

“ORIGINAL”

**IN THE HIGH COURT OF TANZANIA
DODOMA DISTRICT REGISTRY
AT DODOMA**

CRIMINAL APPELLATE JURISDICTION

DC CRIMINAL APPEAL NO. 81 OF 2016

*(Originating from the District Court of MANYONI
Economic Case No. 10 of 2016,
Hon. J.M. MINDE, SRM)*

RAMADHANI SHABANI

@MAGURUMBATA.....1ST APPELLANT

JUMA KITWANGA JEMBE.....2ND APPELLANT

YUSTO PAUL.....3RD APPELLANT

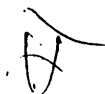
NSALAMBA KATUKU@NSALAMBA.....4TH APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGEMENT

Mansoor, J:




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08TH MAY 2017

The 1st Appellant Ramadhani Shabani @ Magurumbata and the 4th Appellant Nsalamba Katuku @ Nsalamba were charged with an offence of being found with unlawful dealing and possession of Government Trophies including two pieces of elephant Tusks worth THz 27,750,000 and two elephant tails worth THz 55,500,000. They were found with the trophies on 1/04/2015 at Manyoni Town, in Manyoni District.

The 1st Appellant Ramadhani Shabani@ Magurumbata and Yusto Paul, the 3rd Appellant were also charged with being found with unlawful possession of 2 elephant tails valued at THz 55,500,000, and also possessing weapon including a Rifle 404 and one Muzzle Loader, without a valid license. They were found with the trophies and weapon on 4th day April 2015 at 3.00 hrs. At Kambikatoo Village, Chunya District, Mbeya Region.



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Again, the 1st Appellant Ramadhani Shabani @ Magurumbata, and Yusto Paulo, the 3rd Appellant herein were charged with another count that on 04th April 2015 at about 3.00 hrs. At Kambikatoo Village, in Chunya, Mbeya Region, they were found in possession of firearms make submachine Gun (SMG) and one magazine with eight bullets without a valid license.

PW1 testified on behalf of the prosecution that, they first arrested Nsalamba, who had directed the warden to one Rashid Khalfan @ Ngalihya, who was the 3rd accused at trial Court, they searched the house of Rashid Khalfan and discovered one Firearm a Rifle 404, one Muzzle Loader, and two elephant tails. They filled a seizure certificate on 4/4/2015. Rashid Khalfan mentioned to Game Warden Yusto Paul, and directed the Game Warden to the house of Yusto Paul, they arrested Yusto Paul with an SMG and eight ammunition and two elephant tails. They seized the firearms and completed a seizure certificate. Three Seizure Certificates were admitted at Trial Court as Exhibit P1.



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Hamidu Nsolezi, a traditional healer, and the 8th accused at trial, was acquitted by Hon. Judge Kwariko in her Ruling dated 2/09/2016.

PW1 testified that the statements of the accused persons were taken on 5/4/2015 at Anti-Poaching Unit in Manyoni. All the exhibits were kept at the Anti-Poaching Unit in Manyoni.

It was PW2 one Inspector Kaitila that had recorded all the caution statements of the accused persons on 5th April 2015.

PW3 Sostenes Kweka, Game Warden testified that he arrested Nsalamba Katuku and Juma Kitwanga. He testified that he disguised himself and pretended to be the buyer of the trophies, and the two fell into the trap, they were carrying two elephant tusks, and elephant tails in the bag, and he arrested them in the car. The trophies found with Nsalamba Katuku and Juma Kitwanga was admitted in Court as Exhibit P9. That it was Nsalamba Katuku that had directed them to the house of Rashid Khalfan and the house of Hamidu Nsolezi.



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The Trial Court found the Accused Persons guilty of the offences charged; she/he convicted them, and sentenced them. Juma Kitwanga@ Jembe and Nsalamba Katunku were sentenced to serve 20 years jail under Section 86 (2) (c) (ii) and Section 84 (1) of the Wildlife Conservation Act, No. 5 of 2009, and to pay fine of THz 55,500,000 or to serve a custodian sentence of two years imprisonment in default, respectively. Also they were sentenced to pay a fine of THz 111,000,000 or to serve a custodian sentence of two years imprisonment in default.

