IN THE HIGH COURT OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

CRIMINAL APPEAL NO. 26 OF 2023

(Originating from the Resident Magistrate Court of Katavi at Mpanda in Economic Crime Case No. 01 of 2014)

MATHEO KAYANDA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

17th & 19th January, 2024

MRISHA, J.

The appellant **Matheo Kayanda**, has appealed to this first appellate court against the decision of the Resident Magistrate Court of Katavi at Mpanda henceforth the trial court, which after hearing the Economic Crime Case No. 01 of 2014, convicted and sentenced him to pay a fine of 225,000,000/= which is ten times the value of the Government trophy to wit: three (3) elephant tusks he was allegedly being found in unlawful possession, or to serve twenty (20) imprisonment sentence in default thereof.

In a bid to challenge that decision, the appellant filed with the court a Petition of Appeal containing four (4) grounds of appeal, but later on he filed additional grounds of appeal to make a total of nine (9) grounds of appeal.

The appeal was heard by way of oral submissions with the appellant being present without any legal representation, while the respondent Republic was represented by Ms. Maula Tweve, learned State Attorney.

Having gone through the typed proceedings of the trial court, the typed judgment, the raised grounds of appeal by the appellant, his submission in chief and those of the counsel for the respondent Republic who supported the appeal, which will be displayed shortly, I am of the settled view that this appeal can only be disposed of on two major grounds namely:

1. That the trial court tried and determined the appellant's case without having requisite jurisdiction to do so.
2. That the learned trial magistrate erred in law and fact by not properly evaluating the weight of the prosecution evidence and reasons wherefore he failed to find that the prosecution side failed to prove its case beyond any reasonable doubts.

In the course of making his submission in chief before the court, the appellant narrated that he filed his petition of appeal with the court on 24.03.2023 and addition grounds of appeal on 05.03.2023. Hence, it was his prayer that all the grounds of appeal contained in his petition of appeal be adopted to form part of his submission in chief, considered and his appeal be allowed so that he can be set free.

On her part, Ms. Maula Tweve submitted that she supports the appeal on the grounds that first, there is infringement of the law as the consent and certificate conferring the subordinate court with jurisdiction to try an economic crimes case which were tabled before the trial court, lack the charging provision of the law which makes those legal documents incurably defective.

To back up her position, Ms. Maula Tweve referred the court to section 3 (3) of the Economic and Organized Crime Control Act, Cap 200 R.E. 2022 (the EOCCA) which she said provides that the economic crimes case is triable by the High Court. However, it was her argument that that type of offence may be tried by the subordinate court where the Director of Public Prosecutions has issued such court with the consent and certificate conferring it with jurisdiction to try that offence.

Coming to the present appeal, the learned counsel submitted that having cross checked the consent and certificate allegedly conferring the trial court with jurisdiction to try the economic crime case, she observed that the same to not contain the charging provision of the law which is contrary to the law.

She supported her proposition by citing the case of **Maulid Ismail Ndonde vs Republic**, Criminal Appeal No. 319 of 2019 (CAT, unreported) and submitted that in that case, the Court nullified all the proceedings of the trial court and judgment due to the similar defects as observed in the proceedings of the trial court.

She further submitted that due to lack of the charging provision in the consent and certificate filed with the trial court, she was of the view that the trial court heard and determined the appellant's case without having jurisdiction to do so.

As for the way forward, Ms. Maula Tweve submitted that she is aware that due to those irregularities, a retrial order would be sufficient, but she refrained from praying to the court to order a retrial of the appellant's case due to the fact that the prosecution evidence is tainted with contradiction which makes it insufficient to prove the charge of

unlawful possession of Government trophy the appellant stood charged with.

She clarified that the contradiction is on the identification of the exhibit and also according to her, the procedure of tendering exhibits before the trial court was not complied with for failure of the trial court to consider the three stages to be passed before exhibit is admitted. To bolster her stance, Ms. Maula Tweve cited the case of **Erneo Kidilo and Another vs Republic**, Criminal Appeal No. 206 of 2017 (CAT at Iringa, unreported).

In conclusion, the learned counsel for the respondent Republic, reiterated her previous position that she supports the present appeal and urged the court to quash the conviction entered by the trial court against the appellant, set aside the sentence imposed against the said appellant and set him free. The appellant had nothing to rejoin after hearing the submission of the respondent's counsel.

That marks the end of the submissions by both parties. Suffice it for me to say that I have paid much attention to all those submissions and the authorities cited by the learned counsel for the respondent Republic. I have also considered all the grounds of appeal as raised by the appellant

which as I have pointed above revolve around two major complaints which I need not to reproduce here.

My task now is to determine the appeal and in doing so, I will be guided by two issues namely:

i. Whether the trial court had jurisdiction to inquire and determined the appellant's case
ii. Whether the prosecution evidence was sufficient to ground conviction against the appellant.

To start with the first issue, it is a trite law that the certificate and consent of the DPP must be issued before commencement of a trial involving an economic offence before the subordinate court; see **Rhobi Marwa Mgare and Two Others v. The Republic**, Criminal Appeal No. 192 of 2005 and **Nico s/o Mhando and Two Others v. The Republic**, Criminal Appeal No. 332 of 2008 (all unreported), and I may add that not only should those documents be given to the subordinate courts, but also, they must contain the charging provision of the law.

The appellant in the present appeal, was charged with one count of Unlawful Possession of Government Trophy contrary to section 86 (1) and (2) of the Wildlife Conservation Act No. 5 of 2009 read together

with paragraph 14 (d) of the First Schedule to, and sections 57 (1) and 60 (2) of the EOCCA.

In her submission regarding the first issue, the learned counsel for the respondent Republic has argued that the certificate and consent given the trial court before commencement of the appellant's economic case, do not have the charging provisions of the law and for that, it is her view that the trial court heard and tried the economic crime case without being clothed with jurisdiction to do so.

With all due respect to the learned counsel, that is not what the two documents reveal. The same depicts clearly that in drafting them, Mr. Abel M. Sanga who was the State Attorney In-charge by the time those documents were drafted and filed by him, properly inserted the charging provisions of the law as reflected from the charge sheet which is section 86 (1) and (2) of the Wildlife Conservation Act No. 5 of 2009 read together with paragraph 14 (d) of the First Schedule to, and sections 57 (1) and 60 (2) of the EOCCA.

The above court observation is justified by the contents of the certificate filed with the trial court on the 12th day of April, 2021 which I find apt to reproduce as hereunder:

"IN THE DISTRICT COURT OF MPANDA DISTRICT

AT MPANDA

(Economic Crime Jurisdiction)

ECONOMIC CRIME CASE NO....2014

REPUBLIC

VERSUS

MATEO S/O KAYANDA @MATESO S/O KAYANDA

CERTIFICATE (SIC) CONFERING JURISDICTION TO SUBORDINATE COURT TO TRY AN ECONOMIC CRIME CASE

I, ***ABEL M. SANGA****, State Attorney In-charge of Katavi Region, DO HEREBY in terms of section 12 (3) of the Economic and Organised Crimes Control Act [CAP 200 R.E. 2002] read together with Government Notice No. 284 of 2014 ORDER that* ***MATEO S/O KAYANDA @MATESO S/O KAYANDA*** *who is charged for having contravened the provisions of section 86 (1) and (2) (b) of the Wildlife Conservation Act No. 5. of 2009 read together with paragraph 14 (d) of the First Schedule to, and section 57 (1) and 60 (2) of the Economic and Organized Crime Control Act, [CAP 200 R.E. 2002],* ***BE TRIED*** *by the* ***DISTRICT COURT OF MPANDA DISTRICT AT MPANDA****."*

Dated at ***MPANDA*** *this 12th day of April, 2021*

ABEL M. SANGA

STATE ATTORNEY IN-CHARGE" *(the underlined is mine)*

It is glaring from the above excerpt that the charging provisions of the law were inserted in the certificate conferring the trial court with jurisdiction to try the appellant's economic crime case and I take this opportunity to commend Mr. Sanga for complying with the requirement of the law, as I have stated it herein above.

