

TANZANIA / JUDGMENT

PETER SAMWELI NDEKEJA

COURT
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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (SHINYANGA SUB-REGISTRY)
AT SHINYANGA CRIMINAL APPEAL NO. 22200 OF 2024 (Arising from Misc. Criminal Application
No. 13899 of 2024 before Hon Mahimbali - Judge) which originated from Economic Case No. 09 of
2023 from District Court of Meatu at Mwanhuzi) PETER SAMWEL NDEKEJA
APPELANT VERSUS THE REPUBLIC.....RESPONDENT

JUDGMENT

23rd & 27th September, 2024 MASSAM, J: In the District court of Meatu at Mwanhuzi, the
appellant was charged with unlawfully possession of Government trophy to wit two complete
elephant tusks and seven pieces of elephants tusks equal to two elephants which the same were
properties of government of Tanzania were valued to USD 30,000 equivalent to Tshs. 70,423,800
Contrary to Section 86 (1) and (2)

(b) of the Wildlife Conservation Act Cap. 283 reads together with paragraph 14 of the First
Schedule to section 57 (1) and 60(2) of the Economic and Organized Control Act Cap. 200. 1 It
was alleged that, on 29th April, 2023 at Sakasaka village within Meatu District in Simiyu
Region the accused did unlawfully found in possession of government trophy to wit two
complete elephant tusks and seven pieces of elephant which were valued to USD 30000
equivalent to Tshs. 70,423,800/= After the matter being heard the trial court found the
appellant guilty and convicted for the offence of Unlawful Possession of Government Trophy
whereby he was ordered to pay a fine of Tshs. 704,238.000/= in default imprisonment term of
twenty years. Aggrieved with such conviction and sentence appellant preferred this appeal
with two grounds to wit;-

1. That, the learned trial court magistrate erred in law and in fact in convicting and sentencing
the appellant to pay fine to the tune of Tshs. 704,238,000/= or to serve a term of twenty years
imprisonment in jail while the prosecution side did not prove its case on balance of
probability.
2. That, the learned trial court magistrate had no jurisdiction to try the case before it as
consent from the DPP and certificate conferring jurisdiction to try the case was not properly
obtained 2 During hearing of this appeal, the appellant was represented by Mr. Sululu
advocate and the Republic was represented by Mr. Saguya Goodluck learned State Attorney.

Submitting to the appeal, the appellant advocate submitted that they brought two grounds of appeal but they will abandon one 1st ground and proceed with second ground of appeal that the trial court had no jurisdiction to try the case as the consent and certificate was not properly obtained. He added that in para 1 of the proceedings show that the consent was tendered to the court but was not stamped and endorsed this make this court to fail to know how does the said documents entered to the court proceedings on the date when the same was admitted. Again, he said that there is current decision from the Court of Appeal which gave principle the consent and certificate must be stamped and endorsed before tendered to the court the same was held in the case of Seif Abdalla Chomba @ Baba Fatina and 5 Others vs. Republic in Criminal Appeal No. 628/2022. Mr. Sululu added that the situation on that case is the same in this case so he prays to this court that this appellant to be acquitted. He continued to state that there was a lot of discrepancies conducted in hearing of this case and in the Seif's case in page No. 17 it was directed that the re trial is not a best option in 3 the situation when the evidence in the case is weak and by ordering the same will give the chance to prosecution to fill the gaps. He also said that some errors which was conducted was the improper identification of exhibits. He said that PW1 when testifying he failed to identify the exhibit which he was tendering to the court. Another error was the recording of the evidence in bullet instead of narrative form this make the court to fail to understand which question was asked to get the answer which shown in the proceedings. Lastly, he said that according to that discrepancies he prays the acquittal of the appellant. Mr. Saguya S/A in his reply supported appellant appeal especially in ground No. 1 and, concede that it is true that the consent and certificate required to be stamped and endorsed but in our case the said consent was endorsed but was not stamped so he concede that it was hard to know how those exhibits entered to the court proceedings. He added that in recording the evidence some errors were conducted in page 16 it shown that PW1 when identifying the prosecution exhibits he failed to identified it well as the law is clear that before admission of the exhibits the same must be cleared. Again, he said that Pw3 failed to give description of the said two long objects which he mentioned in his evidence. Another error was that the 4 evidence was recorded in bullet form instead of narrative as required by the law in Section 210 (2) of CPA. He cemented his argument with the case of Mangalu Maduhu vs. Republic in Criminal Appeal No. 158 of 2022 Court Appeal of Tanzania held that the evidence required to be recorded in narrative form and not in bullet and it went further and held that cross examination is the best tool to discover the truth. Mr. Saguya also said that another error was conducted by PW2 when describing how the said exhibits was parked he told the court that the said exhibit was parked by using kikoi which was in green bag, the said story was said by PW2 only other witnesses mentioned nothing about it. Lastly Mr. Saguya said that the other error was conducted in search process as the search was conducted in night hours without search warrant and sanction of court order while the law require the search which conducted at night hours to be conducted by sanction of court order so, in absence of it the said search was illegal and he join appellant advocate prayers that appellant required to be left free. In rejoinder, the appellant's advocate had nothing to add than to insist this court to left appellant free . 5 Having gone through the submission of both parties, the trial

