IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

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

CRIMINAL APPEAL NO. 42 OF 2020

JOHN JULIUS MARTIN.....1ST APPELLANT

PAULO SAMWEL GIRENGI.....2ND APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Arusha)

(Mzuna, J.)

dated the 13th day of September, 2019
in
RM Criminal Appeal No. 73 of 2017

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JUDGMENT OF THE COURT

2nd & 8th December 2022

GALEBA, J.A.:

The appellants, John Julius Martin and Paulo Samwel Girengi, were jointly and together charged before the Resident Magistrate's Court of Arusha in Economic Crime Case No. 21 of 2016. They were arraigned on a single count of being found in unlawful possession of Government trophy at Makuyuni in Monduli District within Arusha Region. According to the charge, by committing the offence, the appellants contravened the provisions of section 86 (1) and (2) (b) of the Wildlife Conservation Act,

No. 5 of 2009 (the WCA), read together with paragraph 14 (d) of the First Schedule to, and sections 57 (1) and 60 (2) both of the Economic and Organized Crime Control Act [Cap 200 R.E. 2002, now 2022], (the EOCCA). Naturally, the appellants denied the charge, so the prosecution had to call witnesses to prove it. It called eight witnesses and tendered six documentary exhibits and one physical exhibit. The appellants, as usual, gave their evidence as DW1 and DW2 in defending themselves against the charge laid at their door.

Nonetheless, at the end of the case, the trial court found the duo guilty and convicted them of the offence charged. They were accordingly sentenced to payment of TZS. 1,300,986,000.00 as a fine or serve a term of twenty years imprisonment, in case they would be unable to pay the fine. It appears the appellants failed to raise the money for payment of the fine, so they had to go to jail. That decision aggrieved the appellants, so they filed RM Criminal Appeal No. 73 of 2017 to High Court at Arusha to challenge their conviction and sentence. However, their efforts in that respect did not succeed; their appeal was dismissed by the first appellate court on 13th September 2019. This appeal is challenging that decision of the High Court.

The appeal is based on two memoranda of appeal. The substantive memorandum of appeal containing eight (8) grounds, followed by a separate supplementary memorandum listing four (4) more grounds of appeal, making a total grounds of complaint to be twelve (12).

Although the grounds of appeal were that numerous, the major complaints of the appellants and relevant for this judgment, may be summarized as follows; **one**, that the High Court upheld the decision of the trial court, while the latter court tried the case without jurisdiction; **two**, that the first appellate court erred in law by upholding the decision of the trial court, which had relied on unlawfully admitted exhibits and; **three,** that the High Court erred in law to uphold a conviction and sentence imposed upon them by the trial court which relied on the evidence of PW8, Ponsiano Magoda Cyprian who did not swear before he could adduce his evidence. Lastly, **four**, that the evidence tendered did not prove the charge.

When this appeal was called on for hearing, the appellants appeared in person, and for the respondent Republic, were Ms. Eliainenyi Njiro, learned Senior State Attorney assisted by Ms. Penina Ngotea, learned State Attorney.

It was the first appellant, by way of reading some notes to us, who argued the appeal on behalf of himself and the second appellant, who informed us that he adopts the submissions of his colleague. On the first complaint, the first appellant submitted that there is no record of the trial court to the effect that, it was vested with jurisdiction to try an economic case, which by law, is triable by the High Court.

In reply to that ground, Ms. Ngotea submitted that the first appellants' submission was misleading because at page three of the record of appeal, there is both a consent and a certificate instrument executed by one Innocent Eliawony Njau, the prosecuting Attorney Incharge, which document also shows that it was presented for filing on 8th April, 2016. However, in the same breath, the learned State Attorney readily conceded to two glaring shortcomings; **one**, that there is no endorsement on the document constituting the Consent and the Certificate by the trial magistrate that, the instrument was duly admitted by the trial court and; **two**, that throughout the record of the trial court, there is nowhere, where the trial magistrate indicated by recording that the prosecutor requested for admission of the Consent and the Certificate instrument or that, the trial court ordered filing of the document. Despite the conceded legal setbacks, she moved the court to hold the appellants'

complaint in that respect to be unfounded because the trial court had criminal jurisdiction to try the appellants.

