IN THE COURT OF APPEAL OF TANZANIA
AT SHINYANGA

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

CRIMINAL APPEAL NO. 305 OF 2019

ALEX KALILO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Shinyanga)

(Mkeha, J.)

Dated the 30th day of July, 2019
in
Criminal Appeal No. 146 of 2017

JUDGMENT OF THE COURT

9th & 28th November, 2022

KENTE, J.A.:

The appellant Alex Kalilo was charged with three counts in Economic Case No. 3 of 2017 in the District Court of Kahama. In the first count, he was charged with unlawful entering into a Game Reserve contrary to section 15 (1) and (2) of the Wildlife Conservation Act, No. 5 of 2009 (the WCA). In the second count, he was charged with unlawful possession of weapons in a Game Reserve contrary to section 17 (1) and (2), 20 (1) (b) and (4) of the WCA read together with paragraph 14 of the First Schedule to the Economic and Organised Crime Control Act, Chapter 200 of the Laws of Tanzania ("the EOCCA"). In the third count, the appellant was

charged with unlawful possession of Government Trophies an offence predicated under section 86 (1) and (2) (c) of the WCA read together with paragraph 14 of the First Schedule and section 57 (1) and 60 (2) of the EOCCA. After a full trial, the appellant was convicted as charged and sentenced as follows:

For the first count, the appellant was sentenced to pay a fine of TZS 150,000.00 or upon default, to two years imprisonment. Regarding the second count, he was sentenced to pay a fine of TZS 400,000.00 or to two years imprisonment upon default. For the third count, he was sentenced to the mandatory sentence of twenty years imprisonment. Dissatisfied with the convictions and sentences, the appellant unsuccessfully appealed to the High Court at Shinyanga (Mkeha, J). Still protesting his innocence, he has now appealed to this Court to challenge both the convictions and sentences.

The factual background of the case as found by the two lower courts, was to the following effect. On 18th January, 2017 a game ranger namely Makanya Karoto (PW1) and his fellow game rangers were on a normal patrol inside Kigosi Game Reserve in Kahama District. When they arrived at "Nchi tatu" area a place which is said to be within the boundaries of the said Game Reserve, they came across the appellant whom they suspected and arrested. They allegedly found him in

possession of a muzzleloader and one skin of a pangolin which they seized from him. It was the prosecution case that, the appellant had no permit allowing him to be at the said place and in possession of the said two items. On the basis of these facts, the appellant was charged and convicted of the three counts as earlier mentioned.

On the other hand, the appellant's side of the story was materially different. He told the trial court that, indeed he was arrested at Nchi tatu area, but he was firm that, the game rangers found him at a place which was far outside the boundaries of the Game Reserve. He denied valiantly but could not hold out against the accusations of being found in possession of a muzzleloader together with a skin of a pangolin.

After hearing both parties, the trial court rejected the appellant's explanation and chose to believe the prosecution witnesses to the effect that, the appellant, was found in the Game Reserve while possessing the above-mentioned items. Having been convicted and sentenced as stated earlier, the appellant unsuccessfully appealed to the High Court which after considering the evidence of both sides, it went on to sustain and confirm his convictions and sentences by the trial court. Aggrieved by the decision of the High Court the appellant has appealed to this Court.

In this appeal, after abandoning the second, fourth and seventh grounds of appeal and after successfully applying to argue three new grounds in terms of Rule 81 (1) of the Tanzania Court of Appeal Rules, Mr. Frank Samwel learned advocate who appeared to represent the appellant, argued a total of six grounds which challenged the competency of the appellant's conviction and sentences by the trial court together with the decision of the High Court endorsing the decision of the trial court.

In the said grounds which we take the liberty to rephrase and re-number, starting with the new grounds, the appellant complained that:

i) Both, the trial court and the first appellate court erred in law for convicting him while the prosecution failed to prove that the said Game Reserve had boundaries separating Game Reserve and non-Game Reserve land;

ii) Both, the trial and the first appellate court erred in law for convicting the appellant basing of the trophies evaluation certificate which was not read out to the appellant in court;

iii) Both, the trial court and the first appellate court erred in law for convicting the appellant basing on the said certificate which was prepared by an unqualified officer contrary to the law.

iv) That the first appellate court erred in law for upholding the appellant's conviction which was

based on his caution statement which was recorded out of the prescribed period without any excuse.

v) *That the first appellate court erred in law in sustaining the appellant's conviction based on a caution statement which was not authentic; and*

vi) *The first appellate court erred in law in relying on a certificate of seizure which was not read out to the appellant after being admitted in evidence.*

Arguing the appeal before us, Mr. Samwel submitted in support of the first ground that, the prosecution failed to lead evidence showing the existence of a clear boundary between the Game Reserve area and the non-Game Reserve area which was part of the public or village land. Mr. Samwel contended that, it was necessary for the prosecution to lead such evidence all the more so, after the appellant had denied the charges and told the trial court that he was arrested not within the boundaries of the Game Reserve. The learned counsel relied on our decision in the case of **William Kilunga v. Republic**, Criminal Appeal No. 447 of 2017 (unreported) to underscore the need for the prosecution in any case of the present nature, to lead evidence positively showing the boundaries between the National Park or the Game Reserve as it is in the instant case and the neighboring public or village lands.

Regarding the second ground which we wish to consider together with the third ground of appeal, Mr. Samwel was relatively very brief. He submitted that, the certificate of evaluation of Government trophies (Exh. P3) was prepared by an un-authorized officer and subsequently not read out in court after being admitted in evidence. On both points, the learned counsel relied on the same case of **William Kilunga** (supra) to substantiate his argument. He prayed in the circumstances that the said certificate should be expunged from the record for having been admitted in evidence but not read out to the appellant contrary to the mandatory requirements of the law.

Moving forward to the fourth ground of appeal which challenges the first appellate court for upholding the appellant's conviction and sentence by the trial court which was based on a caution statement (Exh. P2) recorded out of the prescribed period of four hours after the appellant was taken into restraint, Mr. Samwel submitted and this was readily conceded by Ms. Wampumbulya Shani who appeared together with Ms. Edith Tuka learned State Attorneys representing the respondent Republic, that indeed the said statement was problematic. The learned counsel challenged the appellant's statement on two aspects. In the first place, and this was not disputed by Ms. Shani, he submitted that, whereas the appellant was arrested on 18th January, 2017 his statement was recorded

on 20th January, 2017 in total violation of the mandatory provisions of section 50 (1) (a) of the Criminal Procedure Act, Chapter 20 of the laws (the CPA). The learned counsel submitted further that, as if that was not bad enough, whereas the learned trial magistrate sort of discarded the said statement in his judgment saying that it was not dated, the learned judge of the first appellate court accorded it undue weight when upholding the decision by the trial court. In view of the uncontested fact that the said statement was recorded far beyond the four hours period prescribed by law, Mr. Samwel implored us to expunge it from the record.

Regarding the sixth ground of appeal, having rephrased it, Mr. Samwel submitted very briefly that, the certificate of seizure which was received and admitted in evidence as Exhibit P1 was not read out to the appellant immediately after being admitted in evidence as required by law. The learned counsel argued and he accordingly pressed that, because of the omission to read it out to the appellant, it should be expunged from the record. In the alternative, while placing reliance on sections 86 (4) and 114 (3) of the WCA which require a certificate of evaluation of trophies to be signed by the Director of Wildlife or Officers from the rank of Wildlife Officer, Mr. Samwel submitted that the impugned certificate was prepared and signed by an unauthorised person.

As stated earlier, the case for the respondent Republic was presented by Ms. Shani learned State Attorney. She urged us to dismiss the appeal saying in the first place that, PW1 gave oral evidence showing that the place called Nchi tatu where the appellant was found and arrested was within the boundaries of Kigosi Game Reserve and that it was not necessary for the prosecution to lead evidence establishing a clear-cut demarcation between the Game Reserve area and the non-game reserve area. Above all, the learned State Attorney contended, during cross-examination the appellant did not challenge PW1 on that point.

Regarding the trophies evaluation report, (Exh. P4), the learned State Attorney readily conceded that, indeed after being admitted in evidence, it was not read out to the appellant as required by law. Therefore, she had no issues with Mr. Samwel who prayed for its expungement from the evidence. However, Ms. Shani had another string to her bow. She submitted quickly that, on being expunged from the record, the oral testimony of PW3 still remains. With regard to Mr. Samwel's contention that the said certificate was prepared by an unqualified person, the learned State Attorney submitted in rebuttal that, being a Game Officer, one Paschalates Rwegoya (PW3) who prepared and signed the said certificate was a qualified and competent officer to assess

the value of the said trophies and issue a certificate in accordance with the law.

As for the cautioned statement which was recorded two days after the appellant's arrest contrary to section 50 of the CPA which demands such statements to be recorded within the period of four hours commencing at the time when a suspect of a suspected criminal offender is taken under restraint, Mr. Shani conceded to Mr. Samwel's submission and prayer for its expungement with no qualms. However, she was not without a word. In what seems to be an erroneous interpretation of the import of our decision in **Nyerere Nyague v. Republic**, Criminal Appeal No. 67 of 2020 (unreported), the learned State Attorney contended that, after expungement of the impugned statement, it would still retain some evidential value which could be relied on to ground a conviction. Ms. Shani's basic argument was premised on the fact that the appellant did not object to the admissibility of the said statement into evidence. Regarding the certificate of seizure (Exh. P1) which likewise, was not read out to the appellant after being admitted in evidence, relying on our earlier decision in **Anania Clavery Beela v. Republic,** Criminal Appeal No. 355 of 2017 (unreported), the learned State Attorney contended that, on being expunged from the evidence, the oral testimony of PW1 who prepared the said certificate would still be available to keep the

prosecution case intact. Ms. Shani contended generally that, the appellant's conviction and sentence by the trial court and the subsequent dismissal of his appeal by the first appellate court were tellingly well-founded concurrent decisions. She thus urged us not to disturb the said decisions.

Starting with the most fundamental question in this case as to whether the appellant was arrested within or outside the boundaries of Kigosi Game Reserve, it is worth noting at this stage that, as the law stands today, the question of the boundaries between the Game Reserve or the National Park as the case may be, and the public or village land surrounding or adjoining it, is not a matter of lackadaisical testimony by the prosecution witnesses who more often than not, are Game or Park Rangers. This stance was taken by the Court in the case of **Dogo Marwa @ Sigana v. Republic,** Criminal Appeal No. 512 of 2019 and subsequently followed in the case of **Maduhu Nhandi @ Limbu v. Republic**, Criminal Appeal No. 419 of 2019 (both unreported).

Coming back to the instant case, the evidence regarding the place where the appellant was found and arrested was given by Makanya Karoto (PW1), a Game Ranger. This witness is on record as having offhandedly told the trial court that, on the fateful day, as they were on a normal patrol within Kigosi Game Reserve, they came across the appellant

who had fallen asleep at a place called "Nchi tatu". We note from the prosecution evidence that there were no efforts to lead further evidence proving beyond reasonable doubt that, indeed the place where the appellant was found and arrested was within the area declared by the relevant law to be Kigosi Game Reserve. We make this pertinent observation in view of the appellant's consistent and persistent defence version in which he told the trial court that, he was arrested outside of the Game Reserve area. Given the above stated position, proof that the appellant had transcended the boundaries and gone into a Game Reserve required much more evidence than mere assertions by the Game or Park Rangers. In the absence of such necessary evidence from the prosecution side, we are not prepared to rely solely on PW1's word of mouth to hold that, in the present case, the prosecution had proved conclusively that the appellant was found and arrested in the Game Reserve. We thus find merit in the first ground of appeal which we hereby sustain.

Regarding the second count which charged the appellant with unlawful possession of weapons in a Game Reserve, what was required was for the prosecution to establish in the first place that, the appellant was found and arrested within the boundaries of the Game Reserve. For, to charge the appellant with unlawful possession of weapons in a game reserve without laying a proper foundation in the first count which

charged him with unlawful entering into a game reserve was in our respectful view, a futile exercise. We therefore note that, the charges in the second count were not independent of the first count. In other words, for the prosecution to prove the charges in the second count, proof of the charges in the first count was a condition precedent. Now, as it has not been established in the first count that the scene of the appellant's arrest was within the Game Reserve area, this leads to the inevitable conclusion that, whatever the appellant was found possessing, he was not within the Game Reserve area and in the circumstances, he could not fall under sections 17 (1) and (2) and 20 (1) (b) and (4) of the Wildlife WCA read together with paragraph 14 of the First Schedule to the EOCCA under which he was charged and subsequently convicted.

With regard to the validity or otherwise of the disputed trophies evaluation certificate, it must be noted that the said certificate was issued by PW3 who introduced himself as a Game Officer based at Kahama. Without hesitation, we agree with Mr. Samwel that the said officer was not a qualified officer to issue such a certificate. Faced with a similar situation, in the case of **William Kilunga v. Republic,** Criminal Appeal No. 447 of 2017 (unreported), the Court took the view that the District Game Officer who had issued an inventory form and a trophies evaluation certificate was not among the officers capable of doing so in line with

sections 86 (4) and 114 (3) of the WCA which require such a certificate to be issued either by the Director of Wildlife or any Wildlife Officer as defined under section 3 of the WCA. Having been urged by Mr. Samwel to follow suit as we hereby do, we expunge the said certificate from the evidence not only on account of incompetency of its author but also for not being read out to the appellant after it was admitted into evidence.

For the reasons we have endeavoured to state, we are of the settled view that, even the oral testimony of PW3 regarding the nature and value of the alleged trophies would not suffice in the circumstances of this case. One does not need to be a genius to deduce that, an-expert witness, cannot turn around to be a competent witness to give oral evidence on a specialized field of which he has been disqualified. With the above remark, we decline the invitation extended to us by Ms. Shani who urged us to rely on PW3's oral testimony on the nature and value of the Government Trophies allegedly found in the appellant's possession.

Turning now to the appellant's cautioned statement which was plainly recorded out of the time prescribed by law, we have very little to say in view of Ms. Shani's concession to that effect. Indeed section 50 (1) of the CPA provides for the basic period available for interviewing a person who is in restraint in respect of a criminal offence as being four hours commencing at the time when the said person was taken under

restraint in respect of the said offence. The law is clear that, recording a cautioned statement outside the prescribed period under section 50 (1) (a) and (b) of the CPA renders such a statement incompetent and liable to be expunged from the evidence. (See **Ramadhani Mashaka v. Republic,** Criminal Appeal No. 311 of 2015 (unreported).

In the case now under scrutiny, is not disputed that whereas the appellant was arrested on 18th January, 2017, his statement was recorded by Detective Corporal Charles (PW2) on 20th January, 2017 and no reason was forthcoming to account for the inordinate delay to record his statement nor to offer any explanation that the time for recording his statement had been extended. In the circumstances, bearing in mind the mandatory requirements of the law, we follow suit and hereby expunge the said statement from the evidence. But for a different reason, the same eventuality must be fall the certificate of seizure (Exh. P1) which was not read out to the appellant after it was admitted in evidence.

Finally, is the argument by Ms. Shani that, we could still rely on the appellant's cautioned statement which we have immediately expunged from the record for having been improperly admitted in evidence. What should settle the issue is that, once a documentary exhibit is expunged from the evidence, it becomes completely obliterated as to be presumed not to have ever existed. For to expunge the documentary exhibit from

the record has the effect of bringing its evidential life to an end. It should therefore be very elementary that, a court of law properly so called, cannot rely on non-existent evidence to arrive at a judicial decision.

For the above reasons, we are of the final view that all in all, it was not safe for the two courts below to base the appellant's conviction and sentences upon the flimsy evidence of the prosecution as adduced by PW1, PW2 and PW3. We allow the appeal, quash and set aside the appellant's convictions and the sentences imposed on him. We order for his immediate release from prison if he is not otherwise lawfully detained.

DATED at **DAR ES SALAAM** this 22nd day of November, 2022.

A. G. MWARIJA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 28th day of November, 2022 in the presence for the Appellant in person and Ms. Edith Tuka, learned State Attorney, for the Respondent/Republic, both linked via video from Shinyanga High Court, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL