THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB - REGISTRY

AT MBEYA

CRIMINA APPEAL NO. 136 OF 2023

(Originating from the district court of Mbeya at Mbeya in Economic Case No. 8 of 2022)

JOSEPH NDOBO MWAMAHUSI ……..……APPELLANT

VERSUS

REPUBLIC ……RESPONDENT

JUDGMENT

Hearing date: 13/2/2024

Date of judgment: 18/3/2024

NONGWA, J.

The appellant, Joseph Ndobo Mwamahusi, had been charged, convicted and sentenced before the District Court of Mbeya at Mbeya, in Economic Case No. 8 of 2022 with three counts. The first and second count related to the offence of unlawful possession of fire arms contrary to section 20 (1) and (2) of Fire Arms and Ammunitions Control Act No. 2 of 2015 read together with paragraph 31 of the first schedule to and section 57(1) and 60(2) of the Economic and Organised Crime Control Act. The third count was unlawful possession of ammunition contrary to section 21(a) and (b) of the Fire Arms and Ammunition Control Act No. 2 of 2015 read together with paragraph 31 of the First Schedule, and sections 57 and 60 (2)

of the Economic and Organized Crimes Control Act, Cap 200, R.E 2002 [now R.E 2022], (the EOCCA).

In the particulars of offence, it was alleged that on 24th February 2021 at Iyela area within the district and Mbeya region the appellant was found in possession of shotgun number 5481 and pistol without a gunsmith licence or permit. In the third count it was alleged that on the same date and area the appellant was found in possession of twelve round of ammunition without licence or permit. The appellant denied the allegations.

To prove their case, the prosecution paraded two witnesses, PW1(F4948 SGT Msamaha) a police officer as depicted from the name and PW2 (Golden Mwakigula) a ten-cell leader of Iyela moja. Further the prosecution tendered 1 documentary exhibit, certificate of seizure (exhibit PE1) and three real objects, a bag (exhibit PE2), plastic bag (exhibit PE3), pistol, shotgun 5481, eleven ammunition and magazine (exhibit PE4 collectively).

The substance of prosecution evidence of PW1 is that on 24/2/2021 particularly at 03:00hrs night while in patrol with other police officers at Uyole area, the OC-CID Luambano received a call from the informer to go at Iyela. On reaching

Iyela the informer laid the information of a person possessing weapons unlawfully. They procured the presence of the local leader of the area and knocked the door of the house, the appellant emerged. They informed the purpose of their visit and the appellant admitted to possess the weapons which was wrapped in the plastic bag, on opening the same, they found a shotgun 5481, pistol, eleven ammunition and pistol magazine found. The OCCID filled the certificate of seizure along with local leader and the accused. The certificate of seizure and seized articles were tendered in evidence as stated above.

PW2 on his side testified on 24/2/2021 at night was awakened by police officer and told to accompany them ta the appellant's residence. Reaching there the appellant was told that he possessed weapons and he admitted. The appellant retrieved the bag at the ceiling and upon opening it, the shotgun pistol and eleven ammunition were found. Further that he signed a certain form. PW2 identified exhibit PE2, PE3 and PE4 as those found to the appellant.

In defence the appellant testified on oath as DW1 and in addition called Elizabeth Sanga (DW2). In his evidence the appellant stated that the bag was left to his wife by one Merinyo in his absence. He admitted the police accompanied by

local leader to have stormed his residence and inquired about the bag. Further that in the bag he saw weapons. The appellant distanced himself from being the owner of the weapons. DW2 supported the appellant's evidence that the bag belonged to one Merinyo and the police found weapon when the bag was opened.

At the height of the prosecution evidence, the trial magistrate believed the prosecution evidence and consequently the appellant was convicted and sentenced to custodian sentence of twenty years in all counts. Sentence was ordered to run concurrently.

The above decision aggrieved the appellant who filed the self-crafted petition of appeal consisting of six grounds. The petition was later amended following Mr. Godwin Mwakyusa learned counsel being engaged by the appellant in the matter. The grounds are; **one,** that, the learned trial magistrate grossly erred in law and fact in failing to consider the defence case, hence reached into wrong decision; **two,** that, the learned trial magistrate grossly erred in law and fact when convicted the appellant while the prosecution did not prove its case beyond reasonable doubt; **three,** that, the learned trial magistrate grossly erred both in law and fact when convicted the appellant

while the whole case was fabricated one; **four**, that, the learned trial magistrate grossly erred both in law and fact when convicted the appellant by relying on exhibits PEI, PE2, PE3, and PE4 while the search was conducted contrary to the law; **five,** that, the learned trial magistrate grossly erred both in law and fact when convicted the appellant in absence of the report from the ballistic expert in order to prove that Exhibit PE4 was found in possession of the appellant; **six**, that, the learned trial magistrate grossly erred both in law and fact when convicted the appellant in absence of the report from the fingerprint expert in order to prove that Exhibit PE4 was found in possession of the appellant, and **seven** that, the learned trial magistrate grossly erred both in law and fact when convicted the appellant while the prosecution failed to call ballistic expert and fingerprint expert as material witness.

When the appeal was called for hearing Mr. Godwin Mwakyusa appeared representing the appellant whereas the respondent Republic was represented by Ms Upendo Lyimo and Mr. George Ngwembe, both State Attorneys. Counsel for the appellant argued ground 1 and 3 together, 2 and 4 separately, 6 and 7 conjointly while ground five was withdrawn.

For purpose of this judgment, I intend not to reproduce the whole submission on all grounds because the appeal can only be disposed based on submissions on ground 2 which is on the principle of proof beyond reasonable doubt, but also he submitted on the issue of jurisdiction of the trial court.

Submitting on ground 2 Mr. Mwakyusa stated that the trial court had no jurisdiction over the matter because it was an economic case. He said that there was no consent of the DPP issued under section 26(1)(2) of the EOCCA and certificate conferring jurisdiction to the court, hence the magistrate had no power to hear and determine the matter. The counsel referred the court to the case of **John Aglikola vs Juma Rashid** [1990] TLR 1. He submitted that lack of jurisdiction is fundamental defect and not curable.

Responding to the above, the state attorney referred to section 26(1)(2) of the EOCCA and the case of **Dilipkumar Magambai Patel vs Republic,** Criminal Appeal No. 270 of 2019 [2022] TZCA 477. He submitted that the court lacked jurisdiction because its record does not show if the certificate in court followed procedure citing the case of **Hashim Nassoro @ Almas vs Director of Public Prosecutions**, Criminal

Appeal No. 312 of 2019) [2023] TZCA 17716. The state attorney pressed for retrial.

Rejoining Mr. Mwakyusa submitted that per decision in **Fatihali Manji vs R** [1966] EA 343 retrial will cause injustice.

I have considered the parties' submissions, and it is clearly noted that 2nd ground was not crafted in the way counsel for appellant made his submission however, as both parties submitted on it, I will make findings. Counsel of both sides also are in agreement that the trial court lacked jurisdiction for want of consent of DPP or authorised officer and certificate conferring jurisdiction on the subordinate court.

I wish to begin by emphasizing that jurisdiction of the court is crucial for it to try a case. In **Shyam Thanki and Others vs New Palace Hotel** [1971]1 EA 199 the court stated.

> *'All the courts in Tanzania are created by statute and their jurisdiction is purely statutory.'*

In the case of **CRDB Bank PLC vs Lusekelo Mwakapala**, Civil Appeal No. 143 of 2021 [2023] TZCA 17637 (22 September 2023, TANZLII), it was held that:

> *'It is worth noting that, the question of jurisdiction is crucial and must be determined by the court/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.'

In the present appeal it is undeniable truth that the appellant was facing the offence of unlawful possession of fire arms and ammunition under section 20 and 21 of the Fire Arms and Ammunition Control Act. In terms of the first schedule to the Economic and Organised Crime Act [Cap 200 R: E 202, under item 31 makes it an economic offence. All economic offence per section 3(3) of the EOCCA its trial is within the exclusive jurisdiction of the High Court. 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, it 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.'

It is noteworthy that the certificate and consent envisaged under sections 12(3) and 26(1)(2) of the EOCCA must be duly lodged and acknowledged by the trial court before it assumes the jurisdiction to try an economic offence case.

Counsels of the parties right so, are at one that consent and certificate conferring jurisdiction to the district court found in the file did not follow the procedure and therefore the trial court assumed jurisdiction. In **Salumu s/o Andrew Kamande vs Republic,** Criminal Appeal No. 513 of 2020 [2023] TZCA 133 (www.tanzlii.org.tz; 22 March 2023) 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 present appeal, the appellant was charged and tried by the district court of Mbeya with the economic offence of

unlawful possession of fire arms and ammunition, however there is no record if the consent of the state attorney and certificate conferring jurisdiction was filed and received by the court. The two documents are in the court file but record is silence how the same got its way therein. There is no statement from the state attorney who prosecuted the case of the existence of the consent to try the accused and certificate conferring jurisdiction to the district court. The same is indorsed admitted on this 29th day of June, 2019, the same date the charge was presented to the court and the accused arraigned but it does not show if it was received before being indorsed by the court. I have said there is lacking statement of the state attorney introducing the two documents in the proceeding and the order of the court receiving the same.

Akin scenario was discussed in recent case of **Samwel Slaa @ Sarea & Another vs Republic**, Criminal Appeal No. 153 of 2021 [2024] TZCA 32 (13 February 2024; TANZLII) the court stated;

> *'It is not disputed that though the record of appeal contains copies of the certificate and consent issued by the State Attorney In charge of Arusha Zone on 13th October, 2015, there is no indication that they were*

duly filed and endorsed by the trial court on any respective date before the trial commenced. The record of appeal leaves no doubt that the appellants were arraigned before the trial court on the same date indicated in the certificate and consent, that is, 13th October, 2015 on which the charge was read over and they pleaded not guilty. However, on that date and the dates which followed until the completion of the trial, there is no indication in the record of appeal that the said documents were the subject of consideration by the trial court before it assumed jurisdiction to try the appellants. Besides, there is no recorded statement from the State Attorney who prosecuted the case notifying the trial court of the existence of those documents.'

In absence of proceedings which presents what was taking place in the court room making indication that it was introduced in record by the state attorney, mere indorsement that it has been admitted saves no purpose and it will be an assumption to gauge that it was filed, received and indorsed without record narrating those events. That is to say consent of the state attorney and certificate conferring jurisdiction to the subordinate court were not filed.

It is the position of this Court and that has been well settled in our jurisprudence that, if an accused person is

arraigned before a subordinate court and there is no consent to try him, there is no certificate to confer jurisdiction on that subordinate court, such a subordinate court lacks jurisdiction to try the economic offence case and the entire proceedings becomes a nullity. See the case of **Aloyce Joseph vs Republic,** Criminal Appeal No. 35 of 2020 [2022] TZCA 771 (05 December 2022, TANZLII) and **Salum Andrew Kamande** (supra).

The same befalls the present case, the district court of Mbeya had no jurisdiction to try the appellant on economic offence of unlawful possession of fire arms and ammunition without there being consent to try the appellant and certificate conferring jurisdiction dully issued by a State Attorney in charge of Mbeya Region contrary to the requirement of sections 12 (3) and 26 (2) of the EOCCA to try the offence which is the domain of the high court. Therefore, I agree with both counsels that the trial court proceedings were rendered a nullify.

As to the way forward counsel parted ways, while Mr. Mwakyusa was in favour of acquittal, state attorney pressed for retrial. To cement their stances, Mr. Mwakyusa made submission on grounds of appeal filed, so the state attorney made the reply thereto.

On my part I will not delve to reproduce their respective submission here but I will consider generally if retrial is viable in circumstances of this case per rule laid in the case of **Fatehali Manji vs The Republic** [1966]1 EA 343.

After going through the evidence of the prosecution I have found that the manner exhibits were tendered leaves a lot to be desired, I will demonstrate. All exhibits were tendered by PW1 who identified himself as a police officer and to have been involved in the search of the appellant's home. The introduction of exhibits PE12, PE2, PE3 and PE4 started with the certificate of seizure exhibit PE1. My reading of evidence of PW1 has landed to the conclusion that PW1 was not competent to tender exhibit PE1.

Tendering of exhibit in court may be classified into two ways **one;** competency of a witness as provided under section 127(1) of the Evidence Act, [Cap 6 R: E 2022] and **two**; must be a material witness, that is must be a person who has information or knowledge of the subject matter which is significant enough to affect the outcome of a trial. See **Director of Public Prosecution vs Sharif s/o Mohamed @ Athumani & Others**, Criminal Appeal No. 74 of 2016 [2016] TZCA 635 (5 August 2016; TANZLII).

In the present case there is nowhere PW1 explained how he was acquainted with exhibit PE1, this is more so because **one,** PW1 is not the one who prepared exhibit PE1, and his name is nowhere to be seen; **two,** PW1 was not the investigator of the case for exhibits PE1 to have been at one point in time in his possession; **three,** PW1 was not the custodian of exhibits at the central police. The mere fact that PW1 witnessed the seizure does not *ipso* make him a competent witness to tender exhibits of whatever type in court, at least was a witness to cement how search and seizure of the subject matter of crime was done.

Persons who can tender exhibits are a maker or author of a document, a person who at one point in time possessed anything subject of the trial, custodian of an exhibit, actual owner, addressee, arresting, searching or investigating officer or an officer from a corporate entity to which an exhibit relates and any person with knowledge of the exhibit. See the Judiciary of Tanzania, **Exhibits Management Guideline** of September 2020. PW1 does not fall in any of the category above.

Connected with the above, is chain of custody, it is noteworthy that shotgun and pistol is one of the things which cannot change hands easily however, for the same to be

received in evidence, there must be tray of paper from the moment it was seized to tendering it in court. Chain of custody can also be established by oral evidence. See **Ernest Jackson @ Mwandikaupesi & Another vs Republic**, Criminal Appeal No. 408 of 2019 [2021] TZCA 585 (12 October 2021; TANZLII) and **Jason Pascal & Another vs Republic**, Criminal Appeal No. 615 of 2020 [2022] TZCA 448 (19 July 2022; TANZLII).

In the appeal at hand, there was no evidence as to how exhibit PE2, PE3, and PE4 moved from the home of the appellant after being seized by OCCID Luambano to its tendering in court. Exhibit PE1 show that it was signed on 24/2/2022 and the same along with other exhibits was tendered in court on 25/10/2022 by PW1, prosecution evidence is silence as to where it was kept until the moment it was brought in court. The police officer who signed exhibit PE1 was not called to testify and no reason was advanced.

Another thing which creates doubt in the prosecution case is contradiction in evidence of PW1 and PW2 as to who retrieved exhibit PE2 and PE3. While PW1 testified that is the one who climbed to the ceiling and retrieved the black bag, PW2 stated that it was the appellant who picked the bag. This is another blow in the prosecution case.

Taking evidence presented by the prosecution with what I have deliberated above, diminish prosecution case which if retrial is ordered will give them chance to go and fill those gaps to the prejudice of the appellant.

From the foregoing analysis, in terms of section 373(1) of the Criminal Procedure Act (Cap 20 R: E 2022), I nullify the proceedings of the trial courts, quash the appellant's conviction and set aside the custodial sentence imposed on him. In the circumstances, I agree with Mr. Mwakyusa that a retrial will not be in the interest of justice on part of the appellant. Consequently, I order for the appellant's immediate release from jail if he is not otherwise held for some other lawful cause.

DATED at MBEYA this 18th March, 2024

V.M. NONGWA

JUDGE

18/3/2024

Judgment delivered this 18th March 2024 in presence of both sides.

V.M. NONGWA

JUDGE

18/3/2024