IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA SUB-REGISTRY)
AT ARUSHA

CRIMINAL APPEAL NO. 68 OF 2023

(Originating from the Resident Magistrates' Court of Arusha, Economic Case No. 63 of 2018)

IKAYO NDENGER @ISSAYA SAITOTI ..... APPELLANT

Versus

THE REPUBLIC ..... RESPONDENT

JUDGMENT

9th October & 15th December 2023

Masara, J

Ikayo Ndenger @Issaya Saitoti, the Appellant herein, was arraigned before the Resident Magistrates' Court of Arusha (hereinafter "the trial court"), facing a charge consisting of six counts. In the 1st, 2nd, 3rd and 4th counts he was accused of Unlawful Possession of Government Trophy, contrary to sections 86(1), (2)(b) and (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) 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 said four counts, it was the case for the prosecution that on 1st and 8th days of September 2018, at Naisiyo hamlet, Irerendei and Meirugoi villages, within Monduli and Longido Districts, Arusha Region, he was found in possession of Government trophies, to wit: Three leopard skins, valued at USD 10,500 equivalent to TZS 24,010,035/=; one ostrich egg shell, valued at USD 1,200 equivalent to TZS 2,744,004/=; one piece of lion skin, valued at USD 4,900 equivalent to TZS 11,204,683/= and two Thomson's Gazelle horns, valued at USD 1,000 equivalent to TZS 2,286,670/=, the properties of the Government of the United Republic of Tanzania, without permit from the Director of Wildlife.

In the 5th count, the Appellant stood charged of Unlawful Possession of Ammunition, contrary to Sections 21(b) of the Firearms and Ammunitions Control Act, No. 2 of 2015, read together with paragraph 31 of the 1st Schedule to, and Sections 57(1) and 60(2) of the EOCCA, as amended by Sections 16(b) and (13)(b) of the Written Laws (Miscellaneous Amendment) Act, No. 3 of 2016. In the 6th count, he was charged with Unlawful Possession of Forest Produce, contrary to Section 88 of the Forest Act, No. 14 of 2002 as amended by section 28 of the Written Laws (Miscellaneous Amendments) (No. 2) Act, 2016.

It was the prosecution's case that on 8th September 2018 at Meruigoi village within Longido District and Arusha Region, the Appellant was found in possession of five (5) spent cartridges with different calibres, to wit: calibres 458, 375, 300, 270 and 243. That he was also found in possession of one hundred and sixty-six (166) poles of cedar/pencil cedar, scientifically known as *juniperus procera* valued at TZS 813,285/=, without valid licence or permit from the authorized Authority. The Appellant pleaded innocence when the charges were read to him.

In an attempt to prove its case, the prosecution paraded four witnesses and tendered four exhibits. The Appellant defended himself on oath, calling no witness. After hearing evidence from both sides, the trial magistrate was convinced that the charge against the Appellant in respect of the first count was proved to the hilt. The trial magistrate found the prosecution evidence wanting in respect of the 2nd, 3rd, 4th, 5th and 6th counts. The Appellant was therefore acquitted on those counts. In respect of the 1st count, he was convicted and sentenced to pay a fine of TZS 240,100,350/= or serve twenty years custodial term.

The Appellant was aggrieved by the conviction and sentence. He preferred an appeal in this Court vide Criminal Appeal No. 20 of 2022. His appeal was transferred to the Resident Magistrates' Court to be heard and

determined by a Resident Magistrate with Extended Jurisdiction. It was assigned to Massam-SRM, with Extended Jurisdiction, branded as RM Criminal Appeal No. 3 of 2022. After hearing the appeal, the learned Senior Resident Magistrate with Extended Jurisdiction, in her judgment dated 21/09/2022, nullified the proceedings of the trial court from 30/08/2021 for being a nullity. She remitted the file to the trial court with an order of a retrial.

After remitting the record to the trial court, the case was heard by A. R. Ndossy, SRM, who heard the four witnesses who had testified in the previous matter. This time, the defence consisted of two witnesses, the Appellant inclusive. At the conclusion of the trial, the learned Senior Resident Magistrate, just like her confrère, acquitted the Appellant on the 2nd, 3rd, 4th, 5th and 6th counts, for insufficiency of evidence. The Appellant was found guilty in respect of the first count. He was convicted and sentenced to pay a fine of TZS 240,100,350 or serve twenty years custodial term. Still protesting his innocence, the Appellant has preferred this appeal on the following grounds:

a) *That the Honourable trial magistrate tried the case convicted the Appellant and sentenced him without jurisdiction;*

b) *That the trial court erred in law and fact in convicting and sentencing the Appellant while the charge was not proved as there was variance between the charge and evidence;*

c) *That the trial court erred in law and fact in convicting and sentencing the Appellant based on defective charge;*

d) *That the trial court erred in law and fact in convicting and sentencing the Appellant herein while the Republic did not prove its case beyond reasonable doubt; and*

e) *That the honourable Resident Magistrate erred in law and fact by convicting and sentencing the Appellant without properly evaluating the evidence adduced during hearing.*

At the hearing of the appeal, the Appellant was represented by Mr Sylivester Kahunduka, learned advocate, while the Respondent Republic was represented of Ms Tusaje Samwel, learned State Attorney. Hearing of the appeal proceeded *viva voce*.

In his submissions, Mr Kahunduka dropped the 3rd ground of appeal. He argued the 1st ground separately and the 2nd, 4th and 5th grounds of appeal were argued conjointly. Submitting in support of the 1st ground of appeal, Mr Kahunduka averred that, in terms of sections 12(3) and 26 of the EOCCA, the DPP has powers to confer jurisdiction to subordinate courts to try economic offence by issuing a certificate conferring jurisdiction and consent. He submitted that once such documents are submitted to court, the trial court has to receive them, endorse them and make them part of

the proceedings. That, in the previous proceedings dated 14/07/2021 before Meena, RM, the State Attorney, who was in conduct of the case, prayed to file both the certificate to confer jurisdiction and the DPP's consent. He maintained that there is no record whether such documents were admitted, endorsed and made part of the proceedings. According to counsel for the Appellant, what the court received was the amended charge. He insisted that failure to endorse the two documents, deprives the court of jurisdiction to entertain the matter. To substantiate his contention, he cited the Court of Appeal decision in **John Julius Martin & Another vs Republic, Criminal Appeal No. 42 of 2020** (unreported).

Mr Kahunduka added that once this Court is satisfied that the trial court had no jurisdiction, it may order a retrial, relying on **Fatehali Manji vs Republic [1966] E.A 343**. However, he stated that a retrial cannot be ordered if it will afford the prosecution an opportunity to fill in the gaps. According to Mr Kahunduka, this case has a lot of short falls that the prosecution may want to fill in gaps.

Submitting on the rest of the grounds of appeal, counsel for the Appellant averred that the prosecution did not prove its case beyond reasonable doubts as the trial magistrate did not consider that the evidence that led

to the Appellant's conviction, which is three leopard skins, were not tendered as exhibits in court. That, after the proceedings from 30/08/2021 were nullified on appeal by Massam, SRM in *RM Criminal Appeal No. 3 of 2022*, the prosecution continued to rely on the exhibits without seeking to re-tender them in evidence. It was his position that since the proceedings which admitted the skins as exhibit were nullified, the exhibit did not form part of the proceedings subject of this appeal. It was counsel's view that in the absence of the said exhibit, the charge against the Appellant was not proved. Bolstering his contention, Mr Kahunduka relied on the decision in **Ngasa Tambu vs Republic, Criminal Appeal No. 168 of 2019** (unreported).

Mr Kahunduka added that there was variance between the charge and the evidence adduced on the *locus* of the offence. While the charge states that the Appellant was arrested at Naisio hamlet in Irerendeni village, Monduli District, PW2's evidence showed that the Appellant was arrested at Naisijo village. He found this to be two distinct places, hence the prosecution ought to have amended the charge in terms of section 234(1) of the CPA. Since there was no such amendment, the charge remained unproven, he submitted. In support of his proposition, he referred the

Court to the decision in **Godfrey Simon and Another vs Republic, Criminal Appeal No. 296 of 2018** (unreported).

Mr Kahunduka also faulted the trial court stating that the Appellant's defence that the case was framed up against him for ill motive was not considered. He was of the view that the Appellant's defence raised serious doubts in the prosecution evidence which ought to have been resolved in his favour. He urged the Court that if it is convinced that the trial court had jurisdiction, it finds that the charge against the Appellant was not proved.

On her part, the learned State Attorney, in response to the 1st ground of appeal, submitted that the trial court had jurisdiction to entertain the matter because on 14/07/2021 the prosecution prayed to amend the charge sheet and also prayed to file consent and certificate conferring jurisdiction and the court allowed the prayer. That the charge was substituted and the two documents were admitted forming part of the proceedings. She maintained that the trial court had jurisdiction to entertain the matter before it, pressing that if the court finds that there was no endorsement, still the prosecution had sufficient evidence for the court to order a retrial.

Responding to the 2nd, 4th and 5th grounds, the learned State Attorney, after revisiting the trial court records, admitted that PW1 testified and tendered the leopard skins on 01/09/2021. She also noted that the proceedings in respect of the tendered exhibit forms part of the proceedings nullified by Massam-SRM with Extended Jurisdiction. She thus conceded that the said exhibit formed the basis of the Appellant's conviction. In the end, the learned State Attorney was keen to concede that there was no evidence to be relied upon by the prosecution to prove the charge against the Appellant. She regrettably supported the appeal.

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 in the same modality applied by counsel for the parties.

In the first ground, counsel for both parties disagreed. Whereas the Appellant's counsel invited the Court to find that the trial court had no jurisdiction to deal with the matter, the learned State Attorney insisted that the trial court was vested with jurisdiction to entertain the matter. The contention relates to whether the certificate conferring jurisdiction on the trial court to deal with an economic offence and the consent from the DPP were endorsed in order to form part of the trial court proceedings.

It is trite law that jurisdiction to try economic offences is vested in the High Court, in terms of section 3 of the EOCCA. However, subordinate courts may be conferred jurisdiction to try such offences by a consent of the DPP made under section 26(1) and a certificate to confer jurisdiction issued in terms of section 12(3) both of the EOCCA. For easy of reference, section 12(3) of the EOCCA provides that:

> *"The Director of Public Prosecutions or any State Attorney duly authorised 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 Court under this Act be tried by such court subordinate to the High Court as he may specify in the certificate."*

Similarly, Section 26(1) provides 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."*

From the above provisions, economic offences are triable by subordinate courts only if a certificate conferring jurisdiction and the consent of the DPP are issued and endorsed to form part of the court record. This position was cemented by the Court of Appeal in **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."

Noteworthy is, mere presence of the two documents in the court file cannot confer jurisdiction on the subordinate court to try economic offence. Such documents must be tendered before the magistrate and the same must be endorsed by him/her as having been dully admitted in the court record. The position has been reaffirmed in the case referred to me by the Appellant's counsel, that is **John Julius Martin and Another vs Republic** (supra). In that case 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." (Emphasis added)

In the appeal under scrutiny, the record shows that on 14/07/2021, the prosecution sought to amend the charge and file a certificate to confer jurisdiction as well as the consent of the DPP. For clarity purposes, I let that part of the proceedings speak for itself:

"Date: 14/07/2021
Coram: P. Meena-RM ...
State Attorney: For mention we pray to amend the charge and file a consent for certificate for order to trial (sic)
Court: ***Prayer granted.***
Charge substituted." (Emphasis added)

Thereafter the amended charge was read out to the Appellant. The record further shows that both Consent of the Prosecuting Attorney In charge and Certificate of the Prosecuting Attorney In charge conferring jurisdiction on a subordinate court to try an economic and non-economic offence were filed and endorsed by the registry officer on the same date. Now, looking at the trial court proceedings, specifically the bolded part, I entirely agree with the learned State Attorney that the certificate conferring jurisdiction and the consent were properly tendered before the court. As the trial magistrate granted the prayer sought by the prosecuting

Attorney of amending the charge and filing of the two documents, by endorsing "*prayer granted",* the trial magistrate admitted the certificate and the consent. In other words, the two documents along with the amended charge were endorsed and they formed part of the trial court proceedings. It is worth noting that their presence was acknowledged by the trial magistrate. I therefore find and hold that indeed the trial court was vested with jurisdiction to entertain the matter. The 1st ground of appeal is devoid of merits, it stands dismissed.

Determination of the 2nd 4th and 5th grounds of appeal will not detain me following the concession from the learned State Attorney that there was no evidence to rely on to convict the Appellant. According to the trial court records, the Appellant was charged with six counts. He was convicted only on the first count of Unlawful Possession of Government Trophy; to wit, three leopard skins.

From the records, on 09/08/2021 G. 7421 PC Hija, who testified as PW1, sought to tender the three leopard skins. The defence raised an objection to their admission. After deliberations, the said leopard skins were admitted in evidence as exhibit P2. That was on 01/09/2021. On appeal, in RM Criminal Appeal No. 3 of 2022, as hinted earlier on, learned SRM with Extended Jurisdiction nullified the proceedings of the trial court from

30/08/2021 onwards. Considering that the leopard skins were admitted in evidence on 01/09/2021, the admissibility falls within the nullified proceedings.

During the retrial, the leopard skins were not tendered in evidence. But at the hearing, all the prosecution witnesses identified the leopard skins as Exhibit P2. In her judgment dated 28/04/2023, the trial magistrate referred to the leopard skins as exhibit P2. The said exhibit P2 formed the basis of the Appellant's conviction and sentence. Since the said leopard skins were not tendered in evidence at the retrial, after the proceedings admitting the same in evidence were nullified, it was wrong for the trial magistrate to rely on the said leopard skins as a basis to convict the Appellant.

The law requires that, in the unlawful possession of government trophy case, the trophy or its inventory must be tendered in evidence as a basis to prove such charges. Short of that, the charge remains unproven. That position has been subject of deliberations in the case referred to me by counsel for the Appellant. In **Ngasa Tambu vs Republic** (supra), the Court *inter alia* held:

> *"Otherwise, if the offence of unlawful possession of government trophies is not admitted by a suspect, in the absence of both the*

physical Government Trophies, and an Inventory, a charge of unlawful possession of the trophies cannot be proved."

Similarly, in the appeal under consideration, the said Government trophies (leopard skins) were not tendered in evidence. In the absence of the leopard skins or an inventory thereof, the charge against the Appellant remains unproven. Since the trial court judgment was based on the leopard skins which were not admitted in evidence, the Appellant's conviction was improperly anchored. The Appellant's conviction had nowhere to base, in the absence of the said trophy or inventory thereof. I therefore find merits in the 2nd, 4th and 5th grounds of appeal.

Consequently, the conviction against the Appellant cannot be sustained, there being no evidence of the trophies he was allegedly found in possession of. I allow the appeal, quash the conviction by the trial court and set aside the sentence imposed on the Appellant. I order that the Appellant be released forthwith from prison, unless he is held there for some other lawful cause.

THE HIGH COURT OF TA

Y.B. Masara

JUDGE

15th December 2023