IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: LILA, J.A., NDIKA, J.A. And MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 565 OF 2017

PETRO KILO KINANGAI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania, at Arusha)

(Opiyo, J.)

dated the 22nd day of August, 2017
in
Criminal Appeal No. 17 of 2016

.....

JUDGMENT OF THE COURT

8th & 17th December, 2020

MWAMBEGELE, J.A.:

The District Court of Karatu convicted Petro Kilo Kinangai, the appellant herein, of the offence of unlawful possession of Government Trophy contrary to section 86 (1) and (2) (b) of the Wildlife Conservation Act, Act No. 5 of 2009 (henceforth "the Wildlife Act") read together with paragraph 14 (d) of the First Schedule to, and sections 57 (1) and 60 (2) of the Economic and Organized Crimes Control Act, Cap. 200 of the Revised Edition, 2002 (henceforth "Cap. 200"). He was sentenced to pay fine of

Tshs. 290,172,000/= or serve a prison term of twenty years in default. It was averred in the particulars of the offence part of the charge that on 11.01.2013 at Lake Manyara National Park area within the Karatu District of Arusha Region, the appellant was found in unlawful possession of two elephant tusks valued at Tanzanian Shillings twenty nine million one hundred seventy two thousand (Tshs. 29,172,000/=), the property of the Government of Tanzania.

The appellant was aggrieved by the decision of the District Court. His first appeal to the High Court was barren of fruit, for Opiyo, J. found the appeal with no speck of merit and dismissed it in its entirety on 22.08.2017. Undeterred, he has knocked the door of this Court seeking to assail the decision of the High Court on three grounds of grievance; **one**, that the charge sheet was defective, **two**, that the chain of custody of the elephant tusks was not observed and broken and **three**, evidence of Inspector James Kilosa (PW2) and certificate of seizure (Exh. P2) were not fully scrutinized thereby arriving at a wrong conclusion.

The material background facts leading to the appellant's arrest, as told by the prosecution, are simple and not difficult to comprehend. They

go thus: on 10.01.2013, PW2; a police officer charged with the duty of antipoaching, got wind that four persons had entered Lake Manyara National Park for poaching and were still there. On 11.01.2013, he, together with Cosmas Kireti (PW1), a conservator working with Ngorongoro Crater Area Authority (NCAA) and a certain Mazengo, went in Lake Manyara National Park in search for the culprits. At Arai River in the Park, they saw four persons at a distance of about one hundred metres. PW2 ordered them to stop but they could not obey the order and, instead, took to their heels. PW2 fired in the air to stop them to no avail; three of them managed to escape except for the appellant. He was in possession of a polythene bag containing two elephant tusks, the subject of the charge in the present appeal. They arrested him and the charge the subject of this appeal was preferred against him.

In a bid to prove its case, the prosecution fielded five witnesses. PW1 and PW2 are arresting officers. Robert Mande (PW3); a Wildlife Manager with NCAA, is the one who prepared the Trophy Valuation Report (Exh. P2). Asst. inspector Kaitira (PW4) wrote the appellant's cautioned statement which, however, was expunged from the record by the first

appellate court. D 7072 Detective Sergeant Yohana (PW5) is a police officer who was assigned custody of the two elephant tusks. The appellant did not call any witness except for himself. After a full trial, the appellant was found guilty as charged, convicted and sentenced in the manner alluded to above.

The appeal was argued before us on 08.12.2020 during which the appellant appeared in person, unrepresented. The respondent Republic appeared through Mses. Alice Mtenga, Amina Kiango and Tusaje Samwel, learned State Attorneys.

When called upon to argue his appeal, the appellant sought and obtained leave to supply the Court with a typed script in which he argued the grounds of appeal. In a two-page document, the appellant submitted that the charge was defective because it did not mention section 60 (2) of the Wildlife Act and sections 16 (1) and 13 (1) of a legislation he did not mention but which allegedly shows amendment to the provisions under which he was charged. He also attacked the particulars of the offence part of the charge that it did contain the words "without the permission of the

wildlife officer". He submitted that the omissions were fatal and prejudiced him as he could not prepare his defence well.

The appellant also attacked the chain of custody of the tusks arguing that it was broken. He submitted that PW1, in his testimony, did not state as to whom were the tusks handed after he was arrested. PW3 who valued the tusks, he argued, did not testify on who handed him the same. The appellant also submitted that PW5 who took charge of the custody of the tusks, did not show any document to verify handing over of the same. This witness testified that he was given the tusks by PW4 but the said PW4 did not so testify, he submitted.

The appellant also challenged the certificate of seizure not being signed by an independent witness which was contrary to law.

The respondent Republic, speaking through Ms. Kiango, supported the appeal. Premising their support on grounds two and three of the memorandum of appeal, the learned State Attorney argued that the chain of custody of the elephant tusks (Exh. P1) was broken. She argued that the offence was committed on 11.01.2013 and PW5 testified that he was handed the exhibit by PW4 on 12.01.2013 but the evidence is silent on

where the exhibit was kept in that one day. The learned State Attorney submitted further that PW1 tendered the two elephant tusks in evidence but did not say who gave them to him or whether he was the custodian of the same. She added that the rest of the evidence did not show any paper trail from the time of arrest to the time of it being tendered in court.

Ms. Kiango submitted further that none of the witnesses properly identified the tusks in court.

The learned State Attorney also took issue with Exh. P2; the Trophy Valuation Report arguing that it was prepared by PW3 as a "wildlife manager" thus offending against the provisions of section 86 (4) of the Wildlife Act which require that it be signed by the Director or wildlife officers. In the premises, the learned State Attorney argued that Exh. P2 has no evidential value and that the value of the trophy is important for sentencing purposes. She thus implored us to disregard it.

The foregoing said, Ms. Kiango argued, the appeal could be disposed of on only the second and third grounds of appeal. On our permission, she did not present arguments for or against the first ground of appeal.

In rejoinder, given the Republic's concession, the appellant had nothing useful to add. He simply urged us to set him free by allowing his appeal.

In the determination of this appeal, we will be guided by the following principles which are seemingly settled in cases of this nature. **First**, when the police investigate a crime of this nature, the relevant provisions controlling the chain of custody are the Police General Order (PGO) No. 229 made by the Inspector General of Police in exercise of his powers under section 7 (2) of the Police Force Auxiliary Services Act, Cap. 322 of the Revised Edition, 2002. These provisions guide the handling of exhibits by the police from seizure to exhibition as evidence in court - see: **Anania Clavery Betela v. Republic**, Criminal Appeal No. 355 of 2017 (unreported).

Secondly, where the chronological documentation and/or paper trail showing the seizure, custody, control, transfer, analysis and disposition of evidence is not observed, it cannot be guaranteed that the said evidence relates to the alleged crime – see: **Paul Maduka and Four Others v.**

Republic, Criminal Appeal No. 110 of 2007 (unreported) and **Anania Clavery Betela** (supra).

Thirdly, elephant tusks fall within a category of items that cannot change hands easily and thus cannot be easily altered, swapped or tampered with. Thus in appropriate cases, the principle governing the chain of custody will be relaxed whenever an item involved is one that cannot change hands easily – see: **Anania Clavery Betela** (supra), **Joseph Leonard Manyota v. Republic,** Criminal Appeal No. 485 of 2015, **Issa Hassan Uki v. Republic**, Criminal Appeal No. 129 of 2017, **Vuyo Jack v. Director of Public Prosecutions,** Criminal Appeal No. 334 of 2016 and **Song Lei v. Director of Public Prosecutions,** Consolidated Criminal Appeals No. 16A of 2016 and 16 of 2017 (all unreported). In **Joseph Leonard Manyota**, for instance, we observed:

> *"... it is not every time that when the chain of custody is broken, then the relevant item cannot be produced and accepted by the court as evidence, regardless of its nature. We are certain that this cannot be the cases say, where the potential evidence is not in the danger of being destroyed, or polluted, and/or in any way tampered with. Where*

the circumstances may reasonably show the absence of such dangers, the court can safely receive such evidence despite the fact that the chain of custody may have been broken. Of course; this will depend on the prevailing circumstances in every particular case."

We shall be guided by the above principles, among others, in the determination of this appeal.

To start with, the main complaint of the appellant as supported by the respondent Republic hinges on the chain of custody of the elephant tusks the subject of the present charge. We find it irresistible, at the very outset of our determination, to agree with the appellant and the learned respondent Republic that the chain of custody in the case the subject of this appeal leaves a lot to be desired. We shall demonstrate why and our demonstration falls in all fours with the learned State Attorney's demonstration in submissions.

First, it is no gainsaying that the offence was committed on 11.01.2013 when the appellant was allegedly arrested by PW1 and PW2 in possession of Exh. P1. However, none of these two witnesses testified on

where the exhibit was kept. PW1 only testified that they took the appellant to Ngorongoro Police without any further detail.

Secondly, it is in the testimony of PW5 that he was handed the exhibit by PW4 on 12.01.2013; a day after the commission of the offence on 11.01.2013. However, it is shown nowhere in evidence where the exhibit was kept from 11.01.2013 to 12.01.2013 when the same was handed over to PW5.

Thirdly, PW1 tendered the exhibit in court on 03.09.2015 without any scintilla of detail where he got it or whether it was under his custody.

Fourthly, the chronological documentation and/or paper trail showing the seizure, custody, control, transfer, analysis and disposition of evidence does not come out clearly in the evidence in the record of appeal. The witnesses that ought to have testified on this aspect were very casual in their testimonies. Their evidence was very scanty on how Exh. P1 was kept.

Fifthly, PW5 who testified to have been the custodian of Exh. P1 stated that he was handed the same by PW2 on 12.01.2013. However, even this witness does not come out clearly how the exhibit was kept. He

simply testified on keeping the same in the Exhibit Room at the Police Station and taking out when required. For instance, he testified, he took it out on 03.09.2013 so that it could be examined by PW3 for the purpose of filling a Trophy Valuation Report. It was taken out again on 03.09.2013 but the witness does not state for which purpose but that on 10.09.2013, they were taken to court. His testimony does not tally with that of PW1 who tendered it in Court.

Sixthly, the exhibit was not properly identified by the witness in court. None of them testified on any distinct marks on it and we are not surprised as the custodian of it did not testify if he marked it. No witness testified to have marked it.

The foregoing discussion culminates into the conclusion that the chain of custody of Exh. P1 was not at all observed. In the premises it is doubtful if the elephant tusks found in possession of the appellant at the time of arrest were the very ones that were tendered in court as Exh. P1. That, as we held in **Paul Maduka** and **Anania Clavery Betela** (supra), was a fatal infraction. We are thus satisfied that despite the fact that Exh. P1 is one that does not change hands easily and therefore cannot be easily

is that of the person holding the office specified therein."

[Emphasis added]

The designation "Wildlife Officer" is defined under section 3 of the Wildlife Act to mean:

"a wildlife officer, wildlife warden and wildlife ranger engaged for the purposes of enforcing this Act".

We have found nowhere in the Wildlife Act defining the designation "Wildlife Manager". Neither have we found anywhere to peg an idea that the designation "Wildlife Manager" falls within the scope and purview of the "Wildlife Officer". We thus agree with the learned State Attorney that the Trophy Valuation Report (Exh. P2) was filled by an unauthorized person the consequence of which is to lack probative value. In the premises, Exh. P2 is prone to, and must be expunged as we hereby do.

The expungement of Exh. P2 has a significant repercussion on the prosecution case and the appeal at large. This would mean that the value of the trophy under discussion is not ascertained and thus there will be nowhere to peg the sentence against the culprit.

In the upshot, we join hands with the appellant and the respondent Republic that the case against the appellant was not proved to the required standard; that is, beyond reasonable doubt. In consequence whereof, we allow the appeal and quash the conviction of the appellant and set aside the sentence meted out to him. We order his immediate release from prison custody unless held there for some other lawful cause.

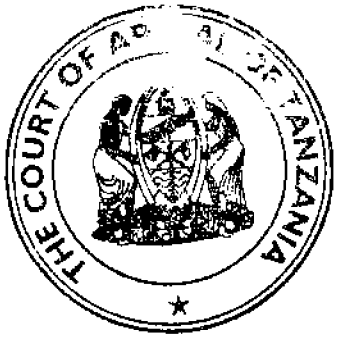
DATED at **ARUSHA** this 16th day of December, 2020.

S. A. LILA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

The judgment delivered this 17th day of December, 2020 in the presence of the Appellant appeared in person, unrepresented and Ms. Amina Kiango, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL