

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

**(ARUSHA SUB-REGISTRY)
AT ARUSHA**

CRIMINAL APPEAL NO. 153 OF 2022

(Originating from the Resident Magistrates' Court of Arusha, Economic Case No. 90 of 2020)

JULIUS KANANKIRA MBISE APPELLANT

Versus

REPUBLIC RESPONDENT

JUDGMENT

29th May & 21st July, 2023

BADE, J.

Julius Kanankira Mbise, the Appellant herein, has preferred this appeal in the quest to have the conviction and sentence imposed on him by the Resident Magistrates' Court of Arusha (hereinafter "the trial court") overturned. In the trial court, the appellant was charged with three counts as follows:

In the 1st count, he was charged with the offence of Abuse of Position, contrary to section 31 of the Prevention and Combating of Corruption Act No. 11 of 2007 (hereinafter "the PCCA").

In the 2nd count, the appellant was charged with the offence of Embezzlement and Misappropriation contrary to Section 28(1) of the PCCA and;

In the 3rd count, he was charged with the offence of Occasioning Loss to a Specified Authority, contrary to Paragraph 10(1) of the First Schedule to, and section 57(1) and 60(2) of the Economic and Organized Crimes Control Act, Cap. 200 [R.E 2019] (hereinafter "the EOCCA").

The Appellant pleaded Not Guilty to all the charges.

After a full trial, the Trial Magistrate was satisfied that the charges against the appellant were proved to the grip for some of the counts charged. He was acquitted on the first count but convicted on the second and the third counts. Eventually, he was sentenced to pay a fine of TZS 2,000,000/= or in default serve one-year custodial sentence whereas in the third count, he was sentenced to serve twenty years custodial term. In addition, the appellant was ordered to pay TZS 7,000,000/= as compensation to Kikwe Ward. The custodial sentence was ordered to run concurrently.

The material background facts of the case leading to this appeal as gathered from the trial court record is that in the year 2014/2015, Kikwe Ward whose Ward Executive Officer (WEO) was the Appellant herein, was assigned to carry out various development projects. Among the projects undertaken include building a Ward office, a Ward toilet, and Kikwe Secondary School Laboratory. The projects were carried out under the supervision of the Ward Development Committee (WDC), whose secretary was the Appellant herein and the Chairman was Councillor Emmanuel

Silayo Mbise (PW5) who was the councillor until October, 2015. Other members of the WDC included Tuma Ally Kafuko (PW3), Emmanuel Olengailudu Mollel (PW6), Christopher John Akyoo (PW7) and Jackson Saitoti Mollel (PW9).

The projects were all funded by Meru District Council. On 05/05/2015, Kikwe ward was given a plot located at Madira area, registered as Plot No. 169, Block B which had 588 Sqm. The plot was given to the Ward by Meru District Council in order to support the development projects underway. The WDC made a resolution that the plot be sold, so that the proceeds of sale would be used to support the ongoing construction projects. It was agreed that upon the sale of the plot, the Ward would pay to the District Council TZS 3,000,000/= as costs for surveying the plot and the rest of the proceeds would then be diffused in the development projects. The WDC appointed a subcommittee of four members (the Appellant herein, PW3, Emmanuel Kaaya, Esther Salanga, and Paulo Manyata) to look for a buyer and supervise the sale of the plot on behalf of the WDC.

According to the evidence on record, in July 2015, the Appellant clandestinely, sold the plot to Kennedy Kyungai who could not be summoned to testify, hence his statement was admitted as exhibit P8. The said Kyungai is also the husband of Fatuma Ahmed Ngomuo (PW1), who is the current owner of the plot. The plot was sold at TZS

10,000,000/= which was paid in two instalments. The sale was witnessed by the sale agreements and receipt which were admitted as exhibit P1 collectively.

According to the prosecution evidence, it was only TZS 3,000,000/= out of the TZS 10,000,000/= which was paid to the District Council, while expenditure of the remaining amount was unknown to the WDC members.

A further factual account is that on 06/06/2016, there was a WDC meeting which was also attended by Hamson Elimuri Mrema (PW8), the acting District Executive Director of Meru District at that time. The Appellant being the secretary of the meeting, read the minutes of the meeting to the members, including the expenditure in respect of the proceeds of the sale of the plot. The report was admitted as exhibit P3D.

The WDC members protested the said report, and demanded that the appellant be expelled from the office for the allegation that he misappropriated the funds. Due to the ensuing unrest, PW8 who represented the District Executive Director had to intervene so as to bring the matter to a halt. He closed the Ward offices and retired with the keys which he handed to the District Executive Director together with the Appellant, for conducting an inquiry on the allegations against him. The discontents of the WDC members were addressed to the District Executive Director in a letter which was admitted as exhibit P3A1.

The District Executive Director ordered an inquiry against the appellant be initiated whereby a special audit was conducted by Jackson Abraham Laizer (PW2). The audit revealed that the proceeds of sale of the plot were not used in the development projects because the projects were funded by the District Council as per exhibit P4B. The audited report was admitted as exhibit P2. Further inquiry was made in Ward's bank account which according to Benadetha Richard Mmari (PW10) there was no deposit from the Appellant. The matter was referred to the Prevention and Combating of Corruption Bureau for investigation. According to Eunice Ikwila (PW12), the investigation revealed that the appellant misappropriated the funds for his personal gain, leading to his arraignment and prosecution at the trial court.

In his sworn defence, the Appellant gave lengthy evidence explaining his side of the story. He generally denied to have misappropriated the funds from the sale of the plot, accounting that he was mandated by the District Executive Director to supervise the sale of the plot after attempts by some of the subcommittee members to clandestinely sell the plot was hijacked. The appellant firmly stated that the proceeds of the sale of the plot were spent for paying the debts to the lenders from whom the building materials were borrowed under the instruction of the DED. When inquired if he had any document to prove what he testified, he stated that he had,

but all documents were left in the office as he was denied access after being locked out at the WDC meeting.

After hearing the evidence of both the prosecution and defence, as alluded to above, the Trial Magistrate acquitted the Appellant on the first count, convicted him on the second and third counts, and sentenced him as above hinted. Aggrieved, the Appellant has preferred this appeal armed up with 10 grounds, as reproduced *verbatim*:

1. *That, the learned trial Magistrate erred in law and facts in holding that the charge was proved beyond reasonable doubt against the Appellant;*
2. *That, the learned trial Magistrate erred in law and facts by finding the Appellant guilty by (sic) relying on inconsistency (sic) and contradictory statements by the prosecution witnesses;*
3. *That, the learned trial Magistrate erred in law and facts for shifting the burden of proof from the prosecution to the appellant and found his defence weak;*
4. *That, the trial Court erred in law and facts when it failed to note that the ward projects were carried out and lenders were accordingly paid by the Appellant;*
5. *That, the learned trial Magistrate grossly erred in law and facts for his failure to make proper analysis and evaluation of the evidence*

thereby occasioning a miscarriage of justice on the part of the Appellant;

- 6. That, the trial Magistrate grossly erred in law and facts for his failure to explain to the Appellant that he has a right to appeal;*
- 7. That, the learned trial Magistrate grossly erred in law and facts for failure to sentence the Appellant herein;*
- 8. That, the learned trial Magistrate erred in law for proceeding with the matter which contained economic offences without requisite certificates conferring jurisdiction;*
- 9. That, the learned trial Magistrate erred in law for proceeding with the matter which contained economic offences without the certificate of consent by the Director of Public Prosecutions; and*
- 10. That, the learned trial Magistrate erred in law and facts for failure to consider the Appellant's previous criminal record so to allow (sic) him to mitigate the sentence.*

Based on the said grounds of appeal, the Appellant prayed that the appeal be allowed by quashing the conviction and setting aside the sentence imposed upon him.

At the hearing, the appellant was represented by Mr. Dickson Abraham Maturo, learned advocate while the respondent Republic was represented by Mr. Mahfudh Mbagwa, learned State Attorney. It was

resolved that the hearing of the appeal proceed through the filing of written submissions.

For obvious reasons, the Counsel for the Appellant started by addressing grounds 8 and 9 of the grounds of Appeal. Submitting in support of the 8th ground, Mr. Maturo contended that the trial court had no jurisdiction to try the economic offences levelled against the appellant because there was no issued certificate by the DPP or State Attorney duly authorized by him to confer jurisdiction on the trial court. He relied on section 12(3) of the EOCCA. It was the counsel's submission that economic offences are triable by the High Court Economic Crimes Division, therefore jurisdiction of the trial court to try economic offences is conferred by the DPP upon issuance of a certificate to confer jurisdiction. He maintained that in the appeal under consideration, the said certificate was not produced by the prosecution, hence the trial court had no jurisdiction to entertain the suit. In support of his argument, he referred the case of **Peter Allen Moyo vs Republic**, Criminal Appeal No. 397 of 2015 (unreported), urging the Court to nullify the proceedings and decision of the trial court for determining the case without jurisdiction.

Elaborating the 9th ground, the appellant amplified that the trial court lacked jurisdiction to entertain the case because there was no issued consent by the DPP in tandem with section 26(1) of the EOCCA. He

strenuously submitted that the trial court proceedings do not reflect whether the certificate to confer jurisdiction and consent by the DPP were tendered and admitted in the trial court prior to commencing the trial. According to the learned counsel, since there was no record on whether the two instruments conferring jurisdiction on the trial court were received and endorsed by the trial magistrate, the trial court had no jurisdiction to determine the matter. To reinforce his argument, he relied on the following Court of Appeal decisions: **John Julius Martin and Another vs Republic**, Criminal Appeal No. 42 of 2020 and **Abdulswamadu Azizi vs Republic**, Criminal Appeal No. 180 of 2011 (both unreported).

In response to the 8th ground of appeal, Mr. Mbagwa asserted that both the certificate to confer jurisdiction and consent by the DPP were filed in the trial court along with the charge sheet. Even though such documents were not reflected in the proceedings, still according to the learned State Attorney, the trial court had jurisdiction in as much as they are featured in the court record. To bolster his contention, he referred to the case of **Omari Bakari Daud vs Republic**, Criminal Appeal No. 52 of 2022 (unreported), which underscored the importance of having consent and a certificate conferring jurisdiction in the trial court before instituting any economic offence.

Embarking on the 9th ground, Mr. Mbagwa reiterated what he submitted in the preceding ground insisting that the mere fact that the proceedings do not reflect when the two instruments were filed while they are featured in the court record is not fatal, it is curable under section 388 of the CPA. His stance was perplexed by the fact that there would have been no prejudice on the part of the appellant.

The rejoinder submission of the appellant's counsel was a mere reiteration of what he has submitted in the submission in chief. I thus find no reasons to re-reproduce what has been said in the submission in chief.

Having gone through the grounds of appeal and the rival submissions by both counsel for the appellant and the learned State Attorney, the determination of this appeal will be centred on the two grounds of appeal for reasons which will be apparent shortly in due course. The thrust in the two grounds, which shall be subject of determination is whether the trial court had jurisdiction to try the case.

At the outset, it is trite law that jurisdiction to try economic offences is vested in the High Court in terms of section 3 of the EOCCA. However subordinate courts may be conferred with jurisdiction to try such offences by the consent of the DPP issued under section 26 (1) of the EOCCA and a certificate to confer jurisdiction issued in terms of section 12(3) of the EOCCA. For ease of reference, section 12(3) of the EOCCA, provides that:

"(3) 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."

Similarly, Section 26(1) 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."

From the above set of provisions, economic offences are triable by subordinate courts only after certificates conferring jurisdiction and consent of the DPP are issued. This position was cemented in myriad Court of Appeal decisions including **Jumanne Leonard Nagana @ Azori Leonard Nagana and Another vs Republic**, Criminal Appeal No. 515 of 2019 (unreported), where the Court had guided:

"The consent of the DPP must be given before any trial of an economic offence can proceed, this is in accordance with section 26 (1) and (2) of the EOCCA. A subordinate court could only be vested with jurisdiction to try an economic offence if conferred jurisdiction under section 12 (3) of the EOCCA,

when the DPP issues a certificate that any offence triable by the High Court be tried by a court subordinate to the High Court."

