

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE SUB REGISTRY OF MANYARA**

**AT BABATI**

**CRIMINAL APPEAL NO. 3 OF 2023**

*(Originating from Economic Case No. 22 of 2021 in the District Court of Babati at Babati)*

**DAO BURA..... APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**JUDGMENT**

*23<sup>rd</sup> November, 2023 & 21<sup>st</sup> February, 2024*

***Kahyoza, J.:***

**Dao Bura**, the appellant, was convicted by the District Court of Babati on a count of Unlawful possession of Government Trophy, contrary to Section 86(1) and (2)(c)(iii) of the **Wildlife Conservation Act**, [ Cap. 283 R.E. 2022] (the **WLCA**) and read together with paragraph 14 of the First schedule to and sections 57(1) and 60(2) of **the the Economic and Organised Crime Control Act**, [Cap 200 R.E 2022] (the EOCCA) and sentenced to serve; a minimum mandatory statutory sentence of twenty (20) years imprisonment.

Aggrieved, by both conviction and sentence, he appealed to this court, seeking to fault the judgment of the trial court, on 4 grounds of appeal, of which I find it uncalled for to reproduce them at this juncture for the reason to be availed in due course.

On the hearing of this appeal, Mr. Moshia, State Attorney for the Respondent supported the appeal, submitting orally that the trial Court lacked jurisdiction since the Consent was defective, the Regional Prosecution Officer (RPO) issued the consent under section 26(1) of **the EOCCA** of which the same is enjoyed by the Director of Public Prosecution (the DPP).

He argued this court to nullify the proceedings, judgment and the sentence meted out, and order a retrial, for the record shows that there is sufficient evidence, citing the rule in **Ibrahim Idrissa vrs. Republic**, Criminal Appeal 82/2023 HC – Manyara.

The appellant had nothing to add.

There is no doubt that the issues of “Consent to the prosecution of the accused” and “Certificate conferring jurisdiction to the subordinate court” not only that they are matters of law, but they are also matters of jurisdiction – short of which renders a subordinate court ousted with the jurisdiction to

entertain Economic offences. Economic offences subject to DPP's consent are offence triable by the Corruption and Economic Crimes Division of the High Court section established under section 3 of **the EOCCA**.

There is basically one issue for determination, which is **whether the trial court had jurisdiction**.

The record bears testimony that the Regional Prosecutions Officer was the one who issued the consent to prosecution of the appellants and the Certificate conferring jurisdiction to the District Court of Babati to entertain Economic Case No. 22 of 2021.

It is truism also, that the author to the two instituting documents, cited section 26(1) of **the EOCCA** as enabling provision of the law. The whole of the section provides: -

*"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.*

*(2) The Director of Public Prosecutions shall establish and maintain a system whereby the process of seeking and obtaining of his consent for prosecutions may be expedited and may, for that purpose, by notice published in the Gazette, specify economic offences the*

*prosecutions of which shall require the consent of the Director of Public Prosecutions in person and those the power of consenting to the prosecution of which may be exercised by such officer or officers subordinate to him as he may specify acting in accordance with his general or special instructions.*

*(3) The Director of Public Prosecutions shall have and may exercise in relation to prosecutions under this Act the same power which is conferred on him in respect of public and private prosecutions by the Criminal Procedure Act."*

From the wording of sub-section (1) to section 26, the law speaks that it is only the DPP who is vested with the mandate to issue consent and any exercise of such powers by a person other than DPP under that subsection, renders the proceedings a nullity. The Court of Appeal in **Peter Kongori Maliwa & Others vrs Republic** (Criminal Appeal No. 252 of 2020) 2023 TZCA 17350 (14 June 2023) that the power to issue a consent under section 26(1) of the EOCCA is not delegable. It observed-

*"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...We, therefore, agree with the learned State Attorney that, the legal consequence of the omission is to vitiate the trial proceedings as the trial court acted without jurisdiction.”*  
*(Emphasis is mine)*

I am inclined to hold as argued by Mr. Mosha, SA, that, in the absence of a valid consent, the trial court assumed jurisdiction that it did not possess. It is a valid consent issued in terms of section 26 of **the EOCCA**, which bestows jurisdiction to courts to try an economic offence. It is settled that the Regional Prosecutions Officer, is mandated to issue consent by 26(2) of **the EOCCA** read together with item 6 to Part III of the Economic Offences (Specification of Offences for Consent) Notice, 2021, GN. No. 496H of 2021.

In addition, the certificate conferring jurisdiction was also flawed as the offence sections were not cited, that is section 86(1) of the WCA, an offence which is preferred to the accused must be expressly stipulated in the consent and the same must be featured in the charge, in other words the charged offence was not clothed by the certificate conferring jurisdiction, see the rule in **Dilipkumar Magambai Patel vs Republic** (Criminal Appeal 270 of 2019) 2022 TZCA 477 (25 July 2022).

Indeed, the Consent and the Certificate were both incurably defective, for want of proper enabling section(s). I therefore, nullify the proceedings, and set aside the conviction and sentence meted out to the appellant.

As to the remedy after nullifying the proceedings, and setting aside the conviction and sentence, Mr. Mosha prayed for retrial. He cited Ibrahim Iddrisa v. R., Criminal Appeal No. 82 of 2023, of this Court Manyara sub registry.

I went through the records and considered his submissions. It is not disputed 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"*

I scrutinized the evidence on record and found that Christopher Peter Laizer (**Pw4**) did not specify the characteristics of impala meat neither in oral evidence or in trophy valuation certificate exh.P.III. It is hard to tell from Christopher Peter Laizer (**Pw4**)'s evidence if the meat was that of impala and not of any other wild or domestic animal.

It is common knowledge that when a person is charged with the offence of unlawful possession of the government trophy, the trophy or if, it is subject to speedy decay, an inventory under the Police General Order (PGO) or an order under section 101 of the **WLCA** must be tendered. The prosecution tendered an inventory as exhibit PEVI. The PGO stipulates the procedure for disposing the exhibit under paragraph 25 of PGO No. 229, which the Court of Appeal had an opportunity to discuss in in **Mohamed Juma @ Mpakama v R.**, Criminal Appeal No. 385/2017 (CAT Unreported). The Court of Appeal held in **Mohamed Juma @ Mpakama v R.**, (supra) that before disposing exhibits under paragraph 25 of PGO No. 229, that the

accused person must be present and the magistrate should hear him. 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.**"*

Fortunately, as the inventory depicts, the appellant was present when the magistrate ordered disposal of the trophy and he (the appellant) signed the Inventory Form. Regrettably, the Inventory Form does not show that the magistrate heard the appellant before issuing the disposal order. Thus, the appellant was present but he was not heard. As held in **Mohamed Juma @ Mpakama v R.**, (supra) paragraph 25 of PGO No. 229, provides in no uncertain terms that the accused must not only be present but he must be heard before the magistrate orders the trophy to be destructed. Failure to hear the accused person, the appellant rendered the Inventory Form worthless it cannot prove in the absence of the trophy that the appellant was found in possession of trophy; to wit fresh meat of impala.

I am of the position that a retrial will not serve the best ends of justice as it will end with the appellant's acquittal for want of evidence or give the prosecution an opportunity to fill the gap in its evidence. In In **Fatehali**

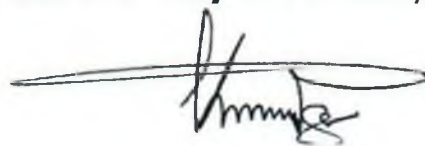


**Manji v R** [1966] E.A. 341 the then Court of Appeal of East Africa laid down the principle governing retrial that “[the retrial]... *will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial*”.

In the end, I nullify the proceedings and set aside the conviction and sentence. The prosecution evidence as it stands cannot prove the offence of unlawful possession of the government trophy as there is no exhibit allegedly found in possession of the appellant or a valid inventory to prove that it was properly disposed of as it was subject to speed decay. Consequently, 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 **21<sup>st</sup> day** of February, 2024.

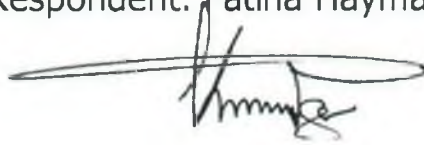


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**J. R. Kahyoza**

**Judge**

**Court:** Judgment delivered in the presence of the appellant and Ms. Leah, State Attorney for the Respondent. Fatina Haymale (RMA) present.



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**J. R. Kahyoza**

**Judge**

**21/02/2024**