In the same vein I urge the other State Attorneys to ensure that they remember to insert the charging provisions of the law when drafting the consent and certificate to be filed with the subordinate courts before commencement of the economic crime cases.

With the above reasons, I am of the settled view that since the consent and certificate filed with the trial court contained the charging provisions of the law and were properly drafted, the said trial court had the requisite jurisdiction to trial the appellant's case. The foregoing reasons make me to answer the first issue in the negative.

The second issue is whether the prosecution evidence was sufficient to ground conviction against the appellant. It is a cardinal principle of the law that in criminal cases, the prosecution bears the duty to prove its

case beyond any reasonable doubts and it never shift to the accused person; see **Simon Edson @Makundi vs The Republic**, Criminal Appeal No. 5 of 2017 (CAT at Arusha, unreported).

The appellant in the present appeal has complained that the trial magistrate erred in law and fact by convicting him based on the prosecution evidence which fell short of proving the economic crime case against him beyond any reasonable doubts. His complaint has been supported by Ms. Maula Tweve who has urged the court to quash the appellant's conviction and sentence on the ground that the prosecution case was insufficient to prove the case against the appellant due to some procedural flaws and contradictions.

Although, she did not go far by pointing out what were those irregularities and contradictions, I am certain that the appellant's complaint has a merit. I am unhesitant to say so because of the reasons which I am going to assign hereunder:

First, despite the fact that the prosecution witnesses who were EX. E. 8024 D/Constable Barton (PW1) and G. 4125 DC Lameck (PW2) testified before the trial court that on 29.01.2014 search was conducted by the police in the premises of the appellant which is located at Kawajense, Mpanda District in Katavi Region and that the appellant was found with

unlawful possession of three pieces (3) elephant tusks, the typed records of the trial court reveal that the procedure of admitting the certificate of seizure tendered by PW6 one Assistant Inspector Kishimba, was not complied with by the trial court. This is shown at page 50 of the typed records where after hearing the rival submissions from both parties, the trial court resolved as follows: -

"Court: Having considered the submissions of both sides I have (sic) find that accused objection based on evidential value and not on the law, this being the case I find the objections raised by the accused being basalis, I hereby admit the search order and mark the same as PE6

Sgd
SRM
28/10/2021

PW6 Proceeds: after finishing the search all accused persons were taken to Mpanda police station with exhibits found with them..."

Looking on the above excerpt, it is apparent that after admitting the said certificate of seizure, the trial magistrate did not comply with the procedure of admitting documents as exhibits which intel alia, requires that after admission of a document as an exhibit, its contents must be

read over loudly so that the accused can be familiar with the contents of that document.

The requirement to read the contents of a document was emphasized by the Court of Appeal in the case of **Robinson Mwanjisi and Three Others v. The Republic** [2003] T.L.R. 218 which was also referred in the case of **John Mghandi @ Ndovo v. The Republic**, Criminal Appeal No. 352 of 2018 (unreported). In the latter case, the Court of Appeal had the following to say: -

> *"We think we should use this opportunity to reiterate that whenever a documentary exhibit is introduced and admitted into evidence,* ***it is imperative upon a presiding officer to read and explain its contents so that the accused is kept posted on its details to enable him/her give a focused defence.*** *That was not done in the matter at hand and we agree with Mr; Mbogoro that, on account o f the omission, we are left with no other option than to expunge the document from the record o f the evidence." (Emphasis supplied)*

I find the above Court's instructive decision applicable to the circumstances of the case at hand where as I have pointed above, it is crystal clear that the presiding trial magistrate did not comply with the

mandatory procedure of reading the contents of Exhibit PE6 which is a certificate of seizure just after admitting it. In the same vein, I am constrained to expunge Exhibit PE6 from the record, due to none compliance with the mandatory requirement of the law.

The above first reason would be enough to make the prosecution case collapse. However, there are other reasons which I find opportune to continue assigning them in order to show why the prosecution evidence before the trial court failed to prove the case against the appellant beyond any reasonable doubts.

Secondly, it is a trite law that where search is conducted and the items connected with commission of an offence are found in possession of the suspect and seized, the police officer seizing those items, must issue a receipt to the suspect to acknowledge seizure of those items; see **Mustafa Darajani vs The Republic**, Criminal Appeal No. 277 of 2008 (CAT at Iringa, unreported). This is provided under section 38 (3) of the Criminal Procedure Act, Cap 20 R.E. 2022 (the CPA) which is to the effect that:

> *"(3) Where anything is seized in pursuance of the powers conferred by subsection (1)* ***the officer seizing the thing shall***

issue a receipt acknowledging the seizure of that thing, *being the signature of the owner or occupier of the premises or his near relative or other person for the time being in possession or control of the premises, and the signature of witnesses to the search, if any." (Emphasis supplied]*

In their testimonies, PW1 and PW2 did not tell the trial court that after seizing the alleged Government trophy from the appellant, a receipt was issued to him in order to acknowledge the seizure of those items, as the law requires; see **Selemani Abdallah & others vs Republic**, Criminal Appeal no. 384 (unreported). This raises a serious and reasonable doubt whether it is true that the appellant was found in possession of the alleged Government trophies.

Thirdly, it is not told in the prosecution evidence why was the search conducted by Assistant Inspector Kishimba (PW6) in the premises of the appellant without a search warrant which, as required under section 38 (1) of the CPA. The law requires the police officer to obtain a search warrant before conducting search in the premises of a suspect. That requirement is couched in mandatory terms.

It is only where there are exceptional circumstances like the possibility of the suspect to remove the items suspected to be in his unlawful

possession or be used by him to commit an offence or where the suspected item in likely to endanger the life, that the police officer can conduct search without warrant.

Also, it is a trite law that where search is conducted without warrant, the police officer who conducted search without warrant must give reasons as to why he/she did that; failure to assign reasons in such circumstances is fatal. That court's position is fortified by the decision of the Apex Court in the case of **Mustafa Darajani vs The Republic** (supra) where it was stated that:

> *"Police officers are empowered to search without search warrant provided it is shown there are reasonable grounds to do so and that the delay may result in the removal or destruction or endanger life or property. Otherwise search warrants must always be issued."*

Now, since the prosecution evidence does not show if there were any reasons to justify PW6 conduct search in the appellant's premises without a search warrant, it is my settled view that the omission to do so was fatal and made the whole process of search to be null and void.

Before I pen off, I wish to say that I have also considered the submission of Ms. Maula Tweve who has argued that owing to the

procedural flaws and the discrepancies contained in the prosecution evidence, a retrial would not be a proper course to be taken, as far as the circumstances of the case at hand are concerned.

I entirely agree with her on that argumentation. A retrial order will only made by the appellate court upon satisfaction that should it be made; the prosecution will not use that opportunity to fill up some gaps in the weak evidence already adduced before the trial court.

With the foregoing reasons, I am of the settled view that the present appeal has merit. The same is allowed and in consequence thereof, I quash the conviction entered against the appellant, set aside the sentence passed thereto and order for the immediate release of the appellant from the prison custody, save if he is otherwise held for some lawful cause.

Order accordingly.

A.A. MRISHA
JUDGE
19.01.2024

DATED at **SUMBAWANGA** this 19th day of January, 2024.

THE HIGH COURT OF TANZANIA

A.A. MRISHA
JUDGE
19.01.2024