IN THE HIGH COURT OF TANZANIA

IN THE SUB-REGISTRY OF MTWARA

AT MTWARA

CRIMINAL APPEAL NO. 105 OF 2023

(Original Economic Case No. 1 of 2021 of the Resident Magistrates' Court of Mtwara before Hon. C.T. Mnzava, PRM)

ARMELINDO ANIBAL GANHANE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

7th & 26th February, 2024

DING'OHI, J;

Armelindo Anibal Ganhane (hereinafter referred to as the appellant) was charged in the Resident Magistrate Court of Mtwara with the offence of Unlawful Possession of a Government Trophy contrary to Section 86 (1), (2) and (3) (b) of the Wildlife Conservation Act, No. 5 of 2009 as amended by Section 61 of the Written Laws (Miscellaneous Amendment) Act No. 2 of 2016 read together with Paragraph 14 of the first schedule, and Section 57 (1) of the Economic and Organized Crime Control Act [Cap. 200 R.E 2019].

The charge made against the appellant in the trial court is to the effect that on the 7th December 2021, at Masasi Police Station area within Masasi District in Mtwara Region, the appellant was found in unlawful possession of government trophies, to wit, two pieces of rhinoceros horns worth Tshs. 88,350,000/=, the property of the Government of the United Republic of Tanzania without any permit or licence. The appellant pleaded not guilty to the charge.

The material facts that gave rise to the present matter are that on the 7th day of December 2021, the PW5 SSP **ADAM AMIRI,** by then the OC-CID of Masasi district, grabbed information that there was a person in transit who illegally dealing with the government trophies. That person was traveling along Masasi- Tunduru Road from Mtambaswala, Mozambique/Tanzania heading to Masasi. That person, who turned out to be the present appellant, was traveling using a passenger's motor vehicle. Following that tip, the police officers from Masasi police station followed the information. They arranged themselves at Masasi traffic checkpoint where they stopped several motor vehicles *shunting* from Mangaka to Masasi. One of the stopped motor vehicles was that which the appellant and other persons bordered. The driver of that motor vehicle was

instructed to proceed to Masasi Police Station. At the police station every person on board, including the appellant was searched. It is alleged the search resulted in finding the appellant herein in possession of two pieces of rhinoceros horns. The Certificate of seizure and receipt of seizure to that effect were collectively admitted in the trial court as exhibit P10.

After a full trial, the appellant was convicted as charged. He was sentenced to pay a fine of Tshs. 883,500,000/= (Eight Hundred and Eighty-Three million and Five Hundred Thousand shillings) or to serve twenty years' imprisonment in default of fine. It would appear the appellant did not manage to pay a fine. He was taken to prison to serve a custodial sentence. The trial court believed the evidence of the prosecution side that the appellant was found in unlawful possession of the Government trophy. It also believed that before the appellant was prosecuted, the DPP gave consent and a certificate conferring jurisdiction to the trial court to try that economic offence.

Discontented with both the conviction and sentence, the appellant knocked on the doors of this court with five grounds of appeal which are designed as follows:

1. *That, the trial court erred in law and fact by proceeding to entertain the matter and convict the Appellant while the court was not vested with the jurisdiction.*
2. *That, the trial court erred in law and facts by convicting the Appellant while the prosecution side failed to prove their case beyond a reasonable doubt.*
3. *That, the trial court erred in law and facts by convicting Appellant while the proceedings tainted with irregularities to wit; the charge was not read during the commencement of the prosecution case and during the ccommencement of the defence case.*
4. *That, the trial court erred in law and facts by convicting the Appellant without considering and evaluating defence evidence.*
5. *That, the trial Magistrate erred in law and facts by sentencing without taking into consideration the time spent by the Appellant in custody.*

In this appeal, the appellant was represented by **Mr. Rainery Norbert Songea** a learned counsel assisted by **Mr. Issa Chiputula**, a learned counsel. The respondent Republic had the services of **Mr. Edson Laurence Mwapili,** a learned State Attorney.

Submitting on the first ground of appeal, Mr. Songea argued that according to the provision of section 3 of the Economic and Organized Crime Control Act [Cap. 200 R.E 2019] It is the High Court that is vested with jurisdiction to try cases involving economic offences. According to him, the DPP or any person acting on his behalf is vested with powers to confer jurisdiction to subordinate courts to try economic cases by consent and a certificate of transfer (Certificate).

On that, the learned counsel submitted that page 3 of the trial court's typed proceedings shows that the prosecution prayed to submit the consent and certificate of transfer. However, it does not show how that consent and certificate of transfer were admitted in court as the same consent and certificate do not have a court stamp, and it was not signed by the trial Magistrate. According to the learned counsel, the trial court entertained the economic case without consent and thus It had no jurisdiction to try that economic case. To support his stance, Mr. Songea referred me to the cases of **MAULID ISMAIL NDONDE VS REPUBLIC** (CRIMINAL APPEAL 319 OF 2019) [2021] TZCA 538, **SALUMU S/O ANDREW KAMANDE vs REPUBLIC** (CRIMINAL APPEAL NO. 513 OF

2020) [2023] TZCA 133, and **JOHN JULIUS MARTIN & ANOTHER vs REPUBLIC** (CRIMINAL APPEAL 42 OF 2020) [2022] TZCA 789.

Argued on the second ground of appeal that the case was not proved beyond reasonable doubt. This complaint is fourfold. **Firstly,** the prosecution brought PW2 and PW3 which were introduced as independent witnesses, but according to the learned counsel, these two witnesses were also the suspects because they were both searched by the police. Since the search was planned, he argued, the prosecution had room to find another independent witness, and for that reason, the learned counsel revealed that PW2 and PW3 were not qualified to be independent witnesses thus the search done was improper. He cited the case of **SHABANI SAID KINDAMBA vs REPUBLIC (**CRIMINAL APPEAL 390 OF 2019) [2021] TZCA 221. **Secondly,** the learned counsel referred me to page no. 1 of the typed proceedings which shows that on the first date of the trial of the case, there was an interpreter but it does not show how that interpreter was found, and who brought him to court. The learned counsel referred me to the case of **SHIMBI DAUD @ KULWA & OTHERS vs REPUBLIC** (CRIMINAL APPEAL NO. 660 OF 2020) [2023] TZCA 1790. He further added that the hearing of the case was firstly conducted in Swahili

language, but from 8/05/2023 it was conducted in English. There was no reason given for that change. **Thirdly**, the learned counsel submitted that this case was heard by two Resident Magistrates that is Hon. Kasebele and Hon. Mnzava as shown on page 57 of the typed proceedings. The trial magistrate who then took over the matter did not address the parties to that effect and if they intended to re-call witnesses who testified after the first magistrate as required by the law. He supported his arguments with the case of **DPP vs LAURENT NEOPHITUS CHACHA & OTHERS** (CRIMINAL APPEAL 252 OF 2018) [2019] TZCA 367; and **Fourthly**, the prosecution did not produce a bus ticket as evidence that the appellant traveled on the date of incidence as he disputed the allegation that he traveled using the mentioned motor vehicle and he also disputed having been found in possession of government trophy.

As regards the third ground of appeal the learned advocate contended that the charge was not read over to the appellant during the commencement of the prosecution and during the defence case. According to the learned counsel, the preliminary hearing was conducted on 22/11/2022, and the hearing of the case commenced on 16/02/2023. However, he submitted, before the commencement of the hearing the charge was not read over to

the Appellant as required by the law. He stressed that failure to read over the charge to the appellant makes all proceedings by the trial court to be void. He supported that stance with the cases of **JAFARI S/O RAMADHANI VS REPUBLIC** (CRIMINAL APPEAL 311 OF 2017) [2019] TZCA 388, and **DIRECTOR OF PUBLIC PROSECUTION VS AGREY SAPALI** (CRIMINAL APPEAL 190 OF 2018) [2020] TZHC 1178.

As to the fourth ground of appeal, Mr. Songea submitted that the appellant's evidence was not analyzed and evaluated. He contended that the trial court did not analyze the evidence as required by the law.

Submitting on the last ground of appeal, the learned counsel had the view that the trial magistrate sentenced the appellant without considering the time he spent in custody. He contended that the records show that the appellant had been in custody since 2021. In sentencing, the trial court should have considered the time spent by the Appellant in custody.

In reply, Mr Mwapili, the learned State Attorney argued against the first ground of appeal that, the Resident Magistrates Court of Mtwara had jurisdiction to entertain the economic case which was before it. He added that before the commencement of that case, the prosecution prayed to file

a consent and certificate, which were properly admitted by the trial court. Mr. Mwapili submitted further that all cases cited by the Appellant's counsel in support of the first ground of appeal are distinguishable to this case. In this case, according to Mr. Mwapili, the documents concerned are in the court file already.

On the 2nd ground of appeal, the learned counsel submitted that the charge against the appellant was proved beyond reasonable doubt. He was of the view that PW2 and PW3 were independent witnesses, and were credible enough. They did not have any interest in serving. He went on to submit that those two witnesses were not even known to PW5 before the incident, thus they were qualified per the law.

Addressing the issue of an interpreter, Mr. Mwapili argued that there was no problem with the interpreter. That it was the duty of the trial court to find an interpreter. The learned State Attorney added that the magistrate who took over the matter after the first one had complied with the provisions of Section 214 of the Criminal Procedure Act CAP 20 RE 2020.

On the sentence imposed on the appellant, the learned State Attorney thought that it was contrary to the provisions of sections 57 and 60 of the

Economic and Organized Crime Control Act [Cap. 200 R.E 2019]. He stressed that the Appellant was required to be sentenced to serve the imprisonment term together with payment of a fine without an option. According to him, it was against the law to impose an optional sentence. To bolster his argument, he referred me to the case of **PAPAA OLESIKALADAI @ LENDEMU & ANOTHER VS REPUBLIC** (CRIMINAL APPEAL NO. 47 OF 2020) [2023] TZCA 51.

However, Mr. Edson Laurence Mwapili, the learned State Attorney conceded on the 4th and 5th grounds of appeal though he did not argue anything against the 3rd ground of appeal.

In a brief rejoinder, Mr. Songea insisted that the prosecution had not proven their case beyond the reasonable doubt. He argued the court to consider what he submitted in chief.

After reviewing the evidence on record and the submissions made by both sides, I will now consider the grounds of appeal one after another starting with the first ground of appeal which questions the jurisdiction of the trial court in entertaining the economic charge which was before it. The issue is whether the certificate and consent which confers jurisdiction of the trial

court over economic offence were properly admitted to meet the purposes of the prosecution case. Admittedly, the records show that there are certificates and consents in the case file, but those documents were not endorsed by the trial magistrate to meet the requirement. I will not share with Mr. Mapili's view therefore that the fact that the consent and certificate were in the court file, was legally enough for the Resident Magistrate's Court of Mtwara to entertain the economic case.

The law is very clear and it is now settled that the endorsement of the consent and certificate by the court officer designated to entertain the economic case is of the most importance. Where those documents are not endorsed they can not form part of the record in the economic case proceedings even if it is found in the case file.

That was the position of the Court of Appeal of Tanzania in the cases of **NDIHOKUBWAYO EMMANUEL VS. THE REPUBLIC**, CRIMINAL APPEAL NO. 300 "B" OF 2011; **MHOLE SAGUDA NYAMAGU VS REPUBLIC** (CRIMINAL APPEAL NO 337 OF 2016) [2019] TZCA 623; and **ADAM SELEMANI NJALAMOTO VS REPUBLIC** (CRIMINAL APPEAL 196 OF 2016) [2018] TZCA 373, just to mention a few.

It's trite law that, before commencing the trial of the economic case in the trial court, prior consent of the Director of Public Prosecutions had to be obtained in terms of **section 26 (1)** of the Economic and Organized Crime Control Act [Cap. 200 R.E 2019], which 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".*

Whereas **section 12 (3)** of the Act also provides:

> *"The Director of Public Prosecutions or any State Attorney duly authorized 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".*

After careful perusal of the trial record records, I have found that the certificate and consent are in the trial court case file but were not properly

and officially received as required by the law and as made clear in the cited case laws above. In another case of **MAULIDI ISMAILI NDONDE**(supra) the Court of Appeal of Tanzania had the following to say;

> *".....the consent and certificate signed on 10th April 2018 were not officially received by the trial court.....Consequently, in the absence of the consent and the certificate of the DPP, the trial court lacked jurisdiction to try this case rendering the entire proceedings a nullity."*

Also, in **Salumu Andrew Kamande**(supra), the Court of Appeal of Tanzania observed that:

> *"since there is no clear indication discerned from the record of appeal as to how the consent and certificate find their way into the trial court records, we are in agreement with the counsel for the parties that the Appellant was tried without a prior consent"*

As the appellant, in this case, was prosecuted without consent by the DPP, as aforesaid, and there is no certificate of transfer, the proceedings,

conviction, and sentence by the trial court are illegal, and a nullity. They are hereby vitiated. In a proper case what would follow is the order for retrial. But under the circumstances of this case, I don't think that will be an appropriate order.

The Court of Appeal in the case of **George Claud Kasanda vs DPP** (Criminal Appeal 376 of 2017) [2020] TZCA 76 which quoted with approval the case of **Fatehali Manji v. R [1996]** made clear the circumstances that may call for the order of retrial. It said:

"In general, a retrial may 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 purposes of enabling the prosecution to fill in gaps in its evidence at the first trial.....each case must depend on its own facts and an order for retrial should only be made where the interests of justice require it."

See also; **Selina Yambi and Others vs Republic, Criminal Appeal No. 94 of 2013,** and **Omary Salum @ Mjusi vs Republic** (Criminal Appeal 125 of 2020) [2022] TZCA 579.

I certainly associate myself with the appellant counsel's position that retrial will not be proper under the circumstances of this case. That is because since the consent and leave were not properly endorsed per the law, ordering a retrial will pave the way for the prosecution to straighten up its already fragmented case. That, in my view, will certainly bring injustice on the side of the appellant.

Since in the first ground of appeal, this court found that the trial court lacked jurisdiction to entertain the economic offence there will be no need to venture on the remaining grounds which tends to challenge matters of procedures and evidence. The first ground is stiff enough to dispose of this appeal the way I am about to do.

The appeal is allowed. Conviction and sentence imposed on the appellant are hereby quashed and set aside. The appellant is to be set at liberty forthwith unless lawfully incarcerated in connection with another cause.

It is so ordered.

Dated at Mtwara this 26th February 2024.

S. R. DING'OHI
JUDGE
26/02/2024

COURT: Judgment delivered this 26th day of February 2024 in the presence of Mr. Edson Laurance Mwapili State Attorney for the Republic, who also held brief of Mr. Rainery Norbert Songea for the appellant.

S. R. DING'OHI

JUDGE

26/02/2024