

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB REGISTRY OF KIGOMA

AT KIGOMA

ECONOMIC APPEAL NO. 1 OF 2023

(Arising from Economic Case No. 02 of 2022 in the Resident Court Magistrates of
Kigoma at Kigoma)

NTUNZWENIMANA DIEDONNE1ST APPELLANT

ERNEST IRAMBONA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

Date of Last order: 21 .08. 2023

Date of judgement: 08 .09. 2023

JUDGEMENT

MAGOIGA, J.

The appellants, **NTUNZWENIMANA DIEDONNE** and **ERNEST IRAMBONA** were on 4th day of July, 2022 arraigned in the Resident Magistrate Court of Kigoma for unlawful possession of Government Trophies contrary to section 86 (1), (2)(b) of the Wildlife Conservation Act, (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 Organised Crimes Control Act [Cap 200 R.E 2019].

It was alleged that the appellants on 12th day of June, 2022 at Msagala village within Buhigwe District in Kigoma region, the two appellants were

found in possession of (3) pieces of elephant tusks weighing 11.4 Kilograms valued at USD 15,000 equivalent to Tshs.34,950,000/= the properties of the United Republic of Tanzania without a permit from the Director of Wildlife.

Having heard the case on merits, the trial Senior Resident Magistrate found the accused persons guilty as charged and sentenced them to pay a fine of Tshs.34,950,000/= or to serve Twenty (20) years custodial imprisonment in default.

Aggrieved by conviction and sentence, the appellants preferred this appeal to this Court faulting the trial Senior Resident Magistrate on the following grounds, namely: -

1. That, the charges against the appellants were not proved to the required standards.
2. That the trial court erred in law and facts when she failed to ascertain the defence of the accused persons that they knew nothing about the said government trophies and that the said charges were fabricated by the arresting police officers at Manyovu Police Post where the appellants were arrested and determined at different times for other issues of immigration.
3. That, PW1 locally (kienyeji) identified the said trophies as elephant's tusk using colour, cemented layer and small curve. This is not a



professional way of identifying government trophies as a game officer.

On the strength of the above grounds of appeal, the appellants prayed that this Court be pleased to set aside the judgement, conviction and sentence of the trial court and set the appellants free.

When this appeal was called on for hearing, the appellants had the legal services of Mr. Daniel Rumenyela learned advocate through video conference, while the Republic was represented by Ms. Antia Julius, learned State Attorney.

Before hearing commenced, the court noted that the consent given by RPO did not cite the provision of section 86 of Wild Life Conservation Act (WCA) [Cap 283 R.E 2022] and invited the learned counsel for parties to address me to the effect of such consent along with the merits of the appeal and the way forward, in case, I find it defective rendering the whole trial a nullity.

Mr. Rumenyela started by submitting on the issue raised suo motto by the court on the consent filed, that it is, obviously defective, for failure to cite section 86(1) and (2) of the WCA [Cap 283 R.E 2022]. He strongly argued that much as the consent is defective, then, the whole trial was a nullity. He referred to this court the case of **Peter Kongori Maliwa & 4 others vs Republic, Criminal Appeal No. 253 of 2020**, where the CAT at



Musoma, in which court was clear that once consent and certificate are defective, the whole trial was a nullity.

Guided by the above stance, the learned advocate argued that, where the consent is conspicuously defective, then, he prayed that the appellants be acquitted because an order of retrial will not do justice in this case but it will enable the prosecution to fill in gaps.

According to Mr. Rumenyela the prosecution evidence, in its totality is sharky to prove the case because PW2 said he communicated with the first accused but in which language while in record, it is clear that he does not understand English nor Kiswahili. PW2 mentioned the number which was registered at Burundi but he did not tell which language were communicating.

On identification, the counsel for the appellants argued that PW1 identified government trophy but PW2 said the same were identified by Mr. Salim, but who did not testify.

On those few reasons, Mr. Rumenyela prayed that the whole trial be nullified and the appellants be set free. Not only that but also said there is no officer by the name of Game officer for the purpose of making identification. So, to Mr. Rumenyela's views, the person who made this identification was not a wildlife officer.

Submitting on the issue of time of arrest, Mr. Rumenyela quantified that it was stated as 19:30 while PW4 stated as 12hrs so to him, when were



these arrested remain unproved. Expounding his argument, the counsel for the appellants said that on account of all those gaps, the prosecution if allowed, will definitely use it to fill the gaps at the detriment of the appellants. He strongly prayed the whole proceedings and judgement be declared a nullity and set the free the appellants.

Now coming to the appeal, the counsel for the appellants submitted on the first ground as submitted above that it goes to the root of the appeal that the offence charged was not proved beyond reasonable doubt.

On the second ground the counsel insisted that the court did not consider defence evidence at all because she heavily considered the prosecution case than the defence. Mr. Runyemela pointed out as well that no search was done at the scene of crime and the explanation of PW2 which was not enough.

On the 3rd ground, Mr. Rumenyela submitted that, there was no expert with powers to make any identification to say are elephant tusks and not something else.

On the totality of the above reasons, Mr. Rumenyela prayed the appeal be allowed.

Responding to the above submissions, Ms. Antia Julius, learned State Attorney admitted that, it is true that the consent did not mention section 86 of the Wildlife Conservation Act, No.5 of 2009, subject of the charge, but was quick to point out that, the defect was curable because in the




certificate all sections were mentioned. The learned State Attorney further argued that the consent gives permission for subordinate court to try a case which did not have jurisdiction. Certificate gives the powers to transfer a case supposedly tried by the High Court to the subordinate court. To her views, these two complement each other and as such curable under section 388 of the CPA. Much as under the certificate is proper, then, the consent, if found defect do not fetter the jurisdiction of the court.

In the alternative and without prejudice to the above, Ms. Antia submitted that if the court finds the consent is not curable, then, the court be pleased nullify the trial court proceedings and judgement and order retrial denovo.

According to Ms. Antia, the gaps pointed out by the leaned counsel for the appellant do not go to the root of the matter but are mere lapse of human which occur but are curable.

It was the submission of Ms. Antia that at page 12 of the proceedings, PW2 said that these two people were communicating in Swahili. The issue here is, they understand swahili though not fluent.

On the issues of Ismail and Salim, Ms. Antia pointed out that it is a slip of the pen and not intended to defeat justice but if the names are different are minor contradiction which did not affect the justice in this case. According to Antia, PW2 was referring to PW1.




On the valuer who called himself as Game Officer, Ms. Antia referred to this court the case of **Emmanuel Lyabonga vs Republic, Criminal Appeal No. 257 of 2019 CAT** which expunged valuation report but continued to convict the appellant. According to Ms. Antia, the defects are minor ones which did not shake the prosecution case.

On the issue of time, the learned State attorney argued that it was curable because the charge sheet did not state time. Basing on the above reasons, Antia argued that if an order of retrial is ordered no filing of gaps but there is strong evidence to do justice to parties.

Ms. Antia went further arguing that, PW2 explained when it was not possible to do all things at scene of crime. It was the submission by Ms. Antia that, PW4 witnessed as an independent witness so had no interest in the case.

Replying to the 1st ground, the State Attorney submitted that no gaps are to be filled but there is strong evidence to be justly tried in case of an order for retrial.

On the 2nd ground, it was the submission of the learned State Attorney that, the trial magistrate considered all evidence of both sides and came to just conclusion that the case for prosecution was proved. She urged the court to dismiss this ground of appeal.



Responding on the 3rd ground, Ms. Antia replied that the ground is baseless because the identification was professionally done which confirmed and identified that it was the elephant's tusks. To buttress her argument, she cited the case of **Sylvester Stephano vs Republic, Criminal Appeal No. 527 of 2016 CAT** at arusha where it was held that the duty of an expert is to provide the court with necessary scientific criteria for testing the accuracy of their conclusion, so as to enable the court to form its own independent judgement by application of those criteria to the facts given in the evidence.

Guided by the above holding, the learned Attorney was of the strong view that identification given was professional identification which assisted the court to arrive at just decision. She, thus, urged to find no merits in this ground.

In conclusion, the learned State Attorney prayed the appeal be dismissed for want of merits.

In rejoinder, Mr. Rumenyela reiterated his earlier submissions by insisting that if P1 is expunged the whole case for prosecution crumbles down because the trial magistrate relied heavily on exhibit P1 to convict the appellants. According to Mr. Rumenyela, the case of Emmanuel cited is distinguishable because there was other evidence to prove the offence



contrary to this case where there is no other evidence to prove the offence and urged this court to allow the appeal as prayed.

This marked the end of hearing of this hotly contested appeal. The task of this court now is to determine the merits or otherwise of this appeal in the light of evidence on record.

Before embarking on the merits of the appeal, I wish to start answering the legal issue concerning the consent given by the RPO which was raised suo motto by this court and argued by both counsels, I truly recommend the learned advocates for parties for their brilliant arguments.

Having carefully followed the serious rivalling arguments by learned counsel for parties in this appeal, I find out that there is no dispute that the consent given by Regional Prosecution Officer from the office of National Prosecution Services subject of this trial of the appellants did not cite the provisions of section 86 of the Wildlife Conservation Act, NO.5 of 2009. For easy of reference the said consent was couched in the following language:

"CONSENT OF THE PROSECUTIONS ATTORNEY IN-CHARGE

I SHABAN JUMA MASANJA, the Prosecutions Attorney In-Charge of Kigoma region, in terms of section 26(2) of the Economic and Organized Crime Control Act, [Cap 200 R.E.2019] read together with Government Notice No.496H



of 2021 HEREBY CONSENT to the prosecution of NTUNZWENIMANA DIEUDONNE and ERNEST IRAMBONA for contravening the provisions of paragraph 14 of the Schedule to and sections 57(1) and 60 (2) both of the Economic and Organized Crime Control Act, [Cap 200 R.E. 2019] particulars of which are stated in the charged.

Signed at Kigoma 30th day of August, 2022

Signed

Shaban Juma Masanja

Prosecutions Attorney In-charge."

However, what is in serious dispute between the legal trained minds for parties' is whether the defect is curable or not and its consequences. While Ms. Julius argued that, the defective is curable under section 388 of the CPA, on the other hand Mr. Rumenyela strongly argued that is not curable and its consequences are obvious and cited the case of **Peter Kongori Maliwa and 4 others Vs. The Republic, Criminal Appeal No.253 of 2020 CAT (Musoma)** in which it was held that the legal consequences for failure to cite section 86 of the Wildlife Conservation Act, is to vitiate the trial proceedings as the court acted without jurisdiction.


In the above cited case, the Court of Appeal guided by the case of **Dilpkumur Maganbai Vs. Republic, Criminal Appeal No.270 of**

2019 (Unreported) CAT in which the Highest Court of the Land was loud and clear that such serious was incurably defective and there was no way it could be cured as suggested by the learned State Attorney.

Guided by the above stance of the Court of Appeal, therefore, I have no reasons to differ nor distinguish but to follow suit and find that the instant appeal suffices to be disposed of by this point alone, and I am increasingly to hold that the trial proceedings were incurably defective for being conducted without proper consent from the office of National Prosecution Services as required by law. On that note, the arguments by Ms. Julius that same is curable under section 388 of the CPA are misconceived, misleading, and, as such rejected.

That said and done, I hereby under the provisions section 43(1) of the Magistrates' Courts Act, [Cap 11 R.E 2019] do hereby, therefore, nullify the proceedings of the trial Court, quash the conviction and set aside the sentenced meted out against the appellants.

On the way forward, the counsel for the appellants prayed that the appellants be acquitted because an order for retrial will not do justice in this case but it will enable the prosecution to fill in gaps. On the other side, the learned State Attorney prayed that if the court finds the consent is not curable, then the court be pleased to order a retrial because there is ample evidence to mount conviction to the appellants.



I am in agreement with Mr. Runyemela, that, an order of retrial will not do justice in this appeal but be loophole to feel the gaps pointed out because, in my considered opinion, the gaps pointed out go to the roots of the matter.

That said and done, this appeal is merited and is allowed. In the final, I order immediate release of the appellants from prison unless held there for some other lawful cause. The other relevant authority be involved in dealing with foreigners when setting the appellants free who are not Tanzanians for proper evacuation to their respective nation.

It is so ordered.

Dated at Kigoma this 15th day of September, 2023.



A handwritten signature in blue ink, appearing to read "S.M. Magoiga", is written over a horizontal line.

S.M. MAGOIGA

JUDGE

15/09/2023