IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

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

CRIMINAL APPEAL NO. 328 OF 2019

RAMADHAN IDD MCHAFU ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Arusha)

(Mzuna, J.)

dated the 18th day of June, 2019
in
Criminal Appeal No. 56 of 2018

JUDGMENT OF THE COURT

27th September & 11th November, 2022

LILA, JA.:

This is a second appeal. The decision of the High Court sustaining the conviction and sentence is being challenged by Ramadhani Idd Mchafu, the appellant. The appellant was arraigned before the Resident Magistrates' Court of Manyara at Babati (the trial court) together with one Mohamed Miraji who was acquitted hence not a party to this appeal to answer a charge of being found in unlawful possession of government trophy contrary to section 86(1) and (2) (b) of the Wildlife Conservation Act No. 5 of 2009 (the WCA) read together with sections 57(1), 60(2) and paragraph 14(d) of the First Schedule to the Economic and Organized Crimes Control Act, (the EOCCA).

The trial was founded on an allegation that on the 23rd day of April, 2016 at Mnadani – Magugu area in Babati District within Manyara Region the duo were found in unlawful possession of one piece of elephant tusk valued at TZS. 6,549, 125/= the property of Tanzania Government.

A substantial part of the facts were not in dispute in this case. The appellant and one Mohamed Miraji were arrested at Mnadani Magugu area. They arrived there on a motorcycle (exhibit PE2) owned by Tumsifu Temu (PW6) but being ridden by the appellant and, on it was Mohamed Miraji and a polythene bag (the bag). By then a team of policemen had already arrived at the scene led by ASP Christopher (PW1). He was together with Detective DC Jerry, Detective Ally and A/Insp. Aloyce (PW4). One Herman Thomas (PW2), a ten Cell leader of the area was called to witness the appellant's arrest with the bag in which an elephant tusk was found. The policemen had set a trap to arrest the duo acting on information from an informer that there were people looking for a customer to buy elephant tusks (exhibit PE3) and prior to their arrival at that place, PW1 had communicated with the appellant pretending to be a prospective buyer and arranged to meet them at Mnadani Magugu. At the scene, P4 and DC Jerry pretended to be buyers and upon the arrival of the appellant and other two persons, the appellant and Mohamed Miraji were arrested. Exhibit PE3 was found in the bag and PW1 prepared a

seizure certificate (exhibit PE1). Halidi Jumanne (PW3), a Park Ranger, was called by PW4 at Babati police station, valued exhibit PE3 and found it weighing 5.5 kilograms worth TZS 6,549,125.00 which information he reduced in writing in a trophy valuation report (exhibit PE4).

The trial court found the charge not proved as against Mohamed Miraji and acquitted him. Conversely, the appellant was convicted as charged and was sentenced to serve twenty (20) years imprisonment. Discontented, the appellant exercised his right of appeal by preferring an appeal to the High Court which was dismissed (Mzuna, J.). He is still protesting his innocence before the Court.

The learned judge's decision is being faulted upon five points as reflected in the substantive memorandum of appeal and four points contained in the supplementary memorandum of appeal making a total of ten grounds. The substance in those grounds boils down to these complaints:-

1. The trial court lacked jurisdiction to adjudicate on the case for want of certificate conferring jurisdiction.
2. Section 29(1) of EOCA was not complied with.

3. The conviction was faulty for relying on a trophy valuation report prepared by an unqualified person in terms of section 86(4) of the WCA.
4. The charge was defective.
5. Consent by the Director of Public Prosecutions (DPP) for trial by the subordinate court by is invalid for being issued under a wrong provision of the law.
6. Exhibits PE1, PE2, PE3, PE4, PE7 and PE8 were wrongly tendered by a prosecutor who was not a witness.
7. Search and seizure of the Government Trophy (exhibit PE3) was improper for want of search warrant.
8. Possession of exhibit PE3 was not proved because a receipt was not issued after its seizure in terms of section 38(3) of the Criminal Procedure Act (the CPA).
9. Chain of custody of exhibit PE3 was broken.
10. The charge was not proved on the required standard.

