IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MANYARA

AT BABATI

CRIMINAL APPEAL NO. 63 OF 2023

(Originating from Economic Case No 5/2022 before Mbulu district court.)

HAMIMU ISSA MASAWANI..... APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

11th October, 2023 & 15th February, 2024

Kahyoza, J.:

Hamimu Issa Masawani was charged with an offence of unlawful possession of government trophy before the district court of Mbulu, convicted and sentenced to 20 years' imprisonment. Aggrieved, he appealed to the High Court of Tanzania against both conviction and sentence.

Before, the Court heard the appeal, the respondent raised the preliminary point of law that the trial court had no jurisdiction, prayed the conviction and sentence to be set aside and the Court to order a trial *de novo*.

There are two issues; **one**, whether the proceedings, conviction and sentence were a nullity; and **two**, whether the prosecution evidence warrants the Court to order trial *de novo*.

A brief background is that, the prosecution allegedly found **Hamimu Issa Masawani** in unlawful possession of government trophy contrary to section 86 (1) and (2) of the Wildlife Conservation Act, [Cap. 283, now R.E. 2022] (the **WLCA**) read together with paragraph 14 of the First 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). The prosecution alleged that **Hamimu Issa Masawani** was found on 24. 3. 2022 at New City Comfort lodge within Mblu district found in unlawful possession of government trophy, to wit, two elephant tusks.

The value of the tusks were equivalent to the value of one elephant, which is USD 15,000.00 which by then was equivalent to Tzs. 36.615,000.00. He pleaded not guilty. After full trial, the trial court convicted and sentenced him. **Hamimu Issa Masawani** appealed to this court raising four grounds of appeal. I will not produce the grounds of appeal for obvious reason.

As hinted above, Mr. Bizimana, state attorney raised, before we heard the appeal, a point of law that the District Court of Mbulu had no jurisdiction to try the appellant for want of the valid consent. He argued that the consent to try the appellant in respect of an economic offence was invalid as the Regional Prosecution Officer, issued it under the wrong provisions of the law. The Regional Prosecution Officer issued the consent under section 26 (1) of the Economic and Organized Crime Control Act, which empowers the DPP to issue consent and not officers subordinate to the DPP. He argued that defective consent cannot give the court jurisdiction to try an economic offence. To support his contention, he cited the case of **Sandu John V. DPP**, Criminal Appeal No. 237 of 2019 [2023] TZCA 17719 where the Court of Appeal held that consent issued under section 26 (1) of the **EOCCA** by the officer subordinate to the DPP is invalid and renders the proceedings and judgment a nullity.

The appellant had nothing substantive to submit. He prayed to be released arguing that the case took a long time before the trial court and that the prosecution withdrew it at one time, re-arrested and charged him.

Are the proceedings, conviction and sentence a nullity?

The law is settled that no court has jurisdiction to try an economic offence without consent from the DPP as provided by section 26 of the **EOCCA**. Section 26(1) of the **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**. (Emphasis provided).*

As submitted by the respondent's state attorney, the consent which purported to give jurisdiction to the trial court was defective. The Regional Prosecution Officer issued the consent under sub-section (1) instead of sub-section (2) both, of section 26 of the **EOCCA**. Officers subordinate to the DPP are mandated under sub-section (2) of section 26 of the **EOCCA** to issue a consent to courts to prosecute economic offences. A defective consent cannot confer jurisdiction to a court to try an economic offence. Consequently, the proceedings, conviction and sentence were a nullity as the trial court had no jurisdiction to try an economic offence for want of the valid consent. I, therefore nullify and quash the proceedings, set aside the conviction and sentence. After quashing the proceedings and setting aside the conviction together with the sentence, the issue is what follows.

Should this Court order a retrial?

Mr. Bizimani, the respondent's state attorney prayed the court to order a retrial. Referring to the case of **Fatehali Manji V. R** [1966], E.A, he submitted that after nullifying the proceedings, a court has two options; **one**, to order the appellant to be tried afresh, if there is enough evidence; or **two**, to release the appellant if the prosecution's evidence is wanting. He argued that the prosecution's evidence was sufficient to prosecute the case. He prayed for the court to order a retrial.

It is settled as held by the defunct Court of Appeal of East Africa, in **Fatehali Manji v. R**, [1966] EA 343 regarding when to order a retrial thus-

> *"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".

I took pains to examine the evidence on record, to say the least, I am in agreement with Mr. Bizman that there is ample evidence to re-try the accused person without causing injustice. It is settled principle that a trial should not be ordered, if to do will give the prosecution an opportunity to fill the gaps in its evidence. The accused person was charged with the offence of unlawful possession of two elephant tasks, thus, to prove the appellant guilty, the prosecution tendered elephants tusks, the extra judicial statement, a search warrant and the evidence of independent witness who witness the search and seizure of the elephant tusks.

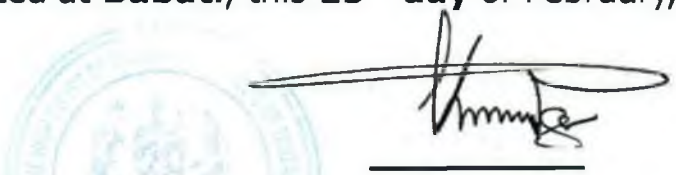
Having considered the evidence as shown above, I am of the considered view that there is a *prima facie* evidence to order the appellant to be tried afresh. I, therefore, find that, to order a retrial will not give the prosecution an opportunity to fill in gaps in its evidence, thus, no miscarriage of justice will be occasioned once a trial is ordered.

In the end, I quash the proceedings, set aside the conviction and sentence and order a fresh trial. I further order that, if a retrial is not commenced within 30 days from the date of the judgment or if the

elephant tasks were disposed of, the appellant should be set at liberty. Should the appellant be convicted as a result of the fresh trial, the trial court will have to take into consideration the period the appellant has been in custody both as an inmate and as a prisoner. The record should be remitted immediate for trial before another magistrate.

I order accordingly.

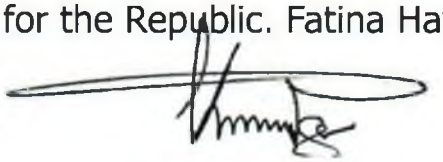
Dated at **Babati**, this **15th day** of February, 2024.



J. R. Kahyoza

Judge

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

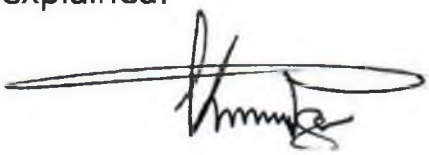


J. R. Kahyoza

Judge

15/02/2024

Court: Right to appeal explained.



John Kahyoza.

Judge.

15/02/2024