

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TABORA DISTRICT REGISTRY

AT TABORA

DC. CRIMINAL APPEAL NO. 3 OF 2023

*(Arising from Economic Crime Case No. 58/2021 in the
Resident Magistrate's Court of Tabora)*

MATHIAS AUGUSTINO LUKALA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

Date of the Last Order: 27/3/2023

Date of Judgment: 5/5/2023

KADILU, J.

In the Resident Magistrates' Court of Tabora, the appellant was charged with two counts namely, abuse of position contrary to Section 31 of the Prevention and Combating of Corruption Act (PCCA), [Cap. 329 R.E. 2019] read together with paragraph 21 of the First Schedule to, and sections 57 (1) and 60 (2) both of the Economic and Organized Crime Control Act, (EOCCA) Cap. 200. The second count was the use of documents intended to mislead the principal contrary to Section 22 of the PCCA read together with paragraph 21 of the first schedule to, and Section 57 (1) and 60 (2) both of the EOCCA.

According to the records, the appellant was found guilty of the charged offences hence, for the first count he was sentenced to pay fine of Tsh. 3,000,000/= or three years imprisonment. For the second count, he was imprisoned for a term of five years, both sentences were to run

concurrently. Dissatisfied with the conviction and sentence, the appellant filed the present appeal containing four (4) grounds as reproduced hereunder:

- a) *That, the trial Magistrate erred in law and facts when he convicted the appellant against the weight of evidence to the required standards.*
- b) *That, the trial Magistrate erred in law and facts, when he convicted the appellant without considering his evidence in defence.*
- c) *That, the trial Magistrate grossly erred in law by failing to analyse and evaluate evidence on trial.*
- d) *That, the decision of the trial Court amounts to a miscarriage of justice for reliance on extraneous matters.*

On the strength of those grounds of appeal, the appellant has prayed this Court to allow his appeal by quashing the conviction and set aside the sentence and the order thereto while leaving him at liberty. When the appeal was called on for hearing, the appellant was represented by Mr. Kelvin Kayaga, learned Advocate whereas the respondent Republic enjoyed legal services of Ms. Alice Thomas, the learned State Attorney. Before arguing in support of the appeal, the learned Advocate for the appellant prayed to add some two (2) more grounds of appeal, the prayer which was granted by the court as there was no objection from the respondent. The said grounds are as follows:

- a) *That, the trial Court had no jurisdiction to entertain the case.*
- b) *That, the proceedings and decision of the trial Court violated the principles of fair hearing and the provisions of Section 214 of the Criminal Procedure Act, [Cap 20 R: E 2019].*

In submitting on the added grounds of appeal, Mr. Kayaga contented firstly that the trial court had no jurisdiction to entertain the case because the DPP's consent and certificate conferring jurisdiction to the trial court were not properly admitted. According to him, the said documents are in the record of the court, but the proceedings are silent about how they got into the case file. This is against the decision of the Court of Appeal in the case of ***John Julius Martin and Paulo Samwel Girengi v R., Criminal Appeal No. 42 of 2020*** in which it was stated that the DPP's consent and certificate should be reflected in the proceedings and endorsed by the trial Magistrate. Failure to do so has the effect of taking away the trial court's jurisdiction to decide that particular case.

On the second ground of appeal, the learned Advocate for the appellant alleged that the proceedings and decision of the trial court violated the principles of fair hearing and the provisions of Section 214 (1) of the Criminal Procedure Act, [Cap 20 R. E 2019]. He explained that, there was a change of Magistrates in between the hearing without assigning reasons. He said up to the time of composing the judgment, two Magistrates were changed one of them being the Magistrate who received the testimony of PW1 and PW2 and the rest of testimonies were heard by another Magistrate without the appellant being informed about the reasons thereof.

He said, this is contrary to Section 214 (1) of CPA and the decision of the Court of Appeal in the case of ***James Maro Mahende v R., Criminal Appeal No. 83 of 2016*** in which it was held that violation of

this requirement impairs fair trial of the accused person and its effect is to render the proceedings by a successor Magistrate a nullity. The same position was also stated by the Court of Appeal in the case of ***Emmanuel Jackson Kamwela v R., Criminal Appeal No. 482 of 2015.***

Regarding the grounds of appeal which were filed in court earlier, Mr. Kayaga prayed to argue them jointly as they all relate to the discrepancies in the evidence of prosecution witnesses. He contended that exhibits that were taken from the appellant were taken without issuing a certificate of seizure. He asserted further that the chain of custody was broken, making evidential value of such exhibits useless. He urged this court to expunge the said exhibits from the record.

In yet another contention, Mr. Kayaga told this court that in the trial court, evidence of the appellant was not considered properly, something which led to the court reaching into improper decision. The learned Advocate made reference to pages 3 up to 4, and pages 8 up to 9 of the typed proceedings of the trial court. He then urged the court not to order retrial as it will give chance to the prosecution to fill in the gaps of their case. He prayed the trial court's decision to be overturned and the appeal to be allowed so as to set the appellant free.

Responding to the submissions by the appellant's Advocate, Ms. Alice Thomas, learned State Attorney stated from the outset that she was supporting the appeal because according to her, the procedural irregularities raised by the Advocate for the appellant are apparent on the record. She firstly, explained that the DPP's consent and certificate were

improperly received by the trial court as correctly pointed out by Mr. Kayaga. Secondly, the learned State Attorney told the court that decision of the trial court was based on documentary evidence, but the documents tendered were seized without the certificate of seizure. She then submitted that expunging these documents from the record will render the retrial of this case meaningless.

Thirdly, Ms. Alice stated that admission of the exhibits in this case was improperly done. She referred to the case of ***Robinson Mwanjisi & others v. R.***, [2003] TLR 218 in which the Court of Appeal gave eleven steps to be observed in the admission of exhibits, one of them being that, the document should firstly be cleared for admission. According to her, this was not done in the present case. Concerning the chain of custody, the learned State Attorney narrated that, proceedings of the trial court are silent about the chain of custody of the exhibits admitted by the court, something which is wrong in law.

Therefore, she prayed to join hands with Mr. Kayaga, the learned Advocate for the appellant that the proceedings were conducted without the court having jurisdiction. She firmly concluded that there was non-compliance with the legal procedures in the conduct of this case during the trial.

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 evident 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."

The certificate conferring jurisdiction to the subordinate court to try an economic offence and consent of the DPP are the points of the appellant's contention in his first ground of appeal. According to Mr. Kayaga, the documents are in the case file, but there is no explanation in the proceedings about how they got into the case file. I thus, agree with the learned State Attorney 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 records, I hold that the Resident Magistrate's Court of Tabora commenced the Economic Case No. 58 of 2021 without having jurisdiction. The law is very clear that the decision reached by any court without having jurisdiction is a nullity. As such, the first ground of appeal succeeds.

In the ordinary course of things, after having quashed the entire proceedings of the lower court, there are two alternatives and competing orders that a court may make, either to order a trial de novo or to release the appellant. However, in this case, where the error was committed by the prosecution, it would not be in the interest of justice to order a retrial because as pointed by Mr. Kayaga, it will only help the prosecution to fill in the gaps in its evidence. In the case of ***Fatehali Manji v R., [1966] E.A 343***, it was held that:

"In general, a retrial may be ordered only where 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 purposes of enabling the prosecution to fill in gaps in its evidence at the first trial... each case must depend on its own facts and an order for retrial should only be made where the interests of justice require it."

In the present case, the exhibits which were admitted during the trial were taken from the appellant without a certificate of seizure, the chain of custody was broken and, the admission was improperly done. As it was stated in the case of ***Robinson Mwanjisi case*** cited earlier, this was in contravention with the law. While an order of retrial may give the prosecution the opportunity to rectify some of the defects or fill in gaps, other defects cannot be rectified and they render the would-be prosecution case very weak.

For the reasons I have endeavoured to establish, the proceedings of the trial court are hereby nullified. The conviction of the appellant and the sentence imposed upon him are quashed and set aside. That said and done, I see no reason to deal with other grounds of appeal as doing so

will not serve any meaningful purpose. For that reason, I allow the appeal and order the appellant's immediate release from custody unless held for some other lawful cause.

Order accordingly.


KADILU, M.J.,

JUDGE

05/05/2023

Judgement delivered on the 5th Day of May, 2023 in the presence of Mr. Kelvin Kayaga, Advocate for the appellant and Ms. Aneth Makunja, State Attorney, for the Respondent.




KADILU, M. J.

JUDGE

05/05/2023