

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA SUB-REGISTRY)

AT ARUSHA

CRIMINAL APPEAL NO.140 OF 2022

**(Originating from the District Court of Babati in Economic Case No.7
of 2022)**

JOHN SIMON.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

23/10/2023 & 9/11/2023

KIWONDE, J.:

The appellant, John Simon was charged with an offence of unlawful possession of Government trophy, contrary to section 86(1) and (2)(b) of the Wildlife Conservation Act No.5 of 2009 read together with paragraph 14 of the first Schedule to and sections 57(1) and 60(2) of the Economic and Organized Crimes Control Act, Cap 200 (R. E 2019).

The facts of the case are that the appellant, on 19th February, 2021 at Mandi Village within the District of Babati in Manyara Region,



was found in possession of government trophy to wit; one leopard skin which is equated to one killed leopard valued at USD 3,500 equivalent to eight million one hundred sixteen thousand five hundred Tanzanian shillings (TZS 8,116, 500/=) the property of Tanzania Government without permit from the Director of the wildlife.

When the appellant was arraigned before the District Court of Babati, he pleaded not guilty. After a full trial, he was convicted and sentenced to serve imprisonment in jail for a term of 20 years.

The appellant was aggrieved by the decision of the trial court and has appealed to this court against both conviction and sentence meted out against him. He has filed a petition of appeal containing four (4) grounds of appeal and four (4) additional grounds. The main grounds of appeal include:

1. That, the trial court erred in law and fact for convicting him based on a defective charge,
2. That, the trial court erred in law by convicting him while there was material difference between the charge and the evidence adduced in court,

3. That, the trial court erred in law and fact by convicting him basing solely on suspicion and,
4. That, the trial court erred in law when it convicted the appellant while the prosecution failed to prove the case beyond reasonable doubt.

Whereas, in his additional grounds of appeal, the appellant said the trial court erred in law and fact when it failed to find that the prosecution amended the charge before commencement of the trial contrary to section 234 (1) of the Criminal Procedure Act, Cap 20 (R. E 2022), by its failure to find that section 231(1) of the Criminal Procedure Act, Cap 20 was contravened, that the defence of *alibi* raised by the appellant was not considered contrary to section 194 (6) of the Criminal Procedure Act, Cap 20 and finally, that, the trial court erred in law and fact by convicting and sentencing him while the arraignment, hearing and determination of the case contravened section 29 (1) of the Economic and Organized Crimes Control Act, Cap 200 (R. E 2019).

The appellant asked this court to allow this appeal.

During hearing of the appeal, the appellant was unrepresented, however, he had lengthy submissions supported by several case

laws which submissions and precedents, I find not necessary to repeat them here on good reason that the appeal was readily supported by the respondent Republic.

In reply to the submissions in-chief, the respondent was represented by Mr. Mafudh Mbagwa, State Attorney, who supported the appeal but on different grounds. According to the State Attorney, the consent filed in the trial court was made under section 26 (1) of the Economic and Organized Crimes Act, Cap 200 instead of sub-section 2 of the Act. He said, the cited section of the law vests powers to the Director of Public Prosecutions (D. P. P) alone. He argued that the powers cannot be delegated. Thus, the Regional Prosecutions Officer had no authority to issue consent under section 26 (1) of the cited Act above.

Apart from that, the State Attorney submitted that the certificate conferring jurisdiction to the trial court had to indicate the provisions of the law which the appellant violated. The State Attorney said where the consent and certificate conferring jurisdiction to the subordinate court are defective, the irregularity makes the trial a nullity. He referred to the case of **Peter Kongori Maliwa and 4 others Versus Republic**, Criminal Appeal No. 253

of 2020, Court of Appeal of Tanzania sitting at Musoma (unreported).

On the way forward, the State Attorney said the appellate court was otherwise to order retrial. But, in this appeal, if the case will be tried *de novo*, the prosecution will fill up the gaps because the evidence adduced was not sufficient to ground conviction. To buttress his position, the State Attorney said the cautioned statements of the appellant were tendered and not objected by him, but there was no evidence to show when the appellant was arrested; so, the statements may have been taken out of time.

Besides that, the State Attorney submitted that at the trial, a material witness was not called to testify. It was said that when the appellant sent the government trophy to PW3, one Felician Mobesh, his wife saw the appellant doing so using a motor cycle famously called *bodaboda*. But this witness was not produced in court to give evidence to that effect. The State Attorney, thus, supported the appeal and said the conviction be quashed, sentence be set aside and the appellant be released.

The appellant had nothing to rejoin.

Had the appeal not supported by the respondent, the issue for determination would have been whether the appeal has merits or otherwise.

Upon considering the submissions of both sides, I found it crystal clear that the appeal has been supported by the respondent in a different approach. I concur with the learned State Attorney that the trial before the subordinate court was a nullity. This is based on reason that where the consent and certificate conferring jurisdiction to the subordinate court are defective, the trial court lacks jurisdiction. In this appeal, the consent filed in the trial court was signed by the Regional Prosecutions Officer (RPO) and it is shown that he issued the same under section 26 (1) of the Economic and Organized Crimes Control Act, Cap 200. It has been held that the powers to issued consent to the subordinate courts to try economic offences under the above cited provision of the law are exclusively vested to the Director of the Public Prosecutions. The powers cannot be delegated. If the same are to be exercised by other officers, then the consent has to be made and issued under section 26(2) of the Economic and Organized Crimes Control Act, Cap 200.

Therefore, there is an apparent irregularity in the consent issued by unauthorised officer.

Also, the certificate conferring jurisdiction to the trial court did not indicate the provisions of the law creating the economic offence alleged to have been committed by the appellant. The certificate did not refer to the offence of unlawful possession of Government trophy, contrary to section 86 (1)(2)(b) of the Wildlife Conservation Act, No.5 of 2009 as indicated in the charge. This rendered the certificate defective.

In **Chacha Chiwa Marungu Versus Republic**, Criminal Appeal No.364 of 2020, Court of Appeal of Tanzania at Musoma (unreported), it was clearly stated that the trial court was not clothed with jurisdiction to try economic offences on reason that the consent issued and filed by a person not authorized and that the certificate conferring jurisdiction to the trial court omitted to cite the sections of the law creating the offence. The Court nullified the trial. Likewise, this position was taken in **Dilipkumar Maganbai Patel Versus Republic**, Criminal Appeal No. 270 of 2019 (unreported)

For that matter, I find and hold that the trial of the appellant before the District Court of Babati was without jurisdiction and thus, a nullity.

This ground touching the jurisdiction of the trial court, suffices to dispose of the entire appeal. Therefore, I will not go on expounding the rest of the grounds of appeal.

Concerning the way forward where the trial in the subordinate court is found a nullity, the appellate court can order retrial if the interests of justice so require. The principle was set in the case of **Fatehali Manji V. R** [1966] E. A. 343 that retrial cannot be ordered for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial. In our jurisdiction, this was also fortified in **Sijali Shabani Versus Republic**, Criminal Appeal No.538 of 2017, Court of Appeal of Tanzania at Dar-es Salaam (unreported)

In the appeal at hand, it is expressly shown by the respondent that if retrial is ordered, the prosecution will get an opportunity to fill up gaps in their evidence. The prosecution's evidence would not ground conviction for it was insufficient. For instance, the failure of the prosecution to call the material witness, that is, the wife of

Felician Mobesh (PW3) without reason, made the prosecution evidence wanting in order to prove the case. This witness was alleged to have eye witnessed the appellant sending to PW3 the leopard skin. But she was not called to testify in court.

In law, where a material witness is mentioned by the prosecution, he or she has to be brought to court to testify unless there are cogent reasons for not bringing the same. In **Aziz Abdallah V. R** [1991] T. L. R 71, it was categorically stated that where the material witness is not called to testify in court without assigning reasons, the trial court is justified to draw an adverse inference against the prosecution case. Therefore, in this case, the order of retrial will serve no interest of justice.

Furthermore, the conviction of the appellant based on the cautioned statements of the appellant. However, the time of arrest of the appellant was not clearly stated so that the prosecution could establish that the evidence in question was legally obtained within time stipulated by law. In **Anold Loishie @ Leshai versus Republic**, Criminal Appeal No. 249 of 2017, Court of Appeal of Tanzania at Arusha (unreported), it was stated that there being no clear time of the appellant's arrest, leaves doubts on whether the

recording of the cautioned statements complied with the law and the appellants should benefit from those doubts. Under the circumstances of this appeal, this is not a fit case to order retrial.

Consequently, the entire proceedings of the trial court are hereby nullified, conviction of the appellant is quashed, the sentence meted out on the appellant is set aside and it is hereby ordered that the appellant be immediately released from prison unless he is held for other reason.

Dated at Arusha this 9th day of November 2023



F. H. KIWONDE

JUDGE

09/11/ 2023

Court: Judgment is delivered in open court in the presence of the appellant in person, Mr. Mafudh Mbagwa, State Attorney for the respondent Republic and Joyce, a bench clerk this 9th November 2023 and the right of further appeal is explained.



F. H. KIWONDE

JUDGE

09/11/ 2023