THE UNITED REPUBLIC OF TANZANIA

(JUDICIARY)

THE HIGH COURT

(MUSOMA SUB REGISTRY)

AT MUSOMA

CRIMINAL APPEAL No. 127 OF 2022

(Arising from the Resident Magistrates' Court of Musoma at Musoma in Economic Case No. 2 of 2020)

1. AMOS NYAKYAGA @ NYANGO &
2. SELEMANI ALLY @ WARANGE ..... **APPELANTS**

Versus

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

JUDGMENT

22.05.2023 & 29.05.2023

Mtulya, J.:

In the present appeal, three (3) officers of this court, *viz*: **Mr. Salehe Nassoro, Mr. Frank Nchanila** and **Ms. Beatrice Mgumba** are in agreement that when consent and certificate conferring jurisdiction to subordinate court of **Serengeti District Court at Mugumu** (the district court) to resolve **Economic Case No. 2 of 2020** (the case), the **Resident Magistrates' Court of Musoma at Musoma** (the RMs court) cannot hear and determine the case.

In support of the position, the learned minds have registered a barrage of relevant materials in submissions and precedents of our superior court in judicial hierarchy, the Court

of Appeal (see: **Omary Bakary @ Daud v. Republic**, Criminal Appeal No. 52 of 2022; **Dilipkumar Maganbai Patel v. Republic**, Criminal Appeal No. 270 of 2019; **Yusuph Masalu @ Jiduvi & Three Others v. Republic**, Criminal Appeal No. 163 of 2017; **Nico Mhando & Two Others v. Republic**, Criminal Appeal No. 332 of 2008; and **Rhobi Marwa Mgare & Two Others v. Republic**, Criminal Appeal No. 272 of 2007).

I have consulted the current judgments of the Court of Appeal (the Court) in the cited judgments, *viz*: **Omary Bakary @ Daud v. Republic** (supra), **Dilipkumar Maganbai Patel v. Republic** (supra), and **Yusuph Masalu @ Jiduvi & Three Others v. Republic** (supra). The Judgment of **Omary Bakary @ Daud v. Republic** (supra) shows that the appellant was convicted by the **District Court of Lushoto at Lushoto** (Lushoto District Court) for two counts, *viz*: unlawful possession of firearm called home made gun make short gun and unlawful possession of ammunition. His appeal in this court located at Tanga was declined. The appellant then appealed to the Court and the appeal was scheduled for hearing on 25th April 2022.

However, before the appeal hearing proceedings could take its course, the Court had noted three (3) anomalies and one (1)

related to the DPP's consent. The Court at page 7, 8 and 9 of the judgment, in brief, had observed that:

> *...for the reason of the certificate and consent being issued prior to the initiation of the instant charge, the trial court had no jurisdiction to entertain the matter. These are no doubt economic offences which ordinarily are within the jurisdiction of the Corruption and Economic Division of the High Court. A subordinate can only enjoy such jurisdiction if the DPP issues a certificate directing that the offence be tried by the respective subordinate court and the certificate should be accompanied by the DPP consent. This is in terms of sections 26 (1) and 12 (3) of the EOCCA.... There was a charge which initiated Economic Case No. 1 of 2019. It was however withdrawn and the current one instituted. With the withdrawal of the of the initial charge, the certificate phased out of existence. So was the consent.*

Regarding the jurisdiction, status of the proceedings and judgment of Lushoto District Court, the Court had replied at page 9 of the judgment that:

*...it is obvious that the trial court acted without jurisdiction. In law, therefore, the proceedings and the judgment of the trial court were null and void...armed with the above authority [**Ramadhani Omary Mtiula v. Republic**, Criminal Appeal No. 62 of 2019], we are of the view that, as there was no consent and certificate from the DPP conferring jurisdiction to the trial court to try the case, the proceedings of the trial court as much as it is for the first appellate court were null and void.*

On the other hand, the precedent in **Dilipkumar Maganbai Patel v. Republic** (supra) had stated, at page 11 of the judgment, that:

This Court in its various decisions had emphasized the importance of compliance of sections 12 (3) and 26 (1) of the EOCCA and held that the certificate and consent of the DPP must be given before commencement of a trial involving an economic offence before subordinate courts...in view of the irregularities in the consent and certificate of the DPP with regard to the name and

propriety of the provisions of the law, the trial court was not properly seized with jurisdiction to try the appellant as charged...the consent and certificate conferring jurisdiction on the trial court were defective, though they were made under the appropriate provisions of sections 12 (3) and 26 (1) of the EOCCA, but referred to the provisions which the appellant was not charged with. The consent and certificate did not refer to section 86 (1), (2) (c) (ii) and (3) of the WCA which was clearly cited in the charge sheet.

The effect of the irregularities is found at page 12 of the judgment, that:

Having held that the consent and certificate were incurably defective, there could not have been any valid proceedings before the trial court resulting in the conviction and sentence held out to the appellant, we allow this ground of appeal...we accordingly nullify the proceedings of the trial court, quash the conviction and set aside the sentence. To follow suit, the proceedings before

the first appellate court are similarly quashed and the judgment and orders set aside.

The appellant in the appeal was arraigned in the **Resident Magistrate Court of Dar Es Salaam at Kisutu** (the Kisutu RMs Court) in **Economic Case No. 1 of 2016** (the economic case) for allegation of unlawful possession of government trophy to wit seventeen lion (17) claws and finally the Kisutu RMs court had found him guilty of the offence and his reasons of appeal at this court located at Dar Es Salaam were found to have no merit.

In the precedent of **Yusuph Masalu @ Jiduvi & Three Others v. Republic** (supra), at page 9 of the judgment, **Mr. Godfrey Wasunga,** learned counsel for the appellant had complained before the Court that the **District Court of Singida at Singida** (Singida District Court). entertained economic case without having jurisdiction, as the case was conducted at the Singida District Court contrary to the Director of Public Prosecution's consent which directed the case to be tried by the Resident Magistrates' Court of Singida (Singida RMs court).

After invitation and scrutiny of the of the original case file, it was found that the proceedings were conducted at the Singida

RMs court. Finally, the Court at page 11 of the judgment had stated that:

> *...we were compelled to call for the original record to satisfy ourselves as to whether the case was filed in the District Court of Singida or the Resident Magistrates' Court of Singida and on perusal of the said record, we were satisfied that the case originated from the Resident Magistrates' Court of Singida. With great respect, taking all of these into account and the fact that the DPP's consent was addressed to the RM's court of Singida and the case being tried in the RM's court of Singida, as the record reflect at page 407 and 459, we are convinced that the reference to District Court of Singida was therefore a typing error and it was not intended that the case should be tried by the District Court of Singida. We find the issue of jurisdiction raised to have no merit at all.*

Finally, at page 19 of the judgment, the Court found the appeal to have no merit hence dismissed it in entirety. Having displayed what transpired in the indicated three (3) recent judgments of the Court, I have no any reservations on the

results when the consent and certificate were directed to the district court, but the case was tried at the RMs court.

It is vivid from the record of appeal that the consent and certificate conferred jurisdiction to the **Serengeti District Court at Mugumu** in **Economic Case No. 2 of 2020** (the case), but the **Resident Magistrates Court of Musoma at Musoma**, had moved itself in the case and accordingly resolved. The result is obvious as stated in the cited precedents that: *there could not have been any valid proceedings before the trial court resulting in the conviction and sentence held out to the appellant. it is obvious that the trial court acted without jurisdiction. In law, therefore, the proceedings and the judgment of the trial court were null and void.*

However, the present learned minds are in contest on the way forward when the proceedings are found to be a nullity, like in the present case. The learned minds were in contest for a total of eight (8) hours exchanging horns to persuade this court on the proper course to take. Mr. Nassoro thinks that retrial of the case will prejudice the appellants whereas Mr. Nchanila and Ms. Mgumba think that retrial will be for interest of justice of both parties.

According to Mr. Nassoro for the appellants, the record of appeal has no necessary materials to show that the appellants are criminally liable to order for retrial of the case. In giving reasons of his position, Mr. Nassoro thought that: first, there are no tangible evidences to convict the appellants; second, the respondent heavily relied on circumstantial evidence without any corroboration; third, the relied circumstantial evidences have a bunch of anomalies; fourth, the respondent will clear the gaps of facts and evidences in retrial of the case; fifth, no evidence of the complained animal was tendered during the hearing of the case; and finally, there are several hypothesis on the complained un-seen animal or trophy.

In substantiating his submission and thinking, Mr. Nassoro citated multiple decisions of the Court in: **Fatehali Manji v. Republic** [1966] 1 EA 343; **Republic v. Kerstin Cameron** [2003] TLR 84; **Ngasa Tambu v. Republic**, Criminal appeal No. 168 of 2019 **Omary Bakary @ Daud v. Republic** (supra), **Dilipkumar Maganbai Patel v. Republic** (supra) **Yusuph Masalu @ Jiduvi & Three Others v. Republic** (supra); **Godlizen Daud @ Mweta & Another v. Republic**, Criminal Appeal No. 259 of 2014; **Emmanuel Denis Mosha & Two Others v. Republic**, Criminal

Appeal No. 188 of 2018; and **Mohamedi Juma @ Mpakama v. Republic**, Criminal Appeal No. 385 of 2017.

On the other hand, Mr. Nchanila thinks that retrial of the case would be appropriate as there is plenty list of evidences to convict the appellants. In support of the move, Mr. Nchanila produced four reasons, namely: first, retrial will allow evidences to display the truth of the matter; second, retrial will be in the interest of justice to both parties; third, the RMs court lacked jurisdiction and the practice shows that when there is a nullity proceeding, retrial is a proper course to follow; and finally, the allegations are serious and directed to officials who were entrusted with the preservation and protection of wild animals and trophies at Grumeti Game Reserve.

Regarding authorities in precedents, Mr. Nchanila cited a bundle of authorities in: **Fatehali Manji v. Republic** (supra); **Republic v. Kerstin Cameron** (supra); **Yusuph Masalu @ Jiduvi & Three Others v. Republic** (supra); **Mohamedi Juma @ Mpakama v. Republic** (supra); **Dilipkumar Maganbai Patel v. Republic** (supra); **Mathias Bundala v. Republic**, Criminal Appeal No. 62 of 2004; and **Goodluck Kyando v. Republic**, Criminal Appeal No. 118 of 2003.

In the midst of the contest, it was vivid that the learned minds are exchanging horns on whether the circumstantial evidence brought in the case can warrant conviction to the appellants. In their opinions, the present case is basically relied on circumstantial evidence and this court will easily resolve the issue of retrial or not by reading the rules regulating circumstantial evidences itemized in the precedent of **Mark Kasimiri v. Republic**, Criminal Appeal No. 39 of 2017.

However, the learned minds entered into a further contest as to whether the six (6) basic principles regulating the law on circumstantial evidence listed at page 15 to 17 of the judgment must be considered together or in isolation. According to Mr. Nassoro, all six (6) basic principles must be proved as per statement of the Court, whereas Mr. Nchanila thinks that the practice requires the prosecution to prove any of the basic principle to hold an accused person responsible for his action.

I have read the judgment in **Mark Kasimiri v. Republic** (supra) and found nothing related to the submissions of learned minds in Mr. Nassoro and Nchanila regarding to the application of the principles. The case is silent on whether the indicated principles must all be considered simultaneously or one principle

may hold an accused person criminally liable based on circumstantial materials. The Court, at page 15 of the judgment, when started pondering the principles, just stated that: *in resolving this appeal, we deem it pertinent to initially restate the basic principles governing reliability of the circumstantial evidence to convict [an accused person]*, whereas at page 17 of the judgment, when the Court was ending the matter, just resolved that: *we shall be guided by the said principles to establish whether or not the available circumstantial evidence irresistibly points to the guilt of the appellant*.