As the appellant had no legal representation, he personally elaborated his grounds of appeal before us at the hearing of the appeal. Ms. Janeth Sekule, learned Senior State Attorney, Ms. Upendo Shemkole and Ms. Lilian Kowero, both learned State Attorneys represented the

respondent Republic. It was, however, Ms. Kowero who took the floor to resist the appeal.

Grounds 1 and 5 of appeal are questioning the trial court's jurisdiction to try the case. The appellant's attack was that since he was charged on 2/5/2016, consent for prosecution which was issued under section 26(1)(3) of the EOCCA was signed by the State Attorney In-charge of Manyara who had no powers to issue it and that the certificate conferring jurisdiction to the subordinate court to try the case was issued under a wrong provision of the law. In respect of the first limb, he contended that it was a legal requirement that consent must be issued by the DPP himself. It was argued that since that was not the case, the situation was as if it was not issued hence the trial court lacked jurisdiction rendering the proceedings a nullity. The case of **Omari Bakari @ Daudi vs Republic**, Criminal Appeal No. 52 of 2022 (unreported) was cited to us to reinforce his argument.

Ms. Kowero, refuted that contention arguing that the consent was properly issued by State Attorney In-charge in terms of the Economic Offences (Specification of Offences Exercising Consent) Notice, 2014, Government Notice No. 284 published on 15/8/2014 through which the DPP's powers to issue consent was delegated to the State Attorney In-

charge or a Prosecution Attorney In-charge of the region or district in which the offence took place.

We have perused the cited law and we respectfully agree with the learned State Attorney as that was the correct position of the law at the time the appellant was arraigned. We also acknowledge that, indeed, the cases cited to us emphasized the need for a trial court to ensure that there is consent and certificate conferring jurisdiction before embarking on the trial of an economic case because they are the ones which confer or cloth a court with mandate to try such case without which the proceedings are rendered a nullity. For instance and by way of emphasis, in **Ramadhani Omari Mtiula vs Republic**, Criminal Appeal No. 62 of 2019 cited in **Omari Bakari @ Daudi vs Republic** (supra) case, the Court stated:

> *"Thus, without the DPP's consent and certificate conferring the respective jurisdiction, the District Court of Songea embarked on a nullity to try Criminal Case No. 8 of 1995. On that account, since the first appeal stemmed from null proceedings this adversely impacted on the appeal before the High Court."*

Unfortunately, there was no elaboration from the appellant on the second limb on the wrong citation of the law in the certificate to confer jurisdiction to the subordinate court to try an economic case. Ms. Kowero

was, however, firm that the cited provisions were proper. Having examined the faulted certificate, we are satisfied that as the charged offence was an economic offence, section 12(3) of the EOCCA was the only relevant provision in issuing the certificate. We accordingly hold that both the consent and certificate were valid and therefore the trial court had the requisite jurisdiction to try the case. The complaint on jurisdiction in grounds 1 and 5 of appeal is therefore unfounded and we dismiss it.

The appellant complained in ground 4 that the charge was defective. He contended that the particulars of the offence used the words 'unlawful possession" instead of "without permit" and referred the Court to the decision in **R vs Titus Petro** [1998] TLR 395 to fortify the assertion that for the offence to be complete, the above words must have been reflected in the charge. Ms. Kowero discounted it as being unworthy of merit as reference to unlawful possession meant without permit.

The charge against the appellant was predicated under section 86(1) and 2(b) of the WCA read together with sections 57(1), 60(2) and paragraph 14(d) of the schedule to the EOCCA. While section 86(1) of WCA creates the offence, section 57(1) of EOCCA treats it to be an economic offence. Sections 86(2) of WCA and 60(2) provide for the

sentence in the event of a conviction. Section 86(1) of WCA makes a prohibition in these words:

> *"86-(1) subject to the provisions of this act, a person shall not be in possession of, or buy, sell or otherwise deal in any government trophies"*

It is plain therefore that it is against the law and therefore unlawful to do any of the above specified acts. Contextually, therefore, the charge found at page 1 of the record rules out the appellant's complaint. The complaint is purely a misconception and we dismiss it.

