IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: MMILLA, J.A., SEHEL, J.A. And MWANDAMBO, J.A.)

CRIMINAL APPEAL NO. 122 OF 2018

SALUM s/o SAID KANDURU.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Mlacha, J.)

dated the 22nd day of March, 2018
in
Criminal Appeal No. 132 of 2016
.....

JUDGMENT OF THE COURT

25th October & 4th November, 2019.

SEHEL, J.A.:

In the District Court of Liwale, the appellant was charged with 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 First Schedule to and sections 57

(1) and 60 (2) of the Economic and Organized Crime Control Act, Cap. 200 RE 2002.

It was alleged at the trial court that, on 22nd day of July, 2012 during night hours at Barikiwa village within Liwale District in Lindi Region, the appellant was found in possession of a bracelet made of three knots of elephant hair valued at TZS 23,625,000.00 the property of the Government of Tanzania without a valid permit.

To establish its case, the prosecution called a total of three (3) witnesses who were; **Assistant Inspector Isack Mwakisisile** (PW1) working at the Field Force Unit (FFU), Dar es Salaam; **E. 1174 Detective Magoa** (PW2), working at the Criminal Investigation Department (CID) at Dar es Salaam, headquarters; and **Abbas Lijembe** (PW3), a forestry officer. The prosecution also tendered two exhibits: the bracelet made of elephant hair (exhibit P1) and valuation report prepared by PW3 (exhibit P2).

The facts which led to the conviction of the appellant are very straight forward that: on 22nd day of July, 2012 PW1 and PW2 were in a patrol looking for poachers. While on the patrol, they received

information that one Juma Chande Mbwana was in possession of a rifle. They went to Mbwana's home and there they were informed that the rifle was with the appellant. Having been told that, they went up to the appellant's house, made a search, and they found him with a bracelet made of elephant hair. It was the evidence of PW2, that the appellant tried to swallow that bracelet but they managed to retrieve it from him. The appellant was arrested and the bracelet was taken to PW3 for examination. PW3 confirmed before the trial court that it was a bracelet made of elephant hair valued at USD 15,000.

The appellant in his defence, did not the dispute the fact he was searched but he denied to have been found with the said bracelet. The trial court was satisfied with the evidence led by the prosecution it convicted the appellant and sentenced him to serve a term of two years in prison.

The appellant did not appeal. However, when the judge in charge was conducting supervision at Liwale District Court, noted that the sentence meted out to the appellant was wanting. Consequently, he ordered for revisional proceedings to be opened in order to consider the legality, propriety or otherwise of the sentence. Consequently,

Criminal Revision No. 26 of 2016 was initiated. In its revisional powers, the High Court quashed, set aside the sentence and substituted it a twenty (20) year's imprisonment or payment of fine of TZS. 5,000,000.00.

Aggrieved with that decision, the appellant appealed to this Court. His appeal was struck out for failure to seek redress first before the High Court on his conviction. He therefore appealed to the High Court whereas his appeal was dismissed for lacking merit. Hence, the present appeal.

In the grounds of appeal which was in a format of written submissions, the appellant criticized the two courts below for believing the evidence of PW1 and PW2. To him, although he admitted that he was searched but he strongly denied to have been found with the bracelet made of three knots of the elephant hair. Generally, his complaint was that the prosecution failed to prove its case beyond reasonable doubt.

At the hearing of the appeal, the appellant appeared in person and fended for himself. Being a lay person, he had nothing to submit

than just to adopt his memorandum of appeal and opted for the learned State Attorney to respond first and if need arose to rejoin, he will do so.

Mr. Wilbroad Ndunguru, learned Senior State Attorney who appeared for the respondent/ Republic supported the appeal for one main reason, that is, there was non-compliance with section 198 (1) of the Criminal Procedure Act, Ca. 20 RE 2002 when PW1 and PW2 were called to give their evidence. He submitted that the evidence of PW1 and PW2 was received by the trial court without oath or affirmation. Mr. Ndunguru argued that this Court in its several decisions has held that that evidence amounts to no evidence as such it cannot be acted upon. He contended that once the evidence of PW1 and PW2 is discounted then the remaining evidence of PW3 cannot warrant a conviction against the appellant. In support of his argument, he referred us to the case of **Amos Seleman v. Republic**, Criminal Appeal No.267 of 2015, (unreported). With that anomaly, Mr. Ndunguru urged us to allow the appeal by setting aside the conviction and quash the sentence imposed on the appellant.

On our part, we fully associate ourselves with the observation and submission made by Mr. Ndunguru. It is true that the record of appeal shows after PW1 and PW2 took the witness stand, they were neither sworn nor affirmed. Hence, their evidence is no evidence in law due to the flouting of the procedure of taking evidence in criminal matters which is governed by section 198 (1) of the CPA that reads as follows:

> *"Every witness in a criminal cause or matter shall, subject to the provisions of any other written law to the contrary, be examined upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declaration Act."*

This Court in a number of occasions had taken the view that apart from the evidence of a child of tender age which can be taken in accordance with section 127 (2) of the Evidence Act, non compliance with section 198 of the CPA renders the evidence as no evidence at all and is to be discarded (See **Godi Kasenegela v. Republic,** Criminal Appeal No. 10 of 2008; **Membi Steyani v. Republic,** Criminal Appeal No. 300 of 2008; **Athumani Bakari v. Republic,** Criminal Appeal No.

284 of 2008; **Ebon Stephen @ Chandika v. Republic**, Criminal Appeal No. 86 of 2011; and **Amos Seleman** (supra) (all unreported)).

In **Amos Seleman** (supra) citing the case of **Mwami Ngura v. Republic**, Criminal Appeal No. 63 of 2014 the Court said:

> *"...this means that, as a general rule, every witness who is competent to testify, must do so under oath or affirmation, unless, she falls under the exceptions provided in a written law. As demonstrated above one such exception is section 127 (2) of the Evidence Act. But once a trial court, upon an inquiry under section 127 (2) of the Evidence Act, finds that the witness understands the nature of an oath/ the witness must take an oath or affirmation. If this is not done, such evidence must be visited by the consequences of non-compliance with section 198 (1) of the CPA. And, in several cases, this Court has held that if in a criminal case, evidence is given without oath or affirmation, in violation of section 198 (1) of the CPA, such testimony amounts to no evidence in law (see eg* ***Mwita Sigore @ Ogorea v. R****. Criminal Appeal No. 54 of 2004 (unreported). The question of such evidence being relegated to*

"unsworn" evidence does not therefore arise."
(at page 4).

In the present appeal, it is clear from the record that, both PW1 and PW2 who were key witnesses for the prosecution were neither sworn nor affirmed after they took the witness box. This is what transpired in respect of PW1 at page 5 of the record of appeal:

> *"**PW1:** Assistant Inspector Isack Mwakisisile of FFU Dar es Salaam.*
>
> ***XD by PP (Mr. Sekwao):** I am working with FFU department in Dar es Salaam. I am in this field for almost twelve years. My duties are to investigate and am looking all of the soldiers daily....."*

Also at page 7 of the record of appeal the following is what transpired in regard to PW2:

> *"**PW2:** E. 1174 Detective Magoa of CID Headquarters Dar es Salaam.*
>
> ***XD by PP:** I have been in the field for 20 years. My duties are to investigate criminals and to arrest. And I remember on 22/7/2012...."*

What we gather from the above transcript is that PW1 and PW2 gave evidence without taking oath or affirmation which is contrary to the requirement of section 198 (1) of the CPA. Thus, their evidence is of no value, and we proceed to discard it from the record.

Having discarded the evidence of PW1 and PW2 we remain with the evidence of PW3. His evidence was limited to the extent of establishing the value of the Trophy and whether the bracelet was made of three knots of the elephant hair. As such, his evidence does not connect the appellant with the exhibit that he valued. His evidence alone cannot warrant a conviction against the appellant on the offence charged.

In view of the irregularity pointed out by the learned Senior State Attorney, we are constrained to exercise our revisional power under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 RE 2002 by quashing the conviction entered by the trial court against the appellant which was upheld by the first appellate court. Acting on the same powers, we set aside the sentence enhanced by the first appellate court of twenty (20) years imprisonment or payment of fine of TZS.

5,000,000.00. We order that the appellant be released from custody forthwith unless he is held therein for some other lawful cause.

DATED at **MTWARA** this 2nd day of November, 2019.

B. M. MMILLA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Judgment delivered this 4th day of November, 2019 in the presence of Salum Said Kanduru the appellant present in person unrepresented and Mr. Paul Kimweri learned Senior State Attorney for the Respondent/Republic is hereby certified as a true copy of the original

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL