IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MWARIJA, J.A., MAIGE, J.A., And MASOUD, J.A.)

CRIMINAL APPEAL NO. 427 OF 2020

MATHAYO NOAH SANINGO..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Arusha)

(Luvanda, J.)

dated the 6th day of March, 2020
in
Economic Case No. 16 of 2020

JUDGMENT OF THE COURT

5th & 15th December, 2023

MASOUD, J.A.:

The appellant was charged with and convicted of the offence of unlawful possession of government trophy contrary to sections 86(1) and (2)(b) of the Wildlife Conversation Act, No. 5 of 2009 (WCA) read together with Paragraph 14 of the First Schedule to, and sections 57(1) and 60(2) of the Economic and Organised Crime Control Act, [Cap. 200 R.E 2019 now R.E 2022] (EOCCA). He was sentenced either to pay fine of TZS. 673,341,000.00 or to serve a term of twenty years in prison.

The allegations in respect of which the appellant was charged, convicted and ultimately sentenced arose from the incriminating information that one, Raymond Mdoe, then a game warden, received on 27th November, 2017 from his informer. The information was that there were people who were suspected to have elephant tusks contrary to the law, and were looking for a buyer. Eventually, the suspects turned out to be the appellant, and one, Paulo Taraiya. The latter was however ultimately acquitted by the trial court.

Subsequently, a trap was set up for Solomon Jeremia Bilozo (PW3) and Raymond Mdoe, to meet the suspects, as buyers, on 28th November, 2017 at around 02:00 hrs. The appellant was, as a result, arrested by the duo in the bushland at Matian, Namanga area, in possession of three elephant tusks, as the duo were pretending to inspect the trophy before they could buy them.

At the trial, it was in dispute that the appellant was found and arrested in possession of the said government trophy at Matian, Namanga area as alleged. The evidence on which the trial court convicted the appellant was given by four witnesses. The evidence from the defence,

which sought in vain to exonerate the appellant from the allegations was from the appellant himself who testified as DW1.

In so far as the prosecution witnesses and the insight of their evidence were concerned, there was, James Kugusa (PW1), a game warden officer at KDU Arusha, who received and kept the seized pieces of elephant tusk (Exhibit P3) from Raymond Mdoe, on 28th November, 2017 after labelling them and signing the handing over certificate (Exhibit P1) along with the said Raymond Mdoe; Emanuel Daniel Pius (PW2), a wildlife officer at KDU Arusha, who collected the trophy from PW1 and identified it as comprising three elephant tusks valued at TZS. 67,334,100 and filled a trophy valuation certificate (Exhibit P4) before he returned the trophy to PW1 on 29th November, 2017 as per Exhibit P2; Solomon Jeremia Bilonzo (PW3), who took part in the arrest, search and seizing the trophy and filling certificate of seizure (Exhibit P5) signed by himself, Raymond Mdoe and the appellant; and Assistant Inspector Kaitira Machumu (PW4), a police officer, who tendered in evidence a witness statement (Exhibit P7) of Raymond Mdoe who could not be found despite the efforts put by him in tracing his whereabouts since 27th January 2020 as shown in Exhibit P6. It was therefore with the above witnesses and the evidence adduced whose

details are on the record that the learned trial judge was satisfied that the charge laid against the appellant was proved beyond reasonable doubt.

The appellant was dissatisfied, hence this appeal. He appeared in person unrepresented, while Ms. Amina Kiango, learned Senior State Attorney, assisted by Mr. Charles Kagirwa, Ms. Tusaje Samwel, Mr. Stanslaus Halawe, and Helena Sanga, learned State Attorneys, appeared and resisted the appeal on behalf of the respondent Republic.

A number of grounds of appeal were raised by the appellant in his initial memorandum of appeal and supplementary grounds of appeal lodged in this Court. They were all argued for and against by the appellant and Ms. Samwel, learned State Attorney. While others were combined and argued together, others were separately argued.

Having looked at the grounds of appeal as raised and argued, we thought that they centred in faulting the trial court on the basis of the following complaints: **One**, propriety of procedure taken in substituting the charge and the information laid against the appellant and lodging consents to prosecute; **two**, defective information due to its variance with the adduced evidence; **three**, extraneous matters entertained in the

judgment; **four**, irregularity in admission of exhibits; **five**, impropriety of search and seizure; **six**, violation of section 32 of the CPA; and **seven**, convicting and sentencing the appellant without proof of the case beyond reasonable doubt and consideration of the defence.

First, the complaint on the procedure taken by the respondent in substituting the charge and the information and lodging consents to prosecute raised by the appellant was hinged on sections 276(1) and (3) and 277(1) and (2) of the Criminal Procedure Act, [Cap. 20 R.E 2020] (CPA). The argument was that the charge laid against the appellant at the committal court was substituted twice without leave of the trial court and without knowledge of the appellant. It was thus confusing which one preceded the other. The confusion allegedly affected the appellant's right to defend himself. It was further argued that there were three consents of the prosecuting Attorney in-charge which were not given in accordance with the law. When asked about the information in respect of which he was ultimately convicted and sentenced, he said that it was the one that was read over to him at the trial court. The response by the appellant matches the contents of pages 56 and 61 of the record of appeal.

In reply, Ms. Samwel admitted that the charge laid against the appellant at the committal court was substituted when the appellant was being committed to the trial court. The substitution was in accordance with section 29(7) of the EOCCA which empowers the prosecution to draw up the information and submit to the trial court. Thus, while at the committal proceedings the charge sheet had two counts, namely, unlawful possession of government trophy and unlawful dealing in government trophy, it was replaced with an information containing only one count of unlawful possession of government trophy when the appellant was being committed for trial to the trial court. The information had subsequently to be substituted for another information to correct a clerical error apparent in the particulars of the offence. Instead of the particulars showing that the offence involved *"three (3) elephant tusks",* they showed that the offence involved *"one three (3) elephant tusks".* It was this information which was ultimately read over to the appellant on 21st November, 2019 as he was being committed to the High Court for the trial.

We were referred to pages 42 and 56 of the record, where the substituted information was filed and respectively read over. It was further submitted that as the substituted information had to be accompanied with

respective consents to prosecute pursuant to the requirements of section 26 of the EOCCA, it cannot be said that there were three consents lodged contrary to the law. It was not correct to say that the consents were irregularly issued, the learned State Attorney submitted.

On our part, we examined the record in the light of the provision of sections 276 and 277 of the CPA and sections 29(7) of the EOCCA. We were in the end in agreement with the learned State Attorney that the substitution of the information was done in accordance with section 29(7) of the EOCCA. It is on the record that substituted information was read over to the appellant when he was committed for trial to the trial court on 21st November, 2023. As is required by section 26 of the EOCCA, the information was accompanied by consent to prosecution of the appellant for the offence.

It is also evident on the record that the information prepared and filed to the court as the appellant was being committed to the trial court was replaced with another one after correcting the clerical mistakes before the same was read over to the appellant at the committal court on 21st November, 2019 and thereafter at the trial court on 11th February, 2020. This record is evident from page 50 up to 53 of the record of appeal. Thus,

we do not find anything on the record suggesting that there was any objection from the appellant when the information was being read over to him in terms of sections 276(1) and 277(1) of the CPA. Because of what we have found, we are satisfied that the complaint is wanting in merit and must fail.

Second, in the complaint that the information varied with the evidence, the submission by the appellant anchored on a number of alleged differences. These were on the place where the offence was committed, on the value of the government trophy seized, and on the date the trophy was received and stored.

The appellant submitted that while the information named the place as *"Matian Namanga area",* the evidence named it as just *"Namanga"* or *"Matian"* as is apparent in the testimony of PW1 and PW3 at page 65 and from page 82 up to 84 of the record of appeal. Again, while the information quoted the value of the seized trophy as TZS 67,334,000.00, the evidence on the record (PW1) quoted the value of TZS 67,334,100.00. Likewise, whereas the information indicated that the offence was committed on 28th November, 2017, the 2.8 Kg piece of seized elephant tusks which was

amongst the three pieces seized was dated 27th November, 2019 (exhibit P.3).

Because of such variations, the appellant contended that his right to defend himself against the allegation levelled was not only infringed, but also there was no proof of the place where the appellant was arrested committing the offence, the value of the trophy and the exact date of commission of the offence. In support, he relied on the cases of **Godfrey Simon and Another v. Republic**, Criminal Appeal No. 296 of 2018, and **John Julius Martin and Another v. Republic**, Criminal Appeal No. 42 of 2020 (both unreported).

Replying, Ms. Samwel disputed that there was variance between the information and the evidence as to the place where the offence was committed. She referred us to the evidence of the arresting officer (PW3) who also seized the trophy (Exhibit P3) from the appellant. The evidence is from page 78 up to page 84 of the record of appeal. In so doing, she submitted that the evidence was clear that the appellant was found in unlawful possession of the trophy at Matian area. After all, she added, the relevant evidence was not cross-examined upon by the appellant.

As to the value of the government trophy, the learned State Attorney highlighted the difference margin between TZS 67,334,100.00 and TZS 67,334,000.00, arguing that the former could conveniently be rounded and substituted for the latter without occasioning failure of justice. In her submission, therefore, the difference is so trivial and inconsequential that it does not go to the root of the case. It would have been different, she argued, had the appellant shown that he was prejudiced. Reliance was placed on the case of **Shabani Haruna@Dr. Mwagilo v. Republic,** Criminal Appeal No. 396B of 2017 (unreported) in support of her argument that section 388 of the CPA applies to cure such trivial errors.

In so far as the date labelled on the tusk weighing 2.8 Kg is concerned, it was submitted by the learned State Attorney that since the said tusk is part of Exhibit P3, which was admitted in evidence without objection and without cross-examining PW1 who labelled and kept the exhibit, the complaint is an afterthought. Nevertheless, we were invited to consider the entire evidence on the record and find that the date labelled on the said tusk was a clerical mistake, as exhibit P1 which was not objected by the appellant is evident that the handing over was held on 28th November, 2017 and not on 28th November, 2019.

Considering the record and guided by the decision in **Shabani Haruna@Dr. Mwagilo v. Republic** (supra) which was referred to us by the learned State Attorney, we find ourself in agreement with her that the complaint is not only trivial but also more of an afterthought. Besides the overwhelming prosecution evidence which was not shaken in the cross-examination or objected to by the appellant, it is plain that the complaint as to the date is misplaced. The foregoing would equally apply on the variance between the information and the evidence as to the place where the offence was committed. We think that if we were to uphold the argument raised, we would be picking pieces of evidence in isolation of the whole evidence in its totality. See, **Dickson Elia Nsamba Shapwata and Another v. Republic**, Criminal Appeal No. 92 of 2007 (unreported). In any event, we were neither satisfied nor shown that such variance, if at all, prejudiced the appellant. See, **Osward Mokiwa@Sudu v. Republic**, Criminal Appeal No. 190 of 2014 (unreported). We, accordingly, dismiss the complaint.

Third, on extraneous matters in the trial court's judgment, the appellant in her submission referred us to pages 168 and 173 of the record of appeal, drawing our attention to remarks by the trial court on *"seven*

pieces of elephant tusks Exhibit P2". According to the appellant *"seven pieces of elephant tusks Exhibit P2"* are not only extraneous and not reflected on the record of the proceedings, but also are at variance with "three elephant tusks" particularized in the information levelled against the appellant. To buttress his argument, the appellant employed the case of **Athanas Julius v. Republic**, Criminal No. 498 of 2015 and **Richard Otieno@ Ogullo v. Republic**, Criminal Appeal No. 367 of 2018 (both unreported).

In response, Ms. Samwel submitted that looking at the recorded evidence, particularly, from page 73 up to 75 of the record, and the judgment of the trial court as a whole, it is clear that the appellant's conviction was founded on unlawful possession of *"three elephant tusks".* Ms. Samwel submitted that the contents of the above-mentioned pages of the record of appeal referred clearly show that it is *"three elephant tusks"* (Exhibit P3) that were received by PW1, which was again in the judgment used in grounding the conviction. She added that despite the inadvertent reference to *"seven pieces of elephant tusks"* at page 168 and 173 of the record, they were not used in grounding conviction. Thus, Ms. Samwel urged us to find that the trial court's reference to *"seven pieces of elephant*

tusks Exhibit P2" was a mere slip of a pen, as even Exhibit P2 (handing over certificate dated 29th November, 2017) was by itself evidencing three elephant tusks handed over to PW1 from PW2 after identification and valuation.

Our scrutiny of the trial court's judgment from page 165 up to 175 of the record left us in no doubt that the reference for *"seven pieces of elephant tusks"* was only found at page 168 and 173 of the record of appeal as the trial judge was summarizing the evidence before its evaluation. Having summarized the evidence, the trial judge evaluated the evidence from page 170 up to page 175 of the record of appeal and arrived at his findings that informed his decision.

It was not hard on our part to find that the trial judge's evaluation of the entire evidence which informed his decision, was not at all based on *"seven pieces of elephant tusks"* inadvertently appearing at pages 168 and 173 of the record. Rather, it was not only based on *"three elephant tusks"* exhibited by Exhibit P3 among others which were in unlawful possession of the appellant. We are thus in agreement with the learned State Attorney that the reference to *"seven pieces of elephant tusks"* must have been a

result of a slip of a pen which did not however occasion any failure of justice. We accordingly dismiss the complaint.

Fourth, on irregularity in admission of exhibits, the thrust of the appellant's submission was that the trial judge wrongly admitted all exhibits by merely marking them as exhibits without first admitting them. He relied on the case of **Robinson Mwanjisi and Others v. Republic** [2003] T.L.R. 2018 which restated the procedure governing admission of exhibits. In rebuttal, Ms. Samwel submitted that since the exhibits were cleared before they were marked as exhibits, the absence of a statements that a particular exhibit is admitted or received before it is marked as such cannot render the exhibit being wrongly admitted.

Having examined the record on the basis of the appellant's complaint, we underscored that the basis of the appellant's complaint is that each and every exhibit was after being cleared for admission simply marked as such and thereafter read out without the trial judge expressly stating that it has been admitted in evidence. However, notwithstanding such omission, the record shows that each of the exhibits was cleared for admission, accordingly marked as an exhibit, before it was read out. See, **Robinson Mwanjisi and Others v. Republic** (supra).

The only grievance by the appellant is that the trial court did not make an express statement admitting each and every exhibit before marking it as an exhibit and having it read out. In view of the record before us, we have no doubt that the trial judge by marking the exhibits after clearing them for admission, he admitted them before he had them read out. As the exhibits were in the circumstances marked as such, after being cleared for admission, the omission to expressly make a statement of admission for each exhibit is not, in our view, a fatal irregularity. The complaint is, accordingly, dismissed.

Fifth, regarding impropriety of the search and seizure, it was the submission of the appellant that the manner in which the search and seizure was carried out violated the provision of section 38(1) and (3) of the CPA and P.G.O No. 226. According to the appellant, since the arresting officers, namely, PW3 and one, Raymond Mdoe, had prior information about the possession of the government trophy by the suspects as is evident in the testimony of PW3 at page 78 of the record, the search was not an emergency one and must have therefore complied with the above-mentioned provisions of law.

In the appellant's further submission, the requirements of the above provisions of the law, as to obtaining search warrant by the arresting officers before arrest of the appellant, having independent witnesses, and seizing items from him, and issuing a receipt of the seized items to the appellant must have been complied with. Thus, the failure to comply with such requirements, according to the appellant, meant that the search and seizure were illegally conducted and therefore fatal. The omission, in the appellant's submission, should lead to expungement of certificate of seizure (Exhibit P5) which was tendered by PW3. In support of his argument, the appellant relied on **Shabani Said Kindamba v. Republic**, Criminal Appeal No. 390 of 2019 (unreported).

In reply, Ms. Samwel admitted that the search and seizure were conducted at around 02:00 hours in the remote bushland area of Matian, Namanga where there were no residents nearby and not in the residence of the appellant. It was therefore not possible to procure the presence of an independent witness. She added that since there was certificate of seizure (Exhibit P5) issued and signed by the appellant, it constituted evidence even without a receipt. She relied on the position we took in the

case of **Papaa Olesekaledai @ Lendemu and Another v. Republic,** Criminal Appeal No. 47 of 2020 (unreported).

Going by the evidence of PW3, we agree with the learned State Attorney that the search and seizure were conducted at 02:00 hrs on 28th November, 2017 in the remote bushland area of Matian, Namanga, and not in a dwelling house. The search and seizure were in the circumstances covered by section 106 of the WCA. Independent witness was, therefore, not necessary. In the event, as there is a certificate of seizure (Exhibit P5) which was signed by the appellant, the same constitutes evidence even without a receipt. We took this position in a number of our previous decisions. They include, **Emmanuel Lyabonga v. Republic**, Criminal Appeal No. 257 of 2019, **Pascal Mwinuka v. Republic**, Criminal Appeal No. 258 of 2019, and **Jason Pascal and Another v. Republic**, Criminal Appeal No. 615 of 2020 (all unreported). Accordingly, we find that the complaint on the propriety of the search and seizure is devoid of merit. We dismiss it.

Sixth, with regard to the complaint on the failure to note and act on the delays in taking the appellant to court contrary to the requirements of section 32 of the CPA and section 29(1) of the EOCCA, there was not much

from the appellant. It was only alleged that the appellant was brought to court after a lapse of 48 hours contrary to the requirements of the law. He implored us to find that the delay vitiates the entire proceedings. In reply, Ms. Samwel relied on our previous decision in **Gabriel Lucas v. Republic**, Criminal Appeal No. 557 of 2017 (unreported), arguing that since the complaint was not raised and determined at the trial court, it was a mere afterthought which did not have any bearing on the merit of the case.

We perused the record before us. We could not, however, find anything suggesting that the complaint was indeed raised and determined by the trial court in spite of insistence by the appellant that he raised the complaint in vain. In the circumstances, we subscribe to the position we took in our earlier decision in **Gabriel Lucas v. Republic** (supra) when we observed and held from page 11 up to 12 of our typed judgment that:

> *....there is nothing on record substantiating the claim that the appellant suffered such prolonged illegal detention at the hands of the police..... We think that the trial court was best placed to consider and determine the issue had the appellant brought it up. Thus, both courts cannot be blamed for not dealing with an allegation of*

which they were not cognizant. Given the circumstances, we find this claim not just an afterthought but also implausible. At any rate, the said claim has no bearing on the merits of the case.

We thus agree with the learned State Attorney that in so far as the record does not show that the complaint was raised by the appellant and determined by the trial court, it is not open for us to deal with the complaint at this stage. The complaint fails and is herein dismissed.

Last, on the complaint on proof of the case beyond reasonable doubt and consideration of the defence, the appellant wanted us to resolve it in his favour. He attacked the credibility of PW3, questioned Exhibit P3, and faulted the chain of custody which was not raised in the grounds of appeal. He did not, however, have anything further to submit on, other than referring us generally to the defence evidence on the record and citing to us the case of **Ramadhan Abdallah @ Namtule v. Republic**, Criminal Appeal No. 341 of 2019 (unreported) among others. He urged us to find that there was a failure by the trial judge to consider the defence evidence and that had it been considered in the light of the prosecution evidence, he would not have convicted and sentenced him for the offence.

On the other hand, the learned State Attorney in her brief and focused submission, urged us to find that the trial court considered the defence evidence, referring us from page 165 up to page 171 of the record. She, however, implored us to step into the shoes of the trial court and consider whether the defence evidence raises any reasonable doubt in the prosecution case in the event we are satisfied that the defence evidence was not considered. It is in line with the above argument that Ms. Samwel implored us to be guided by our previous decision in **Shabani Haruna @ Dr.Mwagilo** (supra).

We have already considered herein above how the trial court subjected the entire evidence to an objective evaluation in order to separate the chaff from the grain as we were determining the complaint about extraneous matter. We noted how the trial court summarized the evidence including the evidence of the defence from page 168 up to 169 of the record, and how it appraised the evidence from page 170 up to 175 of the record, whilst arriving at its findings that informed the judgment. At page 170 of the record, reference was made by the trial court to admission by the appellant (DW1) in cross-examination that he signed the certificate of seizure (Exhibit P5). The trial court in its scrutiny showed that the

admission was consistent with the evidence of PW3 that the appellant signed the said exhibit.

Again, at page 171, the trial court considered the appellant's assertion that he was forced to sign Exhibit P5 in the light of the fact that the appellant did not object the exhibit when it was tendered in evidence and how the trial court in the end after a proper scrutiny disregarded the assertion. There was at the same page a consideration by the trial court of the evidence by the appellant that the case against him was framed up by his neighbour, one Mussa Hassan @ Ustadh, against whom he had a land dispute, and hence a finding by the trial court that the evidence could not exonerate him from inculpability in view of its inherent weaknesses. Similar consideration of various pieces of the defence evidence is glaringly clear from page 171 up to page 174 of the record of appeal as is the corresponding finding of the trial court.

As is clear on the record, all exhibits, particularly, Exhibit P1, P3, P4 and P5 were admitted without any objection from the appellant and without reasonable doubt being raised from the cross-examination of the prosecution witnesses that was conducted. It is therefore our conclusion that the trial court considered the defence and correctly found that the

prosecution proved the case beyond reasonable doubt. The complaint is therefore dismissed.

For reasons stated, we find the appeal before us devoid of merit and consequently dismiss in its entirety.

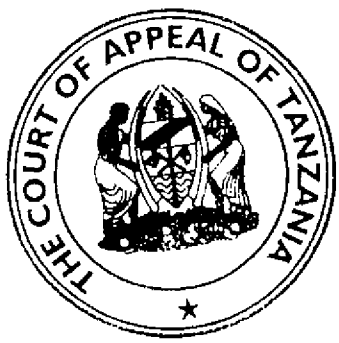
DATED at **ARUSHA** this 14th day of December, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

B. S. MASOUD
JUSTICE OF APPEAL

The Judgment delivered this 15th day of December, 2023 in the presence of the appellant in person and Mr. Charles Kagirwa, learned Senior State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



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SENIOR DEPUTY REGISTRAR
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