Ramadhani shabani @ Magurumbata was sentenced to twenty years imprisonment, and to pay fine of THz 500,000 or to serve imprisonment sentence of two yrs. in default, and Yusto Paul was sentenced to 20 years imprisonment and to pay a fine of THz 500,000 or to serve a sentence of 2 years, in default.

Aggrieved by the conviction and the sentence, the 4 appellants named above, lodged an appeal before this Court, raising

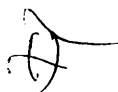


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several grounds of appeal. The State was represented by Ms. Magesa, the Learned State Attorney. All the Appellants were unrepresented. The State Attorney challenged the grounds of appeal and she only repeated the prosecution case as explained herein above. On torture, she said, the trial court conducted an enquiry, and the court found that there were no any tortures.

Although not learned and unrepresented, the appellants were complaining on the procedure on their arrest, the illegal search, and the torture, and that they were kept in remand for so long and they were seriously tortured before their statements were recorded, and that they were all forced to sign statements under torture, and that they were taken to court after a long time has passed.

The learned State Attorney did not object that the Appellants were arrested between 1st April 2015 and 4th April 2015 but their statements were recorded on 5th April 2015. Page 5 of the typed judgment it is recorded that PW1 recorded the accused



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statements on 5th April 2015 at Anti-Poaching Unit in Manyoni, while at page three of the typed judgment, he states that he arrested the Appellants on the 3rd April 2015 and 4th April 2015. PW6, G 81 DC Masoe, testifies at page 8 of the typed judgment that he recorded the caution statement of the 6th Accused Juma Kitwanga @ Jembe on 5th April 2015, while Juma Kitwanga @ Jembe was arrested together with Nsalamba on 1st April 2015.

The Appellants challenged the caution statements saying that they were obtained after threats, beatings and cruelty by the Game Warden to the Appellants and in total violation of Section 55 of the Criminal Procedure Act, which provides as follows:

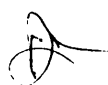
55.-(1) a person shall, while under restraint be treated with humanity and with respect for human dignity.



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- (2) No person shall, while under restraint, be subjected to cruel, inhuman or degrading treatment.

While there is on record that the Trial Magistrate conducted an enquiry on the allegation of torture, I agree with the Appellants that the caution statements were recorded after the expiration of time prescribed under Section 50 of the Criminal Procedure Act in which, the Appellants were interviewed beyond the period of four hours from the time they were taken under restraint and that period was not extended under section 51, of the Criminal Procedure Act. I agree with the Appellants that the caution statements were recorded in total violation of Section 50 of the Criminal Procedure Act. Also as it was not shown or certified on the Caution Statement, it has not been shown by the prosecution whether the caution statements were read or explained to the appellants in the language they understood. I agree that the caution statements were riddled with irregularities and it was not safe for the Trial Magistrate to rely on them in convicting the accused. On this



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base by decisions on the decision of the case of **Abuhi Omari Abdallah**, and the case of **Emmanuel Malahya vs. R, Criminal Appeal No. 212 of 2004 (unreported)**.

Thus, the caution statements of all the four appellants being tainted by irregularities are hereby expunged from records, and cannot be relied by the either the prosecution or the trial court for conviction.

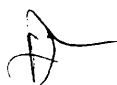
It is the prosecution case that a search was carried out but there was no witnesses present during the search wherein two elephant tusk and firearms were recovered from the Appellants and seized. It has not been disputed by the prosecution that the seizing and sealing was not done in the presence of an independent witnesses as required by Section 38 (3) of the Criminal Procedure Act, and Section 22 (3) of CAP 200, where it is required by law that where anything is seized in the exercise of the power of search, the officer seizing the thing shall issue a receipt acknowledging the seizure of that thing, being the signature of the owner or occupier of the premises or



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his near relative or other person for the time being in possession or control of the premises, and the signature of witnesses to the search, if any.

