IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

(CORAM: JUMA, C.J., MWARIJA, J.A. And WAMBALI,J.A.)

CRIMINAL APPEAL NO 385 OF 2017

MOHAMED JUMA @MPAKAMA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mlacha, J.)

dated the 30th day of June, 2017
in
Criminal Appeal No. 59 of 2016

JUDGMENT OF THE COURT

20th & 27th February, 2019

JUMA, C.J.:

In the District Court of Nanyumbu at Nanyumbu the appellant, MOHAMED JUMA @ MPAKAMA, was convicted by the trial magistrate (M.S. Kasonde—RM) in three counts of the offences of:

> *(i) being found in unlawful possession of Government Trophies (one warthog, seven rock hyrax, two mongoose, and one African hare) contrary to sections 86 (1), (2)(b), (c) (ii) and (3) of the Wildlife Conservation Act No. 5 of 2009 read together with*

sections 57 (1), 60 (2) and paragraph 14(d) of the First Schedule to the Economic and Organized Crime Control Act Cap. 200 R.E. 2002;

(ii) Unlawful hunting of Scheduled Animals (one warthog, seven rock hyrax, two mongoose, and one African hare) contrary to section 47 (a) of the Wildlife Conservation Act No. 5 of 2009 read together with sections 57 (1), 60 (2) and paragraph 14(a) of the First Schedule to the Economic and Organized Crime Control Act Cap. 200 R.E. 2002; and

(iii) Unlawful possession of weapons in a Game Reserve contrary to section 17 (1) and (2) of the Wildlife Conservation Act No. 5 of 2009 read together with sections 57 (1), 60 (2) and paragraph 14 (c) of the First Schedule to the Economic and Organized Crime Control Act Cap. 200 R.E. 2002.

On being convicted on all three counts, the trial court sentenced the appellant to serve twenty (20) years imprisonment on the first count; five years (5) imprisonment on the second count and another five (5) years imprisonment on the third count. The trial magistrate ordered the sentences to run concurrently.

The appellant appealed to the High Court presided over by Mlacha, J. who, after re-evaluating the evidence dismissed it after finding that the appellant had been properly found guilty, and convicted.

Still unfazed by the dismissal, the appellant brought his appeal to this Court, based on four grounds. In the first ground, the appellant expresses his belief that the prosecution case against him was not proved beyond reasonable doubt. The second ground questions why the prosecution failed to produce the Certificate of Seizure at very least to prove that he was in fact found in possession of Government Trophy. He urged us not to allow the prosecution to rely on his cautioned statement to prove his unlawful possession. In his third ground he faulted the first appellate court for upholding his conviction on the reason that he failed to object the admission of his cautioned statement. In his final ground, the appellant complains that the two courts below failed to consider his defence that he was returning home from his farm, when the Game Wardens arrested him along the road.

The background facts which was the basis of the appellant's conviction is succinctly summarised in the judgment of Mlacha, J. Two game

wardens, one Madulu Ilanga James (PW1) and another Allen Emmanuel Chinga (PW2) were on 5/9/2014 in their routine patrol within the Lukwika/Lumisule Game Reserve when they saw four (4) men carrying bags. On seeing the approaching wardens, they dropped their bags and ran away. Only three managed to escape, but the appellant was arrested. The wardens picked up the bags and took the appellant first to their camp, and later to the police station.

At Mangaka police station, D/Cpl Msafiri (PW3) recorded the appellant's statement (exhibit PE3) wherein he allegedly confessed to have committed the offence. The game meat, which was perishable, was disposed of after the police had obtained necessary order (exhibit PE3) from a magistrate at Nanyumbu Primary Court. Another game warden, Ezekiel Petro Ruchenja (PW5) was also at the police station where he assessed the value of the Government trophy that was allegedly found in the appellant's possession. He prepared a Trophy Valuation Certificate which was tendered as evidence (exhibit PE4).

In his defence, the appellant rejected the prosecution's version of evidence. He testified how he was arrested around noon on 05/09/2014

while returning back home from his farm at Makoteni, where he had gone to clear the bush. While the game wardens were driving by in their vehicle, they stopped near where he was, and accused him that he was together with three people who had ran away from the wardens. His denials were to avail when the wardens physically assaulted him. He was bundled into the warden's vehicle which drove him first to their camp where he was assaulted. He was finally taken to the police station.

