

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA  
DAR ES SALAAM SUB REGISTRY  
AT DAR ES SALAAM**

**CRIMINAL APPEAL NO. 84 OF 2023**

(Appeal from the decision of the District Court of Mkuranga at Mkuranga, given before (Hon. H.I MWAILOLO -SRM) dated on 28<sup>th</sup> day of December,2022 Originating from Criminal Case No. 2 of 2021)

**JAMAL ATHUMAN NGALIMA ..... 1<sup>ST</sup> APPELLANT**  
**LATIFA ABDALLAH KOKOLE @ KUKULI.....2<sup>ND</sup> APPELLANT**  
**MAULID SAID MALOWA ..... 1<sup>ST</sup> APPELLANT**

**VERSUS**

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

**JUDGMENT**

**MKWIZU, J:-**

The three appellants above, were jointly and together charged at the District Court Mkuranga in two counts. Unlawful possession of the government Trophy and Unlawful dealing in Trophies contrary to sections , 86 (1) and (2) (b) and (3), 80 and 84 both of the wildlife Conservation Act No 5 of 2009 Cap 283 (the WCA) read together with paragraph 14 of the First Schedule to and sections 57 (1) and 60 (2) of the Economic and Organised Crime Control Act, [Cap. 200 R.E 2002] (now R.E 2019)

The allegation laid in the particulars of the offence was to the effect that on 22<sup>nd</sup> September 2021 at Utunge Kisemvule area within Mkuranga

District in Coast Region the accused were found in unlawful possession of sixteen (16) pieces of elephant tusks worth Tanzania Shillings One hundred seventy-Three million, Three Hundred Twenty-two thousand seven hundred Nine and Ninety-nine cents (Tsh 173,322,749.99) and that they were carrying on government trophies business without a permit from the Director of Wildlife.

The appellants pleaded not guilty to both counts. To prove the charge, the prosecution paraded a total of nine (9) witnesses and tendered nine (9) documentary exhibits including the accused's cautioned statement (exhibit PP5, P2, and P6), the 16 elephant tusks (Exhibit P3), certificate of seizure (Exhibit P7), chain of custody Form (exhibit P8). The appellant defence was led by themselves.

The prosecution accounts were as follows. On 22/9/2021 at around 17.10 hrs to 18.10 hrs PW1, the then Mkuranga OC-CID received an information that at Kisemvule area there are people in unlawful possession of Government trophies. He arranged the team including PW2, DC Abdallah and the informer and rushed to Utunge area in Kisemvule village at the 2<sup>nd</sup> and 3<sup>rd</sup> accused house. At the scene, they involved three independent witnesses, Abdul, Bahati and Selemani to witness the search and they managed to seize 16 government trophies inside the 2<sup>nd</sup> and 3<sup>rd</sup> accused house. They filled the seizure certificate signed by PW1, the independent witness and the accused and marked the 16 Trophies as KS1 to KS 16. They then arrested the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons and took both the accused persons and the trophies to Mkuranga Police station.

At Mkuranga Police, arrangement was made to have the accused cautioned statement recorded. The 2<sup>nd</sup> accused cautioned statement

(exhibit P1) was recorded by PW5, D/C Fredrick on 22/9/2021 from 20.05hrs and admitted during the preliminary hearing. The 3<sup>rd</sup> accused cautioned statement (exhibit P6) was recorded by Pw6 SGT Issa on 22/9/2021 and 1<sup>st</sup> accused's cautioned statement (exhibit P5) was recorded by PW3 on 27/9/2021 from 16hrs to 19hrs after he had personally surrendered to the police.

The trophies were handled to G 9872 CPL Ndano (PW8) who recorded the same to the lockup register before he shortly handled them to SGT Abdul (PW9) the exhibit keeper for safe custody who again recorded the exhibits in the exhibit register (exhibit P9). This witness was also involved in handing over the said exhibit to PW7, Said Ng'anzo Selema a wildlife warden on 23/9/2021 for valuation.

PW7 on the other hand, recalled having been entrusted by the police with 16 elephant tusks which he established to weigh 17.650kgs valued at USD 75000 equivalent to TSh 174,322746.99. He filled the certificate of valuation and gave it to the police officer, and it was tendered at the trial as Exhibit P7.

After a full trial, the 1<sup>st</sup> and 2<sup>nd</sup> accused were found guilty of the first count of unlawful possession of government trophies, convicted and accordingly sentenced to twenty years jail term. In addition to that the trial court was satisfied that the evidence has been proved to the tilt for the 2<sup>nd</sup> and 3<sup>rd</sup> accused on the 2<sup>nd</sup> count. They were thus found guilty of unlawfully dealing in Government trophies, convicted and sentenced to 20 years jail term while acquitting the 1<sup>st</sup> accused on the second count

Being dissatisfied, they appealed to this court with two sets of grounds of appeal, the first initial set by the 1<sup>st</sup> appellant alone, and the second set was by the 2<sup>nd</sup> and 3<sup>rd</sup> appellant. They however later jointly came with an additional ground of appeal challenging the jurisdiction of the trial court. This ground was phrased as follows:

*"That, the learned Magistrate erred in law in holding to the Appellant conviction while the court had no Jurisdiction to try Economic crime case,"*

The 1<sup>st</sup> appellant feels that the trial court did not have jurisdiction to try the economic crime case. Relying on **Salumu Andrew Kamande V.R**, Criminal Appeal No. 513 of 2020 (unreported) and **Maulid Ismail Ndonde V. R**, Criminal Appeal No. 319 of 2019 (unreported) He contended that the records is silent on whether the filed consent and certificate conferring jurisdiction to prosecute the appellants, were received to form part of the trial records terming it as a serious procedural irregularity vitiating the whole trial . He on that ground, urged the court to quash the trial court's judgment ,conviction and sentence and set the appellants free arguing that a retrial order would not do justice to the appellant because the search which is the basic foundation of this case was illegally conducted from the very beginning . The 2<sup>nd</sup> and 3<sup>rd</sup> appellant did not argue this grounds .

The learned State Attorney is in support of this ground on the reason that the record is silent on whether the Consent and certificate were endorsed and received by the court to form part of the proceedings. She relied on then decision of the court of Appeal in **John Julius Martin & Another v. Republic** Criminal Appeal No.45 of 2020 (unreported) arguing that the error is fatal vitiating the entire trial because the Court lacked jurisdiction to entertain the matter. Banking on **Fatehali Manji v. Republic** [1966] EA 343 prayed for a retrial on the reason that the prosecution evidence is watertight.

I will for convenience begin with this ground before embarking into the rest of the grounds if need be. Correctly as the records tells, the appellants were arraigned with two counts, all economic offences triable by the District court only with consent of the DPP or a person authorized by and certificate conferring Jurisdiction pursuant to sections 26 (2) and 12 (3) of the EOCCA. Section 26 (2) provides:

*"(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."*

And section 12 (3) of the EOCCA, reads:

*"(3) The Director of Public Prosecutions or any State Attorney duly authorised by him, may, in each case in which he deems it necessary or appropriate in the public interest, **by certificate under his hand**, order that any case involving an offence triable by the Court under this Act be tried by such court subordinate to the High Court as he may specify in the certificate."* (bold is mine)

As stated earlier, all appellants were arranged before the District Court-Mkuranga. On 23/6/2022 there was filed in the trial court records two documents, the consent by the Regional Prosecution officer together with the certificate conferring jurisdiction on the subordinate court to try economic case as required by the cited laws above. And on the same day, just before the plea taking the prosecutor informed the court that they have filed certificate and consent conferring Jurisdiction to the Court. The trial court did not comment on the documents or its authority on the matter. It went ahead to reading the charges to the accused persons, recording the accused's plea and eventually to a full trial.

Both parties fault the adopted procedure. I have read the decision in **John Julius Martin & Another v. Republic** cited to me by the learned State Attorney. In that case, the State Attorney's arguments were that the mere presence of the documents in the trial court's file, is legally enough to rag the subordinate court with jurisdiction. Having deliberated on the matter the Court citing with approval the decision in **Maganzo Zelamoshi @ Nyanzomola v. R**, Criminal Appeal No. 355 of 2016(Unreported) and **Maulid Ismail Ndonde v. R**, (Supra), held:

*"...we hold that because the instruments of consent and the certificate at page 3 of the record of appeal, were neither endorsed as having been admitted by the trial court, nor does the record show that the documents were admitted, the trial court tried the case without jurisdiction."*

Similarly, in **Salumu s/o Andrew Kamande v. Republic** (Supra) cited by the appellant the court held:

*"In the present appeal, at pages 3 - 4 of the record of appeal, there is a consent to prosecute the appellant and certificate conferring jurisdiction on the District Court of Mufindi at Maftnga but the record does not reflect how they got into the court record to form part of the proceedings. We note that at page 15 of the record of appeal, the PP informed the trial court that he had received the consent from the DPP but the record is still silent as to whether the same was received to form part of the trial record. Since there is no clear indication discerned from the record of appeal as to how the consent and certificate found their way into the trial court record, we are in agreement with the counsel for the parties that the appellant was tried without a prior consent of his prosecution and there was no certificate issued to confer jurisdiction on the District Court of Mufindi at Mafinga, Given that there was no consent and certificate, the trial court lacked jurisdiction to try the appellant with an economic offence. Accordingly, we find that the trial court proceedings and that of the first appellate court were a nullity"*

This court is bound by the above decisions. Since the consent and the certificate conferring jurisdiction filed in the trial court on 23/6/2022 were not endorsed and the trial court records does not show that they were formerly admitted, the trial was without jurisdiction rendering the decision reached therefrom a nullity. The appropriate step to take is to nullify the proceedings of the trial court from 23/6/2022 to the end, quash the judgment and set aside the appellant's conviction and sentence as I hereby do.

As to the way forward, Ms Gloria Eliachim Simpassa the learned State Attorney urged the court to order a retrial in the instant case while the 1st appellant prayed that a retrial not be ordered, because of the deficiencies in the search procedure. The guiding principles in retrials were stated in **Fatehali Manji v. Republic**, [1966] E. A. 343 where a firm decision was made restricting a retrial order unless the original trial is illegal or defective. The decision to order a retrial will only be made where the Interest of justice so require depending on circumstances of each individual case. The Court decision is specific to the point that:

*" 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 the gaps in its evidence at the first trial; even where a conviction is vitiated by 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 own facts and circumstances and an order for retrial should be made where the interests of justice require it"*



Having considered the evidence tendered in this case and the serious nature of the offence, I am of the considered view that an order for retrial is appropriate under the circumstances of this case. The original file is remitted to the trial court for a fresh trial before another magistrate. The appellants should remain in custody pending their retrial.

**Dated at Dar es Salaam, this 31<sup>st</sup> day of May 2024.**



*E.Y. Mkwizu*  
**E.Y. MKWIZU**  
**JUDGE**  
**31/5/2024**