

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF
TANZANIA**

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO.52 OF 2020

*(C/f Criminal Case No. 540 of 2017 District Court of Moshi at
Moshi*

NICODEMUS LEO NYAKI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

26th July & 20th August, 2021

JUDGMENT

MKAPA, J.

Before the District Court of Moshi at Moshi, the appellant herein together with one Lucas Sweeting Kawiche were charged for ten counts. Three of violation of section 22 of Prevention and Combating of Corruption Act, No. 11 of 2007 (Act No 11 of 2007) related to use of documents intended to mislead the principal. Other three counts of forgery contrary to sections 333, 335 (a) and 337 of the Penal Code Cap 16 [R.E 2002] and three other counts were of uttering false documents contrary to section 342 and 337 of the Penal Code and the last tenth count of stealing

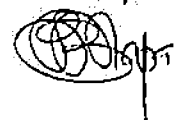


by person in public service contrary to sections 265 and 270 of the same Act.

The appellant pleaded not guilty and trial ensued. At the conclusion of the trial he was convicted with the tenth count only namely, stealing by person in public service c/s section 265 and 270 of the Penal Code. He was sentenced to pay a fine of shillings one million (Tshs.1,000,000/=), or in default to serve two (2) years imprisonment. Aggrieved, he filed this appeal based on three grounds;

1. That, the learned trial Magistrate erred in law and fact in holding that the prosecution proved its case against the appellant beyond reasonable doubt.
2. That, the learned trial magistrate erred in law and fact in convicting the appellant while specimen signatures of the 1st accused/appellant herein, were not taken to prove if the same was involved in the the alleged offence.
3. That, the learned trial Magistrate erred in law and fact in failing to properly evaluate the evidence on record which led to conviction and sentencing the appellant.

The hearing of this appeal proceeded by way of written submissions. The appellant had the services of Mr. Julius Antipas Semali, learned advocate while the respondent/Republic was represented by Mr. Kassim Nassir, learned State Attorney.



Supporting the appeal, Mr. Semali abandoned the 2nd ground and consolidated 1st and 2nd grounds. However, prior to arguing the contents of the said grounds Mr. Semali raised the issue of jurisdiction to the effect that, the trial court was not vested with jurisdiction to determine this case, since the hearing commenced without prior consent of the Director of Public Prosecutions (DPP) as required under section 12 (3) of the Economic and Organized Crime Act (EOCCA). To the contrary the trial court sat as Economic crimes court without Certificate of the DPP which confer jurisdiction to subordinate court.

The counsel went on arguing that, the consent and certificate were not properly filed as required by the law, thus the trial court lacked jurisdiction to entertain the matter. He contended that the nature of the offences are triable by High Court, else DPP's Consent is needed together with Certificate conferring jurisdiction to the subordinate court as per section 12 (3) of EOCCA.

Mr. Semali averred that, the trial court's proceedings are silent on the consent or certificate from the DPP. In support of the above submission the learned counsel for the appellant relied on the case of **Adam Selemani Njalamoto V The Republic**, Criminal Appeal, No 196 Of 2016 (unreported).



He finally contended that the omission vitiated the proceedings of the trial court for want of jurisdiction hence he prayed for the court to quash and set aside the proceedings of the trial court, set aside the conviction and acquit the Appellant.

Responding on the on the issue of lack of jurisdiction, Mr. Kassim, argued that the appellant had raised a new ground which is based on point of law. That, the charges against the accused/appellant herein were not economic offences thus, EOCCA does not apply. Furthering his argument Mr. Kassim asserted that the appellant was convicted of offence of use of Documents intended to mislead principal contrary to section 22 of Act No. 11 of 2007 which section 57(1) of Act No. 11, of 2007 requires written consent of the DPP.

Mr. Kassim explained further that, there was a written consent signed by the DPP on 21st August, 2017 but conceded the fact that the same was not properly tabled in court since it was not presented for filing, nor endorsed as received and not read in court. Further that the same is not featured anywhere in the trial court proceedings. It was Mr. Kassim's view that technically there was no consent from the DPP at the commencement of the trial which rendered the trial proceedings and judgment a nullity.



However, Mr. Kassim vehemently disputed the remedy sought by the appellant's counsel, for the court to order the acquittal but rather the appropriate Order would be for the court to order retrial. In support of his argument he placed reliance in the case of Adam **Selemani Njalamoto V R** (*supra*), which lay down the remedy for the situation with similar facts like the one at hand. In his rejoinder submission Mr. Semali maintained his stance to the effect that the trial court conducted trial without DPP's consent failure of which vitiated the whole proceeding and judgment. He prayed for the trial court's decision be quashed and set aside and the appellant be acquitted.

Before I get on determining the merit ad demerits of this appeal I find it necessary to dwell on the issues raised by the counsel for the appellant submission and replied in detail by the respondent's counsel on two issues namely;

- (i) Whether DPP's consent under section 57 (1) of Act No 11 of 2007 under section 26(1) of EOCCA was required prior to the commencement of the trial at the trial court
- (ii) If the first issue is answered in affirmative, the remedy (if any)

As to the first issue, section 57(1) of Act No. 11 of 2007 reads;



"Except for the offences under section 15, prosecution for an offence under this Act shall be instituted with written consent of the Director of Public Prosecutions."

Section 26(1) of EOCCA also provides that;

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.

A reading from the aforementioned provisions and as rightly argued by the appellant's counsel and conceded by respondent's counsel it is plain clear that, the present case is among of the cases which require consent from the DPP under section 12(1) of Act No. 11 of 2007 and 26(1) of EOCCA.

The reason why I hold so is that the appellant was charged with among other offences, under section 22 of the Act No. 11 of 2007 which are inclusive under section 57 (1), as per the First schedule paragraph 21 of the EOCCA thus are economic offences.

Although consent document is on the record at the trial court no explanation was given as to how it found its way to the court file record as the same was not properly included in the proceedings of the trial court. It was neither filed nor featured in the proceedings of the trial court hence technically non-existent.

The case of **Abdulswamadu Azizi V The Republic, Criminal**

Appeal No. 180 Of 2011 CAT at Mwanza (unreported) is relevant in which the Court of Appeal observed;

*"In the instant case, the counts against the appellant combined the economic and non-economic offences, but again no certificate of the DPP was issued. This Court in its various decisions had emphasized the compliance with the provisions of section 12 (3), 12 (4) and 26 (1) of the Act and held that the consent of the DPP must be given before the commencement of a trial involving an economic offence. For instance, See, the decisions in the cases of **Rhobi Marwa Mgare and Two Others v. The Republic**, Criminal Appeal No. 192 of 2005, **Elias Vitus Ndimbo and Another v. The Republic**, Criminal Appeal No. 272 of 2007, **Nico s/o Mhando and Two Others v. The Republic**, Criminal Appeal No. 332 of 2008 (all unreported)"*

In **Selemani Njalamoto V Republic** (supra), when deciding the effect of the lack of consent from the DPP the Court of Appeal had this to say;

*"In view of this legal position, **the appellant was prosecuted without consent** and a certificate of transfer by the Director of Public Prosecutions, in the*

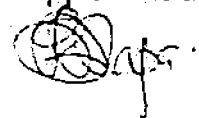
result, we are of the view that the proceedings, the conviction and sentences in the trial court and in the first appellate court were illegal and nullity" (Emphasis mine)

Guided by the aforementioned judicial authorities of the Court of Appeal, I am inclined to hold that the proceedings and the judgment of the trial court are nullity and illegal as the same commenced without DPP consent as required by law. Thus the first issue is emphatically answered in affirmative.

Turning to the second issue, as to the remedy of this situation, I wish to be guided by the case of **Adam Selemani Njalamoto V Republic** (supra).

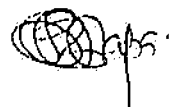
*"We are mindful that where the trial court fails to direct itself on an essential step in the course of the proceedings, it does not in our view, automatically follow that a re-trial should be ordered, even if the prosecution is not to blame for the fault. **Clearly of course each case must depend on its particulars.**" (emphasis mine)*

However, in the case of **Fatehali Manji V Republic**, [1966] E.A 343 discussing on when to order retrial, the Court of Appeal had this to say that;



*"Generally 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 the purpose of enabling the prosecution to fill up 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 blame, it does not necessarily follow that a retrial should be ordered; **each case must depend on its own facts and circumstances** and an order for retrial should only be made where the interests of justice require it."*
(emphasis mine)

Merging the above judicial authorities and subjecting the same in the present matter, in the case at hand, it is worth pointing, out that the trial magistrate convicted the appellant on tenth count by relying solely on the appellant's cautioned statement which was objected at the trial. Although after the inquiry the same was admitted into evidence, the trial magistrate did not bother to warn herself on the credibility of the said cautioned statement before convicting the appellant rather he discussed the content of the cautioned statement only.



In the case of **Hemedi Abdallah V Republic** [1995] TLR 172 the following was observed with regard to the cautioned statement;

*"Generally it is dangerous to act upon a repudiated or retracted confession unless it is corroborated in material particular or **unless the court after full consideration of the circumstances, is satisfied that the confession must be true; and once the trial court warns itself of the danger of basing a conviction on uncorroborated retracted confession and having regard to all the circumstances of the case it is satisfied that the confession is true, it may convict on such evidence without any further ado"** (emphasis mine)*

Having regard to the circumstances and facts of this case, the prosecution evidence was not watertight to ground conviction against the appellant for the offence of stealing by public servant as it needed corroboration, especially from a cashier one Marietha Massawe who handed the money to the appellant, and the register which recorded the said handing of the money to the appellant.

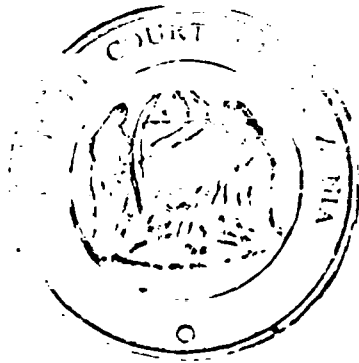
I have discussed the merit of the ground of appeal in partial so as to ascertain as to whether the circumstance of the case

warrant ordering retrial, and my view is ordering retrial will prejudice the appellant as that will allow the respondent to fill up gaps in its evidence at the first trial as mentioned above.

In the circumstances, I nullify and quash the proceedings and judgment of the trial court and set aside the conviction and sentence thereof.

It is so ordered.

Dated and Delivered at Moshi this 20th day of August, 2021.




S.B. MKAPA
JUDGE
20/08/2021