

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(IRINGA DISTRICT REGISTRY)
AT IRINGA
(APPELLATE JURISDICTION)

(DC) CRIMINAL APPEAL NO. 67 OF 2021

(Originating from Iringa District Court Criminal Case No. 01 of 2018)

ALINET CHAHE BIATUS @ MASAKA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

Date of Land Order: 06/04/2022

Date of Judgement: 29/04/2022

JUDGMENT

MATOGOLO, J.

Alinet Chahe Biatus @ Masaka the appellant in this appeal was charged and convicted by the District Court of Iringa on the charge of unlawful possession of Government trophies contrary to Section 86(1) and (2) (b) of the Wildlife Conservation Act No. 5 of 2009 read together with paragraph 14 of the first schedule to, and Section 57(1) and 60 (1) and (2) of the Economic and Organized Crimes Control Act, No3 of 2016. It was alleged that on 10th day of December, 2018 at Matalawe area within the

District and Region of Iringa he was found in possession of two pieces of elephant tusks and one ostrich egg valued at Tshs. 34,350,000 and Tshs. 2, 748,000/= respectively without any permit or licence. The appellant denied the charges, at the end of the trial he was found guilty convicted and sentenced to pay fine of Tshs. 343,500,000/= or to serve ten years in jail for the first count and to pay fine of Tshs. 8,244,000/= or to serve five years in jail in default.

The appellant was aggrieved with both conviction and sentence, he appealed to this court where he presented petition of appeal of seven grounds as followed:-

1. That, the learned trial Magistrate wrongly inter proceeded to hear and determine this case without considering that the trial court had no jurisdiction because the certificate and consent from the DPP was not filed before the trial court.
2. That, the trial court wrongly held that the prosecution side proved the case beyond reasonable doubts without drawing the reference towards to evidence of PW3 to why after arresting the appellant did not took him to the village office instead proceeded with him from village to the bush.
3. That, the trial court misdirected itself for failure to address its mind properly that if exactly the appellant was arrested by PW3 on 10/12/2018 why the time of arresting him was not clearly stated by PW3.

4. That, the learned trial magistrate erred in law and facts for holding that the appellant lead the prosecution witnesses to crime scene without taking into account that the prosecution evidence is full of contradictions on the specific place and who lead them to the alleged place (PW1, PW2, PW3 and 5).
5. That, the learned trial magistrate erred in law and facts for holding that the evidence of PW2 was credible during judgment writing without jurisdiction (sic) thereof from the proceedings.
6. That, it's not fair and just for trial court to convict and sentence the appellant for 2nd count while the ostrich egg was not for unknown reasons tendered before the court of law as exhibit.
7. That the prosecution side failed totally to prove this case against the appellant beyond reasonable doubts.

The appellant prays that this appeal be allowed, the conviction be quashed and sentence set aside and an order for his immediate release from the prison.

At the hearing the appellant appeared in person and prayed to this court to accept and consider his grounds of appeal. The respondent Republic was represented by Jackline Nungu learned State Attorney who supported the appeal. In supporting the appeal, the learned State Attorney relied only on the first ground of appeal that the trial court entertained the matter without having jurisdiction.

He said before entertaining the case there was no consent from the DPP and certificate authorizing prosecution of the appellant by the District

Court. She said at page 9 of the trial court proceeding dated 08/12/2019 the learned State Attorney who was prosecuting the case prayed for the trial court to receive consent and certificate conferring jurisdiction to that court to try the case as the appellant was charged with an economic offence. She said the law under Section 26(1) of the Economic and Organized Criminal Control Act, requires that all economic crimes offences cannot be tried unless consent and certificate by the DPP have been issued as provided under subsection (3) of the Act, that all economic offences are triable by the High Court unless the DPP issue a consent and certificate for them to be tried by a subordinate court. But in the present case, the court did not record whether the documents were received or not. She said although the documents are in the case file but they were not endorsed to show that were received. She said that rendered the trial before the District court a nullity as the trial court tried the case without authority. She supported her argument by citing the case of ***Maulid Ismail Ndonde vs Republic*** Criminal Appeal No. 319 of 2019 CAT (unreported). The same position was insisted in the case of ***Mchote Saguda Nyamugu vs. Republic***, Criminal Appeal No. 337 of 2016, CAT (unreported) in which the certificate and consent were issued in a different name and not of the accused person. The same was found defective. The court nullified the whole proceedings.

The learned State Attorney said there has been different position whether a court can order retrial or not. But this depends on the circumstances of each case. The courts usually order retrial where the

original trial was illegal or defective. The court cannot order a retrial where the error was committed by the prosecution as doing so gives chance to the prosecution to re-organize themselves. This was held in the case of ***Adam Selemani Jalanor vs. Republic***, Criminal Appeal No. 196 of 2016 CAT (unreported) at page 8. But in this case there is also issue of certificate and consent which were not filed before trial commences. The court referred the decision in the case of ***Almad Sume vs Republic (1964) EA 481*** in which it was held that where the appellant was convicted by the defect on the prosecution, retrial cannot be ordered. But if the defect was occasioned by the trial court then a retrial can be ordered. She said basing on the decision in the case of ***Adam Selemani Jalanor*** (supra), and the circumstances of the case where the State Attorney prayed to produce in court consent and certificate from the DPP, but the trial court did not accept them, the error was committed by the court. She therefore prayed for this court to order a retrial, she said so because there is ample evidence to sustain conviction if a retrial is ordered. The learned State Attorney prayed to this court to nullify the entire proceedings, quashed conviction and set aside the sentence and order for retrial.

In rejoinder the appellant apart from accepting what was submitted by the learned State Attorney on the defect of proceedings, he prayed to this court to acquit him.

I have carefully heard what the appellant as well as the learned State Attorney have submitted, and upon going through the trial court proceedings, I concur with the learned State Attorney as well as the

appellant that the trial magistrate entertained the case without jurisdiction. It was rightly submitted by the learned State Attorney that as the appellant was charged with economic offences the court having jurisdiction to entertain the same is the High Court as provided for under Sections 3(3) and 11 (3) of the Economic and Organized Crime Control Act, Cap. 200 R.E. 2019, (the Act). However, the District Court may have jurisdiction upon been conferred by the DPP upon filing a certificate as provided for under Section 12(3) of the Act. The same provides:-

"12(3) the Director of Public Prosecutions or any State Attorney dully 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".

Section 12(5) of the Act provides:

*"12(5) where a certificate is issued under subsection (3) it shall be lodged in the court concerned, and **shall***

constitute full authority for and confer jurisdiction upon the court in which it is lodged to try the case in question'.

(Emphasis added)

Apart from the certificate conferring jurisdiction to the subordinate court, the DPP must also file consent under Section 26(1) of the Act for purpose of authorising prosecution of the charged offence. In this case it is on record that the learned State Attorney who appeared in court on 08/12/2019 informed the trial court and prayed to the court to receive the certificate as well as consent from the DPP. This appears at page 9 of the trial court proceedings. However there is nowhere in the trial court record showing that such certificate and consent were received. It cannot be assumed that the same were formally received although the learned State Attorney prayed to tender the same in court. As there is no proof that the said certificate and consent by the DPP were admitted by the trial court, it is as good as there was no certificate filed by the DPP conferring jurisdiction to the District Court of Iringa which tried this case. Likewise there is no consent filed authorizing prosecution of the appellant. The Court of Appeal of Tanzania in the case of ***Maulid Ismail Ndonde vs The Republic***, Criminal Appeal No. 319 of 2019 (unreported) at page 6 last paragraph it observed that:-

"... 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 court record is silent as to whether the same were supplied and received in court**".*

(Emphasis added).

It is like in the present case, the State Attorney prayed to the court to receive the certificate and consent by the DPP. But the trial court record is silent as to whether those documents were received in court.

Since the trial court did not officially receive the certificate and consent by the DPP, the trial court lacked jurisdiction to try the case. It follows that the whole proceedings is a nullity. The appellant's conviction is hereby quashed and sentence set aside. The learned State Attorney has prayed to this court to order for retrial on the ground that the error was not occasioned by the prosecution but by a court, basing on the decision of the Court of Appeal in the case of ***Adam Selemani Jalanor vs. The Republic*** (supra).

I have taken note of that, however looking at the period appellant has so far served in the prison, I am of the firm view that ordering a retrial will cause injustice to the appellant. In ***Maulid Ismail Ndonde case*** (supra) the Court of Appeal referred the decision in the case of ***Fatehali Manji vs Republic (1966) EA 343*** in which it was held:-

*"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 purpose 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 interest of justice require it**".*

By considering the circumstances of this case, and the fact that the appellant has served substantial part of his sentence, ordering a retrial will occasion great injustice to him. I therefore order for immediate release of the appellant from the prison unless is held for other lawful causes.

DATED at IRINGA this 29th day of April, 2022.




F.N. MATOGOLO
JUDGE
29/04/2022

Date: 29/04/2022
Coram: Hon. F. N. Matogolo – Judge
Appellant: Present
Respondent: Veneranda – State Attorney
C/C: Charles

Ms. Veneranda Masai – State Attorney:

My Lord I am appearing for the Republic. The appellant is present.
The matter is for judgment we are ready.

COURT:

Judgment delivered.



F. N. Matogolo
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JUDGE
29/04/2022