IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: NDIKA, J.A., SEHEL, J.A. And KENTE, J.A.)

CRIMINAL APPEAL NO. 393 OF 2018

ROBERT S/O NYAKIE @ NATI..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Mbeya)

(Mambi,J.)

dated the 29th day of October, 2018
in
DC. Criminal Appeal No. 60 of 2018

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JUDGMENT OF THE COURT

15th & 20th September, 2021

SEHEL, JA.:

The Resident Magistrate's Court of Katavi at Mpanda (the trial court) sentenced Robert s/o Nyakie @ Nati (the appellant) to twenty years imprisonment after finding him guilty of an offence of unlawful possession of government trophy contrary to section 86 (1) and (2) (c) (ii) of the Wildlife Conservation Act, No. 5 of 2005 (the WCA) read together with paragraph 14 of the first schedule to section 57 (1) of the Economic and Organised Crime Control Act, Cap. 200 R.E. 200 (now R.E. 2019) (the EOCCA). The appellant unsuccessfully appealed to the High Court of Tanzania at Sumbawanga (the first appellate court). Hence, he

filed this second appeal. In his memorandum of appeal, he raised the following eight grounds. **One,** Exh. P1 was not found in his home. **Two,** the search was conducted at PW2's residence. **Three**, the motorcycle claimed to have ferried the elephant tusks was not tendered in the trial court. **Four**, the search order was not signed by the leader of the area where the search was conducted. **Five**, the appellant was arrested and convicted on suspicious allegations as there was no cogent evidence. **Six**, the charge against the appellant was not proven to the required standard by the prosecution. **Seven**, Exh. P5 was illegally admitted as the death certificate was not tendered to prove the death of the witness. **Eight**, the defence of the appellant was not considered by the first appellate court.

Before going into the merits of the appeal, we wish to give a brief background to the appeal. On 29th February, 2016 the appellant approached Jackson Michael (PW2) and told him that he had elephant tusks and he was looking for a buyer. PW2 tipped the Katavi National Park rangers, who were Kapini, Jordan and Daudi Daniel (PW4). Upon receipt of such information, the park rangers went to a nearby police post seeking reinforcement to trap the appellant.

At the post, they met two police officers, namely E. 7863 Corporal Bashiru (PW1) and 6814 Detective Corporal Julius (PW5). A trap was set whereby Kapini and Jordan posed as would be buyers of the elephant tusks. Kapini and Jordan went to PW2's residence at Kanoge area and met their seller, the appellant. They discussed and reached to an agreement.

As the elephant tusks were not there, the appellant asked for a transport assistance to ferry the goods. Kapini and Jordan hired for him a motorcycle. After the appellant had left, Kapini texted the police officers that once they hear a sound of a motorcycle, they should immediately appear from their hide out to apprehend the appellant with the goods.

The appellant took about forty-five minutes then he returned with a polythene bag. Immediatedly after he had parked the motorcycle, the police officers appeared, apprehended him and seized his bag. In that bag, they found four pieces of elephant tusks (Exh. P1). PW1 prepared a seizure certificate (Exh. P2.) which was signed by the appellant and PW2 as an independent witness. The appellant and the seized items were taken to Katumba police station and handed over to a police officer, H. 4534 Detective Corporal Shabani (PW7). On 2nd March, 2016,

PW7 took the tusks to Mbonea Hassan (PW3), a game warden station at Nsimbo District Council for identification and valuation.

Upon inspection, PW3 confirmed that the four pieces were elephant tusks due to their colour, suture and size. He valued them and prepared the trophy valuation certificate (Exh. P3). The value of the tusks was TZS. 27,750,00.00.

The prosecution case was also built upon two more police officers. H. 611 Detective Corporal Mwalami (PW6) and E. 5701 Corporal Robert (PW8). PW7 recorded a statement of Kapini Selemani (Exh. P5), a witness who passed away before he gave his evidence in the trial Court. The post mortem examination report of Kapini Selemani was also admitted as Exh. P4. PW8 is an exhibit-keepers who tendered a document titled "chain of custody" (Exh. P.6).

