IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MWARIJA, J.A., KITUSI, J.A., And KEREFU, J.A.)

CRIMINAL APPEAL NO. 240 OF 2017

MICHAEL GABRIEL ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Maghimbi, J.)

dated the 14th day of February, 2017
in
Criminal Appeal No. 80 of 2016

JUDGMENT OF THE COURT

10th & 19th February, 2021

MWARIJA, J.A.:

The appellant was charged in the Resident Magistrate's Court of Manyara at Babati with the offence of unlawful possession of Government trophy contrary to sections 85 (1) and 86 (1), (2) (b) of the Wildlife Conservation Act, No. 5 of 2009 (the WCA) 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 R.E. 2002].

It was alleged that on or about 17/9/2015 at Ng'arwa-Orkiu area in Ngorongoro District, Arusha Region, the appellant was found in unlawful possession of two leopard skins valued at TZS 15,076,670.00, the property of the Government of the United Republic of Tanzania.

The appellant pleaded not guilty and thus the case proceeded to hearing. At the trial, the prosecution relied on the evidence of four witnesses while in his defence, the appellant relied on his own evidence. In its judgment, the trial court found that the prosecution had proved its case beyond reasonable doubt. It thus convicted and sentenced the appellant to pay a fine of TZS 150,076,760.00 or twenty (20) years imprisonment. Aggrieved by the decision of the trial court, the appellant unsuccessfully appealed to the High Court hence this second appeal.

The background facts of the case can be briefly stated as follows: On 17/9/2015 the police at Loliondo received information that there were persons who were selling leopard skins. Following that information, Assistant Inspector of Police, Alfred Damas Luambano (PW1) was assigned the duty of leading a team of police officers to investigate on the matter and arrest the culprits. The team consisted of Detective Station Serjeant Jumanne (PW4) and Detective Corporal Yahaya (PW1). Together with them was one Mdoe from the Anti-poaching Unit, Arusha.

According to PW1's evidence, through the assistance of an informer, the trio who, posed as buyers, managed to meet the appellant who took them to the persons who had the custody of the skins somewhere outside the town, in a bushy area. It was PW1's further evidence that, at the scene the appellant introduced them to the two other persons as

prospective buyers of the skins. The appellant and his colleagues then went into the bush and came out with a polythene bag. When PW1 and his team were satisfied that what was contained in the bag were leopard skins, they introduced themselves and while in the course of arresting the appellant and the other persons, chaos ensued and two of them escaped. Only the appellant ended up being arrested.

The prosecution led evidence also through PW3. His testimony was to the effect that on 18/9/2015, he identified the skins as being of leopard. He told the trial court that he identified them because they had black spots and different from that of cheetah, there were no tear mark on the eye's part of the skins. He also valued the two skins and found that the same were worth TZS 15,076,670.00. He tendered the valuation report/ inventory which was admitted in evidence as exhibit P4.

The evidence of PW1 was supported by that of PW4 who added that through assistance of a police informer, they met the appellant and one of his colleagues near the NMB building, Loliondo. From there, the duo were taken in a motor vehicle which was being used by the police team to the outskirts of the town where they found the third person.

The prosecution relied also on the evidence of No. E.6749 Detective Corporal Donald who recorded the cautioned statement of the appellant.

It was his evidence that the appellant confessed that he committed the offence. The statement was admitted in evidence as exhibit P3.

In his defence, the appellant testified that on 17/9/2015 at about 20.30 hrs while at the area near the bus stand, he was arrested by two police officers who were in plain clothes. He said that, he was forced to enter into their car and thereafter, was handcuffed and beaten severely. He was taken to a house near the airport where after having disembarked from the car, PW1 asked whether he remembered him. The appellant replied that he remembered him because on that day he went with another person to have their shoes cleaned by the appellant at his shoe shine kiosk.

It was the appellant's further evidence that PW1 told him that he would pay for what he did to their fellow police officer. The police tied his hands and thereafter, was subjected to torture. He said that the acts of torture included gripping of his testacles by use of a plies while being required to agree with what they wanted him to do. According to his evidence, he agreed with them to save himself from further torture. Having achieved what they wanted from him, they took him to Loliondo police station where he was required to sign certain papers. Having signed them they transported him to Babati and on 18/9/2015 he was charged in court.

It was his defence that the case against him was framed. That, he said, can be gleaned from the prosecution evidence, particularly the evidence of PW1. The appellant challenged that evidence contending that the same was fabricated because, although he was arrested on 17/9/2015, PW1's statement which the appellant tendered in court and admitted as exhibit D1, shows that it was signed on 15/9/2015, before the date of the offence.

In its decision, the trial court was satisfied that the prosecution had proved its case beyond reasonable doubt. It found that the two leopard skins which were identified by PW3, were found in possession of the appellant. The trial court relied also on the evidence of the cautioned statement which the learned trial Resident Magistrate found to have been voluntarily recorded by the appellant. She was of the view that, in any case, that evidence which was repudiated by the appellant was corroborated by the evidence of PW1 and PW4 which, according to her, was self-sufficient to prove the case against the appellant.

With regard to the appellant's defence, the learned trial Resident Magistrate was of the opinion that the same did not raise any reasonable doubt in the prosecution's case. She was of the view that the appellant's allegation that the case against him was framed was baseless because he did not substantiate that he had grudges with any of the arresting officers.

She found also that, the fact that PW1's statement was signed on 15/9/2015 before the date of the incident, was a minor irregularity and did not weaken the prosecution evidence.

The High Court (Maghimbi, J.) upheld the decision of the trial court. She dismissed the appellant's complaints, first, that the trial court's judgment was erroneous for stating that the place at which the offence was allegedly committed was Makame Village in Kiteto District while the charge sheets states that it was at Ng'arwa-Orkiu in Ngorongoro District. Secondly, that the trial court did not have jurisdiction to try the case because, according to the charge, the offence did not take place in Babati District. The learned first appellate Judge relied on s. 113 of the WCA, which empowers any District Court to try any person charged with the offence committed against the WCA in any other District.

As stated above, the appellant was further aggrieved by the decision of the High Court and thus preferred this appeal. In his memorandum of appeal filed on 29/6/2018 he raised the following eight grounds:-

> " *1. That both, the trial court and first appellate court did not consider that sections 85 (1) and 86 (1) of the Wildlife Conservation Act (Cap 283 R.E. 2009) as were cited in the charge sheet, did not specifically state what kind of trophy the appellant was alleged to be found in possession hence the same is defective.*

2. *That both, the first appellate court and the trial court did not consider and evaluate the chain of custody of exhibit P2 as per testimony of PW1, PW3 and PW4, as a result arrived on a wrong conclusion.*
3. *That, without prejudice to the contents of paragraphs 3 herein above, the trial court and the first appellate court did not consider and evaluate the evidence on record hence the case of the appellant was not proved beyond reasonable doubt by the respondent.*
4. *That, the first appellate court and the trial court miserably failed both in law and in fact by not considering exhibit P4 that it was prematurely filled and referring to the Resident Magistrate Court of Babati at Babati on the 18th day of September, 2015 while the appellant (accused hereto) was first charged in court on the 23rd day of September 2015, in terms or charge sheet.*
5. *That, the first appellate court and the trial court did not consider exhibit DW1 or the statement of the complainant who testified as PW1. If the same was considered by the court it could have realised that the same was signed on the 15th day of July 2015 (15/7/2015) as reflected on the last page of the statement, line number 5, from the bottom.*
6. *That both, the first appellate court and trial court, failed miserably to direct its legal minds on the contradiction of the PW1, PW2, PW3, and PW4 on how the alleged two leopards skins were kept and handled*

since no prosecution witness was called to testify on the issue of the alleged exhibit book from Loliondo, Babati and Arusha police stations and Arusha Anti-poaching officers respectively.

7. *That, the first appellate court erred in law and in fact when it failed to scrutinize exhibit P3 (cautioned statement) and hence arrived on at erroneous decision.*
8. *That, both the trial Court and first appellate court erred in law and in fact for failing to notice the variance between the charge sheet and evidence as regards the place where the offence was committed."*

Later on 4/2/2021, the appellant filed a supplementary memorandum of appeal raising therein one ground to the following effect:-

"1. That, the 1st appellate court erred in law by upholding the conviction and sentence while there were apparent procedural mistakes committed by the trial court"

At the hearing of the appeal, the appellant, who was not represented by a counsel, appeared through video conferencing facility linked to Arusha Central Prison. On its part, the respondent Republic was represented by Mses. Janeth Sekule and Adelaide Kassala, learned Senior State Attorneys. When he was called upon to argue his grounds of appeal, the appellant opted to let the learned Senior State Attorney start the ball

rolling by submitting in reply to the grounds of appeal but reserved his right to make rejoinder submission, if the need to do so would arise.

When she took the floor, Ms. Sekule started by informing the Court that the respondent was supporting the appeal. She said that her stand to that effect was based on the 2nd, 3rd and 8th grounds of appeal. In essence, the three grounds challenge the findings of the two courts below on account that they misapprehended the evidence thus arriving at a wrong conclusion that the appellant was guilty of the offence with which he was charged.

Arguing in support of the 2nd and 3rd grounds, the learned Senior State Attorney agreed with the appellant that the chain of custody of the two leopard skins, whose valuation report was tendered in the trial court, was not observed thus raising reasonable doubt as to whether the skins were really found in possession of the appellant. It was her submission that the evidence does not show on whose custody were the skins entrusted between the date of their seizure and the time when the trophy valuation report (exhibit P4) was tendered in the trial court in Manyara Region. Relying on the case of **Petro Kilo Kinangai v. Republic**, Criminal Appeal No. 565 of 2017 (unreported), Ms. Sekule urged us to find that the prosecution did not prove the case to the required standard,

that the trophy described in exhibit P4 was found in possession of the appellant.

On the 8th ground, the learned Senior State Attorney submitted that, it is indeed a correct position, as put forwarded by the appellant, that there was variance between the charge and evidence. She contended that, according to the evidence of PW1 and PW4 the appellant was arrested in connection with the offence which was committed at Loliondo, the place where the certificate of seizure was also filled, but the charge sheet states that the offence was committed at Ng'arwa-Orikiu in Ngorongoro District. The learned Senior State Attorney argued that, in the circumstances, the prosecution evidence leaves doubt as regards the place at which the appellant was arrested.

The appellant welcomed the stance taken by the learned Senior State Attorney of supporting the appeal. He did not therefore have any material arguments to make in rejoinder. He urged us to allow his appeal and release him from prison.

In determining the appeal, we wish to begin with the 8th ground of appeal. We agree with both the appellant and the learned Senior State Attorney that there was variance between the charge and the evidence because, whereas in the charge, it is stated that the appellant was found in possession of the two leopard skins at Ng'arwa-Orikiu area in

Ngorongoro District, the arresting officers, PW1 and PW4 stated in their evidence that he was found in possession of the skins at a distance of about one kilometre out of Loliondo town where he was arrested.

Under s. 234 (1) of the Criminal Procedure Act [Cap. 20 R.E. 2002] (now R.E. 2019) where in the course of trial, it transpires that there is variance between the charge and evidence, the charge may be amended. The provision states as hereunder:-

> *"234 – (1) Where at any stage of a trial, it appears to the court that the charge is defective, either in substance or form, the court may make such order for alteration of the charge either by way of amendment of the charge or by substitution or addition of a new charge as the court thinks necessary to meet the circumstances of the case unless, having regard to the merits of the case, the required amendments cannot be made without injustice, and all amendments made under the provisions of this sub-section shall be made upon such terms as the court shall seem fit."*

In the particular circumstances of this case, it was necessary to amend the charge because the evidence did not support the charge as regards the place at which the offence was committed. However, that was not done. The effect of the omission was to water down the prosecution evidence. Where, as a result of the variance between the charge and evidence, it is necessary to amend the charge but such amendment is not made, the offence will remain unproved. In the case of **Noel Gurth a.k.a**

Bainth & Another v. Republic, Criminal Appeal No. 339 of 2013 (unreported) in which a situation similar to this case occurred, the Court observed as follows:-

> *"...where there is a variation in the place where the alleged armed robbery took place, then the charge must be amended forthwith. If no amendment is effected the charge will remain unproved and the accused shall be entitled to an acquittal as a matter of right. Short of that a failure of justice will occur."*

- See also the case of **Issa Mwanjiku @ White v. Republic**, Criminal Appeal No. 175 of 2018 (unreported). In that case the evidence led by the victim of the offence as regards the stolen properties varied with those which were mentioned in the charge, yet the prosecution did not apply to amend the charge. Having considered that situation, the Court had this to say on the effect of that omission to the prosecution evidence:-

> *"We note that, other items mentioned by PW1 to be among those stolen like ignition switches of tractor and Pajero were not indicated in the charge sheet. In the prevailing circumstances of the case, we find that* ***the prosecution evidence is not compatible with the particulars in the charge sheet to prove the charge to the required standard."***
>
> [Emphasis added.]

Going by the above stated position of the law, we find that the variance rendered the prosecution case deficient of proof beyond

reasonable doubt. Besides that deficiency, the manner in which the skins, the subject matter of the charge were handled, raises reasonable doubt in the evidence as to whether the same were found in possession of the appellant. As submitted by the learned Senior State Attorney in response to the 2nd ground of appeal, the chain of custody of the skins was not observed. We agree with her that there is nothing in the evidence showing how the same were handled from the time of their alleged seizure at Loliondo to the time when the valuation report (exhibit P4) was tendered in the Resident Magistrate's Court of Manyara at Babati.

One more observation. Apart from the prosecution's failure to observe the chain of custody of the skins, no reason was given as to why were the same not tendered in evidence, instead it was the valuation report and the certificate of seizure which were tendered. Normally, a valuation report or an inventory may be tendered in the case of perishable items but the same must have been ordered by the magistrate to be disposed of before the hearing of the case after being taken before him in the presence of the accused person. That is in accordance with paragraph 25 of the Police General Orders No. 229 which provides as follows:-

> *"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."

This was not done and therefore, exhibits P4 was of no evidential value. –See the case of **Mohamed Juma @ Mpakama v. Republic**, Criminal Appeal No. 385 of 2017 (unreported).

Before we conclude, we wish to also consider the appellant's 7th ground of appeal which relates to his cautioned statement, the evidence which the trial court acted upon to found his conviction. Upon a careful reading of the statement, it is certain that the appellant did not confess to have been found in possession of the skins. From the contents of the statement, he was merely a middleman linking the prospective buyers and those who were selling the leopard skins. His acts might therefore, have constituted an offence different from the one with which he was charged. With respect therefore, we are of the considered view that the learned trial Resident Magistrate erred in finding that the appellant had confessed that the skins were found in his possession.

On the basis of the foregoing, we find that, had the learned first appellate Judge properly re-evaluated the evidence, she would have found that the same did not prove the case against the appellant beyond reasonable doubt. We are thus of the considered view that both lower courts misapprehended the evidence thereby arriving at an erroneous

conclusion that the appellant was guilty of the offence. Since the findings on the 2nd, 3rd, 7th and 8th grounds of appeal suffice to disposed of the appeal, we agree with the learned Senior State Attorney that there is no pressing need to consider the other grounds of appeal.

In the event, we allow the appeal and consequently, hereby quash the appellant's conviction and set aside the sentence imposed on him. He should be released from prison forthwith unless he is otherwise held for any other lawful cause.

DATED at **ARUSHA** this 19th day of February, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEA

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 19th day of February, 2021 in the presence of the Appellant in person through video conferencing facility linked to Arusha Central Prison and Mr. Ahmed Hatibu, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL