**IN THE HIGH COURT OF TANZANIA**

**IN THE DISTRICT REGISTRY OF SHINYANGA**

**AT SHINYANGA**

**CRIMINAL APPEAL NO. 58 OF 2021**

**KOMBE TABI YOMBO.....1ST APPLELLANT**

**MASUNGA SHIYI ITUGIJO @SEGENGE.....2ND APPELLANT**

**JOSHUA IBRAHIM @ SIMBA.....3RD APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**[Appeal from the Decision of Resident Magistrate's Court of Simiyu at Bariadi.]**

**(Hon. C.E. KILIWA SRM)**

**dated the 28th day of June, 2021**
**in**
**Economic Crime Case No. 3 of 2019**

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**JUDGMENT**

18th May & 6th July,2022.

**S.M KULITA, J.:**

This is an appeal from the Resident Magistrate's Court of Simiyu. The Appellants herein above were charged in the said court for Unlawful possession of Government Trophies, contrary to the provisions of section 86(1)(2)(b) and Part 1 of the first schedule to the Wildlife Conservation

Act No. 5 of 2009, read together with paragraph 14 of the first schedule to and sections 57(1) and 60(2) of the Economic and Organized Crime Control Act [Cap 200 RE 2018].

In a nutshell the Prosecution case, as it was unfolded by its witnesses is that, on 16th January, 2019 at Lung'wa Village within Itilima District in Simiyu Region, the Appellants were in unlawful possession of Government trophies, to wit; one piece of elephant tusk weighing 30.75 Kgs, valued at USD 15,000 which is equivalent to Tshs. 34,606,500/=, the property of Tanzania Government without having a permit.

On their part the Appellants denied the charge. To the conclusion of the trial, the Appellants were accordingly found guilty, and upon conviction, twenty years imprisonment sentence was met to each of them. This was on 28th of June, 2021.

Aggrieved with that decision, the Appellants preferred the instant appeal on four grounds which may be summarized as follows: **One**, the trial court erred by not calling the Village Chairperson to testify whether the elephant tusk was found in the house of the first Appellant, **Two**, the trial court erred to convict the Appellants while the case was not proved at the required standard, **three**, it was wrong for the trial court to convict

the Appellants relying on a weak prosecution evidence, **four,** the defense evidence was not considered.

The Appeal was heard on 18th of May, 2022. On that date, the Appellants appeared in person whereas the Respondent, Republic had the service of Ms. Gloria Ndondi, learned State Attorney who conceded the appeal for the 2nd and 3rd appellants but resisted the same for the 1st Appellant.

Before I venture into the submissions of both parties, it is worth to start with dealing with what the records show. The Appellants herein were charged with the offence that falls under the first schedule to the Economic and Organized Crime Control Act. Thus, economic offence as per section 57(1) of that same Act. The said section provides;

> *"57.- (1) With effect from the 25th day of September, 1984, the offences prescribed in the First Schedule to this Act shall be known as economic offences and triable by the Court in accordance with the provisions of this Act."*

The court with jurisdiction to entertain such offences as stated under the quoted paragraph, has been defined under section 2 of the same Economic and Organized Crime Control Act as follows;

> *"Court" means the Corruption and Economic Crimes Division of the High Court established under section 3".*

For the Appellants to be tried by a subordinate court there is a need of a **certificate** conferring jurisdiction to it, and **consent** as per sections 12(3) and 26(1) respectively of the same Act. The said sections provide;

> *"12(3) The Director of Public Prosecutions or any State Attorney duly authorized by him, may, in each case in which he deems it necessary or appropriate in the public interest, by certificate under his hand, order that any case involving an offence triable by the Court under this Act be tried by such court subordinate to the High Court as he may specify in the certificate".*

> *"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".*

The available records show that, the Appellants were tried under a subordinate court without consent of the Director of Public Prosecutions. This is because what purports to be a consent was made under section 26(2) of Cap 200 which in actual sense is unfit for the intended purpose. It is as saying the Appellants were tried with no consent at all.

Concerning this defect, what does the law say on it? In the case of **Adam Seleman Njalamoto v. Republic, Criminal Appeal No. 196 of 2016 CAT, Dar es Salaam** had this to say; -

> *"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."*

To insist on it the Court of Appeal enlisted a litany of authorities to that effect which are **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 of 2007; Nicco Mhando & 2 Others vs. Republic, Criminal Appeal No. 332 of 2008** (all unreported) just to mention a few.

On that account and with the dictates of the Court of Appeal decisions on the issue in question, I am settled in my mind that, as the Appellants were tried without consent from the Director of Public Prosecution, the trial court's proceedings, conviction and sentence as well are hereby declared illegal and nullity. I thus, proceed to quash all proceedings and conviction made by the trial Court and set aside sentence imposed against all Appellants.

The remaining question is what should be done then, at this juncture? In the cited case of **Adam Seleman Njalamoto** (supra) it was stated that; -

> *"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".*

In order to ascertain whether this court should thus order re-trial, the guidance of the case of **Fatehali Manji Vs. R [1966] E.A. 343** was regarded, particularly on the below quote; -

*"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"*

The question is, in the case at hand, are there no gaps the prosecution will fill when retrial is ordered? The answer is not far to fetch. **Firstly**, the Ms. Ndondi State Attorney conceded to the appeal for the 2nd and 3rd Appellants. It is obvious that she saw the mistakes the prosecution made during trial. Ordering re-trial will give them a chance to fill in the gaps. **Secondly**, the Exhibit P3 seizure certificate was not read out after it was admitted in court. This is apparent seen at page 45 of the typed

proceedings, thus should be expunged from the records. To order a retrial will permit the prosecution to fill that gap. **Thirdly**, the Exhibit P4 Weigh and Measure report was not read out after it was admitted in court. This is apparent seen at page 53 of the typed proceedings, which means it should also be expunged from the records. To order a re-trial will be a venue for the prosecution to fill that gap.

In general, as there are complaints in the grounds of appeal that the prosecution case was not established at the required standard, and as long as there are trial defects as shown above, ordering re-trial will give chance for the prosecution to fill in the gaps, the act which will be against the dictates of the Court of Appeal made in the cited case of **Fatehali Manji** (supra).

On that account, I refrain ordering re-trial, instead I allow the appeal in its totality. The appellants should be released from prison forthwith unless held for any other lawful cause.

Order accordingly.

**S.M. KULITA**

**JUDGE**

**06/07/2022**

**DATED** at **SHINYANGA** this 6th day of July, 2022.


**S. M KULITA**

**JUDGE**

**06/07/2022**