

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

CRIMINAL APPEAL NO. 81 OF 2023

(Arising from Economic Case No. 74 of 2021 District Court of Simanjiro at Orkesument)

JAPHET JOSEPH DIDAS.....1ST APPELLANT
RAULENT MICHAL MUSHI.....2ND APPELLANT
VERSUS
THE DPP.....RESPONDENT

JUDGMENT

14th & 17th November, 2023

Kahyoza, J.

Japhet Joseph Didas and Raulent Michal Mushi were charged with the offence of unlawful possession of Government Trophy, convicted and sentenced to 20 years imprisonment.

Aggrieved, Japhet Joseph Didas and Raulent Michal Mushi appealed to this Court. They raised six (6) grounds of complaint of which I will not produce. On the date the appeal was fixed for hearing, Ms. Mwanaidi, State Attorney supported the appeal though, on different grounds. She submitted that the trial court tried the appellants without jurisdiction as there was no valid consent. She asserted that the defective consent could not give the

district court jurisdiction to try an economic offence. She argued that the consent was invalid as the Regional Prosecutions Officer issued it under subsection (1) of section 26 instead of subsection (2) of section 26 of the Economic Organized Crime Control Act, [Cap. 200 R. E. 2019] (the EOCCA). She contended that powers to issue consent to try economic offence under subsection (1) of section 26 of EOCCA are bestowed to the DPP and are not delegable. The Regional Prosecutions Officer had mandate to act under subsection (2) of section 26 of the EOCCA. To support her contention, she cited the case of **Salum Saadi @ Salum V. R**, Criminal Appeal No. 502 2019 [2023] TZCA 17737.

She argued further that, the district court had no jurisdiction to try an economic offence as the certificate conferring jurisdiction did not specify the section of the offence the accused person stood charged with. It referred to the penal section.

She contended that the proceedings and judgment were a nullity. As a way forward after nullifying the proceedings and judgment, she prayed the appellants to be set at liberty. She asserted that a retrial was not in the interest of justice for reasons that; **one**, the trophy was not properly identified as the witness did not specify the peculiarities of meat allegedly

found in possession of the appellants. She cited the case of **William Maganga @ Charles V. R**, Criminal Appeal No. 104 of 2022 CAT published on Tanzlii website Media Neutral Citation [2023] TCA 17742; **Two**, she asserted that the inventory form was defective as the appellants were not given the right to comment on the inventory. She cited the case of **Mohamed Juma @ Mpakama**, Criminal Appeal No. 383 of 2017 [2019] TZCA, 1518. She had another ground why the re-trial should not be ordered, which is that the exhibit was not properly kept as the exhibit keeper did not make entry in the exhibit book.

She beseeched the court to quash the proceedings, set aside the conviction together with the sentence, and release the appellants.

The appellants had nothing to argue in support or to counter the State Attorney's submission.

The records depict that 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 now settled that, it is the DPP who has mandate to issue consent to prosecute an economic offence under section 26 (1) of the EOCCA and that the officer subordinate to the DPP may only issue a valid

consent to prosecute an economic offence 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 addition, the Court of Appeal of Tanzania has held in cases without number that an officer subordinate to the DPP ought 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. See the cases of **Salum Saadi @ Salum 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.

Undoubtedly, given that the Regional Prosecutions Officer issued the consent under incorrect enabling provisions of the law, the consent is legally invalid. Consequently, the trial court proceeded to try the appellants without the necessary consent. The trial of an economic offence without consent from the Director of Public Prosecutions (DPP) or an officer subordinate to him is a nullity. I unequivocally conclude that the trial in the present case was, without a doubt, a nullity.

I concur with the learned state attorney's assertion that the certificate conferring jurisdiction to the district court was defective. The Regional Prosecutions Officer failed to specify in the certificate of transfer the economic offence for which jurisdiction was being conferred upon the Simanjiro district court to prosecute. It is unlawful to grant jurisdiction to the district court without explicitly specifying the offence it is mandated to try. Although the certificate referred to the penal section, it did not mention the offence section.

Having identified the fatal defects in both the consent and the certificate conferring jurisdiction, the only valid conclusion is that the trial was a nullity. Therefore, I hereby annul the proceedings and overturn the conviction and sentence.

Following the annulment of the conviction and sentence, the next pertinent issue is whether this court should order a retrial. It is well-established in legal principles that a retrial should not be ordered merely to provide the prosecution an opportunity to address gaps in its evidence from the initial trial. In the case of **Fatehali Manji v R** [1966] EA341, the then Court of Appeal of East Africa outlined the guiding principle for retrials, stating-

"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."

Ms. Mwanaidi, the learned state attorney, contended that ordering a retrial for the appellants would not serve the interest of justice. I agree with her argument that the evidence on record is deficient. The inventory certificate presented as evidence, indicating that the appellants were found in unlawful possession of government trophy, was prepared in violation of the law. She asserted that the appellants were not given an opportunity to comment at the time of disposing of the trophy. In support of her argument, she cited the case of **Mohamed Juma @ Mpakama** (supra). The Court of Appeal in the case of **Mohamed Juma @ Mpakama** held that the suspect should be heard before an inventory certificate is issued under paragraph 25 of the Police General Orders Chapter No. 229. Paragraph 25 of the Chapter 229 of the PGO reads, thus-

*25. Perishable exhibits which cannot easily be preserved until the case is heard, **shall be brought before the Magistrate, together with the prisoner (if any) so that the Magistrate may note the exhibits and order immediate disposal.** Where possible, such exhibits should be photographed before disposal.*

The Court of Appeal held in of **Mohamed Juma @ Mpakama**, that the accused person must be present and the court should hear him at the time of authorizing the disposal of the exhibits. It stated-

*"This paragraph 25 in addition emphasizes the mandatory right of an accused (if he is in custody or out of police bail) **to be present before the magistrate and be heard.**" (Emphasis added)*

It was wrong for the trial court to act on such exhibit which was prepared in violation of the law. Once this exhibit is expunged, the prosecution will be left without evidence to establish that the appellants were found in possession of the government trophy. Therefore, I concur with Ms. Mwanaidi, the learned state attorney, in her submission that a retrial is not in the interest of justice.

In the upshot, it is this Court's view that the trial was a nullity for want of a valid consent and certificate conferring jurisdiction to the subordinate court to try economic offence. Consequently, I quash the proceedings and set aside the conviction and sentence, order the appellants to be released forthwith from the prison, unless held there for any other lawful cause.

I order accordingly.

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

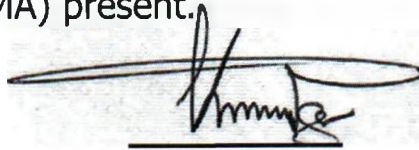


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J. R. Kahyoza

Judge

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

A handwritten signature in black ink, appearing to read 'J. R. Kahyoza', is written over a horizontal line. The signature is stylized with a long, sweeping horizontal stroke at the top.

J. R. Kahyoza

Judge

17/11/2023