

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA SUB - REGISTRY
AT MBEYA

CRIMINAL APPEAL NO. 171 OF 2023

*(Originating from Economic Crime Case No. 22 of 2022 of the District Court of
Mbarali at Rujewa)*

JUMA LASMOS MANSULI APPELLANT

VERSUS

THE REPUBLICRESPONDENT

JUDGMENT

Date of hearing: 22/4/2024

Date of judgment: 10/6/2024

NONGWA, J.

In the District Court of Mbarali at Rujewa in Economic Crime Case No. 22 of 2022, the appellant Juma s/o Lasmos Mwansuli was charged with unlawful possession of Government Trophies contrary to the provision of section 86(1)(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) of the Economic and Organized Crime Control Act, [Cap. 200 R: E 2022] (the EOCCA). It was alleged that on 27th day of June 2022 at Iyala village within Mbarali District in Mbeya region the appellant was found with a motorcycle made Kinglion red color with registration number MC 962CHY in possession of government trophy

to wit two pieces of fresh meat of ostrich valued at USD 1200 equivalent to Tsh. 2,799,600/= without permit from the Director of the Wildlife. The accused denied the charge. At the end of trial was convicted to twenty years imprisonment.

To prove the case the prosecution called total of six witnesses, Halifu Juma (PW1), J.190 PC Joffrey (PW2), E.8285 D/GT Roman, Raphael Ramso Mwajombe (PW4), Deogratius Benedict Mwageni (PW5) and F. 3672 SGT Salvatory (PW6) and tendered four documentary and one real exhibits certificate of seizure (exhibit P1), a motor cycle (exhibit P2), caution statement of the accused (exhibit P3), Inventory of unclaimed property (exhibit P4), trophy evaluation certificate (exhibit P5).

Substance of the evidence as narrated was that PW1 and PW4 the park ranger on 27th day of June 2022 found a motorcycle at Iyala village which carried a luggage. They became suspicious, when the owner of the motorcycle was asked what he carried refused to heed the request. They became suspicious, they apprehended the motorcycle owner, checked the luggage and found it to be a fresh meat of ostrich. The same was seized together with the motorcycle. The ostrich meat and motorcycle were sent at Rujewa police station where it was handed to a store keeper, PW2. At the police the accused was recorded statement by PW3. The meat was

evaluated by PW5 who confirmed it was ostrich meat valued at USD 1200 equal to Tsh 2,799,600.

In defence the appellant stated that there was a person riding a motorcycle being chased by TANAPA officer, the said person disappeared and left the sulphate bag. He was assaulted, ordered to take the bag and forced to sign some papers. Then was taken to Rujewa Police station and after two days sent to court.

After full trial the appellant was convicted and sentenced to twenty years. Aggrieved the appellant through his counsel filed petition of appeal consisting four grounds of appeal; **one**, that the exhibit P3 and exhibit P4 were wrongly admitted by the trial court as the learned trial magistrate did not conduct trial within trial before admitting the, **two**, that the trial court erred in law and fact in convicting the appellant for an offence which was not proved; **three**, that the trial court erred in law and fact for ignoring evidence of adduced by the appellant and **four**, that the trial court erred in law and fact in convicting and sentencing the appellant while there were contradictions and inconsistencies in the testimony of the prosecution witnesses.

When the appeal was called for hearing, the appellant was represented by Mr. Ayoub Mwakalonge, learned advocate whereas the

respondent Republic was represented by Mr. Emmanuel Bashome, State Attorney.

Counsels for parties submitted for and against grounds of appeal. However, for a reason to be apparent shortly, its substance will not be summarised here because the judgment is based on other aspect.

In the course of composing judgment, I discovered a point of law touching jurisdiction of the trial court to try economic offence, thus I re-opened proceedings for parties to address the court on;

1. Whether or not consent and certificate of the regional prosecution officer was formerly received by the trial court.
2. If the answer above is in negative, what is the way forward.

On attendance were Ms. Imelda Aliko State Attorney for the respondent and Mr. Ayoub Mwakalonge. First to submit was Ms. Imelda Aliko and stated that at page 7 of the trial court proceedings, prosecution stated to have received consent and certificate and prayed to read out the charges. The court allowed the charges to be read out. She argued that it was just a slip of the pen that the trial court did not show that consent and certificate have been filed. She however added that upon going through the copies of consent and certificate, she discovered that the two documents had no stamp of the office that issued the said documents, therefore prayed for retrial. In reply, Mr.

Mwakalonge referred this court to the cases of **Solomon Makulu Mtenya Vs. Republic**, Criminal Appeal no. 117 of 2022 CAT DSM that the omission to have consent and certificate properly filed renders the court that heard this matter to have no jurisdiction and the proceedings becomes a nullity.

I have considered the submission of counsels on the raised issues. The appellant was charged with the offence of unlawful possession of government trophy to wit ostrich meat which is economic offences whose trials are within the jurisdiction of the Corruption and Economic Crimes Division of the High Court in terms of section 3(3) of the provisions of EOCCA. Nevertheless, there is an exception to that statutory prescription that a certificate issued by the DPP or any State Attorney authorised by him, may confer jurisdiction on a subordinate court to try an economic offence case. Such a certificate may be issued pursuant to section 12 (3) of the EOCCA where an accused person is charged with a pure economic offence as it happened here. Section 12 (3) of EOCCA which reads;

'The Director of Public Prosecution 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 subordinate to the High Court as he may specify in the certificate.'

It is also the law that, for a trial to commence at the respective subordinate court, there must be a consent from the DPP or state attorney authorised by him under section 26(1)(2) of the EOCCA which provides 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 the present appeal there is consent and certificate conferring jurisdiction to the district court of Mbarali to try economic offence issued on 13th day of February 2022. It is in record that on 13/2/2023 prosecution informed the court that he had received consent of the Regional Prosecution Officer and prayed the charge to be read over to the accused. The prayer to read a charge was granted and the accused entered plea of not guilty. However, records are silence if consent of the Regional

Prosecution Officer was filed and received by the court. The settled law is that consent of the DPP or state attorney authorising to try the accused and certificate conferring jurisdiction on the subordinate court to try economic offence becomes legally recognised after being formally filed, received and indorsed by the court to form part of its record. This was expounded in the case of **Salumu s/o Andrew Kamande vs Republic**, Criminal Appeal No. 513 of 2020 [2023] TZCA 133 (22 March 2023; TanzLII) the court stated;

'We note that at page 15 of the record of appeal, the PP informed the trial court that he has 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 find 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.'

In the recent case of **Solomon Makuru Mtenya @ Kuhembe & Others vs Republic**, Criminal Appeal No. 117 of 2022 [2024] TZCA 376 (20 May 2024; TanzLII) the court was faced with akin situation and held that;

'... Apart from that, it is notable at page 17 of the record that on 14/11/2016 the learned State Attorney prayed to file the consent and the charge sheet but there was no order of the trial court granting or denying it meaning that it was not even appreciated. As it is, the leaned Senior State Attorney's line of argument does not support her proposition.'

From the above exposition of the law, for consent of DPP or Regional Prosecution Officer to form part of court record, there must be a specific order of the court receiving the same by indorsing it to have been received. In this case like what happened in the case of **Solomon Makuru Mtenya @ Kuhembe** (supra), the public prosecutor just acknowledged to have received consent of the Regional Prosecution Officer but did not pray the same to be filed and received by the court. Worse enough there is no any note by a magistrate to have appreciated the concern of the public prosecutor. My reading of proceedings is clear that the prosecution did not intend to file consent and form part of court record, the reason the magistrate did not make any order. To appreciate what happened it was recorded

'Pros: this case is due for mention, I have received consent of the Regional Prosecution officer, I pray to read new charge to the accused person

Court- charge read over and explained to the accused person who is asked to plead thereto.

Accused plea: it is not true.'

The above demonstrates that what the prosecution asked the court was to read charge, a prayer the court granted and plea of the appellant taken. In absence of records indicating that the prosecution prayed to file consent and certificate of transfer of the Regional Prosecution Officer and specific order of the court receiving and indorsing the same, it cannot be said district court had jurisdiction to try economic offence, the appellant was charged with. Although the same are in court file, it is not open how it got its way there. If consent and certificate is discarded in court file it follows, therefore that, the trial court was not seized with the jurisdiction to entertain the matter ultimately, the omission which was fatal irregularity and vitiated the proceedings.

As for the way forward, counsel for parties differed, for the appellant it was submitted that prayer for retrial will make the prosecution re build up their case which is not fair on part of the appellant, the case of **William Kilunga vs Republic** Criminal Appeal no. 447 of 2017 CAT at Shinyanga was referred. The state attorney had nothing to submit than praying for retrial.

To decide whether retrial is appropriate order or not, test laid in the case of **Fatehali Manji vs The Republic** [1966] 1 EA 343 is paramount, the court stated 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 purpose of enabling the prosecution to fill up the 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 be blamed, 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.'

[See also; **Peter Kongori Maliwa & Others vs Republic**, Criminal Appeal No.252 of 2020 [2023] TZCA 17350 (14 June 2023; TanzLII) and **Salumu s/o Andrew Kamande vs Republic**, Criminal Appeal No. 513 of 2020 [2023] TZCA 133 (22 March 2023; TanzLII)].

In this case the subject matter of the charge is ostrich meat which is a government trophy, my search in evidence of all prosecution witnesses has not come across with any witness who tendered it in evidence or evidence of its destruction and tendering of inventory form. This implied that subject matter of the charge was not introduced in evidence by the prosecution. In **Ngasa Tambu vs Republic**, Criminal Appeal No. 168 of 2019 [2022] TZCA 455 (21 July 2022; TanzLII) the court stated;

*'The critical concern is that the **only evidence to show that there existed any trophy any time after destroying them is the document called Inventory, containing the order for destroying the trophies.** Otherwise, if the offence of unlawful possession of government trophies is not admitted by a suspect, **in the absence of both the physical Government Trophies, and an Inventory,** a charge of unlawful possession of the trophies cannot be proved. Emphasize supplied.*

What is seen in prosecution evidence is certificate of seizure (exhibit P1) tendered by PW1, inventory of unclaimed property (exhibit P4) tendered by PW3 and trophy evaluation form (exhibit P5) produced by PW5. With those evidence which has bearing to the subject matter of the charge, it is clear that neither fresh meat of ostrich nor inventory form of destruction indicating that the meat was destroyed as per the dictates of sections 88 or 101 of the WCA were tendered in evidence by the prosecution.

It is the law that an order for retrial will not be given so as to avail an opportunity to the prosecution to fill in gaps. For a charge of unlawful possession of government trophy to stand, the subject matter of the charge or inventory form containing a court order as to its destruction must be introduced in evidence. In this appeal no trophies and no inventory form for its destruction were tendered in evidence remitting the

matter for retrial to the district court will be to allow the prosecution to go and gather those evidence to the detriment of the appellant.

In light of what I have explained above, the appeal is meritorious and allow it and in terms of section 373(1) of the Criminal Procedure Act [Cap. 20 R: E 2022], I hereby nullify and quash all the proceedings, convictions and set aside the sentences by the trial court. And proceed to order the release of the appellant from prison unless lawfully held for lawful causes.



A handwritten signature in blue ink, appearing to read "V.M. Nongwa".

V.M.NONGWA
JUDGE
10/6/2024

Right of appeal explained.

Dated and **delivered** this 10th June 2024 in presence of Ms. Imelda Aliko State Attorney for the Respondent, Mr. Ayoub Mwakalonge advocate for the appellant and the appellant.

A handwritten signature in blue ink, appearing to read "V.M. Nongwa".

V.M. NONGWA
JUDGE