IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MBAROUK, J.A., MKUYE, J.A. And MWAMBEGELE, J.A.)

CRIMINAL APPEAL No. 196 OF 2016

ADAM SELEMANI NJALAMOTO ..... APPELLANT
VERSUS
THE REPUBLIC..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Dar es Salaam)

Kitusi, J.)

Dated 11th day of February, 2016
in
Criminal Appeal No. 130 of 2015

RULING OF THE COURT

12th February, & 1st March, 2018.

MBAROUK, J.A.:

In the District Court of Ulanga at Mahenge, in Morogoro Region, Adam Selemani Njalamoto (hereinafter referred as the appellant) was charged with unlawful possession of government trophies contrary to sections 86(1) & (2), 70(1) (c) (ii) and 3 of the Wildlife Conservation Act (Cap 283 R.E. 2002) read together with paragraph 14 (d) of the First Schedule to and section 57 (1)

and section 60 (2) of the Economic and Organized Crimes Control Act (Cap 200 R.E. 2002).

It was alleged by the prosecution that, the appellant on the 21st day of July, 2014 at or about 23:30 hours at Kivukoni Area within Ulanga District in Morogoro Region was found in unlawful possession of government trophies, to wit, 4 pieces of elephant tusks, worth Tshs. 24,000,000/= the property of the Government of Tanzania.

The appellant was convicted as charged and sentenced to twenty (20) years imprisonment, the sentence was ordered to run from 22nd July, 2014 and in addition, he was ordered to pay a compensation of Tshs. 24,936,750/= to Wildlife Authority and also four pieces of elephant tusks were forfeited. His first appeal to the High Court (Hon. Kitusi J.) was unsuccessful. He has now come to this Court on second appeal.

Before us the appellant appeared in person, unrepresented, while Mr. Wankyo Simon and Mr. Salim Hakimu

Msemo both learned State Attorneys represented the respondent/Republic.

At the commencement of the hearing of appeal, the Court *suo motu* raised two issues relating to the original jurisdiction of the trial court and appellate power of the first appellate court. **Firstly,** the trial court commenced the hearing of the case without the consent of the Director of Public Prosecution (DPP). **Secondly,** the District Court sat as an Economic Crimes Court without a certificate of transfer by the DPP issued under Section 12 (3) of the Economic and Organized Crimes Control Act. It is pertinent to know that, Economic cases can only be tried by a subordinate court after a certificate of transfer has been signed and filed by the DPP.

Initially, Mr. Simon responded to us that, he perused the original record and found to have contained the aforementioned documents. We asked him if the same were properly filed before the trial court in view of the absence of an endorsement by Court Officer designated as such in order to validate if they were legally

filed and placed in the court file. After a long discussion, the learned State Attorney readily conceded that the certificate and consent signed by the learned State Attorney In charge were neither endorsed nor form part of the proceedings before the trial court, as a result therefore the learned counsel submitted that, the proceedings from the District Court to the High Court were a nullity given the fact that the trial commenced without the consent of the DPP. He also submitted that the District Court had no power to hear the case in the absence of the certificate of transfer under the hand of the DPP. He then urged the Court to nullify and quash the proceedings of the District Court and the High Court and set aside the sentence. Finally order a retrial.

The appellant, understandably being a lay person had nothing useful to complement on the issues raised other than to submit that it was the prosecution's mistake. Further to that, the appellant asked the Court to set him free.

It goes without saying that, the trial against the appellant was conducted without jurisdiction. Absence of consent of DPP

and transfer certificate is a legal predicament apparent in the charge sheet and in the trial in general. The charge sheet and the trial proceedings was illegal and a nullity since in terms of the provisions of sections 57 and 60 of the Economic and Organized Crimes Control Act, [Cap. 200 R.E. 2002] (the Act) which deals with economic offences require the consent of the Director of Public Prosecutions to prosecute them.

Again, under section 3 of the Act, the jurisdiction to try economic crimes is solely vested with the High Court sitting as an economic crone court. The trial District Magistrate of Ulanga at Mahenge had no jurisdiction to hear the case unless the Director of Public Prosecutions issued consent and a certificate of transfer which would vest the trial District Court with jurisdiction.

