IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: LILA, J.A., KOROSSO, J.A. And MWANDAMBO, J.A.)

CRIMINAL APPEAL NO. 555 OF 2020

FALE SHIJA @ MIGUNGUMALO .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania, at Dodoma

(Mansoor, J.)

dated the 02nd day of September, 2020
in
DC. Criminal Appeal No. 97 of 2019

.....

JUDGMENT OF THE COURT

18th & 27th August, 2021

MWANDAMBO, J.A.:

Fale Shija @ Migungumalo (the appellant) and Mashaka Abdallah @ Sudi not a party to this appeal were convicted by the District Court of Manyoni as first and second accused respectively on two counts of unlawful possession of and dealing in government trophy and sentenced accordingly. The first count in the amended charge sheet was preferred under sections 86 (1) (2) (c) (ii), (3) (b) and section 111 (a) (2) of the Wildlife Conservation Act No. 5 of 2009 (the WCA) read together with paragraph 14 (a) of the

First Schedule to and section 57 (1) and 60 (1) of the Economic and Organised Crime Control Act, Cap. 200 as amended by sections 13 (b) (2) (3) and 16 (1) (a) of the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016. The second count on unlawful dealing with Government trophy was preferred under sections 80 (1), 84 (1), 111 (1) (a) of the WCA read together with paragraph 14 (a) of the First Schedule to and section 57 (1) and 60 (1) of the Economic and Organised Crime Control Act, Cap. 200 as amended by sections 13 (b) (2) (3) and 16 (1) (a) of the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016.

The particulars in the first count alleged that on 22/09/2017 at a village called Mtakuja in Mtundu Township, within Manyoni District, Singida Region, the appellant and Mashaka Abdallah @ Sudi, were found in unlawful possession of nine pieces of government trophies weighing 6.5 kg from five elephants valued at USD 75,000 equivalent to TZS 168,675,000.00 the property of the Government of the United Republic of Tanzania. As for the second count, it was alleged that on the same date and place, the duo was found in an unlawful dealing with government trophy to wit: *sells, transfers, transport and accepts* nine elephant tusks weighing 6.5 kg obtained from five elephants with a total value of USD 75,000 equivalent to TZS

168,675,000.00, the property of the Government of the United Republic of Tanzania without dealer's licence.

Satisfied that the prosecution had proved its case to the required standard, the trial court convicted the appellant and the second accused on both counts and afterwards passed sentences of 20 years imprisonment on each count. Against both convictions and sentences, the appellant and the second accused appealed to the High Court which found that the appeal by the second accused had merit and allowed it. With regard to the appellant, the first appellate court sustained the complaint challenging conviction on the second count. It quashed conviction and set aside the corresponding sentence. The first appellate court sustained conviction and sentence on the first count which aggrieved the appellant and hence the instant appeal.

The tale behind the arraignment and conviction of the appellant and the second accused before the trial court runs as follows: On 22/09/2017, D 7312 Detective Sergeant Jumanne (PW2) and Isack Nanyaro arrested the appellant at a place called Mtakuja, Mtundu Township in Manyoni District allegedly in connection with unlawful possession and dealing involving nine pieces of elephant tusks said to have been extracted from five elephants. The arrest was facilitated by a tip from an informer who had relayed

information about the appellant dealing in government trophies. It is for that reason a trap was set which entailed PW2 and his colleagues, pretending to be prospective buyers of elephant tusks. All being set, a plan was hatched to meet with the appellant somewhere away from Mitundu Township for concluding the deal of buying the much-needed trophy from the seller. According to PW2, the plan succeeded whereby upon such meeting the seller (the appellant) unleashed a bucket in which he had stuffed a "sulphate" bag containing seven complete tusks and two pieces. No sooner than the appellant released the goods than he was put under arrest followed by the seizure of the tusks as well as the bucket and sulphate bag. A certificate of seizure containing the seized items was witnessed by Romana Stephen (PW5), an independent witness who appended his signature on it (exhibit P.6) along with the appellant and PW2. Afterwards, the seized items were taken to KDU (Kikosi Dhidi ya Ujangili) at Manyoni and handed over to Athuman Bahati (PW1), the exhibit keeper for custody.

Later in the evening, the appellant is recorded to have confessed to the commission of the offence before No. E 1678, Detective Cpl Juma (PW3) mentioning the second accused who was arrested on 23/09/2017. According to PW2, after the arrest of the second accused, he recorded his

cautioned statement confessing to be involved in unlawful dealing with government trophy in collaboration with the appellant. Subsequently, Japhet Maro, a game warden who testified as PW4 conducted a valuation of the seized elephant tusks showing that they were worth USD 75,000 equivalent to TZS 168,675,000.00. PW4 tendered a valuation report which was admitted as exhibit P10.

The appellant and the second accused dissociated himself from the accusations in their defence. The appellant attributed his search at his room to the allegations in connection with unlawful possession of fire arm which was nonetheless not found. He denied having confessed to have been found in unlawful possession of the elephant tusks alleging that he was tortured even though he readily consented to the admission of the cautioned statement tendered by PW3 and marked exhibit P9 after its admission.

