

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MANYARA
AT BABATI**

CRIMINAL APPEAL NO. 86 OF 2023

(Originating from Economic Case No. 23 of 2021 District Court of Simanjiro at Orkesument)

ALLY JUMA ISSA..... APPELLANT

VERSUS

THE DPP.....RESPONDENT

JUDGMENT

21th November, 2023 & 23rd February, 2024

Kahyoza, J.

Rehema Adamu Seleman and **Ally Jumam Issa** (the accused persons) appeared before Simanjiro district court charged with the offence of unlawful possession of Government Trophy; to wit, meat of three great kudu valued Tzs. 15,095,200.00 the property of Tanzania Government. The accused persons refuted the charge. After full trial, the court acquitted Rehema Adamu Seleman and convicted **Ally Jumam Issa**. Following **Ally Jumam Issa**'s conviction, the court sentenced him to serve 20 years' imprisonment.

Aggrieved, **Ally Jumam Issa** appealed to this Court. He raised five (5) grounds of complaint of which I will not re-produce. On the date the

appeal was fixed for hearing, Mr Ndibalema, State Attorney, raised and argued a point of preliminary to objection the proceedings, judgment and the subsequent conviction and sentence that were nullity as the trial court lacked jurisdiction. He argued trial court tried the appellants without jurisdiction as there was no valid consent and certificate conferring jurisdiction.

The state attorney submitted that the consent was invalid as the Regional Prosecutions Officer, the officer subordinate to the DPP, issued the consent under subsection (1) of section 26 instead of subsection (2) of section 26 of the **Economic Organized Crime Control Act**, [Cap. 200 R. E. 2019] (the **EOCCA**). He was emphatic that it is only the DPP, who has mandate issue consent under subsection (1) of section 26 of the **EOCCA**).

He submitted further that, the district court had no jurisdiction to try an economic offence as the certificate conferring jurisdiction did not specify the section of the offence the accused persons stood charged with. It referred to the penal section. To support his contention, he cited the cases of **Peter Kangori and 4 Others v. R.**, Criminal Appeal No 250/2022 and **Paulo Kayama @ Solomiri v R.**, Criminal Appeal No.101/2023

He prayed the Court to declare the proceedings and judgment a nullity. As a way forward after nullifying the proceedings and judgment, he prayed for trial *de novo* as there is sufficient evidence for trial.

The appellant had nothing to submit as issues raised were legal.

The law speaks in uncertain terms that no trial in respect of an economic offence may be commenced without the consent from the DPP. The requirement for consent before trying an economic offence is provided for under subsection (1) of section 26 of the EOCCA, which states 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 added)*

As Mr. Ndibalema, the state attorney, argued, the records illustrate that the Regional Prosecutions Officer, who is an officer subordinate to the DPP, issued a certificate of consent under section 26 (1) of the EOCCA. Given the clear provision of subsection (1) of section 26 of the EOCCA, it is the DPP who has mandate to issue consent to prosecute an economic offence under the subsection and not the officer subordinate to the DPP. The officer subordinate to the DPP may only issue a valid consent to prosecute an

economic offence under subsection (2) section 26 of the EOCCA. Subsection (2) of section 26 of EOCCA provides that-

"(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."

In addition, the Court of Appeal of Tanzania has held several times that an officer subordinate to the DPP ought to issue the consent under subsection (2) of the section 26 of EOCCA and that the powers of the DPP under subsection (1) of section 26 are not delegable. See the cases of **Paulo Kayama @ Solomiri v R.**, (supra) **Peter Kongori Maliwa & 4 others** (Supra) **Emmanuel Chacha Kenyaba & 3 others**, Criminal Appeal No. 368 of 2020 [2023] TZCA 17823, **Salum Saadi @ Salum V. R.**, Criminal Appeal No. 502 2019 [2023] TZCA 17737, and **Ghati Mwikwabe @ Sasi V. R.**, Criminal Appeal No. 305 of 2020 [2023] TZCA 17814, Tanzilii, a few to mention.

Given the position of the law and the unbroken authorities cited above, I find that the consent is invalid as the officer subordinate to the DPP assumed illegally the DPP's mandate. Consequently, the trial court proceeded to try the appellants without the necessary consent. The trial of an economic offence without consent from the Director of Public Prosecutions (DPP) or an officer subordinate to him is a nullity.

The learned state attorney asserted that the certificate conferring jurisdiction to the district court was defective as the Regional Prosecutions Officer omitted to cite in the certificate of transfer the economic offence for which jurisdiction was being conferred upon the Simanjiro district court to prosecute. I am not in agreement with the learned state attorney the certificate conferring jurisdiction did not specify penal section the district court was mandated to try. The certificate specified both substantive section and the penal section. I decline the invitation that the certificate conferring jurisdiction was defective.

