

TANZANIA / JUDGMENT

salum so saad rashid vs the director of public prosecutions dpp 2023 tzca 17737 6 october 2023

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6 October 2023

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IN THE COURT OF APPEAL OF TANZANIA AT SUMBAWANGA (CORAM: WAMBALI, J.A.. KENTE, 3.A. And MURUKE, J.A.1 CRIMINAL APPEAL NO. 502 OF 2019 SALUM S/O SAAD ©RASHIDIAPPELLANT VERSUS THE DIRECTOR OF PUBLIC PROSECUTIONS (DPP) RESPONDENT (Appeal from the Decision of High Court of Tanzania at Sumbawanga) (Mrango,J) dated the 16th day of September, 2019 in Criminal Appeal No. 51 of 2019 JUDGMENT OF THE COURT 25n September & 6-h October, 2023 MURUKE. 3.A.: The appellant, Salum Saad @ Rashid, together with two others were charged before the Resident Magistrate's Court of Rukwa at Sumbawanga, in Economic Case No. 9 of 2017. The first count which was for all the accused persons, related to the offence of unlawful possession of fire arms without license contrary to section 20 (1) (a) and (b) and section 20 (2) of Fire Arms and Ammunitions Control Act No. 2 of 2015. The second count for the first and second accused persons related to unlawful possession of ammunition without license contrary to section 21(a) and (b) of the Fire Arms and Ammunition Control Act No. 2 of 2015 read together with paragraph 31 of the First Schedule, and sections 57 and 60 (2) of the Economic and Organized Crimes Control Act, Cap 200, R.E 2002 [now R.E 2022], (the EOCCA). The third count which was for the first and second accused persons related to unlawful possession of Government Trophies contrary to section 86(1) and (2) (c) 11 of the Wildlife Conservation Act [Cap. 283] read together with paragraph 14(d) of the First Schedule and sections 57 (1) and 60 (2) of the EOCCA. In short, the substance of the prosecution evidence was that, on 13th September, 2017, the appellant was brought to Kibaoni police station, Mlele District by the National Park Rangers where they met DC James, (PW1) who was on duty. The purpose of the visit was to inform the police about the appellant's intention to surrender a fire arm which was in his possession illegally, alleged to have been kept at Mi rumba Village. Therefore, while in the company of PW l and the said Game Rangers, the appellant took them to Mirumba Village to collect the said fire arm. At Mirumba Village, they met the Village Executive Officer (VEO), Ladislaus Munguajua (PW2) and informed him the purpose of the visit. While there, the appellant informed them that the said firearm was at Machete Viillage. Thus, they all headed to Machete Village where they first met the VEO, one Joyce Misala (PW3) who identified the appellant and they together went to his house. At the

appellant's house, they conducted search and found a submachine gun (SMG) kept under the mattress, 10 kgs of warthog meat and 31 ammunitions. After seizure of all the items, the appellant (DW1-), PW1, PW2 and PW3 signed the Certificate of Seizure. The appellant and his co accused were taken to the Police Station and later on charged in court. Before the trial court, the appellant and other accused persons denied the charges. To support the case in respect of the three counts, the prosecution summoned eight witnesses, namely; Detective Corporal James (PW1), Radislaus Munguajua (PW2), Joyce Misala (PW3), Deogratius Kayera (PW4), WP Detective Constable Rehema (PW5), D. 8841 Detective Surgent Felix (PW6), F. 3624 Detective Corporal Bahati (PW7) and Rarmadhani Msafiri (PW8). In addition, they tendered the following exhibits namely: a Caution statement of Flora Paulo Kilongozi (exhibit P5), Certificate of Seizure and Inventory (exhibit P7), a document called a Chain of Custody (exhibit P3), a Certificate of Identification of Trophy report (exhibit P4), Search order (exhibit P1), One SMG No.35082311, 31 ammunitions and one magazine (exhibit P-2) and cautioned statement of the appellant (exhibit P6). After closure of the prosecution case, the trial court found the 2nd and the 3rd accused to have no case to answer, hence they were acquitted. The appellant defended himself testifying that, he was at the Resident Magistrate's Court of Katavi at Mpanda and was arrested at around 10.00 hours by Game Officers and taken to different places for searching for the gun. The appellant disputed to have been found with exhibits tendered by prosecution for the reason that, the game rangers said to have arrested him did not testify. He also insisted that, those who were said to have witnessed the search were not his neighbours at Machete Village, including PW2, the VEO of Milumba Village. Basically, he exonerated himself from the charges levelled against him. In its judgment, the trial court found the appellant guilty of all the three counts, convicted and sentenced him to serve a custodial sentence of twenty years for each count. The said sentences were ordered to run concurrently. The appellant was dissatisfied with the decision of the trial court, but he unsuccessfully appealed to the High Court at Sumbawanga, hence this second appeal. He has preferred the present appeal raising 4 grounds contained in the memorandum of appeal. At the hearing of the appeal, the appellant appeared in person, unrepresented while the respondent, the DPP was represented by Mr. Pascal Marungu learned Principal State Attorney assisted by Ms. Irene Mwabeza, learned State Attorney. When the appellant was called upon to argue his appeal, he opted to hear first the respondent's counsel reply to his ground of appeal and retained the right to rejoin later. However, hearing of the appeal could not proceed on the appellant's grounds as the respondent's counsel raised a point of law on the issue of jurisdiction of the trial court. Submitting on that point of law, Mr. Marungu argued that the trial court had no jurisdiction to hear and determine the appellant's case which comprised of economic offences on account of a defective consent to try the case. He submitted that, the consent to try the case was issued by the State Attorney Incharge purportedly under section 26(1) of the ECCOA instead of the DPP. He emphasized that the State Attorney Incharge is authorized to issue such consent under section 26(2) of the EOCCA. The learned Principal State Attorney thus invited us to invoke section 4(2) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2019] (the AJA) to quash the trial court's proceedings, nullify convictions and set aside the sentences imposed on the appellant. To support his prayer, he referred the Court's decision in the case of *Peter Kongori Maliwa & 4 Others*

- v. The Republic, (Criminal Appeal No.252 of 2020) [2023] TZCA 17350 (14 June 2023, TANZLII). It was Marungu's further submission that ordinarily, after nullifying the proceedings, quashing the convictions and setting aside the sentences, the remedy would have been to order for re-trial. However, he hesitated to make that prayer on the contention that there was no sufficient evidence to ground the appellant's convictions. The learned Principal State Attorney's stance was premised on the following reasons: first, before the trial court though the appellant was alleged to have been found in possession of government trophies, the same were destroyed in the absence of the appellant, contrary to the requirement of the law. He supported his position by relying on the case of Mohamed Juma @ Mpakama v. The Republic (Criminal Appeal No.385 of 2017) evidence of PW8. Second, there was no sufficient proof before the trial court that the appellant was found with the fire arms and ammunition as alleged by the prosecution, since the circumstances in which the search warrant was obtained and the manner in which search was conducted offended the requirement of the law. The learned Principal State Attorney therefore insisted that, a re-trial will not be in the interest of justice in the circumstances of this case. He thus urged the court to order for release of the appellant from custody forthwith. Responding to the arguments made by Mr. Marungu the appellant had no much to say apart from urging the Court to release him from custody because despite the shortfall in the prosecution case, he has been in prison since 2016 for the offences that he did not commit. According to the record of appeal and submissions made by the learned Principal State Attorney, there is no dispute that what the appellant and two others were facing at the trial court were Economic offences. Thus, the issue before us is whether the trial court had the jurisdiction to try the case. Section 3 (1) (2) (a) and (b) of the EOCCA, vests the jurisdiction to try economic offences in the High Court, Corruption and Economic Crimes Division. Nonetheless, section 12(3) of the EOCCA, gives power to the DPP or an officer authorized by him if he deems it necessary, to direct such cases to be tried by a subordinate court. For clarity it provides as follows: "12(3) 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 case involving an 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." However, a subordinate court cannot assume that jurisdiction without a consent from the DPP or an officer authorised by him as prescribed under section 26(1) and (2) of EOCCA. We deem it appropriate to reproduce the provision hereunder: "26(1) Subject to the provisions of this section, no trial in respect of economic offences 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 consenting to the prosecution of officers subordinate to him as he may specify acting in accordance with his general or special instructions 8 The provisions

of section 26(1) and (2) of the EOCCA leave no doubt that the consent must be issued by the DPP or the officer, as the case may be, before the accused is prosecuted at the subordinate court. However, it must be issued under the proper provision. In this case, it is beyond controversy that the consent to prosecute the appellant was issued and signed by the State Attorney Incharge under Section 26 (1) of the EOCCA instead of the DPP. The error committed by the State Attorney Incharge was fundamental because the power under Section 26 (1) of the EOCCA is vested in the DPP himself. Therefore, since the respective consent was not issued by the DPP, it could not be a sufficient authority for the subordinate court to try and determine the economic offences. At this juncture, we better reproduce the purported consent hereunder: CONSENT OF THE STATE ATTORNEY IN CHARGE I, Prosper M. Rwegerera State Attorney Incharge, Rukwa Region DO HEREBY in terms of Section 26(1) of the Economic and Organized Crime Act, [CAP 200 R.E] together with Government Notice No. 284 of 2014 the Economic Offences (Specification of offences Exercising Consent) Notice, do hereby CONSENT to prosecution of SALUM S/O SAAD @ RASHID, FLORA D/O PAULO and STEVEN S/O WILLIAM STAFANO @ BUNDALA for contravening the provisions sections 20(1)(a),(b) and section 20(2) of the Fire Arms and Ammunitions Control Act No.2 Of 2015, section 21(a) and (b) of the Fire Arms and Ammunitions Control Act No.2 of 2015 and section 86 (1) (2) (c) (ii) of the Wild Life Conservation Act No. 5 of 2009 read together with paragraph 14 (d) of the First Schedule to and section 57 (1) and 60 (2) of the Economic and Organized Crime Control Act, [Cap 200 R. E 2002] the particulars whereof are as stated in the charge sheet. Dated at Sumbawanga this 12th day of December, 2017 Sgd Prosper M, Rwegerera ST A TEA T TORNEY INCHARGE In this regard the purported consent could not have been an authority in the eyes of the law for the subordinate court to assume jurisdiction to try the appellant and other accused persons as it transpired because it was incurably defective. To emphasize this point, we wish to reiterate what the Court stated in the case of Peter Kongori Maliwa & 4 Others v. The Republic, (supra): "...in this case, consent was issued by the State Attorney Incharge instead of the DPP. That was a serious irregularity as the power to issue a consent under section 26(1) of the EOCCA is not delegable. It is absolutely vested in the DPP himself. As such, the consent under discussion having been issued by a person without mandate was incapable of authorizing the trial court to try the economic offences" In the circumstance, though the certificate conferring jurisdiction on the trial court was properly issued under section 12(3) of the EOCCA, since consent was not issued in accordance with the law, the trial court was deprived of the requisite jurisdiction to try the appellant. In the case of CRDB Bank PLG v. Lusekelo Mwakapala (Civil Appeal No. 143 of

- 2021) [2023] TZCA 17637 (22 September 2023, TANZLII), it was 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. Where a Court has no jurisdiction there would be no basis for a continuation of proceedings. Generally, a court is barred to entertain a matter in which it has no jurisdiction See also the cases of Aloyce James Kasawa v. William Mufungo

Mwangwa .& Another (Civil Reference 5 of 2018) [2021] TZCA -610 (22 October 2021, TANZLII), AloisI Hamsini Mchuwau & Another v. Ahamadi Hassani Liyamata (Criminal Appeal 583 of 2019) [2020] TZCA 1855 (19 November 2020, TANZLII), and Fanuei Mantiri Ng'unda

- v. Herman Mantiri Ng'unda & 2 Others [1995] T.L.R. 155. 11 In the circumstances, we agree with Mr. Marungu that lack of consent vitiated the trial court's proceedings and those of the first appellate court rendering them a nullity. Having made that finding, the issue for consideration is whether or not a retrial should be ordered, We have thoroughly scrutinized the material in the record of appeal. We have no hesitation to agree with the submission by the learned Principal State Attorney that, a retrial will occasion a miscarriage of justice to the appellant and thus, it will not in the interest of justice. Basically, the prosecution case was wanting on the following aspect. One, disposal of the alleged government trophy (10 kgs of warthog meat) in the absence of the appellant as evidenced by the inventory (exhibit P7) was against the requirement of the and rendered the exhibit worthless. Two, the doubt on whether the alleged gun and ammunition was found in possession of appellant is apparent. Three, the legality of the search warrant which was intended for Milumba Village but was finally used at Mashete Village. Moreover, search was conducted involving the VEO of Milumba Village PW2, while the items seized were allegedly found at Mashete Village. The defect rendered the search illegal. Thus, ordering retrial will likely give chance to the prosecution to reshape its case to achieve conviction. In the event, we accordingly invoke our revisional jurisdiction under section 4 (2) of the AJA, to revise and nullify the proceedings of the trial and first appellate courts, quash the convictions and set aside the sentences imposed on the appellant. Ultimately, we order the immediate release of the appellant unless held for a distinct lawful cause. DATED at SUMBAWANGA this 5th day of October, 2023. F. L. K. WAMBALI JUSTICE OF APPEAL P. M. KENTE JUSTICE OF APPEAL Z. G. MURUKE JUSTICE OF APPEAL The Judgment delivered this 06th day of October, 2023 in the presence of appellant in person and Ms. Marietha Augustine Maguta, learned State Attorney for the respondent/Republic is hereby certified as a true c o d v of the oriainal. GO U R ? 13

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Prepared on 13 October 2026 · Esheria