In the appeal under consideration, the record shows that both certificates of the Director of Public Prosecutions conferring jurisdiction to subordinate court to try an economic offence and consent of the Director of the Public Prosecution were issued on 24/08/2020. The two instruments were issued by the DPP of the time, Biswalo Eutropius Kachele Mganga, as he then was as featured in the court records.

Notably however, it is a settled position of the law that the mere presence of such documents in the court file without endorsement or acknowledgment of their receipt by the trial magistrate does not confer jurisdiction on the subordinate court. This position was subject of discussion in *extenso* in the cited case of **John Julius Martin and Another vs Republic** (supra), where the Court held:

*"Respectfully, we do not agree with her, because that is not the position maintained by this Court. In Maganzo Zelamoshi @ Nyanzomola v. R, Criminal Appeal No. 355 of 2016 (unreported), **there was a certificate and the consent in the record of the trial court, but the documents were not endorsed by the trial magistrate as having been duly admitted on record.** In*

*another case of **Maulid Ismail Ndonde v. R**, Criminal Appeal No. 319 of 2019 (unreported), **there was neither an endorsement on the face of the consent and the certificate, nor did the trial court's record reflect that there were such documents on record.** In both cases, the Court nullified the proceedings of both the trial courts and of the High Court, because the certificate and the consent documents, had no legal force as they were not endorsed by the trial magistrate as having been admitted them on record."*

(Emphasis mine)

In the instant appeal, as pointed out above, both instruments were filed at the trial court along with the charge sheet. However, they were neither endorsed by the trial magistrate as having been duly admitted on record nor does the record reflect the existence of such instruments. As to how they paved their way in the trial court record, the record is silent. In the spirit of the above-cited authoritative decision of the Court of Appeal, that was a fatal irregularity that renders the proceedings and decision of the trial court a nullity. The reason is not farfetched because the certificate to confer jurisdiction and the consent by the DPP are the instruments that confer jurisdiction on the trial court to try an economic offence. In the absence of the two instruments or any defect in such documents, renders

the trial a nullity because it was entertained by a court that in essence, lacked jurisdiction.

Based on the above reasoning, since the documents purported to confer jurisdiction on the trial court to try the economic offences had not been endorsed or admitted so they can be reflected by the trial magistrate as forming part of the trial court record, the trial court was not seized with jurisdiction to entertain the case. The jurisdiction of any court to entertain a case is so basic in such a way that any decision reached by any court without jurisdiction is a nullity. That being the position, the 8th and 9th grounds of appeal challenging the jurisdiction of the trial court succeed.

Having found that the trial court had no jurisdiction to try the offences, it is my profound view that the 8th and 9th grounds of appeal sufficiently dispose of the appeal. I find no compelling reasons to delve into determining the rest of the grounds of appeal since they are basically on evidential matters, and at this point, such determination will serve no purpose. Accordingly, the proceedings of the trial court are nullified. The conviction against the appellant is quashed and the sentence imposed on him is set aside.

On the way forward, I think this is a fit case that augers with the principle established by the erstwhile Court for Eastern Africa in **Fatehali Manji**

vs Republic [1966] E.A. 343, guiding on the circumstances where retrial can be ordered. Having revisited the record, I am certain that if a retrial is ordered, it will not serve as an opportunity for the prosecution to fill in gaps.

Consequently, the appeal is found meritorious, it is allowed to the extent explained in the above analysis. I order the file to be remitted back to the trial court for an expedited retrial before another magistrate. In the meantime, the appellant shall remain in prison.

It is so ordered.

DATED at ARUSHA this 21st day of July 2023



**A. Z. BADE
JUDGE
21/07/2023**

Judgment delivered in the presence of parties / their representatives in chambers /virtually on the **21st** day of **July 2023**



**A. Z. BADE
JUDGE
21/07/2023**