Delayed arraignment is a complaint in ground 2 of appeal. Elaborating it, the appellant argued that he was not produced in court within 48 hours after his arrest by the police and he cited to us the case of **Mashimba Dotto @ Lukubanija vs Republic**, [2016] T. L. S. L. R. 388 in supporting his contention. There was concession by the learned State Attorney that while the appellant was arrested on 23/4/2016, he was arraigned in court on 2/5/2016 which was about a week but urged that the non-compliance be ignored as is curable under section 388 of the CPA since no injustice was occasioned to the appellant. We preface our discussion with the import of section 29(1) of EOCCA. It provides as follows;

> *"after a person is arrested, or* ***upon the completion of investigations and the arrest of any person or persons, in respect of the commission of an economic offence****, the person arrested shall as soon as practicable, and in any case within not more than forty-eight hours after his arrest, be taken before the District Court and the resident magistrate within whose local limits the arrest was made, together with the charge upon which it is proposed to prosecute him, for him to be dealt with according to law subject to this Act." (Emphasis added).*

From its wording, the section puts it as legal requirement in very clear and imperative terms that an accused person must be produced in court within forty- eight hours of either his arrest or upon completion of investigation. Forty-eight hours are therefore gauged from the beginning of either of those occurrences. It is therefore a matter to be determined based on the evidence availed to the court as to either the time when the arrest was effected or when the investigation was completed. In the present case, we are only told that the appellant was arrested on 23/4/2016 and was arraigned in court on 2/5/2016. Evidence is lacking as to when investigation was completed. In some cases, investigation is completed sometime after an arrest. It is a matter of evidence. We are saying so alive to what we said in **Laurent Rajabu vs Republic**, Criminal

Appeal No. 270 of 2012 (unreported). In that case the record showed that the incident occurred on 1/11/2009 and the appellant remained in custody until 16/2/2010 which was about three months and the Court considered it to be a very long time for one to stay without being charged. It went to on state that:-

> *"Such a delay in charging the appellant not within reasonable time is a serious and fatal omission on the part of the prosecution's case leading to watering-down the credence of their case. For that reason, we agree with Mr. Hashim Ngole that such a delay in charging the accused (appellant) creates doubt on the credence of prosecution's case."*

In the light of the above, consideration is on the reasonableness of the time taken to arraign an accused person in court from the date of his arrest. The position is therefore that in every situation it is important that an accused person should be charged within reasonable time and in the cited case, three months' delay was taken to be too long and unreasonable time. To the contrary, in the present case, the delay was of only around eight to nine days which period we consider not to be long to cast doubt on the prosecution case. We dismiss the complaint.

The complaint in ground 3 of appeal is about the appellant's conviction resting on a trophy evaluation report (exhibit PE4) which was prepared by an unqualified person in terms of section 86(4) of the WCA. The appellant asserted that PW3 introduced himself as Park Ranger and the form used made reference to GN No. 243 of 2/7/2010 instead of GN. No. 207 of 15/6/2012. It was his conclusion that exhibit PE4 and evidence by PW3 was invalid and cannot therefore ground a conviction. Ms. Kowero countered the contention by asserting that a Park Ranger is covered under section 3 of the WCA. She referred us to the Court's recent decision in the case of **Jamali Msombe vs Republic**, Criminal Appeal No. 28 of 2020 (unreported).

Section 86(4) of the WCA referred to by the appellant stipulates that a certificate signed by the Director or wildlife officers from the rank of wildlife officer stating the value of any trophy involved in the proceedings shall be admissible in evidence and shall be *prime facie* evidence of the matters stated therein. Further, section 3 of the WCA defines a "wildlife officer" thus:

> *"Wildlife officer" means a wildlife officer, wildlife warden and wildlife ranger engaged for the purposes of enforcing this Act.*

It seems therefore obvious to us that PW3 as a Park Ranger is a wildlife officer with mandate to do a valuation of a wild animal and prepare and tender a certificate under section 86(4) of the WCA. Besides, in **Jamali Msombe vs Republic** (supra) cited to us by the learned State Attorney, the Court, after a critical analysis and consideration of the meaning of a game ranger, it concluded that a "wildlife officer", "wildlife ranger", a "game ranger' or a "wild ranger" mean one and the same person. There is no striking difference between them. That said, PW3 was a qualified person to perform the valuation of the government trophy the subject of the case. Ground 4 of complaint is hereby dismissed. With this finding, we also agree with Ms. Kowero that using a form referring to an outdated Government Notice occasioned no any injustice to the appellant for what was important was the value of the trophy as there was a back-up detailed account by PW3 of the value of the trophy and therefore the anomaly is curable under section 388 of the CPA.

Another complaint as reflected in ground 6 of appeal is that Exhibits PE1, PE2, PE3, PE4, PE7 and PE8 were wrongly tendered by a prosecutor who was not a witness. The prayer by the appellant was that they should be expunged and in their absence the Court should take it that the charge was not proved. Ms. Kowero readily conceded that looked superficially, one may be faked that such exhibits were tendered by the prosecutor,

but a critical examination would show clearly that the witnesses during their respective testimonies intimated their intention to tender such exhibits and the prosecutor simply invited the trial court to receive and admit them as exhibits. We have scrutinized the record and we agree with the learned State Attorney's argument. The situation that we have encountered bear semblance with the one the Court grappled with in the case of **Abas Kondo Gede vs Republic**, Criminal Appeal No. 472 of 2017 (unreported) and the Court held that the prosecutor simply invited the court to receive the exhibits after the witnesses had cleared them for admission. The Court treated the infraction not fatal and not prejudicial to the appellant. In the same parity of reasoning, we dismiss this complaint.

Failure to issue a receipt of the seized property (exhibit PE3) is a complaint by the appellant in ground 8 of appeal. That complaint was based under section 38(3) of the CPA but in the course of hearing, the appellant corrected it to be section 22(3) of the EOCCA. There was concession from the learned State Attorney that there was no compliance but she was of the view that no prejudice was caused to the appellant as the infraction is curable under section 388 of the CPA. No reasons were given for the suggestion.

It may be observed at once that, sections 38(3) of the CPA and 22(3) of the EOCCA provide for a mandatory requirement for a police officer conducting the search to issue a receipt evidencing seizure of a property following a search. It is in evidence by PW1, PW2 and PW4, in the instant case, that a certificate of seizure (exhibit PE 1) was prepared, filled and signed by PW1 and was also signed by PW2 and the appellant. No receipt was issued by PW1 to the appellant in compliance with section 22(3) of the EOCCA. The issue to be determined here is therefore whether its absence had any consequences to the prosecution case.

Admittedly, we could not easily lay hands on a past decision on the situation we are confronted with. However, the Court was faced with an issue bearing some semblance with ours in the case of **Abdalah Said Mwingereza vs Republic**, Criminal Appeal No. 258 of 2013 (unreported). In that case the appellant challenged PW2 for not being able to identify either the seized pistol or the certificate of seizure he had himself prepared and caused it to be signed by the appellant and two other persons and tendered in court as exhibit P3. In his defence, the appellant never denied to have signed the seizure certificate. On these facts, the Court stated that:-

> *"It may be observed however that normally under section 38(3) of the Criminal Procedure Act seizure*

receipts are issued following issue of search warrants. But even if the seizure certificate were to be ignored still there was sufficient evidence from PW1 and PW2 which proved that the appellant was found with the pistol and seven rounds of ammunition."

In the present case, the appellant signed the seizure certificate and did not disown his signature during his defence. Instead, he claimed to have been hired by Mohamed Miraji, after they were arrested in possession of the Government trophy. That by itself amounted to confession that he was found in possession of the government trophy save for who owned the same which issue we shall discuss latter in this judgment. PW1 and PW2 gave evidence on the same line. Like in **Abdalah Said Mwingereza vs Republic** (supra), absence of the official receipt is inconsequential in establishing that the appellant was found in possession of the Government trophy. The omission to issue a receipt was not therefore fatal. It was cured by, not only the appellant's own evidence, but also by the evidence of PW1 and PW2. It is hackneyed stance of the Court that even in the absence of documentary evidence, a court may act on oral evidence of witnesses relayed in court if it reveals sufficient details of the information contained in a document and ground a conviction notwithstanding the relevant document being expunged from the record.

(see **Huang Qin and Another vs Republic**, Criminal Appeal No. 173 of 2018 and **Anania Clavery Betela vs Republic**, Criminal Appeal No. 355 of 2017 (both unreported)]. This complaint misses legs to stand on and we dismiss it.

Linked with above is the complaint in ground number 7 of appeal that the search and seizure of the Government Trophy (exhibit PE3) was improper for want of search warrant. The complaint escaped the minds of both the appellant and the learned Senior State Attorney hence he had no advantage of hearing the substance of the complaint and the response thereof respectively. We could, for that reason, validly assume that it was abandoned. However for the sake of it, it is true that the arresting team had no search warrant. But that does not dispel the fact that the bag the appellant had in possession was searched and an elephant tusk seized therefrom. The oral evidence of PW1 and PW2 is clear on that. Given the seriousness of the offence, this is a fit case where section 169(1)(2) of the CPA rightly apply with the effect that absence of a search warrant at the time search was conducted and a government trophy being seized was inconsequential. We therefore hold that the contravention was not fatal. Exhibit PE3 was therefore properly seized, admitted as exhibit and acted on to convict the appellant. The complaint has no merit and is dismissed.

Although the appellant complained of chain of custody of exhibit PE3 not being established in ground 5 of the memorandum of appeal which is ground 9 herein, he opted not to elaborate it during the hearing of the appeal. The impression created is that he abandoned it after a reflection that it is unworthy of discussion. That route must have been right in the circumstances of this case where the chain of custody may be established by oral evidence instead of documentation (paper trail) as the item the subject matter of the charge was an elephant tusk to which the Court has held it not an item which can change hands easily and may not be easily tempered with [see **Joseph Leonard Manyota vs Republic**, Criminal Appeal No. 485 of 2015 and **Issa Hassan Uki vs Republic**, Criminal Appeal No. 129 of 2017 (both unreported)]. In **Issa Hassan Uki's** case (supra) the Court stated:-

> *"We are of the considered view that elephant tusks cannot change hands easily and therefore not easy to temper with. In cases relating to chain of custody, it is important to distinguish items which change hands easily in which the principle stated in* ***Paulo Maduka*** *and followed in* ***Makoye Samwel @ Kashinje and Kashindye Bundala*** *would apply. In cases relating to items which cannot change hands easily and therefore not easy to temper with, the principle laid down in the above case can be relaxed."*

In the instant case, the record bears out that after exhibit PE3 was seized at Mnadani Magugu, it remained at the police station under the control of PW4 who called PW3 to do the valuation while there and it was produced in court by PW4 himself. There is no indication that it fell into another person's hands at any moment other than PW4. We hasten to hold that the testimonies from PW1, PW4 and PW3 sustained the completeness of the chain of custody. Exhibit PE3, therefore, remained intact. We entertain no doubt that the elephant tusk seized at Mnadani Magugu was the one produced in court.

Lastly, we agree with the learned State Attorney that the charge against the appellant was proved beyond reasonable doubt as opposed to the appellant's complaint in ground 10 of appeal. As we have endeavoured to demonstrate above, the appellant was arrested while in possession of a bag from which exhibit PE3 was seized. His assertion in his defence that the bag belonged to Mohamed Miraji who he alleged had hired him but was acquitted is highly improbable as PW1 confirmed that it was the appellant with whom he communicated with and arranged to meet him at Mnadani Magugu for purchasing exhibit PE3 after calling the same number and finding that it belonged to him. PW1 was believed by the trial court which observed him testifying and, from the nature of his evidence on

record, we have no cogent reason to doubt him. That said ground 10 of appeal fails and we dismiss it.

In the final analysis, we find no merit in this appeal and we hereby dismiss it in its entirety.

DATED at **DAR ES SALAAM** this 10th day of November, 2022.

S. A. LILA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Judgment delivered this 11th day of November, 2022 in the presence of the Appellant in person and Ms. Upendo Shemkole, learned State Attorney, for the Respondent/Republic both appeared through Video Link is hereby certified as a true copy of the original.

A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL