IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MANYARA

AT BABATI

CRIMINAL APPEAL NO. 1 OF 2023

(Arising from Economic Case No. 6 of 2022 District Court of Mbulu)

SAMWEL QAMBINA DUKHO.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

19th October & 16th November, 2023

Kahyoza, J.

Samwel Qambina Dukho, was employed by Mbulu District Council as the Village Executive Officer. He appeared before Mbulu district court arraigned with three counts, two of which were economic offences embezzlements and mis-appropriation in the first count. In the second count, Samwel was charged with the offence of abuse of position. Whereas he was charged with the offence of stealing in the third count. He pleaded not guilty to the charges. After trial, Mbulu district court found Samwel guilty of all offences in the counts, convicted and sentenced him to serve 20 years' imprisonment for offence embezzlements, and mis-appropriation, and for offence of abuse of position. And for the offence of stealing, the trial court sentenced Samwel to serve one year custodial sentence.

Aggrieved, Samwel appeal against conviction and sentence. Samwel raised eight (8) grounds of appeal, and later engaged an advocate Mr. Philibert L. Akaro to argue his appeal. The court heard the appeal by way of written submissions.

Before the appellant's advocate submitted on regarding the grounds of appeal, he contended that the prosecution had contravened fundamental issues of law. The appellant's advocate argued those legal issues which were, **one**, that DPP's consent was defective, the **two**, that the charges were preferred in contravention of section 4 (3) of the Criminal Procedure Act, [Cap. 20 R. E. 2022]. It is a common practice for the court to address legal issues raised before delving into other matters. In adherence to this common practice, the court will first address the identified legal concerns.

Was the consent of the DPP defective?

The appellant's advocate submitted that the consent was defective because the Regional Prosecutions Officer issued it under section 26 (1) of the Economic and Organization Crimes Control Act, [Cap. 200 R. E. 2019], powered, which are exercisable by the Director of Public Prosecutions. To support his contention, he cited the decision of the Court of Appeal in **Salum**

s/o Saad @ Rashidi V. DPP, Criminal Appeal No. 502 of 2019, where it was held that-

> *"In this case, it is beyond controversy that the consent to prosecute the appellant was issued and signed by the State Attorney Incharge under section 26 (1) of the EOCCA instead od the DPP. The error committed by the State Attorney Incharge was fundamental because the power under section 26 (1) of the EOCCA is vested in the DPP himself. Therefore, since the respective consent was issued by the DPP, it could not be a sufficient authority for the subordinate court to try and determine the economic offences"*

The appellant's advocate added that after the Court of Appeal found that the consent was defective, held that a retrial will occasion a miscarriage of justice to the appellant and thus, it will not be in the interest of justice. The court eventually ordered immediate release of the appellant from custody.

The respondent (the Republic) conceded to the contention that consent was defective. A State Attorney who argued the appeal did not wish to disclose his name, asserted that the act of the Regional Prosecutions Officer issuing a consent to the court to try an economic offence under section 26 (1) of EOCCA was a serious irregularity, because the power to issue consent under section 26 (1) of EOCCA was not delegable. The powers to issue consent under section 26 (1) of EOCCA was vested in and

exercisable only by the DPP. He added that the consent under discussion having been issued by a person without mandate was incapable of authorizing the trial court to try the economic offence. To support his contention, he cited the case of **Peter Kongori Maliwa & 4 others V R**, in Criminal Appeal No. 253 of 2023 [2023] TZCA 17350 Tanzilii.

The learned State Attorney petitioned this Court to invalidate the proceedings and decision of the trial court had no jurisdiction. He further, prayed the court to order *trial denovo* after nullifying the proceedings and judgment. He submitted that before the court orders *trial denovo*, it should ensure that the prosecution is not going to utilize the opportunity of rehearing to mount a better prosecution case by filing in the gaps, to detriment or prejudice of the appellant. He referred to the decisions of the Court of Appeal is **Salum s/o Saad @ Rashidi** (Supra) and **Peter Kangori Maliwa & 4 others** (Supra). He prayed the court to order *trial denovo* after nullifying the proceedings on the ground that there are no gaps in the evidence that are likely to be filled by the prosecution during rehearing.

In his rejoinder, the appellant's advocate vehemently opposed the respondent's prayer for a retrial. He contended that a rehearing will aim at filing the gaps to clear the grave doubts on the prosecution case at the detriment and prejudice of the Appellant. He argued that the prosecution's

evidence was shaky, and without limbs to stand on, and that the evidence on record did not establish *prima facie* against the appellant.

Having heard the submissions one thing is clear, that there is no dispute that the consent was defective. I am in total agreement with the learned friends, that the Regional Prosecutions Officer had no mandate to issue a consent under section 26 (1) of the EOCCA. As held by the Court of Appeal in cases without number, it is the DPP himself who has mandate to issue consent under subsection (1) of the section 26 of EOCCA and the powers under section that subsection is not delegable. See the cases of **Salum s/o Saad @ Rashid V. R, (Supra) Peter Kongori Maliwa & 4 others (Supra) Emmanuel Chacha Kenyaba & 3 others**, Criminal Appeal No. 368 of 2020 [2023] TZCA 17823, and **Ghati Mwikwabe @ Sasi V. R**, Criminal Appeal No. 305 of 2020 [2023] TZCA 17814, Tanzilii, a few to mention. I find that since the consent was defective, it was a good as not having been issued. Section 26 (1) of EOCCA provides among other things, that, "*no trial in respect of an economic offence may be commenced under this Act, safe with consent*".

The appellant, therefore tried without a valid consent; hence, the trial was a nullity. Given this finding of the trial's nullity, it logically follows that both the conviction and the subsequent sentence are also nullities.

Consequently, I quash the proceedings and set aside the judgment and sentence.

Is it a fit case to order a re-trial?

It is settled that a retrial should not be ordered in order the prosecution to filling the gap in their case. In **Fatehali Manji v R** (supra) the then Court of Appeal of East Africa laid down the principle governing retrial. It stated-

> *"In general, a retrial will be ordered only 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 up gaps in its evidence at the first trial. Even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame; it does not necessarily follow that a retrial shall be ordered; each case must depend on its own facts and circumstances and an order of retrial should only be made where the interests of justice require."*

The Court of Appeal in **Marko Patrick Nzumila & Another v. Republic,** Criminal Appeal No. 141 of 2010 CAT (unreported) held that in considering whether to order a retrial a court should consider whether it is fair to do so for both the accused person and the public. It stated-

> *"Failure of justice (sometimes, referred to as miscarriage of justice) has equally occurred where the prosecution is denied an opportunity of conviction. This is because, while it is always safer to err in acquitting than punishment, it is also in the interests of the state*

that crimes do not go unpunished. So, in deciding whether a failure of justice has been occasioned, the interests of both sides of the scale of justice have to be considered."

The appellant's advocate submitted the ably that the prosecution evidence was wanting. It is common understanding that submission is not evidence so as to consider whether to order for retrial I examined the record. The record shows that there exists evidence to prosecute the appellant. I wish to point without going into the detail, the appellant's advocate complained that the internal auditor did not hear the appellant, however, the record depicts that John David Kajivo (**Pw2**), the internal auditor went through the documents and interrogated the ward executive officer and the village executive officer. The appellant was the village executive officer.

To avoid prejudicing the appellant's case, I refrain from delving into the specifics of the issues raised by the appellant's advocate. After reviewing the submissions and the evidence on record, I am inclined to order a retrial based on fairness as there exists evidence on record.

Finally, I quash the proceedings and set aside the conviction and sentence because the district court tried the appellant without jurisdiction. Thus, the appeal is allowed to that extent. However, I order the original record to be remitted to the trial court for a fresh trial before a different

magistrate. Should the trial not commence within thirty days, the charges shall stand dismissed, and the appellant, if in prison or on bail, should be released immediately.

I so order.

Dated at **Babati** this **16th day** of November, 2023.

J. R. Kahyoza
Judge

Court: Judgment delivered in Mr. Philbert Akaro, the appellant's advocate and Mr. Bizman, the state attorney for the respondent. The appellant absent. B/C Ms. Fatina Haymale (RMA) present.

J. R. Kahyoza
Judge
16/11/2023