Given the fact there was no valid consent granting jurisdiction to the trial court to try an economic offence, the trial and subsequent judgment, conviction and sentence were all a nullity. I invalidate the proceedings and

set aside the conviction and sentence. The next apposite issue is whether this court should order a retrial as the state attorney prayed.

It is trite law that a retrial should not be ordered when to do so will provide the prosecution an opportunity to address gaps in its evidence in the initial trial. In **Fatehali Manji v R** [1966] EA341, the then Court of Appeal of East Africa outlined the guiding principle for retrials, stating-

"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 shall be ordered; each case must depend on its own facts and circumstances and an order of retrial should only be made where the interests of justice require."

Mr. Ndibalema, the learned state attorney, prayed for a retrial contending the prosecution had marshalled sufficient evidence during the initial trial. I have different views from the learned state attorney. I am of the position that to order a retrial is not in the interest of justice as evidence on record is deficient or to do so will grant the prosecution an opportunity to fill in gaps in its evidence.

To begin with, I examined the inventory certificate presented in lieu of the trophy, which was subject to speed decay, to establish the offence of unlawful possession of government trophy. Indisputably, the inventory was prepared in violation of the law. The inventory certificate (exh. P 4) depicts the appellant and his co-accused person were not present before the magistrate and therefore not afforded an opportunity to comment before the magistrate ordered trophy to be disposed. The Court of Appeal in **Mohamed Juma @ Mpakama**, Criminal Appeal No. 383 of 2017 [2019] TZCA, 1518 held that the suspect should be heard before an inventory certificate is issued under paragraph 25 of the Police General Orders Chapter No. 229. Paragraph 25 of the Chapter 229 of the PGO reads, thus-

*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 in of **Mohamed Juma @ Mpakama**, 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)*

The trial court erred to admit and rely on exhibit P.4, to find that the appellant was in possession of trophy. In the absence of the inventory certificate, Exh.P.4, the prosecution will not be able to establish that the appellant was found in possession of the government trophy. I am therefore of the view that a retrial is not in the interest of justice.

I also considered the evidence of identification of the trophy from Frenk Mertin, (**Pw4**) to find out he properly identified the trophy. Frenk Mertin, (**Pw4**) deposed that he identified the trophy as the meat was unskinned and the head was not cut.

There is no doubt that Frenk Mertin, (**Pw4**) did not properly specify the peculiarities of meat allegedly found in possession of the appellant and his co-accused person. The Court of Appeal in **William Maganga @ Charles vs R.**, (Criminal Appeal No. 104 of 2020) [2023] TZCA 17742 (6 October 2023) held that the identifying officer must explain peculiar features that assisted him to identify the trophy. It observed-

"In wildlife conservation related cases, identification of a specie of the animal affected or part of it in relation to an offence charged, is a matter of considerable significance. That aspect of the case, is provable by tendering a properly filled in Trophy Valuation Certificate, which is a standard form document created under the Wildlife Conservation (Valuation of Trophies) Regulations 2012, (Government Notice No. 207 of 2012). Tendering of that certificate must go hand in glove with a proper explanation of a wildlife expert detailing the distinctive features of a given animal. Such oral explanation or description may be based on animal science or the witness's experience in wildlife conservation and management."

Undoubtedly, the fact that the meat or the trophy was unskinned must have assisted Frenk Mertin, (**Pw4**) to identify it. All in all, he must have explained the features of the skin of the great kudu or any other characteristics and explained to the court that the trophy in question had those features. I am of the view that it was not sufficient for him to generalize that he identified the trophy because the meat was unskinned and the head was not chopped off. To order a retrial will certainly give the prosecution an opportunity to fill the gap in Frenk Mertin, (**Pw4**)'s identification evidence.

Eventually, I find the trial of the appellant a nullity for want of a valid consent to try economic offence. Consequently, I quash the proceedings and set aside the conviction and sentence, order the appellant's immediate to release from the prison, unless held there for any other lawful cause.

I order accordingly.

Dated at **Babati** this **23rd day** of February, 2024.



A handwritten signature in black ink, consisting of a long horizontal stroke followed by a series of loops and a final vertical stroke.

J. R. Kahyoza

Judge

Court: Judgment delivered in the virtual presence of the appellant and in the physical presence of Mr. Ndibalema, SA for the Repsondent. B/C Ms. Fatina Haymale (RMA) present.

A handwritten signature in black ink, identical to the one above, consisting of a long horizontal stroke followed by a series of loops and a final vertical stroke.

J. R. Kahyoza

Judge

23/02/2024