

**IN THE COURT OF APPEAL OF TANZANIA
AT TABORA**

(CORAM: JUMA, C.J., MJASIRI, J.A., And LILA, J.A.)

CRIMINAL APPEAL NO. 285 OF 2014

1. EDWIN FABIAN TALLAS
2. MOHAMED ALLY MASHA }**APPELLANTS**

VERSUS

THE REPUBLIC.....RESPONDENT

**(Appeal from the decision of the High Court of Tanzania
at Tabora)**

(Lukelelwa, J.)

dated the 18th day of February, 2013

in

(DC) Criminal Appeal No. 24 and 25 of 2012

JUDGMENT OF THE COURT

12th & 19th February, 2018

MJASIRI, J.A.:

In the District Court of Kigoma at Kigoma, the appellants, Edwin Fabian Tallas and Mohamed Ali Masha were charged under Economic Case No. 3 of 2009. A total number of twenty four counts were levelled against them. They were initially charged with Athumani Waziri Mahanyu who was acquitted at the end of the prosecution case for failure on the part of the prosecution to

establish a *prima facie* case against him. The first and second appellants were found guilty as charged on all the twenty-four (24) counts and they were sentenced to four (4) years imprisonment. On the 1st – 11th counts, four years imprisonment, on the 12th count, 13th count, four years imprisonment, on the 14th to 22nd count four and seven (7) years imprisonment on the 23rd and 24th count four years imprisonment. The sentences were to run concurrently.

In addition to the imprisonment term of four and seven years, the 1st and 2nd appellants were also ordered to compensate the sum of Tshs. 25,700,000/= and Tshs. 51,400,000/= respectively to the Kigoma District Council.

Being aggrieved with the decision of the Kigoma District Court, the appellants filed an appeal in the High Court. Their appeal was unsuccessful. The High Court (Lukelelwa, J.) upheld their conviction and ordered them to serve a sentence of four (4) years imprisonment. They were also ordered to pay compensation to the Kigoma District Council in the sum of Tshs. 77,100,000/= in equal sum.

Still aggrieved, the appellants found their way to this Court, hence their second appeal. The appellants presented a joint memorandum of appeal through their advocate, Mr. Godfrey Wasonga.

Following a diligent search through the papers filed by Mr. Wasonga, we managed to trace a four-point memorandum of appeal which is reproduced as under:

- "1. That, the District Court of Kigoma at Kigoma was not vested with jurisdiction to entertain and deliver judgment in Economic Case No. 3 of 2009 which was filed in the Resident Magistrate's Court of Kigoma at Kigoma.*
- 2. That, the proceedings and judgment of the Economic Criminal Case No. 3 of 2009 at the District Court of Kigoma at Kigoma are a nullity for want of jurisdiction by the Director of Public Prosecutions.*

3. *That, the whole proceedings in the above Economic Case is marked by procedural irregularities.*
4. *That, the prosecution totally failed to prove their case beyond reasonable doubt”.*

At the hearing of the appeal, the appellants were represented by Godfrey Wasonga, learned advocate while the respondent Republic had the services of Mr. Juma Masanja, learned Senior State Attorney who was assisted by Mr. Miraji Kajiru, learned State Attorney.

In his submissions, Mr. Wasonga complained of procedural irregularities and lack of jurisdiction by the District Court of Kigoma District to hear and determine Economic Case No. 3 of 2009. This complaint is covered under grounds 1 to 3 of his memorandum of appeal. The charges against the appellants fall under section 6 of the Prevention and Combating of Corruption Act [Cap. 329 R.E. 2002] read together with sections 57(1) and 60(2) and paragraph 1 of the First Schedule to the Economic and Organized Crimes Control Act [Cap. 200 R.E. 2002] and the Penal Code.

He stated further that the offences under the Economic and Organized Crimes Control Act, (the Act) require the Consent of the Director of Public Prosecutions (DPP) under section 26(1) of the Act. In addition to the consent of the DPP a certificate of the DPP is also required under section 12(3) of the Act to enable the case to be tried in the subordinate court as such cases are triable by the High Court. Section 12(3) of the Act provides that:

"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 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.

In the instant case both the consent and the certificate of the DPP were issued on August 24, 2009. The DPP's certificate authorised the case involving the appellants to be tried in the Resident Magistrate's Court of Kigoma at Kigoma.

However, what transpired is that, the case was heard in the District Court of Kigoma, leading to the conviction and sentencing of the appellants. In view of this anomaly, Mr. Wasonga contended that all the proceedings before the District Court were a nullity. He asked the Court to nullify the proceedings. However, he stated that as the appellants have already served the sentences meted out by the District Court and upheld by High Court there is no need to order a trial *de novo*.

Mr. Masanja on his part supported the appeal. He submitted that as far as grounds No. 1, 2 & 3 of the memorandum of appeal are concerned, he was in complete agreement with the submissions by the counsel for the appellants. He conceded to the procedural irregularities and the fact that the irregularities rendered the proceedings a nullity.

Mr. Masanja made reference to the case of **Marko Patrick Nzumila and Another v Republic**, Criminal Appeal No. 141 of 2010 and **Israel Miseze @ Minani v. Republic**, Criminal Appeal No. 117 of 2006 (unreported). Mr. Masanja relying on the case of **James Sendama v. Republic**, Criminal Appeal No. 279B of 2013 strongly argued in favour of a retrial.

In relation to ground No. 4, Mr. Masanja argued that the issue of the jurisdiction of the Court has to be determined first before going into the merit of the case.

After a careful review of the record we are of the considered view that the crucial issue for determination and decision is whether or not there were procedural irregularities rendering the proceedings in respect of Economic Crime No. 3 of 2009 which was tried by the District Court of Kigoma a nullity.

Looking at the certificate of the DPP issued under section 12(3) of the Act, it is evident that the certificate required that the matter be heard in the Resident Magistrate's Court of Kigoma and not the District Court of Kigoma. Counsel are in agreement on the existence of the procedural irregularities rendering the proceedings and the judgment of the Kigoma District Court a nullity.

We agree with the observations made by this Court in **Israel Misezero @ Minani v. Republic**, Criminal Appeal No. 117 of 2006 (unreported).

The Court stated that:

"Our Courts are a creature of statutes and they have such powers as are conferred upon them by statute."

In **Desai v Warsama** [1967] E.A. 351 the Court had this to say in respect of a decision made without jurisdiction: -

"It is well established law that a judgment of a Court without jurisdiction is a nullity and HALSBURY 351 sets out the proposition briefly thus:

"Where a Court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing."

In **Deus Mallya v. Republic**, Criminal Appeal No. 52 of 2010 (unreported) the Court faced a similar situation. The District Court of Dodoma was found not to be a designated special Traffic Court of Dodoma. It was held that the proceedings were a nullity.

Whereas counsels were in agreement on the procedural irregularities and the consequences thereof, they differed considerably on the way forward. Mr. Masanja learned Senior State Attorney vehemently argued for a re-trial. Mr. Wasonga strongly argued that a retrial was uncalled for, the appellants having served

their full imprisonment term. Mr. Masanja on his part relying on the case of **James Sendama v. Republic**, Criminal Appeal No. 279B of 2013 (unreported) which called for retrial as the appellant had only served four years out of a twenty (20) year imprisonment term. Mr. Wasonga submitted that the circumstances of this case are different and the appellants had served a full term of the sentence imposed.

What are the considerations for a re-trial? In the case of **Fatehali Manji v. Republic** [1966] EA.343, the East African Court of Appeal, had this to say:

*"In general 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 purpose of enabling the prosecution to fill up the 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 shall 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”.

[Emphasis ours.]

The principle in the **Fatehali Manji** case (supra) has been followed in various decisions of this Court. See – **Makubi Kweli and Another v. Republic**, Criminal Appeal No. 149 of 2015 (unreported).

In view of the fact that the appellants have been in custody for a period of four years, that is a serving a full term custodial sentence, this is not a fit case for a retrial and the interests of justice do not so require. In ordering a retrial, the appellants would be subjected to undergo a second trial.

Taking into consideration of what we have stated herein above and given the circumstances of this case, we are of the firm view that it is not in the interest of justice to order a retrial in respect of this case.

Given the circumstances we invoke Section 4(2) of the Appellate Jurisdiction Act [Cap. 141, R.E. 2002] and hereby quash

the proceedings and judgments of the lower courts. The appeal is hereby allowed.

Order accordingly.

DATED at TABORA this 15th day of February, 2018.

I.H. JUMA
CHIEF JUSTICE

S. MJASIRI
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL