IN THE COURT OF APPEAL OF TANZANIA

AT SUMBAWANGA

(CORAM: WAMBALI, J.A., KENTE, J.A. And MURUKE, J.A.)

CRIMINAL APPEAL NO. 501 OF 2019

JUSTINE BARUTI @ ZORLOS ..... APPELLANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS (DPP) ..... RESPONDENT

(Appeal from the decision of High Court of Tanzania at Sumbawanga)

(Mambi, J)

dated the 11th day of September, 2018

in

Criminal Appeal No. 63 of 2016

.....

JUDGMENT OF THE COURT

29th September & 6th October,2023

KENTE, J.A.:

On 24th December, 2014 early in the morning, the appellant Justine Baruti @Zorlos arrived at the Bus stand at Mpanda in Katavi Region where he boarded a bus christened "Adventure" due to travel to Kigoma. For the reasons that would soon become obvious, the appellant is said to have stiffly resisted his 46.3kg travel luggage to be kept in the luggage compartment on the pretext that it was a mere carry-on luggage which could be placed underneath the seat in front of him. But little did he know that the truth was about to unfold and that

someone was going to pull the plug on his travelling arrangements because of his involvement in organised criminality.

Acting on a tip by their informer, the Police Officers at Mpanda went to the bus stand and ordered for the bus which the appellant had boarded to be driven to the Mpanda Central Police Station. The passengers were then ordered to alight from the bus one after another upon suspicion that some of them were in unlawful possession of Government Trophies. The prosecution evidence has it that, unlike other passengers who were at all the time self-possessed, the appellant had suddenly gone pale and was shaking like a leaf. Upon search, it emerged that the contents of his fiercely protected bag were not the ordinary personal belongings, but ten pieces of elephant tusks weighing 46.3kg.

On being interrogated, the appellant is said to have told the police officers that the said bag was given to him at the bus stand by a person who had however taken to his heels when he saw the police officers coming. The appellant's exculpatory story was quickly dismissed by the police as would be expected. He was booked at the police station and subsequently charged and tried along with two others on two counts of leading organised crime contrary to paragraph 4(1) (d) of the First

Schedule to, and sections 57 (1) and 60 (2) both of the Economic and organised Crimes control Act (Cap 200 R.E. 200 now R.E. 2022) (hereinafter the EOCCA), and unlawful possession of Government Trophies contrary to section 86 (1), (2) (b) and (3) (a) and (b) of the Wildlife Conservation Act, Cap. 283 read together with Paragraph 14(d) of the First Schedule to, and sections 57 (1) and 60(2) of the EOCCA.

During the marathon trial that ensued, the appellant together with his co-accused were tried and convicted by the District Court of Mpanda and subsequently sentenced to seven years' imprisonment in respect of the first count of which the appellant was convicted along with three others and, twenty years' imprisonment in respect of the second count which charged him alone.

Aggrieved by the convictions and sentences imposed on him, the appellant appealed to the High Court at Sumbawanga which on 11th September, 2018 delivered is judgment confirming the decision of the trial court. Dissatisfied with the decision of the High Court, the appellant appealed to this Court on five grounds in which the bottom line is essentially that, the learned Judge of the first appellate court strayed into error both in law and in fact for not finding that the charge against him was not proved beyond reasonable doubt.

At the hearing of the appeal before us, the appellant appeared in person without any legal representation while the respondent, the Director of Public Prosecutions (the DPP) was ably represented by Mr. John Mwesiga Kabengula learned Senior State Attorney assisted by Ms. Safi Kashindi Amani and Marietha Augustine Maguta, learned State Attorneys.

Conventionally, Ms. Maguta who addressed the Court on behalf of the respondent the DPP, sought to argue the appeal on the basis of the grounds of appeal raised by the appellant. However, when we asked her by way of a preliminary observation and in exercise of our judicial oversight role as a higher court over the lower courts, to look into the propriety or otherwise of the consent and certificate issued by the Director of Public Prosecutions conferring jurisdiction on the District Court to try an economic offence together with the charge sheet all of which were not formally admitted by the trial court so as to form part of the trial court's record, the learned State Attorney did not waste much time. From her brief submissions, we can gather that she readily conceded that:

> *i. The consent, certificate and charge sheet were indeed not formally filed and received*

by the trial District Court, before the commencement of trial;

ii. *The above-mentioned three instruments were the foundation of the prosecution case and therefore indispensable to the appellant's; and that*

iii. *In the absence of the said instruments, the trial court was not clothed with the requisite jurisdiction to try the case which charged the appellant with economic offences.*

Moreover, it may be worth noting here and we also brought this anomaly to the attention of Ms. Maguta that, the record is silent as to whether or not there was a holding charge which was purportedly read over to the appellant and his co-accuseds when they were first arraigned and charged in court on 16th February, 2015. Upon scanning through both the trial court's original record and the record of appeal, she quickly conceded that indeed there was no charge as pointed out by the Court.

Addressing herself to the above-mentioned procedural flaws in the prosecution case, Ms. Maguta succinctly went straight to the point. She submitted to the effect that, since the consent and certificate issued by the DPP conferring jurisdiction on the trial court were not formally

filed and admitted in court, the District Court of Mpanda lacked the requisite jurisdiction to try the economic crimes case. The argument by the learned State Attorney was premised rightly so in our view, on the provisions of sections 26 (1) (2) and 12 (3) (4) of the EOCCA whose interpretation is that, unless there is consent by the DPP or an officer authorised by him and a certificate conferring jurisdiction, a subordinate court has no jurisdiction to entertain a case involving an economic offence for otherwise, the jurisdiction to hear and determine cases involving economic offences is by law vested in the Corruption and Economic Crimes Division of the High Court as per section 3 (1) (3) (a) (b) of the same Act.

Moreover, the learned State Attorney relied on our earlier decisions in **Mabula Mboje and 2 Others v. The Republic**, (Criminal Appeal No. 557 of 2016) [2020]TZCA 1740 (20 August 2020, TANZLII), in which, in the context of the above provisions of the law, we reached the conclusion that, where, as in the case now under review, an accused person is charged with an economic offence in a subordinate court but there is neither the consent nor certificate issued by the DPP conferring jurisdiction on that subordinate court, such a court lacks the requisite jurisdiction to try the case.

Given the circumstance, Ms. Maguta invited us to invoke our revisionary powers in terms of section 4 (2) of the Appellate Jurisdiction Act (Cap. 141 R.E. 2019) (the AJA), to nullify the proceedings before the lower courts, quash the appellant's convictions and set aside the custodial sentences which were meted out on him.

Regarding the course forward, the learned State Attorney implored us to order for a retrial as she fervently believed that there was sufficient evidence upon which the appellant's conviction could be grounded. In the alternatives, she urged us to leave the matter in the hands of the DPP who will determine the fate of the appellant.

In response, being a layman, the appellant had nothing significant to say. He only implored us to allow the appeal and set him free taking into account that he has been in jail for almost nine years.

We propose to begin our discussion with the omission by the prosecution to formally submit a charge instituting the economic case against the appellant and the trial court's unexpected condonation of the inexcusable omission.

As observed by this Court in the case of **Naoche Ole Mbile v. Republic** [1993] T.L.R. 253, one of the fundamental principles of our

criminal justice is that, at the beginning of a criminal trial, the accused person must be arraigned. In other words, the court has to put the charge or charges on the accused and non-compliance with the requirements of arraignment of an accused person, renders the trial a nullity.

In terms of section 128 (6) of the Criminal Procedure Act, (Cap 20 R.E. 2022) (the CPA) read together with PGO No. 227(1)(a), when an accused person has been arrested without a warrant, is brought before a magistrate, a formal charge, containing a statement of the offence with which the accused person is charged, shall be presented by the Police Officer preferring the charge. The charge sheet must be signed and presented by the Public Prosecutor before the magistrate.

While the law is silent on what should follow after a charge is presented to the magistrate, going by the wording of section 129 of the CPA which empowers the magistrate to make an order refusing to admit a charge presented under section 128 of the same Act if it does not disclose any offence, it occurs to us, and this has been a well-established practice that, on being presented, a formal charge which discloses an offence shall be formally admitted by the magistrate before it can be acted upon.

Moreover, section 228 (1) of the CPA provides that, the accused must be arraigned, meaning that the substance of the charge must be stated to the accused person by the court, and he shall thereafter be asked whether he admits or denies the truth of the charge.

In this case, although initially the appellant along with others appeared before the trial court on 16th February 2015 and they were not required to enter any plea to the charge comprising two economic offences because by that time, there was no consent and certificate conferring jurisdiction on the court, it is rather startling as to which holding charge was read over to the appellant and his co-accused as reflected on the court record because there is no charge in the record of appeal as intimated above.

In view of the above omission and given the unwavering position of the law, we wish to observe that, in any criminal trial in the District and Resident Magistrate's Court, generally an accused person must be arraigned by presentation of a charge. Although no hard and fast rule can be laid down regarding the standard words that can be used by the magistrate in receiving and acting on a charge brought against an accused person, it must at least be shown either on the record or on the charge sheet itself that, the trial magistrate or the magistrate

incharge as the case may be, has formally admitted the charge. By way of emphasis, we wish to reiterate the earlier position of the law that, non-compliance with the above requirements of arraignment of an accused person in a court of law as happened in the present case, renders the subsequent trial a nullity.

Coming to the appeal now before us, it will be apparent that, there were two instances of non-compliance with the mandatory requirements of arraignment of an accused person in a court of law. In the first place, as stated earlier, there was no holding charge when the appellant appeared for the first time before the trial court on 16th February, 2015. In the second place, as we shall later on demonstrate, we have not been able to find and indeed there is nothing on the record showing that the charge sheet dated 27th July, 2015 charging the appellant together with others with two economic offences was formally admitted by the trial court. Likewise, is the consent and certificate issued by the DPP both dated 24th July 2015 conferring jurisdiction to the District Court of Mpanda, to try the appellant and others with economic offences. The two instruments were not formally admitted by the trial court as readily conceded by Ms. Maguta. The appellant was therefore arraigned without a charge being formally lodged and

admitted by the trial court. On that account, we hold without hesitation that, his trial could not have been valid as he must have pleaded to a charge which was non-existent.

Since in any criminal trial the charge is a foundation of the trial and in this case the charge was not properly before the court, which simply translates into the charge being non-existent, the issue is whether an order for retrial can be in the interest of justice.

While addressing a somewhat similar situation in the case of **Mayala Njigailele v. The Republic**, (Criminal Appeal No. 490 of 2015) [2016] TZCA 253 (24 October 2016, TANZLII), the Court held, among other things, that:

> *"Normally an order for retrial is granted, in criminal cases, when the basis of the case namely, the charge sheet is proper and in existence."*

We also find support in the case of **Mashaki s/o Malongo @Kitachangwa v. The Republic**, (Criminal Appeal No. 302 of 2016) [2018] TZCA 301 (11 December 2018, TANZLII), in which the Court made a categorical statement that, a retrial is normally ordered on assumption that the charge is properly before the court. (See also

Samwel Lazaro v. The Republic, (Criminal Appel No. 68 of 2017) [2019] TZCA 220 (18 July 2019, TANZLII).

Moving on, as we strategize and plan on the way forward, we are also mindful of Ms. Maguta's alternative prayer that, we should nullify the proceedings, quash the appellant's convictions and set aside the sentences imposed on him and in leau thereof consider to leave the matter in the discretion of the DPP who will then decide on the appellant's fate. With due respect, we are of the quite different view. Given the above-mentioned facts and circumstances which were unfortunate, such an order is inherently dangerous as it might amount to ordering for the appellant's persecution at the hands of the DPP thereby taking him back to the undesirable position of being unfairly treated. We will thus at the latter stage on this judgment decline the learned State Attorney's invitation.

Moreover, while we are mindful that in view of the overriding objective principle which we will always cherish in the administration of justice, the courts of law are not supposed go down to procedural details that might seem pendatic elsewhere, it is extremely important to state for the benefit of the magistracy that, the mandatory

procedural requirements of the law such as the filing by the prosecution and formal admission of the charge by the trial court, do not fall in the category of the things the court may trivialize as to consign to oblivion.

In coming to this conclusion, we are guided by our own decision in the case of **Njake Enterprises Limited v. Blue Rock Ltd and Rock and Venture Limited**, (Civil Appeal No. 69 of 2017) [2018] TZCA 304 (4 December 2018, TANZLII) where we held that:

> *"...the overriding objective principle cannot be applied blindly on the mandatory provisions of the procedural law which go to the very foundation of the case. This can be gleaned from the Objective and Reasons in introducing the principle in the Act..."*

Regarding the course forward in this case, we have on one hand seriously considered the alternative prayers by Ms. Maguta who as stated before, beseeched us to order for a retrial on the grounds that there was sufficient evidence to implicate the appellant or to leave the matter in the discretion of the DPP to determine the appellant's fate. We find, in the circumstances of this case that, for all purposes and intents, and for the reasons already stated, an order for retrial or leaving the matter in the discretion of the DPP as urged by Ms. Maguta,

will not be in the best interest of justice. In the result, we have no option but to invoke our powers in terms of section 4 (2) of the AJA and nullify the proceedings before the lower courts. We quash the appellant's convictions and set aside the imprisonment sentences imposed on him. Consequently, we order for his immediate release from jail if he is not otherwise detained for some other lawful cause.

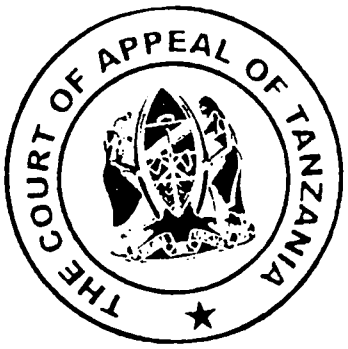
DATED at **SUMBAWANGA** this 5th day of October, 2023.

F. L. K. WAMBALI
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

Z. G. MURUKE
JUSTICE OF APPEAL

The Judgment delivered this 6th day of October, 2023 in the presence of the Appellant in person and Ms. Marietha Augustine Maguta, learned State Attorney for the Respondent is hereby certified as a true copy of the original.



E. G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL