IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MWARIJA, J.A., MAKUNGU, J.A., And MDEMU, J.A.)

CRIMINAL APPEAL NO. 11 OF 2021

IBRAHIM IDD NAAM ..... 1ST APPELLANT

RAMADHANI SALIM RAMADHANI ..... 2ND APPELLANT

NASSORO HATIBU RAJABU ..... 3RD APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Masara, J.)

dated the 29th day of September, 2020
in
Criminal Appeal No. 28 of 20019

JUDGMENT OF THE COURT

26th September & 5th October, 2023

MWARIJA, J.A.:

The appellants, Ibrahim Idd Naam, Ramadhani Salim Ramadhani and Nassoro Hatibu Rajabu (the 1st – 3rd appellants respectively) were charged in the District Court of Babati with the offence of unlawful possession of Government trophy contrary to sections 86 (1) and (2) (b) of the Wildlife Conservation Act, No. 5 of 2009 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, Chapter 200 of the Revised Laws (the EOCCA).

It was the prosecution's case that on 17/9/2016 at Mtuka Village within Babati District in Manyara Region, the appellants were unlawfully found in possession of sixteen pieces of elephant tusks weighing fifty two kilograms, total valued at TZS 131,940,000.00, the property of Tanzania Government. When they were arraigned before the trial court, the appellants denied the charge and as a result, the prosecution called a total of seven witnesses to testify. On their part, the appellants relied on their own evidence in defence.

The facts giving rise to appellants' arrest and later their trial and conviction by the trial court, may be briefly stated as follows: On 17/9/2016, the police received information from its secret informer through ASP Christopher Msonsa (PW1) that, illicit business of selling elephant tusks would be conducted at Mtuka area on the night of that date. On that information, PW1 arranged for a trap. He went to the scene with other police officers including A/Insp. Aloyce Bwire (PW3). They were directed by the informer to the particular location where the illegal business would be conducted. Having arrived at the area, PW1 and his team took cover in the nearby bush. Later on between 1:00 and 1:15 a.m., a group of persons carrying sulphate bags on a bicycle arrived at the scene and placed down the bags. Shortly thereafter, another group of persons suspected to be the buyers, appeared. It was at that moment

that PW1 and his team emerged from the bush and managed to arrest three out of seveal persons who had arrived at the scene. The sulphate bags were searched and according to PW1, sixteen pieces of trophy suspected to be elephant tusks were found. The appellants were later charged as shown above.

In his evidence, PW1 said that, the three persons who were arrested at the scene of crime were the appellants. They were taken to Babati Police Station together with the seized sixteen pieces of the trophy which were later identified by Samwel Daud Bayo, a Game Warden (PW4) to be elephant tusks. The bicycle, make Phoenix, green in colour was also seized. It was PW1's further evidence that, after the seizure of the trophy and the bicycle, he prepared a seizure certificate which was signed by all the appellants. The elephant tusks were handed over to No. D 7540 S/Sgt Masoud (PW2), the Police Exhibits Keeper to keep them in safe custody. They were later tendered and admitted in evidence as exhibit P1. The certificate of seizure was admitted as exhibit P2 while the six sulphate bags and the bicycle were admitted in evidence as exhibit P3 collectively. The evidence of PW1 was supported by that of PW3 who testified that, he also signed the seizure certificate.

On how the elephant tusks and other exhibits were kept at the police station, PW2 testified that, after he had received them, he registered the same in the exhibits register and thereafter marked each piece of the tusks with the number of the register, which was register No. 89.

As shown above, the pieces of the trophy were identified by Samwel Daud Bayo, (PW4). It was his evidence that the same were elephant tusks and according to his valuation, the same were worth USD 60,000.00, equal to TZS 131,940,000.00. He tendered a valuation report which was admitted in evidence as exhibit P5.

At the police station, each appellant was interrogated by a different police officer. No. E 6749 D/Cpl. Donald (PW7) interrogated the 1st appellant while No. E 4279 D/Cpl. Nicholaus (PW5) interrogated the 2nd appellant. The 3rd appellant was interrogated by WP 5328 D/Cpl. Josephine (PW6). The three named witnesses contended that, all the appellants confessed to have committed the offence. The statement of the 1st, 2nd and 3rd appellants were admitted in evidence after a trial within a trial as exhibits P7, P5 and P6 respectively.

In their defence, the appellants exculpated themselves from the charge. The first appellant (DW1) testified that, on 16/9/2016 he travelled from his home at Puli Village, Kondoa District to Endagire Village,

Babati Rural District to great his in-laws. He arrived at Mamire Village at about 6:00 in the evening. While at that place, he was arrested by police officers who forced him into the police motor vehicle in which he found two other persons. He was thereafter taken to police station. Having stayed for a while at the police station, he was taken out together with two other persons and shown elephant tusks. He denied that the same were found in his possession. On 18/9/2016, he was taken into a small room in which, after he had been beaten by police officers, among them being PW4, he was forced to sign a document which was later tendered in court as his cautioned statement. It was his evidence further that, as a result of being tortured by the police, he had to be taken to hospital where he was attended by one Dr. Emmanuel Bayo.

The 2nd appellant (DW2) gave a similar defence. He testified that, on 18/9/2016, he was working in his farm at Chemchem area. At about 7:00 p.m., while he was returning home, he met a motor vehicle in which there were two persons. They forced him to enter into it and while therein, those persons slapped, and chained him. They drove away and when the motor vehicle stopped, he realized that he was at the police station where he was locked up. On the next day, he was taken to a small room in which he was asked about his name and residence. Having answered them, he was shown some sulphate bags in which were

elephant tusks. He denied ever seen those tusks before. The police then forced him to sign a document which was later tendered in court as his cautioned statement.

On his part, the 3rd appellant (DW3) stated in his defence that, on 21/8/2016, he was in the Babati police cafeteria having a drink. While there, a woman arrived and sat behind him. He asked her to join him and unhesitantly did so. While having conversation with that woman, one person arrived and the woman appeared to have got worried and thus decided to leave. The person warned the 3rd appellant to stay aware from that woman. That was all for that day. On 15/9/2016, the person he met at the police cafeteria arrived at his (DW3's) home. He came to know that the person, who was in the company of other persons, was a police officer by the name of Donald (PW7). According to DW3, the said person (PW7) asked him whether he remembered him and thereafter, threatened him that his day had come. He was arrested and taken to Magugu and later to Babati Police Station. After having stayed there for two days, he was charged in the trial court. He denied having been found in possession of any Government trophies adding that, he had never known the 1st and 2nd appellants before the date of his arrest.

In its judgment, the trial court found that, the case against the appellants had been proved beyond reasonable doubt. It relied on the evidence of PW1 and PW3 to the effect that, they arrested the appellants on the material night at Mutuka Village. It also acted on the evidence of PW4 who identified the elephant tusks as well as the evidence of PW2, the police officer who testified that, he received and kept the elephant tusks and other exhibits. The learned trial Senior Resident Magistrate was of the view that, since the appellants were arrested red handed at the scene of crime, the question of a mistaken identity did not arise. The trial court relied also on the cautioned statements of the 1st – 3rd appellants which were recorded by PW5, PW6 and PW7 and which, despite being objected by the appellants, were admitted in evidence as shown above. The trial court was also satisfied that, from the evidence of PW2, the chain of custody of the elephant tusks was unbroken. As for the appellants' defence, the learned trial Senior Resident Magistrate found that, the defence evidence did not raise any reasonable doubt against the prosecution case. It thus convicted and sentenced each of them to twenty year imprisonment.

Aggrieved by the decision of the trial court, the appellants appealed to the High court. Their appeal was however, unsuccessful. In its judgment, the High Court (Masara, J.) held, **first**, that since the

appellants were arrested at the scene of crime, their complaint that they were not properly identified was without merit because the requirement of considering the necessary factors for identifying a suspect under difficult conditions, did not arise. **Secondly,** on the appellants' cautioned statements, the learned first appellate Judge was of the view that, the same were valid because, apart from being recorded in a narrative form, which the learned High Court Judge found not to be a fatal irregularity under s. 57 of the Criminal Procedure Act, Chapter. 20 of the Revised Laws (the CPA), they were recorded within the time prescribed under s. 50 (1) (a) of the CPA.

The first appellate court found further that, the chain of custody of elephant tusks, which were the subject of the charge, was properly established by the evidence of PW1, PW3, PW4 as well as PW2, the exhibit keeper who explained that, after having received them, he labelled each piece of the tusks using the number of the exhibits register in which the tusks were recorded. Further that, he later handed them to PW4 who, after valuation, returned them to PW2. The same were therefore handed over to PW1 for him to tender them in court. Relying on our decision in the case of **Issa Hassan Uki v. Republic**, Criminal Appeal No. 303 of 2007 (unreported), the learned first appellate Judge concluded that, the chain of custody of exhibit P1 was established by the evidence of the said

witnesses, particularly so because, the items were not of the nature which could change hands easily.

The High Court also dismissed the appellants' complaint that the prosecution evidence was tainted with inconsistencies and discrepancies. Relying on *inter alia,* the Court's decision in the case of **Chrizant John v. Republic,** Criminal Appeal No. 313 of 2015, (unreported) the learned Judge found that, the complaint about inconsistencies and contradictions of the witnesses' evidence on the number of pieces of elephant tusks found in the sulphate bags, were minor. This, he said, is because from the totality of the evidence, the number of pieces of elephant tusks seized at the scene of crime and those which were received by the police exhibits keeper (PW2) and later tendered in court were sixteen and therefore, the inconsistencies and contradictions did not corrode the credibility of the prosecution evidence. In conclusion, like the trial court, the first appellate court was satisfied that the prosecution case was not shaken by the appellants' defence and therefore, dismissed the appeal in its entirety.

Dissatisfied further with the decision of the High Court, the appellants preferred this second appeal. According to their joint memorandum of appeal filed on 4/4/2022, their appeal is predicated on 11 grounds of complaint. Later on 15/9/2023 however, they lodged a

supplementary memorandum of appeal consisting of 6 grounds. For reasons which will be apparent herein, we are not going to consider all the grounds raised by the appellants.

At the hearing of the appeal, the appellants appeared in person, unrepresented while the respondent Republic was represented by Ms. Adelide Kassala assisted by Ms. Grace Madikenya and Mr. Charles Kagirwa, all learned Principal State Attorneys. Before the appeal could proceed to hearing, Mr. Kagirwa informed the Court that, the respondent was not opposing it on the basis of grounds 2, 3, 4, 5 and 7 of the memorandum of appeal which challenge the finding of the High Court that, the chain of custody of exhibit P1 was established. In the said grounds, the appellants state as follows:

> "2. *That, the first appellate court erred to believe that the case against the appellants was proved beyond reasonable doubt despite that the documentary evidence which formed the basis of the case, namely, the Certificate of Seizure (exhibit P2), the Trophy Valuation Report (exhibit P4) and the Cautioned Statements of the appellants (exhibit P7, exhibit P5, exhibit P6) were unlawful, as they were not read out in court after admission. Thus exhibit P2, P4, P5, P6*

and P7 should be expunged; this is fatal to the whole case.

3. *That, the lower courts erred when they believed that the case against the appellants was proved beyond reasonable doubt despite [the fact that there were] no Exhibit Register (No. 89), [and] handing over documents [establishing the] or chain of custody from which would have [proved] the case beyond reasonable doubt.*

4. *That, the first appellate court erred in believing that the case was proved beyond reasonable doubt but failed to see that exhibit P1 (the 16 pieces of elephant tusks) were admitted in evidence without proper chain of custody/handling of exhibit. One wonders how did PW1 came to repossess the exhibits so as to tender them in court as exhibit on 14/12/2016 having testified that the exhibits were handed to PW2 for safe custody on 17/9/2016. This casts doubt which must be resolved in favor of the appellants.*

5. *That, the first appellate court erred for failure to properly examine and evaluate the chain of custody as the same was not a full proof, it was unverifiabie and it is*

irretrievably broken beyond repair; it could not sustain conviction.

6. *That the lower courts erred for failure to properly examine the integrity of the chain of custody of the trophy, as the same was broken from the very beginning. PW1 and PW3 who allegedly seized the exhibits did not say whether they marked them or sealed them immediately after seizing them, or how the exhibits were handled or secured from the scene to Babati police so as to avoid faul play, or under whose custody the exhibit was all the way to the police. In addition, PW2 suggested that the appellants were not present when the exhibits were handed to him for custody at Babati police station. To this extent, there is doubt whether the suspected trophy allegedly seized with the appellants in the forest at 01:15 hrs was the very same one which was handed to PW2 at Babati police station for custody at 2:00 hrs and later identified to be Government trophy. The doubt to be resolved in favour of the appellants.*

7. *That, the lower courts erred to believe that the chain of custody was established despite the failure by prosecution to call the said*

police officer DONALD who was an important link for undisclosed reason. PW2 who identified the trophy stated that it was given to him by Donald, yet it is prosecution's case that the exhibits allegedly seized with the appellants were under custody of PW2 (Masoud). Thus, failure to call the said Donald to testify breaks the chain, and the doubt therefrom must be resolved in favor of the appellants."

The learned Principal State Attorney also conceded to the 8th ground of appeal in which the appellants state as follows:

> *"8. That, the first appellate court erred for failing to see that there was no sufficient and credible evidence to warrant conviction against the appellants."*

When he was prompted by the Court to express his stance on the 1st ground of the appellants' supplementary memorandum of appeal, Mr. Kagirwa conceded also to that ground in which the appellants faults the learned first appellate Judge for having failed to find that, the trial court did not have jurisdiction to entertain the case. That ground is to the following effect:

> *"That, the learned High Court Judge erred in law and fact in not finding that, the trial court (the*

District Court of Babati) had no territorial Jurisdiction to try Economic Case No. 2 of 2016 because, the certificate of order for trial directed that Economic Case No. 2 of 2016 be tried in the Resident Magistrate's Court of MANYARA AT BABATI."

In determining the appeal, we wish to begin with the 1st ground of the appellant's supplementary memorandum of appeal reproduced above. We agree with both the appellants and Mr. Kagirwa that, the District Court of Babati did not have jurisdiction to try the case. By her certificate of transfer of the Economic Case against the appellants for trial by the subordinate court, the learned State Attorney In-charge of Manyara Region conferred the jurisdiction to try it to the Court of the Resident Magistrate, Manyara Region at Babati, not the District Court of Babati. The Certificate reads as follows:

"I, IMMACULATA BANZI, the State Attorney In-charge of Manyara Region, in terms of section 12 (3) and (4) of the Economic and Organized Crime Control Act [Cap. 200 R.E. 2002], do hereby ORDER that the Economic Case No. 2 of 2016 in which ***IBRAHIM IDDI NAAM, RAMADHANI KALIM RAMADHANI*** *and* ***NASSORO HATIBU RAJABU*** *are charged for contravening paragraph 14 of the 1st Schedule to as amended by section*

16 (a) of the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016 and section 57 (1) and 60 (2) as amended by section 13 (b) of the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016 both of the Economic and Organized Crime Control Act [Cap. 200 R.E. 2002] read together with section 86 (1) (2) (b) of the Wildlife Conservation Act, No. 5 of 2009 ***BE TRIED BY THE RESISENT MAGISTRATE'S COURT OF MANYARA AT BABATI."***

Signed at Babati this 1st day of December, 2016

Sgd.
Immaculata Banzi
STATE ATTORNEY IN-CHARGE

It is obvious, in the circumstances that, the District Court of Babati lacked jurisdiction to try the case because it was not the one conferred that jurisdiction under s. 12 (3) of the EOCCA. The provision empowers the Director of Public Prosecutions or any State Attorney duly authorized by him to order that an economic crime case triable by the Economic Crimes Court be tried by a subordinate court which may be specified by him. Since the trial court acted without jurisdiction, the proceedings before it were a nullity. As a consequence, we hereby nullify the proceedings and the judgment of the District Court of Babati and quash the appellants' conviction. The proceeding and the judgment of the High

Court which originated from the trial which was a nullity are, as a result, also quashed.

Next for our consideration is on the way forward. Ordinariiy when the proceedings are quashed on the ground of illegality, of a trial, an order of retrial follows. As a principle however, before doing, the appellate court has to be guided by some laid down principle. The same are stated in the often cited case of **Fatehal Manji v. Republic,** [1966] E.A. 343, in which the erstwhile Court of Appeal for East Africa stated as follows:

> *"In general, a retrial may be ordered only where the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for purposes of enabling the prosecution to fill in gaps in its evidence at the first trial . . . each case must depend on its own facts and an order for retrial should only be made where the interests of justice require it."*

Mr. Kagirwa was not in favour of a retrial. He agreed with the eight grounds of appeal reproduced above which, in essence relate to the chain of custody and the appellants' cautioned statements. **First,** on the chain of custody, the learned Principal State Attorney argued that, there was a broken chain of custody of the elephant tusks and thus, in the

circumstances, the evidence to the effect that the tusks tendered in court were found in possession of the appellants, is doubtful and thus insufficient to ground their conviction. According to the learned Principal State Attorney, the evidence of PW1 was that, after having seized the elephant tusks, (exhibit P1) he took them to Babati Police Station and handed them over to PW2 for safe keeping. From there however, there was a breakdown of the movements of that exhibit from the time PW2 handed them to the valuer (PW4) until when they were later tendered in court by PW1.

With respect, we agree with Mr. Kagirwa that, from the prosecution evidence, there is a broken chain of custody of the said exhibit between the time when the same was handed to PW2 and the time when PW1 tendered it in court.

With respect to the learned first appellate Judge, although he was of the view that the chain of custody was not broken, the evidence of PW1 is silent as regards the person who handed him the elephant tusks shortly before he tendered them in court. Again, as submitted by Mr. Kagirwa, there is no evidence showing the movement of the exhibit between PW2 and PW7 who, according to PW4 was the one who handed over the elephant tusks to PW4 for valuation.

Furthermore, the evidence shows that after he had received the sixteen pieces of elephant tusks, PW2 lebelled each of the pieces by the number of the exhibit register in which the exhibit was registered, that is register No. 89. That did not however, feature in the prosecution evidence at the time when the exhibit was tendered.

Secondly, on the cautioned statement, Mr. Kagirwa submitted that after their admission in evidence, none of the appellants' cautioned statement was read out in court. To that, we agree with both the appellants and the learned Principal State Attorney that, from the record, the cautioned statements were not read out. The omission make the statements to have been wrongly acted upon as the omission rendered them invalid. See the case of **Robinson Mwanjisi and Others v. Republic** [2003] T.L.R. 218 in which the Court underscored the requirement of reading out a document after its admission in evidence. When that is not done, the same should be taken to have been improperly admitted thus deserving to be expunged from the record. See for instance the cases of **Semeni Mgonda Chiwanza v. Republic,** Criminal Appeal No 79 of 2019 and **Hatari Masharubu @ Babu Ayubu v. Republic**, Criminal Appeal No. 590 of 2017 (both unreported). In both cases, the documentary exhibits which were not read out after their admission in evidence were expunged from the record.

On the basis of those deficiencies in the prosecution evidence, we agree with the learned Principal State Attorney, that in the particular circumstances of this case, an order of retrial is not appropriate. It will have the effect of enabling the prosecution to fill in gaps in its evidence. For these reasons, we order the appellants be released from prison forthwith unless they are otherwise lawfully held.

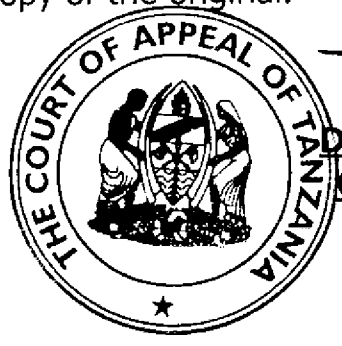
DATED at **ARUSHA** this 4th day of October, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

G. J. MDEMU
JUSTICE OF APPEAL

The Judgment delivered this 5th day of October, 2023 in the presence of the 1st, 2nd and 3rd appellants in person and Ms. Caroline Kasubi, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL