THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB - REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 110 OF 2023

(Originating from Mbarali District Court at Rujewa in Economic Case No. 25 of 2019)

SWED S/0 LINUS MHONGOLE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Last Order: 15/09/2023
Date of Judgment: 18/09/2023

NDUNGURU, J.

This is an appeal whereas the appellant one **Swedi s/o Linus Mhongole** was arraigned before the District Court of Mbarali at Rujewa (trial court) for unlawful possession of Government Trophy contrary to Section 86 (1) and (2) (c)(iii) 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 (2) of the Economic and Organized Crime Control Act, [CAP. 200 R. E 2019].

It was the prosecution side's case that on the 5th day of October, 2019 at Ikanukwa village within Mbarali District in Mbeya Region, the appellant was found in unlawful possession of Government trophies to wit; Impala meat valued at USD 390 which was equivalent to Tshs. 893,802/= the property of the Government of Tanzania, without permit from the Director of Wildlife.

Despite of his protest of being innocent, at the end of a full trial, the appellant was convicted after being found guilty, and he was sentenced to serve 20 years in prison.

Aggrieved by both conviction and the sentence, the appellant herein flew to the base of this court holding the Petition of Appeal which consists of four grounds which I find best to reproduce as herein under;

1. That the trial court erred both in law and fact when convicted and sentenced the appellant in a case which was not proved to the required standard.

2. That, the trial court erred in law and fact by convicting and sentencing the appellant for the strange offence unknown by the charge before it.
3. The trial court erred in law and fact by convicting and sentencing the appellant relying on the exhibit PE2 that was irregular admitted by the court.
4. That the trial magistrate erred in law and fact when sentenced the appellant griviously(sic) by its failure to analyse and evaluate the evidence put forth by both sides.

As the date of hearing this appeal, the appellant enjoyed the service of Ms. Kajanja learned advocate whereas the respondent/Republic was represented by Mr. Bajutta, learned State Attorney.

At the outset at his opening statement, Mr. Bajutta supported the appeal but not on the grounds of appeal, but because of the irregularity therein. he submitted that the trial court was not conferred with jurisdiction to entertain the economic case. The learned Attorney told the court that apart from the certificate of DPP being issued but consent was not issued that was contrary section 26 of Cap 200 thus the trial court had jurisdiction to try the case.

The learned State Attorney continued telling the court that all what was done by the trial court was a nullity. He prayed the case be remitted back to the trial court for retrial.

On her side Ms. Kajanja supported the learned Attorney that the trial court had no jurisdiction thus the whole proceedings is a nullity. Her concern was on the prayer of retrial. But she left it for the court to determine.

The submission by the learned State Attorney made me keenly peruse the proceedings of the trial court, and in doing so, I should remark that the issue for consideration here is the jurisdiction of the trial court in entertaining the matter which was before it.

It is needless to restate that jurisdiction is the threshold, and it touches the courts' competence to seize the matter presented before them. In other words, courts in Tanzania cannot try cases if they do not have jurisdiction. Section 57(1) of the Economic and Organized Crime Control Act, (Cap 200 R.E. 2002) (EOCCA) is a jurisdictional provision. Section 12 (3) of the EOCCA empowers the Director of Public Prosecutions (DPP) or any State Attorney duly authorized, to confer

jurisdiction to subordinate courts over economic offences he specifies under certificates. The relevant jurisdiction-conferring subsection (3) states:

> (3) *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.*** *[Emphasis added].*

The economic offences cannot be validly tried by the court without obtaining the consent of the DPP as required under section 26(1) of the EOCCA which states 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."*

In this appeal at hand, the trial court's records reveal that the certificate was issued but the consent was not issued. This means that the trial court entertained the case without consent of the DPP to try it. For the jurisdiction to be conferred to the subordinate court, the Certificate and Consent must be issued. In the absence of the consent of DPP or by issuing certificate alone without consent it cannot be taken that jurisdiction has been conferred.

To that effect, the District Court of Mbarali was not vested with jurisdiction to try the case which is a subject of this appeal and as such, the trial proceedings were a nullity as well as the conviction and sentences. There are plenty of authorities with similar situation, to mention a few, See the cases of **Ebon Stephen Chandika vs Republic, Criminal Appeal No.236 of 2011 and Abdulswamadu Azizi vs Republic, Criminal Appeal No.180 of 2011**(unreported).

In such circumstance, a retrial seems to be inevitable. But I did warn myself over this as I have been guided by the decision in the case of **Dogo Marwa @ Sigana & Another vs Republic, Criminal Appeal No. 512 of 2019** (unreported), which quoted with approval the former Eastern African Court of Appeal in **Fatehali Manji vs Republic [1966] 1 EA**

343, in which it has provided a helpful guide to courts in Tanzania when considering whether to order a retrial. It was held that;

> *"...In general a retrial will be ordered only when the original trial was "illegal or defective; it will not be ordered when 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 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 a retrial should only be made where the interests of justice require it."*

I have dispassionately gone through trial court's judgment. Apart from jurisdictional issue I have noted that the offences appeared to be the subject in the judgment are not the same preferred in the charge. Likewise, the offence which the appellant has been convicted and sentenced against is not the one arraigned in the charge.

At this juncture, a new trial will not serve the best interest of justice for the appellant, and therefore I proceed to allow the appeal, quash the conviction and set aside the sentence. The appellant shall be freed immediately, unless he is otherwise lawfully held.

Order accordingly.

D. B. NDUNGURU

JUDGE

18/09/2023