IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: MWARIJA, J.A., KEREFU, J.A And ISMAIL, J.A.)

CRIMINAL APPEAL NO. 653 OF 2021

RAMADHANI LABIA LABIA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Dodoma)

(Kagomba, J.)

dated the 29th day of November, 2021

in

Criminal Appeal No. 13 of 2021

JUDGMENT OF THE COURT

12th & 23rd February, 2024

MWARIJA, J.A.:

The appellant, Ramadhani Labia Labia and another person, Urughu Amas Urughu (hereinafter referred to by his surname of Urughu) were charged in the District Court of Singida at Singida with two counts under the Wildlife Conservation Act No. 5 of 2009 as amended by s. 59 (a) and (b) of the Written Laws (Miscellaneous Amendments) Act No. 2 of 2016 (the WCA) read together with the Economic and Organized Crime Control Act, Chapter 200 of the Revised Laws as amended by ss. 13(b), (2), (3), (4) and 16 (a) of the

Written Laws (Miscellaneous Amendments) Act No. 2 of 2016 (the EOCCA).

In the first count, they were charged with unlawful possession of Government trophy contrary to ss. 86(1), (2) (c) (iii), 3(b), 111(1) (a), (d) and 113(1) of the WCA read together with paragraph 14 of the First Schedule to and ss. 57 (1) and 60(1) of the EOCCA. It was alleged that, on 14/6/2018 at a place near Lake Kindai, Kindai Ward in Mungumaji Division within the Municipality, District and the Region of Singida, the appellant and Urughu were found in unlawful possession of seven pieces of elephant tusks weighing 13.3 Kilograms, total valued at USD 60,000 which is equivalent to TZS 136,544,400.00, the property of the United Republic of Tanzania.

In the second count, they were charged with unlawful dealing in Government trophy contrary to ss. 80(1) 84(1), 111(1) (a), (d) and 113(1) of the WCA read together with paragraph 14 of the First Schedule to and ss. 57(1) and 60(1) of the EOCCA. That, at the same place and date as stated in the first count, they were found dealing unlawfully in Government trophy by transferring, transporting and selling the said quantity of the elephant tusks having the value stated in the first count.

Both the appellant and Urughu denied both counts. At the conclusion of the trial, whereas Urughu was found not guilty of both counts hence acquitted, the appellant was convicted and consequently, sentenced to serve imprisonment terms of seven years on each count. The trophy which was found in possession of the appellant and the motorcycle found to have been used to carry the tusks, were forfeited to the Government. The appellant was aggrieved by the decision of the trial court and thus appealed to the High Court. His appeal was unsuccessful hence this second appeal.

The evidence which was acted upon by the trial court to convict the appellant was adduced by five prosecution witnesses; D.8775 D/Sgt Said (PW1), Richard Michael (PW2), Josiah Yohana Zacharia (PW3), E.8831 D/Cpl Emmanuel (PW4) and Adelard Paul Kimario (PW5). The substance of their evidence was to the following effect: On 13/6/2018 at about 15:00 hours while at Manyoni PW2, a Game Warden received information from a secret agent that there were certain persons at Singida who were selling elephant tusks. The information detailed that, those persons had lodged in one of the Guest Houses in Singida town, known as Sui. On that information, PW2 arranged a trap. He involved his fellow Game Wardens, Joseph

Mbena and Scholastica Peter. They travelled to Singida using a motor vehicle which was being driven by PW3. Together with them was also a police officer from the office of the Singida Regional Crimes Officer (RCO), one Enock. They went to the said Guest House with a view of arresting the suspected persons. The trick was it that, PW2 would pretend to be the buyer of elephant tusks.

When PW2 and his team arrived at the Guest House, he called the informer who had been acting as a middleman. He went out of the Guest House with the appellant who was introduced to PW2 as a prospective buyer. At that time, the members of PW2's team remained in the motor vehicle. PW2 wanted to see the tusks and according to him, the appellant explained that he had kept them at his friend's house situated at the area near Lake Kindai. PW2 went on to state that, he was led to the area by the appellant and when they arrived, the appellant called his friend who brought to him a polythene bag in which were elephant tusks.

Having seen the tusks, PW2 signalled his colleagues who disembarked from the motor vehicle and arrested the appellant and Urughu. They were taken to police station together with the tusks and a motorcycle registration No. T. 819 BYB make, Lantic allegedly

used by the appellant to carry the tusks. The evidence of PW2 was supported by PW3, one of the members of the team who arrested the appellant.

At the police station, the tusks and the motorcycle were handed over to PW1 who was at the material time the exhibits keeper. In his evidence, the said witness testified that, he received and after having registered the tusks, he kept them in the exhibits room until when he handed them to PW4 who tendered them in Court. The tusks and the motorcycle were received in evidence as exhibits P1 and P2 respectively.

The tusks (exhibit P1) were identified and valued by Barakael Abdiel Ndossi, a Game Officer. He was not however, called to testify in court on account that, he was away on studies in China. Instead, the valuation report and his statement, which was recorded by PW4, were tendered in court by PW4 and the same were admitted as exhibits P8 and P7 respectively. PW4 also tendered the cautioned statement of the appellant which was admitted in evidence as exhibit P6.

After exhibit P8, which was prepared by Barakael Abdiel Ndossi, had been admitted in evidence, PW5 a Game Officer, who was also a

valuer, was called to identify and interprete it. The witness testified that, the document is an official report properly prepared by his fellow valuer the said Barakael Abdiel Ndossi.

In his defence, the appellant testified that, on 13/6/2018, he had business arrangement with his friend, Richard Mambokale, a herbalist. According to the appellant, the herbalist informed him that there were certain persons who wanted to be treated and thus asked the appellant to cooperate with him in that business. At first, they agreed that the customers would be attended at Urughu's house, subject to his consent. Using his motorcycle, the appellant took the Herbalist to Urughu's home where the Herbalist asked that his bag be kept there so that, if the expected customers arrived, he would go there to attend them. The appellant kept the bag outside Urughu's house and the herbalist went to Sui Guest House.

While at the said Guest House, the herbalist called and informed the appellant that the customers had arrived there and that he had found it convenient to attend them at the Guest House. When the appellant went there, he was asked by the herbalist to collect the bag from Urughu's house and take it to the Guest House. Richard, the herbalist, decided to accompany the appellant and thus

went together to Urughu's house using the appellant's motorcycle. Having collected the bag, Richard asked Urughu to accompany them as well on the promise that, he would also be paid. The appellant stated further that, the venue of conducting the business kept on changing. When the trio arrived at the Guest House, they found that the customers had left. They were traced and found to be at Sky Way Bar. Richard arranged to attend them at Annex Bama and thus left Urughu there with the bag. From there, the appellant and Richard went and took the customers to Annex Bama where, while Urughu was handing over the bag to Richard, who in turn gave it to his customers, the appellant and Urughu were arrested but Richard was left free. According to the appellant, he was unaware that the bag contained the alleged elephant tusks.

As shown above, after having heard the prosecution and the defence evidence, the trial court was satisfied that the case against the appellant had been proved beyond reasonable doubt. That decision was upheld by the High Court. In his appeal to the High Court, the appellant raised ten grounds of appeal. The learned first appellate Judge was, however, of the view that, in essence, the grounds of appeal were "*focussed on the weakness in the*

prosecution evidence." He then proceeded to determine the appeal on the basis of the 2nd and 4th grounds only.

The appellant's complaint in the 2nd ground in the High Court was to the effect that, the prosecution evidence was contradictory as regards the date of commission of the offence. That, whereas according to the facts of the case, the offence was committed on 8/8/2018, in his evidence, PW2 testified that it was on 13/6/2018. On that ground, the learned Judge was of the opinion that the discrepancy is curable under s. 388 of the Criminal Procedure Act, Chapter 20 of the revised Laws.

With regard to the 3rd ground, the appellant challenged the trial court for having acted on the evidence of the appellant's cautioned statement (exhibit P6), contending that, the same was recorded contrary to the law. It was the appellant's submission that, he was denied the right to call his relative or a lawyer so that the statement could be recorded in the presence of one of the said persons. The learned Judge agreed with the learned State Attorney that, since the appellant did not raise an objection when the prosecution sought to tender the appellant's cautioned statement, raising that ground at the appellate stage was an afterthought. For that reason, the High Court

dismissed that ground as well. On the basis of that finding, the learned first appellate Judge was of the opinion that, exhibit P6 proved all the ingredients of the offence with which the appellant was convicted and therefore, the appeal lacked merit.

In this appeal, the appellant has raised a total of 16 grounds of appeal, 8 grounds in his memorandum of appeal filed on 9/11/2022 and 8 additional grounds submitted in court on the date of hearing of the appeal. For reasons which will be apparent herein, we do not intend to state the substance of the raised grounds of appeal.

At the hearing of the appeal, the appellant appeared in person, unrepresented while the respondent Republic was represented by Ms. Lina Magoma, learned Senior State Attorney assisted by Mses. Happiness Makungu and Elizabeth Barabara, both learned State Attorneys.

