IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MANYARA

AT BABATI

CRIMINAL APPEAL NO. 96 OF 2023

(Originating from Economic Case No 8/2022 before the court of the resident magistrate of Manyara at Babati.)

SAIDI IBRAHIM ISA @ MAGODORO.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

11th October, 2023 & 15th February, 2024

Kahyoza, J.:

Saidi Ibrahim Isa @ Magodoro was charged with an offence of unlawful possession of government trophy before the court of Resident Magistrate, convicted and sentenced to 20 years' imprisonment. Aggrieved, he appealed to the High Court of Tanzania against both conviction and sentence.

Aggrieved, Said Ibrahimu @ Magodoro appealed, raising three grounds of appeal, which I will not reproduce for reasons to be unveiled. The background of the appeal is that; the prosecution arraigned **Saidi Ibrahimu @ Magodoro** before a court of the resident magistrate charged with an offence of unlawful possession of Government trophy contrary to Paragraph 86 (1) and (2) (b) of the Wildlife Conservation Act [Cap. 283 RE 2022] (WLCA) read together with paragraph 14 of the 1st

Schedule to and section 57 (1) and 60 (2) of the Economic and Organized Crime Control Act [Cap. 200 R.E 2019 now 2022], (the **EOCCA**). After a full trial, the trial court convicted the appellant and sentenced him to serve twenty (20) years imprisonment. It was alleged that Said Ibrahimu @ Magododro was on 18.8.2022 at Bulukeri area-Magugu area found in possession of 66.5kg fresh meat of zebra equivalent to one zebra killed valued at USD. 1,200 the property of the Government of Tanzania without permit from the Director.

Before hearing the appeal on merit, Mr. Kapera learned state attorney, raised a point of law that the court of the resident magistrate of Manyara at Babati had no jurisdiction to try an economic offence for want of the valid consent. He contended that the Regional Prosecutions Officer issued the consent under the wrong provisions of the law, as it issued under section 26 (1) of the EOCCA, which empowers the DPP to issue consent and not officers subordinate to him. he prayed to proceedings and be quashed and the conviction and sentence to be set aside and retrial ordered.

Are the proceedings, conviction and sentence a nullity?

The learned state attorney submitted the since the trial court tried an economic offence without a valid consent, the proceedings, conviction and sentence are a nullity. To support his contention, he

cited **Peter Kongoli Maliwa & 4 Other V. R.,** Criminal Application No. 254 of 2020 CAT-Musoma, Media Neutral Citation [2023] TZCA 17350.

The appellant's advocate Mr**. Festo Jackson** concurred with Mr Kapera's submission that a trial of an economic offence without a valid consent vitiates the proceedings and the subsequent conviction and sentence.

I have no reason to take different stand from my learned friends. It is settled that no court can try an economic offence without consent from the D.P.P. as per section 26(1) of the **EOCCA.** Section 26(1) of the **EOCCA** which stipulates 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****."*

A consent to try an economic offence may be issued by officers subordinate to the DPP under sub-section (2) of section 26 of the **EOCCA**. In the present case, as submitted by the learned state attorney, consent to try an economic offence was issued by an officer subordinate to the DPP under sub-section (1) of section 26 of the **EOCCA**. Thus, it was issued under the wrong provision of the law. It is now settled that consent issued under the wrong provisions is illegal and

invalid. The Court of Appeal confronted with a similar position in **Sandu John v. R.**, Criminal Appeal No. 237 of 2019 (unreported), observed as it had previously done in **Peter Kongori Maliwa** (supra), thus-

> *"Similarly, in the case under scrutiny' since the Prosecution Attorney In charge purported to issue consent under section 26 (1) of the EOCCA which was not within her mandate, it amounted to no consent at all authorising the prosecution of the appellant by the trial court.* ***In the event, the proceedings of the trial court were a nullity as it could not assume the jurisdiction without the requisite consent to prosecute the appellant as required by law****. Ultimately, the proceedings of the first appellate court were also null and void as they emanated from nullity proceedings of the trial court. We therefore, conclude that the appellant was wrongly prosecuted at the trial court."*

I find that that the proceedings and the subsequent conviction and sentence are all a nullity for want of valid consent to prosecute the appellant with an economic offence. I nullify the proceedings and set aside the conviction and sentence. The next question is what happens to the appellant after quashing proceedings and set aside the conviction and sentence.

Is there justification to order a retrial?

Mr. Kapera S/A argued that after the court nullified the proceedings and set aside the judgment, there are two options available; **one**, to order a retrial in the event the prosecution evidence was sufficient to support conviction; or **two**, to release the appellant when the prosecution evidence is wanting. He cited the case of **Peter Kongoli Maliwa & 4 Other V. R.,** (supra) to support his contention.

He argued that the prosecution adduced ample evidence, as the accused was found in possession of zebra meat, as witnessed by PW3 and PW4 who gave evidence to that extent and that the accused signed a seizure certificate without objection. He added that Pw5 identified the trophy as zebra meat and that the chain of custody was not broken.

In addition, he argued that the prosecution tendered the accused person's cautioned statement, which was admitted without objection, Citing the case of **Mohamed Hamma @ Mtupeni & another V. R**., Criminal Appeal No. CAT, Media Neutral Citation [2010] TZCA 141, he contended that *confession of an accused person is a best evidence*, and therefore, there is sufficient evidence to prove the case on appellant. He prayed the Court to order of a trial *denovo*.

The appellant's advocate **Mr. Festo Jackson** had an opinion different from his learned brother, as he submitted that the prosecution's evidence was not sufficient to prove the allegations. To

start with, he argued that the certificate of seizure was defective as there was no independent witness. He contended if the Court will order a trial de novo, the prosecution will take that opportunity to fill in the gaps in its evidence.

He added that it is true that the appellant did not oppose the confession but the proceedings depict that the appellant asked questions which raised issues of the voluntariness and also gave different version in his defence. He cited the case of **Sandu John V. DPP**, Criminal Appeal No. 237 of 2019 [2023] TZCA 17719 and prayed the appellant to be set free and this Court should not order a retrial.

In his rejoinder, **Mr. Kapera,** state attorney, submitted that according to the evidence of PW3, the appellant was found at the place where it was not possible to find an independent witness.

I reviewed the evidence on record and found that the prosecution evidence is not sufficient to order a retrial. It is true that the appellant confessed to commit the offence and the chain of custody did not break. The appellant was charged with the offence of being found in possession of meat alleged to be that of zebra. To prove the offence, the prosecution was required among other things, to tender meat as exhibit or an inventory under the PGO or an order disposing perishable

exhibit issued under section 101 of the Wildlife Conservation Act, [Cap. 283] (the **WLCA**).

The prosecution opted to tender inventory in lieu of meat which was subject to speedy decay. The law permits inventory to be tendered instead of the exhibit which is subject to speed decay. To be admitted and acted upon an inventory must be prepared in accordance with the law. Unfortunately, the inventory (exh. P. 5) cannot be relied upon to prove that the appellant was found in possession of government trophy as it was in compliance with the law. Paragraph **25** of PGO No. 229 as the Court of Appeal held in **Mohamed Juma @ Mpakama vs R.,** (Criminal Appeal 385 of 2017) [2019] TZCA 518 (26 February 2019) [2019] 1 T.L.R. 514 [CA**]** provides the for procedure of disposing of exhibits subject to speedy decay. One of the conditions, which must be complied with is to give the suspects the right to be heard before the magistrate orders the exhibit to be tendered.

The Court of Appeal in **Mohamed Juma @ Mpakama vs R.** made a reference to Paragraph 25 of the PGO which states that-

> *"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 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)*

There is no evidence that the prosecution witness presented the appellant to the magistrate who ordered the disposal of the exhibits. The inventory shows that the appellant signed it but no one can tell with confidence that the appellant appeared before the magistrate let alone to tell that the magistrate heard him. Hence, I am of the firm view that the inventory was not properly prepared, thus, it was wrong to admit it and rely on it. Once the inventory is expunged the prosecution remains with no evidence to prove that the appellant was found in possession of meat. To order a retrial would not be practical as the prosecution will have no evidence to tender as meat was disposed without observing the law.

The prosecution identified the exhibit as being zebra meet. The prosecution witness Christopher Peter Laizer (Pw5) identified the meat as being zebra meat. He described unique characteristics of zebra meat. He deposed that zebra's muscles are elongated and arraigned vertically. He added that zebra meat smells differently from other meat. I have no reason to the question the identification done by Christopher Peter Laizer (**Pw5**). I would say Christopher Peter Laizer (**Pw5**) did properly identify the meat.

The appellant's advocate invited me to hold the prosecution's evidence was weak because the seizure certificate was not signed by an independent witness. Like, the state attorney, the appellant's advocate did not persuade me that the seizure certificate was not credible because there was no independent witness to witness the search and seizure. It is not in every case that a search and seizure must be witnessed by an independent witness so as to be valid. There are circumstances where a search and seizure would be valid without an independent witness. Section 106 (1)(b) of the WLCA justifies a search and seizure without an independent witness. It provides-

> ***106***.*-(1) Without prejudice to any other law, where any authorized officer has reasonable grounds to believe that any*

person has committed or is about to commit an offence under this Act, he may-

(a) require any such person to produce for his inspection any animal, game meat, trophy or

weapon in his possession or any licence, permit or other document issued to him or required to be kept by him under the provisions of this Act or the Firearms and Ammunition Control Act;

(b) enter and search without warrant any land, building, tent, vehicle, aircraft or vessel in the occupation or use of such person, open and search any baggage or other thing in his possession:

***Provided that, no dwelling house shall be entered into without a warrant except in the presence of at least one independent witness**; and*

(C)..."

It is my firm opinion that the prosecution evidence is not strong as suggested by **Mr. Kapera S/A** to order a retrial as to do so will give chance to the prosecution to shape its case and fill in gaps. In **Fatehali Manji v. R**, [1966] EA 343 the Court of Appeal of East Africa restated the principles upon which court should order retrial. It said;-

"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 should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person".

In this case, it is clear that the trial court had no jurisdiction, but that does not necessarily follow that a retrial should be ordered. An order for a retrial is as a result of an exercise of the court discretion, I wish to associate myself with the decision in the Ugandan case of **Wapokra v. Uganda** [2016] UGCA 33 it was held;-

"The overriding purpose of the retrial is to ensure that the cause of justice is done in a case before court. A serious error committed as to the conduct of a trial or the discovery of the new evidence, which was not obtainable at the trial, are the major considerations for ordering retrial. The court that has tried a case should be able to correct the errors as the manners of the conduct of the trial or to receive other evidence that was then not available. However, that must ensure that the accused person is not subjected to double jeopardy by way of expense, delay and inconvenience by reason of the retrial. An order of a retrial is as a result of the judicious exercise of the courts discretion"

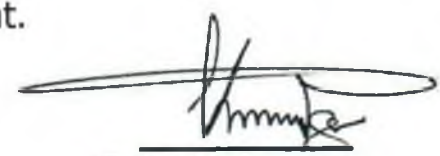
In the end, I nullify the proceedings and set aside the conviction and sentence. As the prosecution evidence is weak for want of the exhibit or a valid inventory to prove the offence of unlawful possession of the government trophy, I hesitate to order a retrial and order the appellant's immediate release from prison unless held there for a lawful cause.

I order accordingly.

DATED at Babati, this day of **15th February**, 2024.

J. R. Kahyoza.
Judge

Court: Judgment delivered in the presence of the appellant, his advocate and Mr. Bizman, State Attorney for the Republic. Fatina Haymale (RMA) present.



J. R. Kahyoza
Judge
15/02/2024