

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF MANYARA

AT BABATI

CRIMINAL APPEAL NO. 65 OF 2023

(Appeal from the conviction and sentence of the District Court of Simanjiro in
Economic Case No. 76 of 2021 Hon. M. J. Massao-RM)

WAZIRI JUMANNE SWALEHE.....APPELLANT

VERSUS

REPUBLICRESPONDENT

Date of last order: 30/10/2023

Date of Judgment: 10/11/2023

JUDGMENT

MAGOIGA, J.

The appellant **WAZIRI JUMANNE SWALEHE** was arraigned before District Court of Simanjiro (the trial court) with one count of unlawful possession of the government trophy contrary to section 86(1) and (2)(c)(iii) of the Wildlife Conservation Act No. 5 of 2009 (hereinafter to be referred to as the WCA) as amended by section 59(a)(b) of the written laws (miscellaneous amendment act) No 2 of 2017 read together with paragraph 14 of the first schedule to and section 57(1) and 60(2) of the Economic and Organized

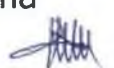
Crimes Control Act [CAP 200 RE 2019], (hereinafter to be referred to as the EOCCA).

It was alleged before the trial court that on 24/12/2021 PW 4 Alex Kipii who is wildlife officer while on antipoaching operation with his fellow wildlife officers, managed to arrest the appellant with the two heads of impala and its skin. On inquiring if the appellant had permit, it was found that he had none. Consequently, he was arraigned before the trial court to answer the charge of unlawful possession of the government trophy.

After hearing the parties, the trial court was convinced that the case against the appellant was proved beyond reasonable doubt as such convicted and subsequently sentenced the appellant to pay fine at the sum of Tshs. 17,940,000/= or to 20 years imprisonment in default of the fine.

Aggrieved with the conviction and sentence meted out against him, the appellant preferred the instant appeal with five grounds of appeal which I will not reproduce them here for the reason that will be apparent shortly.

When this appeal was called on for hearing before me, Mr. Rashid Shaban, learned advocate appeared for the appellant while Ms. Mwanaidi Chuma



assisted by Ms. Leah Viosena and Ms. Rose Kayumbo, all learned State Attorneys appeared for the respondent.

Before hearing of the appeal had commenced, Ms. Kayumbo, learned State Attorney raised a concern regarding the jurisdiction of the trial court to try the matter. She was emphatic that the certificate which conferred jurisdiction to the trial court to try the matter was incurably defective for failure to cite the section which creates the economic offence and that the consent was given under the section 26(1) of the EOCCA, hence, rendering the whole trial a nullity.

According to Ms. Kayumbo, economic offences are tried by the High Court. And if the matter is to be tried by the subordinate court, consent and certificate conferring jurisdiction have to be issued by the Director of Public Prosecutions in terms of sections 3 and 12 of the EOCCA. She submitted that where the consent it to be given by any office under Director of Public Prosecutions the same must be given under section 26(2) of the EOCCA.

On that note, the learned Attorney submitted that, in the instant matter, the consent and certificate conferring jurisdiction were issued and signed by Regional Prosecution Officer under section 26(1) which is not delegable and



did not cite a section which creates an offence to be economic, hence, incurably defective.

On the way forward, the learned Attorney urged this court to nullify all the proceedings and judgment of the trial court and order trial *de novo*. To fortify her stance, the learned State Attorney referred the decision of this court in the case of **Abirency Paul @ Chagile & 3 others v Republic**, Criminal Appeal No. 123 of 2022 (unreported) in which the court ordered trial *de novo* since the first trial was a nullity and there is enough evidence to mount conviction, an order for retrial *de novo* is ideal.

In response, Mr. Shaban joined issues with the submission by the learned State Attorney that the trial was a nullity for the reasons stated save that, parted ways on the way forward. According to Mr. Shaban, ordering retrial *de novo* will give the Republic a chance to fill in gaps in the case which was not proved beyond reasonable doubt. The gaps, according to the learned advocate were: there was no chain of custody of the exhibits since the appellant was arrested till when he was taken to the police at Simanjiro which is contrary to Orders 3, 8, 9 & 18 of the Police Force General Orders 2019 (without further explanation how those orders are applicable here).



Further, Mr. Shaban pointed out that, the evidence of PW4 shows that the person who filled the arrest and seizure certificate is Goodluck Nko while the form of arrest was filled by Goodluck Emmanuel who are different persons. He submitted that the trophy valuation certificate under section 86 (4) of the WCA has to be signed by wildlife officer or director and not wildlife warden who is not a proper officer to sign. Therefore, the Republic's failure to call Goodluck Nko and Goodluck Emmanuel as material witnesses will open a room to call them, which amounts to filling gaps.

Furthermore, the learned advocate pointed out that the place where the appellant was arrested is doubtful because at page 37 it is stated that the appellant was arrested at reserve while on page 38 it was stated that the appellant was arrested near the reserve. To buttress his argument, he referred the decision in the case of **Luthgnasia Simon Mushi @ Vumi v Republic** Criminal Appeal No. 209 of 2019 Court of Appeal of Tanzania at Moshi (unreported) in which the court pointed out that an informer can be a witness.

More so, the learned advocate pointed out that there were also contradictions between PW3 who said impala head while in other



proceedings referred to "swala & Ngozi". He therefore pointed out that the prosecution did not prove its case.

He therefore urged the court not to order retrial.

On a brief rejoinder Ms. Kayumbo contended that there was a chain of custody as shown by PW1. She contended that the appellant did not cross examine on the certificate of seizure which was signed by PW1 and the appellant. She argued that there was no need to call Goodluck. She pointed out that there were no contradictions and the evidence was water tight. She reiterated her early prayer for retrial.

Having gone through the parties' submissions in respect of the concern raised by the learned State Attorney and supported by the learned advocate for the appellant, it is not in dispute that the consent was issued under section 26(1) of the EOCCA while the certificate conferring jurisdiction was issued under section 12(3) of EOCCA. Looking at the consent, which was issued under section 26(1) of the EOCCA, the said provision of the law gives powers only to the Director of Public Prosecutions to issue consent and such powers are not delegable. See the case of Peter Kongori Maliwa and 4 others



Vs. the Republic, Criminal Appeal No.253 of 2020, CAT (Musoma) (unreported).

In the instant matter, no dispute the consent was issued by Regional Prosecution Officer under section 26(1) of the EOCCA, hence, incurably defective for exercising powers not granted by law. This amounts to no consent at all to prosecute the case. Equally to note, no dispute that, the certificate conferring jurisdiction did not cite the section which creates the economic offence. These omissions make both the consent and certificate to prosecute and conferring jurisdiction respectively incurably defective and therefore the trial court lacked jurisdiction to try the matter.

It is settled law that where a decision is reached without jurisdiction by any court, such decision is a nullity. In the case of **Ramadhani Omary Mtiula vs The Republic**, Criminal Appeal No. 62 of 2019 (unreported) when referring to the decision in **Fanuel Mantiri Ng'unda vs Herman Mantiri Ng'unda and 20 Others**, Civil Appeal No. 8 of 1995 (unreported) the Court of Appeal observed thus: -

" The question of jurisdiction for any court is basic, it goes to the very root of the authority of the court to adjudicate



upon cases of different nature **The question of jurisdiction is so fundamental that courts must as a matter of practice on the face of it be certain and assured of their jurisdictional position at the commencement of the trial....** It is risky and unsafe for the court to proceed with the trial of a case on the assumption that the court has jurisdiction to adjudicate upon the case. [Emphasis added]

Furthermore, in the case of **Jumanne Leonard Nagana @ Azori Leonard Nagana & another v The Republic**, Criminal Appeal No. 515 of 2019 Court of Appeal of Tanzania at Musoma (unreported) it was observed thus;

"The fate which befalls the proceedings and a decision made without jurisdiction is a nullity. Even where a court decides to exercise a jurisdiction which it does not possess, its decision amounts to nothing."

From the foregoing discussion and guided by the above stance, I fully subscribe to the invitation made by the both parties herein that the



proceedings and judgment of the trial court are a nullity. Therefore, by my powers vested in me under section 43 (1) of Magistrates' Courts Act, [Cap 11 R.E. 2019] doth hereby revise and as such quash the proceedings and set aside judgement and conviction meted out against the appellant for same were conducted without jurisdiction.

Next what is the way forward after nullifying the proceedings and judgment of the trial court. While Ms. Kayumbo urged the court to order retrial because there is ample evidence on record. Mr. Shaban, on the other hand, urged court not order retrial but set the appellant free because an order for retrial will amount to give the Republic a chance to fill in gaps.

It is settled law that, in the alternative, there are two orders that a court can make after nullifying proceedings like in the instant matter. These orders can be either to order trial *de novo* or to release the appellant. The principles guiding the court on whether to order trial *de novo* or to release the appellant was expounded in the case of **Fatehali Manji v. The Republic** [1966] E.A, 343, in which the court observed that for the court to order a retrial, it should ensure that the prosecution is not going to utilize the opportunity of a rehearing to amount a better prosecution case by filling in the gaps, all to the detriment of the appellant.

I have keenly gone through the entire proceedings of the trial court, but I find no serious issues that if an order for retrial will be ordered there are dangers for prosecution to fill in gaps to the detriment of the appellant. All points argued by the learned advocate for the appellant that will amount to filling gaps are not true. The evidence of PW4 mentioned Emmanuel Nko as their supervisor but not that he filled the forms. It was Goodluck Emmanuel who did so and the record is so loud. Further, other issue raised that where the appellant was arrested is immaterial if one has no permit and as such do not go to the roots of the matter. Also, on the chain of custody, rightly as argued by the learned Attorney, PW4 in his testimony told the trial court that he was in the company of other wildlife officers one being Goodluck Nko when they arrested the appellant so exhibits P1 which is on the chain of custody, was filled by one Goodluck Emmanuel and the said Goodluck Emmanuel was called to testify contrary to what was argued by the learned advocate that he was not called.

Similarly, looking at the testimony of PW3, the Resident Magistrate who ordered the seized meat to be destroyed told the trial court that PW2 came with one head of impala for an order of disposal but looking at the testimony of PW4 the appellant is claimed to have been arrested with two heads and



skin of impala. These are matters that, if case for the appellant will be well defended may be resolved in favour of the appellant, hence, at this stage cannot be reason for not ordering retrial.

In the circumstance, I am constrained to agree with the learned Attorney that, this is fit case for an order for retrial de novo.

That said and done, I hereby order retrial de novo of the appellant before another Magistrate with competent jurisdiction to try this case. I further order that this case be remitted back to Simanjiro for immediate determination of this matter given the time the appellant has spent in jail.

Order accordingly.

Dated at Babati this 10th November 2023.



A handwritten signature in blue ink, consisting of a series of vertical strokes followed by a horizontal line that curves upwards at the end.

S. M. MAGOIGA

JUDGE

10/11/2023