

TANZANIA / JUDGMENT

Petro Misana Judgment

COURT
TANZLII

DECIDED
29 November 2024

Source: media.tanzlii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE SUB-REGISTRY OF
MWANZA AT MWANZA CRIMINAL APPEAL NO. 22455 OF 2024 (Appeal from the decision of the
District Court of Ukerewe at Nansio (Hon. LA.Nyahega SRM) in Economic Case No. 02 of 2023)
PETRO MISANA MAJULA..... APPELLANT VERSUS THE REPUBLIC
..... RESPONDENT

JUDGMENT

21st and 29th November 2024 CHUMA, J. The Appellant was arraigned with counts in the District Court of Ukerewe at Nansio facing two counts of offences. The first count is Embezzlement and Misappropriation contrary to section 28 (1) (3) of the Prevention and Combating of Corruption Act, Cap 329 R.E 2022 read together with Paragraph 21 of the First Schedule to, and section 57 (1) and 60 (2) (3) both of the Economic and Organized Crime Control Act Cap 200 R.E 2022. The second count is abuse of position contrary to section 31 of the Prevention and Combating of Corruption Act Cap 329 R.E 2022 read together with Paragraph 21 of the First Schedule to, and section 57 (1) and 60 (2) both of the Economic and Organized Crime Control Act Cap 200 R.E 2022. The appellant denied the offence against him however at 1 the end of the trial he was convicted and sentenced to serve 20 years jail term. The appellant preferred this appeal after being quite uncomfortable with the decision of the trial court in both conviction and sentence fronting about six grounds of appeal which during the hearing however Mr. Amri Linus condensed to two grounds. In this appeal, the appellant enjoyed the legal service of Mr. Amri Linus Learned counsel while Ms. Matha Mtiti, Mr. Ngussa, and Mr. Maleo State Attorneys appeared for the Republic. In the course of preparing this judgment, I did encounter a crucial point of law regarding the validity of consent issued by the Regional Prosecution officer (RPO) under section 26(1) instead of section 26(2) of the Economic and Organized Crime Control Act Cap 200(EOCCA) and its way forward. Since this point was raised by the court on 21st November, 2024 I invited the parties to give their insights on it. Arguing for the appellant Mr. Amri Linus advocate stated that, section 26(1) invoked by the RPO was wrongly used because the cited provision is under the mandate of DPP and not RPO. In this matter, the consent was issued by Ms. Bibiana Kileo who ought to invoke section 26(2) off EOCCA. The Court of Appeal in the case of Mwita Muhere Vs. R 2 Criminal Appeal No. 340 of 2020 on pages 13 and 14. The court discussed it in detail and held that the power of DPP should not be delegated. On the way forward, the Court of Appeal on page 15 declined to order a retrial on the ground that ordering so would make the prosecution fill gaps in

their case and acquitted and released the appellant. In the case of Nkwabi Nila @Limbu Vs. R Criminal Appeal No. 26 of 2021. On page 5 the court had a similar view with the above findings on the powers of DPP as far as issuing consent is concerned. On what proper order to make in circumstance the Court of Appeal allowed the appeal by nullifying the proceedings of the lower court and released the appellant. See also the case of Marwa Chacha Gekondo Vs. R Cr. Appeal No. 463 of 2020. And that of Sila Sila Chacha & Two Others Vs. Republic Criminal Appeal No. 44, 45 and 46 of 2021 on pages 5, 6, 7, and 8. Maganye Senteu V R Cr Appeal No. 254 of 2024 on page 10, Amos Nyakiha Vs. R Cr. Appeal No. 42 of 2021 on pages 1 to 6. James Siluli @Mwita Vs. R Cr. Appeal No. 24 of 2021 on pages 10 to 12 and 16. Mbaraka G Mwaga @Kalumbete Vs. R Cr. Appeal No 211 of 2021. In all those cases retrial order was not issued but rather allowed the appeal and released the appellants. 3 He concluded his submission by arguing that since in this case, the consent was wrongly issued as per the above-cited cases rendering the lower court proceedings nullity, he prayed this court quash the lower court proceedings, set aside the conviction and sentence, and release the appellant. In response, Mr. Ngussa SA contended that signing the consent by RPO under section 26(1) does not prejudice the appellant. The purpose of consent is to empower the court with jurisdiction to entertain the matter. And since the consent is there only that it was signed by RPO does not take away the court's jurisdiction. The trial court had power by consent of DPP which was issued by RPO who has been mandated under GN No. 496 H of 2021 through delegation. See Regulation No 3(4). The issue here is the existence of consent which was issued and signed by RPO that can be cured by section 388 of CPA. In the case of Shamimu Omary Mwasha & Another Vs. R A Consolidated Criminal Appeal No. 173 and 182 of 2021 delivered in 2024 on pages 26 to 28. The court of appeal discussed the issue of endorsement of the consent and found that non-endorsement is an error that can be cured by section 388 of CPA. The remedy provided there was either to order a retrial or any other order the court would find proper and not to acquit the appellant. In this case, 4 the conviction was upheld because the appellant was not prejudiced by the omission to endorse the consent. The cited case by the appellant is an outdated case, unlike his cited case which in his view is a recent one. Mr. Maleo SA on the other hand subscribed to the submission of Mr. Ngussa with the addition that the issue is whether the impugned consent was lawfully issued. Section 26(1) is a delegated power to RPOs to endorse consent on behalf of the DPP. The delegated power in issue is similar to the power of DPP. The present consent was signed by Ms. Kileo (RPO) under the GN cited above By Mr. Ngussa SA. But section 26 in general deals with issuing consent which has been mentioned in the present consent. The omission of a subsection cannot do away with or affect the meaning and essence of the whole section. Such omission is curable and never prejudiced the appellant. He prayed this consent be considered valid as is curable under section 388 of CPA. In his rejoinder, Mr. Linus' advocate reiterated his submission in chief and as per Ms. Maleo appears to admit that the provision was wrongly applied. The republic did not explain the difference in the use of section 26(1) and (2) and the anomaly cannot be cured under section 388 of CPA. The powers of the DPP under section 26(1) are solely to the DPP and are non-delegable to any other person or officer. 5 But subsection 2 is what mandates other officers to act and or issue consent. In the case of Shamim cited by Mr. Ngussa SA is not applicable here because in that case the consent was not endorsed by the DPP himself and is a case of the High Court hence distinguishable here. The

court of appeals in the cited cases has already given directives that fit the present case. The republic admits that the provision was wrongly applied or invoked only that the same are curable under section 38. He prayed this court to quash the lower court proceedings, set aside the conviction and sentence, and release the appellant. Having heard the rival submission of the parties, the issue before this court for determination is whether the instant appeal is or not meritable. Before determining this appeal on merit I feel compelled to determine first the raised pertinent issue on whether the issued consent by Regional Prosecution Officer under section 26(1) of EOCCA was or not valid. It is a settled position of law that, the power of the Court to entertain economic offences has been conferred to the Corruption and Economic Crimes Division of the High Court under section 3(3) of the EOCCA, but the subordinate courts are also empowered to try such offences if the DPP or any State Attorney duly authorized by the DPP directs by certificate under his hand that it should be tried by such subordinate court. The law also states that, for a trial to commence at the respective subordinate court, there must be a consent from the DPP under section 26(1) of the EOCCA or an officer subordinate to the DPP under section 26(2) of the EOCCA. The referred section 26 reads thus; "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 Prosecution.

