

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

**IN THE SUB REGISTRY OF MANYARA**

**AT BABATI**

**CRIMINAL APPEAL NO. 80 OF 2023**

*(Originating from Economic Case No. 69 of 2021 in the District Court of Simanjiro)*

**OMARI HASSAN SAMBELWA.....1<sup>ST</sup> APPELLANT**

**JAMES THOMAS @ YAHYI.....2<sup>ND</sup> APPELLANT**

**VERSUS**

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

**JUDGMENT**

*9<sup>th</sup> November, 2023 & 25<sup>th</sup> January, 2024*

***Kahyoza, J.:***

**Omari Hassan Sambelwa** and **James Thomas @Yahyi**, the appellants, were convicted by the District Court of Simanjiro on three counts, two counts on 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 WCA) read together with Paragraph 14 of the First Schedule to, and Section 57(1) and 60(2) of the **Economic and Organised Crime Control Act**, [Cap 200 R.E 2022] (the EOCCA) and one on unlawful possession of weapon within the game controlled area contrary to section 20(1)(b) and (4) of **the WCA**. The trial court sentenced them to serve twenty (20) years imprisonment, each, on both, the first and the second

count(s) and on the third count, to pay a fine of Tzs. 200,000/= each, or to serve a custodial sentence of one year in default to pay the fine. The trial court ordered the sentence to run concurrently.

Aggrieved, they appealed to this Court, raising six (6) 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. Rwezaura, State Attorney for the Respondent supported the appeal, submitting orally that the trial Court lacked jurisdiction for want of a valid consent from the Director of Public Prosecution (the DPP) under section 26(1) of **the EOCCA**. He contended the consent was issued and signed by the Regional Prosecuting officer under section 26(1) of **the EOCCA** instead of issuing it under section 26(2) of **the EOCCA**. To support his contention, he cited **Salum s/o Saad Rashid vs DPP**, (Criminal Appeal No 502 of 2019) 2023 TZCA 17737 (6 October 2023). He prayed this Court to declare the proceedings a nullity, quash the conviction and set aside the sentence.

As to the recourse, he submitted that this case does not befit a trial *de novo* for; **One**, the wildlife officer did not properly identify the government trophy; **two**, the trophy valuation certificate (exhibit(s) P2) did not indicate

characteristics of the said trophy; and **Three**, the inventory form (exhibit P3) was procured against the procedure under the PGO paragraph 25 of 228, where it provides that before the disposition of the exhibit which is subject to speed decay, the accused person should be present and the court must give him an opportunity to be heard. Citing the rule in **Mohamed Juma @ Mpakama vrs. The Republic**, Cr Appeal No. 385 of 2017.

The appellants being laymen, had nothing substantive to add.

### **Are the proceedings and judgment a nullity?**

The law is settled that no court has jurisdiction to try an economic offence without consent from the DPP. Section 26(1) of the **EOCCA** provides 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 provided).***

As submitted by the respondent's state attorney, the consent which purported to give jurisdiction to the trial court was defective. The Court of Appeal in **CRDB Bank PLG v. Lusekelo Mwakapala** (Civil Appeal No. 143 of 2021) [2023] TZCA 17637 (22 September 2023, TANZLII), emphasised

on the importance of a court making a finding as to whether it has jurisdiction before hearing the case. It held-

*"It is worth noting that, the question of jurisdiction is crucial and must be determined by the court or tribunal at the earliest opportunity. Jurisdiction is everything without which a court has no power to determine the dispute before it. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings. Generally, a court is barred to entertain a matter in which it has no jurisdiction."*

Indisputably, no court has jurisdiction to try an economic offence without a valid consent issued as per the dictates of the law under section 26(1) of **the EOCCA**. In addition to a valid consent, subordinate courts may try economic offence when issued the DPP issues a certificate conferring jurisdiction. It is also beyond dispute that the Regional Prosecuting officer issued the consent to prosecute the appellants under section 26(1) of **the EOCCA** instead of under section 26(2) of **the EOCCA**. It has been held in cases without number that it is the DPP who is mandated to issue consent under section 26(1) of **the EOCCA**. The Regional Prosecuting officer has mandate to issue consent to prosecute an economic offence under section 26(2) of **the EOCCA**. For that reason, I find that the consent was defective.



