

IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM.

CRIMINAL APPEAL NO. 46 OF 2018

1. OCTAVIAN HILIMALI... } **APPLICANT**
2. MAKLIUS ELIAS }

VERSUS

THE REPUBLIC **RESPONDENT**

17/5/2018 & 24/5/2018

JUDGMENT

I.P.KITUSI,J.

Octavian s/o Hilimali and Makalius s/o Elias, hereafter the first and second appellants are challenging the decision of the District Court of Ulanga at Mahenge, Hon Mahumbuga, DRM. Before that court the appellants were charged with being in unlawful possession of Government trophies contrary to section 86(1), (2) (b) and (3) of the Wildlife Conservation Act, No 5 of 2009, read together with paragraph 14(a) of the first schedule to and Section 57(1) and 60(2) of the Economic and Organized Crime Control Act, [cap 200].

It was alleged at the trial that on 13 April 2016 at or about 11.00 hours at Lugogi- Kivukoni village within Ulanga District in Morogoro Region the appellants were found in unlawful possession of 11/4 Kilograms of buffalo meat valued at Sh 4, 151,500/= the property of Tanzania Government without licence or permit. After hearing four witnesses for the prosecution and the appellants' respective testimonies

in defence the trial court found the appellants guilty, convicted them as charged and thereafter sentenced each to a fine of Shs 41, 800,000/= or to twenty years imprisonment each in default.

The evidence for the prosecution was that on 13/4/2016 Game Wardens including Gasper Leonard Mshama (Pw2) and John Msinguzi (PW3) were on patrol at Kivukoni and Luogi areas. In the second appellant's house described as hut, they found uncooked buffalo meat which he told them he had been given by a person who had been proceeding to Ifakara. The Game Wardens took the second appellant with them so that he could lead them to the person who gave him the meat. On the way they ran into the first appellant who was in possession of buffalo meat too who explained that he got it from some other people. The Game Wardens put the two appellants under arrest and took them to police.

At police station Joshua Labani (PW1) also a Game Warden valued the meat and estimated it to be worth Us dollars 1, 900 equivalent of SHS 4, 180,000/=.He tendered the valuation report as Exhibit P1.

In defence the first appellant denied to have been found in possession of buffalo meat, and stated that he was found in possession of fish. He further stated that the Game Wardens who arrested him had been looking for fugitives who were believed to be in possession of buffalo meat and they took him to assist in the hunt for them. The second appellant's defence was that he was interrogated by Game Wardens at gun point and forced to lead them to a place where they

would find unknown fugitives who were in possession of buffalo meat. He took them to a fish market where they found many people including the first appellant. He too denied to have been in possession of buffalo meat.

The trial court accepted the prosecution's case as true and convicted the appellants.

This appeal raises eight (8) grounds on the basis of which the appellants invite this court to quash the convictions and set aside the respective sentences. In the first ground, the appellants have raised the issue of the jurisdiction of the District Court of Ulanga at Mahenge, proceeding to try an Economic case without being conferred jurisdiction by a Certificate and consent from the Director of Public Prosecutions, hereafter the DPP.

Mr Candid Nasia, learned State Attorney who prosecuted the case on behalf of the Respondent Republic towed the line and submitted in support of this ground. The learned State Attorney, citing section 3(1) of the Economic and Organised Crime Control Act Cap 200, hereafter the Act, submitted that jurisdiction to trial Economic offences is vested on the High Court, and that subordinate courts may only assume jurisdiction through a certificate issued by the DPP under section 12 (3) of the Act.

The case of **Adam Seleman Njalamoto V. Republic**, Criminal Appeal No. 196 of 2016 CAT at Dar es Salaam (unreported) was cited by the learned State Attorney to support his submissions. In that case the Court of Appeal held in relation to the omission to file a certificate and consent;

" 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 appellant court were illegal and nullity."

The court of Appeal proceeded to order a retrial, and so has the learned State Attorney prayed, in this case, that a retrial be ordered considering, he submitted, the fact that the appellants have spent a short time in custody.

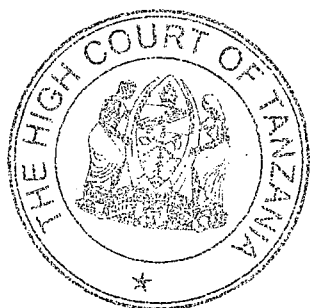
On the other hand the appellants protested the order prayed for on the ground that it will occasion injustice to them. The second appellant even went as far as suspecting that such an order will provide the trial magistrate with an opportunity to victimize them.

With respect I am inclined to agree with both the appellants and the learned State Attorney that the trial Court had no jurisdiction to sit in the case without the requisite jurisdiction being conferred under section 12(3) of the Act and a consent under section 26(1) of the Act both issued by the DPP. The proceedings before Ulanga District Court were, therefore, a nullity and are hereby quashed.

What has to be determined is whether or not a retrial should be ordered.

In the case of Adam Seleman Njalamoto(supra) the case of **Fatehali Manji V. Republic** [1966] EA 343 on the principles governing an order of retrial was considered. It was the court's conclusion that each case is decided on its own peculiar facts. Back to this case I have to consider the period during which the appellants have been in custody. Form the record, the appellants were admitted to bail and were on bail throughout during the trial that ended on 15 December, 2017. It means they have been in custody for five months to date. It is my finding that this is a short period in the circumstances of this case. The second appellant's fear that the trial magistrate will victimize the appellants is uncalled for and given the court's oath of office and role, it is not practical for it to victimize an accused.

Thus I order a retrial before a court of competent jurisdiction.



A handwritten signature in black ink, appearing to read "I.P. Kitusi", is written over the printed name.

I.P. KITUSI

JUDGE

21/5/2018

Date: 24/5/2018

Coram: Hon. Massam, DR

Appellant: 1st
 2nd } Present

Respondent : Ms Elizabeth Mkunde State Attorney.

Cc: Banza.

Ms Elizabeth Mkunde State Attorney

This matter is coming for judgment, I pray to proceed.

Order - Judgment delivered today un the presence of appellant and Ms Elizabeth Mkunde for respondent.

B.MASSAM

DR

24/5/2018