Before commencing the prosecution of the appellant in the stated court, a prior consent of the Director of Public Prosecutions had to be obtained in terms of section 26(1) of Act, which provides:-

"26 – (1) 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 3(1) of the Economic Crimes Act vests the High Court with the jurisdiction over economic crimes. For simple reference the section provides:-

"3 (1) The jurisdiction to hear and determine cases involving ***economic offences under this Act is hereby vested in the High Court."***

(Emphasis added).

However, an economic crime may be prosecuted in a subordinate court where in addition to obtaining the **consent** of the Director of Public Prosecutions to prosecute; **a certificate of transfer** to try the offence in a subordinate court is issued under section 12 (3) of the Economic Crimes Act.

In view of this legal position, the appellant was prosecuted without **consent** and **a certificate of transfer issued by the Director of Public Prosecutions,** in the result, we are of the view that the proceedings, conviction and sentences in the trial court and in the first appellate court were illegal and a nullity. For instance see our decisions in the cases of **Ndihokubwayo s/o Emmanuel vs. the Republic,** Criminal Appeal No. 300 "B" of 2011; **Rhobi Marwa Mgare and two others vs. Republic,** Criminal Appeal No.192 of 2005, **Amri Ally @Becha vs. Republic,** Criminal Appeal No. 151 of 2009, **Samwel Mwita vs. Republic,** (Consolidated Criminal Appeal Nos.34, 35, 36, and 66 of 2009; **Kaganda John & Another vs. Republic,** Criminal Appeal No. 356 of 2009; **Dotto Salum @ Butwa vs. Republic,** Criminal Appeal No. 5/2007; **Nicco Mhando & 2 Others vs. Republic,** Criminal Appeal No. 332 of 2008 (all unreported) just to mention a few.

Given the non-compliance with the law, it follows therefore, as the night follows the day that, the proceedings in

the District Court and the High Court are a nullity. By the powers vested on us under section 4 (2) of the Appellate Jurisdiction Act, [Cap. 141 R.E. 2002] we hereby nullify and quash all proceedings conviction made by the District Court and set aside sentence. We also quash all the proceedings and the judgment of the High Court.

We are mindful that where the trial court fails to direct itself on an essential step in the course of the proceedings, it does not, in our view, automatically follow that a re-trial should be ordered, even if the prosecution is not to blame for the fault. Clearly, of course, each case must depend on its particular facts and circumstances.

This Court has consistently subscribed to the holding in the case of **Fatehali Manji Vs. R** [1966] E.A.343 to the effect that:

> *"In general, a retrial may be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set*

aside because of insufficiency of evidence or for purposes of enabling the prosecution to fill in gaps in its evidence at the first trial.....each case must depend on its own facts and an order for retrial should only be made where the interests of justice require it."

In another case of **Ahmed Sumar Vs. Republic** [1964] EA 481, the erstwhile East African Court of Appeal stated at page 483 as follows:

"It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. ***But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not,*** *in our view follow that a re-trial should be ordered."* (Emphasis added).

The Court in **Ahmed Sumar** (supra) further stated that:

"We are also referred to the judgment in ***Pascal Clement Braganza v. R*** *[1957] EA 152. In this judgment the Court accepted the principle that a re-trial should not be ordered unless the court was of the opinion that on a consideration of the admissible or potentially admissible evidence, a conviction might result. Each case must depend on the particular facts and circumstances of that case* ***but an order for the re-trial should only be made where the interests of justice require it*** *and should not be ordered where it is likely to cause an injustice to an accused person."* (Emphasis added).

There are many decisions on the question of what appropriate case would attract an order of re-trial but on the main, the principle that has been acceptable to courts is that each case must depend on the particular facts and circumstances of that case. An order for re-trial should only be made where

interests of justice require it. In this matter, for the interest of justice, we order it to be tried afresh in the court of competent jurisdiction. It is so ordered.

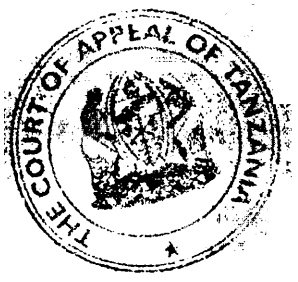
DATED at **DAR ES SALAAM** this 20th day of February, 2018.

M. S. MBAROUK
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL