

IN THE COURT OF APPEAL OF TANZANIA
AT MUSOMA

(CORAM: WAMBALI, J.A., KITUSI, J.A. And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 515 OF 2019

JUMANNE LEONARD NAGANA @
AZORI LEONARD NAGANA 1ST APPELLANT
PALA s/o YORAM @ NDABALINZE 2ND APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**[Appeal from the Judgment of the Resident Magistrate's Court
of Musoma (Extended Jurisdiction) at Musoma]**

(Ng'umbu, RM EXT. JUR.)

dated the 18th day of October, 2019

in

Criminal Appeal No. 13 of 2019

JUDGMENT OF THE COURT

25th October & 4th November, 2021

MASHAKA, J.A.:

In the District Court of Serengeti, the appellants Jumanne Leonard Nagana @ Azori Leonard Nagana and Pala Yoram @ Ndabalinze were charged with two offences. The first count was unlawful possession of firearm contrary to section 20(1) (2) of the Firearms and Ammunition Control Act, No. 2 of 2015. It was alleged that on the 7th July, 2017 at 10:00 hours at Kibeyo village, within Serengeti District in Mara Region,

the appellants were found with one firearm make sub machine gun (SMG) with registration number 196224K5624 and one magazine without a license. The second count was in respect of unlawful possession of ammunition contrary to section 21 (1) and section 60 (1) of the Firearms and Ammunition Control Act, No. 2 of 2015. It was alleged that on the same day, place and time, the appellants were found in possession of eighty-seven (87) ammunitions with caliber 7.62mm which are used for SMG/ SAR, without a license.

Upon conviction on both counts, they were sentenced to serve five years imprisonment each. The sentences were ordered to run concurrently. They appealed to the High Court to challenge the convictions and sentences. Their appeal was dismissed and the first appellate court upheld the convictions and sentences, hence this second appeal.

The factual background unveiled by the prosecution during trial may briefly be recapitulated as follows. From a total of four prosecution witnesses and six documentary and physical exhibits supported the allegations by the prosecution. Inspector Mathias Charles Nkayage (PW1) received information from his informant that there were people

from the neighbouring country of Burundi who had in possession a firearm make SMG and 200 rounds of ammunitions/bullets and were hosted by a Tanzanian citizen one Kisiri Marwa @ Sabure at the Kibeyo village. PW1 and Detective Corporal Constantine (PW2) (police officers) and John Nyamhanga (PW3) the Village Chairman went to the house of Kisiri Marwa @Sabure, they surrounded it and knocked on the door. They found many people in the house who escaped and they only managed to arrest two people, who introduced themselves as Jumanne Leonard Nagana and Pala Yoram Ndabalinze from Buhigwe District; the appellants. The house of Kisiri was searched in the presence of PW3, the independent witness and the two appellants. PW1 and PW2 found the appellants with two axes, weighing scale, one saw, 'turubai jeusi' and one knife which were tendered and admitted in evidence as exhibit P.E.1 collectively.

The appellants were taken to the Police Station at Mugumu and interrogated by Detective Staff Sergeant Jumanne (PW4). They led PW1, PW2 and PW3 to a place where the firearm and ammunitions were hidden. Upon arrival at Kibeyo village, near a bush at the compound of Kisiri, a firearm SMG was found wrapped in a blue bag together with

eighty -seven bullets and a magazine. These were tendered by PW1 and admitted in evidence as exhibit P.E. 2 collectively. A record of search prepared by PW1, signed by the appellants and PW3, was admitted in evidence as exhibit P.E.3. PW1 also tendered in evidence a chain of custody record which was admitted as exhibit P.E.4 and the 'hati ya makabidhiano ya vielelezo' exhibit P.E.5. PW4 interrogated the first appellant and recorded his cautioned statement which was admitted in evidence as exhibit P.E. 6.

In their defence, the appellants in their respective testimonies strongly denied the charges and stated that they came from Kigoma for the purpose of visiting their relatives at Mugumu Remand Prison, one Eugene Bicoloma and Hatinganeni Kiamagwa. They arrived at the house of Kisiri Marwa and decided to spend a night there. Unfortunately, at 2:00 hours, police officers arrived at the house, searched and arrested them for unlawful possession of a firearm, ammunitions and one magazine without a license.

Against this backdrop, the trial court convicted and sentenced them as earlier indicated. Aggrieved with the conviction and sentence of the trial court, the appellants appealed to the High Court and Hon. W.S.

Ng'umbu, learned Resident Magistrate exercising Extended Jurisdiction under section 45(2) of the Magistrates' Court Act, [Cap 11 R.E. 2019] (the MCA) dismissed their appeal and upheld the conviction and sentence. In their attempt to justify their innocence, the appellants have lodged this second appeal challenging the first appellate court verdict. Each appellant lodged his Memorandum of Appeal with similar four grounds of appeal which, we reproduce them hereunder:

- 1. That, both the trial court and first appellate court grossly erred in law and fact to convict and sentence the appellants as the trial court lacked jurisdiction to try the case at hand since there was no consent of Public Prosecution and Certificate conferring jurisdiction to subordinate court to try the case at hand since it fall (sic) under economic offence.*
- 2. That, both trial court and the first appellate court erred in law and fact for considering the confession of the exhibit possession (PE1 and PE2) by the appellant which was implausible and improbable due to lack of any caution (sic) statement by the appellant for confession corroboration.*

3. That both the trial court and the first appellate court erred in law and fact to convict and sentence the appellant as the prosecution evidence has no any fact of custody chain of the exhibit (PE1 and PE2) from the seizure to the attending them to the trial court that is confirmation of planting them in the case.

4. That, the trial court and the first appellate court grossly erred in law and fact to convict and sentence the appellant without the case being proved beyond all reasonable doubt by prosecution side.

The appeal was argued before us on the 25th October, 2021 during which the appellants appeared in person unrepresented remotely through video conference facility linked from the Musoma Prison. The respondent Republic had the services of Messrs. Kainunura Anesius, learned Senior State Attorney assisted by Mafuru Moses and Frank Nchanila, learned State Attorneys. When we gave the floor to the appellants to argue their appeal, they urged the Court to adopt their grounds of appeal in the Memorandum of Appeal reproduced above and asked the learned Senior

State Attorney to respond first to the grounds of appeal and reserved their right of rejoinder.

Responding, Mr. Anesius stated his stance at the very outset of his submissions that he supported the appeal brought by the appellants based on the first ground which is about the jurisdiction of the trial court. He submitted that the trial court was not conferred jurisdiction to try the case against the appellants. He explained that the appellants were charged with two offences under the Firearms and Ammunitions Act, No. 2 of 2015, which according to the Economic and Organised Crime Control Act [Cap 200 R.E. 2019] (the EOCCA) such offences are prescribed as economic offences per Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016, which became operational on the 8th July, 2016. He argued that the offences were committed on the 7th July, 2017 when they were already prescribed under Paragraph 31 of the First Schedule to the EOCCA to be economic offences. He further submitted that section 3 of the EOCCA confers mandate to the High Court to try economic offences, while section 26 (1) of the said Act, stipulates that a consent to prosecute such offences had to be issued by the Director of Public Prosecutions (the DPP). Also, a certificate had to be issued under section 12 (3) of the

EOCCA to confer jurisdiction to a subordinate court to try an economic offence.

It was his humble submission that in this case before the trial court, in the record of appeal, no consent was issued by the DPP and also there was no certificate conferring jurisdiction to try the economic case. Mr. Anesius conceded that the trial court proceedings are a nullity and urged us to invoke our revisional powers under section 4(2) of the Appellate Jurisdiction Act, [CAP 141 R.E. 2019] (the AJA), to nullify the proceedings of the trial and first appellate courts, quash the convictions and set aside sentences. On the way forward, he prayed for a retrial, before the competent court with jurisdiction as held in the case of **Fatehali Manji v. Republic** (1966) EA 343. On the other hand, having heard the submissions by learned Senior State Attorney, the appellants left it to the Court to make a final decision.

We entirely agree with the submissions by Mr. Anesius that these two offences against the appellants were economic offences from the 08/07/2016. Yet, this case was tried as a criminal case and the appellants were found guilty, convicted and sentenced. On appeal, before Hon. Ng'umbu RM (EJ), among the four grounds of appeal; the first ground as

gleaned from the petition of appeal, was that the appellants were not informed neither aware that the case had consent of the DPP and the certificate of transfer, thus their absence confirmed that the trial court had no jurisdiction to try the case.

However, in his judgment at page 91 of the record of appeal, Hon. Ng'umbu RM (EJ) held that: -

"On this argument, while it is true that the Firearms and Ammunitions Act No. 2 of 2015 creates the offences with which the appellants stood charged, the EOCCA aggravated the offences by qualifying them to be punishable as economic offences. This, in my view, was intended to aggravate the punishment for the offences not to cease it to be offences under the law under which they were created".

He further explained that: -

"The proceedings by the trial court would not be rendered a nullity for want of a consent to prosecution and certificate of transfer conferring jurisdiction upon the trial court in the proceedings whose offences were not charged as economic offences. Although they could be so charged as well. There was no prejudice, in fact it was rather favorable on the part of the

appellants for being charged with non – aggravated offences”.

Ultimately, he found the prosecution had proved its case beyond reasonable doubt to warrant the appellants’ conviction and sentence on both counts.

We will deal with this first ground of appeal, which we are certain it will dispose of the appeal. We are aware that the amendment of the EOCCA vide Act No. 3 of 2016 led to the offences under sections 20 and 21 of the Firearms and Ammunition Control Act, No. 2 of 2015, being prescribed as economic offences under Paragraph 31 of the First Schedule to the EOCCA, which stipulates that: -

“A person commits an offence under this paragraph who commits an offence under sections 20, 21 or 45 of the Firearms and Ammunition Control Act”.

For the trial of every economic offence under the EOCCA, it has to be preceded by the consent of the DPP under section 26(1) of the EOCCA, which 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:

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"(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."

According to section 3 (1) of the EOCCA, it established the Corruption and Economic Crimes Division of the High Court, in which proceedings concerning economic cases under this Act may be instituted.

Under section 3 (3)(b) of the same Act, it is stipulated as follows: -

"(3) The Court shall have jurisdiction to hear and determine cases involving:

(b) economic offences specified under paragraphs 22, 23, 24, 25, 26, 27, 28, 30, 31, 32, 33,34, 35, 36, 37 and 39 of the Schedule regardless of their value."

However, in terms of section 12 (3) of the EOCCA, the jurisdiction could be conferred to the subordinate court, and it provides as follows: -

"(3) 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."

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. In this appeal, the trial commenced without obtaining the consent of the DPP and the certificate conferring jurisdiction to the District Court of Serengeti at Mugumu. Though the issue of jurisdiction

was raised by the appellants before the BSM (EJ), he decided to ignore it and expressed that it was in their favor.

We have emphasized in a number of our decisions that the first question which needs to be determined in any adjudication is whether or not the court or tribunal is vested with the requisite jurisdiction. As we held in the case of **Ramadhani Omary Mtiula vs The Republic**, Criminal Appeal No. 62 of 2019 (unreported) when referring to the decision in **Fanuel Mantiri Ng'unda vs Herman Mantiri Ng'unda and 20 Others**, Civil Appeal No. 8 of 1995 (unreported) that: -

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"The question of jurisdiction for any court is basic, it goes to the very root of the authority of the court to adjudicate upon cases of different nature The question of jurisdiction is so fundamental that courts must as a matter of practice on the face of it be certain and assured of their jurisdictional position at the commencement of the trial.... It is risky and unsafe for the court to proceed with the trial of a case on the assumption that the court has jurisdiction to adjudicate upon the case."

The jurisdiction of courts is a creature of statute and not what the litigants or the court prefers. Our courts are creatures of

statutes and they have powers as conferred upon them by the statute. (see – **Madeni Nindwa vs Republic**, Criminal Appeal No. 350 of 2016 - (unreported)). The fate which befalls the proceedings and a decision made without jurisdiction is a nullity. Even where a court decides to exercise a jurisdiction which it does not possess, its decision amounts to nothing.

As discussed above, the jurisdiction of a court is vested by the law and cannot be assumed as it was applied in the trial court and assumed in the first appellate court. In **Mhole Saguda Nyamagu vs Republic**, Criminal Appeal No. 337 of 2016 (unreported), we had this to say: -

".....we are satisfied that in the absence of the DPP's consent given under section 26 (1) of the Act and the requisite certificates under subsections (3) and (4) of section 12 of the Act, the trial District Court had no jurisdiction to hear and determine charges against the appellant, as it did. We further firmly hold that the purported trial of the appellant was a nullity. In the same vein, the proceedings and judgment made by the High Court dated 8/06/2016 based on null proceedings of the trial were also a nullity."

Coming to the appeal before us, without the consent of the DPP and certificate conferring jurisdiction to try an economic offence, the District Court of Serengeti at Mugumu embarked on a nullity to try Criminal Case No. 157 of 2017 against the appellants. On that same account, the judgment of the first appellate court is adversely impacted together with this second appeal due to the fact that a judgment in an appeal from proceedings which were a nullity is also a nullity. See - **Mhole Saguda Nyamagu vs Republic**, (supra).

Mr. Anesius urged us to invoke our revisional powers under section 4(2) of the AJA, to nullify the proceedings of the first appellate and trial courts, quash the convictions and set aside sentences which we entirely agree and do so. On the way forward, he' prayed that the appellants be prosecuted afresh by a competent court with jurisdiction. We disagree with Mr. Anesius because as discussed above the trial court embarked on a nullity to try the Criminal Case No. 157 of 2017 against the appellants without the requisite jurisdiction, hence there was no charge before the trial court. In the circumstances of the case at hand, it is upon the DPP to decide on the proper steps to take.

Consequently, in the circumstances, we order the immediate discharge of the appellants unless they are otherwise held for some other lawful causes.

DATED at **MUSOMA** this 3rd day of November, 2021.

F. L. K. WAMBALI
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 4th day of November, 2021 in the Presence of Mr. Frank Nchanila, learned State Attorney for the Respondent/Republic, and the Appellants who appeared remotely via Video link from Musoma Prison is hereby certified as a true copy of the original.



F. A. Mtaranja
F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL