IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

(CORAM: MWARIJA, J.A., KWARIKO, J.A. And MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 319 OF 2019

MAULID ISMAIL NDONDE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Songea)

(Arufani, J.)

dated the 14th day of August, 2019
in
(DC) Criminal Appeal No. 12 of 2019

JUDGMENT OF THE COURT

24th & 29th September, 2021

KWARIKO, J.A.:

The appellant and his wife, Asha Mahamudu (the first accused) who is not a party to this appeal, were arraigned before the District Court of Namtumbo for unlawful possession of Government trophy contrary to section 86 (1) (2) (c) (ii) of the Wildlife Conservation Act No. 5 of 2009 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. 2002;] as amended by Act No. 3 of 2016; now R.E. 2019 (the Act).

The particulars of the offence were that, the appellant and the first accused jointly and together on 23rd day of December, 2016 at Likuyu

Sekamaganga within Namtumbo District in Ruvuma Region were found in unlawful possession of Sable Antelope meat valued at TZS 5,564,000.00, the property of the Tanzania Government without a valid permit.

A plea of not guilty having entered by the two, the prosecution led a total of five witnesses to prove the charge against them.

The facts of the case which led to the appellant's conviction can briefly be stated as follows. Having received information that the appellant was in unlawful possession of Government trophies, wildlife officers including Fortunatus Joshua Mmari (PW1), Emmanuel Lalashe Laizer (PW3) and Mayama Khale (PW4) prepared to apprehend him. Thus, on 23rd December, 2016, at 5:00 am, the officers visited the appellant's locality but first they reported to the sub-village chairman of Mfuate one Mustapha Omary Makumaye (PW2). They asked him to witness search at the appellant's home. When they got to that house, only the first accused was found. According to her, the appellant had left to unknown destination before the arrival of the officers.

The search was conducted in that house where some meat, skin and hoof were found in a bucket and a bag. Later, the meat was identified to be that of Sable Antelope valued at TZS 5,564,000.00. A valuation report and a certificate of seizure were admitted in evidence as exhibits P1 and

P2 respectively. The meat, skin and hoof being perishable items, were taken to court and an order to dispose them was issued. Therefore, an inventory to that effect was admitted in evidence as exhibit P3. The first accused was charged in court and following her release on bail, she facilitated the arrest of the appellant who was joined in the case.

In defence, the first accused denied the allegations and claimed that, it was the appellant who had brought the meat home. For his part, the appellant raised a defence of *alibi* in that at the material date he was away from home to attend a funeral of his relative. At the end of the trial, the court found that the prosecution case had been proved beyond reasonable doubt against the appellant. He was accordingly convicted and sentenced to twenty years imprisonment. The first accused was acquitted of the offence. Aggrieved, the appellant appealed to the High Court but he did not succeed as the court upheld the trial court's decision. The appellant is thus before the Court on a second appeal.

Before this Court, the appellant raised four grounds of appeal but for the reasons which will be apparent soon, we find no need to reproduce them here.

At the hearing of the appeal, the appellant appeared in person, unrepresented whilst Mr. Emmanuel Barigila, learned State Attorney,

appeared for the respondent Republic. When the appellant was invited to argue his appeal, he preferred for the learned State Attorney to reply first to his grounds of appeal, reserving his right of rejoinder later should it be necessary to do so.

For his part, Mr. Barigila intimated to the Court that he was supporting the appeal, not for the grounds raised by the appellant, but on the procedural irregularities committed at the trial court. He argued that the trial court did not have jurisdiction to try the case. He expounded that at page 21 of the record of appeal, the trial court received a certificate of transfer (the certificate) and consent from the Director of Public Prosecutions (the DPP) conferring jurisdiction to it to try the case. However, he argued, at that time, the appellant had not been charged, hence it could not be said that the court had jurisdiction when it tried him.

The learned State Attorney argued further that the consent and certificate of the DPP which was signed on 10th April, 2018 though contained in the record, there is no proof as to when they were officially received by the trial court. Mr. Barigila contended further that at page 31 of the record of appeal, it is shown that the trial court had not received the certificate and consent from the DPP. In that case, the magistrate ordered the public prosecutor to supply the court with the copy but there is no record to show that they were supplied and received.

