IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

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

CRIMINAL APPEAL NO. 258 OF 2020

CHANDE ZUBERI NGAYAGA .....1ST APPELLANT

MOHAMED RASHID RUPEMBE.....2ND APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Ngwembe, J.)

dated the 2nd day of June, 2020
in
DC Criminal Appeal No. 4 of 2020

JUDGMENT OF THE COURT

14th & 18th March, 2021

KEREFU, J.A.:

In the District Court of Liwale, the appellants, Chande Zuberi Ngayaga and Mohamed Rashid Rupembe were jointly and severally charged with the offence of unlawful possession of government trophy contrary to section 86 (1), (2), (c), (iii) of the Wildlife Conservation Act No. 5 of 2009 (the WCA) as amended by section 61 of the Written Laws (Miscellaneous Amendments) Act No. 2 of 2016 read together with paragraph 14 of the First Schedule to and Section 57 (1) and 60 (2) both

of the Economic and Organized Crime Control Act, [Cap. 200 R.E. 2002] (the EOCCA) as amended by the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016. It was alleged that on 20th January, 2018 at Makata Village within Liwale District in Lindi Region, the appellants were found in possession of government trophy to wit, one piece of elephant tusk valued at TZS. 31,500,000,00 the property of the United Republic of Tanzania without permit.

Both appellants pleaded not guilty to the charge. However, after a full trial, they were both found guilty, convicted and each sentenced to pay a fine at the tune of TZS. 63,000,000.00 or to serve a term of twenty years in prison in default.

In essence, the substance of the prosecution case, as obtained from the record is to the effect that, on 20th January, 2018, following a tip from an informer that at Makata Village, around 22:00 hours there was an illegal plan to conduct a business of sale of elephant tusks weighing 170 Kgs, Mshukuru Eliauny Mboya (PW3), a game reserve officer relayed the said information to his boss, one Marwa, and a team of three officers was mobilized and directed to go to the scene of the crime to arrest the vendors. The said team was accompanied by PW3, a driver one Sudi

Ikungu and the said informer who was planted to pretend as a customer who was in communication with the vendors.

PW3 testified that, a few moments after arriving at the scene, around 22:30 hours, they saw a motorcycle moving towards their direction and he directed the driver to switch on the motor vehicle's headlights to enable them to see the people on the motorcycle. It was the PW3's evidence that with the aid of the said lights, they saw three people on the motorcycle, one of them was carrying a luggage in his hands. That, among the three people the informer managed to identify the 1st appellant who intended to sell the elephant tusk to him. PW3 stated further that, he ordered the officers to stop the motorcycle and arrest the said suspects. He said that, before being arrested, the said suspects jumped from the motorcycle and disappeared into the forest leaving the luggage and the motorcycle at the scene of the crime. It was PW3's further evidence that they tried to chase the suspects but in vain. That, they collected the luggage left by the suspects and found therein one elephant tusk (the trophy). They took the said trophy together with the motorcycle make King Lion with Registration No. T. 839 CLA to Liwale Police Station for safe custody. The motorcycle and the trophy were admitted in evidence as exhibits P3 and P4 respectively.

PW3 went on to state that, on 22nd January, 2018 together with one Filipo Bernald Orio (PW4), they went to Liwale Police Station to identify and evaluate the trophy. PW4 assessed the trophy and left it at the police station. PW4 testified that he weighed the trophy at 0.55 kgs and valued it at TZS. 31,500,000.00. He filled a trophy valuation certificate which was received in evidence as exhibit P5. PW3 stated further that, on the same date, he received information that at Makata Village there was another illegal plan to sell elephant tusks around 23:00 hours. He informed his boss on the said plan and he organized a team to go to Makata Village to arrest the vendors. PW3 stated further that, around 23:30 hours, one person with a luggage came and met with other people who were already at the scene. The said luggage was opened for purposes of doing business and PW3 and the team heard arguments among those people complaining against each other that they agreed to sell an elephant tusk but, what was brought was a rhino tusk. PW3 testified that, upon hearing such an argument, they raided the said people and arrested two out of five including the one with the luggage. Having arrested them, PW3 recognized the 1st appellant to be the person who left an elephant tusk on 20th January, 2018 and escaped. The other person who was arrested was the 2nd appellant and were both

taken to the village authority for identification and then to Liwale Police Station.

