IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

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

CRIMINAL APPEAL NO. 506 OF 2019

ZHENG ZHI CHAO..... APPELLANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

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

(Mansoor, J.)

dated the 9th day of August, 2019
in
DC Criminal Appeal No. 66 of 2019

JUDGMENT OF THE COURT

31st May & 8th June, 2021

KEREFU, J.A.:

In the Resident Magistrate's Court of Dodoma, the appellant, ZENG ZHI CHAO together with three others, all Chinese nationals, namely, WANG XIN WEN (first accused), WU KAI JUN (third accused) and XU YONG FEI (fourth accused), who are not parties to this appeal, were jointly and severally charged with twelve (12) counts. On the first and third counts they were all charged with the offence of unlawful possession of government trophies contrary to sections 85 (1) (a), (b), (d) and 86 (1), (2), (c), (iii) and 3 (b) of the Wildlife Conservation Act No. 5 of 2009 as amended by section 61 of the Written Laws (Miscellaneous Amendments)

Act No. 2 of 2016 read together with paragraph 14 (d) of the First Schedule to and Section 57 (1) and 60 (1) both of the Economic and Organized Crime Control Act, [Cap. 200 R.E. 2002] as amended by section 13 (b), (2), (3), (4) and 16 (a) of the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016.

It was alleged that on 11th September, 2017 at Mpamatwa Village within Bahi District in Dodoma Region the appellant and the trio were found with 379 pangolin scales and 5 pangolin claws valued at TZS 8,628,480.00 the property of the United Republic of Tanzania without the permission from the authorized authority.

In the second and fourth counts they were all charged with unlawful dealing in government trophies contrary to sections 80 (1) and 84 (1) of the Wildlife Conservation Act No. 5 of 2009. On these counts, it was alleged that on the same date and place they were unlawfully dealing in government trophies to wit, 379 pangolin scales valued at TZS 8,628,480,00 the property of the United Republic of Tanzania without the permission from the director of wildlife.

The fifth and sixth counts were for the first accused alone on the same offences of unlawful possession of government trophies and unlawful

dealing in government trophies contrary to the same provisions of the law indicated above. In those counts, it was alleged that on the same date and place, the first accused was found with 262 pangolin scales valued at TZS 8,628,480.00 the property of the United Republic of Tanzania without the permission from the authorized authority.

The seventh, eighth, ninth, tenth, eleventh and the twelfth counts were for the appellant alone on the same offences of unlawful possession of government trophies and unlawful dealing in government trophies contrary to the same provisions of the law indicated above. It was alleged that on the same date place and time, the appellant was found with four lion's claws valued at TZS 11,010,300.00, one lion's tooth valued at TZS 11,010,300.00 and eleven pangolin scales valued at TZS 2,157,120.00 the properties of the United Republic of Tanzania without the permission from the authorized authority.

The appellant and the trio denied the charge laid against them and therefore, the case proceeded to a full trial. To establish its case, the prosecution marshalled a total of ten witnesses, twelve-documentary evidence and two physical evidence. The appellant relied on his own evidence as he did not summon any witness.

Brief facts in respect of this appeal, as obtained from the record is to the effect that on 11th September, 2017, following a tip from an informer, Renalda Kweka (PW2) a game warden together with Richard Michael and Japhet Maro were dispatched to Mpamatwa Village in Bahi District to conduct a search at the appellant's residence. They passed by at the Bahi Police Station where inspector Edward Kazungu (PW8) joined them and they all headed to that village. PW2 testified that upon arriving, they introduced themselves to the watchman and explained the purpose of their visit. The said watchman allowed them to search the area. PW2 stated that, in the course of the search, the appellant was found with four lion's claws and one lion's tooth on the left side of his trousers' pocket. PW2 marked the said trophies and labeled them with special number for identification purposes. The search was conducted by PW8 and witnessed by Vicent Madata (PW6) who was an independent witness, Kusekwa Madata, Richard Michael and PW2.

PW2 went on to state that the appellant was arrested and the said government trophies were seized. A certificate of seizure was prepared and signed by, among others, the appellant, PW6 and PW8. The said certificate was admitted in evidence as exhibit P8. PW2 handed over the trophies to

Athuman Bahati (PW1), the exhibit keeper who had been the custodian of the same throughout. In his testimony, PW1 produced the exhibit register book which was admitted in evidence as exhibit P1. Later, the trophies were weighed by Zulu Nathael N'gondya (PW3) at US$ 4900 who filled the trophy valuation certificate. The said certificate was admitted in evidence as exhibit P14. In his evidence regarding the said search, PW6 supported the narration made by PW2.

D7347 D/CPL Kichonge (PW9) the investigation officer testified that he was involved in the investigation of the incident and interviewed the appellant who confessed to have been found in possession of the said trophies. The appellant's cautioned statement was recorded in the presence of Dr. Neema Mkwawa (PW7) who was the interpreter, interpreting from Swahili to Chinese and vice versa. The said statement was admitted in evidence as exhibit P17.

In his defence, the appellant denied to have committed the offence and he contended that the alleged trophies were not his. He further contended that, since the search was conducted in Kiswahili language, which he did not understand, they did not understand each other.

After a full trial, the trial court acquitted the appellant and the trio on all charges on account that the prosecution had failed to prove the case against them to the required standard. Aggrieved, the respondent appealed to the High Court where the appellant was convicted on the seventh, eighth, ninth and tenth counts. For the conviction on the seventh and eighth counts, the High Court sentenced the appellant to pay a fine at the tune of US$ 9,800 or to serve two (2) years in prison in default. On the ninth and tenth counts, he was sentenced to pay a fine at the tune of US$ 49,000 or to serve twenty (20) years in prison in default. The two sentences were ordered to run concurrently. Aggrieved by the conviction and sentences meted out against him, the appellant lodged the current appeal. In the Memorandum of Appeal, the appellant has raised the following grounds;

1. *That, the honourable Judge erred both in law and in fact by convicting the appellant basing on the statement and evidence of PW2, PW6, PW8 and PW4 which was contradictory;*

2. *That, the honourable Judge erred both in law and in fact by giving weight to unreliable evidence, cautioned statement (exhibit P17) which was retracted and recorded without following legal procedures;*

3. *That, the honourable Judge erred both in law and in fact by attaching weight to unreliable evidence which was un-procedurally procured and admitted (exhibit P8);*

4. *That, the honourable Judge erred both in law and fact by basing the conviction on the contradictory, unreliable and un-procedural procured evidence and exhibits.*

At the hearing of the appeal, the appellant was represented by Mr. Augustino Edwin Ndomba, learned counsel, whereas the respondent Republic was represented by Ms. Catherine Gwaltu, learned Senior State Attorney.

Submitting in support of the first ground, Mr. Ndomba challenged the evidence of PW2 and PW6 for being contradictory in relation to where the search started and the person found in possession of the said trophies. He clarified that, PW2 testified that the search started outside the appellant's residence, then on the appellant's body (trousers) and finally, inside the house, while PW6 said that it started inside the house, then outside and finally the appellant's body (trousers). Mr. Ndomba contended further that, while PW2 testified that the person who was found in possession of the said trophies was Zen Chao, PW6 said that, that person was Xi and PW8 testified that they were obtained from Zhi Chao Wang. It was the

argument of Mr. Ndomba that all those names mentioned by the prosecution witnesses are not the appellant's names. As such, he contended that PW2, PW6 and PW8 were not credible witnesses.

With regard to the second ground, Mr. Ndomba argued that the appellant's cautioned statement (exhibit P17) was taken outside the prescribed period of four hours after his arrest. He elaborated that, the appellant was arrested on 11th September, 2017 but his statement was recorded on 14th September, 2017 after three days without explanation and there was no extension of time sought by the prosecution as required by the law. In that regard, Mr. Ndomba urged us to expunge the appellant's cautioned statement from the record.

As regards the third ground, Mr. Ndomba challenged the certificate of seizure (exhibit P8) that it was un-procedurally procured. He referred us to the evidence of PW8 who filled the said certificate and then argued that, in his evidence PW8 testified that he did not understand English language but exhibit P8 was filled in English. He added that since the said exhibit P8 was not read out after its admission in evidence, the same should also be expunged from the record.

On the last ground, Mr. Ndomba argued that the search was conducted contrary to the requirement of section 22 of the Economic and Organized Crime Control Act, [Cap. 200 R.E. 2002] (the EOCCA). He argued that, in terms of that section, before conducting a search a police officer is required to call upon some independent and reliable persons from the respective locality. He said that, although PW6 was named as an independent witness but he was a mere mechanic working for the appellant and was not from that locality. To justify his argument, Mr. Ndomba referred us to the decision of the first appellate court and argued that, the said court had declared PW6 to be unqualified independent witness. He then emphasized that, since in this case the search was conducted without any independent witness the same was invalid and had an adverse effect on the prosecution case.

Upon being prompted by the Court as to whether there was evidence adduced before the trial court to prove charges on unlawful dealing in the government trophies, Mr. Ndomba argued that there was no evidence adduced to that effect and, he said, it was wrong for the first appellate court to convict the appellant on those counts. Based on his

submission, Mr. Ndomba urged us to allow the appeal, quash the conviction and set aside the sentences imposed against the appellant.

In response, Ms. Gwaltu, started with the issue of law regarding the legality of the eighth and tenth counts on unlawfully dealing in government trophies. She argued that the particulars of the offence of unlawful dealing in government trophies in those counts were crafted contrary to section 80 (1) and 84 (1) of the Wildlife Conservation Act, No. 5 of 2009 (the WCA) as they do not disclose the nature of dealing, whether it was selling, buying, transferring or transporting the said trophies. She added that, the said particulars did not support the statement of the offence for failure to indicate on how the appellant was engaged in the said dealing and committed the said offence. As such, Ms. Gwaltu urged us to find that the said counts were defective and prejudicial to the appellant as he could not have properly understood the nature of the charge levelled against him. On that point, Ms. Gwaltu supported the appeal in respect of those counts. She then informed us that her response to the appeal will focus on the remaining counts, the seventh and ninth counts concerning unlawful possession of government trophies.

As regards the first ground on the alleged contradictions between the evidence of PW2 and PW6, Ms. Gwaltu argued that there is no contradiction and that PW2 and PW6 were credible and reliable witnesses. She, however argued that, even if the said contradiction exists, the same is a minor defect which does not go to the root of the matter because it does not contradict the fact that the appellant was found in possession of those trophies. Ms. Gwaltu also challenged Mr. Ndomba's contention that there are contradictions in the evidence of PW6 and PW8 as regards the name of the appellant. According to her, the said contradiction was a minor issue which, she said, could have been caused by different pronunciation of Chinese names. To buttress her proposition, she cited the case of **Huang Qin & Another v. Republic,** Criminal Appeal No. 173 of 2018 (unreported) and urged us to disregard the first ground of appeal as the pointed-out contradictions are only minor defects which do not go to the root of the matter.

On the second and third grounds, Ms. Gwaltu readily conceded that exhibits P8 and P17 were admitted in evidence contrary to the requirement of the law. As such, she also urged us to expunge the said exhibits from the record of appeal. However, Ms. Gwaltu was quick to argue that, even if the said exhibits are expunged, since their contents were adequately

explained by PW2, PW6 and PW8 their expungement would not affect the strength of the prosecution case on that aspect. On this point, Ms. Gwaltu relied on the case of **Huang Qin & Another** (supra).

As regards the fourth ground, Ms. Gwaltu was in agreement with Mr. Ndomba that the search exercise is supposed to be conducted in accordance with section 22 of the EOCCA. However, she argued that the said section was properly considered by the first appellate court in respect of other counts for other accused persons. She therefore insisted that the search which was conducted on the body and trousers of the appellant was properly conducted.

At the conclusion of the learned Senior State Attorney's address to us, we asked her to comment on the propriety or otherwise of section 86 (1), (2), (c) (iii) and (3) (b) of the WCA indicated in both counts and section 86 (1), (2) (b) of the same law cited in the decision of the first appellate court. Ms. Gwaltu readily conceded that the section in both counts was improperly cited and that is why the same was corrected by the first appellate court. She argued that the section used to convict the appellant is the correct provision of the law. She however added that the said defect is curable under section 388 of the Criminal Procedure Act,

[Cap. 20 R.E 2019] (the CPA) and the appellant was not prejudiced because the sentence meted out to him was properly pronounced. She then rested her case by urging us to find the appellant's appeal in respect of the seventh and ninth counts unmerited and dismiss it in its entirety.

We have carefully considered the submissions made by the counsel for the parties, the record and grounds of appeal. We wish to start by reiterating that, this being the second appeal, we are guided by a salutary principle of law which was restated in **Director of Public Prosecutions v. Jaffari Mfaume Kawawa,** [1981] TLR 149; **Mussa Mwaikunda v. The Republic**, [2006] TLR 387 and **Omary Lugiko Ndaki v. The Republic**, Criminal Appeal No. 544 of 2015 (unreported) that, in the second appeal the Court is only entitled to interfere with the concurrent findings of facts made by the courts below if there is a misdirection or non-direction made. The rationale behind that, is because the trial court having seen the witnesses is better placed to assess their demeanor and credibility, whereas the second appellate court assess the same from the record.

We have noted that, in her submissions, Ms. Gwaltu, among others, submitted on matters of law regarding the defects of wrong citation of the

provisions of the law in the seventh and ninth counts of unlawful possession of the government trophies and the defects in the particulars of offence in the eighth and tenth counts of unlawful dealing in government trophies. These being points of law, we shall start with them.

It is on record that the animal involved in the current matter falls under Part I of the First Schedule to the WCA and the value of the trophy exceeded one hundred thousand shillings (TZS 100,000.00). Therefore, as argued by Ms. Gwaltu the proper and applicable provision of the law which was supposed to be cited in the seventh and ninth counts is section 86 (1), (2) (b) of the WCA and not section 86 (1), (2), (c) (iii) cited in the said counts. However, having considered the said defect, we agree with Ms. Gwaltu that the same was not fatal and is curable under section 388 of the CPA. We have further noted that the said defect did not occasion any miscarriage of justice to the appellant as he understood the offence he was facing and his sentence in respect of those counts was properly pronounced – see **Jamali Ally @ Salum v. Republic,** Criminal Appeal No. 52 of 2017 (unreported).

On the eighth and tenth counts, as hinted earlier on, the appellant, was charged with the offence of unlawful dealing in government trophies

contrary to sections 80 (1) and 84 (1) of the WCA. The particulars of the offence in the said counts reads as follows: -

The eighth count –

"PARTICULARS OF OFFENCE

ZENG ZHI CHAO *on the 11th day of September, 2017 at Mpamatwa Village within Bahi District in Dodoma Region was unlawfully dealing in Government Trophies to wit, four (4) lion's claws valued at Tshs 11,010,300/= the property of the United Republic of Tanzania without the permit from the Director of Wildlife."*

The tenth count –

"PARTICULARS OF OFFENCE

ZENG ZHI CHAO *on the 11th day of September, 2017 at Mpamatwa Village within Bahi District in Dodoma Region was unlawfully dealing in Government Trophy to wit, one (1) lion's tooth valued at Tshs 11,010,300/= the property of the United Republic of Tanzania without the permit from the Director of Wildlife."*

Sections 80 (1) and 80 (4) which creates the offence of unlawful dealing in government trophy provide that: -

> *80 (1) A person shall not deal in trophy or **manufacture an article from a trophy for sale or carry on the business of a trophy dealer** except under and in accordance with the conditions of a trophy dealer's licence.*
>
> *84 (1) A person who **sells, buys, transfers, transports, accepts, exports or imports** any trophy in contravention of any of the provisions of this Part or CITES requirements, commits an offence and shall be liable on conviction to a fine of not less than twice the value of the trophy or to imprisonment for a term of not less than two years but not exceeding five years or to both. [Emphasis added].*

It is clear that the particulars extracted from the two counts do not contain sufficient information as to the nature of the offence because they do not specify the nature of dealing in government trophies the appellant was charged with, whether it was *manufacturing, selling, buying, transferring, transporting or importing of the said trophies.* The above irregularity is in itself sufficient to render the two counts totally defective – see for instance the cases of **David Athanas @ Makasi and Joseph Masima @ Shandoo v. Republic**, Criminal Appeal No. 168 of 2017, **Jonas Ngolida v. Republic,** Criminal Appeal No. 351 of 2017 and

Emmanuel Mwaluko Kanyusi and 4 Others v. Republic, Consolidated Criminal Appeals Nos. 110 of 2019 and 553 of 2020 (all unreported).

Besides the said irregularity, there was no scintilla of evidence adduced and tendered before the trial court to support those counts. In the circumstances, we reverse the finding of the first appellate court and find the appellant not guilty of the eighth and tenth counts.

Back to the grounds of appeal. Starting with the first ground on alleged inconsistencies in the evidence of prosecution witnesses, we deem it necessary to reiterate that the law regarding contradictions and inconsistencies in the evidence is settled. That, contradictions by any particular witness or among witnesses cannot be avoided in any particular case - see **Dickson Elia Nsamba Shapwata v. Republic,** Criminal Appeal No. 92 of 2007 (unreported). In that case, this Court observed that regularly in all trials, normal contradictions or discrepancies occur in the testimonies of the witnesses due to normal errors of observation, or errors in memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence of the incident. The Court added that, a material contradiction or discrepancy is that which is not normal and not expected of a normal person, and that courts have to determine the category to which a contradiction, discrepancy or inconsistency could be

characterized. In the premises, the Court held that minor contradictions, discrepancies or inconsistencies which do not go to the root of the case for the prosecution, cannot be a ground upon which the evidence can be discounted and that they do not affect the credibility of a party's case.

In the case at hand, having considered the discrepancies complained of, we do not, with respect, consider them to be material to the extent of affecting the credibility and reliability of PW2, PW6 and PW8. For instance, the issue on where the search started had no any bearing in this case because, the said trophies were not found outside or even inside the appellant's house but in the appellant's trousers' pocket. In addition, and considering the manner PW6 and PW8 had been consistent in narrating on how the appellant was found with the said trophies in his pocket, their difference in pronouncing his name could not vitiate that fact. By any means, we cannot expect PW6 and PW8 to match in their testimonies in pronouncing the appellant's Chinese names. As such, we have no hesitation to agree with Ms. Gwaltu that the appellant's complaint on this ground is plainly baseless as the pointed-out contradictions do not go to the root of the matter. We thus find the first ground to have no merit.

The complaints under the second and third grounds should not detain us, as both counsel for the parties were concurrent, rightly so, in our view that exhibits P8 and P17 were un-procedurally admitted in evidence. Indeed, the record bears it out at page 85 of the record that the contents of exhibit P8 was not read out and explained to the appellant after its admission contrary to the requirement of the law. Likewise at page 168 of the same record, it is evident that when PW8 tendered exhibit P17, Mr. Ndomba objected on account that the said exhibit was recorded out of time. The trial court heard parties on that objection and promised to consider the respective arguments and decide on the same at the time of composing the judgment. Unfortunately, that was not done. For the sake of clarity, we reproduce the trial court's order found at page 170 of the record of the appeal: -

> *"I have heard the arguments from both parties. At this juncture I admit Zeng Zhi Chao's statement as an exhibit, I however, promise to deal intensively and widely on the arguments when writing the judgment and resolve whether I can ground conviction on it. It is marked exhibit P17."*

We have carefully perused the trial court's judgment and there is nowhere the said objection on the admissibility of exhibit P17 was addressed and decided upon by the trial court. As hinted earlier, the said exhibit was un-procedurally admitted in evidence. Having thoroughly scanned the record, we have also observed that even the contents of exhibit P1 (the handover statement), exhibit P9 (hati ya makubaliano) and exhibit P14 (trophy evaluation certificate) were not read out after those exhibits were admitted in evidence.

It is settled position that failure to read out the contents of an exhibit after its admission in evidence is a fatal irregularity as it violates the accused's right to a fair trial - see the cases of **Robinson Mwanjisi and 3 Others v. Republic** [2003] T.L.R 218 and **Anania Clavery Betela v. Republic,** Criminal Appeal No. 355 of 2017. In the latter case the Court emphasized that failure to read over the contents of exhibit after being cleared for admission and actually admitted in evidence is wrong and prejudicial.

Being guided by the above authorities, the said exhibits deserve to be expunged from the record as we accordingly, hereby do. Nevertheless, we agree with Ms. Gwaltu that even if the said exhibits are expunged from the record, the oral evidence of the respective witnesses who tendered them in

court can sufficiently prove facts contained in the expunged documents. See the cases of **Saganda Saganda Kasanzu v. Republic,** Criminal Appeal No. 53 of 2019 (unreported), **Huang Qin & Another** (supra) and **Emmanuel Mwaluko Kanyusi and 4 Others** (supra). Specifically, in all these cases after expunging the certificate of seizure and trophy valuation certificate which were not read out, the Court relied on the oral evidence of those prosecution witnesses who proved the contents of both expunged exhibits.

Likewise, in the case at hand, we are settled in our mind that even after expunging the said exhibits from the record, the remaining evidence of PW1, PW2, PW3, PW6 and PW8 has sufficiently proved the contents of the said exhibits and proved that the appellant was found in unlawful possession of government trophies in his pocket. With respect, we also find the submission by Mr. Ndomba on the fourth ground that the search which was conducted in this case was done in breach of section 22 of the EOCCA, in the circumstances of the appellant's case, without any legal justification.

In the circumstances, and for the reasons stated above, we partly allow the appeal in respect of the counts of unlawful dealing in government trophies to the extent explained above. For the remaining counts of

unlawful possession of government trophies, we dismiss the appeal and uphold the decision pronounced against the appellant by the first appellate court.

DATED at **Dodoma** this 7th day of June, 2021.

A.G. MWARIJA
JUSTICE OF APPEAL

J.C.M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

This judgment delivered this 8th day of June, 2021 in the presence of Mr. Leonard Haule, learned counsel holding brief for Mr. Augustino Ndomba, learned counsel for the Appellant and Ms. Rachel Tulli, 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