Because this point seeks to determine whether the trial court had jurisdiction to try the case, we think it is appropriate that we resolve it first. On this issue, we thoroughly and painstakingly reviewed the record of the proceedings of the trial court which is contained from page 4 to page 50 of the record of appeal, but we failed to locate any page on which the prosecutor is recorded as requesting to file the Consent and the Certificate of the Director of Public Prosecutions (the DPP) or the State Attorney appointed by him in terms of sections 12 (3) and 26 (2) of the EOCCA. We have also, noted that, at page three of the record of appeal, as submitted by Ms. Ngotea, there is one document containing both the Consent and the Certificate transferring the case for trial to the subordinate court, but as admitted by her, the same is not endorsed by the trial magistrate that it was duly admitted by him in the case.

We will start with the law applicable. Under section 86 (1) and (2) (b) of the WCA, possession of elephant tusks is an economic offence, unless a suspect can produce a permit issued by the Director of Wildlife

established under section 7 (1) of the WCA, legalizing possession of the Government trophy. This point is not disputed in this case.

According to section 3 of the EOCCA, the court with jurisdiction to try economic offences was, at the time of the trial of the appellants and to date, is the High Court. However, section 12 (3) of the EOCCA, provides that:

> *"(3) The Director of Public Prosecutions or any State Attorney duly authorised 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 invoiving 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."*

The law, that is, section 26 (2) of the same Act, the EOCCA, provides further for a requirement of the consent from the DPP or a person authorized by him, before such an offence is tried. That section provides:

> *"(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."

The instruments referred to in the above provisions, that is, the certificate conferring jurisdiction on the subordinate court to try an economic offence and the consent, are the contested documents subject of discussion in the first ground. In this respect, the issue is, is it enough for the instruments to just be delivered in the trial court's file or a prosecuting attorney should orally move the trial court in session before commencement of trial for it to endorse the documents as admitted and also record that act in writing. According to Ms. Ngotia, the mere presence of the documents in the trial court's file, is legally enough and the subordinate court has jurisdiction.

Respectfully, we do not agree with her, because that is not the position maintained by this Court. In **Maganzo Zelamoshi @ Nyanzomola v. R,** Criminal Appeal No. 355 of 2016 (unreported), there was a certificate and the consent in the record of the trial court, but the

documents were not endorsed by the trial magistrate as having been duly admitted on record. In another case of **Maulid Ismail Ndonde v. R**, Criminal Appeal No. 319 of 2019 (unreported), there was neither an endorsement on the face of the consent and the certificate, nor did the trial court's record reflect that there were such documents on record. In both cases, the Court nullified the proceedings of both the trial courts and of the High Court, because the certificate and the consent documents, had no legal force as they were not endorsed by the trial magistrate as having been admitted them on record.

The situation in the above cases is akin to the state of affairs obtaining in this case. Thus, we hold that because the instruments of consent and the certificate at page 3 of the record of appeal, were neither endorsed as having been admitted by the trial court, nor does the record show that the documents were admitted, the trial court tried the case without jurisdiction.

Under the laws of this country, any decision reached by any court without jurisdiction is a nullity, see **Maganzo Zelamoshi @ Nyanzomola** (supra). Thus, the first ground of appeal questioning the jurisdiction of the trial court succeeds. Accordingly, the proceedings of the trial court are nullified. The conviction of the appellants and the sentence

imposed upon them are equally quashed and set aside. Likewise, the proceedings of the High Court are nullified and the judgment based on the nullified proceedings, is quashed and set aside for having originated from a nullity.

Ordinarily, there are two alternative and competing orders that a court may make, after nullifying proceedings following technical defects like it has happened in this case. It is either to order a trial *de novo* or to release the appellant. To decide this or the other way, the guiding principle is found in the decision of **Fatehali Manji v. R** [1966] E.A. 343. The principle in that case is that for the court to order a retrial, it should ensure that the prosecution is not going to utilize the opportunity of a rehearing to mount a better prosecution case by filling in the gaps, all to the detriment or prejudice of the appellant.

If the court finds out that there is room or possibility of the prosecution presenting better evidence in order to achieve a conviction by perfecting the nullified proceedings, according to the principle in the case **Fatehali Manji** (supra), the court should release the appellant from prison, instead of ordering his retrial.