- (2) The Director of Public Prosecutions shall establish and maintain a system whereby the process of seeking and obtaining his consent for prosecutions shall require the consent of the Director of Public Prosecutions in person and those 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 specific instructions". In the instant case, the consent was issued under section 26(1) by the Regional Prosecution Officer instead of the DPP. This was a serious irregularity as the power under section 26(1) is vested solely to the DPP 7 which cannot be delegated as rightly argued by Mr .Amri Linus advocate for the appellant. This position was held in a number of cases including the case of Mwita Muhere Vs. R Criminal Appeal No 340 of 2020 on pages 13 and 14, Peter Kongori Maliwa & 4 Others Vs. The Republic Criminal Appeal No. 253 of 2020, Amri Ally Shaban & Another Vs. The Republic Criminal Appeal No. 155B of 2023. From the above-cited provision of the law and authorities, it is amply clear that the trial court entertained the case before it without jurisdiction as the consent was invalid. It is a cardinal principle of law that, any decision reached by any court without jurisdiction is a nullity and there is a plethora of authorities on this issue including the case of Fanuel Mantiri Ng'unda Vs. Herman Mantiri Ng'unda and 20 Others, Civil Appeal No. 8 of 1995 (unreported) the Court of Appeal observed thus; "The question of jurisdiction for any court is basic, it goes to the very root of the authority of the court to adjudicate upon cases of different nature ... The question of jurisdiction is so fundamental that courts must as a matter of practice on the face of it be certain and assured of their jurisdictional position at the commencement of the trial... It is risky and unsafe for the court to proceed with the trial of a case on the 8 assumption that the court has jurisdiction to adjudicate upon the case. " In the other case of Jumanne Leonard Naqana @ Azori Leonard Nagana & Another Vs. The Republic, Criminal Appeal No. 515 of 2019 Court of

Appeal of Tanzania at Musoma (unreported) it was observed thus: "The fate which befalls the proceedings and a decision made without jurisdiction is a nullity. Even where a court decides to exercise a jurisdiction which it does not possess, its decision amounts to nothing". A similar view was held in the case of CRDB Bank PLC Vs. Lusekelo Mwakapala, Civil Appeal No. 143 of 2021 where the court held that; "It is worth noting that, the question of jurisdiction is crucial and must be determined by the court/ tribunal at the earliest opportunity. Jurisdiction is everything without which a court has no power to determine the dispute before it... Generally, a court is barred to entertain a matter in which it has no jurisdiction" The Court of Appeal of Kenya in the case of Owners of Motor Vessel Lillian Vs. Caltex Oil Kenya Limited (1989) KLR the court inter-alia held through persuasively that: - - : 9 "Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing." With the aid of the above authorities to the instant circumstance and having found that the consent of the DPP in the case at hand was invalid, it follows that the appellant was wrongly prosecuted before the trial court as rightly submitted by Mr. Amri Linus the learned advocate for the appellant. This fact was however not a stance of the republic as the learned Attorneys Mr. Ngussa, Mr. Maleo and Ms. Martha had a different view that the anomaly pointed out is curable under section 388 of CPA. I distance myself from their stand for being out of context as the defect cannot be cured under section 388 as it goes to the root cause of the matter. I then nullify the trial court proceedings, quash the conviction, and set aside the sentence imposed on the appellant. The above verdict takes me to another apposite issue on what proper order to make after quashing proceedings and setting aside conviction and sentence. On one hand, I subscribe to the submission of Mr. Linus that retrial is normally ordered where the justice demands so as it was held in the 10 case of Fatahali Manji Vs. The Republic [1966] E.A.343 in this case it was held that: - "A retrial will be ordered only where 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". Going through the entire evidence which I hesitate to reveal at this stage for the obvious reason of favoring either of the parties, I found myself unable to order otherwise than ordering a retrial because the trial was tainted with serious irregularity touching the jurisdiction of the court which in my view will serve the best interest of justice to both parties of this case. In the light of the foregoing, I order retrial before another Magistrate with requisite jurisdiction. I so order. DATED at MWANZA this 29th day of November, 2024. W.M. CHUMA JUDGE 11 This judgment delivered in court virtually in attendance of Mr. Amri Linus advocate for the appellant, the appellant and Ms. Martha State Attorney for the republic this 29th day of November, 2024. C. KISONGO DEPUTY REGISTRAR 12

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE	https://media.tanzlii.org/media/judgment/323192/source_file/42e73763ad093901/Petro_Misana_-Judgment.pdf
CASE PAGE	https://chat.esheria.ai/case-law/tanzania/petro-misana-majula-v-the-republic-embezzlement-tanzlii-2024--6a3ea5243b1caa9129819eef

Prepared on 13 October 2026 · Esheria