In the circumstances, the learned State Attorney urged us to invoke our revisional powers under section 4 (2) of the Appellate Jurisdiction Act [CAP 141 R.E. 2019] (the AJA] to nullify the proceedings of the trial court and that of the High Court. He implored the Court to release the appellant from prison as per the authority in the case of **Fatehali Manji v. R** [1966] E.A. 343. Following the stance taken by Mr. Barigila, the appellant had nothing to add apart from concurring with him.

We have considered the foregoing submission. We agree with the learned State Attorney that the trial court did not have jurisdiction to try the case. This is because, it is the High Court that is vested with jurisdiction to try cases involving economic offences. It is provided under section 3 of the Act thus:

> *"The jurisdiction to hear and determine cases involving economic offences under the Act is hereby vested in the High Court."*

Notwithstanding the above provision of the law, the DPP is vested with powers to confer jurisdiction to subordinate courts to try economic cases by consent under section 26 (1) and a certificate of transfer under section 12 (3) of the Act. Section 26 (1) provides thus:

> *"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 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."*

According to the cited provisions, unless the DPP issues consent and a certificate of transfer to the subordinate court to try cases involving economic offences, jurisdiction in that respect is in the High Court.

In the instant case, the DPP neither issued consent nor certificate to the trial court to try the case. As correctly argued by the learned State Attorney, the certificate and consent which was said to have been issued on 21st December, 2017 are not in the record of appeal and the same related to the first accused only because by that time, the appellant had not been charged. Likewise, the consent and certificate signed on 10th April, 2018 were not officially received by the trial court. Additionally, although at page 31 of the record of appeal the public prosecutor was

ordered to supply the court with those documents, the record is silent as to whether the same were supplied and received in 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. Some of the Court's decisions on this aspect include: **Mhole Saguda Nyamagu v. R,** Criminal Appeal No. 334 of 2016; **Adam Selemani Njalamoto v. R,** Criminal Appeal No. 196 of 2016; **Maganzo Zelamoshi @ Nyanzomola v. R,** Criminal Appeal No. 355 of 2016; **Matheo Ngula & Three Others v. R,** Criminal Appeal No. 452 of 2017; and **Kenge Ndila v. R,** Criminal Appeal No. 515 of 2017 (all unreported). In the case of **Mhole Saguda Nyamagu** (supra), the Court stated thus:

> *"From the foregoing brief discussion, we are satisfied that in the absence of the D.P.P's consent given under section 26 (1) of the Act and the requisite certificates given under subsections (3) and (4) of section 12 of the Act, the trial District Court had no jurisdiction to hear and determine charges against the appellant, as it did. We further firmly hold that, the purported trial of the appellant was a nullity. In similar vein, the proceedings and the judgment made by the High*

Court dated 8/06/2016 based on null proceedings of the trial court were also a nullity."

Similarly, in **Maganzo Zelamoshi @ Nyanzomola,** the Court stated as follows:

"Without the requisite consent and certificate of the learned DPP, the entire proceedings of the trial court were a nullity; just as were the proceedings of the High Court which then had no legs to stand on."

It follows therefore that, because the DPP did not issue consent and certificate to the district court to try the case, the proceedings were a nullity and so are those of the High Court. We thus invoke our revisional powers under section 4 (2) of the AJA and quash the proceedings and conviction by the district court and set aside the sentence. Likewise, we quash the appeal proceedings and set aside the judgment of the High Court as they originated from a nullity.

In the ordinary course of things, after having quashed the entire proceedings of the lower courts, a retrial would have been ordered. However, in this case where the error was committed by the prosecution, it would not be in the interest of justice because an order of retrial will only help the prosecution to fill in gaps. In the case of **Fatehali Manji** (supra), it was held thus;

"In general, a retrial may be ordered only where 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."

Consequently, we order the immediate release of the appellant from prison unless his continued incarceration is related to other lawful cause.

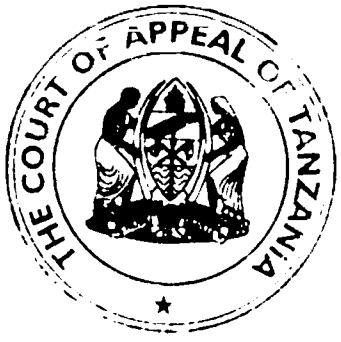
DATED at **IRINGA** this 29th day of September, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 29th day of September, 2021 in the presence of the Appellant in person, and Ms. Radhia Njovu, learned State Attorneys represented the Respondent/Republic, is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL