

TANZANIA / JUDGMENT

john elisha mgamo vs the republic

2024 tzhc 861 13 march 2024

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TZHCDECIDED
13 March 2024

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE SUB-REGISTRY OF MANYARA AT BABATI CRIMINAL APPEAL NO. 122 OF 2023 (Arising from Economic Case No. 53 of 2021 District Court of Simanjiro at Orkesument) JOHN ELISHA MGAMO.....APPELLANT VERSUS THE REPUBLIC.....RESPONDENT JUDGM ENT , 6th & 13th March 2024 Kahyoza, J. John Elisha Mgamo (the appellant) was charged with the offence of unlawful possession of Government Trophy, convicted and sentenced to 20 years' imprisonment. He contended that the prosecution did not prove him guilty beyond reasonable doubt. John Elisha Mgamo's petition of appeal to this Court raised four (4) grounds of appeal, which I will not produce. As on the date the appeal was fixed for hearing, Ms. Blandina, State Attorney raised a preliminary point of law that the trial court tried the appellant without jurisdiction as there was no valid consent. She avowed that an officer subordinate to the DPP issued a consent under section 26(1) of the Economic Organized and Crime Control Act, [Cap. 200 R.E. 2022] (the EOCCA). The law provides that the officer l subordinate to the DPP may issue consent under section 26(2) of the EOCCA and not under section 26(1) of the EOCCA. She contended that consent issued by the officer subordinate to the DPP under section 26(1) of the EOCCA was defective. The defective consent could not give the district court jurisdiction to try an economic offence, she submitted. To support her contention, she cited the decision of the Court of Appeal in Sandu John v. R. Criminal Appeal 237/2019, Neutral citation [2023] TZCA 17719, where it was held that an officier subordinate to the DPP has no mandate to sign consent under section 26(1) of the ECCOCA. It held further that if the officer subordinate to the DPP issues a consent under wrong section, proceedings are vitiated; the conviction and sentence rendered a nullity. As a way forward, she prayed the court to nullify the proceedings, set aside the conviction and sentence, and to order a re-trial. Ms. Blandina Msao, submitted vehemently that the record showed that the prosecution's evidence was watertight. The prosecution summoned three witnesses who proved the offence the appellant was charged with. Goodluck Emmanuel Niko (Pw2) deposed how he arrested the appellant while patrolling. Goodluck Emmanuel Niko (Pw2) prepared and tendered a certificate of seizure as the Exh. 3. The trophy was handed to the exhibit 2 keeper H 5869 Pc Sweetbert (Pwl). They prepared the chain of custody form Exh.Pl. H 5869 Pc Sweetbert (Pw l) deposed that he handed the exhibit to Pw3 using the chain of custody form. Happiness Mathias

Msigwa (Pw3) identified and valued the trophy. Happiness Mathias Msigwa (Pw3) took the exhibit to the learned resident magistrate, Honourable Uiso who interrogated the appellant. The appellant was given the right to be heard as per Happiness Mathias Msigwa (Pw3). She submitted that prosecution witnesses complied with the procedure. She prayed for the Court to order the appellant to be tried de-novo. The appellant had nothing to argue in support or to counter the State Attorney's submission. Indisputably, the trial court's record portrays that the Regional Prosecutions Officer, who is an officer subordinate to the DPP, issued a certificate of consent under section 26 (1) of the EOCCA. It is now settled that, it is the DPP who has mandate to issue consent to prosecute an economic offence under section 26 (1) of the EOCCA and that the officer subordinate to the DPP may only issue a valid consent to prosecute an economic offence under section 26 (2) of EOCCA. Section 26 of EOCCA provides that- 3 "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.

- (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 Court of Appeal of Tanzania in Sandu John v. R. (supra) Salum Saadi @ Salum V. R, (supra), Peter Kongori Maliwa & 4 others (Supra) Emmanuel Chacha Kenyaba & 3 others, Criminal Appeal No. 368 of 2020 [2023] TZCA 17823, and Ghati Mwikwabe @ Sasi V. R, Criminal Appeal No. 305 of 2020 [2023] TZCA 17814, Tanzilii, a few to mention, held that an officer subordinate to the DPP ought to issue a consent under subsection (2) of the section 26 of EOCCA and that the powers of the DPP under subsection (1) of section 26 are not delegable. 4 I am of the firm view that, since the Regional Prosecutions Officer issued the consent under the incorrect enabling provisions of the law, the consent is invalid. Consequently, the trial court proceeded to try the appellants without a valid consent. The trial of an economic offence without consent from the Director of Public Prosecutions (DPP) or an officer subordinate to the DPP, is a nullity. I irrefutably conclude that, the trial in the present case was, without a doubt, a nullity. I annul the proceedings and set aside the conviction and sentence. As a way forward after quashing the proceedings and setting aside the conviction and sentence, the Respondent prayed this Court to order a retrial. It is trite law that, a retrial should not be ordered merely to provide the prosecution an opportunity to address gaps in its evidence but when there is sufficient evidence on record to ground conviction. In the case of Fatehali Manji v R [1966] EA341, the then Court of Appeal of East Africa outlined the guiding principle for retrials, stating- "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 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 5 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 of retrial should only be made where the interests of justice require." The learned state, Ms Blandina submitted forcefully that the prosecution's evidence is watertight. I reviewed the prosecution's evidence which alleged that the appellant was found cooking wild meat in the forest. He told them that he got the meat from people working in the farm. The appellant led Goodluck Emmanuel Niko (Pw2) and other people to a place where he told them that there were hunters. They did not find anyone there but they found pieces of eland meat including its head. They arrested the appellant prepared a certificate of seizure. Goodluck Emmanuel Niko (Pw2) tendered a certificate of seizure. Happiness Mathias Msigwa (Pw3) identified the trophy. She specified special characteristics of meat of eland and the skin on the head of the eland. I am satisfied with her identification. In addition, the prosecution tendered an inventory to prove that, the appellant was found in possession of government trophy as exhibit P. 5. 6 Happiness Mathias Msigwa (Pw3) deposed she went to the magistrate with the appellant and the exhibit. And that the magistrate asked the appellant his name and whether he was found in possession of trophy. She added that the appellant admitted that he was found in possession of the trophy. Unfortunately, the magistrate who ordered the inventory to be disposed did not indicate on the inventory whether Happiness Mathias Msigwa (Pw3) took the appellant to him and whether he gave an opportunity to the appellant to give his comments. Worse still, the prosecution did not call the magistrate to testify. I am not convinced, beyond reasonable doubt, that the appellant appeared before the magistrate who ordered the trophy to be disposed and the magistrate heard him. It was not enough for Happiness Mathias Msigwa (Pw3) to depose that she took the appellant to the magistrate and the magistrate asked him if he was found in possession of meat. The magistrate must have indicated that on the inventory. The inventory does not indicate that the appellant was heard before the magistrate issued the order to dispose the exhibit. The Court of Appeal in Mohamed Juma @ Mpakama held that, that the accused person must be present and the court should hear him at the time of authorizing the disposal of the exhibits. It stated- 7 "This paragraph 25 in addition emphasizes the mandatory right of an accused (if he is in custody or out of police bail) to be present before the magistrate and be heard." (Emphasis added) For the sake of clarity, I wish to reproduce paragraph 25 of the Police General Orders Chapter No. 229. Paragraph 25 of the Chapter 229 of the PGO reads, thus-

25. Perishable exhibits which cannot easily be preserved until the case is heard, shall be brought before the Magistrate, together with the prisoner (if any) so that the Magistrate may note the exhibits and order immediate disposal. Where possible such exhibits should be photographed before disposal. Reading the inventory, it is not clear whether the appellant was present and whether, before ordering the disposal of the exhibit, the magistrate heard the appellant. Truly, the inventory bears the appellant's signature, but that is not a proof the appellant was present and the magistrate heard him. The appellant may have signed before or after the magistrate ordered the trophy to be disposed of. It is trite law that in case of doubts, the doubts must be resolved in favour of the accused person. 8 I am of the view that

the inventory was prepared in violation of Paragraph 25 of the Chapter 229 of the PGO. It was therefore wrong, for the trial court to admit and act on such exhibit which was prepared in violation of the law. Once the inventory is expunged, the prosecution cannot prove that the appellant was found in possession of the government trophy. I respectfully differ with Ms. Blandina, learned state attorney, that the prosecution's evidence is watertight. I hesitate for interest of justice, to order a retrial. In the upshot, I uphold the preliminary objection that the trial of the appellant was a nullity for want of a valid consent to try economic offence. Consequently, I quash the proceedings and set aside the conviction and sentence, order the appellant to be released forthwith from the prison, unless held there for any other lawful cause. I order accordingly. Dated at Babati t' ' ' M t h r ' ' 024. J. R. Kahyoza Judge 9 Court: Judgment delivered in the virtual presence of the appellant and Ms. Blandina, State Attorney, for the respondent. B/C Ms. Ombeni (RMA) present. J. R. Kahyoza Judge 14/03/2024

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