

IN THE HIGH COURT OF TANZANIA
AT SUMBAWANGA
RM CRIMINAL APPEAL NO. 134/2018

*(Original Economic case No. 4/2015 from resident magistrate's court of
Katavi at Mpanda)*

LUHENDE BUNDALA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

W.R. MASHAURI – J

18/03/2020 & 20/03/2020

The Resident Magistrates' court of Katavi at Mpanda meted out a sentence of twenty years imprisonment to the appellant consequent upon a conviction for being found in possession of three pieces of elephant tusks which however is contrary to the charge sheet which alleges that, on 30/12/2015 at Kashishi village within Mlele District in Katavi Region the accused was found in possession of a Hippopotamus tooth valued at 1,500 USD at exchange rate of Tshs. 2000 which is equivalent to Tshs 3,000,000/=, the property of the United Republic of Tanzania without any written permit sought and obtained from the Director of Wildlife.

Be that as it may, the appellant has appealed to this court against both conviction and sentence. He has advance five grounds but for the purpose, I deem it sufficient to mention and deal with ground five alone which states that:-

5. The trial court erred in law and fact to convict the appellant relying on whole null process of the trial court as the witnesses testified that we was possessed hippopotamus tooth while the trial court convicted him of unlawful possession of elephant tooth something which is antagonistic to the realty of the offence alleged.

During the hearing of his appeal the appellant refused even to have been found in possession of the said hippopotamus tooth. He said this case against him is a fictitious case cooked by his former wife Luli d/o Ngusa upon separated with her. That, before separated he and his wife were blessed with five children and upon separation the wife was claiming division of the children. She even reported the matter to the sub-village chairman and we was summoned for reconciliation of their quarrel but reconciliation failed.

After a lapse of three months, he was arrested by police officers on 30/12/2015 and taken to Usevya police station and while at police station, his wife went there and said he was found a tooth of hippopotamus in his shamba when clearing it for cultivating and hid it for selling it latter, the allegation of which was spitefully framed against him by his wife.

Having so submitted in support of his appeal, he prayed the court to allow it so that he can go home to join his children.

On his part, Mr. Mwashubira learned Senior State Attorney for the Republic/Respondent supported the appeal and said that, the conviction of the appellant for the offence of possession of three pieces of elephant tusks while the charge and the evidence given against him was possessing a tooth of hippopotamus is odd and contrary to the provisions of S. 235(1) which requires the trial court to convict and/or acquit the accused basing on the evidence given against him by the prosecution witnesses.

That, convicting the accused person on a different subject matter of the case is wrong and it renders the conviction a nullity. He therefore besought the court to allow the appellant's appeal for want of proper conviction and sentencing.

On my part, upon carefully gone through the trial court's record, I am also in all fours incline to the learned Senior State Attorney that the conviction is vitiated by mistake of the trial court of which the prosecution is not to blame.

At law, I therefore ought to quash the conviction and set aside the sentence of 20 years imprisonment imposed on the appellant.

Upon quashing the conviction and setting aside the sentence of 20 years imprisonment, what would follow thereof is to order for retrial in so far as the circumstances in this case are concerned.

However, as I have said above, I have carefully gone through the trial court record and have gathered that, the evidence given by prosecution witnesses against the appellant is a tainted framed evidence of which is incompatible with the innocence of the accused. The evidence is incapable of explanation upon any other reasonable hypothesis than that of guilty.

I cannot therefore order for the re-trial of the case. The guidance in respect of cases of this kind was laid down in the case of **Fatehal Maji vrs Republic** (1966) I E.A in which the court held as following:-

"In general, a re-trial will be ordered only when the original trial was illegal or defective, it will not be ordered when the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up the gaps in its evidence at the first trial, even where a conviction is vitiated by mistake

of the trial court for which the prosecution is not to blame, it does not necessarily follow that a re-trial should be ordered, each case must depend on its particular facts and circumstances and an order for retrial should only be made where interests of justice required it and should not be ordered where it is likely to cause an injustice to the appellant”.

Basing on that guidance given by the Court of Appeal for East Africa, and so far as I have quashed the conviction and set aside the sentence of 20 years Imposed on the appellant by the court, what follows now is to allow the appellant’s appeal on its entirety. The same is allowed. He shall be released from custody forthwith unless further held in some other lawful connections.

It is so ordered.



W.R. Mashauri

Judge

20/03/2020

Judgment delivered in court In presence of the appellant and absence of the respondent this 20/03/2020.



W.R. Mashauri

Judge

20/03/2020