IN THE COURT OF APPEAL OF TANZANIA
AT KIGOMA

(CORAM: MKUYE, J. A., SEHEL, J.A, And GALEBA, J. A.)

CRIMINAL APPEAL NO. 196 OF 2020

EVARIST NYAMTEMBA..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the Resident Magistrate's Court at Kigoma (Extended Jurisdiction))

(Kirekiano, SRM Ext. J.)

dated the 31st day of March, 2020
in
DC. Criminal Appeal No. 4 of 2019

.....

JUDGMENT OF THE COURT

6th & 12th July, 2021

SEHEL, J.A.:

This second appeal is against the decision of the Senior Resident Magistrate with Extended Jurisdiction, A. J. Kirekiano dated 31st March, 2020 that dismissed the appellant's appeal. The appeal was against the conviction and the sentence of twenty (20) years imprisonment.

The facts leading to this appeal are as follows: - the appellant stood charged before the District Court of Kigoma at Kigoma with an offence of unlawful possession of Government Trophy contrary to sections 86 (1) and (2) (c) (ii) of the Wildlife Conservation Act, No. 5 of 2009 (henceforth "the Wildlife Conservation Act") read together with Paragraph 14 (d) of the First Schedule to the Economic and Organized Crime Control Act, Cap. 200 R.E 2002 (henceforth "the EOCCA") as amended by section 16 of the Written Laws (Miscellaneous Amendments) Act No. 4 of 2016 and sections 57 (1) and 60 (2) of the EOCCA as amended by section 13 of the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016.

After the charge was read over to him, he pleaded not guilty. Hence, the prosecution paraded a total of twelve witnesses and tendered six exhibits to prove its case. The tendered exhibits were eight (8) pieces of elephant tusks, the Certificate of Seizure, the Trophy Valuation Certificate, Measure Test Form, the Exhibit Register and the cautioned statement (Exhibits P1, P2, P3, P4, P5 and P6

respectively). On the defence side, the appellant fended for himself and did not call any witness. Neither did he tender any exhibit.

It was the evidence of the prosecution that on 28th October, 2017 at about 22:30 hours, Inspector Chacha (PW1) while at his office at the Criminal Investigation Department (CID), Central Police Station at Kigoma he received a tip from Albert s/o Chiza (PW4) that the appellant was in possession of Government Trophy, to wit, elephant tusks. PW1 set up a trap with Detective Corporal Innocent (PW10) and at about 00:30 hours, he together with PW4 and PW10 travelled to Kibirizi area to the house of Guni d/o Said (PW2) where the appellant was said to be residing. Upon reaching there, they summoned the chairperson of Kibirizi street, one John s/o Kimondo (PW3) to witness the search. After dispersing the occupants in the house, they mounted a search from one room to another. In the room where the appellant slept with his wife, they found four (4) pieces of elephant tusks wrapped inside a sachet and the four (4) others inside a black bag. PW1 filled and signed a seizure certificate which was also signed by the appellant and the chairperson of Kibirizi street (PW3).

PW2 told the trial court that she was a traditional healer and that on the fateful night the police arrived at her place of abode and conducted a search. In the room where the appellant slept with his wife, the police officers retrieved four (4) pieces of elephant ivories that were placed inside a black bag and four (4) pieces were inside a sachet. She was asked to sign a Seizure Certificate, Exhibit P2 as independent witness and she did sign it.

PW4 and PW10 corroborated the evidence of PW1 that they accompanied PW1 to Kibirizi area to the house of PW2 where they found the appellant in possession of eight (8) pieces of elephant tusks. They arrested him and took him to the Central Police Station Kigoma.

Linus s/o Chuma (PW5) a senior game officer attached at anti-poaching unit at Tabora zone told the trial court that on 1st November, 2017 he received eight (8) pieces of elephant tusks from the Regional Crimes Officer (RCO), Kigoma. He examined and valued the trophies and found that they were pieces of elephant tusks valued at United States Dollars (USD) 15,000 which was equivalent to TZS.

33,750,000.00. He recorded his findings in the Trophy Valuation Certificate, Exhibit P3.

On 29th October, 2017, Detective Corporal Elias (PW12) interrogated the appellant and in the course of interrogation, the appellant admitted the commission of the offence. To that effect, a cautioned statement (Exhibit P6) was recorded.

In his sworn defence, the appellant admitted to have been found asleep in PW2's room on the fateful night where he went for treatment of his sick child since PW2 was a traditional healer. He strongly denied any involvement in the commission of the alleged offence. He told the trial court that in the room where he slept, the police officers found food stuffs and took his money TZS. 300,000.00 and his two (2) mobile phones make Tecno. He was taken to Central Police Station and then transferred to Tabora Region whereby on 8th January, 2018 he was arraigned before the trial court for the aforesaid offence.

The trial court found that the evidence of the police officers (PW1, PW4 and PW10) was corroborated by the evidence of

independent witnesses, PW2 and PW3 that the appellant was found in actual possession of the Government Trophy while asleep in his room with his wife. It was thus satisfied that the prosecution proved its case against the appellant to the hilt. Consequently, the trial court convicted and sentenced the appellant as stated herein.

His appeal which was transferred to the Court of the Resident Magistrate at Kigoma and determined by Honourable Kirekiano, Senior Resident Magistrate with Extended Jurisdiction, was dismissed on account, among others that, the findings of PW5 in Exhibit P3 sufficiently proved that the seized items (Exhibit P1) were elephant tusks.

Discontented with the dismissal of his appeal, the appellant lodged to this Court a six-point memorandum of appeal that: -

> *"1. The learned trial magistrate erred in law and fact in convicting the appellant basing on the evidence of PW1 and PW3 which was contradictory.*
>
> *2. The learned trial magistrate erred in law and fact for convicting the appellant without considering that the*

appellant was deprived a fair trial and that the prosecution did not prove the case beyond all reasonable doubt.

3. *The learned senior resident magistrate with extended jurisdiction erred in law to uphold the conviction without considering that the appellant was detained in police custody for up to 70 days without being arraigned before the trial court.*

4. *The learned senior resident magistrate with extended jurisdiction erred in law and fact in upholding the appellant's conviction while the identification of the appellant was not adequate since the search was conducted during the night thus there was a possibility of mistaken identity.*

5. *The learned senior resident magistrate with extended jurisdiction erred in law and fact in upholding the appellant's conviction regardless of procedural irregularities since the appellant was not issued with a certificate of seizure and the register book was not tendered to establish that the chain of custody was not broken.*

6. *The learned senior resident magistrate with extended jurisdiction erred in law and fact in upholding the*

appellant's conviction without considering that the appellant cannot be convicted on the weakness of his defence but on the strength of the prosecution evidence."

At the hearing of the appeal, the appellant appeared in person. He had no legal representation whereas the respondent /Republic had the services of Mr. Adolf Maganda, learned Senior State Attorney who was assisted by Messrs Shabani Juma Masanja and Benedict Kivuma, both learned State Attorneys.

When the appellant was invited to submit on his appeal, he opted for the learned State Attorney to respond first to the grounds of appeal while reserving his right to re-join, if need would arise.

On the part of the respondent, it was Mr. Kivuma who made a reply to the appeal by intimating to the Court that the respondent was opposing the appeal. Before he started to respond to the grounds of appeal, we invited him to address the Court as to whether the procedure in admitting the documentary exhibits was complied with. He readily conceded that all documentary exhibits were not read out in court after they were cleared and admitted in evidence. It was his

submission that the failure to read the contents of admitted documents to the accused person was a fatal irregularity thus they ought to be expunged from the record. To support his submission, he referred us to case of **Robinson Mwanjisi and Three Others v. The Republic** [2003] T.L.R. 218 He therefore prayed for Exhibits P2, P3, P4, P5 and P6 to be expunged from the record.

After expunging the documents, he tried to impress the Court that the remaining direct oral evidence of PW1, PW2, PW3, PW4 and PW10 sufficiently proved the offence against the appellant of being found in unlawful possession of the Government Trophy. He submitted that the evidence of the three investigative police officers, PW1, PW4 and PW10 was corroborated with two independent witnesses, PW2 (owner of the house in which the appellant slept) and PW3 (a chairperson of Kibirizi street) that the search conducted in PW2's house led to the retrieval and seizure of Government Trophies (Exhibit P1) from the room in which the appellant was sleeping with his wife. He added that even after expunging Exhibit P5, the oral testimony of PW5 suffices to prove that Exhibit P1 was a Government Trophy, to

wit, elephant tusks whose value was USD 15,000 which was equivalent to TZS. 33,750,000.00 as it was held in the case of **Issa Hassan Uki v. The Republic**, Criminal Appeal No. 129 of 2017 at page 13 that: -

> *"... despite expunging Exhibit P3 (Trophy Valuation Certificate), there was ample evidence in its stead to show beyond reasonable doubt that the items were actually elephant tusks whose value was TZS. 29,100,000.00 as testified by PW4."*

However, after we had adverted him to the facts of that case, he changed his stance and conceded that the remaining evidence was insufficient to prove and sustain the appellant's conviction and sentence. He reasoned that PW5 gave a generalized statement and he did not explain as to how he was able to differentiate Exhibit P1 from the horns of other animals. He submitted further that PW5 did not explain in his oral account the weight of the tusks for the trial court to be satisfied that the offence fell under the provisions of section 86 (1) and (2) (c) (ii) and not under section 86 (2) (c) (i) or (iii) of the Wildlife Conservation Act. With that insufficient information, Mr.

Kivuma requested the Court to invoke its revisional power under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 (henceforth "the AJA") to quash the conviction, set aside the sentence and set the appellant free from the prison custody unless otherwise lawfully held.

The appellant in his rejoinder did not have anything to say apart from welcoming the submission made by Mr. Kivuma and prayed to be released from prison custody.

On our part, having duly considered the submissions of the learned State Attorney and reviewed the record of appeal, we entirely agree with Mr. Kivuma that the documentary exhibits were not read over to the appellant after they were cleared and admitted in evidence. It is a settled position of the law that whenever it is intended to introduce any document in evidence, it should first be cleared for admission, and be actually admitted in evidence, before it can be read out in court (see: **Robinson Mwanjisi and Three Others** (supra), **Walii Abdallah Kibuta and Two Others v. The Republic**, Criminal Appeal No. 181 of 2006, **Kurubone Bagirigwa and Three Others v.**

The Republic, Criminal Appeal No. 132 of 2015, **Lack s/o Kilingani v. The Republic**, Criminal Appeal No. 405 of 2015 **Issa Hassan Uki v. The Republic**, Criminal Appeal No. 129 of 2017 and **Kassim Salum v. The Republic**, Criminal Appeal No. 186 of 2018 (All unreported)).

For instance, in **Lack s/o Kilinga** (supra) we elucidated the three stages which a trial court has to observe before a document is admitted in evidence it should first be cleared for admission, secondly, it should be admitted in evidence and thirdly, it should be read out in court. The Court said: -

> *"Even after their admission, the contents of cautioned statement and the PF3 were not read out to the appellant as the established practice of the Court demands. Reading out would have gone a long way, to fully appraise the appellant of facts he was being called upon to accept as true or reject as untruthful. The Court in* ***Robinson Mwanjisi and Three Others v. The Republic*** *[2003] T.L.R. 218, at page 226 alluded to the three stages of clearing, admitting and reading out; which evidence contained in documents*

invariably pass through, before their exhibition as evidence."

Yet, in **John Mghandi @ Ndovo v. The Republic,** Criminal Appeal No. 352 of 2018 (unreported) we stated the reason behind the requirement to read over the admitted documentary exhibits to the accused person. In particular we stated as follows: -

> *"We think we should use this opportunity to reiterate that whenever a documentary exhibit is introduced and admitted into evidence, it is imperative upon a presiding officer to read and explain its contents so that the accused is kept posted on its details to enable him/her give a focused defence. That was not done in the matter at hand and we agree with Mr. Mbogoro that, on account of the omission, we are left with no other option than to expunge the document from the record of the evidence."*

From the record of appeal and it is not disputed by the learned State Attorney that the five documents, that is, the Certificate of Seizure (Exhibit P2), the Trophy Valuation Certificate (Exhibit P3), the Weight/Measure Test Form (Exhibit P4), the Exhibit register (Exhibit

P5) and the Cautioned Statement of the appellant (Exhibit P6) were cleared for admission and admitted in evidence without objection from the appellant but skipped the third stage. That is, although they were admitted without objection from the appellant the trial court omitted to read over the contents of the exhibits to enable the appellant to understand and make a meaningful defence. We are therefore satisfied that the omission was fatal as it occasioned a miscarriage of justice to the appellant. Consequently, we expunge Exhibits P2, P3, P4, P5 and P6 from the record.

Having expunged the documentary evidence, we entirely agree with Mr. Kivuma that the remaining oral direct evidence of the twelve prosecution witnesses is insufficient to sustain the conviction of unlawful possession of the Government Trophy and the sentence of twenty (20) years imprisonment. This is because there was no clinching evidence on record to arrive at a finding that Exhibit P1 was truly elephant tusks hence a Government Trophy. None of the Twelve prosecution witnesses gave a detailed account of the contents of the expunged documentary exhibits. Their evidence was in a generalized

form thus it was not enough to support the conviction of unlawful possession of Government Trophy.

There is no doubt that the contents, especially those in Exhibit P3 (the Trophy Valuation Certificate), were very crucial in establishing the ingredients of the offence which the appellant stood charged. Here we wish to echo what we said in the case of **Erneo Kidilo and Another v. The Republic**, Criminal Appeal No. 206 of 2017 (unreported). In that appeal, after we have expunged the Inventory Form (Exhibit P4), the Trophy Valuation Certificate (Exhibit P5) and cautioned statements (Exhibits P6 and P7) from the record whose contents were not read out in court after they were admitted in evidence, we said that: -

> *".... contents of Trophy Valuation Certificate (Exhibit P5) bear special significance in any proof of the offence involving Government Trophy.... As we have shown, exhibit P5 (Trophy Valuation Certificate) which was not read out, is replete with factual information relevant to prove the second count of appellants being found in unlawful possession of Government Trophies*

(meat of one Lesser Kudu and meat of one Impala) whose value the first appellate court enhanced to TZS. 47,840,000.00. The sheer size of facts which exhibit P5 carries, defeats the learned Senior State Attorney's argument that the appellants should be taken to have known all facts that were in the exhibits which were not read out."

Even in this appeal, Exhibit P3 contained a lot of information in respect of the items seized from PW2's house. It has details on the type of trophy, the number of pieces, the number of species unlawfully killed, the weight of the trophies in terms of kilograms, the value of the trophy per kilogram/ pieces/ species in USD, the total value of the trophy in USD, applicable exchange rate of USD to TZS and the total value of the trophy in TZS. The testimony of PW5 lacked all these information. As rightly submitted by the learned State Attorney, PW5 gave a generalized statement that Exhibit P1 was elephant tusks with no further explanation as to the peculiar features of it that led him to conclude that Exhibit P1 was truly elephant tusks hence a Government Trophy.

Even if, Exhibit P1 was proved to be elephant tusks, after expunging Exhibit P6 from the record, there was no any other evidence connecting the appellant with that exhibit. None of the prosecution witnesses sufficiently established that the black bag, that had in it the eight pieces of elephant tusks and found in the room which the appellant slept, belonged to the appellant. In his testimony the appellant told the trial court that he went to PW2's house for treatment of his sick child since PW2 was a traditional healer. PW2 corroborated the evidence of the appellant that she was a traditional healer but she did not say as to whether the appellant arrived at her place with the black bag in which the eight pieces of elephant tusks were kept. In that respect, we are satisfied that the legal issue we raised disposes the whole appeal that the prosecution failed to prove its case to the required standard. Therefore, there is no need to determine the other grounds of appeal raised by the appellant.

In the end, we invoke revisional powers bestowed on us under section 4(2) of the AJA and nullify the proceedings of the trial court, quash the conviction and set aside the sentence. The proceedings of

the first appellate court are also nullified and its judgment is quashed. We order for the immediate release of the appellant, **Evarist Nyamtemba**, from custody unless otherwise held for other lawful reasons.

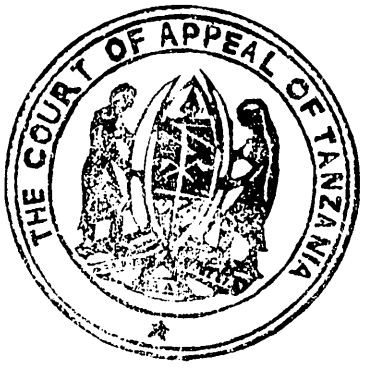
DATED at **KIGOMA** this 12th day of July, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

This Judgment delivered this 12th day of July, 2021 in the presence of the appellant in person by video link from Bangwe Prison in Kigoma and Mr. Benedict Kivuma, the learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL