IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MBEYA SUB- REGISTRY

AT MBEYA

CRIMINAL APPEAL No. 141 OF 2023

(Originating from the District Court of Chunya at Chunya Criminal Case No. 3 of 2021)

VICTOR MARTIN.....1st APPELLANT

DANIEL ERASTO.....2nd APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

3rd & 7th November, 2023

MPAZE, J.:

The appellants were charged together with an offence of unlawful possession of government trophies contrary to section 86 (1) and (2)(c)(ii) of the Wildlife Conservation Act, No. 5 of 2009 as amended by section 59 (a) (b) of the Written Laws (Miscellaneous Amendments) Act No. 2 of 2016 read together with paragraph 14 (d) of the first schedule to section 57(1) of the Economic and Organized Crimes Control Act, Cap 200 R.E 2002 (now R.E. 2022 (the EOCCA).

It was alleged in the particulars of the offence that, on 29th November, 2020 at Mafyeko Village within Chunya District in Mbeya Region, the two were jointly and together found in unlawful possession of Government Trophies, to wit twelve pieces of sable bones, three pieces of sable hooves and one piece of peeled sable hooves valued at USD 2550/= which is equivalent to Tshs. 5,887,950/= the property of the Government of the United Republic of Tanzania without Permit.

Each pleaded not guilty hence a full trial was conducted by the District Court of Chunya at Chunya in Economic Crime Case No. 3 of 2021.

The prosecution case was supported by three (3) witnesses, namely, Joely Olei Sule (PW1), Joyce Rocky (PW2) and E3236 D/SGT Boniface (PW3). The trophy valuation report, a certificate of seizure and 4 pieces of sable hooves all were admitted as exhibits P1, P2 and P3 respectively.

It was the prosecution case that the appellants were arrested within Ruaha National Park by PW1 in possession of four pieces of sable hooves one piece was peeled, they were asked if they had a permit to enter the National Park, and they said they had it, but when they were searched, they were not found with it. They were taken to Chunya Police Station.

Apart from being found with Government trophies, according to PW1, the appellants were also found in possession of explosives and bullets which implied they were poachers. Certificate of Seizure of Police Case File No. CHU/IR/1388/2020 listed things which were seized from the appellants are 4 pieces of sable hooves one being peeled, while the Trophy Valuation Certificate concerning the total value of the trophies involved in the case with, Police File No. CHU/IR/1388/2020 shows, the type of trophy sable bones twelve pieces, sable hooves 3 and one piece of peeled sable.

In their defence the appellants denied being found in possession of a Government trophy in the National Park, instead what the 1st appellant said is that he was arrested while he was at the camp by officials of the National Park who searched the camp and found pieces of bones, he denied the bones to be his they did not believe him, he was taken to police with the 2nd appellant who just arrived there to convey the information of the 1st appellant's child who was sick.

The 2nd appellant confirmed what had been testified by the 1st appellant, and added that he was arrested at the 1st appellant's camp where he went to convey the information that the 1st appellant's child was sick.

After the trial, the trial magistrate evaluated the evidence for both sides he was fully satisfied that the appellants were guilty of the offence charged, convicted and sentenced them to pay a fine of Tshs. 17, 663, 850/= and twenty (20) years imprisonment.

The appellants were discontent with the decision of the trial court; hence they preferred this appeal. A total of 8 grounds were presented in their petition of appeal.

At the hearing of the appeal, the appellants enjoyed the service of Ms. Nyasige Kajanja while the respondent/Republic was represented by Ms. Zena James learned State Attorney assisted by Ms. Imelda Aluko Public Prosecutor.

When the court invited the learned advocate for the appellants to argue the appeal, Ms. James for the respondent prayed to start as she noted the second ground of appeal raises a point of law concerning the jurisdiction of the trial court. Counsel for the appellants had no objection to that, the prayer was granted. The second ground of appeal reads;

'That the trial court erred in law and fact to convict and sentence the appellants in a matter that it had no jurisdiction.'

Supporting this ground Ms. James argued that at the trial court, the appellants were charged with the economic offence, the offence which as per section 3 of the Economic and Organized Crime Control

Act, Cap 200 R.E 2022 henceforth EOCCA, is the High Court which is vested with jurisdiction to try such offences.

