IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: MBAROUK, J.A., MZIRAY, J.A., And MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 163 OF 2017

1. YUSUPH MASALU @ JIDUVI ..... 1ST APPELLANT
2. ELIAS JOHN @ SPILIANO ..... 2ND APPELLANT
3. SALUM MOHAMED @ NGASA ..... 3RD APPELLANT
4. YONA STANLEY @ YOHANA..... 4TH APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT
(Appeal from the decision of the High Court of Tanzania at Dodoma)

(Mansoor, J.)

dated the 24th day of March, 2017
in
Criminal Appeal No. 57 of 2016
.....

JUDGMENT OF THE COURT

6th & 13th March, 2018
MZIRAY, J.A.:

The appellants along with three other persons namely Ramadhan Salum @ Hatibu, Kulwa Said @ Salum and Buhoro Salehe Yubaha Yokonie @ Buhoro appeared in the Resident Magistrates' Court of Singida at Singida on a charge sheet containing twelve counts. All counts were in relation to three offences which are; First, Leading Organized Crime Contrary to

paragraph 4(1) (a) of the 1st Schedule to, read together with sections 57(1) and 60(2) of the Economic and Organized Crimes Control Act Cap. 200 R.E. 2002; second, Unlawful Possession of Government Trophy contrary to section 86(1) and (2) (c)(ii) of the Wildlife Conservation Act No. 5 of 2009 read together with paragraph 14(d) of the 1st Schedule to, and section 57(1) of the Economic and Organized Crimes Control Act Cap. 200 R.E. 2002; and third, Unlawful possession of firearm contrary to section 4(1) and 34(1) and (2) of the Arms and Ammunition Act, Cap 223 R.E. 2002.

At the end of the trial, the appellants were all convicted and sentenced to serve a custodian sentence of fitteen years imprisonment for the 1st count. As for the second count, each appellant was convicted and fined to pay Tshs. 341,440,000/= in default to serve a custodian sentence of twenty years imprisonment. On the third count, the appellants were all convicted and fined to pay Tshs. 1,920,000,000/= and to serve a custodian sentence of twenty years imprisonment. On the fourth count, they were all convicted and fined to pay Tshs. 78,000,000/= each and to serve a custodian sentence of twenty years imprisonment. On the fifth count, they were all convicted and fined to pay Tshs. 35,200,000 and to serve a custodian sentence of

twenty years imprisonment. On the sixth count, they were all convicted and fined to pay Tshs. 475,008,000/= and to serve a custodian sentence of five years imprisonments in default. On the seventh count, they were all convicted and fined to pay of Tshs.3,000,000/= and to serve a custodian sentence of fifteen years imprisonment. On the eighth count, all of them were convicted and fined to pay Tshs. 3,000,000/= each and to serve a custodian sentence of fifteen years imprisonment. On the ninth count, the 1st Appellant, Yusuph Masalu @ Jiduvi was convicted and fined to pay Tshs. 78,400,000/= and to serve a custodian sentence of twenty years imprisonment. On the tenth count, they were all convicted and fined to pay Tshs. 3,000,000/= each and to serve a custodian sentence of fifteen years imprisonment. On the eleventh count, all of them were convicted and fined to pay Tshs.3,000,000/= each and to serve a custodian sentence of fifteen years imprisonment and on the twelveth count, the fifth appellant, Ramadhani salum @ Hatibu and the sixth Appellant Kulwa Said @ Salum were both convicted and fined to pay Tshs. 27,200,000/= and to serve a custodian sentence of twenty years imprisonment.

Dissatisfied with the conviction and sentences, they appealed to the High Court of Tanzania at Dodoma in which after a full hearing Ramadhan Salum @ Hatibu, Kulwa Said @ Salum and Buhoro Salehe Yubaha Yokonie @ Buhoro were acquitted. The first appellate court however upheld the conviction of the appellants in all counts except for the first count in which they were all acquitted.

Still aggrieved, the appellants through the services of Mr. Godfrey Wasonga, learned counsel, have lodged this appeal to this Court raising four grounds in the Memorandum of Appeal as hereunder reproduced:

1. *That, both trial court and Appellate court erred in law and in fact by convicting the appellants without considering that search were conducted during night time and not between hours of sunshine and sunset. The search during night was conducted without application and permit from the court.*
2. *That, all the exhibits tendered in court were illegally obtained which makes the whole trial nullity.*
3. *That, the prosecution side failed to prove their case beyond reasonable doubt.*

4. That, the whole proceedings was marred by procedural irregularities.

Before discussing these grounds of appeal and the respondent Republic's response thereto, it will be refreshing to state briefly the facts which prompted the prosecution of the appellants.

On 8/9/2014, Assistant Superitendent of Police (ASP) Babu(PW1), by then, the OC-CID for Manyoni District, received information from an informer to the effect that the appellants are illegally dealing with government trophies. Following the information, a trap to net them was planned and carried out. The appellants were spotted and arrested at Nkwida Grocery in Singida Municipality at around 20:00 hrs. The 1st appellant's room was searched and 28 elephant tusks, lion skin, great kudu skin, 4 lion nails, eland meat and tail were found therein and later seized. The search was witnessed by Mohamed Mussa (PW4) and Hamis Rajab Alute (PW5); the ten cell leader who also signed the seizure note. The seizure note was produced in the trial court and admitted as Exh. P2. The 1st and 3rd appellants were further interrogated and readily admitted to have been in possession of firearms and ammunitions. They cooporated and took the police to Malampaka village where a firearm (make SMG), ammunitions and

a jar with 4 lion nails were found and later impounded. The police were also taken to Mto Mgumoo in Malampaka village where a 2nd firearm and ammunations were retrieved. The 1st appellant also mentioned Ramadhan Salum @ Hatibu and Buhoro Salehe Yubaha Yokonie @ Buhoro as their accomplices. Acting on this information, on 9/7/2014 at around 04:00 hrs, Ramadhan Salum was arrested and when his house was searched, eland meat in decomposition stage and a motor cycle allegedly used in transportation of the government trophies from Malampaka to Manyoni were seized. The seizure notes issued to that effect and the inventory were tendered in the trial court and admitted as Exh. P4, P5, P6 and P7 respectively. Three months later, that is, on 10/11/2014, Buhoro Salehe Yubaha Yokonie@ Buhoro was also arrested in connection with the offence. It should also be noted that all the exhibits tendered in the trial court were under the custody of PW3, the Game Warden Officer from Anti-Poarching Unit "KDU".

In their respective defences the appellants denied the commission of the offences. They also retracted the cautioned statements saying that they were not made voluntarily and that the same were taken out of the four

hours time prescribed by the law. However, the trial court admitted them after conducting a trial within trial and satisfied itself that they were voluntarily made and properly recorded. All the same, as already hinted, the trial court was satisfied that the prosecution evidence was sufficient to sustain the convictions and imposed the sentences as aforesaid. The High Court upheld the conviction of the appellants in all counts except for the first count in which they were all acquitted.

When the appeal came up for hearing the appellants were represented by Mr. Godfrey Wasonga, learned advocate, while the respondent Republic was represented by Ms. Chivanenda Luwongo , learned State Attorney.

Mr. Wasonga, learned counsel submitted generally to the effect that the prosecution did not prove its case to the standard required; that is, beyond reasonable doubt. First, he said the appellants' cautioned statements were not recorded within four hours from the time of the arrest contrary to section 50 and 51 of the Criminal Procedure Act, Cap. 20 R.E 2002,(the CPA). He stated that the appellants were arrested on 8.7.2014, but the cautioned statements were recorded on the following day. He however pointed out that the argument by the High Court judge at page 496 of the record of appeal

that the police did not record the appellants' cautioned statements in time on the pretext that investigations were still in progress should not be accepted as an exception to section 50(2) of the CPA, because such argument is misconceived on account of the fact that there was no evidence on record to that effect. As such, he urged the Court to expunge all the cautioned statements of the appellants. Second, he said by expunging the appellants' cautioned statements, the remaining vital evidence is that of chain of custody which also is problematic. He stressed that the evidence in relation to chain of custody and that in connection with transfer of exhibits was not consistent and firm to ground a conviction. He further stressed that the requirements and test established in the case of **Paulo Maduka and Four others V. Republic**, Criminal Appeal No. 110 of 2007 (unreported) were not met. He submitted further that search in terms of section 40 of the CPA is ordinarily conducted during the day, not at night and that, should one decide to search at night, he must obtain a court order. Additionally, he submitted that in the case at hand search was done during the night and there was no court order to that effect. He went on to submit that the seizure certificates issued were defectve and worse, had no serial numbers in compliance with PF 91 of the Police General Orders (the PGO). Since the

issued certificates were defective then, the search and seizure exercises were in contravention of section 38(3) of the CPA, thus irregular, he argued. On that basis, he urged the Court to expunge from the record the documentary evidence of search and seizure.

Having completed arguing the grounds of appeal, Mr. Wasonga sought leave of this Court to address us on the issue partaining to the jurisdiction of the trial court. Since the issue of jurisdiction can be raised at any point in time even at the appellate stage, we granted him leave to argue the same.

On this point, he argued that in this case as reflected at page 16 of the record of appeal, it appears that the proceedings were conducted in the District court of Singida contrary to the DPP' s consent which directed the case to be tried by the RM'S court of Singida. He stated further that apart from the charge sheet being lodged in the RM'S Court of Singida, the notices of appeal at page 377-390 are against the decision of the District Court of Singida. For those reasons, he was of the view that the District Court of Singida entertained the case without having jurisdiction.

For the foregoing submissions, Mr. Wasonga urged us to allow the appeal, quash the convictions and set aside the sentences.

On her part, Ms. Luwongo, learned State Attorney out-rightly did not support the appeal. She stated that the case against the appellants was proved beyond reasonable doubt. While supporting the assertion that the appellants' cautioned statements were taken and recorded outside the prescribed time, she was of the view that it was impracticable in the circumstance of the case to record the appellants' cautioned statements within four hours while investigation was still in progress . The nature of the case, the long investigation in the case, the complexity and the fact that the appellants sometimes were to move from one place to another, were the reasons which impeded the statements not to be taken in time. On that basis, she adamantly argued that it was for the prevailing conditions that is, the nature of crime and the complications in the investigations that made the appellants' cautioned statements be taken and recorded outside the four hours under the provision of section 50(2)(a) of the CPA.

As to the issue of chain of custody, she submitted citing the **Maduka's** case *(supra)* as authority that the purpose of chain of custody is to remove the possibility of tampering with the exhibits. She stated that in the case at hand, the requirements in **Maduka's** case *(supra)* were complied with. The

exhibits had the identification marks lebelled MAN/IR/001/2014. Also, PW3 explained in detail on how he kept the exhibits since 9/7/2014 until when the same were produced in court. On the foregoing, she mantained that the chain of custody was not broken.

On the point of search and seizure, she submitted that section 40 of the CPA cannot be read in isolation. The provision of section 42(1)(b)(ii) of the Act gives an exception and explains how and when search can be conducted in an emergency situation. She submitted that the circumstances of the case at hand necessitated application of the exception. Nevertheless, this was not an issue at the trial court nor was it one on appeal, she argued. In the premises, she urged the Court to disregard the same making reference to the case of **DPP V. Nuru Mohamed Gulamrasul** [1988] TLR.82. She went on stating that the seizure certificates issued were proper. They captured the gists and the contents of the form; that is, PF 91. After all, the same were not objected at the trial court, she argued.

As to the issue of jurisdiction, she submitted that though it is true that the DPP's consent was given to RM's court of Singida, that will not vitiate the proceedings because at page 407 and 459, the record shows that the

case originated from the RM's court of Singida. It is however in record that the case was tried by Senior Resident Magistrate. The reference to " District Court of Singida in the notice of appeal " was therefore a typying error, she argued. On that basis, she urged the Court to disregard the jurisdiction point raised as the case was tried by the RM's court and not the District court as alleged.

In rejoinder submission, Mr. Wasonga reiterated his submissions in chief and added that since there was no evidence on record suggesting that investigation was going on to justify the statements being taken out of time, then, he was of the view that the statements should be expunged. On chain of custody, he rejoined that there was no documentary evidence showing how the exhibits were kept. There are mere words that the same were kept by "KDU" up to the time when they were produced in court. On that basis therefore, he urged us to find that the chain of custody was not consistent.

On the search and seizure certificates, he insisted that the search done during night and without court order and there being no evidence to show that circumstances allowed invoking the provision of section 42(b)(ii) of the

CPA, was improperly conducted. The same ought to be expunged, he argued.

We have thoroughly gone through the record of appeal and the submissions made by the respective parties in this appeal. As the question of jurisdiction is fundamental, we shall begin with that issue.

It is on record that the DPP's consent and certificate were addressed to the RM's court of Singida and the case was tried by a Senior Resident Magistrate. Indeed, the record at page 407 and 459 shows that the case originated from the RM's court of Singida. At this juncture, we were compelled to call for the original record to satisfy ourselves as to whether the case was filed in the District Court of Singida or the Resident Magistrates' Court of Singida and on perusal of the said original record, we were satisfied that the case originated from the Resident Magistrates Court of Singida. With great respect, taking all of these into account and the fact that the DPP's consent was addressed to RM's Court of Singida and the case being tried in the RM's Court of Singida by Senior Resident Magistrate as the record reflect at page 407 and 459, we are convinced that the reference to " District Court of Singida " was therefore a typying error and it was not intended that the

case should be tried by the District Court of Singida. We find the issue of jurisdiction raised to have no merit at all.

As for the issue of cautioned statements, we wish to be guided by the provisions of sections of 50 and 51 of the CPA which state as follows:-

> *"(1) For the purpose of this Act, the period available for interviewing a person who is in restraint in respect of an offence is –*
>
> *a) Subject to paragraph (b), the basic period available for interviewing the person, that is to say, the period of four hours commencing at the time when he was taken under restraint of the offence;*
>
> *b) if the basic period available for interviewing the person is extended under section 51, the basic period as so extended.*
>
> *(2) In calculating a period available for interviewing a person who is under restraint in respect of an offence, there shall not be reckoned as part of that period any time while the police officer investigating the offence refrains from interviewing the person, or*

causing the person to do any act connected with the investigation of the offence–

(a) while the person is, after being taken under restraint, being conveyed to a police station or other place for any purpose connected with the investigation;

(b) for the purpose of–

(i) enabling the person to arrange, or attempt to arrange, for the attendance of a lawyer;

(ii) enabling the police officer to communicate, or attempt to communicate with any person whom he is required by section 54 to communicate in connection with the investigation of the offence;

(iii) enabling the person to communicate, or attempt to communicate, with any person with whom he is, under this Act, entitled to communicate; or

(iv) arranging, or attempting to arrange, for the attendance of a person who, under the provisions of this Act is required to be present during an interview with the person under restraint or while the person under restraint

is doing an act in connection with the investigation; (c) while awaiting the arrival of a person referred to in subparagraph (iv) of paragraph (b); or

(d) while the person under restraint is consulting with a lawyer".

In this case, the appellants were arrested on 8.7.2014, but the cautioned statements were recorded on the following day. The reasons for failure to record the statement within time was stated to be the nature of crime and the complications in the investigations. The fact that the appellants sometimes were to move from one place to another as explained by PW1 and PW6 cannot be ignored. This shows that investigation was in progress. That being the case, the delay was with plausible explanation and in the circumstances, we find justification in recording the same outside the four hours prescribed under the provision of section 50(2)(a) of the CPA which provides an exception to the four hours period prescribed by the law.

As to the issue of chain of custody, we make reference to the case of **Iluminatus Mkoka v. Republic** [2003] TLR 245, which observed that establishing a chain of custody is necessary to afford reasonable assurance

that these exhibits tendered at the trial are the same as the ones recovered. The purpose of it was to make sure that exhibits tendered are not tampered with. See also, **Paulo Maduka and Others vs. R.,** *(supra)* in which this Court underscored the importance of proper chain of custody of exhibits and that there should be:-

> *"..... chronological documentation and/or paper trail, showing the seizure, custody, control, transfer analysis and disposition of evidence, be it physical or electronic. The idea behind recording the chain of custody, is to establish that the alleged evidence is in fact related to the alleged crime....."*

In the case at hand, it was testified that on 9/7/2014, the date when the exhibits were found, the same were handed over to PW3 and that it is PW3 who lebelled them and took care of them up to the point were produced and tendered in court by PW1. This being the circumstance, we are of the firm view that the chain of custody was not broken.

The issue of search and seizure certificates cannot detain us. As rightly pointed out by Ms. Luwongo, learned State Attorney, this ground was never at all raised and canvassed in both the trial court and the first appellate

court. We have keenly scanned the record in order to satisfy ourselves on whether or not it was at any given time raised and discussed in the two lower courts. We have found that it was never raised and/or discussed by those courts. This cannot be condoned at this stage of the case.

In the case of **Samwel Sawe v. Republic**, Criminal Appeal No. 135 of 2004, which was cited in **Juma Manjano v. Republic,** Criminal Appeal No.211 of 2009. (both unreported), the Court said:-

> *"As a second appellate court, we cannot adjudicate on a matter which was not raised as a ground of appeal in the first appellate court. The record of appeal at page 21 to 23 shows that this ground of appeal by the appellant was not among the appellant's ten grounds of appeal which he filed in the High Court. In the case of* ***Abdul Athumani v. R.*** *[2004] TLR 151the issue on whether the Court of Appeal may decide on a matter not raised in and decided by the High Court on the first appeal was raised. The Court held that the Court of Appeal has no such jurisdiction. The ground of appeal therefore is struck out."*

Having analyzed the grounds of appeal, the submissions and given the findings of the Court on the said grounds, we are satisfied that the appeal has no merit and we dismiss it in its entirety.

DATED at **DODOMA** this 12th day of March, 2018.

M.S. MBAROUK
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

J.C.M. MWAMBEGELE
JUSTICE OF APPEAL

I certify that this is a true copy of the Original.

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL