IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

(CORAM: LILA, J.A., SEHEL, J.A., And LEVIRA, J.A.,)

CRIMINAL APPEAL N0. 86 OF 2020

MOHAMED RASHID SAID .....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from a Judgment of the High Court of Tanzania at Tanga)

(Aboud, J.)

dated the 23rd day of February, 2018
in
Criminal Appeal No. 54 of 2017
.....

JUDGMENT OF THE COURT

14th & 24th Sept, 2020

LILA, J.A.:

This appeal arises from the decision of the High Court of Tanzania sitting at Tanga in Criminal Appeal No. 54 of 2017 whereby the appellant, Mohamed Rashid Said, was arraigned for the offence of unlawful possession of government trophies contrary to section 86(1) and (2) of the Wildlife Conservation Act, 2009.

It was alleged that, the appellant on 30th January 2015 at Kwabojo Village area within Handeni District in Tanga Region was found in possession of two pieces of elephant tusks weighing 6.5 kilograms valued at 15000 USD which was equivalent to TZS 26,550,000/-, the property of the Government of the United Republic of Tanzania without a valid permit or license.

The appellant pleaded not guilty. In their verge to prove the charge, the prosecution lined up five (5) witnesses and tendered two exhibits; two elephant tusks and a valuation certificate. The defence side had three witnesses, the appellant inclusive.

After a full trial, the appellant was convicted as charged and was sentenced to serve a jail term of twenty years. Aggrieved, he appealed to the High Court. The conviction was sustained. In respect of sentence, it was ordered that the record be remitted back to the trial court for it to conduct a retrial of the case specifically on the issue of value of the elephant tusks so that a proper sentence could be determined. Still, protesting his innocence, he has preferred this second appeal.

For a better appreciation of what transpired, we find it pertinent to narrate, albeit briefly, the facts which gave rise to this appeal. It all started with the finding of a killed elephant and removal of its tusks in October 2014 in Saadani Game Reserve. Following that, Sulemada Rabia (PW2), a security guard specially assigned the duty to guard wild animals and properties of Saadani Game Reserve then, was tasked by his Head of Department to make a follow up so as to find out those involved. In compliance with the directive and so as lay a trap, he sought the assistance of Rajabu Hussein Msangi (PW1) who was to act as a middleman in the business of buying elephant tusks. In executing the mission, PW1 went to collect information at Gendagenda area. In the course of gathering information, PW1 was availed by PW2 with a phone number of a certain informer, a Maasai boy one Samwel Herman Kiso @ Semi (henceforth Kiso). PW1 phoned Kiso over the business who promised to talk with those selling the tusks and, after a while, assured him the availability of the elephant tusks. His attempt to meet Kiso that day was unsuccessful. Instead, Kiso connected him with the chairman of the Kwabojo Village who turned out to be the appellant. The appellant was not ready to do business without Kiso. PW1 spent a night at a certain guest house at Gendagenda

waiting to meet Kiso. On the following day, he met Kiso who promised the business be done the following morning, that is on 30/01/2015.

Came the 30/01/2015, as was agreed, a certain "bodaboda" collected PW1 from the Guest House and was taken to a certain forest/bush where he met three persons; the appellant, Kiso and one Mang'ati boy. Kiso, in Maasai language, made a call and two Maasai boys emerged from the forest. He introduced PW1 to them as a buyer of the elephant tusks and told them to bring the elephant tusk. One Maasai left and returned with a luggage containing an elephant tusk. After seeing the elephant tusk, PW1 communicated with PW2 who, upon being linked with the appellant, pretended to be the buyer and asked for more elephant tusks. The appellant informed the Mang'ati boy to bring another elephant tusk. Thereafter they both agreed to meet at the appellant's house so as to conclude the deal. The elephant tusks were taken by the appellant promising to inform the Maasai boys once the deal was completed. That was around 7.30 hrs. Meanwhile, PW1 communicated with PW2 over the deal. PW2 and one Tumaini Mages John (PW3) arrived at Gendagenda at 9.00hrs in a motor vehicle and were in civilian attire. They stopped at a distance as the road to the appellant was not good and PW2 walked on

foot to the appellant's house leaving PW3 in the motor vehicle. Upon arrival at the appellant's house, the appellant led them to where the tusks were hidden and showed them. Then the appellant and two Maasai boys proceeded to the motor vehicle as it was agreed that business would be done therein. Upon arrival, PW2 and PW3 ambushed them and managed to arrest Kiso and a Mang'ati boy only. The appellant and another Mang'ati boy escaped. The two Maasai boys were, with the elephant tusks, at 10.00 hrs, taken to Kabuku Police Station.

Mussa Mohamed Rajabu, a District Game Officer (PW4), was called at Handeni Police Station to identify the two pieces of elephant tusks and he valued both of them at TZS 26,500,000/= and issued a certificate of value (Exhibit P2).

The appellant was, on 31/1/2015 at 00.00hrs, arrested at his residence by G. 1815 DC Boaz of Msata Police Station who was assisted by members of the Task Force from Dar es Salaam. The arresting team was led by the two arrested persons (Kiso and a Mang'ati boy). The appellant was not found with the elephant tusks.

In his defence, the appellant flatly denied the charge. He admitted being arrested by people who introduced themselves as being policemen on 29/1/2015 at his farm house and later taken to Kwabojo Village. He vehemently disassociated himself with the commission of the alleged offence. He said, he was, initially, charged together with two other persons but upon the charge being withdrawn the two other persons disappeared and he was later charged alone with the same offence. His two witnesses, namely Yusuph Said (DW2) and Sufian Hossein Athuman (DW3) had nothing material to assist the appellant for they all denied knowing anything about the appellant's involvement in the commission of the charged offence.

At the conclusion of the contested trial the trial magistrate was satisfied that the appellant was guilty, convicted him and sentenced him as earlier on stated. His appeal to the High court was grounded on three major complaints as may hereunder be paraphrased thus:-

1. The chain of custody and preservation of the exhibits was problematic.

2. The learned trial magistrate wrongly relied on contradictory evidence to found his conviction.

3. The charge was not proved beyond reasonable doubt.

In her judgment, the learned appellate judge, after quoting and appreciating the import of the Court's decision in the case of **Paul Maduka and Three others vs Republic**, Criminal Appeal No. 110 of 2007 (unreported), she was of the view that none of the prosecution witnesses narrated chronologically how the elephant tusks were handled from the time they were seized until the moment they were tendered in court. Elaborating, the learned judge stated that:-

> *"PW1 stated they took the elephant tusks to the police but he did not state which police station. PW2 said they took those elephant tusks to Kabuku Police Station and he was the one who tendered them in court without stating where he got them from. Pw3 stated they took the appellant and two other to police station at Kabuku. PW4 testified that he went to Handeni police station and inspected the elephant tusks and wrote valuation report."*

Based on the above reasoning, the learned judge found the respondent's contention that there was no need of documentary evidence baseless. However, she, at the end, found that such failure did not cause any injustice to the appellant.

In respect of the alleged contradictions, the learned judge, citing the case of **Mohamed Said Matula vs R** [1995] TLR 4, found that there were no any contradictions. In addition the learned judge discounted the valuation report for having been done and filled by unauthorized officer.

In the end the learned judge dismissed the appeal but did not decide on the sentence which is, in law, dependent on the value of the trophy involved. She directed the issue of value of the trophy be determined by the trial court and the appropriate sentence be accordingly determined.

The appellant was not ready to re-appear before the trial court in compliance with the aforesaid High Court order. He preferred the present second appeal fronting four grounds of grievances followed by written submissions. The complaints were under these headings:-

1. That, the courts below erred in law and in fact by failing to be meticulous to notice that the chain of custody of the alleged two elephant tusks were not established.
2. That, the courts below erred in law and in fact by failing to draw adverse inference against the prosecution for their deliberately failure to summon key witness of the alleged offence named Samwel Herman Kiso @ Semi who played a major role in the alleged elephant tusks transaction.
3. That, the courts below erred in law and in fact by failing to resolve the issue of identification of the appellant at the scene of the crime to evade dock identification as no one among the prosecution witnesses knew the appellant before except the named Samwel Herman Kiso @ Semi who for undisclosed reasons didn't testify.
4. That, the courts below erred in law and in fact by basing the conviction on the unreliable evidence of the prosecution witnesses which evidence was contradictory, incoherent and not worth of belief.

At the hearing of the appeal before us, the appellant who was in Maweni Prison was linked to the Court through video facilities. He was unrepresented. The respondent republic enjoyed the services of Mr. Waziri Magumbo and Mr. Paul Kusekwa, both learned State Attorneys.

Exercising his right to elaborate his grounds of appeal and the submission thereof which were commendably well written and supported by the Court's decisions first, the appellant adopted them without more and left it to the learned State Attorneys to respond to them.

We take liberty to traverse on the appellant's submission. In his submission in respect of ground one of appeal which essentially attacked the learned judge's finding on chain of custody, the appellant contended that PW5 told the trial court that he send two Maasai with elephant tusks to Msata Police Station but they were tendered in court as exhibits by PW2, a TANAPA security guard. To augment his assertion, he brought forth to the attention of the Court the pronouncements in the case of **Yussuf Mohamed Yussuf vs DPP**, Criminal Appeal No. 84 of 2009 and **Paulo Maduka and 4 Others vs Republic**, Criminal Appeal No. 110 of 2007 (both unreported), and submitted that it was not clear how the elephant

tusks changed hands from Msata Police Station to PW2 who tendered them in court. He argued that there was a possibility of tempering with them. He accordingly argued that the chain of custody of the two elephant tusks was broken such that it could not be said that the tusks tendered were the ones taken from Msata Police Station.

In ground two (2) of appeal the appellant invites the Court to draw adverse inference against the prosecution for failure to call Kiso who named the appellant hence led to his arrest and the two Maasai who produced the two tusks from down the hill as witnesses. Apart from appreciating that no number of witnesses is required to prove a fact in terms of section 143 of the Evidence Act, Cap. 6 R. E. 2002, he, citing the case of **Aziz Abdallah vs R.** [1991] TLR 71 and **Yusuph Hassan Lubendo vs Republic**, Criminal Appeal No. 13 of 2009 (unreported), argued that unexplained failure to call Kiso and the two Maasai to testify, entitled the judge to draw an adverse inference against the prosecution case.

Submitting in respect of the remaining grounds of appeal, the appellant stated that, in view of the fact that PW5 said the elephant tusks

were taken to Police Station with the two Maasai namely Daud and Samwel and that the appellant was not found with tusks during his arrest, then there was nothing that connected him with the offence charged. He ultimately urged the Court to allow the appeal and let him enjoy the freedom he had long missed by setting him free.

In response, Mr. Kusekwa intimated to the Court that he was supporting the appeal. He readily conceded that the chain of custody was not established on the major reason that the handling of the two elephant tusks (exhibit P1) was problematic. He went on to state that it was not clear how exhibit P1 which, according to PW1 and PW2, was seized from the appellant's house at Gendagenda Village and taken to Kabuku Police Station reached Msata Police Station, inspected and valued at Handeni Police Station by PW4 and then tendered in court by PW2, a security guard of TANAPA then stationed at Saadani Game Reserve. He insisted that the reception and storage of exhibit P1 was neither explained nor documented as was restated by the Court in the case of **David Athanas @ Makosi and Another vs Republic**, Criminal Appeal No. 168 of 2017 (unreported). This, he submitted, raised doubt on whether the tusks tendered in court were the ones seized at Gendagenda Village. Given the deficiency, the

learned State Attorney argued that the appellant's conviction of the offence charged cannot stand. He accordingly implored us to allow the appeal.

The learned State Attorney did not end there. He attacked grounds three and four of appeal for being new, raised for the first time before this Court contending that this Court, in terms of section 4(1) of the Appellate Jurisdiction act, Cap. 141 R. E. 2019, lacks jurisdiction to entertain them. Elaborating, he argued that this Court is clothed with powers to entertain matters canvassed and determined by the High Court and from subordinate courts exercising extended jurisdiction. He referred the Court to the appellant's petition of appeal at page 88 of the record of appeal and argued that neither of the present two grounds (grounds three and four) featured therein. On that account, he urged the Court to disregard them.

Given the course taken in respect of ground one of appeal, the learned State Attorney was of the view that there was no need to submit on the complaints relating to failure to call Kiso and other Maasai boy and also the credibility and coherence of the prosecution witnesses' testimonies in court.

The appellant had nothing in rejoinder apart from agreeing with the learned State Attorney's responses which were in his favour.

In the light of the learned State Attorney's submissions, we think this appeal can sufficiently be disposed of by our determination of the issue of chain of custody as raised by the appellant in his first ground of appeal.

We appreciate that the charge placed at the appellant's door concerned being found in unlawful possession of government trophies. Therefore the central subject in the charge is the appellant's possession of elephant tusks (exhibit P1). That being the case, it is not sufficient for the prosecution to establish the appellant's possession of the trophies only but also, for the interest of justice, to ensure that the trophies seized are the ones produced in court. To lend such an assurance, the Court, in the case of **Paulo Maduka and 4 Others vs Republic** (supra) set guidance on how to handle the seized properties (exhibits). With lucidity, the Court underscored the importance of proper handling of the seized property termed in legal arena as chain of custody of exhibits and directed 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."

The aforesaid position was restated in the case of **Chacha Jeremiah Murimi and 3 others vs. The Republic,** Criminal Appeal No. 551 of 2015 (unreported) where it was held that:-

"In order to have a solid chain of custody it is important to follow carefully the handling of what is seized from the suspect up to the time of laboratory analysis, until finally the exhibit seized is received in court as evidence. There should be assurance that the exhibit seized from the suspect is the same which has been analyzed by the Chief Government Chemist. The movement of the exhibit from one person to another should be handled with great care to eliminate any possibility that there may have been tampering of that exhibit..."

In the instant case, we agree with the learned State Attorney that there was material unexplained handling of the seized elephant tusks. According to the evidence exhibit P1 was seized at Gendagenda and, together with the two Maasai, taken to Kabuku Police Station. However inspection and valuation was done at Handeni Police Station by PW4. In addition, they were tendered in court by PW2. However, none of the prosecution witnesses attempted to explain how those items were preserved from when they were seized at the homesteads of the appellant at Gendagenda up to the point when they were tendered by PW2, a TANAPA security guard then stationed at Saadani Game Reserve, at the trial. This, as rightly argued by the learned State Attorney, raises doubt and it cannot be safely guaranteed that the items alleged to have been seized from the appellant were those which were adduced in the evidence at the trial. The Court faced an identical scenario in the case of **David Athanas @ Makasi vs Republic** (supra) duly cited by the learned State Attorney. In that case, acting on a tip by a certain informer, a trap was set whereby the informer pretended to transact on tusks business and was to meet the appellant for that purpose. The appellant turned up at the agreed place and informed the informer that he had six pieces of elephant tusks. It

was agreed that the price would be TZS 150,000/= per kilogram. They parted ways to enable the informer mend the allegedly defective motor vehicle which actually meant to allow them time to organize the arrest. They later agreed to meet at Chinangali II whereat the appellant turned out with a sack of charcoal which contained the elephant tusks. The appellant was thereby arrested and taken to Manyoni. After interrogation, the appellant was charged. An issue of chain of custody arose before the High Court in which the appellant's counsel, relying on the Court's decision in the case of **Paulo Maduka and 4 Others vs Republic** (supra), contended that there was no plausible explanation of who handled the elephant tusks from the point it was seized to the time it was tendered in court. The Court, after referring to its earlier decisions in the case of **Onesmo Mlwilo vs Republic**, criminal appeal No. 213 of 2010 and **Mussa Hassan Barie and Albert Peter @ John vs Republic**, Criminal Appeal No. 292 of 2011 (both unreported), stated that:-

> *"In the case at hand, there is no explanation from all prosecution witnesses on how the exhibits were taken care of, from when they were found at the appellants' godown right up to the point when they were tendered in court as exhibits. In the*

circumstances, we find merit in this ground of appeal."

We subscribe ourselves to the above finding of the Court. In the circumstances, we are inclined to hold that the chain of custody was, in the present case, broken leaving room for the possibility of exhibit P1 to be tempered with. Since exhibit P1 formed the basis of the accusations against the appellant, there was need to ensure that there was no possibility of any tempering. Unless that is guaranteed, as is the case herein, injustice is prone to occur to the appellant. We hasten to say that the omission was serious and prejudicial to the appellant. That said, we are therefore not ready to go along with the learned judge's finding that the anomaly did not occasion any injustice to the appellant. The appellant's conviction was unsafe. We find merit in this ground of appeal.

For the purposes of determining the merit of the appeal, we would have ended here but we find ourselves compelled to comment in respect of the learned State Attorney's arguments that ground two (2) and three (3) of appeal are new in that they were not canvassed and determined by the High Court. We have given a deserving consideration to the submissions by the learned State Attorney. In resolving the issue, we have seriously

examined the grounds of appeal fronted by the appellant before the High Court as reflected at pages 88 and 89 of the record of appeal. It is apparent that neither of the two grounds in this appeal featured and were adjudicated by the High Court on first appeal. We accordingly entirely agree with learned State Attorney that grounds 2 and 3 of appeal are new hence this Court is precluded, in terms of section 4(1) of the AJA, from entertaining them. To do otherwise is to go against a settled position that this Court cannot entertain grounds of appeal which were not first put before the High Court for determination unless it is legal issue. That legal position has been restated in an unbroken chain of cases (See **Hassan Bundala @ Swaga vs Republic** (supra), **Bakari Abdallah Masudi vs Republic**, Criminal Appeal No. 126 of 2017 and **Dickson Anyosisye vs Republic,** Criminal Appeal No. 155 of 2017, **Alex Ndendya vs Republic,** Criminal Appeal No. 340 of 2017, **Samwel Sawe vs. Republic,** Criminal Appeal No, 135 of 2004, **Nasibu Ramadhani vs Republic,** Criminal Appeal No. 310 of 2017, (all unreported) and **Abdul Athuman vs R** [2004] T.L.R.151. The two grounds are hereby disregarded.

All said, we have come to the conclusion that the lower courts did not properly address and assess the evidence on chain of custody and so

arrived at a wrong conclusion leading to a miscarriage of justice. We allow the appeal, quash the conviction and set aside the sentence. We accordingly order the appellant's immediate release from custody unless incarcerated therein on account of another justifiable cause.

DATED at **TANGA this** 24th day of September, 2020.

S. A. LILA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The Judgment delivered this 24th day of September, 2020 in the presence of the appellant in person and Ms. Elizabeth Muhangwa State Attorney for the respondent is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL