

**IN THE HIGH COURT OF TANZANIA
(DODOMA DISTRICT REGISTRY)**

AT DODOMA

(APPELLATE JURISDICTION)

DC CRIMINAL APPEAL NO. 55 OF 2019

(Original Criminal Case No. 59 of 2016 of the District
Court of Manyoni at Manyoni)

1. ALOYCE MAGAWA ABINIEL@ MABELEEE

2. JONAS JULIUS CHIATA @ CHEUSI

3. ANTON MAGOMBA @ MLULU

4. ANDERSON WAMI @ MOTO

5. MATAYO ROGAN @ MBEHO

6. GEORGE JOSEPH @ MHANDO

.....APPELLANTS

VERSUS

THE REPUBLICRESPONDENT

19/2/2020 & 26/2/2020

JUDGMENT

MASAJU, J.

The Appellants, Aloyce Magawa Abiniel @ Mabelee, Jonas Julius Chiata @ Cheusi, Anton Magomba @ Mlulu, Anderson Wami @ Moto, Matayo Rogan @ Mbeho and George Joseph @ Mhando (the 1st through the 6th Appellants respectively) were jointly and

together charged with; and convicted of economic offences of Unlawful Possession of Government Trophy contrary to sections 86 (1) (2) (c) (ii), (3) (b), 113 (1) and (2) of the Wildlife Conservation Act No. 5 of 2009 as amended by section 59 (a) and (b) of the Written Laws (Miscellaneous Amendment Act No. 2 of 2016 read together with paragraph 14 of the First Schedule to and sections 57 (1) and 60 (1) both of the Economic and Organised Crime Control Act, [Cap 200] as amended by section 13 (b) (2) (3) (4) and 16 (a) of the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016; and Unlawful Dealing in Government Trophy contrary to section 80 (1), 84 (1) 111 (1) (a) and section 113 (1) (2) of the Wildlife Conservation Act No. 5 of 2009 read together with Paragraph 14 (c) and section 57 (1) and 60 (1) both of the Economic and Organised Crime Control Act, [Cap 200]. The said offences formed the 1st and 3rd counts respectively of the Charge Sheet against the Appellants in the trial Court, namely Manyoni District Court at Manyoni, within Singida Region. On the 1st count, the Respondent Republic (the prosecution) had alleged that the Appellants together and jointly on the 13th day of October, 2016 at about 1630 hrs. at Naguro village within Chamwino District in Dodoma Region were found in unlawful possession of government trophy to wit four (4) pieces

of Elephant tusks valued at USD 30,000/= which is equivalent to TZS 65,670,000/=, the property of the United Republic of Tanzania. On the 3rd count, the Respondent Republic had alleged that the Appellants together and jointly on diverse dates between September, 2016 and day of October, 2016 at Naguro and Ilangali villages within Chamwino District in Dodoma Region were found in unlawful dealing of government trophy to wit; four (4) pieces of Elephant tusks which are from two Elephants valued at USD 30,000 equivalent to TZS 65,670,000/= and two pieces of Ground Pangolin shells from one Pangolin valued at USD 960 which is equivalent to TZS 2,101,440/=, total valued at TZS 67,771,440/= the property of the United Republic of Tanzania without dealing licence. The 5th Appellant (Matayo Rogan @ Mbeho) was charged with; and convicted of the economic offence of Unlawful Possession of Government Trophy contrary to section 86 (1) (2) (c) (ii), (3) (b), 113 (1) and (2) of the Wildlife Conservation Act No. 5 of 2009 as amended by section 59 (a) and (b) of the Witten Laws (Miscellaneous Amendment) Act No. 2 of 2016 read together with paragraph 14 of the First Schedule to and sections 57 (1) and 60 (1) both of the Economic and Organised Crime Control Act, [Cap 200] as amended by section 13 (b) (2) (3) (4) and 16 (a) of the Written Laws (Miscellaneous

Amendments) Act No. 3 of 2016. The Respondent Republic had alleged that on the 17th day of October, 2016 at Ilangali area within Chamwino District in Dodoma Region was found in possession of government trophy to wit; two (2) pieces of Ground pangolin shells from one Pangolin valued at USD 960 which is equivalent to TZS 2,101,440/= the property of the United Republic of Tanzania. The Appellants were sentenced to serve twenty (20) years of imprisonment each in respect of the 1st count. The 5th Appellant was sentenced to serve twenty (20) years imprisonment in respect of the 2nd count. The Appellants severally were sentenced to pay a fine of TZS 135,542,880 in default thereof to serve three years imprisonment each in respect of the 3rd count. The government trophies, the four (4) Elephant Tusks and two (2) Pangolin shells alongwith the Motorcycle with Reg. No. T. 717 CPP were forfeited to the Government pursuant to section 111 (1) (a) (d) of the Wildlife Conservation Act, [Cap 289], hence the appeal to the Court.

The Appellants severally filed their Petitions of Appeal against the trial Court's decision. The said Petitions of Appeal were consolidated in one Criminal Appeal No. 55 of 2019 in the Court. The Appellants Petitions of Appeals included the grounds of appeal thus:

1. That they were forced to sign on cautioned statements which they did not make
2. That they were not found in possession of the alleged government trophy at the time they were individually arrested.
3. That, their alleged cautioned statements were recorded after the expiry of the period of four (4) hours from when they were individually arrested and put under police restraint, and
4. That they were taken to Court after so many days upon their arrest

When the appeal was heard in the Court on the 19th day of February, 2020, the laymen Appellants appeared in persons and adopted their grounds of appeal in their respective Petitions of Appeal to form part of their submissions in support of the appeal in the Court as they prayed the Court to allow the appeal, quash Conviction and set aside the sentences against them accordingly. The learned Senior State Attorney, Ms. Catherine Gwatu, who appeared for the Respondent Republic supported the appeal by the 2nd, 3rd, 4th, and the 6th Appellants as she contested the appeal by the 1st and the 5th Appellants.

The Respondent Republic reasoned that she did support the appeal by the 2nd, 3rd, 4th and 6th Appellants because they were just arrested on the information allegedly given by the 1st Appellant upon his arrest that the said Appellants were his accomplice in the crime; but when they were arrested and searched they were not found in possession of anything incriminating. The said Appellants in rejoinder just appreciated the Respondent's learned senior State Attorney for being objective and professional, hence her so rightly supporting their appeal. That, the Respondent Republic contested the appeals by the 1st and 5th Appellants on the reasoning that they were found in possession of the impugned government trophies when they were individually arrested, and they recorded cautioned statements in time, confessing to have been parties to the crimes they were indicted for in the trial Court. That, their cautioned statements were admitted in evidence in the trial Court as prosecution exhibits. The Respondent Republic prayed the Court to dismiss the appeal by the said 1st and 5th Appellants. The Respondent Republic then drew the attention of the Court to the defective judgment of the trial Court for its non-compliance with section 312 (1) of the Criminal Procedure Act, [Cap 20] in that said judgment neither contained points for determination (issues)

nor the reasons thereof; and that the judgment did not consider the defence case at all. The Respondent Republic advised the Court to step into the shoes of the trial Court and re-evaluate the evidence presented before the trial Court in respect of the 1st and 5th Appellants, find them guilty, and sentence them accordingly. The case of **Daniel Severine & 2 others V. R (CAT) Criminal Appeal No. 431 of 2018, Bukoba Registry (Unreported)** was drawn to the attention of the Court in support of the argument that the Court steps into the shoes of the trial Court in order to rectify the apparent defective judgment of the trial Court. The Respondent Republic also argued that the 1st Appellant has been in mobile phone communication with the prosecution witness Thomas Mahenge (PW3) and informer. That, the said Appellants was arrested when a trap to that effect was made. This was a proof of his unlawful dealing in Government Trophy. The Respondent Republic also argued that the 1st and 5th Appellants had been individually found in possession of government trophies and the certificates of seizure thereof were admitted in the trial Court as prosecution Exhibits P.VIII and P. IX respectively. The Respondent Republic was therefore of the position that the 1st and 5th Appellants were so rightly convicted of the offences they had been indicted for in the trial Court.

In rejoinder the said 1st and 5th Appellants maintained their submissions in chief as they contested the Respondent Republic's submissions against their appeal. The 1st Appellant added that he was indicted in the trial Court on the 19th day of October, 2016 whilst he was arrested on the 13th day of October, 2016 but the certificate of value of the Government Trophy allegedly found in his possession on the 13th day of October, 2016 was drawn and signed on the 20th day of October, 2016. That, the Respondent Republic's evidence in the trial Court was not credible. The 1st and 5th Appellants, once more, prayed the Court to allow the appeal and let them free.

When all is said and done by the parties, the Court is of the following reasoning and considered position; thus;

1. That, Respondent Republic's support of the 2nd, 3rd, 4th, and 6th Appellants' appeal was so rightly done for there was no any meaningful incriminating evidence against the said Appellants.
2. That, according to section 38 (1) of the Criminal Procedure Act, [Cap 20] it is a police officer Incharge of a Police Station who may himself search or issue a written authority to any police officer under him to search the building, vessel,

carriage, box, receptacle or the place as the case may be. The 1st and 5th Appellants were searched by Daudi Thomas Mahenge (PW3) and E. 81 D/Cpl. Masoye (PW4) respectively who were not Police officers Incharge. There was no any written authority that was ever produced in the trial Court as a proof that the said police officers/prosecution witnesses (PW3 & PW4) had written authority to execute the impugned search. Secondly, Prosecution Exhibit PVIII and PIX were allegedly result of searches made under emergency pursuant to section 42 (1) (b) (ii) of the Criminal Procedure Act, [Cap 20]. Yet, none of such emergency situations was ever stated in the trial Court so as to justify bypassing the procedure under section 38 of the Criminal Procedure Act, [Cap 20]. That being the case the purported evidence in Prosecution Exhibits PVIII and PIX having been illegally obtained are hereby expunged from the body of evidence of the trial Court.

3. That, according to section 50 (1) of the Criminal Procedure Act, [Cap 20) the person who is in restraint for offence should be interviewed within four (4) hours commencing at the time when he was taken under restraint except for the conditions stated under section 50 (2) of the Criminal

Procedure Act [Cap 20] which constitute the grounds for seeking extension of time under section 51 (1) of the Criminal Procedure Act, [Cap 20] in case of the delayed interview. By virtue of the testimony of E. 81 D/Cpl. Masoye (PW4) who also testified as PW1 in the inquiry proceedings and Prosecution Exhibit PX in respect of the cautioned statements by the 1st and 5th Appellants, it is apparent that the said Appellants and their co-Appellants were interviewed after the expiry of the basic time available for interviewing suspects of offences who are under restraint so provided for under section 50 (1) of the Criminal Procedure Act, [Cap 20] and there was no application made for extension of such interview in terms of section 51 of the Criminal Procedure Act, [Cap 20]. That being the case, their statements were illegally made and the same are hereby expunged from the body of evidence of the trial Court accordingly pursuant to **Tumaini Moleli @ John Walker & others V Republic (CAT) Criminal Appeal No. 40 of 1999, Arusha Registry, (Unreported).**

4. That, according to section 29 (1) of the Economic and Organised Crime Control Act, [Cap 200], after a person is arrested, or upon the completion of investigations and the

arrest of any person or persons, in respect of the commission of an economic offence, the person arrested shall as soon as practicable, and in any case within not more than forty eight hours after his arrest, be taken before the District Court or the Resident Magistrates' Court within whose local limits the arrest was made, together with the charge upon which it is proposed to prosecute him, for him to be dealt with according to law, subject to the Act. The 1st Appellant was arrested on the 13th day of October, 2016 at about 1600hrs at Naguro village within Chamwino District in Dodoma Region but he was taken before the District Court of Manyoni on the 19th day of October, 2016. The 5th Appellant was arrested at 04.00hrs on the 17th day of October, 2016 at Ilangali area within Chamwino District in Dodoma Region but he was taken before the District Court of Manyoni on the 19th day of October, 2016. In both situations the forty eight timeline had expired. That being the case, their arraignment before the trial Court was illegal. As if the defaulting of the statutory timeline for taking the persons accused of economic offences before the Court was not enough, the Appellants were also charged with economic offences, tried and convicted by the District Court of

Manyoni at Manyoni in Singida Region whilst the offences the Appellants were indicted for were allegedly committed in Naguro and Ilangali villages within Chamwino District, Dodoma Region, the scene of crimes, where the Appellants were arrested as well. So, the indictment and trial of the Appellants before the District Court of Manyoni for the offences which were committed beyond its local limits was also illegal. The said illegality vitiates the Appellants' trial, in the District Court of Manyoni, Singida Region, for want of jurisdiction thereof.

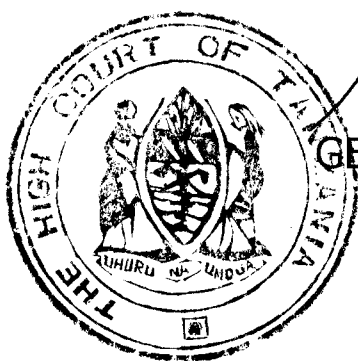
5. That, pursuant to section 214 of the Criminal Procedure Act, [Cap 20] a trial of case can, on good cause, be taken over and completed by another Magistrate but the reason of such taking over of the case must be recorded in the original record of the trial Court. In the instant the case against the Appellants, the case was initially tried by Hon. F.H. Kiwonde (RM) but the trial was subsequently taken over by Hon. S.T. Kiama (RM) to its completion, but the original record reflects no reasons for such development. Other things being equal, the case could have been considered for re-trial.

6. That, a judgment given by a court of competent jurisdiction in criminal justice should be in line with section 312 of the Criminal Procedure Act, [Cap 20]. The weakness pointed out by the Respondent Republic on the judgment of the trial Court, renders it incompetent or defective judgment. Other things being equal, the remedy thereof could have been the Court to remit the original record to the trial court for re-composition of the Judgment.
7. That, by virtue of reasoning on the considered positions 1–3 hereof, the prosecution case evidence in the trial Court hangs on a too thin thread to support and sustain the impugned conviction
8. That, by virtue of reasoning on the considered position 4 the illegal trial by the Court which lacked jurisdictional competence contrary to section 29 (1) of the economic and Organised Crime Control Act, [Cap 200] and contrary to sections 180 and 181 of the Criminal Procedure Act, [Cap 20] as well is hereby, pursuant to the revisionary powers of the Court under sections 372 and 373 of the Criminal Procedure Act, [Cap 20], declared a nullity alongwith the

record of proceedings, judgment and orders thereof which are hereby quashed and set aside accordingly.

9. That, since the trial Court lacked jurisdiction, the irregularities which have been pointed out and highlighted hereof cannot be saved under section 388 (1) of the Criminal Procedure Act, [Cap 20], for the irregularities occasioned failure of justice. And for the reasons given on the considered positions 1–3 and 7 hereof there shall be no retrial against the Appellants.

The Appellants shall therefore be released from prison forthwith unless they are otherwise held for lawful cause. It is hereby so reasoned and ordered by the Court.



GEORGE M. MASAJU

JUDGE

26/2/2029