

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT SUB REGISTER OF SUMBAWANGA

DC CRIMINAL APPEAL NUMBER 36 7086 STROKE 2023

Reference number 2023 111 0000 36786

(Economic Case No. 17 /2022 Mlele District Court)

KATABI S/O PESA @ KATABI.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

MWENEMPAZI, J:

The appellant was arraigned in the trial court, the District Court of Mlele at Mlele, and charged with the offence of unlawful possession of Government Trophy contrary to section 86(1) and (2) of the Wildlife Conservation Act, [Cap. 283 R.E. 2022 read together with Paragraph 14 of the First Schedule to and sections 57(1) and 60(2) of the Economic and Organized Crime Control Act, [Cap.200 R.E. 2022]. It was alleged that the appellant together with other accused persons, namely Bosco Ndikulio @ Ernest and

Shabani s/o Mpemba @ Senzula who were the 1st and 2nd accused and himself as the 3rd accused person on the 15th day of November, 2022 at Usevya Ward within Mlele District in Katavi Region were found in possession of common duiker meat valued at Tshs. 582, 750/= (say Five Hundred Eighty-Two Thousand and seven hundred and fifty shillings) being the property of the Government of the United Republic of Tanzania without any permit thereof.

Upon the charge being read over to the accused persons, they all denied to have been involved in the allegations leveled against them. The trial court, heard the case in a full trial, whereby prosecution called four witnesses and the defendants called seven witnesses. At the end of the trial, the trial court acquitted the 1st and the 2nd accused person and found the 3rd accused person guilty. He was therefore convicted with the offence of unlawful possession of Government Trophy contrary to section 86(1) and (2) (c)(iii) of the Wildlife and Conservation Act, Cap. 283 R.E. 2022 read together with paragraph 14 of the First Schedule to and section 57(10 and 60(2) of the Economic and Organized crime Control Act, Cap.200 R.E. 2022. The trial court sentenced the convict to serve a term in jail for a period of Twenty (20) years.

The appellant has filed a petition of appeal in this court registering five (5) grounds of appeal. For the sake of brevity, I will not reproduce them herein.

At the hearing of an appeal, the appellant was being represented by Mr. Deogratias Sanga, learned Advocate and the Respondent was being represented by Mr. Frank Mwingune, learned State Attorney. Hearing proceeded orally. As a matter of procedure, the appellant had the first right of audience to submit in chief on the appeal.

Mr. Deogratius Sanga – Advocate, submitted that this is an appeal against the decision of the District Court of Mlele dated 19/10/2023. That they filed five grounds of appeal, however when they were going through the proceedings, they discovered that the trial court heard and determined the case without having jurisdiction. They therefore prayed to address this court on that ground as well.

The counsel for the appellant submitted that it is their opinion that the trial court had no jurisdiction to determine this matter because, according to section 12(3) of the Economic and Organized Crime Control Act, [Cap 200 R.E 2019], an economic case cannot be heard and determined by any

subordinate court without there being a certificate conferring jurisdiction to that court issued by the DPP. Also, that where the certificate is issued the charging section must be referred to in the said certificate. Short of that, the certificate is rendered invalid and the proceedings are rendered nullity.

The counsel referred to the proceedings of the trial court dated 31/03/2023 and referred to the certificate. It was missing the charging sections. According to the charge sheet, the accused were charged by breaching section 86(1) and (2) (c) (iii) of the Wildlife Conservation Act, [Cap 283 R.E 2022] read together with paragraph 14 of the 1st schedule to and sections 57(1) and 60(2) of the Penal Code, [Cap 200 R.E 2019].

Since the charging sections were absent, then the whole proceedings are a nullity due to lack of jurisdiction. This is according to the stand in the case of **Dilipkumar Patel Vs. Republic**, Criminal Appeal No. 270/2019; Court of Appeal of Tanzania at Dar es Salaam page 12 the court held: -

"In view of the irregularities in the consent and certificate of the DPP with regard to the name and propriety of the provisions of law, the trial court was not

properly seized with jurisdiction to try the appellant as charged”.

Consent and certificate must have the charging sections in it in order to cloth the trial court with jurisdiction.

Also, it is the position of the Court of Appeal of Tanzania in the case of **Hashim Nassoro @ Almas Vs. DPP**, Criminal Appeal No. 312/2019 Court of Appeal of Tanzania, Sumbawanga where the court held that: -

“It is a settled law that a certificate and consent of the DPP or State Attorney without reference to the relevant provisions of the law creating economic offences are incurably defective and renders the trial court’s proceedings a nullity”.

Under the circumstances, the trial court had no necessary jurisdiction thus the whole proceedings were a nullity and thus they should be nullified.

The counsel for the appellant submitted also that apart from lack of jurisdiction in the proceedings, there are many gaps, which render the case to have not been proved beyond reasonable doubt. He proceeded to

pinpoint the gaps as follows: The way search and seizure was conducted, it was contrary to section 38(3) of the Criminal Procedure Act, [Cap 20 R.E 2022]. For a search to be legal there are four things to be complied: (1) there must be a search warrant. (2) if in the building the owner or occupier of the premises or his near relative or other person with control of the premises, there must be a receipt issued and (3) it must be conducted in the presence of independent witnesses.

In the proceedings, PW1 testified that the search was not under any emergency. The witness did not testify that there were given search warrant or tendering it in court. The search was conducted in absence of the owner of the building. The prosecution was aware of the owner of the building in which the search was conducted. That renders search and seizure to be invalid. There was no compliance to section 38(3) of Criminal Procedure Act. In the case of **Samwel Kibundali Mgaya Vs. Republic**, Criminal Appeal No. 180/2020, Court of Appeal of Tanzania at Musoma a search was declared illegal due to failure to comply with section 38(3) of Criminal Appeal of Tanzania.

The warehouse where the search was conducted, was the property of one Mzee Pesa. The owner of the property was not involved. Since the owner is deceased then the administrator of the estate would have been the proper person to be called.

Also, the alleged trophies were seized from Bosco Ndikulilo Ernest and Shabani Mpemba @ Sunzula who were released. It was the opinion of the counsel for the appellant that in their view the prosecution ought to have proved that the alleged trophy was found in possession of the accused or the building or vessel owned by the accused and under his control.

The premises where the trophy was found belong to the Pesa Family. The same were in the hands of the 1st and 2nd accused the prosecution failed to call the very material witnesses to show that it is the accused who brought the meat into the building. According to PW1 at page 13 the building was under the care of his sons. They ought to have been called or his wife. He argued that failure to call the said witnesses should cause this court to draw adverse of inference. On the point he invited this court to refer to the case of **Aziza Abdallah Vs. Republic [1991] TLR 71.**

In the opinion of the counsel for the appellant, the only reason that led to convict the appellant is that the said trophy was found in the premises alleged to be owned by his family.

If this court will find that the trial court had no jurisdiction and nullify the proceedings, then it should also find that there is no evidence to prove the case against the accused. The counsel referred this court to the case of **Tofilo Ibrahim Kalolo Vs. Republic**, Criminal Appeal No. 83/2023, High Court of Tanzania at Sumbawanga and also **Maulid Ismail Ndonde Vs. Republic**, Criminal Appeal No. 319/2019, Court of Appeal of Tanzania at Iringa (page 8 – 9).

The prosecution is responsible for the errors of wrongly filling the certificate conferring Jurisdiction and the certificate of consent to prosecute the accused persons. They should be taken responsible.

In conclusion, the counsel prayed that this appeal be allowed, judgment and conviction be quashed, sentence set aside; the appellant be discharged and released forthwith.

In reply to the submission in chief, Mr. Frank Mwigune, learned State Attorney submitted that they are supporting the appeal on the point that

the trial court had no jurisdiction. The trial court had no jurisdiction due to deficiency of certificate of consent and transfer of jurisdiction page 11 – 13.

Everything became a nullity; thus, the proceedings, judgement and sentence are a nullity. Principally, the evidence or proceedings after being nullified there is nothing to assess.

In the evidence tendered which is a nullity, PW1 tendered on the argument that the building belongs to the person who is dead, and the accused was the one taking care of the building. The appellant ran away from the police. The conduct of the accused draws him to the inference that he is culpable. It has been argued that there was no warrant. Since it was evening it was difficult to secure a search warrant.

The search was conducted subject to search order attached to the certificate of seizure. At the time of search the person in control of the premises was the appellant; he ran away. The appellant did not cross-examine on the tendered exhibit P1. The evidence is enough to pray for retrial. Retrial is the best way forward.

The available evidence is enough and as a procedure the prosecution cannot add or change the evidence save that the magistrate may change. The counsel for the respondent prayed for an order for retrial.

In rejoinder, Mr. Deogratius Sanga, learned Advocate for the appellant submitted by reiterating the submission in chief. He emphasized that, the search was illegal, as shown in the testimony of PW1, page 14. The search order was illegally entered into the records of the court. It deserves to be disregarded.

The certificate was objected to by words "it is not true". He submitted that the appellant holds the stand that there was no search at all. The other children of Mzee Pesa would have been called. Most witnesses say it is a family property.

The argument that the appellant ran away from police there may be other reasons not necessarily due to possession of trophy. The evidence by PW1 and PW2 does not support the alleged escape. There is no evidence, which will serve the interest of justice. Retrial would give chance to mend the evidence and occasion injustice.

It the position of law under section 3(3) of the Economic and Organized Crime Control Act, Cap. 200 R.E. 2022, (herein after referred to as EOCCA) that the Corruption and Economic Crimes Division of the High Court has jurisdiction to hear and determine all economic offences specified under paragraph 14 of the First Schedule to the said Act. However, courts subordinate to the High Court have jurisdiction over economic offences where the DPP transfers, by a certificate, any such offence to be tried by the court in terms of section 12(3) of the EOCCA. The DPP must also issue a certificate of consent under section 26(1) of the EOCCA. The two certificates, in order to be valid, must cite the law under which the accused is charged with, short of which the certificate is rendered invalid and so the trial court also is deprived of the necessary jurisdiction to try the case.

I have examined the certificates of consent and the certificate conferring jurisdiction to the subordinate court made under section 26(1) and 12(3) of EOCCA respectively, they miss the charging section, namely sections 86(1) and (2) (c)(iii) of the Wildlife and Conservation Act, Cap. 283 R.E. 2022. In the case of **Dilipkumar Magambai Patel vs Republic (Criminal Appeal No. 270 of 2019) [2022] TZCA 477 (25 July 2022)** the certificate conferring jurisdiction and certificate of consent were held to be

defective for not referring to the charging section. As a result, the proceedings of the trial court were found to have been vitiated. The court held as follows:

"The defects rendered the consent of the DPP and certificate transferring the economic offence to be tried by the trial court invalid. For that reason, we are constrained to find that the trial and proceedings before the Resident Magistrate Court of Dar es Salaam at Kisutu in Economic Case No.58 of 2016 and the High Court Criminal Appeal No. 146 of 2018 were nothing but a nullity."

In this case the charging sections were not referred to in the certificates. Hence, the trial court though received the certificates and endorsed as reflected at page 7 of the proceedings. Since the certificates were defective, the trial court proceeded to hear and determine the case without being clothed with the necessary jurisdiction.

The follow up question would thus be what is the way forward. The counsel for the appellant submitted opining that this court should release

the appellant forthwith as there are many gaps which were not addressed in the prosecution evidence. One of the gaps pointed out is that the person in control of the warehouse was not brought to testify as to who exactly brought in the alleged government trophies. Other factors is the search, in his opinion it was conducted illegally and since the owner Mzee Pesa is now deceased, the administrator of the estate of the late Mzee Pesa who is the owner would have been called to testify. I have read the record of the trial court and that at an appeal. One thing or factor I can firmly say it saves the huge task of going through the evidence is the fact that the appellant was charged with his colleagues, namely, Bosco Ndikulilo Ernest and Shabani Mpemba@Sunzula, the 1st and 2nd accused in the trial court, who were acquitted. None of the two nor any other evidence which was adduced in court positively confirmed that the appellant is the one who had a sole control of the warehouse and was responsible to take the *duiker meat (the government trophy)* into the warehouse. That fact alone, leaves doubt on the involvement of the appellant in the commission of the offence. The question under the circumstances is therefore whether I should I issue an order for retrial as prayed by the counsel for the

respondent? In the case of ***Fatehali Manji v. R [1966] E.A.341*** the Court of Appeal of East Africa stated:

"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."

As the holding points out, the prosecution once concluded their case, in reality they declared that to be the evidence available to prove charges against the appellant. In any case, since there is doubt on the firmness of

the same, it doesn't qualify to prove the case to the standard required by the law; proof beyond reasonable doubt.

For the reasons explained, I find it, in the interest of justice, proper to allow the appeal, quash the judgment and conviction and set aside the sentence meted to the appellant. I order an immediate release of the appellant from the prison unless otherwise he is being held for another lawful cause. It is ordered accordingly.

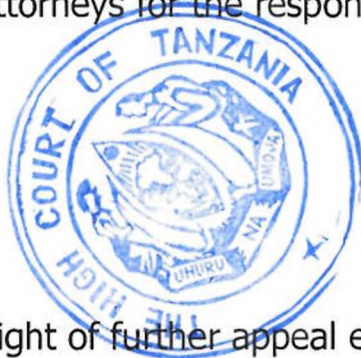
Dated and signed at Sumbawanga this 24th day of May, 2024



T. M. MWENEMPAZI

JUDGE

Judgment delivered in the Judge's Chamber this 24th day of May, 2024 in the presence of the appellant, Mr. Deogratias Sanga, the appellant's Advocate and Mr. Jackson Komba and Ms. Ashura Ally, learned State Attorneys for the respondent.



T. M. MWENEMPAZI

JUDGE

24/05/2024

Right of further appeal explained.