IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: JUMA, CJ., MUGASHA, J.A., And NDIKA, J.A.)

CRIMINAL APPEAL NO. 62 OF 2017

DIRECTOR OF PUBLIC PROSECUTIONS..... APPELLANT

VERSUS

FESTO EMMANUEL MSONGALELI ..... 1ST RESPONDENT

NICODEMU EMMANUEL MSONGALELI.....2ND RESPONDENT

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

(Kalombola, J.)

dated the 11th day of January, 2016
in
DC. Criminal Appeal No. 40 of 2016

JUDGMENT OF THE COURT

2nd & 15th June, 2020

MUGASHA, J.A.:

In the District Court of Manyoni at Manyoni, the respondents were tried before the District Court of Manyoni for various offences laid under the Wildlife Convesation Act No. 5 of 2009, the Economic and Organized Crime Control Act Cap, 200 (RE.2002) and the Arms and Ammunition Act, Cap 223 [R.E. 2002], as amended by Act No. 3 of 2010. It was alleged by the prosecution witnesses that on 15/3/2015 at Mwamagembe village

within Manyoni District in Singida Region, the respondents jointly and together were found in possession of two pieces of elephant tusks valued at USD 15000 the property of the United Republic of Tanzania and fire arms and ammunition.

They were convicted of two offences of unlawful possession of Government trophy; unlawful possession of firearms and unathourised possession of ammunition. They were sentenced to imprisonment ranging from three years to twenty years plus a fine ranging from of TZS 2,000,000 and TZS 333,000,000/= in case of default. The sentences were ordered to run concurrently.

What led to the arraignment and conviction of the respondents is briefly as follows: From a total of five prosecution witnesses and eight physical and documentary exhibits. The prosecution case was to the effect that: acting from a tip of an informer that the respondents were suspected to be dealing in unlawful business of government trophies, PW2 and PW3, game wardens at Rungwa Game reserve made arrangements to arrest the respondents. Subsequently, on the 15/3/2015 PW2 and PW3 mounted a search at the homesteads of the respondents in the presence of the police officers and the local leaders namely, Francis and Majuto who were not

among the prosecution witnesses. In the said search a weighing scale was retrieved at the residence of the 1st respondent and nothing was found in the 2nd respondent's house. Upon interrogation the 1st respondent revealed to have used the weighing scale together with his brother named George and the 2nd respondent, to weigh elephant tusks. Subsequently, the 1st respondent led the search team to his farm whereby more items were retrieved and seized included: three fire arms, two rifles No. 458 and 25 rounds of ammunition, Mark IV, 15 spent cartridges and two elephant tusks. PW3 prepared a seizure note which was signed by the appellants in the presence of the ten cell leader and the division chairman. The seizure note was tendered in court and admitted, though it was not read out after admission.

PW3 recalled that the seized items were entrusted to the store keeper after making entries in the store registration ledger which was adduced in the evidence as an exhibit but it was not read out after the admission. PW4 who was among those in the search team, witnessed the search and signed the seizure note. Apart from PW5 recounting that the respondents were found with the seized items, he testified that, upon being interrogated the respondents admitted to have been involved in

dealing with government trophies and each respondent recorded a cautioned statement confessing to have been found with the seized items.

The respondents denied each and every detail of the prosecution. According to DW1, they were arrested on 15/3/2015, taken to Mwamagembe Game Post until 20.00 hrs. when they were conveyed to Rungwa Game Reserve where they arrived at 02.00 hrs. They remained inside the Game Reserve until 20/3/2015. Moreover, they testified that, during such period, they were tortured and forced to make cautioned statements. They also denied to have been found with elephant tusks and firearms.

Believing the prosecution account to be true, as earlier pointed out the trial court convicted the respondents. The trial court relied on the cautioned statements of the respondent believing that they were voluntarily given and in addition, the oral account of PW2 and PW3 the game wardens who were involved in the search mounted at the residences of the respondents which unveiled that the respondents were found in possession of the tusks and had led the witnesses to where the firearms, rounds of ammunition and cartridges were retrieved.

On first appeal before the High Court, the respondents were acquitted on account that, the trial court wrongly convicted them on the basis of the irregular cautioned statements which were valueless because apart from being recorded out of time, they were not voluntarily made and that the remaining prosecution evidence could not sustain the conviction of the respondents.

The Director of Public Prosecutions was not amused and has preferred this appeal to this court on three grounds of appeal faulting the High Court on **One,** wrongly concluding that, the respondents' caution statements were not taken voluntarily; **two,** that the respondents were forced to admit that they were found with the government trophies and other exhibits and **three,** holding that, the prosecution evidence was weak and failed to prove offences against the respondents.

Also with leave of the Court, the appellant brought a supplementary ground to the effect that the 1st appeal was not preceded by a proper notice of appeal.

At the hearing the DPP was represented by Mr. Tumaini Kweka and Faraja Nchimbi, learned Principal State Attorneys and Ms. Salome Magessa,

propositions, he cited to us the case of **YUSUPH MASALU @ JIDUVI AND 3 OTHERS VS REPUBLIC**, Criminal Appeal No. 163 of 2017. However, after a brief dialogue with the Court, she conceded that the cautioned statement was indeed irregular.

As to the 2nd and 3rd grounds, the learned Senior State Attorney readily conceded that, the cautioned statement was recorded out of time contrary to the provisions of section 50 (1) of the Criminal Procedure Act [CAP 20 RE.2002] (the CPA] and it deserves to be expunged. However, she maintained that, the charge was proved beyond reasonable doubt in the wake of oral prosecution account availed by PW2 and PW3 on what had transpired from arrest of the respondents to their arraignment.

After a careful consideration of the submissions made on behalf of the DPP we shall dispose the appeal beginning with the supplementary ground on the propriety or otherwise of the notice of appeal to the High Court, followed by the grounds in the memorandum of appeal.

We aware that, in terms of section 361 (1) (a) of the CPA, a criminal appeal originating from the Resident Magistrates' court must be preceded by a notice of appeal which must be given not later than ten days from the

of the decision sought to be appealed. The same may be orally given on the date of sentencing, or vide a written notice of appeal.

According to case law such notice titled in the High Court of Tanzania must be filed in the trial court. See **THE REPUBLIC VS MWESIGE GEOFREY TITO BUSHAHU**, Criminal Appeal No. 355 of 2014 (unreported).

We have carefully scrutinized the notice of appeal in question and gathered that, it was initially lodged at Manyoni District Court and forwarded to the High Court. This is cemented by the stamp of the trial Court which is embossed in both the notice and the covering letter authored by the Officer in charge of Manyoni Prison facility which was copied to Manyoni District Court for further requisite action. On this account, considering that the respondents who were behind bars wholly depended on solace of prison officers to file their notices in the proper Registry, even if they so wished, it was beyond their convenience to ensure that the dictates of the law are complied to the letter. Thus, on account of the overriding objective principle stipulated under section 3A of the Appellate Jurisdiction Act [CAP 141 RE.2002] (the AJA) which is geared at just determination of the proceedings and timely disposal of the proceedings in the Court at the convenient affordable cost, it is not in the

interest of justice, to penalize the intending appellant by the inaction of the prison authorities. In the premises, we are satisfied that, the notice of appeal to the High Court sufficed and as such, the first appeal was not wrongly entertained and determined.

Pertaining to the ground 1 and 2, at page 148-151 of the record of appeal the High court expunged the cautioned statements for the reason apart from the statements not being made voluntarily, they were taken out of time in contravention of section 50(1) of the CPA and that they were involuntarily taken. This is cemented by what is evident at pages 33 and 39 of the record whereby the respondents were arrested on 15/3/2015 and interrogated on 20/3/2015 that is, five days after they were arrested. The law is very clear under section 50(1) of the CPA that the basic period available for interviewing a person is a period of four hours commencing from the time when he was taken under restraint in respect of the offence. Therefore, since it is not disputed that the cautioned statements were recorded beyond the prescribed period, in the absence of any explanation on the delay by the prosecution, there is an inference that the statements were involuntary taken. See - **JANTA JOSEPH KOMBA AND 3 OTHERS VERSUS REPUBLIC** Criminal Appeal no 95 of 2006, **SALIM PETRO NGALAWA**

VERSUS THE REPUBLIC, Criminal Appeal no 85 of 2004. In this regard, we do not find cogent reasons to vary the decision of the High Court which expunged the cautioned statements of the respondents.

As for ground 3, the appellant is faulting the first appellate court in holding that the prosecution evidence was weak and failed to prove offences against the respondents. At page 150 of the record in its decision the High Court held that

> *".....The surrounding (sic) in this case are not convincing that the appellants committed the alleged offences, the caution statements which are the basis of the conviction as it was believed by the trial court that the appellant admitted commission (sic) the alleged offences have no value before the law, this court find the appellant did not admit to have committed the alleged offences, the evidence brought against them are weak as it has been submitted by the appellants on the 7th ground of appeal."*

In the absence of the cautioned statements, the question to be addressed is whether or not the remaining evidence is sufficient to ground a conviction. We begin with the PW2 and PW3 who were involved in the

search of the homesteads of the respondents. Pursuant to the mounted search, they testified to have found a weighing scale in the homestead of the 1st respondent who disclosed to have been using the same to weigh the elephant tusks together with the 2nd respondent and a brother. In addition, PW2, PW3 and PW4 were among those who were led to a hideout where the items retrieved included fire arms make rifle 458 with registration no 43309 and another one without registration number, 25 rounds of ammunition, 15 empty cartridges and two elephant tusks. These items were seized and recorded in a seizure note which was tendered and admitted as exhibit P3 without objection but was not read out after its admission. In this regard, the respondents were convicted on the basis of the seizure note which they were not aware of. This is irregular and it defies the principle of fair trial

In view of the said infraction, we expunge the seizure note from the record. Consequently, in the absence of the seizure note, is the oral account of the prosecution witnesses namely PW2, PW3 and PW4 sufficient? We shall address this after scrutinizing the evidence of PW3. At page 40 of the record of appeal, PW4 having signed the seizure note they proceeded to Rungwa Game Reserve to trace in vain those who were

mentioned by the respondents to be involved in the business of selling elephant tusks. Thereafter, the respondents were taken to Anti-Poaching Unit at Manyoni on the 20/3/2015 around 12:00 hours. PW3 stated that all the seized items were entrusted with the storekeeper and that PW3 signed the stores registration ledger. From the version of PW3 the prosecution did not account as to how those the seized items were handled from seizure on 15/3/2015 up to Rungwa Game Reserve where they proceeded with investigation, then to the anti-poaching unit Manyoni on 20/3/2015 when they left the exhibits to the store keeper. In this regard, there is no fool proof of the chain of custody. In the case of **MUSSA HASSAN BARIE AND ALBERT PETER @ JOHN VS. REPUBLIC,** Criminal appeal No. 292 of 2011 (unreported) the Court referred to its earlier decision in the case of **PAULO MADUKA AND OTHERS VS. REPUBLIC., CRIMINAL,** Appeal No. 110 of 2007 (unreported) 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, the seized items took almost five days to reach Manyoni at the Anti-poaching unit. However, none of the prosecution witnesses attempted to explain as to how those items were preserved from when they were seized at the homesteads of the respondents up to the point when they were tendered at the trial having been left with the store keeper. Moreover, PW1 who made evaluation of the elephant tusks explained that having been phoned by the Moses Munya at the anti-poaching unit at Manyoni he was told to identify the government trophies at the store which was under the custody of the store keeper Musongo Meigweri. He marked them as GD/ZAPU/MAN/IR/26/2015. It is clear that the tusks were not marked at time of seizure. However, the storekeeper was not paraded as a prosecution witness to tell the trial court as to how those seized items landed into his hands and the manner he preserved them up to when they were adduced in the evidence. This leaves a lot to be desired and it cannot be safely vouched that if the items alleged to have been seized from the respondents on the 15/3/2015, were those which were adduced in the evidence at the trial. In the circumstances, it cannot

be safely vouched that, the integrity and evidential value of the tusks was preserved from the point of seizure up to the tendering at the trial which. The anomaly cannot be redressed by the oral account of the prosecution and as such, the chain of custody was not broken.

We have also gathered that, other documentary exhibits tendered by the prosecution and which were relied upon to convict the respondents were not read out at the trial which was irregular. These include: the handing over note of the tusks exhibit P5; the trophy valuation report exhibit P1; and the receipt of two elephant tusks. Due to the infraction we have no option but to expunge those exhibits from the record. Also these exhibits including the cautioned statements of the respondents were tendered by the prosecutor who not being a witness, was not qualified to adduce them in evidence. We say so because, a prosecutor cannot assume the role of a prosecutor and a witness at the same time because the prosecutor is not a sort of a witness who could be capable of examination upon oath or affirmation in terms of section 98 (1) of the CPA because not being a witness he cannot be cross-examined. See -**THOMAS ERNEST MSUNGU @ NYOKA MKENYA VS REPUBLIC,** Criminal Appeal No. 78 of 2012

and **FRANK MASSAWE VS REPUBLIC,** Criminal Appeal No. 302 of 2012 (both unreported).

Furthermore, we cannot rely on the evidence of PW4 who testified on the contents of the cautioned statements before they were cleared of admission. This was tantamount to smuggling the cautioned statements through the backdoor which is irregular and as such the evidence of PW4 has no evidential value and it deserves to be expunged. The Court was confronted with a similar scenario in the case of **JUMANNE MOHAMED, MABULA MASANJA @KASHINDYE AND MHESHIMIWA SAKALAMBI @ MAGANGA VS REPUBLIC,** Criminal Appeal No. 534 of 2015 (unreported). In that case, a justice of the peace who had recorded the extrajudicial statements of the appellants, testified on the contents of those statements before they were initially cleared of admission in the evidence. This was found to be irregular and the Court expunged the evidence of the respective witness.

In a nutshell, the first appellate court was indeed justified to acquit the respondents in the wake of weak evidence of the prosecution. In view of what we have endeavoured to discuss, we do find no cogent reasons to

fault the first appellate court and in the result we dismiss the appeal in its entirety.

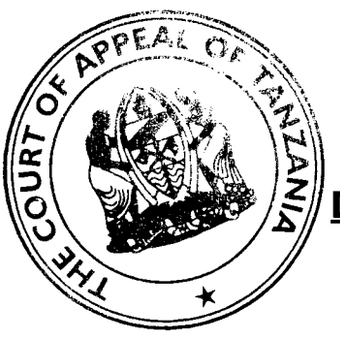
DATED at **DODOMA** this 13th day of June, 2020.

I. H. JUMA
CHIEF JUSTICE

S. E. A. MUGASHA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

The Judgment delivered on 15th day of June, 2020 in the presence of Mr. Aldo Mkini, learned Senior State Attorney for the Appellant / Republic and in the absence of 1st and 2nd respondents, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL