IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA SUB-REGISTRY)
AT ARUSHA

CRIMINAL APPEAL NO. 156 OF 2022

(Originating from the Resident Magistrates' Court of Arusha, Economic Case No. 18 of 2020)

MASUDI MUSSA RAMADHANI ..... APPELLANT

Versus

THE REPUBLIC ..... RESPONDENT

JUDGMENT

15/03/2023 & 10/05/2023

GWAE, J.

Masudi Mussa Ramadhani, the appellant herein, has preferred this appeal in question to have the conviction and sentence imposed on him by the Resident Magistrates' Court of Arusha (hereinafter "the trial court") overturned.

In the trial court, the appellant was charged with two counts as follows: In the 1st count, he was charged with the offence of Unlawful Possession of Government Trophy, contrary to sections 86 (1) and (2)(c)(iii) of the Wildlife Conservation Act, No. 5 of 2009 (hereinafter "the WCA"), as amended by section 59 (a) and (b) of the Written Laws (Miscellaneous Amendments), (No. 2) Act No. 4 of 2016 read together

with paragraph 14 of the 1st schedule to, and Sections 57 (1) and 60 (2) both of the Economic and Organized Crimes Control Act, Cap 200 [R.E 2002] (hereinafter "the EOCCA"), as amended by Sections 16 (a) and (13) (b) respectively of the Written Laws (Miscellaneous Amendment) Act, No. 3 of 2016.

In the 2nd count, the appellant was charged with the offence of Unlawful Possession of Weapons in certain Circumstances contrary to section 103 of the WCA, read together with paragraph 14 of the 1st schedule to, and Sections 57 (1) and 60 (2) both of the EOCCA as amended by Sections 16 (a) and (13) (b) respectively of the Written Laws (Miscellaneous Amendment) Act, No. 3 of 2016. He pleaded not guilty to the charges.

After full trial, the trial magistrate was satisfied that, the charge in both counts against the appellant were proved to the required hilt. He was therefore convicted on both counts and sentenced to pay a fine of TZS 150,640,000/= or serve 20 years custodial term in respect of the first count. He was also sentenced to pay a fine of TZS 200,000/= or serve one (1) year custodial term in respect of the 2nd count. The custodial sentences were ordered to run concurrently.

The background facts of the case leading to this appeal as obtained from the trial court record goes as follows: On 29/01/2020, at 14:00 hrs,

Ngerai Salonike (PW2) was on routine patrol at Olkidingii Makame Conservation area with his fellow wildlife officers. They saw signs of motorcycle tyres and decided to set a trap by putting up a barrier. Soon thereafter, two motorcycles ridden by two persons arrived at. One of the riders disembarked and managed to escape.

The appellant who was in another motorbike was arrested. When searched he was found in possession of eland meat with skin and four necks, two knives, one black torch, one locally made gun (gobore), three marbles, gunpowder in a blue plastic bottle and two motorcycles. At 11:15PM, PW1 filled in the certificate of seizure which was signed by him, and the appellant by his thumb print. The seizure certificate was admitted as exhibit P4. It was rainy, therefore it took them long time to reach Arusha. On 31/01/2020, the appellant was taken to Arusha Central Police Station where he was handed to F.7335 CPL. Evans (PW1). The eland meat with skin and four necks, two knives, one torch, the gun (gobore), three marbles, gunpowder in a bottle and the motorcycles were as well handed to PW1. The handing over was through signing a special form prepared by PW1, which the appellant also signed through his thumbprint. The handover form was admitted as PE1. The gun, three marbles, gun powder in a plastic bottle, two knives and one torch were collectively

admitted and marked as PE2 collectively. The two motorcycles were admitted as PE3.

On the same day, PW1 handed to Emmanuel Daniel Pius (PW3), the eland meat with four necks for identification and valuation purposes. The handover was through signing exhibit P1. PW3 identified the meat to be an eland due to its distinctive features. He valued one eland at USD 1700, multiplying by 4 killed elands (due to the four necks), which gave a total of USD 6800. He converted the same to TZS which was at the exchange rate of TZS 2300 as on that day, which tallied to a total of TZS 15, 640, 000/=. PW3 filled in the trophy valuation report, signed and stamped it. He also prepared an inventory of the meat which was decaying and took the same before Hon. Nguvava RM, seeking disposal order. The Resident Magistrate, PW3 and the appellant, signed the inventory form. The order disposing of the meat through burial was issued and complied with. The trophy valuation report and the inventory forms were admitted as exhibit P5 collectively.

After closure of the prosecution case, the trial magistrate found that a prima facie case was made against the appellant requiring him to enter his defence.

In his affirmed defence, the appellant (DW1) generally denied involvement in the commission of the offence. His defence was basically

pinpointing the shortfalls in the prosecution evidence. He denied to be found in unlawful possession of the prosecution exhibits adding that he signed the documents because he was forced through torture. He further stated that he was arrested on 27/01/2020, severely tortured and remanded in police custody for 16 days before he was arraigned in the trial court. According to DW1, he was arrested at Lengati-Kiteto. He denied to be involved when the inventory was being destroyed. He also faulted the seizure certificate because it was signed without independent witnesses.

As intimated earlier, the trial court was convinced that, the charge against the appellant was proved to the required standard. Unamused by both convictions and sentences meted on him, the appellant has preferred this appeal based on the following grounds of appeal:

1. *That, the trial court erred both in law and fact by convicting the appellant while the prosecution side failed to prove their case beyond reasonable doubts;*
2. *That, the trial court erred in law by convicting the appellant relying on a seizure certificate which was wrongly procured;*
3. *That, the trial court erred in law by convicting the appellant on identification which was done at night;*
4. *That, the trial court erred both in law and fact by convicting the appellant on a case which was poorly prosecuted; and*

5. *That, the trial court erred both in law and in fact by failing to properly analyse the evidence given hence reach to erroneous decision.*

Based on the foregoing grounds of appeal, the appellant prays that the appeal be allowed by quashing the conviction and setting aside the sentence imposed on him, letting him free.

At the hearing of the appeal, the appellant was represented by Ms. Betty Sanare, the learned advocate while the respondent Republic had services of Ms. Alice Mtenga, the learned State Attorney. Hearing of the appeal proceeded *viva voce*.

In her submission in support of the appeal, Ms Sanare dropped the 3rd ground. She also prayed to substitute that ground with a new ground that the trial court had no jurisdiction to entertain the matter. Submitting in support of grounds 1, 4 and 5 jointly, the appellant's counsel stated that, the destruction of the trophies was done without involving the appellant. She asserted that in the trial court, the appellant complained on such irregularity as reflected at pages 30-33 of the typed proceedings. She accounted that it was mandatorily required to involve the appellant in the disposal of the inventory as laid down by the Court of Appeal in the case of **Mohamed Juma vs Republic**, Criminal Appeal No. 385 of 2017 (unreported).

It was her further complaint that section 38(3) of the CPA was not complied with for failure to issue receipt,] adding that, the prosecution evidence fell short to specify the types of trophies which were in unlawful possession of the appellant and that other person who escaped before being apprehended.

In the new raised ground of appeal, Ms. Sanare fortified that the trial court was not clothed with jurisdiction to entertain the case because the appellant was arrested in Kiteto but was tried and prosecuted at Arusha contravening section 29 (3) of EOCCA and section 113 (2) WCA. She added that the trial court was not issued with consent by the DPP pursuant to section 26 of EOCCA referring the case of **John Julius Martine & Another vs Republic**, Criminal Appeal No. 22 of 2020 (unreported), which held that, endorsement and admission of the consent were mandatory requirement. She concluded by praying that this appeal be allowed.

On her part, Ms. Mtenga supported the appellant's conviction and sentence. She averred that disposal of the inventory was done before a Resident Magistrate and was done in the presence of the appellant who signed by thumbprint in the inventory form. She admitted that it is true that the appellant raised the objection but it was not based on point of

law. Further note is that the appellant did not pose any question relating to destruction of the trophies.

Regarding non-compliance of section 38 (3) of the CPA on failure to issue receipt, the learned State Attorney contended that, there is no need of issuance of receipt once certificate of seizure is issued. She based her argument on the case of **Papaa and Another vs. Republic,** Criminal Appeal No. 47 of 2020 (unreported). Ms Mtenga fortified that according to the evidence on record, all the trophies were found in possession of the appellant.

Pertaining to the issue of the jurisdiction, she conceded that the appellant was arrested in Kiteto District in Manyara Region, but she was quick to point out that the defect is curable under section 388 of the Criminal Procedure Act, Cap 20 R.E, 2019.

On the omission to endorse the consent and certificate, the learned State Attorney admitted the complained irregularity however she argued that the same is cured provided that the prosecutor prayed to file the DPP's consent. She added that the referred case of **John Julius Martine** (supra) is distinguishable to the circumstances of the appeal under consideration.

In a brief rejoinder, Ms Sanare referred page 25 of the typed proceedings, stating that the person who supervised the destruction of

the inventory was not called on to testify as a material witness. She maintained that there was a need to admit DPP's consent and certificate by endorsing such documents. In her view, there are doubts whether it was the appellant who was found in possession of the trophies or the other person who escaped. She concluded that, the prosecution evidence was not watertight.

I have carefully gone through the trial court record, the grounds of appeal and the arguments by both counsel for the parties. I will determine the appeal based on the modality applied by counsel for the parties while arguing the same.

The appellant's first complaint is that the trophies were disposed without his involvement. On her part, the learned State Attorney fortified that the inventory was signed by the magistrate in the presence of the appellant who also signed by his thumbprint.

Ordinarily, in the case of perishable items, an inventory form may be prepared, filled and eventually tendered but the same must have been ordered by a magistrate to be disposed of before the hearing of the case after being taken before him in the presence of the accused person. That is in accordance with paragraph 25 of the Police General Orders No. 229, which provides:

> *"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."

The same requirement was judicially stressed in **Michael Gabriel vs. The Republic,** Criminal Appeal No. 240 of 2017 (Unreported) where the Court of Appeal stated;

"Normally, a valuation report or an inventory may be tendered in the case of perishable items but the same must have been ordered by the magistrate to be disposed of before the hearing of the case after being taken before him in the presence of the accused person."

In the instant appeal, the record shows that, on 31/01/2020, Emmanuel Daniel Pius (PW3) took the inventory to the magistrate at the Resident magistrates' Court of Arusha seeking an order for disposal of the trophies (meat, skin and four necks) which were decaying. The inventory was signed by the magistrate and an order to dispose the same was issued. In his evidence, PW3 accounted that while going to the court to seek the disposal order, was accompanied by the appellant and another person by the name of Unuku.

The record shows that while testifying, PW3 who prepared the trophy and took the same to the learned magistrate seeking for disposal

order was accompanied by two person, the appellant inclusive. At page 29 of the trial court record, PW3 had the following to say while testifying:

> *"I then went to the court with inventory form praying to destroy the trophy as it had decayed, we did so in front of Honourable Nguvava and we buried it. We went to the court me, Unuku and accused who signed the trophy with a thumbprint. ... I returned the accused to the custody. The accused is middle in height not white nor black, he is that one there (while pointing at the accused."*

Close scanning of PE5, (the inventory form) it shows that the appellant was involved in the destruction as he is noted to have signed by thumbprint in that form. The form was signed by the magistrate who ordered disposal of the trophies and stamped with seal from the Resident Magistrates' Court of Arusha. As gleaned from PW3's evidence, he went to the Resident Magistrates' Court with the appellant and another person he named as Unuku.

It is vividly clear as corrected asserted by the appellant's counsel that, when PW3 sought to tender the inventory form, the appellant objected on the account that he was not involved. However, his objection was overruled based on the fact that it was not based on law rather facts. The record also shows that when given opportunity to cross-examine PW3

on the validity of the inventory form and his involvement in the trophy disposal, PW3 accounted that the appellant signed by thumbprint because he said he was not capable to write. The case of **Mohamed Juma @ Mpakama vs. Republic** (supra) relied on by the appellant's counsel, is distinguishable because facts of that case showed that the accused in that case was not taken to the magistrate when the inventory was taken to the Primary court Magistrate for disposal. Thus, the complaint that the appellant was not involved in the destruction of the inventory is without any basis.

The next complaint on the alleged non-compliance with section 38 (3) of the CPA because there was no receipt issued in respect of the seized trophies. It is true that after arresting the appellant and seizing trophies as well as PE3, Ngerai Salonike (PW2) who was the arresting officer, did not issue the appellant with a receipt in terms of section 38 (3) of the CPA which requires issuance of receipt acknowledging seized items from the accused person. Despite the fact that there was no issuance of such receipt, seizure certificate indicating the seized items was issued by PW2, and the same was admitted as PE4. The appellant through thumbprint signed PE4. Thus, since certificate of seizure was issued, the mandatory requirement of issuance of receipt can easily be dispensed with. The Court of Appeal in numerous decisions including the case of **Ramadhan Idd**

Mchafu vs Republic, Criminal Appeal No. 328 of 2019 (unreported) held:

> *"...absence of the official receipt is inconsequential in establishing that the appellant was found in possession of the Government trophy. The omission to issue a receipt was not therefore fatal."*

The same position was reiterated in the case of **Gitabeka Giyaya vs Republic**, Criminal Appeal No. 44 of 2020 (unreported), where it was underscored that:

> *"In the case the subject of this appeal, the appellant signed a certificate of seizure and there is evidence from PW1 and PW2 that he was found in possession of the elephant tusks during a transaction in which PW2 and one Aloyce Mtui posed as prospective buyers of the same. Given these circumstances, and in the light of the authorities referred to above, we find the omission to issue a receipt in terms of sections 38 (3) of the CPA or 22 (3) of Cap. 200 not fatal, it is curable under the provisions of section 388 of the CPA."*

In the appeal under consideration, the evidence reveals that the appellant was found in unlawful possession of government trophies, which were later discovered to be eland meat. He was also found in possession of a gun locally made, two motorbikes, torch and marbles. PW2 who arrested the appellant dully prepared and signed the certificate of seizure

(exhibit P4) signed by the appellant through his thumbprint. That being the position, coupled with the oral evidence of PW1 that the appellant was found in possession of the items listed in exhibit P4, I entirely agree with Ms. Mtenga that, the omission to issue receipt in terms of section 38 (3) of the CPA, is curable under section 388 (1) of the CPA. This complaint is also dismissed.

Another appellant's complaint on the prosecution evidence, alleged absence of specification of the types of the trophies unlawful found in the appellant's possession. It was stated by PW1 that, both the appellant and the other person who escaped were arrested in possession of government trophies. The same were retrieved from the appellant after the other person had escaped. As far as both of them were in possession of government trophies and hunting equipments, the complaint on the specificity of the trophies found in the appellant's possession finds no legs to stand. This position was ascertained by the Court of Appeal while faced with similar scenario in the case of **Papaa Olesikaladai @ Lendemu and Another vs Republic** (supra), where the Court found that:

> *"... In the circumstances, we fail to comprehend the appellants' complaint that the witness did not tell which elephant tusks were found in the appellant. Since both of them were found in possession of the elephant tusks, this complaint is without merit and is therefore dismissed."*

In the appeal under reflexion, since both the appellant and the other person allegedly escaped were found in unlawful possession of the government trophies, the complaint is found devoid of merits.

The last ground of appeal (additional ground) relating to the trial court's jurisdiction. The appellant's counsel has argued that the trial court had no jurisdiction to entertain the case on two folds.

Firstly, Ms. Sanare challenged that, the appellant was tried by the subordinate court without there being consent of the DPP as per section 26 of the EOCCA because the consent was not admitted or endorsed by the trial court. Section 26 (1) of the EOCCA, states as follows:

> *"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."*

Section 26 (2) of the EOCCA, provides mandate to the DPP to delegate his powers to his subordinates in terms of sub section (2) which states:

> *"(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."

From the above set of provisions, economic offences are triable by subordinate courts only after certificate conferring jurisdiction and consent of the DPP are issued. The Court of Appeal of Tanzania has consistently stressed this legal position in innumerable decisions including **Jumanne Leonard Nagana @ Azori Leonard Nagana and Another vs. Republic**, Criminal Appeal No. 515 of 2019 (unreported), where it was stated:

"The consent of the DPP must be given before any trial of an economic offence can proceed, this is in accordance with section 26 (1) and (2) of the EOCCA. A subordinate court could only be vested with jurisdiction to try an economic offence if conferred jurisdiction under section 12 (3) of the EOCCA, when the DPP issues a certificate that any offence triable by the High Court be tried by a court subordinate to the High Court."

The record shows that both certificate of the Prosecuting Attorney In-Charge of Arusha conferring jurisdiction on the trial court to try economic offence and consent of the Prosecuting Attorney In charge were

issued on 27/08/2021 as featured in the court record. However, it is settled principle that, mere presence of such documents in the court file without endorsement or acknowledgment of their receipt by the trial magistrate cannot legally confer jurisdiction on the subordinate court. This position was laid down in the case of **John Julius Martin and Another vs Republic**, Criminal Appeal No. 42 of 2020 (unreported), in which the Court held:

> *"Respectfully, we do not agree with her, because that is not the position maintained by this Court. In Maganzo Zelamoshi @ Nyanzomola v. 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 them on record."*

The trial court record shows that on 27/08/2021, the prosecuting State Attorney presented before the trial court both certificate to confer jurisdiction on the trial court to try economic offences and consent of the DPP. For easy of reference, let the record of that date speak for itself:

> *"Date: 27/08/2021*
> *Coram: H. G. Mhenga, RM*
> *Prosecution: Ms. Upendo Shemkole, State Attorney*
> *Accused: Present*
> *Court Clerk: Camila*
> ***State Attorney**: For mention, Investigation is complete. I filed before the court, consent of the Prosecuting Attorney In charge and certificate conferring on this court jurisdiction to try this case. I pray to read the charge to the accused person*
> ***Court:** The charge is read over and explained to the accused person who is asked to plead thereto:*
> ***Accused's plea**:*
> *1st Count: "si kweli"*
> *2nd Count: "Si kweli"*
> *Court: Entered as a plea of not guilty.*
> *Sgd. H. G. Mhenga, RM*
> *27/08/2021."*

From the above prescripts, as alluded to, by the learned State Attorney, it is true that the said documents conferring jurisdiction on the trial court were issued and presented before the trial court. However, the documents were not endorsed by the trial magistrate as having been duly

admitted on the record. There is no indication that the trial court acknowledged receipt of the said documents along the court record. The trial court remained mute as far as the said documents are concerned. The trial court ought to have indicated that, both consent and certificate were received forming part of the proceedings. Giving regard to the above decision, which is considered the procedural position of the law, both the certificate conferring jurisdiction on the trial court to try economic offence and the consent of the Prosecuting Attorney in- charge had no legal force. They cannot confer jurisdiction on the trial court by merely featuring in the court's file. The resultant effect is that the trial magistrate tried the case without requisite jurisdiction.

Secondly, the trial court lacked territorial jurisdiction to try the charge since it is plainly clear that the appellant was arrested at Kiteto District in Manyara Region but was tried at Arusha, RMs' Court at Arusha. As reflected by the charge sheet and prosecution evidence on record, it is certainly clear that the appellant was arrested at Orkijing area within Makame Wildlife area, Manyara Region and was brought in Arusha for the trial. The appellant's counsel made reference to section 113 (2) of the WCA. The said section 113 (2) of the Act provides:

> *"(2) Notwithstanding the provisions of other written law, a court established for a district or area of Mainland*

Tanzania may try, convict and punish or acquit a person charged with an offence committed in any other district or area of Mainland Tanzania."

At the outset, it must be emphasized that, our courts are courts of law and they assume jurisdiction as conferred by law. The Court of Appeal in numerous decisions including **DPP vs. Pirbakash Asharaf and 10 others,** Criminal Appeal No. 345 of 2017 (unreported) stated;

"In response, the learned counsel for the respondents joined hands with the learned state attorney that failure to cite section 113 (2) of the Wildlife Conservation Act, in 2nd, 3rd 4th 5th 6th and 7th count rendered the trial a nullity for want of jurisdiction.....Having considered the submission made by respective learned counsel for the parties, we unhesitatingly agree with them that the charge et, undoubtedly suffers from serious defects.

".....In conclusion we find that one, the trial court did not have jurisdiction to try the charges preferred against the respondents in count 2, 3, 4, 5, 6 and 7."

The circumstances of the former case are similar to the matter under consideration. The appellant was arrested at Orkiijing'i area within Makame Wildlife Management in Manyara Region. He was charged and arraigned in the Resident Magistrates' Court of Arusha at Arusha. In the charge levelled against him, section 113 (2) of the WCA, which would have, conferred jurisdiction to the trial court with the

requisite jurisdiction, was not cited in the statement of offence. This leads me to the conclusion that, the trial court lacked jurisdiction to try the case, hence conviction and sentence meted on the appellant was unlawfully anchored. The appellant's trial was a nullity for being entertained by a court that had no jurisdiction. The additional ground of appeal sufficiently disposes of the appeal.

In view of the foregoing reasons, I am of the considered view that the case against the appellant was heard and determined by the trial court which lacked the requisite jurisdiction, rendering the proceedings and the resultant judgment a nullity. The appeal is thus with merit and it is accordingly allowed. I consequently quash the conviction by the trial court and set aside the sentences. I order the appellant be released forthwith from prison custody unless held therein for some other lawful cause.

Order accordingly.

DATED at **ARUSHA** this 10th May 2023

MOHAMED. R. GWAE

JUDGE