IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MKUYE, J.A., LEVIRA, J.A., And GALEBA, J.A.)

CRIMINAL APPEAL NO. 104 OF 2020

WILLIAM MAGANGA @ CHARLES ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Bongole, J.)

dated the 29th day of November, 2019

in

Criminal Appeal No. 24 of 2019

.....

JUDGMENT OF THE COURT

19th September and 6th October 2023

GALEBA, J.A.:

William Maganga Charles the appellant in this appeal, was charged before the Resident Magistrates' Court of Tabora at Tabora in Economic Crime Case No. 44 of 2017. He was charged jointly with Heneriko Muhoja Charles, on two counts of being found in unlawful possession of Government trophies and unlawful dealing in the trophies. According to the charge, the accused persons had contravened the provisions of sections 86 (1) and (2) (b) and 84 (1) both of the Wildlife Conservation Act, No. 5 of 2009, read together with paragraph 14 of the First Schedule to, and sections 57 (1) and 60 (2) both of the Economic and Organized Crime Control Act, [Cap 200 R.E. 2002 now R.E. 2022]. Upon a full trial, the appellant was found guilty and convicted on both counts. He was

consequently sentenced to 20 years imprisonment on each count, but the sentences were ordered to run concurrently. For reasons that are not relevant to this judgment, the appellant's co-accused, one Heneriko Muhoja Charles was acquitted by the trial court.

The facts material to the case before the trial court were that, in the night of 1st May, 2017, the appellant was found in unlawful possession of two elephant tusks, the property of the Government of the United Republic of Tanzania. He was also found selling the said Government trophies. According to the prosecution, the appellant had no written permit from the Director of Wildlife to possess the trophies or to sell them. The offences were committed at Ipeja-Puge within Nzega District in Tabora Region.

The appellant denied the charge, such that the prosecution called five witnesses and tendered five documentary exhibits and one physical exhibit (the elephant tusks) in seeking to prove the case. The appellant, as usual, defended himself but as indicated above, he was found guilty and was convicted. His first appeal to the High Court was dismissed. This appeal is faulting the said dismissal of his first appeal at the High Court.

The appellant's appeal was originally based on 8 grounds of appeal. When this appeal was called on for hearing on 19th September, 2023, Ms. Veronica Moshi and Mr. Winlucky Mangowi, both learned State Attorneys,

appeared for the respondent Republic and were quick to indicate to us that they were unreservedly supporting the appeal. On his part, the appellant appeared in person without legal representation.

Ms. Moshi who argued in support of the respondent's position, contended that the case was not at all proved beyond reasonable doubt at the trial. In other words, the learned State Attorney conceded to the eighth ground of appeal which was a complaint that the case was not proved beyond reasonable doubt.

Ms. Moshi made three points, as to why the appeal should succeed. **First,** she argued that although the prosecution case was supported by five documentary exhibits, all of them were illegally relied upon by the trial court because, they were not read over to the appellant so that he could know of their contents before the said exhibits could be used against him. The **second** point she raised was that, one Olest Thomas Ngowi (PW5), who identified and evaluated the alleged Government trophy, did not explain or even describe to the trial court as to what were the distinctive features in elephant tusks compared to normal horns in other animals. **Three**, she argued that the chain of custody in handling and keeping of the elephant tusks was not established. In the circumstances, Ms. Moshi beseeched us to allow the appeal and set the appellant free.

When we asked the appellant as to his comments, having heard arguments from the learned State Attorney, he told us that he had nothing to add.

We have studied the record of appeal and have considered the arguments of the learned counsel. In our view, the appropriate starting point is to consider the documents which were tendered and admitted without being read for purposes of ensuring that the appellant gets to know their contents, which is his right.

It is the law of this country generally that, where the exhibit sought to be relied upon is a document, such exhibit after being cleared for admission and actually admitted, must be read aloud in court for the accused person to appreciate its contents. As indicated above, five documents in this case were tendered and admitted at the trial. Those documents which are also listed at page 52 of the record of appeal are; **one,** the requisition/issue voucher, exhibit P2; **two**, a certificate of seizure of the Government Trophy, exhibit P3; **three**, a trophy register certificate, exhibit P4; **four**, a cautioned statement of the appellant, exhibit P5 and; **five,** a trophy valuation certificate, exhibit P6.

As submitted by the learned counsel for the respondent, clearly, when all these documents were admitted, were not read over to the appellant as it is clearly indicated at pages, 30, 33, 33, 40 and 43, respectively.

As intimated above, this was offensive of the law as established by this Court in many decisions including, **Erneo Kadilo and Matatizo Mkenza v. R**, [2019] 1 T.L.R 280; **Lack Kilingani v. R**, Criminal Appeal No. 402 of 2015; and; **John Mghandi Ndovo v. R**, Criminal Appeal No. 352 of 2018 (both unreported).

Reading all documentary exhibits to a person against whom they are sought to be relied upon, gives that person an ample opportunity to defend the case while acquainted with the full content of the entire prosecution case. This is an important part of the doctrine of fair trial.

In this case, there were several documents, that is five of them, upon which the prosecution case was reliant. That implied that the appellant was convicted based on a lot of facts which he was not made aware of. That act entailed a violation of the appellant's right of fair trial, because the trial court based it conviction on information, the appellant was not made aware of, for him to object or admit. That, we think, justifies the reason why we have consistently, time and again stressed the importance of documentary exhibits to be read to the accused person before they can be relied upon. In this case, for instance at page 69 of the record of appeal, the trial court relied on the cautioned statement, among other documents to find the appellant guilty.

According to law and to this Court's decision in **Robinson Mwanjisi and Three Others v. R,** [2003] T.L.R. 218 and many other decisions, the appropriate remedy to impose where a document is not read after its admission in evidence, is to discard or expunge it from the record, thereby rendering it evidentially worthless. Therefore, without any further ado, we discard exhibits, P2, P3, P4, P5 and P6. In the same vein, we declare that the said exhibits had no, and do not have any evidential value for court purposes.

According to Ms. Moshi, after expunging the above exhibits as we have just done, she would have prayed that we consider the remaining evidence and see whether it suffices to form a concrete basis upon which a valid conviction could be assumed, but she submitted that the remaining evidence, after expunging the five exhibits, would be too weak to support the appellant's finding of guilty. In supporting her argument, Ms. Moshi crossed over to her **second** point for supporting the appeal.

She submitted that the actual subject matter of the trial, that is the two pieces of elephant tusk was not duly proved. That is so, she contended, because one, PW5 who identified and evaluated the trophies at page 43 of the record of appeal, gave a general statement that he evaluated the trophies and found out that the items were two pieces of elephant tusks, but that, according to the learned State Attorney, was not

enough, because that did not detail or give any distinctive description of features unique to elephant tusks. If we understood the learned counsel well, which we think we did, her point was that there was no reliable and concrete evidence to show that what was tendered was actually a Government trophy in the nature of elephant tusks.

Indeed, it is true, that where a portion of the evidence is discarded or expunged from the record, it is not automatic that the remaining evidence cannot be sufficient for purposes of conviction according to this Court's decision in **Anania Clavery Batera v. R,** Criminal Appeal No. 255 of 2017 (unreported). It actually depends on the weight and credibility of the remaining evidence. If the remaining evidence is so weak to found a finding of guilty, the case is deemed not to have been proved beyond reasonable doubt. Conversely, if the discarded portion of the evidence leaves behind strong and credible evidence, the case would still be proved, despite the absence of the evidence discarded.

In this case, we agree with the learned State Attorney that, in the absence of the Trophy Valuation Certificate, exhibit P6 which we expunged a while ago, a clear description or the nature of the items or objects that were tendered as exhibit P1, wholly depended on what PW5 orally testified, what the items were. In this case, at page 43 of the record of appeal, the witness stated: -

"...my fellow officer came with four suspects who were arrested with trophies, and myself I evaluated these trophies and discovered that they were Elephant Tusks, and were from one Elephant. I evaluated those trophies; they had the value of Tshs. 33,516,000/.="

With respect, the above linear statement does not demonstrate any kind of expertise that PW5 had, in identification of animal species or their body parts. He does not say why did he conclude that the items were elephant tusks and not any horn or tooth of any other animal. The point we want to clarify ourselves about is that, not every person can identify and differentiate animals or animal parts particularly wild animals. In this case we expected some animal science in the evidence of PW5, at least to mention a feature or two, that are peculiar to elephant tusks and which are not available in any other animal species. In **Evarist Nyamtemba v. R,** Criminal Appeal No. 196 of 2020 (unreported), a case involving identification and valuation of elephant tusks, we observed that:-

"The testimony of PW5 lacked all these information. As rightly submitted by the learned State Attorney, PW5 gave a generalized statement that exhibit P1 was elephant tusks with no further explanation as to the peculiar features of it that led him to conclude that exhibit P1 was truly elephant tusks hence a government trophy."

That is the precise point we are making in this case. A generalized statement is not acceptable, because anybody can make such a sweeping statement. In wildlife conservation related cases, identification of a particular specie of the animal affected or part of it in relation to an offence charged, is a matter of considerable significance. That aspect of the case, is provable by tendering a properly filled in Trophy Valuation Certificate, which is a standard form document created under the Wildlife Conservation (Valuation of Trophies) Regulations 2012, (Government Notice No. 207 of 2012). Tendering of that certificate must go hand in glove with a proper explanation of a wildlife expert detailing the distinctive features of a given animal. Such oral explanation or description may be based on animal science or the witness's experience in wildlife conservation and management. In any event, we agree with Ms. Moshi, who observed that throughout his evidence, PW5 did not state anywhere that he was even a qualified wildlife officer mandated to carry out identification of animal species and their valuations.

In the circumstances, we agree that the evidence of PW5 being deficient to the extent we have endeavoured to discuss above, no other witness did, or could have testified with scientific certainty or based on experience as to the actual nature of the items that were tendered as exhibit P1.

Ms. Moshi now moved to her **third** point. It was on the chain of custody. She submitted that it is not certain that what was tendered as exhibit P1, are the same items that were alleged by PW1, to have been found with the appellant. She submitted that at page 33 of the record of appeal, PW2 stated that he gave the trophies to a store keeper, but the witness did not disclose the name of that store keeper or his or her identity. She also argued that, at page 43 of the record of appeal, PW5 stated that a certain officer came with four suspects, but the witness did not mention who the officer was. Even PW5, she added, did not state where he kept the trophies after the abortive evaluation. Finally, she contended that, PW1 who tendered exhibit P1, at page 30 of the record of appeal, did not disclose as to the location he got the exhibit from. In the circumstances, the learned State Attorney concluded, and properly so in our considered view, that the prosecution failed to establish a proper chain of custody in the handling, controlling, transferring and keeping of exhibit P1.

The general law on chain of custody may be summarized by a short quotation from this Court's decision in **Ernest Jackson Mwandikaupesi v. Republic**, Criminal Appeal No. 408 of 2019 (unreported) where we stated: -

> *"We are cognizant of the peremptory requirement as stated in our decision in* ***Paulo Maduka & 4 Others v. Republic****, Criminal Appeal No. 110 of 2007 (unreported) that the prosecution must produce evidence or chronological documentation and or paper trail, showing the seizure, custody, control, transfer, analysis and disposition of an exhibit allegedly seized from an accused. It should be stressed that such movement can be proved not just by production of documentation but also by oral accounts of the witnesses who handled the exhibit after its seizure."*

Based on the above authority and submission of the learned State Attorney, we have scrutinized the record of appeal, and indeed, it is full of obscurity in the manner exhibit P1 was handled in terms of transfer from one point to the other, and as to the officers engaged in handling and keeping the exhibit. In the circumstances, there was no guarantee that exhibit P1 which was tendered in court was the same item as that which was alleged to have been found with the appellant on the date mentioned in the charge sheet. Thus, we agree with Ms. Moshi, that the case against the appellant was not proved beyond reasonable doubt, in which case we allow the eighth ground of appeal.

As allowing the eighth ground of appeal, as we have done, has the effect of disposing of the entire appeal, for that reason, we find that deliberating on the other grounds to be of no practical importance.

Consequently, we allow the appeal, quash the conviction and set aside the sentence that was imposed on the appellant. We further direct that the appellant be released from prison custody unless he is held there for some other lawful cause.

DATED at **TABORA**, the 6th day of October, 2023.

R. K. MKUYE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

The Judgment delivered this 6th day of October, 2023 in the presence of the appellant in person, and Mr. Magonza Charles, State Attorney for the Respondent/Republic, is hereby certified as a true copy of the Original.

S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL