IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MANYARA

AT BABATI

CRIMINAL APPEAL NO 3705 OF 2024

(Original Criminal Case No. 4 of 2022 of the District Court of Simanjiro at Orkesumet)

MOHAMED S/O RAMADHANI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

REASONS FOR THE JUDGMENT

18th April and 6th June, 2024

MIRINDO, J.:

Mohamed Ramadhani was jointly charged with William Chen alias Stanili and Linus Herman alias Joachim before the Simanjiro District Court with unlawful possession of government trophy contrary to section 86 (1) and (2) (c) (ii) of the Wildlife Conservation Act, No 5 of 2009 as amended by the Written Laws (Miscellaneous Amendments) Act (No 2), 2016. This charge was read together with Paragraph 14 of the First Schedule to the Economic and Organised Crime Control Act [Cap 200 RE 2019 and sections 57 (1) and 60 (2) of the same Act. At the conclusion of the trial, the learned trial Resident Magistrate acquitted William

Chen alias Stanili and Linus Herman alias Joachim but convicted and sentenced Mohamed Ramadhani.

Mohamed Ramadhani, the appellant, appealed to the High Court against his conviction and sentence and at the conclusion of hearing of the appeal, I allowed the appeal, quashed the conviction and set aside the sentence. I reserved the reasons for allowing the appeal and which I now proceed to give.

The appellant appeared in person at the hearing of the appeal and the respondent Republic was represented by Ms Mwanaidi Chuma, learned State Attorney. With leave of this Court, the learned State Attorney, raised a preliminary point of law that the trial was defective on account of invalid prosecutorial consent issued by the Manyara Regional Prosecutions Officer on 25 May 2022 under section 26 (1) of the Economic and Organised Crime Control Act [Cap 200 RE 2022]. The learned State Attorney argued that section 26 (1) confers personal consenting powers to the DPP and consenting powers for the e Regional Prosecution Officer is section 26 (2) of that Act. Due to this error, the District Court had no jurisdiction to try the offence. In support of this view, she referred this Court to the Court of Appeal's decision in **Emmanuel Chacha Keryoba and Others v Republic** (Criminal Appeal No. 368 of 2020) [2023] TZCA 17823. Besides this preliminary point, the learned State Attorney pointed out several investigation defects in the certificate of seizure, the chain of

custody, inventory form and insufficient identification of the government trophy during the valuation process. She asked this Court to quash the proceedings of the trial court, set aside the conviction and sentence, if there is sufficient evidence, order retrial.

The appellant had nothing to add to his grounds of appeal but stated that the trial court erred in convicting him because it was his co-accused who took the animal.

This preliminary point raises a jurisdictional issue which this Court must first consider before dealing with other issues. Nevertheless, a close review of case-law indicates that there are conflicting decisions of the Court of Appeal. Clearly, in **Emmanuel Chacha Keryoba and Others v Republic** (Criminal Appeal No. 368 of 2020) [2023] TZCA 17823, the Court of Appeal followed its relatively recent case of **Peter Kongori Maliwa and Others v R** (Criminal Appeal No.252 of 2020) [2023] TZCA 17350. In the latter case, the Court of Appeal recognised two sets of prosecutorial consent. It distinguished the prosecutorial consent under section 26 (1) which must be given by the DPP in person and the delegates consent issued under section 26 (2). The dichotomy introduced in **Peter Kongori Maliwa** is a recent development which creates a state of conflicting decisions.

Traditionally, statutory provisions tended to distinguish between acts done by the DPP in person and those delegated by the DPP. For example, section 377 of the Criminal Procedure Act, Cap 20 provides an expanded definition of the DPP under part c of Part X to include "any officer subordinate to him acting in accordance with his general or special instructions." On account of this definition, subsequent provisions under part c merely refer to the DPP and no reference is made to DPP's subordinates. In **Director of Public Prosecutions v Thomas Mollel alias Askofu** [2003] TLR 306 a question arose whether the notice of intention to appeal filed by Arusha Regional Crimes Officer was filed by the DPP in terms of section 379 (a) of the Criminal Procedure Act, 1985. Before its amendment, the section provided that:

> No appeal under section 370 shall be entertained unless the Director of Public Prosecutions-
>
> (a) shall have given notice of his intention to appeal to the subordinate court within thirty days of the acquittal, finding, sentence or order against which he wishes appeal; and

The Court of Appeal held that there was no evidence that the Arusha Regional Crimes Officer was subordinate to the DPP within the meaning of section 377. So, what matters in this context is that there is only an appeal by the DPP and there was no appeal by subordinates. The only question is whether a given official is duly authorised to appeal.

Returning to the scheme under the Economic and Organised Crimes Control Act, section 12 differentiates acts by the DPP in person and acts of duly authorised State Attorney. Nevertheless, the scheme pertaining to prosecutorial consent is somewhat different.

For many years the Court of Appeal either affirmed and reaffirmed that the provisions of section 26 (1) authorise prosecutorial consent or quashed proceedings conducted in the absence of the prosecutorial consent under section 26 (1). Before **Peter Kongori Maliwa** the Court of Appeal conceived any prosecutorial consent issued by the DPP under section 26 (1) includes those of the DPP's delegates. There has always been express recognition of the alter ego principle; the DPP's delegates are the alter egos of the DPP who act with their principal under section 26 (1). This principle is traced from section 25 of the Economic and Organised Crime Control Act and is different from that under section 12 of the same Act. Section 26 falls under Part III of the Economic and Organised Crimes Control Act which differentiates provisions dealing with investigation from those dealing with prosecution. Sections 20 to 24 deal with investigation while sections 25 to 27 deal with prosecution. Section 25 (1) provides an expanded definition of the DPP as follows:

> In this Part, the term "Director of Public Prosecutions" includes any public official or officials specified by the Director of Public Prosecutions by notice

published in the *Gazette* to whom he has delegated any of his functions for the purposes of this Part of this Act.

It is because of this expanded definition of the DPP that section 26 (1) recognises only the consent of the DPP, whether issued by the DPP in person or the delegates but section 26 (2) creates a mechanism for delegation. Section 26 (2) is an administrative provision for the DPP to identify delegates who may consent on his or her behalf. It is from this provision that one can determine whether the DPP's consent under section 26 (1) was issued by an authorised officer under section 26 (2). Section 26 (2) empowers the DPP to manage the delegation process and many for that purpose gazette economic offences that may be consented by the DPP in person and those may be consented by the DPP's delegates.

Subsection (2) of section 26 was first applied when in 1984 the DPP introduced the Economic Offences (Specification of Officers Exercising Consent) Notice, GN No 191 of 1984. This notice was followed by Economic Offences (Specification of Offences Exercising Consent) Notice, GN No 284 of 2014 and the current Economic Offences (Specification of Offences for Consent) Notice, GN No 496H of 2021. The important question under this scheme is whether in a given case the consent has been issued by a duly authorised officer gazetted under section 26 (2).

For quite a long time after the enactment of the Economic and Organised Crime Control Act in 1984 the question before the Court of Appeal has been the DPP's consent under section 26 (1) without separate consideration of the delegates' consent. Over the years, the major preoccupation of the Court of Appeal has been with consent under section 26 (1) and there had not been delegate consent under section 26(2). Among the earliest cases on the determination of prosecutorial consent is the 1989 case of **Omari Mohamed Shoshi v R**, Criminal Appeal 130 of 1988 where the High Court sitting as an Economic Crimes Court tried an offence of unawful possession of goverment trophy without the prior DPP's consent. On appeal to the Court of Appeal the appellant's counsel contended that as the DPP never consented to the trial in terms of section 26 (1), the Court lacked jurisdiction to try the economic offence. The Court of Appeal dismissed the Republic contention that appearance by the DPP or his respresentative was sufficient to constitute consent because there was prescribed format for consenting and held that the DPP's consent was a prerrequisite for instituting an economic charge. Discussing the import of section 26 (1), the Court of Appeal concevied the section as dealing with DPP's consent:

> ...We understand section 26 (1) of the Act to mean that the Director of Public Prosecutions has the discretion to prosecute a person for an economic offence but that once he has decided to prosecute for such offence, then the DPP must give consent. Such consent cannot be given merely by implication as

> suggested by counsel. It must be express and it must form part of the record. To the submission that the Act does not prescribe any particular form which the consent should take, we can only say that the Legislatute did not find it necessary to prescribe such form. It would seem that the real intention of the Legislature was that the Director of Public Prosecutions should give his consent. The question as to what form the consent should take is simply one of implementation to be determined by the implimentors of the law.....

The particular significance of DPP's consent as inseparable from delegates' consent is evident in several cases. In the 2004 case of **Eward George Lekule v R**, Criminal Appeal 13 of 2002, the Court of Appeal dismissed the complaint that the DPP's consent was issued retrospectively. On its analysis of the law on prosecutorial consent, the Court of Appeal referred to section 26 (1) and section 12 of the Economic and Organised Crime Control Act, and held that:

> It is not in dispute that one A. N. M. Sumari, State Attorney In Charge, consented to the prosecution of the appellant in the District Court, Moshi and this certificate was lodged in the said court on the 11.12.2000. This is the date from which the District Court, Moshi had jurisdiction to try the case in terms of section 12(4) of the Act and not on any earlier date. Subordinate courts have no jurisdiction to try offences triable under Act No. 13 of 1984 unless such jurisdiction is specifically conferred by the DPP. In the instant case the DPP conferred jurisdiction on the District Court, Moshi on the 11.12.2000. This means that on the 20.8.99 and on the 28.1.2000, the dates relied on by Mr. Kamara, the District Court had no jurisdiction to try the case.

> Therefore it could neither convict nor acquit the appellant. This ground of appeal is devoid of merit.

In 2005 the matter was dealt with in **Hamidu Abdallah Bila v R,** Criminal appeal 73 of 2004. In the District Court of Songea, the appellant along with three others were jointly charged with, and convicted of, two counts of authorised possession of firearm contrary to paragraph 19 of the First Schedule to the Economic and Organised Crime Control Act and its sections 56 (1) and 59 (2), read together with sections 13 (1) and 31 (1) of the Arms and Ammunition Ordinance. In his first ground of appeal, on a further appeal to the Court of Appeal, the appellant, contended that the provisions of section 26 (1) were not complied with by the Republic. In dismissing this ground of appeal, the Court of Appeal held that:

> Our perusal of the court record shows that one Augustino Dominic Shio, Principal State Attorney, having been authorized by the Director of Public Prosecutions, under his hand duly consented to the prosecution of the case and that the appellant Hamid Abdallah@ Bila be tried in the District Court of Songea for the offences enumerated in the certificate...

This point of complaint arose again before the Court of Appeal at Bukoba in 2015 in **Emmanuel Rutta v R**, Criminal Appeal 357 of 2014. The Court of Appeal considered as valid the prosecutorial consent issued by the Principal State

Attorney although the proceedings were invalidated for lack of the certificate of transfer. The Court held that:

> ...Since in this appeal the learned Principal State Attorney in charge at Mwanza failed to comply with section 12(4) of the Economic and Organized Crimes Control Act the District Court of Bukoba lacked jurisdiction to try the appellant. The provisions of section 12(5) are clear on this position. In other words, because the learned Principal State Attorney complied with only with sections 26(1) and 12(3) and failed to comply with sections 12(4) then the District Court of Bukoba lacked the jurisdiction to try the appellant with a combination of the offences of unlawful possession of firearms and ammunition under the Economic and Organized Crime Control No.13 of 1984 as amended by Act. No. 10 of 1989 and those of the armed robbery under the Penal Code.

More recently, the Court in **Joseph Yombo alias Mahema v R** (Criminal Appeal No 448 of 2016) [2020] TZCA 22 (25 February 2020) dismissed a complaint on the validity of the prosecutorial consent. The Court of Appeal summed the appellant's argument in these terms:

> The crucial matter for determination is whether in this case, the two conditions were met. From the original record, it is clear that on 9/1/2014, a certificate and a consent envisaged under sections 12(3) and 26(1) of the EOCC Act respectively, were issued by the State Attorney In-charge of Musoma Zone. The same were issued after institution of the proceedings in

> the trial court. Mr. Ndamugoba submitted that, so long as the certificate was issued and the consent made before commencement of the trial, both documents were valid. He stressed that, according to the applicable procedure, cases under the EOCC Act involving economic offences are being filed in subordinate courts for committal proceedings and at that stage, the consent of the DPP to prosecute the charged persons is not required. According to the learned Senior State Attorney, the consent is mandatorily required at the trial stage.

Distinguishing **Hsu Chin Tai and Another v R**, Criminal Appeal No. 250 of 2012 where trial commenced without the prior consent of the DPP, the Court of Appeal in **Joseph Yombo** dismissed the complaint in the following terms:

> In that case, the leave or consent of the DPP was found to be invalid because it was filed after the institution of proceedings, that is; after the information had been filed while the provisions of section 94(1) of the CPA prohibits institution of proceeding without the consent of the DPP. In the case at hand however, what is prohibited by section 26(1) of the EOCC Act is commencement of a trial without the consent of the DPP. Since the trial commenced after the consent of the DPP had been filed in the trial Court, the proceedings were properly conducted. In the circumstances therefore, the first ground of appeal is devoid of merit.

Other cases include **Paulo Matheo v R** [1995] TLR 144 and the often-cited case of **Rhobi Marwa Magare and Two Others v R**, Criminal Appeal 192 of 2005,

Court of Appeal of Tanzania at Mwanza (2009). The list goes on to include **Dotto s/o Salum alias Butwa v R,** Criminal Appeal 5 of 2007, Court of Appeal of Tanzania at Tabora (2011); **Elias Vitus Ndimbo and Another v R**, Criminal Appeal 272 of 2007, Court of Appeal of Tanzania Iringa (2012); **Jovinary Senga and 3 Others v R**, Criminal Appeal 152 of 2013, Court of Appeal of Tanzania at Bukoba (2014); and **Magoiga Magutu alias Wansima v R** (Criminal Appeal 65 of 2015) [2016] TZCA 608. The major preoccupation of the Court of Appeal in these cases is the requirement of the DPP's consent and not of the DPP's delegates.

In a state of conflicting decisions, principles of judicial precedent dictate choice. In view of **Arcopar (O.M) SA v Harbert Marwa and Family Investments Co Ltd and 3 Others**, Civil Application 94 of 2013, Court of Appeal of Tanzania at Dar es Salaam (2015) where there are conflicting decisions in civil cases, it is preferable to follow the most recent one unless it is shown to be inconsistent with general principles of law. However, the governing principle applicable in criminal cases was stated in **Mabulu Damalu and Makenzi Mihambo alias Kabora v R**, Criminal Appeal 150 of 2015. Having referred to its decision in **Arcopar (O.M) SA**, the Court of Appeal observed that there may be situations in which the Court will not follow its previous decision. In the appeal before it, the Court of Appeal noticed that there were conflicting decisions and refused to follow its "most recent precedent" on the principle that:

> So, in the absence of strong reasons to the contrary in each case, this Court will normally follow its previous decisions on a particular subject matter.

The principle outlined in **Mabulu Damalu** is part of the general principles of judicial precedent long established by the Court of Appeal. There is a duty to follow previous decisions unless circumstances dictate otherwise, as stated in **Ally Linus and Eleven Others v Tanzania Harbours Authority and Another** [1998] TLR 5 at 11, is not:

> ...simply a matter of judicial courtesy but a matter to act judicially which requires a judge not lightly to dissent from the considered opinions of his brethren.

The duty to follow previous decisions is important in criminal law as part of the principle of legality. In leading case of **Jumuiya ya Wafanyakazi Tanzania v Kiwanda cha Uchapishaji cha Taifa** [1988] TLR 146 the full bench of the Court of Appeal adopted the Practice Statement of 1966 Practice Direction - Judicial Precedent [1966] 3 All ER 77 as part of the law of the land. This Practice Statement emphasizes certainty in criminal law. The last paragraph of the Practice Statement states that:

> In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal

> arrangements have been entered into and also the especial need for certainty as to the criminal law.

In **D. 3769 PC. Tegeza v R**, Criminal Appeal 128 of 1994, the Court of Appeal emphasized that following a previous judicial precedent is important to ensure legal certainty and for that purpose it was bound to follow its precedent in **Charles Samson v R** [1990] TLR 39. It was held that:

> We are satisfied **Samson's** case is on all fours with the case currently before us with regard to the issue of the defence of alibi. Under the doctrine of stare decisis this court is bound to stand by **Samson's** case and apply it to the case at hand in the interests of legal certainty and the Rule of law.

For reasons of certainty, I have come to the conclusion that in view of the present state of conflicting decisions of the Court of Appeal, I am not bound to follow the principle in **Peter Kongori Maliwa** and subsequent decisions on the application of subsections (1) and (2) of section 26 in so far as they constitute a departure from settled law.

Having dismissed the preliminary point, I turn to consider the four grounds of appeal which in their totality raise the following question: Was the charge of unlawful possession of government trophy proved beyond reasonable doubt?

Section 86 (1) of the Wildlife Conservation Act creates the offence of unlawful possession of government trophy. It states that:

> Subject to the provisions of this Act, a person shall not be in possession of, or buy, sell or otherwise deal in any Government trophy.

This provision does not define what constitutes "possession" but this term is defined under section 5 of the Penal Code [Cap 16 RE 2022]. According to the definition in section 5, criminal possession may be actual, constructive or joint. In criminal law, possession entails knowledge and physical element of control. As was held by the Court of Appeal in **Moses Charles Deo v R** [1987] TLR 134 at 139

> We turn to consider the question of possession. Mr. Lipiki is perfectly right in saying that possession connotes knowledge on the part of the possessor. Common sense and justice require that it be so. The words of Lord Parker in **R. v Cavendish** [1961] 1 WLR 1083 at p. 1085 bears repeating here: for a person to be found to have had possession, actual or constructive, of goods it must be proven either that he was aware of their presence and that he exercised some control over them, or that the goods came, albeit in his absence, at his invitation and arrangement. But it is also true that mere possession sometimes denotes knowledge and control...

An accused person is in possession of an item when he or she is in control of it. The first element to be proved by the prosecution in a charge of unlawful

possession of a government trophy is the accused's control of the particular government trophy. The key prosecution witness on this point was its third witness, one Sungwa Msindae, a wildlife ranger, whose testimony about the accused possession was that:

> On 19/1/2022 I was at Najuu Mashambani Village with my colleagues Immanuel Baroli and Joel Teofori.
>
> There at an patrol we received information of poaching there were found three suspects who had killed a wildlife animal called an impala deer. [*sic*]
>
> I know the animal was an impala from its skin and head as an expert on wildlife animals. The animal was inside a bag. It had been kept in one of the houses of the area.
>
> I placed the suspects under arrest and asked them if they had a permit from the Director of Wildlife they said they did not.
>
> I took a certificate of seizure filled it which was signed by the suspects they signed their signatures and affixed their thumbprints. [*sic*]
>
> I will be able to identify the certificate of seizure by my name and signature.
>
> Also I found the suspects in possession of two panga and two knives, one torch with a horn tied to it.

This portion of evidence misses out material details on possession. There are no details about how the accused persons were arrested. The fact that the animal

was inside a bag and kept in one of the houses was quite insufficient. Important details relating to the bag, its location in the house and how it reached the house in question, the description of the house, the connection between the accused and the house in question, are missing out. These details were key in proving the charge of unlawful possession.

The three accused persons, who denied the charge, testified on oath at the trial. Mohamed Ramadhani, the appellant who was the first accused person stated that he was simply framed by wildlife officers.

The second accused, William Chen alias Stanili, denied the charge. In his cautioned statement, which was admitted at the trial without objection, he also denied any wrongdoing but mentioned the first accused as the one who killed the animal. Although the cautioned statement incriminated the first accused person, only its maker, the second accused person was given opportunity to express his objection. The first accused person was wrongly denied that opportunity.

It is important to re-examine the second accused remarks incriminating the first accused and for this purpose I will first reproduce those remarks which were recorded in Kiswahili:

> Mimi nilikuwa chini ya ulinzi na hapohapo Askari wa TAWA Aliuliza swali aliyeua mnyama ni nani? Mwenzangu alimjibu kuwa "Aliyeua mnyama huyu ni SWALA -IMBALA ni mwenzetu huyu MOHAMED s/o RAMADJHANI na hata hizi zana za Uwindaji Haramu yaani TOCHI iliyounganishwa na Honi ya pikipiki, panga mbili, visu viwili huwa anatumia huyuhuyu MOHAMED s/o RAMADHANI.....

In his defence, the third accused person, Linus Herman alias Joachim, denied any wrongdoing but also mentioned the first accused as the person who committed the offence:

> ...On arrival at the camp I found a meat load outside the camp and inquired from William as to who brought the meat and he told me it was Muddy Ramadhani and told me that Muddy left with some meat to take to "Mama wa Kitanga." [*sic*] So William told me when he woke up he found the meat outside and he doesn't knew [*sic*] when Muddy brought the meat. So William told me he is sharpening his bush knife and return to the farm bed after a while we were surrounded by three Wildlife Officers. And they inquired who is responsible with the meat and so I told him it was Mohamed and the two Wildlife Officers left and one remained behind. Two of the wildlife officers went to look for Muddy. After a while there were other two wildlife officers with the gun....

Although in convicting the first accused person, the trial court held that the second and third accused persons' testimonies connected the appellant with the

offence, the fact is that the appellant was mentioned in the second accused cautioned statement and in the testimony of the third accused person. It was only from these pieces of evidence that the trial court was convinced that the prosecution evidence was duly corroborated.

As stated earlier, there was no proof of the appellant's possession of the government trophy. Is there anything from the above pieces of evidence to support the appellant's conviction?

Both pieces of evidence are alarmingly inconsistent: In his cautioned statement, the second accused person heard "mwenzangu" (his colleague) responding to a wildlife officer that the first accused person was the one who killed the animal. Implicitly, the second person was referring to the third accused person. By contrast, the third accused person testified it was the second accused who connected the first accused with the offence. So, neither of them mentioned the first accused person to the wildlife officer. These pieces of evidence are doubtful.

But that is not the only problem. The contents of the cautioned statement of the second accused person do not amount to a co-accused confession. Its contents consisted of exculpatory statements.

The status of exculpatory statements has been affirmed and reaffirmed in various decisions. In the well-known case of **Anyangu and Others v R** [1968] EA 239, four accused persons made statements not amounting to confessions. On appeal against conviction, the Court of Appeal for Eastern Africa upheld the conviction of the third appellant only and reaffirmed the principle regarding accused exculpatory statements [at 240]:

> ... The learned judge treated all the statements as evidence, albeit accomplice evidence, against each appellant. With respect in doing so he was in our view in error. A statement which does not amount to a confession is only evidence against the maker. If it is a confession and implicates a co-accused it may, in a joint trial, be "taken into consideration" against that co-accused. It is, however, not only accomplice evidence but evidence of the "weakest kind" (**Anyuna s/o Omolo and Another v R** (1953) 20 EACA 218); and can only be used as lending assurance to other evidence against the co-accused (**Gopa s/o Gidamebanya and Others v R (**1953), 20 EACA 318).
>
> A statement is not a confession unless it is sufficient by itself to justify the conviction of the person making it of the offence with which he is tried....

This principle was reiterated by the Court of Appeal of Tanzania in **Ali Salehe Msutu v R** [1980] TLR 1 after holding that the extra-judicial statements of two-accused persons could not corroborate the appellant's repudiated confession [at 5]:

> ...They are exculpatory statements in which each of the accused clears himself and shifts the blame to the first accused. It is dangerous to rely on such exculpatory statement, and for that matter, it has long been an established rule of law in East Africa, including this country, that an exculpatory statement made by one accused cannot be used to incriminate another.

Thus, the second and third accused exculpatory statements were insufficient to ground the appellant's conviction. In conclusion, the charge of unlawful possession was not proved beyond reasonable doubt.

Having reached this conclusion, it is not necessary to consider the investigation defects outlined by the learned State Attorney. It was these reasons that necessitated the decision to allow the appeal at once.

DATED at BABATI this 4th day of June, 2024

F.M. MIRINDO

JUDGE

Court: Judgment delivered this 6th day of June, 2024 in the presence of Anifa Ally, State Attorney for the respondent Republic and in the absence of the appellant. B/C: William Makori (RMA) present.

Right of appeal explained.

F.M. MIRINDO

JUDGE