For his part, the second accused told the trial court that his arrest by the police had no connection with the elephant tusks seized from the appellant a day before he was arrested and taken to the police and later to KDU Offices at Manyoni where he was forced to sign an unknown document. He feigned unfamiliarity with the appellant whom he claimed to have met in court being charged in the same case.

The trial court found the prosecution case proved on the required standard on both counts. The learned trial Magistrate formulated two points for determination; whether the prosecution adduced sufficient evidence to prove its case on each of the counts; unlawful possession and dealing with government trophies. In arriving at the affirmative findings, the trial court relied on the evidence of PW2, the arresting officer who tendered the certificate of seizure (exhibit P6), handing over certificate of the seized items to Athman Bahati (PW1) admitted as exhibit P7, the seized items; 7 pieces of elephant tusks and two pieces (exhibit P2 and P3 respectively), the exhibit register showing the movement of exhibits (exhibit P1). It also relied on two confessional statements extracted from the appellant (exhibit P9) and the second accused (exhibit P8). The trial court found the evidence in the valuation certificate (exhibit P10) tendered by PW4 to be reflecting the value of the seized elephant tusks which tallied with what PW2 seized from the appellant before handing it over to PW1 who later on tendered them in court and duly identified by PW2, PW4 and PW5.

The appellant and the second accused preferred separate petitions of appeal before the High Court. The learned first appellate Judge (Mansoor, J,) determined them jointly. In relation to the ground directed against the

trial court's findings on the first count, the learned first appellate Judge concurred with the trial court that on the basis of the testimonies of PW2 and PW5 along with exhibit P6 and exhibit P9, there was sufficient evidence proving unlawful possession against the appellant. However, she found no evidence proving the offence against the second accused on both counts and allowed his appeal. As to the complaint challenging the legality of seizure, the first appellate court found no merit in it having been satisfied that the search was one of emergency which dispensed with the requirement to have a search warrant. Having so held the first appellate court dealt with the voluntariness of the appellant's cautioned statement; exhibit P9. Although it did not make any express determination on its legality, the first appellate court took the view that the prosecution case could not be shaken even if exhibit P9 were to be expunged for being repudiated.

Regarding the complaint on contradictions in the testimonies of PW2 and PW5, the High Court found no such contradiction and dismissed it before dealing with the failure by the trial court to consider defence evidence which it found merited. However, the first appellate Judge took the view that the appellant's defence did not raise any reasonable doubt in

the prosecution's case and so the failure did not have any bearing on the appellant's conviction on the first count but not on the second count in relation to the unlawful dealing in government trophy. It found the prosecution's evidence wanting and allowed it.

From the first appellate court's decision, the appellant has preferred this appeal premised on seven grounds of appeal raising the following complaints against his conviction, namely; **one**, failure to inform the appellant's right to engage an advocate; **two,** the contents of the valuation report (exhibit 10) were not read upon admission; **three,** reliance on the improperly admitted cautioned statement by reason of contravention of section 57(2) (a)(b) of the Criminal Procedure Act [Cap. 20 R.E 2002- now RE 2019], henceforth the CPA; **four,** failure to note the variance between the valuation report and the trophies; **five,** failure to hold that there was a variance between the trophy valuation certificate and the certificate of seizure on the number and weight of the pieces of elephant tusks; **six,** sustaining conviction on the evidence which did not prove the charge to the required standard; and, **seven;** failure to consider defence evidence.

The appellant who fended for himself appeared in person during the hearing of the appeal. He urged the Court to determine the appeal in his

favour on the strength of the grounds of appeal without more before we invited Ms. Lina William Magoma, learned Senior State Attorney to take the floor on behalf of the respondent Republic who resisted the appeal.

Ms. Magoma's argument on ground one was that it was neither raised before the High Court nor did the appellant ask the trial court to be allowed to engage an advocate and denied that right. We respectfully agree that this is a new ground which the first appellate court did not have an opportunity to express its opinion thereon. Indeed, that is against the dictates of section 4 (1) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2019] (the AJA) and rule 72 (2) of the Rules which requires an appellant's memorandum of appeal to state the grounds of objection to the decision appealed against. As ground one does not arise from the impugned decision, we shall refrain from determining it as we have done in many of our previous decisions, amongst others, **Robert Andondile Komba v. D.P.P.**, Criminal Appeal No. 465 of 2017 citing **Dickson Anyosisye v. R.**, Criminal Appel No. 155 of 2017 (both unreported).

With regard to ground two, Ms. Magoma readily conceded that the contents of the valuation certificate (exhibit P10) were not read upon being cleared for admission. On that score, the learned Senior State Attorney could

not resist the temptation to have it expunged from the record. All the same, Ms. Magoma argued, and rightly so in our view, the expungement of exhibit P10 will not affect the oral evidence of PW4 who conducted the valuation of the tusks, the subject of exhibit P10. For this proposition, he placed reliance on our decision in **Huang Qin & Another v. R**. Criminal Appeal No. 173 of 2018 (unreported) where a valuation certificate tendered at the trial as an exhibit was expunged because its contents were not read. Nevertheless, the Court held that the oral evidence of the witnesses remained intact and valid. Under the circumstances, guided by the Court's previous decision notably; **Robinson Mwanjisi & 3 Others v. R.**, [2003] T.L.R 2018 and **Anania Clavery Betela v. R.**, Criminal Appeal No. 355 of 2017 (unreported) cited in **Huang Qin & Another v. R** (supra) we shall do alike in this appeal and expunge exhibit P10 as we hereby do.

In the same vein, we hold that PW4's evidence is retained regardless of the expungement of exhibit P10 from the record. Consequently, ground two is allowed to that extent only.

Next, we shall deal with ground four and skip ground three which shall be dealt with later on. The appellant's complaint in ground four was directed against variances connected with exhibit P10 so was ground five. However,

having expunged exhibit P.10, Ms. Magoma impressed upon us that the two grounds have been rendered superfluous. We agree with her. A discussion on the two grounds will not serve any useful purpose and so we shall refrain from doing so.

The complaint in ground three was that the cautioned statement of the appellant was admitted irregularly by reason of non-compliance with section 57(2)(a)(b) of the CPA. Ms. Magoma argued that the complaint is superfluous because the High Court expunged it but it held that nevertheless, the case against the appellant was proved to the required standard.

Initially, the learned Senior State Attorney contended that the first appellate court had expunged exhibit P9. There is no indication in the judgment suggesting so. All what the learned Judge did was to express her view that on the face of it, the appellant appears to have repudiated the confession but the court would still rely on it to ground conviction without any corroboration and, even if it were to be expunged, the remaining evidence will still be sufficient to ground conviction.

Admittedly and without any disrespect to her, the learned first appellate judge's view is not entirety free from difficulties but what is

obvious is that she did not expunge exhibit P9 neither did she give any weight notwithstanding her inclination towards reliance on an uncorroborated repudiated confession on the authority of **Dickson Elia Nsamba Shapwata & Others v. R.**, Criminal Appeal No. 92 of 2007 (unreported). Be that as it may, in the course of her submissions, Ms. Magoma felt unprepared to go along with her argument in favour of the validity of exhibit P9. She conceded that exhibit P9 was indeed taken in contravention of section 57 (2) (a) (b) of the CPA and so it ought to be expunged. With respect we agree with Ms. Magoma and accept her invitation to expunge exhibit P9 which we hereby do. The upshot of the foregoing is that ground three has merit and we allow it.

The next issue for our consideration is whether the remaining evidence is still intact to sustain conviction after expunging exhibit P9.

Ms. Magoma urged us to hold so to which we agree. Like the learned first appellate Judge, we agree that there was sufficient evidence to ground conviction on the first count. **Firstly**, as submitted by the learned Senior State Attorney, the evidence of PW2 who arrested the appellant in possession of seven and two pieces of elephant tusks was not controverted. Besides, it was not controverted also that the arrest of the appellant was

witnessed by PW5; an independent witness who also signed the certificate of seizure (exhibit P6). Both PW2 and PW5 identified the seized items in exhibit P7 during the trial to be the same which were found in possession of the appellant upon his arrest. Furthermore, there was uncontroverted evidence from PW1; the exhibit keeper supported by handover certificate (exhibit P7) and the exhibit register (exhibit P1) which established that the elephant tusks seized from the appellant on 22/09/2017 handed to him for custody and ultimately tendered in court were the same ones which PW4 valued to be worth USD 75,000 equivalent to TZS 168,675,000.00. In our view, the evidence on which the two courts below concurred in finding that the appellant was found in unlawful possession of government trophy was not shaken by reason of the expungement of the appellant's confession. It proved the count on unlawful possession as charged beyond reasonable doubt which disposes ground six against the appellant.

Lastly on ground seven dedicated to the failure to consider defence evidence. Ms. Magoma urged us to dismiss this ground as baseless considering that the first appellate Judge addressed the complaint in her judgment. With respect, we agree with the learned Senior State Attorney. It is plain forming the judgment of the High Court that the trial court did not

indeed consider the appellant's defence. However, playing its role as a first appellate court of evaluating the evidence on record, it came to the conclusion that the defence was too weak to raise any reasonable doubt on the unlawful possession of government trophy and dismissed that complaint (see para 153 of the record of appeal). Without much ado we find no merit in this ground and dismiss it.

In fine, we find no merit in the appeal and dismiss it in its entirety.

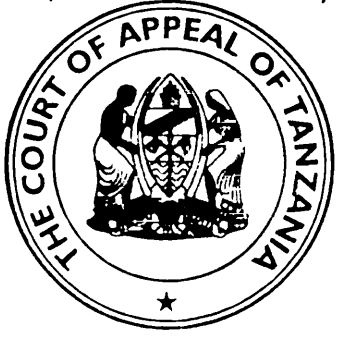
DATED at **DODOMA** this 27th day of August, 2021.

S. A. LILA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Judgment delivered this 27th day of August, 2021 in the presence of the Appellant in person and Ms. Salma Uledi, learned State Attorney for the Respondent is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL