

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MANYARA
AT BABATI**

CRIMINAL APPEAL NO. 85 OF 2023

(Arising from Economic Case No. 5 of 2022 District Court of Simanjrio at Orkesumet)

EMMANUEL BRAYSON MSUYAAPPELLANT

VERSUS

THE REPUBLICRESPONDENT

JUDGMENT

13th & 17th November, 2023

Kahyoza, J.

Emmanuel Brayson Msuya was allegedly found in possession of government trophies to wit; meat of two Dikidiki and meat of two lesser kudu. He appeared before the district court charged with two counts of unlawful possession of government trophies. The trial court convicted him on both counts and sentenced him to 20 years custodial sentence for each count. It ordered the sentence to run concurrently.

Aggrieved, Msuya appealed against both the conviction and sentence. He raised six grounds of appeal. For reason which will be seen obvious, I will not reproduce the grounds of appeal.

On the date the appeal came for hearing, Mr. Bizimana, assisted by Ms. Rose both learned State Attorney, supported the appeal, although on

different grounds of appeal. Mr. Bizimana submitted that appellants were wrongly tried and convicted as the trial court had no jurisdiction to try an economic offence. He asserted that court can try an economic offence upon being granted consent by the DPP under section 26 (1) of the Economic and Organised Crimes Control Act, [Cap 200 R.E 2022] or under section 26 (2) of the EOCCA an offence subordinate to the DPP. The consent in the present case was issued by the officer subordinate to the DPP under section 26 (1) of the TZCCA. He contended that the officer subordinate to the DPP has no mandate to issue consent under section 26 (1) of the EOCCA, hence the consent was defective. To support his content, the case of **Sandu John V. DPP**, Criminal Appeal No., 237 of 2019 [2023] TZA 17719 where the Court of Appeal held that-

"Having heard the submissions of Ms. Mwabeza and perused the Consent presented at the trial court, We agree that it was invalid as the learned Prosecuting State Attorney In-charge purportedly issued it under section 26(1) of the EOCCA while she was not the DPP as prescribed under that provision".

He added that since the consent was defective, the proceedings, judgment and sentence are nullity and prayed this Court to quash the proceedings set aside the judgment and set aside the sentence. As to the

way forward after the proceedings are quashed and the conviction sentence and sentence set aside, Mr. Bizimana submitted that the court may proceed to release the appellant forthwith. He contended that it is settled position of the law that a retrial may not be ordered to give the prosecution an opportunity to fill in the gap. He asserted that the court may order when there is strong evidence on record to lead conviction. He cited the case **Fatehali Manji v R** [1966] EA341.

He contended that he reviewed the evidence for the following reasons, **One**, the government trophies were not properly identified. He contended that the witness who identified with the witness who identified the trophies did not articulate to distinguish meat of the trophies under consideration by peculiar features from other meat of other wild or domestic animals. To support his contention, he cited the case of **Wiliam Maganga @ Charles V. R**, Criminal Appeal No. 104 of 020 [2023] TZCA 17742, dated 06.10.2023.

The appellant had nothing to add.

I reviewed the records of the trial court and found that indeed, the Regional Prosecutions Officer, who is an officer subordinate to the DPP issued a certificate of consent under section 26 (1) of the EOCCA. It is beyond dispute no trial for economic offence would commence without

consent of the DPP under section 26 (1) of the EOCCA or the officer subordinate to the DPP under section 26 (2) of EOCCA. Section 26 of EOCCA provides that-

"26.-(1) 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.

(2) The Director of Public Prosecutions shall establish and maintain a system whereby the process of seeking and obtaining of his consent for prosecutions may be expedited and may, for that purpose, by notice published in the Gazette, specify economic offences the prosecutions of which shall require the consent of the Director of Public Prosecutions in person and those the power of consenting to the prosecution of which may be exercised by such officer or officers subordinate to him as he may specify acting in accordance with his general or special instructions.

(3) The Director of Public Prosecutions shall have and may exercise in relation to prosecutions under this Act the same power which is conferred on him in respect of public and private prosecutions by the Criminal Procedure Act." (*Emphasis added*)

In additional to the above provision of the law, the Court of Appeal of Tanzania has held in cases without number that when an officer subordinate to the DPP has to issue a consent under subsection (2) of the section 26 of EOCCA and that the powers of the DPP under subsection (1) of section 26

are not delegable. It is settled that since the Regional Prosecutions Officer purposed to issue consent under section 26 (1) of EOCCA, the consent was not valid in law. Hence, the trial court tried the appellants without consent. The trial of an economic without consent from the DPP or the officer subordinate him is a nullity. I find without hesitation that the trial in the present case was a nullity.

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

The question after nullifying the proceedings and setting aside the conviction and sentence, is whether this Court should order a retrial. Mr. Bizimana learned State Attorney submitted that in the circumstance of this case a retrial order was not in the interest of justice. He submitted and I agree with him that a retrial may not be ordered where it may enable the prosecution to fill up gaps in its evidence at the first trial.

It is settled that a retrial should not be ordered in order the prosecution to fill 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."

When there is insufficient evidence, which would result into the prosecution filling the gap and deprive the appellant of a chance of acquittal, the court should not order a trial. Mr. Bizman submitted that the prosecution's evidence was insufficient as government trophies were not properly identified.

The appellant had nothing to add to the submission advanced in his favour.

After reviewing the evidence on record, I cannot agree more with the learned state Attorney that this is not a fit case to order a retrial. There prosecution's evidence was wanting. The government trophies were not properly identified. The prosecution witness who identified the trophies did specify peculiar features to distinguish the meat from meats of the other animals. Not only that but also, there exhibits were disposed without observing the procedures under paragraph 25 of the Police General Orders

No. 229 or section 101 (1) of the **Wildlife Conservation Act**, [Cap. 283 R.E. 2022] (the **WCA**). For that reason, if a re-trial is ordered the prosecution will have no evidence to establish the offence of unlawful possession of government trophy, without tendering the trophy of a valid inventory under paragraph 25 of the Police General Orders No. 229 or a court order disposing the trophies under section 101 (1) of the **WCA**.

In the end, I find and hold that the trial was a nullity for want of a valid consent. Consequently, I quash the proceedings and set aside the conviction and sentence. I also find that it is not in the interest of justice to order a trial but to order the appellant's immediate release from prison, unless held in the prison for any other lawful cause.

I order accordingly.

Dated at **Babati** this **17th** day of November, 2023.



J. R. Kahyoza

Judge

Court: Judgment delivered in the appellant and Mr. Bizimana, state attorney assisted by Ms. Mwanaidi State Attorney for the Respondent. B/C Ms. Fatina Haymale (RMA) present.



J. R. Kahyoza

Judge

17/11/2023