At the hearing of the appeal, the learned Senior State Attorney Mr. Paul Kimweri appeared for the Respondent Republic. The appellant, who appeared in person; preferred to let the learned Counsel for the respondent first respond to his grounds of appeal, and he would come in later.

At the outset of his address the learned counsel for the respondent supported the appeal. He roundly faulted all the three counts for which the appellant was charged, tried, convicted. The prosecution, he submitted, did not prove the first count accusing the appellant of unlawful possession of Government trophies. He referred us to exhibit PE3 (Inventory Form), which the prosecution had relied on to show the types of perishable trophies which were disposed of earlier on orders of a Magistrate.

Exhibit PE3 lists carcasses of Warthog (*Ngiri*), Rock Hyrax (*Pimbi*), Mongoose (*Nguchiro*) and African Hare (*Sungura*) which were on orders of a Magistrate, disposed of on the day when the appellant was arrested (i.e. 05/09/2014). He proceeded to argue that exhibit PE3 cannot be relied to prove that the perishable Government trophies were found in the possession of the appellant and were disposed of. This is because, he submitted, the procedures prescribed under either section 353 (2) of the Criminal Procedure Act Cap 20 (**the CPA**), or section 101 of the Wildlife Conservation Act No. 5 of 2009 (**the WCA**); were not followed in the preparation of exhibit PE3. This Inventory Form alone cannot be relied as proof that the mentioned Government trophies were found in the appellant's possession.

The learned Counsel argued further that it was a mistake by the prosecution to dispose of perishable Government trophies on orders of a Magistrate at Nanyumbu Primary Court because primary courts have no jurisdiction over offences created under the WCA. He suggested that for the perishable Government trophies, the prosecution should have sought the disposal orders from the District Court of Nanyumbu, which had requisite jurisdiction to try the three counts of offences falling under the

WCA. He further faulted the way the appellant, who was allegedly found in unlawful possession of the perishable Government trophies, was kept away from the proceedings before the Magistrate of the Primary Court Nanyumbu. He should have been a party to the order (exhibit PE3) which led to the disposal of the trophies on 05/09/2014.

To support his stance that the prosecution did not follow procedure prescribed under section 101 of the WCA to dispose of perishable Government trophies, the learned Counsel referenced us to our decision in **SAMUEL SAGUDA @ SULUKUKA & SAHILI WAMBURA V. R.,** CRIMINAL APPEAL NO. 422 "B" OF 2013 (unreported). In this referenced decision, the prosecution had presented evidence that the appellants were found in the Serengeti National Park armed with bows, arrows, knives, bush-knives and trapping wires. They were in addition found in possession of Government trophies in the form of zebra and warthog meat. It is apparent that the Government trophies concerned had been disposed of much earlier before the date of trial. In lieu of physical exhibits, the prosecution had instead tendered "Evaluation Report" and the "Inventory Form", which were the basis of proving that the fourth count of unlawful possession of Government trophy. It was submitted that the appellants

were in the referenced decision not afforded the opportunity to see these exhibits, and object where necessary. After making referring to sections 353 (2) of the CPA and 101 of the WCA, the Court faulted the prosecution for failing to follow the correct procedures, stating:

> *"It is evident from the provisions of section 101 of the WCA, the Government trophies found in possession of the appellants were required to be tendered in Court as exhibits. This was not done. Instead a certificate of valuation and an inventory form were tendered and admitted in court. The appellants did not have any opportunity to see the actual trophies and did not have an opportunity to raise an objection. It is a well established practice in cases where witnesses are required to testify on a document or object which would subsequently be tendered as Exhibit that the procedure is not simply to refer to it theoretically as was the case here, but to have it physically produced and referred to by the witness before the court either by display or describing it and then have it admitted as an exhibit. The court treated the reports produced by PW1 as conclusive. Given the position, the requirements under the law have not been met."*

