

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 37 OF 2018

ALLY LIHINGA APPELLANT

VERSUS

THE REPLICRESPONDENT

10/5/2018 & 17/5/2018

JUDGMENT

I.P.KITUSI,J.

Ally Lihinga was charged before the District Court of Ulanga at Mahenge and convicted of being in an unlawful possession of Government Trophies contrary to section 86(1) (2) (b) and 3 (a) and (b) of the Wildlife conservation Act No. 5 of 2009, cap 283 read together with paragraph 14(d) of the First Scheduled to and section 57 (1) and 60(2) of the Economic and organized Crimes Control Act, Cap 200. He was sentenced to a fine of Shs 300,000,000/= or to twenty years imprisonment in default.

Ally Lihinga, the appellant appeals hereto against both the conviction and sentence.

It was alleged during the trial that on 13TH July 2015 at Chigandugandu area within Ulanga District in Morogoro Region the appellant was found in possession of three pieces of Elephant Tusks all weighing 4.3 Kilograms, valued at Shs30,000,000 the property of the

Government of the United Republic of Tanzania without a permit from the Director of Wildlife.

The prosecution case was supported by the evidence of Dauda s/o Yunus@ Mohamed (PW1) Zephania s/o Duadi @ Saile (PW2) Asteri s/o Victoria @ Masemeka (PW3) and Sisti s/o Gasper Verani (PW4) all game wardens who arrested the appellant on 13 July 2015. These game wardens had earlier been told by an informer that there would be three people carrying elephant tusks. At around 4.30 P.M on that date the game wardens mounted a barrier at Chigandugandu area whereupon they saw the three people, one of them carrying a bag.

On seeing the culprits, the game wardens moved towards them which made the said culprits take to their heels as the wardens gave chase to the one who was carrying the bag. They managed to arrest the man with the bag and he turns out to be the appellant.

In the bag there were three pieces of elephant tusks for which the appellant had no permit. The appellant was then taken to police station where Felister d/o Edward@ Sisi (PW5) a game officer identified the tusks measured their weight as 4.3 Kilograms and estimated their total value to be Us dollars 15,000 equivalent to Shs 30, 000,000/= She tendered the evaluation report.

In defence the appellant stated that on 10 July 2015 he went to Chigundugandu village to search for a market for his rice. While there he came across two people carrying bags and they were running. The appellant did not know why those two people were running but

he nevertheless joined them in the run, in the course of which he fell down. He was arrested by people who immediately physically assaulted him after which he was taken to the assailants motorvehicle where he was shown elephant tusks. The assailants accused him of being the owner of the elephant tusks, which he denied. They demanded a bribe of Shs 200,000/= to buy himself out of the arrest but he did not have the money.

The appellant was taken to police where he denied having been in possession of the elephant tusks which he has maintained up to this moment. He has raised 13 grounds to challenge the conviction and sentence. The first ground seeks to fault the trial court for assuming jurisdiction of an economic case without a certificate of transfer. Before this court the appellant appeared in person while the Respondent Republic was represented by Mr. Candid Nasua, learned State Attorney.

The learned State Attorney quickly agreed with the appellant's point raised in the first ground of appeal and addressed the court on it. He submitted that under Section 3(1) of the Economic and Organized Crime Control Act, Cap 200, hereinafter, the Act only the High Court has jurisdiction to sit in Economic cases. The District or any other subordinate Court is conferred jurisdiction by a Certificate of transfer and a consent issued by the Director of Public Prosecutions under sections 12(3) and 26(1) respectively, of the Act.

The learned State Attorney supported his submission by citing the case of **Adam Seleman Njalamoto V. Republic**, Criminal Appeal No. 196 of 2016, CAT at Dar es Salaam (unreported) where the Court of Appeal nullified and quashed the proceedings of the trial Court as well as those of the first appellate Court on the ground that the trial Court acted without jurisdiction.

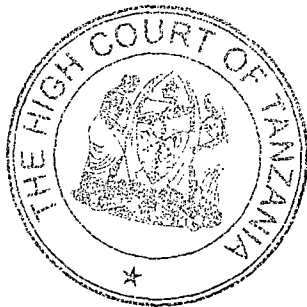
With respect this point was simultaneously raised by both the appellant and the respondent Republic, and I am unhesitatingly in agreement. It is my conclusion that without the certificate of transfer and a consent by the DPP issued under sections 12(3) and 26(1) of the Act, respectively, the District Court of Ulanga at Mahenge did not have the requisite jurisdiction over the case. Consequently I quash the entire proceedings, set aside the sentence and resultant orders.

The next issue is what should be the consequential orders. The learned State Attorney pressed for an order of retrial, relying on the same case of **Adam Seleman Njalamoto** (supra), and submitting that the appellant has not spent a long time in custody. On his part the appellant submitted that he has been in custody since 2015 and that prosecution witnesses were hard to come by at the time of the trial. He also complained that justice did not prevail because he was called upon to defend within a short notice.

The principle to be considered in ordering retrial were exhaustively discussed in the case of **Fatehali Manki V. Republic** [1966] EA 343, cited in the case of **Adam Seleman Njalamoto**

(supra). The conclusion drawn for both cases is that each case shall be decided on its own facts and peculiar circumstances.

I have considered the submissions of both the appellant and the respondent's State Attorney and feel inclined to go along with the latter's. The appellant was convicted and sentenced on 10/11/2017, after being in custody since 9 January, 2017. He is therefore in custody for 16 months because he had no reliable surety to stand for his bail at the trial. The time spent serving sentence therefore should be counted from 10/11/2017 to date hardly six months. Accordingly I find merits in the State Attorney's point and order a retrial before a court of competent jurisdiction.




I.P. KITUSI

JUDGE

21/5/2018

Date: 24/5/2018

Coram: Hon . Massam, DR

Appellant : Present

Respondent : Ms Elizabeth Mkunde

Cc: Banza S/A

Ms. Elizabeth Mkunde State Attorney

The matter is coming for judgment , I am ready for it.

Order

Judgment delivered today on 24.5. 2018 in the presence of appellant person and Elizabeth Mkunde State Attorney for the respondent.

B. MASSAM

DR

24/5/2018

Date: 24/5/2018

Coram: Hon. Massam, DR

Appellant: Present

Respondent : Ms Elizabeth Mkunde State Attorney.

Cc: Banza

Ms Elizabeth Mkunde State Attorney.

The appeal is coming or judgment , I am ready for it.

Order

Judgment delivered today on 25.5.2018 in the presence of appellant and Ms Elizabeth Mkunde State Attorney.

B. MASSAM

DR

25/5/2018