

TANZANIA / JUDGMENT

CRIMINAL APPEAL NO

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TANZLIIDECIDED
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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE SUB-REGISTRY OF
MTWARA AT MTWARA CRIMINAL APPEAL NO. 39558 OF 2024 (Originating from the District
Court of Masasi at Masasi, in Criminal Case No. 15/2023) JUMA GODFREY
KIHUNGA..... APPELLANT VERSUS THE REPUBLIC..... RESPONDENT

JUDGEMENT

29th February & 19th March, 2024 MPAZE, J.: Juma Godfrey Kihunga, the third accused in Criminal Case No. 15 of 2021 at the District Court of Masasi, has been charged alongside with other three accused for the offence of possessing a government trophy contrary to section 86 (1) and (2) (c) (iii) of the Wildlife Conservation Act No. 5 of 2009, as amended by the Written Laws (Miscellaneous Amendment) Act No. 2 of 2016, reading together with paragraph 14(d) of the first schedule, and section 57 (1) and 60 (2) of the Economic and Organized Crimes Control Act, [CAP, 200 R.E. 2019], (hereinafter 'the EOCCA'). 1 The offence to which they pleaded not guilty. Following a full trial/ the court determined that the prosecution had proven its case beyond a reasonable doubt against the second and third accused. Consequently, both were found guilty and sentenced to serve 30 years imprisonment. Dissatisfied with the conviction and sentence, the appellant lodged this appeal, citing a total of nine grounds of appeal. When the matter was called for a hearing on 29th February 2024, the appellant appeared in person without legal representation, whereas the Republic was represented by Mr. Justus Zegge, the State Attorney. Upon being allowed to submit his grounds of appeal, the appellant prayed to the court his grounds of appeal to be adopted and form part of his submission. He further stated that if necessary, he would provide a rejoinder after the State Attorney's reply. On his part, Mr. Zegge, the State Attorney, informed the court that upon examining the grounds of appeal, he had identified shortcomings in the proceedings of the trial court that were not addressed in the grounds of appeal. Consequently, he requested the court to address the shortcomings as the same touches the jurisdiction of the court. In submitting these shortcomings, the State Attorney submitted that it is a legal requirement and various court decisions have stated that when subordinate courts handle cases of this nature, there must first be a 2 consent and certificate conferring jurisdiction to the said court issued by the authorised officer. He stated that this is in accordance with sections 26(1), (2), 12(3), and 12(4) of the EOCCA. He further stated that upon examining the proceedings of the trial court, despite the consent and certificate conferring jurisdiction being issued to the trial court and signed by the trial magistrate, the proceedings do

not indicate anything regarding the admission of the two documents. Additionally, he mentioned that he had also discovered that the certificate conferring jurisdiction cited a wrong provision of the law; it cited section 12(2) of the EOCCA instead Of section 12(3) of the EOCCA. Under these circumstances, he stated that despite he is not supporting the appeal, however, due to the trial court entertaining the matter without jurisdiction, he prayed for an order of retrial. On his part, the appellant, being a layperson, had no useful rejoinder. Instead, he simply agreed with the State Attorney's

submissions.

In light of the submissions made by the State Attorney, I concur with him in respect that for a subordinate court to hear cases of this nature, there must be a consent issued under section 26 (1) (2) and a certificate conferring jurisdiction issued under section 12(3) of the EOCCA. Upon examination of the records of Criminal Case No. 15 of 2021., it has been observed that in the court file, there is a consent and certificate conferring jurisdiction of the court signed by SRM on 9th November 2022, and the records of 9th November 2022 at page 17 of the typed proceedings shows that; 'Coram Date: 9/11/2022 Before: B.KKashusha- SRM For Pros: Insp Jovina Accused: Present B/C Upendo PP: Investigation is complete also the courtis conferred powers to hear and determine this case by certificate conferring jurisdiction on the subordinate court by the DPP, This 9F1 day of November, also the consent of the Prosecution Attorney in charge. The same are received and admitted in this court. Court: Charge is read over and explained to all accused who are asked to plead thereto. 1st Count: 1st Accused: it is not true 2Pd Accused: It is not true 3rd Accused: It is not true 2Fd Count: 1st Accused: it is not true 2nd Accused: It is not true 4 3d Accused: It is not true 3rd Count: 1st Accused: it is not true 2nd Accused: It is not true 3 d Accused: It is not true Court: Enters plea of not guilty for both counts and all accused's. PP: The investigation is complete, we pray for a preliminary hearing date. Order: Preliminary hearing on 18/11/2022 Sgn. B.K. KASHUSHA SRM 9/11/2022' By looking at this proceeding, it is evidenced that although the public prosecutor brought to the attention of the court the presence of consent and the certificate conferring jurisdiction to the court, and went further to explain to the court that the same had been received, the trial magistrate remained silent following the prosecutor's submissions. It was expected that after the submission by the public prosecutor, the trial magistrate would have indicated that the consent and the certificate conferring jurisdiction had been duly received and would form part of the record. 5 The question arises as to whether the failure to indicate that the consent and certificate conferring jurisdiction were admitted and formed part of the court record will invalidate the jurisdiction of the court. As urged by the state attorney there are various decisions regarding this issue, for example, in the case of John J ulius Martin and Another v. The Republic, (Criminal Appeal NO. 42 of 2020) published on the website, www.tanzlii.org [2022] TZCA 789, the Court when confronted with a similar situation, while quoting with approval other decision of the same court had this to say; \..In this respect the issue is, is it enough for the instruments to just be deiivered in the trial court's file or a prosecuting attorney should orally move the trial, court in session before the commencement oftrial for it to endorse the documents as admitted and also record that act in writing. According to Ms: Ngptia,

the mere presence of the documents in the trial court's file is legally enough and the subordinate court has jurisdiction. Respectfully, we do not agree with her, because that is not the position maintained by this Court. In *Maganzo Zeiamoshi @ Nyanzomola k R*, Criminal Appeal No. 355 Of 2016 (unreported), there was a certificate and the consent in the record of the trial court, but the documents were not endorsed by the trial magistrate as having been duly admitted on record. In another case of *Maulid Ismail Ndonde v, R*, Criminal Appeal No. 319 of 2019 (unreported), there was neither an endorsement on the face of the consent and the certificate nor did the trial court's record reflect that there were such documents on record. In both cases, the Court nullified the proceedings of both the trial courts and: of the High Court, because the certificate and the consent documents, had no legal force as they were not endorsed by the trial magistrate as having been admitted on record. The situation in the above cases is akin to the state of affairs obtaining in this case. Thus, we hold that because the instruments of consent and the certificate on page 3 of the record of appeal, were neither endorsed as having been admitted by the trial court nor does the record show that the documents were admitted, the trial court tried the case without jurisdiction.' [Emphasis added] Guided by this authority, it is evident that it is not enough for the certificate conferring jurisdiction and consent to be merely signed by the trial magistrate. What is required is for these documents to be formally recorded as admitted and included in the court records. However, this was not done in the instant case. 7 Apart from the aforementioned concerns, there are also deficiencies regarding the provision cited that confers jurisdiction to the subordinate court to hear economic cases. For the subordinate court to be clothed with requisite jurisdiction to try economic offences it needs both a certificate conferring jurisdiction issued under section 12 (3) of the EOCCA and consent issued under section 26 (2) of the EOCCA. Once both documents are issued the same must be endorsed and admitted by the subordinate court to form part of the record, section 12 (3) of the EOCCA, reads ; The Director of Public Prosecutions or any other 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 offence triable by the High court under this Act, be tried by such Court subordinate to the High Court as he may specify in the Certificate.' In the present case, the certificate conferring jurisdiction to the subordinate court to try economic offence was issued under section 12

- (2) of the EOCCA contrary to the dictates of the law. In the eyes of the law, there was no certificate conferring jurisdiction to try the appellant before the trial court. As such it cannot be said the court tried the case with prerequisite jurisdiction. 8 For all that has been discussed above, the court is of the considered view that there is no valid certificate conferring jurisdiction to the trial court to try the charge which was facing the appellant, and failure to observe the proper procedure for receiving and admitting both consent and certificate conferring jurisdiction the trial court tried the case without jurisdiction therefore both the proceedings and judgement are vitiated. For this reason, therefore, since there was no certificate authorising the trial court to try the case I hereby proceed to nullify the trial court proceedings and judgement in Criminal Case No. 15 of 2021 of Masasi District at Masasi, quash the conviction, and set aside sentences. In this situation what should be done? The state attorney prayed for an order of retrial with which the appellant being a

layperson had no objection to it. Circumstances under which an order of retrial can be made have been stated in the case of Fatehali Manii V Republic, that; V/7 general, a retrial may be ordered only where the original trial was illegal or defective: it will be not ordered where the conviction is set aside because of the insufficiency of evidence for the purpose of enabling the prosecution to fill in gaps in its evidence by the first trial. Even where a conviction is vitiated by mistake of the trial court for which the prosecution is not to be blamed. 9 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 it.' After considering the circumstances of this case, particularly noting that the court was never granted jurisdiction to hear this matter, the court finds that an order for retrial would not serve the interests of justice as required. Consequently, I hereby allow the appeal and order the immediate release of the appellant from custody unless lawfully held for other just cause. Nevertheless, since this court has nullified the proceedings and judgment of the trial court in Criminal Case No. 15 of 2021 of Masasi District at Masasi, and considering that one Yusuph Hamis Makuti, who was the 2nd accused in the said case, was also convicted and sentenced in this case, I also order for his immediate release unless lawfully held. Had it not been for the issue of jurisdiction that led to this appeal being allowed, then I would not have been required to order Yusuph's release as well. It is so ordered. Dated at Mtwara this 19th March 2024. M.B. MPAZE JUDGE 4' * 4 ' 10 Court: Judgment delivered in Mtwara on this 19th day of March 2024 in the presence of the appellant and Mr. Edson Laurence Mwapili State Attorney. M.B. MPAZE JUDGE 19/3/2024 11

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