The learned Counsel also faulted the variance between the particulars of the charge that the appellant hunted and killed Scheduled Animals in the second count, with what the two key prosecution witnesses (PW1 and

PW2) actually stated on pages 16 and 18 of the record of appeal. He submitted that while the particulars alleged that the appellant had hunted and killed scheduled animals in Lukwika/Lumesule Game Reserve, the evidence of PW1 does not in any way explain how he saw the appellant hunting. That PW2 does not similarly say anything about how he saw the appellant hunting. This divergence, he submitted, taken in light of the evidence of the appellant who claimed that he was on the road walking back home when he was arrested; creates doubt whether the appellant committed the offence of unlawful hunting of scheduled animals contrary to section 47 (a) of the WCA as charged.

The learned Counsel went on to submit that the third count, relating to the appellant being found in unlawful possession of weapons, an arrow and a spear without written permission; was not proved to the required standard and cannot sustain the appellant's conviction. He pointed out that while on one hand, the charge sheet mentions an arrow and a spear; PW2 testified that the appellant was found with a bow and an arrow, which were tendered as Exhibit PE. 1. He submitted that this divergence creates doubt which should be resolved in the appellant's favour. The learned counsel observed that this divergence would not have been an issue if PW2

had recorded in the Certificate of Seizure, the types of weapons he had seized from the appellant. When the Court referred him to the appellant's cautioned statement which mentions additional weapons, including an axe, he conceded this to be another divergence from weapons mentioned in the charge sheet. He also added that the cautioned statement of the appellant should not have been admitted in the first place.

Respondent's learned Counsel concluded his submissions by reiterating his support of this appeal.

When he was asked to submit in response, the appellant did not have much to say, other than to support the learned Counsel's submissions which supported the merit of his appeal.

We have carefully considered the submissions of both sides in light of the grounds of appeal. We are alive to the settled practice of the Court that in a second appeal the Court should not generally interfere with concurrent findings of fact by the trial and first appellate courts, unless for example, the findings of facts are unreasonable or where it is evident that some material points or circumstances were not considered by the two courts below: See **MASUMBUKO CHARLES V. R.,** CRIMINAL APPEAL NO. 39 OF

2000 (unreported). Yet, despite this settled practice, the learned Counsel for the respondent and the appellant as well, would like us to interfere with the concurrent findings of facts. In this regard, both are agreed that the three counts; of unlawful possession of Government trophies, unlawful hunting of scheduled animals, and unlawful possession of weapons in the game reserve were not proved beyond reasonable doubt hence the need for interference. Both the learned Counsel for the respondent and the appellant are also agreed that the cautioned statement should not have been admitted and exhibited in evidence.

We think we must point out that, when the charge sheet was read out to the appellant on 13/11/2014 two months had passed since the prosecution had disposed of perishable Government trophies on 05/09/2014. And there were no physical trophies to be tendered as exhibits in the trial district court of Nanyumbu. The learned Counsel spent considerable part of his submissions to fault the procedures that led to the disposal of perishable Government trophies on orders of the Resident Magistrate of Nanyumbu Primary Court (exhibit PE3). It seems clear to us from the record that the learned trial Magistrate (M.S. Kasonde), did not believe the evidence of PW1 and PW2 alleging that they found the

appellant in unlawful possession of Government trophies, instead he relied on the cautioned statement (exhibit PE2) to prove appellant's unlawful possession. This is borne out of the trial magistrate's observation on pages 53 and 54 of the record of appeal faulting PW1 and PW2 failing to state exactly how they seized the alleged trophies from the appellant. This exactness was according to the learned trial magistrate necessary due to the appellant's strong denial that he had been found in possession of both trophies and weapons in question. Yet despite these shortcomings on the part of the two key prosecution witnesses, the trial magistrate relied on confessional statements to convict the appellant:

> *"Under the circumstances, three questions come to light. One is whether the accused person was found in possession of Government trophies. Second, whether at the material time, the accused was found in unlawful possession of weapons in a game reserve; and lastly, whether he was unlawfully hunting scheduled animals.*
>
> *As to the first question the prosecution version (PW1 and PW2 reveal that the accused was arrested within Lukwika-Lumesule game reserve with government trophies in question.* ***In his defence the accused alleges that he was outside the***

game reserve and government trophies in question were in their (game wardens) Motor Vehicle.

It should be noted that the accused was arrested and searched immediately after arrest. Frankly speaking the procedures of searching immediately after the arrest as provided for under the Criminal Procedure Act and the Wildlife Conservation Act No. 5 of 2009 were not complied with. ***PW1 and PW2 did not state exactly how they seized the alleged trophies from the accused person. Here I mean that it was necessary for these officers to tell the procedures thy adopted in seizing the animals (trophies) and weapons in question. This was necessary due to the fact that the accused person denies to have been found in possession of both trophies and weapons in question.***

However, the fact that the procedures of seizing the trophies and weapons in question were not clearly stated, does not in itself affect the prosecution case. I say so simply because we have exhibit PE2, cautioned statement of the accused person in which he admitted to have committed the offences charged. ***I have carefully gone through exhibit PE2 and satisfied fully that it contains the confessional statement of the accused person****. For example, the accused person is recorded to have said... .....*

What is gathered from the extract above is that the accused person admitted in his statement to have committed the offences charged. He entered into the game reserve area and hunted and killed game animals listed in exhibit PE3 and PE4. He also admitted to have been arrested within game reserve with game animals in question.

The law now is very clear that in all criminal trials the very best of witnesses is the accused person who confesses freely and voluntarily.... In the case at hand, ***the accused person did not dispute admissibility of the statement in question; Exhibit PE2 is very obvious that the accused person confessed freely and voluntarily****...."* [Emphasis added].

Equally, the first appellate Judge (Mlacha, J.) relied on the cautioned statement of the appellant when on pages 71 and 72, he stated:

*"****This is a clear confession. The statement was received without objection*** *but the appellant challenged it during the trial (sic). He was in law entitled to challenge it during the trial but I think if an accused who did not object to the tendering of the statement come to challenge [it] subsequent at the trial, brings picture [of] an afterthought or a coaching from some friends. Things could be different if he had challenged the admissibility unsuccessfully. .... I think the trial magistrate was correct in rejecting the defence.* ***Looking at the statement as***

it appears and in the absence of any concrete evidence like a PF3, showing that the accused was really tortured by the police before making the statement, I cannot hesitate to say that the statement was voluntarily made. *The accused could not show the court any scars or anything to indicate torture."* [Emphasis added].

There is no doubt that the learned trial magistrate and the learned first appellate Judge both gave much more weight and credence to the cautioned statement (Exhibit PE2) to prove the three counts. However, the learned Counsel did not support the admission of the appellant's cautioned statement and urged us to expunge it from the record. We would like to support the learned Counsel's rejection of cautioned statement (exhibit PE2) which should not, have been admitted in the first place. The statutory periods available for the police to interview persons suspected to have committed offences are closely regulated by the law under sections 50(1) and 51(1) of the CPA. Section 50 (1) (a) of the CPA has prescribed the initial period of four hours for police interview, counted from the time when the accused person is placed under restraint in respect of the offence. In case an extension of the time interview is desirable, conditions for extension are prescribed under Section 51 of the CPA.

In the instant appeal before us, the charge sheet shows that the offence was committed on 5/9/2014. The appellant places the time of his arrest at 12:00 noon. Although PW2 confirmed 5/9/2014 as the date of the arrest, he did not mention the exact time when the appellant was actually arrested. Again neither PW2, nor PW1 indicated when they arrived at the game wardens' camp after arresting the appellant. They did not also indicate the time when the appellant was finally taken over to the Mangaka police station.

Detective Corporal Msafiri (PW3) who recorded the appellant's cautioned statement stated that the appellant who was arrested on 05/09/2014 but was placed before PW3 for interview on 07/09/2014, which was two days after his arrest. There is no doubt PW3 recorded the cautioned statement two days after the arrest, which was outside the periods prescribed by the law.

This Court has always taken great exception to cautioned statements which the police take outside the period prescribed by sections 50 and 51 of the CPA is quite evident. In **ABDALLAH ALLY @ KALUKUNI VS. R.,** CRIMINAL APPEAL NO. 131 OF 2016 (unreported), a cautioned statement which was taken three days after the appellant's arrest on two counts of

burglary and stealing. The appellant's learned Counsel had submitted that in terms of S. 50 (1) (a) of the CPA, the cautioned statement which was taken beyond the four hours after his arrest should not have been admitted in evidence. The learned Counsel urged the Court to expunge the statement from the record. The Court duly obliged, stating:

> *"We entirely agree with Ms Msalangi. On reading the evidence on record the only material evidence to connect the appellant with the offences he was charged with was that of cautioned statement. The said cautioned statement was taken beyond the four hours period from the time of his arrest. This goes contrary to S. 50(1)(a) of the CPA. The section provides—...*
>
> *...**In our case the statement of the appellant was taken beyond the prescribed time of four hours from the time he was arrested. The statement is not admissible in evidence. Unfortunately both lower courts did not address this legal anomaly** notwithstanding it was not objected to when tendered."* [Emphasis added].

There are many other decisions where the Court has staked similar position. For example in **IDDI MUHIDIN @ KIBATAMO V. R.,** CRIMINAL APPEAL NO. 101 OF 2008 (unreported) the appellant's cautioned statement was recorded six days after his arrest. The Court expunged the statement

from the record describing it to be a clear violation of the law under sections 50(1) and 51(1) of the CPA.

With the position of the Court so settled, we do not agree with the suggestion by the first appellate Judge to the effect that failure to object the admissibility of a cautioned statement that is found to have been recorded out of time would save it. Courts in Tanzania have undeniable duty to ensure that cautioned statements which were taken beyond the times prescribed by the law are first cleared before they are exhibited as evidence. This is a legal question which cannot be shifted to the accused person, even if he does not object to the admission of a belated cautioned statement.

We as a result expunge exhibit PE2 from the record.

With regard to the first count of unlawful possession of Government trophies mentioned in the particulars of the charge, we agree with the learned Counsel for the Respondent Republic that "unlawful possession of Government trophy" which is a salient ingredient of this offence, was not proved; not least because the Government trophies allegedly found in the

appellant's possession were not physically tendered as evidence and the appellant had no opportunity to object if he needed to.

There is one issue which we unsuccessfully pressed for answers from the learned Counsel for the respondent. That is whether the procedures for disposal of perishable Government trophies like game meat under section 101 of the WCA extend to police officers handing these trophies during the investigation stage. We think, a distinction must be drawn between the disposal of perishable Government trophies by the police during their investigations; and the disposals of perishable Government trophies during the course of court proceedings which is outlined under section 101 of the WCA.

We do not agree with the position staked by the learned Counsel that the police, who while they were investigating the offence against the appellant between 05/09/2014 and 13/11/2014 when the appellant appeared before the trial court, were wrong to obtain from the Primary Court of Nanyumbu, an order to dispose of the perishable trophies (exhibit PE3). While referring to section 101 of the WCA, the learned Counsel suggested that during the period when the police were investigating the

offence, the prosecution should have applied to the court having jurisdiction over the offences facing the appellant for an order to place the trophies which were subject to speedy decay, destruction or depreciation, at the disposal of the Director of Wildlife.

It is apparent to us that section 101 of the WCA can only apply to perishable Government trophy when the court with requisite jurisdiction is already seized of the matter, and does not extend back to the period when the police are still carrying their investigations over the same matter. The relevant section 101 states:

> *101 (1)-Subject to section 99 (2),* ***at any stage of the proceedings under this Act****, the court may on its own motion or on an application made by the prosecution in that behalf order that any animal, trophy, weapon, vehicle, vessel or other article which has been tendered or put in evidence before it and which is subject to speedy decay, destruction or depreciation* ***be placed at the disposal of the Director****.* [Emphasis].

To us, the phrase '***at any stage of the proceedings***' in section 101 of the WCA implies the proceedings are already in court with requisite jurisdiction over the matter. Again, the phrase "***be placed at the***

disposal of the Director" in the same section seems to indicate that the end result of the order of the court over perishable Government is to hand over the exhibit to the Director of Wildlife for disposal.

The police, while carrying out investigations have a very different procedure for handling perishable Government trophies. This different procedure is provided for under the Police General Orders (PGOs). On page 28 of the record of the instant appeal, G. 5066 Detective Corporal Saimon (PW4) clearly alluded to the procedures under the PGO when he testified on how the Police during their investigations, handled the perishable Government trophies which were allegedly found in the appellant's possession investigations. He stated:

> *"In investigating criminal matters I interview suspects and witnesses as the purpose being to collect evidence. I also collect exhibits and keep them safely to be used in cases (hearing).*
>
> ***As to the exhibits there are two types. One is those exhibits which are perishable and decaying fast and imperishable exhibits. Perishable (decaying) exhibit is like meat, or a killed animal. Now to avoid the destruction of exhibit we prepare and fill in a special form (Inventory Form) and submit it to the magistrate***

for further order normally allowing the disposition of the said exhibit. *The accused person is not involved in that exercise (Involved in Preparing Inventory). Signatories thereon are OCS and the magistrate."* [Emphasis added].

According to paragraph 2 (a) of the Police General Orders (PGO), the Police Force recognizes the above duty to protect every exhibit, perishable or otherwise, which comes into their possession:

> *2.(a)* ***The police are responsible for each exhibit from the time it comes into the possession of the police, until such time as it is admitted by the Court in evidence,*** *or returned to its owner, or otherwise disposed of according to instructions;* [Emphasis is added].

Concerning the way the Police are required to handle perishable exhibit when still at the stage of criminal investigation, paragraph 25 of PGO No. 229 (INVESTIGATION – EXHIBITS) applies, and states:

> *25. Perishable exhibits which cannot easily be preserved until the case is heard, shall be brought* ***before the Magistrate, together with the prisoner (if any)*** *so that the Magistrate may note the exhibits and order immediate disposal. Where possible, such exhibits should be photographed before disposal.* [Emphasis added].

The above paragraph 25 envisages any nearest Magistrate, who may issue an order to dispose of perishable exhibit. This paragraph 25 in addition emphasizes the mandatory right of an accused (if he is in custody or out on police bail) to be present before the Magistrate and be heard. In the instant appeal, the appellant was not taken before the primary court magistrate and be heard before the magistrate issued the disposal order (exhibit PE3). While the police investigator, Detective Corporal Saimon (PW4), was fully entitled to seek the disposal order from the primary court magistrate, the resulting Inventory Form (exhibit PE3) cannot be proved against the appellant because he was not given the opportunity to be heard by the primary court Magistrate. In addition, no photographs of the perishable Government trophies were taken as directed by the PGO.

Our conclusion on evidential probity of exhibit PE3 ultimately coincides with that of the learned counsel for the respondent. Exhibits PE3 cannot be relied on to prove that the appellant was found in unlawful possession of Government trophies mentioned in the charge sheet.

With regard to the evidence to prove the second count of unlawful hunting, we agree with learned Counsel after expunging the cautioned

statement (exhibit PE2) there is no remaining evidence on the record to prove the charge of unlawful hunting. After disregarding the evidence of PW4 together with the Inventory Form (exhibit PE3) which purported to identify the scheduled animals, there remains no evidence of what animals were actually unlawfully hunted.

We have carefully read the particulars of the third count of being found in unlawful possession of one arrow and one spear. The learned Counsel is correct to point out on the divergence between the particulars of the offence and the evidence of PW1 and PW2 on the type of the weapons they found in the possession of the appellant. Apart from unresolved question of facts regarding whether the appellant was arrested inside the game reserve or along the road outside the reserve; we think, the discrepancy between the type of weapons mentioned in the particulars of the charge, and the weapons mentioned by the prosecution witnesses is not minor. It goes to the root of the third count.

In the end result, we agree with the learned Counsel for the respondent Republic that the conviction against the appellant is unsustainable and cannot be allowed to stand.

We allow the appeal, quash the conviction, set aside the sentences imposed upon the appellant and we order his immediate release from prison, unless is held for other lawful cause. We order accordingly.

DATED at **MTWARA** this 26th day of February, 2019.

I. H. JUMA
CHIEF JUSTICE

A. G. MWARIJA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

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

A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL