IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

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

CRIMINAL APPEAL NO. 337 OF 2018

STEPHEN s/o JONAS.....1st APPELLANT
FRANK s/o HAMIS.....2nd APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Mambi, J.)

dated the 14th day of September, 2018
in
DC. Criminal Appeal No. 21 of 2016

.....

JUDGMENT OF THE COURT

14th & 21st Sept, 2021.

SEHEL, J.A.:

In the District Court of Mpanda, the appellants together with Jackson Erasto, not a party to this appeal, were charged with unlawful possession of government trophies contrary to section 86 (1) and (2) (c) (ii) 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 (now R.E. 2019) (The EOCCA).

It was alleged at the trial court that, on 15th day of May, 2015 during night hours at Nyaki area in Mlele District in Katavi Region, the appellants together with Jackson Erasto were found in possession of three pieces of elephant tusks of 8 kilograms valued at TZS. 24,750,000.00 the property of the United Republic of Tanzania without any permit sought and obtained from the Director of Wildlife. Each of the appellants pleaded not guilty hence a full trial ensued. The prosecution called a total of seven (7) witnesses and tendered seven (7) exhibits, namely; search orders (exhibits P1 and P2), three pieces suspected to be of elephant tusks (Exh. P3), the trophy valuation certificate (exhibit P4), two cautioned statements (exhibits P5 and P6) and a document titled "a chain of custody" (exhibit P7).

The facts which led to the conviction of the appellants are very straight forward that: the appellants and Enos Merick John (PW5) were were old schoolmates. On 14th May, 2015 at about 15:30 hours, when PW5 returned home from school, he found the appellants waiting for him. After greeting each other, the appellants expressed their need of a room to sleep over a night as in the early hours of that morning, they

had to catch a train to Dar Es Salaam. Upon hearing their request, PW5 allowed them to sleep in his room. Since, they could not all fit in one room, PW5 went to sleep into the next room of his friend, one Deus Kibuti.

While they were asleep, at around 03:30 hours they were woken up by Hoza Selemani (PW3), a hamlet chairperson of Nyaki "A" Katumba area. He was accompanied by an inspector of police, one Alfan Abdallah Sumwa (PW1) and Prosper Pinda (PW2), a park ranger working with the Tanzania National Parks Authority (TANAPA) stationed at Katavi National Park.

It was the evidence of PW1 that while he was on patrol on that night, he received a tip from an informer that there were some people in Katumba village in possession of government trophies and they were about to ferry the trophies to Dar es Salaam on the following day. They were told that the trophies were at the house of Felick Gado at Nyaki "A" village in Katumba. Upon receipt of such information, PW1 together with PW2 went to the house of PW3 and requested him to accompany them to the house of Felick Gado. At the house, PW3 woke

up the dwellers of the house and commanded them to open the door to their rooms as they were about to conduct search. The dwellers complied with PW3's order with the exception of the appellants who were in PW5's room. It took the appellants almost fifteen minutes to open the door. PW1 mounted a search in one room after the other in the presence of PW2, PW3, Happiness Jackti (PW4) and PW5. In the room where the appellants were sleeping, he retrieved three pieces suspected to be of elephant tusks (Exhibit P3). The pieces hidden in jeans trouser, tied up firmly with a rubber and put underneath the mattress that was on the bed that the appellants were sleeping.

The appellants together with the seized three pieces were taken to Katumba police station. A police officer, F. 8343 Detective Corporal Conrad (PW7) interrogated the appellants and recorded their cautioned statements, Exh. P5 and P6. In their statements, the appellants mentioned Jackson Erasto who was subsequently arrested and jointly charged with them.

The trophies were then taken to Mbonea Hassan (PW6), a game warden for identification and valuation. He also weighed and valued the

trophies. He recorded his findings in the trophy valuation certificate, Exh. P4.

In their respective defence, the appellants admitted to have spent a night in PW5's room as they were to catch a train to Dar es Salaam. They also admitted that PW1 seized three pieces suspected to be of elephant tusks under the mattress where the appellants were sleeping but denied any knowledge of them. They claimed that they went there with their bags of clothes only. They also denied to have mentioned their co-accused, Jackson Erasto.

At the end of the trial, the trial court found that the prosecution proved the charge against the appellants but failed to prove it against Jackson Erasto. Accordingly, it acquitted Jackson Erasto but convicted the appellants and sentenced each of them to twenty years imprisonment. They unsuccessfully appealed to the High Court.

Aggrieved with that decision, the appellants appealed to this Court. In their joint memorandum of appeal, they raised the following eight grounds of appeal: -

1. That, the first appellate court erred in law and fact by dismissing the appellants' appeal without taking into consideration that exh. P3 was not found in their house or room.

2. That, the first appellate court erred in law and fact to dismiss their appeal without considering that the said search was conducted at the house that did not belong to them.

3. That, the first appellate court erred in law and fact by dismissing their appeal without having regard that the search was conducted at night without a warrant.

4. That, the first appellate court erred in law and fact to dismiss their appeal without taking into account that the trial court erred in acquitting the owner of the said Exh. P3.

5. That, the said Exh. P3 was found hidden under the mattress in the room of PW2.

6. That, the cautioned statements, Exhs. P5 and P6 were wrongly admitted by the trial court as the learned trial magistrate did not

conduct a trial within a trial before admitting them and the first appellate court failed to appreciate this error.

7. That, the trial court erred in acquitting the said Jackson Erasto who confessed before it that he was the owner of Exh. P3.

8. That, the charge against the appellants was not proven as required by the law and the defence of the appellants was disregarded by the first appellate court.

At the hearing of the appeal, the appellants appeared in person and fended for themselves whereas Mr. Paschal Marungu, learned Principal State Attorney assisted by Mr. Lugano Mwasubila, learned State Attorney appeared for the respondent/Republic.

After they were given a chance to submit on their grounds of appeal, each of the appellants preferred to hear a response from the respondent/ Republic reserving the right to make a rejoinder thereafter.

Mr. Mwasubila made a reply submission for the respondent/ Republic. In the first place, he declared the respondent's stand that it supported the appeal on account that the evidence on record is

wanting to support and uphold both the conviction and sentence against the appellants. Thereafter, the learned State Attorney attacked the first, second, fourth, fifth and seventh grounds of appeal that they were new grounds not dealt with by the lower courts. He argued that in terms of section 6 (7) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 the Court has no jurisdiction to consider and determine matters of fact not raised before the lower court. To cement his proposition, he referred us to our previous decision in the case of **Godfrey Wilson v. The Republic**, Criminal Appeal No. 168 of 2018 (unreported).

On the remaining three grounds of appeal, Mr. Mwasubila responded to them in a chronological order. Starting with the third ground of appeal that the search was illegally conducted during night hours and there was no search warrant, he contended that the search was an emergency hence there was no need of a search warrant. Elaborating as to why it was an emergency search, he submitted that, according to the evidence on record, PW1 received the information at night and he was also informed that the suspects were about to flee to Dar es Salaam in the early hours of that morning, with the trophies. For

that reason, Mr. Mwasubila argued, PW1 had to go on that very night to conduct search in accordance with section 42 (1) (b) (i) and (ii) of the Criminal Procedure Act, Cap. 20 R.E. 2019 (the CPA). He thus urged us to find that the ground of appeal lacks merit.

Regarding the complaint that the cautioned statements, Exh. P5 and P6 were illegally admitted as the trial court did not conduct an inquiry to determine whether the appellants voluntarily made them, the learned State Attorney conceded that the learned trial magistrate committed procedural irregularities by not conducting an inquiry after the appellants had repudiated their cautioned statements. He pointed out that during trial, both appellants retracted their statements as can be gathered at page 63 of the record of appeal but the trial court did not conduct an inquiry to establish whether the appellants made the statements and if they were voluntarily made. To augment his submission, he referred us to the case of **Nyerere Nyague v. The Republic**, Criminal Appeal No. 67 of 2010 (unreported) where the Court echoed the requirement of conducting a trial within a trial or an inquiry into the voluntariness or otherwise of the alleged confession or

admission before it is admitted in evidence. With that anomaly, the learned State Attorney urged the Court to expunge Exhs. P5 and P6 from the record.

Mr. Mwasubila rounded off his submission by conceding to the last complaint that the offence was not proven against the appellants. He argued that there are a number of documents admitted in evidence in the trial court but they were not read over after they were cleared for their admission and that their contents were not explained to the appellant hence prejudiced the appellants. For that reason and relying on the case of **Evarist Nyamtemba v. The Republic**, Criminal Appeal No. 196 of 2020 (unreported), he urged us to expunge the search warrants and seizure certificates (Exhs. P1 and P2), trophy valuation certificate (Exh. P4), cautioned statements of the appellants (EXhs. P5 and P6) and a document titled "chain of custody" (Exh. P7).

He then argued that although there is overwhelming evidence from PW1, PW2, PW3, PW4 and PW5 that the appellants were found with three pieces suspected to be of elephant tusks, PW6 failed to positively confirm that the three pieces were elephant tusks. It was his

submission that since the suspected three pieces were not positively identified, the charge was not proved against the appellants. Accordingly, the learned State Attorney urged us to allow the appeal by quashing the conviction and set aside the sentence imposed on the appellants.

On our part, we fully associate ourselves with the observation and submission made by Mr. Mwasubila. It is true that the first, second, fourth, fifth and seventh grounds of appeal appearing in the joint memorandum of appeal are new grounds. They were not raised and determined by the lower court. We say so because we have compared them with the three grounds of appeal raised by each appellant in their separate petition of appeals found at pages 5 – 9 of the record of appeal and noted 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.

We now advert to the remaining three grounds of appeal. We shall start with the third ground of appeal that the search was illegally conducted at night without a search warrant. Although the learned State Attorney did not directly admit to the complaint but we inferred from his submission that he conceded that the search was conducted at night and there was no warrant. The learned State Attorney invited us to consider that the search was an emergency search done in terms of section 42 (1) (b) (i) and (ii) of the CPA. For ease of reference, we reproduce hereunder that provision of the law, it reads: -

> *"42. (1) A police officer may-*
>
> *(a) N/A*
>
> *(b) enter upon any land, or into any premises, vessel or vehicle, on or in which he believes on reasonable*

grounds that anything connected with an offence is situated, and may seize any such thing that he finds in the course of that search, or upon the land or in the premises, vessel or vehicle as the case may be: -

(i) if the police officer believes on reasonable grounds that it is necessary to do so in order to prevent the loss or destruction of anything connected with an offence; and

(ii) the search or entry is made under circumstances of such seriousness and urgency as to require and justify immediate search or entry without the authority of an order of a court or of a warrant issued under this Part."

From the above provision of law, a police officer is authorized to enter and search in any premise, vessel, vehicle or land and seize therefrom anything which is connected with an offence without a warrant, if such police officer believed that there is reasonable ground to do so due to the urgency of the matter.

That being the position of the law, the issue in this appeal would be whether, on the evidence on record, Alfan Abdallah Sumwe (PW1)

was justified to conduct an emergency search. Recapitulating the evidence, it seems that PW1 who was a police officer received the information at very late hours. He received it at around 03:30 hours while he was on patrol. The said information also alerted him that the suspects were about to leave the area in the next few hours to Dar es Salaam by a train of that early morning. Given the time the information was relayed to PW1 and the fact that the suspects were about to leave within the next few hours, we are satisfied that PW1 acted within the powers vested in a policer officer under section 42 (1) (b) (i) and (ii) of the CPA. Therefore, we find that this third ground of appeal lacks merit.

We now turn to the sixth ground of appeal that the cautioned statements, Exhs. P5 and P6 were wrongly admitted in evidence. The record, at page 63, clearly shows that when PW7 wanted to tender the cautioned statements, the 1st appellant told the trial court that he did not write it and the 2nd appellant told the trial court that he had nothing to do with it. In other words, the appellants repudiated their statements. After, the appellants had raised objection, the trial court ought to have stopped everything and conducted an inquiry to

determine the voluntariness of the cautioned statements. In the case of **Twaha Ali and 5 Others v. The Republic**, Criminal Appeal No. 78 of 2004 (unreported) the Court echoed on the requirement to conduct an inquiry or trial within a trial to satisfy itself on the voluntariness of the cautioned statement after the accused person had repudiated or retracted it. It said: -

> *"If that objection is made: after the trial court has informed the accused of his right to say something in connection with the alleged confession, the trial court must stop everything and proceed to conduct an inquiry or a trial within a trial into the voluntariness or not of the alleged confession. Such an inquiry should be conducted before the confession is admitted in evidence."*

Since the learned trial magistrate did not conduct an inquiry after an objection was raised, we are in agreement with the learned State Attorney that the same were illegally received in evidence. Accordingly, we expunge Exhs. P5 and P6 from the record. The sixth ground of appeal has merit.

Lastly, we consider a complaint that the offence was not proven against the appellants. It be recalled that the appellants were facing a charge of unlawful possession of government trophies. In that charge, the particulars of the offence alleged that the appellants were found in unlawful possession of three pieces of elephant tusks. It is on evidence and not disputed by the appellants that in the room in which they were sleeping, three pieces suspected to be of elephant tusks were retrieved and seized therefrom. The seized items were then taken to Mbonea Hassan (PW6), a game warden with a working experience of twenty-nine years and had attended various trainings and courses on wildlife management for identification and valuation. PW6 prepared a trophy valuation certificate which was admitted as Exh. P6. However, as rightly submitted by the learned State Attorney, all documentary documents admitted in evidence were not read over to the accused person and neither their contents were explained to them. We therefore proceed to expunge the search warrants and seizure certificates (Exh. P1 and P2), trophy valuation certificate (Exh. P4) and a document titled "chain of custody" (Exh. P7) from the record.

After we have expunged Exh. P4, we are left with the oral account of PW3. Having inspected the three pieces suspected to be of elephant tusks, PW3 told the trial court the following: -

> *"It would appear the three pieces were cut out of one elephant tusk, or it was one elephant tusk cut into three pieces."*

Obviously, the above statement tells it all that the expert failed to accurately identify the three pieces. He failed to precisely state that they were pieces of elephant tusks. He simply guessed that the three pieces appeared to be cut from one elephant tusk. Further, upon scrutiny of the entire record of appeal, we noted that there is no any other witness called by the prosecution to prove whether the suspected three pieces were elephant tusks. Since the prosecution was duty bound to establish that the three pieces were elephant tusks but failed to do so, we are satisfied that the prosecution failed to prove the offence of unlawful possession of government trophies against the appellants. We therefore find merit on this ground of appeal.

For the foregoing reasons, we find that the appeal has merit. Accordingly, we allow the appeal, quash the conviction and set aside the sentence. We order that the appellants, **Stephen s/o Jonas** and **Frank s/o Hamis** be released forthwith from prison, unless they are held for any other lawful cause.

Order accordingly.

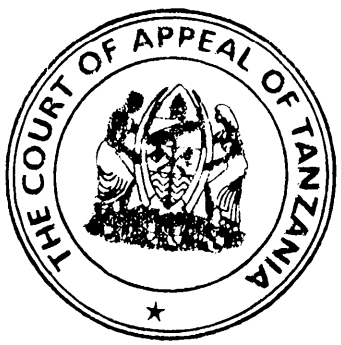
DATED at **MBEYA** this 20th day of September, 2021.

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 21st day September, 2021, in the presence of appellants in person and Mr. John M. Kabengula, 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