

TANZANIA / JUDGMENT

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IN THE COURT OF APPEAL OF TANZANIA AT MOSHI (CORAM; SEHEL. 3.A.. FIKIRINI, 3.A, And MLACHA. J.A^ CRIMINAL APPEAL NO. 30 OF 2022 SAMWEL MURWA..... APPELLANT VERSUS THE REPUBLIC RESPONDENT (Appeal from the decision of the High Court of Tanzania, at Moshi) (Banzi, 3.) Dated 30th day of November, 2021 in Economic Case No. 02 of 2021 JUDGMENT OF THE COURT 29th November & 3rd December, 2024 MLACHA. J.A.: The appellant, Sahnwel Murwa, a Kenyan national, was charged with Trafficking in Narcotic Drugs contrary to Section 15 (1) (a) and 3 (iii) of the Drugs Control and Enforcement Act, Cap. 95 R.E. 2019 (the DCEA) read together with paragraph 23 of the First Schedule to, and sections 57(1) and 60(2) of the Economic and Organized Crime Control Act, Cap 200 R. E. 2019 (the EOCCA) at the Corruption and Economic Crimes Division of the High Court of Tanzania, at Moshi, in Economic Case No. 2 of 2021. It was alleged that the appellant trafficked 259 Kilograms of Catha Edulis "Khat" commonly known as "Mirungi" on 19/8/2018 at Mnoa village within Mwanga District, Kilimanjaro Region. He was found guilty, convicted and sentenced to 27 years in jail. The Catha Edulis was confiscated to the Government of the United Republic of Tanzania and destroyed under the DCEA. Aggrieved by the conviction and sentence, the appellant has preferred an appeal to the Court. Briefly, the evidence of the prosecution was as follows. Inspector Daudi Kimashi (PW3) of Mwanga Police Station was on patrol at Mnoa village, along the Tanzania - Kenya border, on 19/8/2018 at 2:00 p.m. With him were DC Zephania (PW4), DC Linus and DC Lucas. While patrolling, they received a phone call from an informer who tipped them that someone had illicit drugs in the bush, within Mnoa village. They walked into the bush and found the appellant in possession of 7 sulphate bags. On search, they found fresh leaves which they suspected to be Catha Edulis,. PW3 filled a seizure certificate (Exhibit P6) which was signed by all people present including the appellant. They took the appellant to Mwanga Police station with the sulphate bags. PW3 handed the bags to CPL Mrome (PW5), the exhibit keeper. The later took them to the RCO's office at Moshi and handed them to DC Michael (PW2). PW2 kept them in the store until when they were brought before the trial court. Elias Mulima (PW1), a chemist from the Chief Government Chemist Laboratory Dar es Salaam, came to the RCO's office on 20/8/2018 and met PW2. He weighed the bags and established the weight. He also picked samples for forensic examination. Laboratory results showed that the 7 sulphate bags had Catha Edulis. The sulphate bags were received as exhibit during trial and marked P3, collectively. Other exhibits which were received at the trial were; the Sample Submission Form, the Government Laboratory Report, the Handling over Form and

Exhibit Register (exhibits PI, P2, P4 and P5, respectively). The appellant was the sole defence witness. His defence was that, while walking in the streets of Mnoa village on 19/8/2018, he was stopped by the police who demanded his entry permit to Tanzania as he is a Kenyan national. He told them that he had none. He added that both Kenyan and Tanzanian citizens were crossing the border freely to buy supplies under the neighborhood policy. The police declined his defence and took him to a car (Noah) which was parked nearby. The car had bags. They drove to Mwanga Police Station where he was accused of being in unlawful possession of Catha Edulis. He was beaten up and forced to confess. He was forced to sign on a blank paper by force. In essence, he denied to commit the crime. The trial judge was impressed by the evidence from the prosecution. The defence of the appellant could not inject any doubt in the prosecution case. The appellant was found guilty, convicted and sentenced as intimated above. The appellant lodged three memoranda of appeal which have a total of 16 grounds of appeal. The substantive memorandum of appeal lodged on 21/4/2022 has 7 grounds of appeal. The two supplementary memoranda of appeal lodged on 18/11/2024 and 20/11/2024, have one and seven grounds of appeal, respectively. For reasons which will be apparent in the course of this judgement, we will not reproduce all the grounds of appeal. We will only reproduce the ground which is in the memorandum of appeal lodged on 18/11/2024. It is paraphrased to read as under: "The trial court had no jurisdiction to hear the case as there was no valid consent of the Director of Public Prosecutions." The appellant appeared in person, unrepresented, whereas the respondent Republic was represented by Ms. Janet Sekule, Senior State Attorney, assisted by Ms. Tusaje Samwel, State Attorney. When the appellant was called to make his submission on the grounds of appeal, he opted for the respondent Republic to respond first to his grounds of appeal while retaining his right of rejoinder, if need be. On taking the floor, Ms. Samwel supported the appeal on ground one of the supplementary memorandum of appeal lodged on 18/11/2024. In her brief and focused submission, Ms. Samwel contended that the High Court did not have jurisdiction to hear the case because the consent of the Director of Public Prosecutions (the DPP) appearing at Page 19 of the record of appeal (the record) does not contain section 15 (1) (a) and (3) (iii) of the DCEA under which the appellant was charged. The learned counsel submitted that, paragraph 23 of the EOCCA make reference to 3 offences which could be committed under the DCEA. Thus, it is not known which offence was referred to. She contended further that, it was not enough to give consent to paragraph 23 of the First Schedule and sections 57 (1) and 60 (2) of the EOCCA alone without mentioning section 15 (1) (a) and 3 (iii) of the DCEA under which the appellant was charged with. She maintained that, failure to do so rendered the Court without jurisdiction. She urged the Court to nullify the proceedings, vacate and set aside the judgment and sentence imposed to the appellant. She relied on our decision in *Leonard Matacha Rhobi v. The Republic*, (Criminal Appeal No. 302 of 2022) [2024] T7CA 958 (2nd October, 2024: TanzLII) to support her stance. As to the way forward, Ms. Samwel beseeched us to order a retrial contending that the prosecution has good evidence; it will not use that chance to fill in gaps. The appellant being a layman did not have much to say in rejoinder. He urged the court to examine his grounds of appeal and set him free. We had ample time to examine the record and consider the submissions made by the parties. There is no doubt that the appellant was charged with an economic offence. The issue is whether the consent of the DPP, under section 26 (1) of EOCCA, was given to the High

Court prior to the hearing of the case. This takes us to the charge sheet and the consent appearing at page 19 of the record. The charge sheet presented in High Court on 12/11/2021, under which the appellant was charged, reads as follows: "CRIMINAL SESSIONS CASE NO. 2 OF 2021 REPUBLIC VERSUS SAMWELI S/O MURWA STATEMENT OF OFFENCE TRAFFICKING IN NARCOTIC DRUGS: Contrary to section 15(1) (a) and 3 (iii) of the Drugs Control and Enforcement Act [Cap 95, R.E. 2019] read together with paragraph 23 of the first schedule to and sections 57 (1) and 60 (2) of the Economic and Organized Crimes Control Act [Cap 200 R.E 2019] PARTICULARS OF OFFENCE SAMWELI S/O MURWA on 19th day of August, 2018 at Mnoa Villagewith in Mwanga District, Kilimanjaro Region, did traffick in Narcotic Drugs namely Catha Edulis "Khat" commonly known as "MIRUNGI" weighing 259 kilograms. Signed at Moshi this 12th day of November, 2021. STATE ATTORNEY" The consent of the DPP reads: "CONSENT OF THE DIRECTOR OF PUBLIC PROSECUTIONS" I, BISWALO EUTROPIUS KACHELE MGANGA, Director of Public Prosecutions, in terms of section 26 (1) of the Economic and Organized Crimes Control Act, [Cap 200 R.E. 200] DO HEREBY CONSENT to the prosecution of SAMWELI S/O MURWA to contravening the provisions of paragraph 23 of the First Schedule to, and section 57(1) and 60 (2) of the Economic and Organized Crimes Control Act, [Cap 200 R. E. 2019], the particulars of which are stated in the information." As it is apparent from the above excerpts, section 15 (1) (a) and 3 (iii) of the DCEA which appears in the statement of the offence of the charge sheet, does not appear in the Consent of the DPP. Simple logic will reveal that whereas the DPP consented to paragraph 23 of the First Schedule to and section 57(1) and 60 (2) of the EOCCA appearing in the Consent, there is no indication that he consented to section 15 (1) (a) and 3 (iii) of the DCEA under which the appellant was charged. It is obvious that he did not consent the appellant to be tried under the provisions of section 15 (1) (a) and 3 (iii) of the DCEA as mandatorily required by section 26 (1) of the EOCCA. Without the requisite consent of the DPP, the entire proceedings of the trial court were a nullity because they had no legs to stand on. It follows that the trial of the appellant which was based on sections 15 (1) (a) and 3 (iii) of the DCEA was done without jurisdiction. The omission vitiated the proceedings, judgment and the sentence which was imposed to the appellant. This was the import of our decision in Leonard Matacha Rhobi (*supra*) which followed our earlier decisions in Ghacha China Marungu

- v. Republic, (Criminal Appeal No. 364 of 2020) [2023] TZCA 17311 (5 June, 2023: TanzLII) and Peter Kongori Maliwa and Others v. R, (Criminal Appeal No. 252 of 2020) [2023] 7ZCA 17350 (14 June, 2023; TanzLII). The Court stated thus: "The consent of the DPP must be given in respect of the provisions of the information and stated specifically by making reference to the offence charged or else becomes useless rendering the court without jurisdiction to try the offence for want of consentthe trial of the appellant was not sanctioned by the consent of the DPP in terms of section 26 (1) of the EOCCA. The consequence of such omission is to vitiate the trial proceedings as the trial court acted without jurisdiction." [Emphasis supplied]. See also; Dilipkumar Maganbai Patel v. The Republic, (Criminal Appeal No. 270 of 2019) [2022] T2CA 477 (25th July, 2022; TanzLII), Jumanne Leonard Nagana @ Azori Leonard Nagana and another

- v. The Republic, (Criminal Appeal No. 515 of 2019) [2021] TZCA 650 (4th November, 2021; TanzLII), Mwanaharusi Salimu Mshahara v. The Republic, (Criminal Appeal No. 403 of 2022) [2024] TZCA 304 (6th May, 2024; TanzLII) and Omary Bakari @ Daud v. The Republic, (Criminal Appeal No. 52 of 2022) [2022] TZCA 254 (9th May, 2022; TanzLII) to mention a few. As to the way forward, as suggested by the learned State Attorney, we think, the remedy is to nullify the proceedings, set aside the judgment and sentence imposed on the appellant and order retrial upon getting a valid consent of the DPP. We order so. Meanwhile the appellant shall remain in remand custody pending his trial. DATED at MOSHI this 2nd day of December, 2024 B. M. A. SEHEL JUSTICE OF APPEAL P. S. FIKIRINI JUSTICE OF APPEAL L. M. MLACHA JUSTICE OF APPEAL The Judgment delivered this 3rd day of December, 2024 in the presence of the appellant in person and Ms. Ruth Emmanuel Kamola, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original. A. JLU PEP___ ISTRAR COURT OF APPEAL

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