A defective consent cannot grant jurisdiction to a court to try an economic offence. Section 26(1) and (2) of **the EOCCA** read as follows-

*"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."*

In addition, I wish to associated myself with the holding of the Court of Appeal in **Peter Kongori Maliwa & Others vrs Republic** (Criminal Appeal No. 252 of 2020) 2023 TZCA 17350 (14 June 2023) that-

*"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 added)

I agree with Mr. Rwezahura, SA, that, the trial court assumed jurisdiction which it did not possess. Consequently, the proceedings, judgment and sentence were all nullity. I quash the proceedings and the conviction, and set aside the sentence.

### **Should this court order a retrial?**

Now, that I have quashed the proceedings and set aside the conviction and sentence, the issue is whether this Court should order a trial *de novo*. It is trite law that 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 the purposes of enabling the prosecution to fill in the gaps in its evidence at the first trial. This position was stated the famous case of **Fatehali Manji v. Republic** (1966) EA 343, where the Court considered the factors in deciding whether to order a retrial and stated thus-

*"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 the purposes of*

*enabling the prosecution to fill in the 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 interest of justice requires it."*

The Court of Appeal in **Marko Patrick Nzumila & Another v. Republic**, Criminal Appeal No. 141 of 2010 CAT (unreported) held that in considering whether to order for retrial a court should consider whether it is fair to do so for both the accused person and the public. It stated-

*"Failure of justice (sometimes, referred to as miscarriage of justice) has equally occurred where the prosecution is denied an opportunity of conviction. This is because, while it is always safer to err in acquitting than punishment, it is also in the interests of the state that crimes do not go unpunished. So, in deciding whether a failure of justice has been occasioned, the interests of both sides of the scale of justice have to be considered."*

Mr. Rwezaura beseeched the Court to abstain from ordering a fresh trial. I have no reason to differ with him, as to order a retrial will give the prosecution an opportunity to make good their case. Not only that but there is no evidence on record which may lead to the conviction of the appellants. As correctly submitted by the Mr. Rwezaura, the prosecution witness did not identify the trophy as the trophy valuation certificate (exhibit(s) P2) did not indicate characteristics of the said trophy. Furthermore, the inventory form

(exhibit P3) was procured against the procedure under the PGO paragraph 25 of 228, where it provides that before the disposition of the exhibit which is subject to speed decay, the accused person should be present and the court must give him an opportunity to be heard. Citing the rule in **Mohamed Juma @ Mpakama vrs. The Republic**, Cr Appeal No. 385 of 2017.

Given the discrepancies in the prosecution's case, to order retrial would be to give the prosecution a chance to rectify the errors or fill in the gaps in its evidence. It is settled that retrial should not be ordered to give a chance to the prosecution to rectify the errors. In addition, if I order the appellants to be tried, there will be no evidence to prove the appellants guilty. I will not order retrial.

In the end, I quash the proceedings and conviction, and set aside the sentence. I order the appellants' immediate release from the prison unless held there for any other lawful cause.

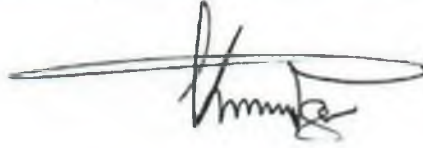
Dated at **Babati**, this **25<sup>th</sup> day** of January 2024.



**J. R. Kahyoza**  
**Judge**



**Court:** Judgment delivered in the presence of the appellants and Mr. Bizman advocate for the Respondents. Fatina Haymale (RMA) present.



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**J. R. Kahyoza**

**Judge**

**25/01/2024**

Niño Quiseno Cofesi 22/2023

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