She said the subordinate courts will only have jurisdiction upon issuance of consent and certificate conferring jurisdiction by the DPP or authorized State Attorney as per sections 26(1) &(2) and 12 (3) of EOCCA.

In addition, Ms. James submitted that the records do not show if the consent and certificate were issued before the hearing of the case took off, she thus prayed the proceedings and judgement of the trial court be quashed and nullified, conviction and sentence imposed to the appellants be set aside. To support her argument, she cited the case of **Hashimu Nassoro @ Almas v. Director of Public Prosecutions**, Criminal Appeal No. 312 of 2019.

In the alternative, and for the interest of justice Ms. James prayed this court to make an order for retrial, as there is sufficient evidence to ground conviction and sentence the appellants if the case will be retried. She referred this court to the evidence adduced by PW1 and PW2, which she considers to be satisfactory to find the appellants guilty.

Responding to the submission made by Ms. James, counsel for the appellant conceded with the prayers made by the State Attorney of

quashing and nullifying the proceedings and the judgement of the trial court, but she opposed the prayer that the case be remitted for retrial.

Ms. Kajanja's standpoint in opposing the order of the retrial is based on the following reasons: first, there is a variance between the charge sheet and the evidence adduced in court regarding Government trophies which were found in possession of the appellants.

Second, there is no sufficient evidence that can lead to the conviction of the appellants, she said the evidence which was adduced during the trial had a lot of inconsistency. According to her neither the evidence of PW1 nor PW2 proved the offence.

Ms. Kajanja believed that granting the order of retrial in the circumstances of this case is allowing the Republic to fill up their gaps and this will not be in the interest of justice on the part of the appellants who have been serving an unjust sentence for a while. She cemented her argument by citing the case of **Fatehali Manji v. Republic**, 1966 Vol 1 EA page 343.

In conclusion, she urged the court to find out that this is not a fit case to order retrial, instead to nullify the trial court proceedings and judgement and set the appellants free taking into account that the appellants have been in custody for long.

From both sides, there is no dispute that the appellants were charged with Economic offence. It is also not in dispute that, for the subordinate court to proceed with a trial of this nature, it must obtain consent and a certificate conferring jurisdiction to try the case from either the DPP or authorized State Attorney.

Going through the trial court record I have seen in the court file there is a consent and certificate conferring jurisdiction of the trial court issued by the Regional Prosecutions Officer hereinafter 'the RPO' under section 26(1) and (2) of EOCCA. Although the same was in the court file they were both not endorsed by the trial Magistrate to have been duly received and form part of the record.

The question is, were the consent and certificate valid to give the trial court requisite jurisdiction? The section referred to by the RPO in issuing the consent and certificate reads;

> 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 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 by his general or special instructions.'

In employing the requirement of section 26(2) (supra) the DPP issued the Economic Offences (Specification of Offences Exercising Consent) Notice, 2014, G.N. No. 284 of 2014 which was letter revoked and replaced by the Economic Offences (Specification of Offences for Consent) Notice, 2021 G.N. No. 496H of 2021.

Through GN No. 496H of 2021, the DPP has delegated his power to some prosecuting officials to issue consent to some economic offences, however, a certificate conferring jurisdiction is not issued under the said GN but rather under section 12(3) of the EOCCA.

Section 26(1) and (2) which the RPO invoked to issue consent and certificate conferring jurisdiction, only provides powers to the DPP or any authorised officer to issue consent and not certificate in economic offences before the commencement of the trial in subordinate courts.

For the subordinate court to be clothed with requisite jurisdiction to try economic offence it needs both certificate conferring jurisdiction issued under section 12(3) of the EOCCA and consent issued under section 26(2) of the EOCCA. Once both documents are issued the same

must be endorsed and admitted by the subordinate court to form part of the record.

As hinted hereinabove certificate conferring jurisdiction to the subordinate courts is governed by section 12(3) of the EOCCA, the section provides;

> *'The Director of Public Prosecutions or any other State Attorney duly authorized 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 offence triable by the High court under this Act, be tried by such Court subordinate to the High Court as he may specify in the Certificate.'*

In the present case, both certificates conferring jurisdiction to the subordinate court to try economic offence and consent to prosecute the appellants were issued under sections 26(1) and (2) of the EOCCA contrary to the dictates of the law. While consent was issued under the proper provision of the law that is section 26(2) of the EOCCA certificate conferring jurisdiction to subordinate court to try economic offence was wrongly issued under section 26(2) of the EOCCA. In the eyes of the law, there was no certificate conferring jurisdiction to try the appellants before the trial court.

In close connection to the foregoing, although the purported certificate conferring jurisdiction to the subordinate court to try

economic offence and consent to prosecute the appellants are in the court file the same were not endorsed nor admitted by the trial court to form part of the record.

The omission to endorse and admit in the record the certificate conferring jurisdiction and consent to try an economic offence before a subordinate court is fatal and renders a trial a nullity.

There is a plethora of authorities regarding this position of the law one of them is the case of **John Julius Martin and Another v. The Republic**, (Criminal Appeal NO. 42 of 2020) published on the website, www.tanzlii.org [2022] TZCA 789 on page 7 the court faced with somewhat similar situation cited with approval its previous decision in the cases of **Maganzo Zelamoshi@nyanzomola v. Republic**, Criminal Appeal number 355 of 2016(Unreported) and **Maulid Ismail Ndonde v. Republic**, Criminal Appeal number 319 of 2019(Unreported) where there was neither an endorsement on the face of the consent and certificate nor did the trial court's record reflect that there were such documents on record like the case before it, the court proceeded to nullify both the proceedings and judgements of both the subordinate court and High Court.

Guided by the foregoing authorities, I am of the considered view that there being no valid consent nor certificate conferring jurisdiction to

the trial court to try the charge which was facing the appellants, the trial court tried the case without jurisdiction therefore both the proceedings and judgement are vitiated.

In this situation what should be done? The trained minds both for the appellants and for the respondent prayed this court to nullify and quash the proceedings and the judgement of the trial court. However, on the part of Ms. James prayed for an order of retrial which was vehemently opposed by Ms. Kajanja.

Relying on the case of **John Julius Martin** (supra), I see no other option but to agree with the trained minds in respect of nullifying the proceedings and judgement of the trial court, as this was also done in the cited case above.

Therefore, since there was no consent and certificate authorising the trial court to try the case I hereby proceed to nullify the trial court proceedings and judgement in Criminal Case No. 3 of 2020 of Chunya District at Chunya, quash the conviction and set aside sentences.

Turning to the way forward, it was stated in the case of **Fatehali Manji V Republic**, (supra) that;

> *'In general, a retrial may be ordered only where the original trial was illegal or defective: it will be not ordered where the conviction is set aside because of the insufficiency of evidence for the*

purpose of enabling the prosecution to fill in gaps in its evidence at the first trial. Even where a conviction is vitiated by mistake of the trial court for which the prosecution is not to be blamed, 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 it'

As correctly, in my view, submitted by Ms. Kajanja that retrial will not be in the interest of the appellants but for the republic who will get a chance to fill up the gaps in their case, this is my perspective as well.

Considering at what has transpired during the trial, there is a variance between the charge sheet, certificate of seizure, and trophy valuation certificate, no inventory was tendered and evidence by prosecution witnesses is wanting. If this court will order retrial the defects may be remedied by the prosecution which is not for the benefit of the appellants but rather the respondent.

For the foregoing reasons, this court is of the considered view that an order for retrial will not be appropriate for the interest of justice but rather it will occasion a miscarriage of justice. Consequently, I allow the appeal and order that the appellants be immediately released from custody unless lawfully held for other just cause.

It is so ordered.

Dated at **Mbeya** this 7th November, 2023.

M.B. MPAZE

JUDGE

Court: Judgment delivered in Mbeya on this 7th day of November, 2023 in the presence of the appellants and Ms. Imelda Aliko for the Republic.

THE HIGH COURT OF TANZANIA

M.B. MPAZE

JUDGE

07/11/2023