Before the hearing of the appeal could proceed in earnest, we raised *suo motu*, the point of law whether or not the trial court had jurisdiction to try the case which involved economic crime charges. From the record of appeal at page 8, in the exercise of the powers vested in him by s. 12(3) of the EOCCA, the Prosecution Attorney In-charge, Dodoma Region, transferred to the Resident Magistrate's

Court of Singida, the case which under s. 3 of the EOCCA is ordinarily triable by the High Court, Corruption and Economic Crimes Division. As it turned out however, it was heard by the District Court of Singida.

Since it is apparent that the trial was conducted by the District Court contrary to the transfer document issued by the Prosecution Attorney In-charge, Ms. Magoma readily conceded that, the District Court lacked jurisdiction. She submitted further that, the effect thereto was to render the proceedings of the trial court a nullity. She thus urged that the same be nullified, the appellant's conviction be quashed and the sentence be set aside. On the way forward, the learned Senior State Attorney prayed that a retrial be ordered as, according to her, the prosecution evidence was sufficient to found the appellant's conviction.

On his part, the appellant appreciated the stance taken by the learned Senior State Attorney on the fate of the appeal. He however, opposed the prayer that a retrial should be ordered. He urged the Court to order his release, taking into consideration that he has health problem and that, he has been in prison since 2020.

It is indeed a correct position, as conceded by Ms. Magoma, that the District Court of Singida did not have jurisdiction to try the case because it was the Resident Magistrate's Court of Singida Region which, by the Certificate of the Prosecution Attorney In-charge, Singida Region, was conferred jurisdiction to try the case. Since therefore, the trial court acted without jurisdiction, the proceedings were a nullity. For that reason, in the exercise of the revisional powers vested in the Court by s. 4 (2) of the Appellate Jurisdiction Act, Chapter 141 of the Revised Laws, we hereby nullify those proceedings, quash the appellant's conviction and set aside the sentence. As a consequence, the proceedings and the judgment of the High Court, which arose from the proceedings of the trial court which were a nullity, are hereby also quashed.

On the way forward, the principle as stated in the often cited case of **Fatehali Manji v. Republic**, [1966] E. A. 343 is that, a retrial may be ordered where the original trial, like in the case at hand, was illegal but will not be ordered if there was no sufficient evidence and that where, by making that order, the prosecution will be enabled, on a second trial, to fill in gaps in its evidence. It is trite

also that, each case must depend on its own facts and generally, a retrial should be made where the interests of justice so demand.

Having carefully gone through the record, we were unable to agree with the learned Senior State Attorney that there was sufficient prosecution evidence proving the offence. To prove the offence which the appellant was convicted of, the prosecution had the duty of establishing, for example, that exhibit P1 which were alleged to have been found in possession of the appellant, were elephant tusks. According to the prosecution, it was one Barakael Abdiel Ndossi, a Game Officer, who identified the exhibit to be elephant tusks and proceeded to value them to be worth TZS 136,544,400.00. The said person did not adduce evidence in court, instead, his statement (exhibit P8) was tendered by PW4. The statement was apparently tendered and admitted in evidence in terms of s.34 B of the Evidence Act, Chapter 6 of the Revised Laws (the Evidence Act). The reason given by the witness was that the maker of the statement was outside the country, undergoing studies in China.

It is however, clear from the record that, the tendering of the statement did not comply with the conditions stipulated under s.34 B of the Evidence Act. Under that provision, there are six conditions

which must be cumulatively complied with. Two of them; that is, items, (d) and (e) state the conditions under which a statement made by a person who for, among other reasons, cannot be found or is outside the country, may be admitted in evidence. The provisions state as follows:

> *"34 B –*
>
> *(a)....*
>
> *(b)....*
>
> *(c)....*
>
> *(d) if, before the hearing at which the statement is to be tendered in evidence, a copy of the statement is served, by or on behalf of the party proposing to tender it, on each of the other parties to the proceedings.*
>
> *(e) if none of the other parties, within ten days from the service of the copy of the statement, serves a notice on the party proposing or objecting to the statement being so tendered in evidence"*

Failure to comply with the conditions which have been reproduced above renders that statement inadmissible. In the circumstances, in this case, the evidence proving that exhibit P1 were elephant tusks is lacking. Clearly therefore, for that reason alone, on

the basis of the principle stated above, it will not be appropriate to order a retrial.

In the event, we order that the appellant be released from prison forthwith unless he is otherwise lawfully held.

DATED at **DODOMA** this 22nd day of February, 2024.

A. G. MWARIJA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

M. K. ISMAIL
JUSTICE OF APPEAL

The Judgment delivered this 23rd day of February, 2024 in the presence of Appellant appeared in person and Ms. Rose W. Ishabakaki, learned State Attorney for the respondent / Republic, is hereby certified as a true copy of the original.

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL