

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF ARUSHA**

**AT ARUSHA**

**CRIMINAL APPEAL NO. 20 OF 2020**

(Originating from Economic Case No. 05 of 2017 in the District Court of Babati at Babati)

**MAHADA KIPARA @ KAEMEREN.....APPELLANT**

**VERSUS**

**THE D.P.P.....RESPONDENT**

**JUDGMENT**

28/04/2021 & 06/08/2021

**GWAE, J**

The District Court of Babati at babati (trial court) tried and convicted the appellant herein, **Mahada Kipara @ Kaemeran**, 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 as amended by section 59 (a) and (b) of the Written Laws (Miscellaneous Amendments No. 2 of 2016 read together with paragraph 14 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 as amended by sections 16 (a) and 13 (b) of the Written Laws (Miscellaneous Amendments) Act No. 03 of

2016. He was sentenced to pay fine of Tshs. 1,**341,126,000/=** or serve a term of minimum statutory custodial sentence of twenty (20) years in default.

It was alleged in the particulars of the offence that; on 01/03/2017 at Burunge Wildlife Management Area-Vilima Vitatu Village within Babati District in Manyara Region, the appellant was found in unlawful possession of eight pieces of elephant tusks valued at Tanzania Shillings One Hundred Thirty-Four Million One Hundred Twelve Thousand Six Hundred (134,112,600) the property of the Government of the United Republic of Tanzania.

The material background facts leading to the appellant's arrest, arraignment prosecution and eventually his conviction as adduced by the prosecution, is as follows; Sometimes at the end of February 2017, a wildlife officer (PW1) dealing with antipoaching received an information that there were persons who were looking for Elephant tusks market. Subsequently, on 01/03/2017, an arrangement was done between PW1, PW2 and the sellers of the Government Trophies. The agreed business area was at Burunge Park along vilima vitatu area. The sellers were five in number including the appellant. While at the scene of crime, the appellant

entered into a bush and emerged with a sulphate bag which contained eight pieces of elephant tusks measuring 18.9 kilograms. Thereafter PW1 and PW2 subsequently informed the sellers that they were under arrest, four out of the five sellers managed to escape and the appellant was the one whom they managed to instantly arrest. He was in possession of the elephant tusks the subject of the charge in the present appeal without license. They arrested him and eventually he was charged.

In a bid to prove its case, the prosecution fielded six witnesses. PW1 and PW3 arresting officers, PW3 a Police officer at Minjingu Police Station whom PW1 & PW2 reported after the arrest of the appellant, PW4 an exhibit keeper, PW5 Felix Meshack Mayumbilwa, a wildlife officer who prepared the Trophy Valuation Report (exhibit P5) and E. 6749 D/CPL Donald who wrote the appellant's cautioned statement (PW6).

The appellant did not call any witness except for himself and patently denied to have committed the offence. After a full trial, the appellant was found guilty as charged, convicted and sentenced in the manner indicated above.

When the appeal came for hearing, the appellant appeared in person, unrepresented. The respondent, Republic, appeared through Mr. Ahmed Hatibu State Attorney. When required to argue his appeal, the appellant sought and obtained leave to file his additional grounds of appeal and being a lay person prayed for an adoption of his grounds of appeal.

The respondent through Mr. Hatibu strongly resisted the appeal and I shall consider his submission in the course of determining the appellant's grounds of appeal.

Starting with **1<sup>st</sup> ground** contained in the petition of appeal, the appellant is basically challenging the prosecution evidence through the certificate of seizure by stating that, it was poor and weak. Submitting on this ground of appeal, the learned state attorney argued that, the alleged certificate of seizure was procedurally filled and admitted in court however on the issue that an independent witness was not involved, according to him, the reason for such a failure was explained to the effect that the appellant was arrested in forest thus no independent witness could be procured.

I have perused thoroughly the trial court's proceedings, PW1, Solomon Jeremiah who was one of the arresting officers, testified to have prepared the certificate of seizure after they had arrested the appellant. The certificate of seizure was admitted in court as exhibit P1 and the same was read loudly in court by the said PW1. However, the proceedings reveal that the witness (PW1) did not request tendering the said document in court. The learned State Attorney admitted to this irregularity in his submission however he was of the view that, the certificate of seizure was properly received in evidence since the appellant was made aware of the contents of the said document thus.

In this type of the appellant's complaint, this court is of the view that, the omission by PW1 to request to tender the said document is a material irregularity, the fact that the court on its own suo moto received the document without being moved by the one tendering it is as good as to say that the court was trying to wear the shoes of the witness and went on assuming that the witness had made such a request. For the interest of justice exhibit P1 is expunged from the record.

Submitting on the complaint that, the cautioned statement was recorded out of the prescribed time (**3<sup>rd</sup> ground of appeal**), the learned

state attorney stated that it was the appellant who caused lapse of the statutory period as stated to have been tired and that is why his statement was recorded beyond the prescribed period. He added that the recording of the appellant's statement beyond the required period of time did not prejudice the appellant.

Looking at the proceedings, it is amply revealed that, PW6 vividly recorded the appellant's cautioned statement after lapse of four hours. According to him, PW6 it was on 02/03/2017 at around 20:30 when he took the appellant from the police custody for interrogation, however he could not interrogate him as the appellant told him (PW6) that he (Appellant) was very tired. Then, PW6 left the appellant to sleep and at 06:30hrs the witness took the appellant for interrogation.

Section 50 (1) of the CPA is very clear on the time frame to which the accused person is to be interrogated which is four (4) hours from the time when the accused was taken under restraint. In the appeal at hand the records are such that PW1, the arresting officer's testimony is to the effect that the appellant was arrested on 01/03/2017 and at around 23:00 they had already apprehended the appellant whom they sent to Arusha. On the other hand, PW6 a police officer who interrogated the appellant stated

that he was assigned to interrogate the appellant on 02/03/2017 at around 20:30hrs however he could not do so as the appellant claimed to be tired. Mr. Hatibu has raised this as a defence justifying the delay in interrogating the appellant, even if I am to accept the learned state attorney's version yet the records do not support his stand as looking at the difference in time from when the appellant was apprehended and taken to Arusha (01/03/2017 at around 23:00) to the time when PW6 approached the appellant for interrogation (02/03/2017 at around 20:30) the four hours as required by the law appear to have been lapsed. In the premises Mr. Hatibu's assertion that it was the appellant's own conducts which led to the delay, in my view, does not hold water.

I am however alive of the position of the law where there are exceptional circumstances which may justify the recording of the accused person's cautioned statement beyond the prescribed time by the law, see the decision of the Court of Appeal of Tanzania sitting at Dodoma in the case of **Saganda Saganda Kasanzu and others v. Republic** Criminal Appeal No. 53 of 2019, (Unreported). Section 50 (2) of the Criminal Procedure Act Cap 20 Revised Edition, 2019 also provides for an exception to the four (4) hours requirement of interrogating a person who is under

police restraint. Given the circumstances of this case, I am not legally justified to hold that, the circumstances of this case fall squarely in the above provision as no reasons were advanced by the prosecution as to the delay from the time the appellant was put under restraint to the time when PW6 went to interrogate the appellant. In the event, exhibit P6 which is the appellant's cautioned statement is hereby expunged from the records for the reason that the same was recorded out of the prescribed time.

Submitting on the complaint that the trial court did not consider the appellant's defence (**4<sup>th</sup> ground**) whereas Mr. Hatibu argued that, the trial court did consider the appellant's defence. The importance of considering the evidence so adduced during trial including that of defence was stressed in the case of **Ramadhani Abdala @ Namtule vs. The Republic**, Criminal Appeal No. 341 of 2019 (Unreported-CAT). Looking at the records in particular the judgment at page 3 and 4 it is lucidly clear that the trial court Magistrate considered the defence of the appellant contrary to what the appellant is complaining. Above all, the trial magistrate glaringly explained how the appellant defended his case and weighed the same.

Coming to the complaint that, the trial court failed to evaluate the evidence of PW5 (**Additional ground**). The appellant in this ground of



appeal is found seriously contending that, the prosecution witnesses especially PW5 ought to have informed the court on how he came to a conclusion that, the tusks in question is no more than the elephant tusks. Mr. Hatibu on the other hand was of the view that PW5 was able to identify the trophies in question, more so, the valuation report was procedurally admitted and the appellant did not object the same to being tendered.

Reverting to the records of the trial court, it is clear that, PW5 one Felix Meshack Mayumbilwa, a wildlife officer testified that he was the one who identified the trophies and made valuation report. The appellant herein is basically challenging that the witness did not reveal to the court as to how he came into a conclusion that the trophies subject of this appeal were elephant tusks. Perhaps, let the proceedings speak for themselves. At page 57 & 58 of the typed proceedings PW5 identified the tusks to be in white/cream colour, the size and shape was that at the tip it was thin while at the base is bigger and has hole at the base therefore, he realized that it was elephant tusks. From these pieces of evidence, it is apparent that the witness identified the trophies as elephant tusks contrary

appellant's appeal stands dismissed. The trial court's conviction and sentence are upheld.

It is so ordered.



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

**M. R. GWAE**  
**JUDGE**  
**06/08/2021**