In his defence, the appellant admitted that he was arrested outside the compound of PW2's residence but he claimed that he went there to visit his neighbour and thereat he found four people having a meeting. While there, the owner of the house went inside and came out with a parcel. The people whom the owner was discussing with tried to arrest him but at no vail hence the appellant was arrested and charged with the offence of unlawful possession of the government trophy.

The trial court found credence to the prosecution evidence. It dismissed the appellant's claim that the tusks belonged to PW2 on account that he did not cross-examine PW2 on that aspect. Accordingly, it found him guilty as charged, convicted and sentenced him as aforesaid. The first appellate court upheld both conviction and sentence as it was satisfied that the appellant was found with actual possession of the elephant tusks.

At the hearing of the appeal, the appellant appeared in person, unrepresented whereas Ms. Irene Godwin Mwabeza, learned State Attorney appeared for the respondent/Republic.

When the appellant was invited to submit on his appeal, he opted for the learned State Attorney to respond to his grounds of appeal and reserved his rights to re-join, if need to do so would arise. In the circumstances, we invited Ms. Mwabeza to respond to the appeal.

The learned State Attorney began her submission by supporting the conviction and sentence meted out against the appellant by the trial court. She then urged us not to consider the second, third, fifth, seventh and eighth grounds of appeal because they were new grounds not canvassed in the lower court. She added that the fourth ground of appeal is also a new ground but since it centres on a legal issue then the

Court has jurisdiction to determine it in term of section 6 (7) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 (the AJA). To cement her proposition, she referred us to our previous decision in the case of **Godfrey Wilson v. The Republic**, Criminal Appeal No. 168 of 2018 (unreported).

Submitting on the fourth ground of appeal that the search order was prepared contrary to the dictates of the law because the leader of the area where search was conducted did not sign it, the learned State Attorney submitted that section 106 (1)(b) of WCA does not require the the leader of the area where the search is conducted to sign a search order. That section, she submitted, only mandatorily requires the presence of an independent witness.

On the first ground of complaint that Exh. P1 was not found in his house, Ms. Mwabeza admitted that it was seized at PW2's residence after a trap was set up by PW1, PW2, PW3 and PW5 that led to the arrest of the appellant red handed with Exh. P1 at PW2's house.

Addressing us on the sixth ground of appeal whether the charge was proven to the required standard by the prosecution, Ms. Mwabeza argued that the prosecution case was built upon oral and documentary evidence. She said, all documentary evidence tendered before the trial

court were not read over after they were cleared for their admission and that their contents were not explained to the appellant hence prejudiced him. For that reason and relying on the case of **Evarist Nyamtembe v. The Republic**, she urged us to expunge the search order (Exh. P2), trophy valuation certificate (Exh. P.3), PMER (Exh. P4), statement of Kapini Selemani (Exh. P5) and the chain of custody (Exh. P6).

After expunging the documents, she impressed upon us that the remaining direct oral evidence of PW1, PW2, PW3, PW4, PW5, PW6, PW7 and PW8 sufficiently proved the offence against the appellant of being found in unlawful possession of the Government Trophy. She submitted that the evidence of PW1, PW2 and PW5 detailed on how the appellant was tricked and subsequently apprehended with the elephant tusks. She added that PW3 identified and confirmed that the tusks seized from the appellant were elephant tusks due to their colour, suture and size. At the end, Ms. Mwabeza prayed to the Court to dismiss the appeal.

The appellant briefly re-joined that the elephant tusks were retrieved at PW2's residence thus he had no nothing to do with them.

Having considered the grounds of appeal, the record of appeal, the submission of the learned State Attorney and the rejoinder by the

appellant, we find it apt to start with the legal issue raised by the learned State Attorney that some of the grounds of appeal in the memorandum of appeal are new grounds. We entirely concur with her. We, on our part, have compared the second, third, fifth seventh and eight grounds of appeal in the memorandum of appeal with the ones advanced before the High Court, appearing at page 4 - 5 of the record of appeal and we are satisfied that they were not raised and considered by the High Court. They are new grounds and not on point of law.

This Court has, in numerous occasions held that it has no jurisdiction to deal with an issue raised for the first time that was not raised nor decided by lowers courts unless that issue raises a point of law; the jurisdiction of the Court is confined to matters which came up in the lower court and were decided. (See- **Jafari Mohamed v. The Republic**, Criminal Appeal No. 112 of 2006, **Hassan Bundala @ Swaga v. The Republic**, Criminal Appeal No. 386 of 2015, and **Godfrey Wilson v. The Republic** (supra) (all unreported)). We thus refrain ourselves from considering them.

Having disregarded the new grounds of appeal, we are now left with the first and sixth grounds of appeal. The fourth ground of appeal that deals with the issue of search order, Exh. P2 died natural death after we have expunged it from the record. The first and sixth grounds

of appeal will be disposed conjointly as they both boil down to one critical issue that is whether the offence against the appellant was proven to the hilt.

This being a second appeal to this Court we shall then be mindful of the settled principle of law that, the Court rarely interferes with concurrent findings of fact by the courts below. We can only interfere where there are mis-directions or non-directions on the evidence, a miscarriage of justice or a violation of some principle of law or practice. (See **The Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] TLR 149 and **Musa Mwaikunda v. The Republic** [2006] TLR 387).

Having appraised the entire evidence, we concur with the submission by the learned State Attorney that there is cogent evidence coming from PW1, PW2, PW4 and PW5 who set a trap that led to the apprehension of the appellant with Exh. P1. We noted that the trial court went into a great length to analyse the evidence of PW1, PW2, PW4 and PW5 and found them as credible witnesses and that their evidence was not shaken by the appellant's defence. In finding whether the appellant was in possession of the elephant tusks, it applied the principle stated by this Court in the case of **Moses Charles Deo v. The Republic** [1987] TLR 134 that:

> *"... for a person to be found to have had possession, actual or constructive of goods, it must be proved either that he was aware of their presence and that he exercised control over them; or that the goods came, albeit in his absence, at his invitation and arrangement. But it is also true that mere possession denotes knowledge and control."*

See also **Simon Ndikulyaka v. Republic**, Criminal Appeal No. 231 of 2014 and **Mwinyi Jamal Kitalamba @ Igonza and 4 Others v. The Republic**, Criminal Appeal No. 348 of 2018 (both unreported).

At the end the trial court concluded that the appellant was in possession of the elephant tusks without a valid permit from the director of wildlife as he did not produce it at the time of arrest.

We further note that the first appellate court re-evaluated the entire evidence, that of the prosecution and of the appellant. At the end, it concurred with the findings of the trial court that there was ample evidence connecting the appellant with the offence. In sum, the two courts below found the evidence of PW1, PW2, PW4 and PW5 to be credible and reliable thus believed their story and dismissed the appellant's claim that he was not aware of the elephant tusks.

On our part, we find no reason to alter the concurrent findings of the two courts below because it is on evidence that after PW4, Kapini and Jordan received a tip from PW2 that the appellant was in possession of elephant tusks and he was looking for a buyer, they went to a police station seeking a reinforcement to arrest the appellant. PW1, PW2, PW4 and PW5 explained to the trial court on how they set a trap that PW4 together with Kapini and Jordan would pose as would be buyers while PW1, PW2 and PW5 would wait in a nearby place for the appellant to bring the tusks and they did exactly as they had planned. It was their evidence that the business deal between the appellant and PW4, Kapini and Jordan was done at the compound of PW2's residence and after an agreement was reached, the appellant went to fetch the tusks from a place where he hid them. It took him about forty-five minutes to bring the goods. He came back with a sulphate cement bag and he was arrested thereat. Upon being searched, he was found to have four pieces of elephant tusks. With that clear evidence on record, we find that both lower courts correctly applied the principle that once it is established by evidence that, a person was found in possession of a good, then such mere possession means that such person has knowledge and control over that good. We therefore like the two lower courts, find that the appellant was in possession of the four pieces of

elephant tusks as they were positively identified and confirmed by PW3. Besides, the appellant did not produce any valid licence issued by the Director of Wildlife as required by section 85 (1) of the WCA. Therefore, the possession was in contravention of section 86 (1) of the WCA. Accordingly, we are satisfied that the appellant was rightly convicted and sentenced.

In the end, we find that the appeal lacks merit and we do hereby dismiss it.

DATED at **MBEYA** this 18th day of September, 2021.

G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered on this 20th day September, 2021, in the presence of appellant in person and Mr. Davice Msanga, 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