E.1180 D/SGT Emmanuel (PW1) and E.4057 D/SGT Issa (PW2) interviewed the first and second appellants and recorded their cautioned statements respectively. In the said statements, both appellants confessed to have been involved in the illegal business of selling government trophies on 20th January, 2018. The said statements were admitted in evidence as exhibits P1 and P2 respectively. The case was investigated by WP.7148 D/C Fredina (PW5) who testified that the appellants were arrested on 23rd April, 2018. PW5 added that, in their cautioned statements, both appellants confessed to the offence as charged.

In their defence before the trial court, the appellants denied to have committed the said offence and they contended that the alleged trophy and a motorcycle were not theirs as on 23rd April, 2018 when they were arrested, they had nothing in their hands. As for the cautioned statements, both appellants only admitted their personal particulars contained therein, but disputed other contents related with the trophy business.

After full trial, the trial court relied on the appellants cautioned statements, exhibits P1 and P2 by which they both confessed to have

committed the offence. The learned trial Magistrate was satisfied that in the said statements, the appellants narrated a full account on how they participated in that illegal business and possessed a government trophy. Thus, the appellants were found guilty, convicted and sentenced as indicated above.

Aggrieved, the appellant unsuccessfully appealed to the High Court where the trial court's conviction and sentence were upheld. It was the finding of the learned High Court Judge that the appellants confessions contained in exhibits P1 and P2 left no doubt that the they had committed the offence as charged.

Still dissatisfied, the appellants lodged the current appeal predicated on two (2) grounds in the original memorandum of appeal lodged on 3rd July, 2020 and three (3) additional grounds in a supplementary memorandum of appeal dated 25th August, 2021. All the five (5) grounds raise the following main complaints, that, **one,** the case against them was not proved beyond reasonable doubts. To support their assertion on this ground, they contended that their identification at the scene of the crime was not watertight and that the chain of custody of the seized items was not established. They also stated that the testimonies of PW3 and PW4 are tainted with contradictions on the weight of the seized trophy; **two,** that

the two cautioned statements were unprocedurally recorded; **three,** that the search was conducted contrary to the requirement of section 38 of the Criminal Procedure Act, Cap. 20 R.E. 2019 as the prosecution failed to tender the certificate of seizure and did not summon an independent witness who witnessed the said search; **fourth,** that, the prosecution failed to summon the village chairperson and the alleged informers to testify before the trial court; and **finally,** that, exhibits P3 and P4 were unprocedurally procured and admitted in evidence.

At the hearing of the appeal, the appellants appeared in person without legal representation whereas the respondent Republic was represented by Ms. Faraja George, learned Senior State Attorney.

When given an opportunity to argue their appeal, both appellants adopted their grounds of appeal and preferred to let the learned Senior State Attorney respond first but they reserved their rights to rejoin, if need to do so would arise.

Upon taking the stage, Ms. George declared the stance of the respondent Republic of not supporting the appeal for the reason that the charge against the appellants was proved beyond reasonable doubt. She then argued the appellants' grounds of appeal generally by stating that, in

convicting the appellants, the trial court relied mainly on their cautioned statements, (exhibits P1 and P2) where the appellants clearly explained on how they committed the offence they were charged with. To clarify on this point, the learned counsel referred us to pages 36 and 38 of the record of appeal and argued that, when the said statements were tendered by PW1 and PW2 respectively, the appellants were asked by the trial court if they had any objection to their admissibility in evidence but they did not raise any objection. Thus, the trial Magistrate admitted the said statements in evidence. It was her argument that, it was correct for the trial Magistrate to convict the appellants on their own confession as that was the best evidence to be believed and relied upon. To buttress her proposition, she cited the cases of **Tuwamoi v. Uganda** [1967] EA 51 and **Michael John @ Mtei v Republic**, Criminal Appeal No. 202 of 2010 (unreported).

In that regard, Ms. George disputed all other complaints raised by the appellants in relation to their identification at the scene of the crime, failure by the prosecution to establish the chain of custody and contradictions between the testimonies of PW3 and PW4 in describing the weight of the seized trophy that they have no merit. She emphasized that, in criminal cases where the accused person confesses to have committed the offence, issues of identification and chain of custody are immaterial.

Ms. George added that, even the complaint by the appellants that the search was not properly conducted has no basis, because, in the circumstances of this case, there was no search conducted or even a seizure certificate prepared, as upon being found doing the said illegal business, the appellants abandoned exhibits P3 and P4 and ran away. She further stated that, PW3 was the competent witness to tender exhibits P3 and P4 before the trial court as he was the one who seized them and kept the same at the police station for safe custody. It was her argument that PW4 who was an expert, properly determined the weight of exhibit P3, stated its value and tendered exhibit P5. Based on her submission, Ms. George urged us to find that the confession by the appellants contained in exhibits P1 and P2 was sufficient to prove the prosecution case beyond reasonable doubt.

At the conclusion of the learned Senior State Attorney's address to us, we asked her to comment on the propriety or otherwise of the sentence imposed on the appellants. Ms. George submitted that the sentence imposed on the appellants under section 86 (1) (2) (c) (iii) of the WCA of payment of fine at TZS 63,000,000.00 or imprisonment of twenty (20) years in default was not proper. She then argued that the appellants being the first offenders were supposed to be sentenced under section 60

(2) of the EOCCA and not otherwise. In the circumstances, the learned counsel urged us to rectify the said sentence in terms of section 60 (2) of the EOCCA. She then rested her case by urging us to find the appellants' appeal unmerited and dismiss it in its entirety.

In their rejoinder submission, the appellants did not have much to say other than raising new issues which were not considered by the trial court. They alleged that they were not properly identified at the scene of crime and that the informer and the village chairperson who were alleged to have identified them at the scene of the crime were not summoned. They pointed out contradictions between the evidence of PW3 and PW4 on the description and weight of the seized trophy and contended that PW3 and PW4 were not credible and reliable witnesses. Finally, both appellants disputed their cautioned statements that they were unprocedurally recorded as they lamented that they were tortured.

When probed by the Court as to whether they challenged the said statements or even raised the issue of torture during the trial and specifically when exhibits P1 and P2 were tendered and being admitted in evidence, both appellants conceded that they did not object the admissibility of the said statement and did not raise the issues of torture

during the trial. In addition, the first appellant blamed their advocate for failure to raise the said issue during the trial. Finally, both appellants urged us to consider their grounds, allow the appeal and set them at liberty.

We have carefully considered the submissions made by 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 a 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 assesses the same from the record.

In the instant appeal, it is obvious that the evidence on record that incriminated the appellants heavily and which was apparently used by the trial court to convict them was their own confession indicated in exhibits P1 and P2. Having thoroughly perused the said statements and the record of

appeal, we immediately agree with Ms. George that the same gave a full account on how the appellants committed the offence they were charged with. It is also clear that at pages 36 and 38 of the record of appeal, when the said statements were tendered by PW1 and PW2, the appellants were asked by the trial court if they had any objection to their admissibility in evidence and both appellants indicated that they did not have any objection. Had they raised an objection at that stage, obviously, the trial court would have resorted to conduct an inquiry before deciding to admit or refuse to admit them in evidence. In the case of **Nyerere Nyague v. Republic,** Criminal Appeal No. 67 of 2010 (unreported), the Court stated that: -

> *"...a confession or statement will be presumed to have been voluntarily made until objection to it is made by the defence on the ground either it was involuntarily made or not made at all."*

In the case at hand, both appellants did not object to the tendering of their cautioned statements. In the absence of an objection, as per the above authority, the statements will be presumed to have been voluntarily made. We took a similar view in the case of **Selemani Hassani v. Republic,** Criminal Appeal No. 364 of 2008 (unreported). In that case, the

appellant was afforded an opportunity to challenge the voluntariness of a cautioned statement but he did not object the tendering of it and finally, the same was admitted in evidence as an exhibit. On appeal, the Court emphasized that, in the absence of any objection to the admission of the statement when the prosecution sought to have it admitted, the trial court could not hold an inquiry *suo motu* to test its voluntariness. See also the case of **Stephene Jason & Another v. Republic,** Criminal Appeal No. 79 of 1999 (unreported).

Being guided by the above authorities, it is our considered view, and as rightly found by the trial court, that the appellants' statements provided overwhelming evidence of their participation in the commission of the offence. In the said statements both appellants clearly admitted that they were the ones who transported the trophy on 20th January, 2018 for sale on a hired motorcycle. That, upon seeing the motor vehicle of the game reserve officers, they abandoned the trophy and the motorcycle and ran away. It is settled that an accused person who confesses to a crime is the best witness. The said principle was pronounced in the cases of **Jacob Asegelile Kakune v. The Director of Public Prosecutions**, Criminal Appeal No. 178 of 2017 and **Emmanuel Stephano v. Republic**, Criminal Appeal No. 413 of 2018 (both unreported). Specifically, in **Emmanuel**

Stephano (supra) the Court while reiterating the above principle stated that: -

> *"We may as well say it right here, that we have no problem with that principle because in a deserving situation,* ***no witness can better tell the perpetrator of a crime than the perpetrator himself who decides to confess.****" [Emphasis added].*

Now, since in the current appeal the appellants were the best witnesses through their own confessions, we agree with Ms. George that, other complaints they raised herein, such as, their identification at the scene of the crime, failure by the prosecution to establish the chain of custody and contradictions in prosecution witnesses, have no merit, as the same were not the basis of their conviction and cannot exonerate them from liability in this case. In the event, we find the first, second, third, fourth and fifth grounds of appeal to have no merit.

Consequently, looking at the totality of the evidence, we entertain no doubt that with the appellants' own confession and the available circumstances, the trial court properly found them to have committed the offence they were charged with. In conclusion and for the foregoing reasons, we do not find any cogent reasons to disturb the concurrent

findings of the lower courts, as we are satisfied that the evidence taken as a whole establishes that the prosecution's case against the appellant was proved beyond reasonable doubt.

Finally, is the issue of propriety of the sentence imposed on the appellants. It is on record that, the appellants were convicted of the offence of unlawful possession of government trophies and were each sentenced to pay a fine of TZS. 63,000,000.00 or to serve a term of twenty years in prison in default. This was in accordance with section 86(I)(2)(c)(ii) of the WCA which was improperly invoked.

Having considered the circumstances of the case, we are settled in our mind that the appellants being first offenders deserved a statutory minimum sentence of imprisonment for twenty (20) year provided under section 60 (2) of the EOCCA as amended by section 13 of the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016 to address the issue of duality of punishment stipulated under the provisions of the EOCCA and other written laws. For ease of reference, section 60 (2) as amended, reads as follows: -

> *"(2) Notwithstanding provision of a different penalty under any other law and subject to subsection (3),* ***a person convicted of corruption or economic***

offence shall be liable to imprisonment for a term of not less than twenty years but not exceeding thirty years, or to both that imprisonment and any other penal measure provided for under this Act; *Provided that, where the law imposes penal measures greater than those provided by this Act, the Court shall impose such sentence."* [Emphasis added].

The above provision, imposes a mandatory custodial term of not less than twenty years but not exceeding thirty years or to both that imprisonment and any other provided penal measure. This provision applies upon an accused person's conviction of any corruption or economic offence, notwithstanding provision of a different penalty under any other law. In this case, as indicated above, the appellant was convicted of an economic offence. As such, no option of fine is allowable and that the imprisonment cannot be levied in default of payment of a fine. Given this position, we set aside the order issued by the trial court that each appellant should pay a fine of TZS 63,000,000.00 or in default, serve twenty years imprisonment term.

Consequently, and in substitution therefor, we order each appellant to serve twenty years imprisonment with effect from the date when they were sentenced by the trial court.

In the circumstances, and for the reasons stated above, we find the appeal to have no merit, save for our finding on the propriety of the sentence. Consequently, we uphold the appellants conviction and, except for the adjustment of the sentence, the appeal stands dismissed.

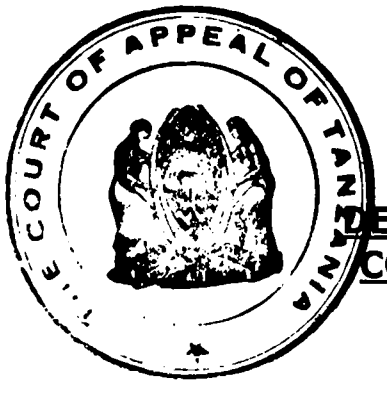
DATED at **MTWARA** this 17th day of March, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 18th day of March, 2022 in the presence of the Appellants in person, unrepresented and Ms. Faraja George, Senior State Attorney learned counsel for the respondent/Republic is hereby certified as a true copy of original.



D. R. Lyimo
DEPUTY REGISTRAR
COURT OF APPEAL