ground of appeal, Mr. Fadhili stated that the case against the appellant was not proved beyond reasonable doubt as the cautioned statement was recorded 24 hours after the appellant was arrested. He cited Section 51 (1) of the Criminal Procedure Act, [Cap. 20 R.E.] and the case of ***Jumanne Mohammed & Another v R.***, Civil Appeal No. 534 of 2015, Court of Appeal of Tanzania at Tabora in which a similar anomaly was held to have vitiated the recorded statement. The learned Advocate explained further that, the receipt of seizure was not issued along with a certificate of seizure, something which is a violation of the law.

In the case of ***Ndima Kashinje @ Joseph v R.***, Criminal Appeal No. 446 of 2017, Court of Appeal of Tanzania at Shinyanga, it was stated that issuance of a receipt of seizure is a mandatory requirement of the law. Finally, Mr. Fadhili explained that the prosecution did not produce chain of custody of the exhibits as required by the law. He referred to the trial court's proceedings and said that there is no paper trail between PW2, PW3, PW4 and PW5. According to him, that was a serious omission which vitiated the proceedings. To buttress his argument, Mr. Fadhili referred to the case of ***Juma Iddi @ Dude v. R.***, Criminal Appeal No. 558 of 2020, Court of Appeal

of Tanzania at Dodoma and the *DPP v Festo Emmanuel Msongaleli*, Criminal Appeal No. 62 of 2017, Court of Appeal of Tanzania at Dodoma.

Mr. Fadhili implored the court to allow the appeal, to quash conviction and sentence imposed against the appellant and set him free from prison.

Responding to the submissions by Mr. Fadhili, Mr. Joseph conceded to the first ground of appeal and urged the court to expunge from the records the fourth count which the trial court had added to the appellant. He also admitted that the trial court's proceedings were tainted with irregularities as demonstrated by the learned Advocate for the appellant. He however, told the court that the remaining evidence of the prosecution witnesses was sufficient to justify conviction and sentence against the appellant. In alternative, Mr. Joseph prayed for this court to order retrial of the appellant by the trial court.

By way of rejoinder, Mr. Fadhili resisted the prayer by the State Attorney that the appellant should be retried by the District Court of Nzega. He said this is not a fit case for the order of retrial as it will give the prosecution an opportunity to rectify the observed anomalies and fill in the gaps in its case to the detriment of the appellant. The learned Counsel explained that the case at hand does not qualify the conditions for retrial as laid down in the case of *Fatehali Manji v R.*, [1966] EA 343. He urged the court not to order retrial of the appellant as it will act in his disadvantage.

Having examined the grounds of appeal and submissions by both Counsel, I find no need to dwell on the grounds of appeal since the observed irregularities which are apparent on the records are sufficient to dispose this appeal. Under Section 3 of the EOCCA [Cap. 200 R.E 2019], the court with jurisdiction to try economic offences is the High Court. However, Section 12 (3) of the EOCCA, 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."*

Section 26 (1) of the same Act provides for the requirement of consent from the DPP or a person authorized by him, before such any economic offence is tried by subordinate court. The section provides:

*"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."*

In the present case, certificate of the DPP conferring jurisdiction to Nzega District court to try an economic offence and consent of the DPP are the points of the appellant's complaint in his second ground of appeal. These documents were not admitted and endorsed by the trial court. I thus, agree with Mr. Fadhili that non-compliance with that legal procedure is fatal. The

record is silent as to whether these instruments were tendered and admitted by the court.

Consequently, in the absence of the consent and the certificate of the DPP, the trial court lacked jurisdiction to try this case rendering the entire proceedings a nullity. This position was held in the cases of ***Mhole Saguda Nyamagu v R.***, Criminal Appeal No. 334 of 2016, ***Adam Selemani Njalamoto v. R.***, Criminal Appeal No. 196 of 2016 whereby, it was stated that:

*"... we are satisfied that in the absence of the DPP's consent given under Section 26 (1) of the Act and the requisite certificates given under subsections (3) and (4) of Section 12 of the Act, the trial District Court had no jurisdiction to hear and determine charges against the appellant, as it did. We further firmly hold that the purported trial of the appellant was a nullity. In a similar vein, the proceedings and the judgment made by the High Court dated 8/06/2016 based on null proceedings of the trial court was also a nullity."*

Similarly, in ***Maganzo Zelamoshi @ Nyanzomola v R.***, Criminal Appeal No. 355 of 2016, there was a certificate and consent in the record of the trial court, but they were not endorsed by the trial Magistrate as having been duly admitted on record, or did the trial court reflect that there were such documents on record. The court was considered lacking the requisite jurisdiction to try the case. Since the consent and certificate were neither endorsed nor reflected on the trial court's records, I hold that the District



Court of Nzega commenced the Economic Case No. 04 of 2021 without having jurisdiction. The law is very clear that the decision reached by any court without having jurisdiction is a nullity.

Section 388 of the Criminal Procedure Act provides that where on appeal or revision, the court is satisfied that there was an error, omission or irregularity in the proceedings of the trial court occasioning a failure of justice, the court may order a retrial or make such other order as it may consider just and equitable. The principle as to whether or not to order a retrial was laid down in the case of ***Fatehali Manji v R.***, (*supra*) in which it was stated that:


*In general, a retrial will be ordered 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 gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of a 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 own facts and circumstances and an order for retrial should only be made where the interests of justice require it."*

In my considered opinion, the appeal at hand is a fit case to order a retrial because all the anomalies pointed out by the Advocate for the appellant are procedural irregularities. Whereas the essence of criminal justice is to ascertain innocence of the accused or otherwise, in the case at hand substance of the charge was not faulted in anyway by the said

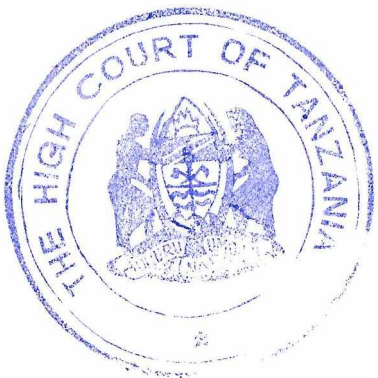
irregularities. In that situation, it is hard for the court to rule without hesitation that the appellant is guilty of the charged offence or not. The interest of justice demands the case file to be remitted back to the trial court so that the appellant may be re-tried.


That said and done, I see no reason to deal with other grounds of appeal as doing so will not serve any meaningful purpose. I dismiss the appeal and order the appellant to be tried afresh by the District Court of Nzega before a different learned Magistrate.

**Order accordingly.**

  
**KADILU, M.J.,**  
**JUDGE**  
**05/06/2023**

Judgement delivered in chamber on the 5<sup>th</sup> Day of June, 2023 in the presence of Mr. Fadhili Kingu, Advocate for the appellant and Ms. Eva Msandi assisted by Ms. Joyce Nkwabi, State Attorneys for the Respondent, Republic.



  
**KADILU, M. J.,**  
**JUDGE**  
**05/06/2023.**