The Seizure Certificate contains the signatures of the Appellants but there are no signatures of independent witnesses. The prosecution states that that articles/substance were seized at the place of seizure itself and there was no possibility of getting an independent witness, since all the villagers got scared. According to PW1 and Pw2, the Warden officers went to the villages for purposes of investigating and eventually arresting the offenders, they had arrested two appellants before they searched Yusto's house, since the officers went to the villages for purposes of arresting the offenders or poachers, they should as well have organized for the compliance of the law, they could as well organize the presence of a witness so as to comply with Section 38 (3), and Section 22 (3) (ii) of the Economic and Organized Crime Control Act, Cap 200 R:E 2002 which makes it mandatory that where anything is seized after a search, the police officer



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seizing shall issue an official receipt evidencing such seizure, having his signature, and the signature of the owner of the premises searched and the signature of at least one independent person who witnessed the search. The two elephant trophies and the firearms were seized and sealed in violation of Section 38 (3) of the Criminal Procedure Act, Cap 20 R:E 2002, and in violation of Section 22(3) of the Economic and Organized Control Act, Cap 200 R:E 2002 . The arresting and seizing officers admitted that they did not obtain the signature of the independent witnesses since the villagers ran away when they saw the wardens. This cannot be true as it has not been stated as to why they could not organize beforehand to get one villager or a village leaders to accompany them during the search. It cannot be true that all the villagers would run away upon seeing the wardens, as if this is true, it signifies that all the villagers were the poachers and they feared being arrested. Economic cases are to be proved beyond doubt just like criminal cases, and if there is



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any doubt, the benefit of the doubt should always be in favor of the accused.

I have expunged the seizure certificates as they were illegally obtained and I have based my decision on the findings of the Court of Appeal in the case of **Abuhi Omari Abdallah & 3 others vs. R, Criminal Appeal No. 28 of 2010**, and the case of **Makoye Samwel @ Kashinje & others vs. R, Criminal Appeal No. 32 of 2014**, wherein, the Court had emphasized the *“dire need, at the level of investigators to abide by the provisions of section 38(3) of the Criminal Procedure Act.”*

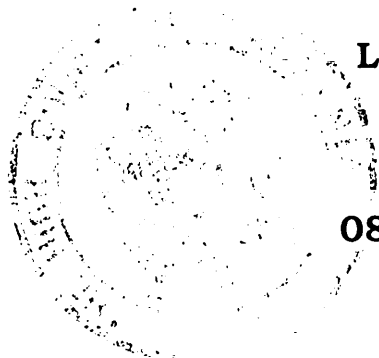
The Certificates of Seizure having been obtained without a signature of an independent witness are excluded as evidence under Section 169 of the Criminal Procedure Act, Cap 20 R: E 2002.


Having expunged all the exhibits, the caution statement and the certificate of seizure, what remains on record is the uncorroborated testimonies of the prosecution witnesses, and that alone cannot be the basis of conviction of the Appellants.



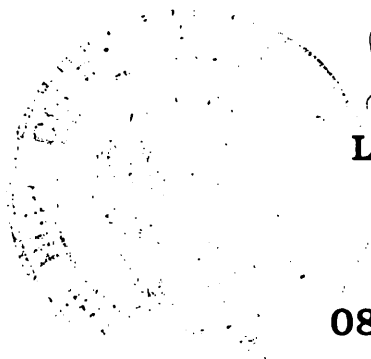
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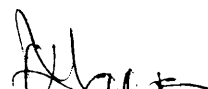
It is for the foregoing reasons, and the reasons explained by Hon. Judge Kwariko in her Ruling of 2/09/2016 in criminal Confirmation no. 1 of 2016 between the Republic and Hamidu Nsoleni (the 10th accused in the original case), this appeal has merit and is allowed; the conviction is quashed and the sentence is set aside. The Appellants are ordered to be released from prison unless their continued confinement is related to other lawful cause.




L. MANSOOR
JUDGE
08th MAY 2017

Judgement delivered in Court today in the presence of the Appellant, Ms. Mwakyusa, State Attorney for the Respondent Republic and Mr C.A.Chali the Court Clerk.




L. MANSOOR
JUDGE
08TH MAY 2017