In that respect, for us to fairly reach to an informed decision as to the appropriate order to make, either to order a trial *de novo* or to release

the appellants, it is key to have a basis. So, we will briefly highlight the three complaints of the appellants pointed out earlier on, that is; the six exhibits that were illegally tendered; the unsworn evidence of PW8; and that the prosecution failed to prove the charge.

Ms. Ngotea conceded that the six exhibits, namely, the seizure certificate, P1, the exhibits hand over from, P3, the trophy valuation certificate, P4, the bag in which the trophies were alleged to have been found, P5 and the caution statements of the first and of the second appellants, P6 and P7, respectively, were all not read after their admission. She submitted that the documents were illegally admitted, and we have carefully gone through the record of the trial court and are satisfied that those exhibits were not read after they were tendered, hence illegally relied upon.

It is our considered opinion that if we order a retrial of the appellants, those documentary exhibits might be legally tendered, which will amount to filling in the gap found in the first trial to the prejudice of the appellants, quite contrary to the principle in **Fatehali Manji** (supra).

Next is the evidence of PW8. This witness did not swear before he adduced his evidence, and Ms. Ngotea conceded that his evidence was unlawful for it was illegally taken. In law, particularly section 198 (1) of

the Criminal Procedure Act [Cap 20 R.E. 2022] read together with section 3, 4 (a) and 5 of the Oaths and Statutory Declarations Act [Cap 34 R.E. 2019], makes it mandatory for a judicial officer presiding over criminal proceedings to administer oath to the witness, before such witness can adduce his evidence. See also **Attu J. Myna v. CFAO Motors Tanzania Limited**, Civil Appeal No. 269 of 2021, **Tanzania Portland Cement Co. Ltd v. Ekwasi Majigo**, Civil Appeal No. 173 of 2019 and **The Copycat Tanzania Limited v. Mariam Chamba,** Civil Appeal No. 404 of 2020 (all unreported).

In this case, if we order a retrial there is nothing to prevent the prosecution to call PW8 and lead him to give evidence after the court will have administered oath to him. That will be to fill in the gap that was clear in the nullified trial, which will be prejudicial to the appellants.

The other point complained of, is that although the charge is to the effect that both appellants were arrested at Makuyuni in Arusha with six elephant tusks and two pieces of tusks of the same animal, the evidence of PW1 on record is to the effect that only the first appellant was arrested at Makuyuni in Arusha Region with six elephant tusks and two pieces of elephant tusks. The evidence of the same witness, PW1, is that the second

appellant was arrested at Mswakini area in Manyara Region with two pieces of elephant tusks. The appellants' complaint was that the evidence tendered was completely different from the charge, as to where the second appellant committed the alleged offence. Ms. Ngotea conceded to this complaint and we agree with her.

Legally, where a place of commission of the offence is mentioned in the charge, evidence must be led to prove that, indeed the appellant committed the offence at that place. See **Marki Said @ Mbega v. R**, Criminal Appeal No. 204 of 2018 and **Salum Rashid Chitende v. R**, Criminal Appeal No. 204 of 2015 (both unreported). In the latter case, this Court in no uncertain terms stated:

> *"When specific date, time and **place is mentioned in the charge sheet**, the prosecution is obliged to prove that the offence was committed on that specific date, time **and place**."*
>
> [Emphasis added]

As for this point, if we order a retrial, there is a possibility of the prosecution to amend the charge such that it will then show that the second appellant was found in unlawful possession of Government trophy, at Mswakini in Manyara Region, the matters which are not in the present charge.

In summary, if we order a retrial of the appellants, we will be opening up an unlimited opportunity for the prosecution to fill in the gaps that have been observed in the first trial, to the prejudice of the appellants.

In view of the above reasons, this appeal succeeds. As we have already quashed the conviction of the appellants and set aside the sentences that had been imposed upon them, we further order their immediate release from prison, unless their continued incarceration is in respect of another lawful cause.

DATED at **ARUSHA**, the 7th day of December, 2022.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

The Judgment delivered this 8th day of December, 2022 in the presence of the Appellants in person and Ms. Penina Ngotea, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL