IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA SUB-REGISTRY

AT BUKOBA

CONSOLIDATED ECONOMIC APPEALS NO. 14 AND 15 OF 2023

(Originating from Economic Case No. 05 of 2022 Resident Magistrate Court of Bukoba)

JOSEPH LAURIAN KAGWA @ SECHANGE..... 1ST APPELLANT

TAWABU ISMAIL ALMAS @ HASSAN..... 2ND APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

9th and 16th February, 2024

BANZI, J.:

Before the Resident Magistrate's Court of Bukoba ("the trial court"), the appellants were jointly and together charged with the following counts; first, leading organised crime contrary to paragraph 4 (1) (a) of the First Schedule to and sections 57 (1) and 60 (2) of the Economic and Organised Crime Act [Cap. 200 R.E. 2019] ("the EOCCA"); second, unlawful hunting contrary to section 47 (a) (iii) (aa) of the Wildlife Conservation Act, No. 5 of 2009 ("the WCA") read together with paragraph 14 of the First Schedule to and sections 57 (1) and 60 (2) of the EOCCA and third, unlawful possession of government trophy contrary to 86 (1) (2) (b) of the WCA read together with paragraph 14 of the First Schedule to and sections 57 (1) and 60 (2) of the EOCCA.

The particulars in the charge sheet reveals that, on unknown day of October, 2021 at Minziro area, within Missenyi District in Kagera Region, the appellants wilfully organised and managed a criminal racket and for the second count, they hunted and killed two elephants valued at TZS 68,427,000.00 the property of the Government of the United Republic of Tanzania without hunting licence. In respect of the third count, it was alleged that, on 6th November, 2021 at Nyakahanga A area, within Missenyi District in Kagera Region the appellants were found in possession several pieces of elephant to wit, one front leg scapula, two bones, one jaw with teeth, four teeth and one carpal bone valued at TZS 68,427,000.00 the property of the Government of the United Republic of Tanzania without permit from the Director of Wildlife.

At the end of the trial, the appellants were acquitted on the first and second counts but convicted with the third count and sentenced to twenty years imprisonment. Dissatisfied with conviction and sentence, each appellant preferred his own appeal which were consolidated as reflected above. For the reasons which will be apparent shortly, I shall not reproduce the grounds of appeal which boil down to one complaint is that, the case against them was not proved beyond reasonable doubt.

At the hearing, the first appellant was represented by Mr. Alloysious Mujulizi, learned Advocate whereas, the second appellant appeared in

person unrepresented and the respondent Republic was represented by Ms. Evarista Kimaro, the learned State Attorney.

Mr. Mujulizi began his submission by adopting the grounds of appeal filed by the first appellant and urged this court to consider them. On the other hand, he challenged the jurisdiction of the trial court because of the defects appearing in the consent and certificate filed before it. First, the consent was issued under section 26 (1) of the EOCCA by a person other than the Director of Public Prosecutions (the DPP) contrary to the dictates of the law. Second, the consent lacked offences and sections of the law creating them as described in the charge sheet. He supported his submission by citing the cases of **Ramadhani Omary Mtiula v. Republic** [2020] TZCA 1734 TanzLII and **Katoto Petro v. Republic** [2023] TZHC 21446 TanzLII. In that regard, he invited this court to revise the proceedings pursuant to section 43 of the Magistrates' Courts Act [Cap. 11 R.E. 2019] and section 373 of the Criminal Procedure Act [Cap. 20 R.E. 2022] (the CPA).

The second appellant, being a lay person had nothing to say and left it to the court to decide. On her side, Ms. Kimaro readily conceded that, the trial court tried the matter without jurisdiction because the consent was issued under section 26 (1) of the EOCCA which is only used by the DPP himself. Likewise, the consent and certificate conferring jurisdiction on subordinate court to try economic offences lacked the offences and sections

of the law as indicated in the charge sheet. She cited case of **Peter Kongori Maliwa v. Republic** [2023] TZCA 17350 TanzLII to support her argument. Finally, she prayed for proceedings to be nullified and an order of retrial.

On the way forward, parties were probed to address the court on whether the order of retrial would be proper in the particular circumstances of this case. Mr. Mujulizi submitted that, the order of retrial will not be appropriate due to weaknesses on prosecution case. The evidence of independent witness, PW6 did not prove about the trophy in question to be seized from the appellants and thus, an order of retrial will enable the prosecution to fill in the gaps. On his side, the second appellant contended that, the prosecution evidence is coupled with contradictions. The independent witness was not called to testify and PW4 said he found him with two elephant bones in his wallet something which is untrue and impossible. Thus, he prayed to be acquitted and released from custody. On her side, Ms. Kimaro in the first instance insisted that, the prosecution evidence was sufficient enough to sustain the conviction. However, she pointed out that, there was contradiction between the independent witness and the other witnesses as the former mentioned to have seen the second appellant only while the latter mentioned about arresting both appellants. In addition, there was no proof if the items seized were government trophy because, PW5 did not explain the distinctive features of the trophy in

question as required by law. She cited the case of **William Maganga @ Charles v. Republic** [2023] TZCA 17742 TanzLII to support her argument.

Having heard the submissions of both parties and perused the record of the trial court, the issue for determination is whether the trial court was clothed with jurisdiction to hear and determine the economic offences against the appellants in compliance to sections 26 (1) and 12 (3) of the EOCCA.

As intimated above, the appellants were charged with the offences of leading organised crime, unlawful hunting and unlawful possession of government trophy. These are economic offences and their trials are within the jurisdiction of the Corruption and Economic Crimes Division of the High Court in terms of section 3 (3) of the EOCCA. However, these offences can be tried by subordinate court where the DPP or any state attorney duly authorised by him, through certificate issued under section 12 (3) of the EOCCA directs that, they should be tried by such subordinate court. Likewise, it is the requirement of the law that, no trial of an economic offence can commence before any court vested with jurisdiction without the consent of the DPP issued under section 26 (1) of the EOCCA.

In the matter at hand, the record reveals that, on 6th October, 2022, the prosecution side filed the consent and certificate of the Prosecution Attorney In-charge conferring jurisdiction to a subordinate court to try

economic offence. Starting with the consent, the same was issued under section 26 (1) of the EOCCA by Prosecutions Attorney In-charge. Nonetheless, it is settled law that, the consent under section 26 (1) of the EOCCA is issued by the DPP himself. Dealing with akin situation, the Court of Appeal in the case of **Peter Kongori Maliwa v. Republic** (supra) had this to say:

> *"In this case, consent was issued by the State Attorney In charge instead of the DPP.* ***That was a serious irregularity as the power to issue a consent under section 26(1) of the EOCCA is not delegable. It is absolutely vested in the DPP himself.*** *As such, the consent under discussion having been issued by a person without mandate was incapable of authorizing the trial court to trial the economic offences."* (Emphasis supplied).

It is apparent from extract above that, the power to issue consent under section 26 (1) of the EOCCA is vested upon the DPP himself and not another officer authorised by him. As alluded earlier, the consent in question was issued under section 26 (1) of the EOCCA by the Prosecuting Attorney In-charge which is a serious irregularity because the Prosecuting Attorney In-charge has no mandate to authorise the trial to commence under section 26 (1) of the EOCCA. As rightly submitted by Ms. Kimaro, when the consent is issued by another person other than the DPP himself, it is issued under section 26 (2) of the EOCCA.

Apart from that, there is another irregularity because both, the consent and certificate did not indicate the provisions of law creating the respective economic offences. It is settled that, for consent and certificate to be valid, the same should cite the provisions of the law creating the economic offence upon which the accused person stands charged. See the case of **Dilipkumar Maganbai Patel v. Republic** [2022] TZCA 477 TanzLII. In our case, the appellants were charged with three counts as mentioned above. However, both the consent and certificate cited only paragraph 14 of the First Schedule to and sections 57 (1) and 60 (2) of the EOCCA. However, they did not cite paragraph 4 (1) (a) in respect of the first count as well as sections 47 (a) (iii) (aa) and 86 (1) (2) (b) of the WCA which create the offences in respect of the second and third counts. The Court of Appeal in the case of **Dilipkumar Maganbai** went on and held that:

> *"We have no doubt that in view of our deliberations above the consent and certificate conferring jurisdiction on the trial court were defective,...The certificate and consent were therefore incurably defective and the trial magistrate could not cure the anomaly in the judgment as suggested by the learned State Attorney for the respondent. The defects rendered the consent of the DPP and certificate transferring the economic offence to be tried by the trial court invalid. For that reason, we are constrained to find that the trial and proceedings before the Resident Magistrate Court of Dar es Salaam at Kisutu in Economic*

Case No. 58 of 2016 and the High Court Criminal Appeal No. 146 of 2018 were nothing but a nullity."

Since the consent and certificate filed on 6th October, 2022 are incurably defective, it goes without saying that, they are invalid and vitiates the proceedings before the trial court as it tried economic offences without being clothed with jurisdiction. As a result, I invoke my revisional powers under section 373 of the CPA and nullify the proceedings of the trial court, quash the conviction and set aside the sentence meted against the appellants.

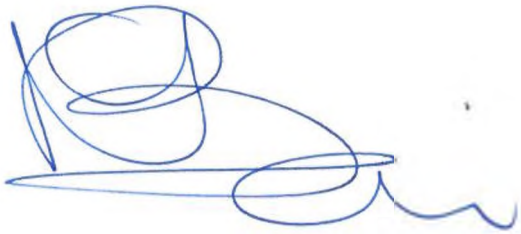
On the way forward, I entirely agree with Mr. Mujulizi and the second appellant that, an order for retrial is not in the interest of justice due to the apparent shortcomings in the prosecution case. First and foremost, there is contradiction between PW6 and arresting officers (PW1, PW3 and PW4) in respect of the persons who were arrested at the crime scene. According to PW1, PW3 and PW4, they arrested two persons; the second appellant who was riding the motorcycle and the first appellant being a passenger. On the other hand, PW6 said, they arrested the second appellant only.

Secondly, as rightly submitted by Ms. Kimaro, some of the items tendered as exhibit P1 were not proved as government trophy which was the basis of appellants' conviction in respect of the third count. In the first instance, PW5 who introduced himself as game officer is neither the Director

nor wildlife officer who is qualified to conduct valuation pursuant to section 86 (4) of the WCA. Apart from that, PW5 did not describe any peculiar feature to establish that, the items in question were elephant teeth and bones. In the absence of evidence explaining peculiar features that led him to conclude that the items in question were teeth and bones of elephant, it cannot be said that, those items were government trophy. See the cases of **William Maganga @ Charles v. Republic** (*supra*) and **Evarist Nyamtemba v. Republic** [2021] TZCA 294 TanzLII.

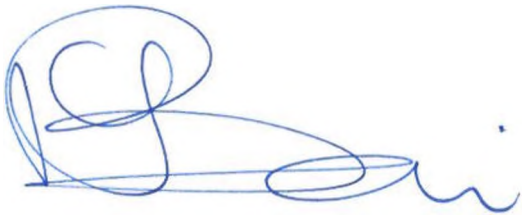
Due to these weaknesses, an order of retrial would give the prosecution a chance to fill in gaps and thus occasioning injustices to the appellants. That would be against the settled principle in the case of **Fatehali Manji v. Republic** [1966] EA. 343, that retrial cannot be ordered for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial. Thus, I order the immediate release of the appellants from prison custody unless otherwise lawfully held.

It is accordingly ordered.



I. K. BANZI
JUDGE
16/02/2024

Delivered this 16th February, 2024 in the presence of Mr. Alloysious Mujulizi, learned counsel for the first appellant, Ms. Evarista Kimaro, learned State Attorney for the respondent, both appellants, Hon. Audax V. Kaizilege, Judge's Law Assistant and Ms. Mwashabani Bundala B/C. Right of appeal duly explained.



I. K. BANZI
JUDGE
16/02/2024