The Court after listing the principles, did not fix any specific facts to any specific principles and finally resolved the case in the next three (3) pages of the judgment, and at page 18 of the judgment, thought that: *in the present matter, the conduct of the appellant leaves a lot to be desired*. In conclusion, the Court had decided to dismiss the appeal.

The indicated precedent in **Mark Kasimiri v. Republic** (supra) generally, cannot be invited to resolve the present matter, and in any case, it could have been of assistance if the proceedings in the present appeal were proper. This takes me back to the three (3) indicated precedents which have similar facts to the present appeal and see what their Lordships in the

Court have decided. It is unfortunate that all the indicated cases have produced three (3) different results. I will explain:

The precedent in **Yusuph Masalu @ Jiduvi & Three Others v. Republic** (supra), the Court had found typing errors and finally had dismissed the appeal in its entirety for want of merit. In the case of **Omary Bakary @ Daud v. Republic** (supra), the Court had ordered release of the appellant from prison custody for want of strength of available materials on record, whereas in the judgment of **Dilipkumar Maganbai Patel v. Republic** (supra), it ordered retrial for want of best interest of the matter.

The question on which precedent to follow, among the indicted three (3) judgments, in resolving the present appeal is replied in the decision of the Court in **Arcopar (O.M) S.A. v. Hurbert Marwa & Family Investment Co. Ltd**, Civil Application No. 94 of 2013 and this court in **Republic v. Manila Hamduni & Another**, Criminal Session Case No. 76 of 2017, that that the most recent decision of the Court overrides any other previous decisions emanated in the Court (also see: **Geita Gold Mining Ltd v. Jumanne Mtafuni**, Civil Appeal No. 30 of 2019, at page 13 of the Ruling).

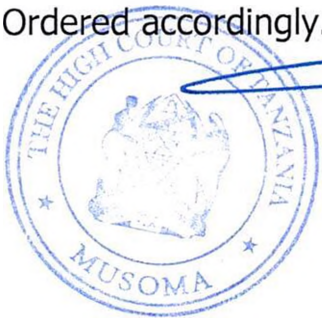
The practice was borrowed in the common law legal tradition (see: **Fisken Et Al v. Meehan** (1876) 40 U C Q.B. 146 and **Campbell v. Campbell** (1880) 5 App. Case 787). Tanzania is party of the tradition and courts do not hesitate to resolve disputes by inviting the tradition (see: **Mwananchi Insurance Company Ltd v. The Commissioner for Insurance,** Misc. Commercial Cause No. 2 of 2016).

In the cited three (3) decisions of the Court which regulate the subject in dispute, two were handed down last year, 2022. The decision in **Dilipkumar Maganbai Patel v. Republic** (supra) was decided on 25th July 2022 whereas the decision in **Omary Bakary @ Daud v. Republic** (supra) was resolved on 9th May 2022. The precedent in **Yusuph Masalu @ Jiduvi & Three Others v. Republic** (supra) is reserved as it was rendered down since March 2018 and several developments and knew thinking have already taken place on the subject. Having said so, it is obvious that the decision in **Dilipkumar Maganbai Patel v. Republic** (supra) is the most recent precedent and must be followed by this court without any interpolations.

In the end, and having considered all circumstances of the case and arguments produced by the learned minds, I hold that

a retrial will be in the interest of justice to both parties. I therefore order a retrial of the case subject to the current laws regulating filing and hearing of the economic cases. In mean time, the appellants shall remain in prison custody pending retrial before a competent court.

Ordered accordingly.



F.H. Mtulya

Judge

29.05.2023

This Judgment was pronounced in Chambers under the Seal of this court in the presence of the appellants' learned counsel, **Mr. Salehe Nassoro** and in the presence of the respondent's learned State Attorney, **Mr. Felix Mshana**.

F. H. Mtulya

Judge

29.05.2023