proceedings and judgment. I find the main issue to dispose this appeal is whether the ground of appeal No. 2 has merit or not. Starting with 2nd ground of appeal, that the consent and certificate was not well obtained both parties agreed that the consent and certificate was just endorsed but not stamped while the law require the same to be endorsed and stamped. This court after perusal of the trial court proceedings is in support of submission of both parties that the said consent and certificate was just endorsed but not stamped which made this court fail to understand how the same entered to the court proceedings, again this court is in support of the held in the case of Seif Abdalla Chomba @ Baba Fatina and 5 others vs. Republic in Criminal Appeal No. 628/2022 that the consent must be endorsed and stamped before admitted to the court. Also Mr. Sululu informed this court that the exhibits which tendered to the court were not well identified by PW1. At this point Mr. Saguya submitted that is in support of appellant submission that the said exhibits were supposed to be identified in special marks and PW1 failed to identify the exhibits he identified by said that it was long and short objects he was supposed to say what was the said long and short objects. Indeed, on that 6 issue the prosecution has the onerous duty to positively establish that properties which PW1 was identified was the one which accused was found with it, and in the absence of any special mark on the same, it may not be possible to achieve a proper and adequate identification of a recently retrieved property in this category. Such evidence of positive identification is glaringly lacking in this case. Again, appellant complained that in addition with that trial court was erred in recording the evidence in bullet form instead of narrative form, this was supported by Mr. Saguya that it was wrong for the trial court to record the evidence in bullet way. This court in perusal of the trial court evidence especially in page 18, 23 and 26 of the court proceedings is in support of both submission that the trial court was erred in recording witnesses evidence in bullet way instead of narrative way and it's true that the same make this court to fail to understand what was the question asked to get the said answer which was written by the trial magistrate. Another issue which raised by the learned state Attorney was that the search which conducted was illegal as it was done at night hours without 7 search warrant nor the sanction of the court order, I therefore, agree with the learned State Attorney that the said search was conducted contrary to Section 40 of the Criminal Procedure Act and whatever done was illegal. Lastly this court is in support with the submission and prayers from both parties that this appellant to be acquitted and this ground of appeal is allowed. Having observed those irregularities, I don't see the reason of embarking other grounds of appeal of the appellant since the non- compliance of the provision of law suffice to render the entire proceeding and judgment nullity. In the circumstance I am satisfied that the appellant's conviction and sentence was not properly done as the trial court failed to notice these irregularities which lead to injustice on the part of the accused person who is now the appellant. It is well settled principle that in some cases such irregularities may warrant the court to order trial denovo but in my considered view the circumstance of this case at hand does not warrant this court to do so as both parties conceded that appellant to be left free after finds out that the said errors goes to the root of the case and giving the same will give 8 prosecution to fill the gaps in their case. See the case of Fatehali Manji Vs. Republic [1966] EA 343 where the court of Appeal of East Africa restated

the principle upon which the court should order retrial. It said; “In general a retrial will 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 the purpose of enabling the prosecution to fill the gaps in its evidence at the first trial, even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case came must depend on its particular facts and circumstances and an order for retrial should only be made where the interest of justice require it and should not be ordered where it is likely to cause an injustice to the accused person....” Having said so, basing on Section 388 of the Criminal Procedure Act, Cap. 20 the irregularities are immense that does not favour this court to order retrial or trial de novo and the interest of justice does not require to do so. With all these observations, I find this appeal to have been brought, with sufficient cause, I quash the conviction and set aside the sentence and 9 order the appellant's immediate release from custody unless otherwise lawfully held. It is so ordered. DATED at SHINYANGA this 27th day of September, 2024. R.B. Massam JUDGE 10

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