IN THE HIGH COURT OF TANZANIA

AT DODOMA

DC CRIMINAL APPEAL NO 96 OF 2016

(Original Criminal Case No. 18 of 2015 of the District Court of Dodoma at Dodoma)

IDDI YUSUPH GOLONYA..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

08/02/2017 & 22/2/2017

A. MOHAMED, J.

The appellant was charged with and convicted of unlawful possession of government trophies contrary to paragraph 14 (d) of the schedule to and sections 57 (1) and 60 (2) both of the Economic and Crime Control Act [Cap 200 RE 2002] read together with section 86 (1) (2)(b) of the Wildlife Conservation Act No 5 of 2009. He was sentenced to 20 years imprisonment.

Against that decision has appealed on the following grounds:

1. That the trial court erred in law and fact in admitting the exhibit of leopard skins without warning itself of the prosecution's failure to explain the chain of custody of the said exhibits as is required by the law.

2. That the trial court convicted the appellant on the weakness of his defence and not on the strength and credibility of the prosecution case.

3. That the cautioned statement was admitted wrongly since the trial court did not inform the appellant of his right to comment on it when it was tendered in court as was held in the case of **PAULO MADUKA AND OTHERS VR (CAT) DODOMA CR. APP. NO 110 OF 2007** (Unreported).

4. That the trial court erred in law in convicting the appellant without considering his defence.
5. That there was no judgment at all since the trial court did not convict the appellant as is requisite under section 235 (1) of the Criminal Procedure Act, Cap 20 [R.E 2002] as is seen page 3 of the copy of judgment.

6. That the trial court contravened the provisions of section 312 (2) of the CPA Cap 20 [R.E. 2002] as the trial magistrate failed to specify the offence and the section of the Penal Code or other law under which the accused person was convicted and sentenced with.

It was alleged by the prosecution that on 20/9/2015 at 20 hours in Chandama village within Chemba District in Dodoma Region, the

appellant was found in unlawful possession of two leopard skins worth 15,009,950/=, the property of the Tanzanian Government. The arrest followed a tip from an informer where officers from a Special Task Force (KDU) posing as buyers, had arrested the appellant.

At the hearing of the appeal on 16/11/ 2016 the appellant appeared in person whilst the respondent was represented by Ms. Mgoma, learned State Attorney. The appellant adopted his grounds set out in his petition of appeal in support of the appeal.

In resisting the appeal, Ms. Mgoma said she would group together the appellant's 1st to 4th grounds of appeal together. Submitting on the first ground, to wit the appellant's complaint that there was no independent witness in the seizure certificate, she argued that although section 22 (3) (ii) of the Economic and Crime Control Act requires the presence of an independent witness to witness an article being seized in an official seizure certificate, nonetheless, section 38 (3) of the Criminal Procedure Act [Cap 20 RE. 2002] is couched in optional terms as there ought to be signatures of the seizing officer, that of the suspect and;

"the signature of witnesses to the search if any"

She argued that the phrase ***"if any"*** means there are circumstances where that "any witness" cannot be found. She was of the view that a court can, therefore, admit a seizure receipt lacking the signature of an independent witness as was in this case, where it was difficult to find one. Ms. Mgoma went on to say that

the prosecution witnesses testified they received information a suspect had intended to sell leopard skins and they arrested him in the bush and detained him in their vehicle. She argued that even if they had taken him to a village leader after the arrest, the provision of requiring the presence of an independent witness at the seizure would not be meaningful.

She went on to argue that the as the Criminal Procedure Act is the principle Act in criminal procedure, then section 38 (3) shall prevail over section 22 (2) (ii) of the Organized Crime Control Act [Cap 2002 RE 2002]. She concluded on this ground by maintaining that it has no merit and should be dismissed.

> ***In regard to the absence of the chain of custody of the leopard skins seized pursuant to a seizure by law enforcement officers which is the appellant's 2nd ground of appeal is on, Ms. Mgoma admitted that it is true the prosecution did not state clearly the chain of custody, but said that there is no objection that the leopard skins that were seized were the ones brought in court. She said, at page 13 of the proceedings it is shown PW1 Assistant Inspector Lwambano of Police Head Quarters Dar es Salaam tendered two leopard skins which were admitted as Exhibit P2. She went on to say PW1 testified how they arrested the appellant with the two leopard skins which were in a blue plastic bag in a box. And thereafter he***

filled in seizure forms which the appellant signed on the said certificate acknowledging he was found with the said leopard skins. She further said that PW1 did not explain in detail the chain of custody because he was not led in that direction by the trial prosecutor. But the appellant did not object to the admission of the leopard skins. She maintained that it is not every discrepancy or any irregularity that causes a prosecution case to flop. She went on to say that the appellant had confessed in his cautioned statement (P3), that the leopard skins tendered in court were those seized when he was arrested. The State Attorney urged this court to dismiss this ground as it was baseless.

In regard to the voluntariness of the confession; the 3rd ground of the appeal, she said the appellant had not objected to the admission of the said cautioned statement admission when PW2 D/S Sgt Jumanne tendered it as evidence. She argued the appellant's objection was afterthought as the accused wrote the statement in his own handwriting and did not object to its admission in court. She went on to say the trial magistrate cautioned himself on the contents of the said statement and satisfied himself that it was the truth and was voluntarily given. It support of her argument she cited a passage from **Paulo Maduka's** case where in the 3rd paragraph at page 10 of the judgment the court said:

"... the very best of witness in a criminal trial is an accused person who confesses his guilt"

As to the 4th ground of appeal, that the trial magistrate convicted him basing on the weakness of his defence rather than on the strength of the prosecution case, the State Attorney argued that the trial magistrate analyzed both parties' evidence, raised issues and answered them basing on the prosecution's evidence. She denied that he based on the defence weaknesses to convict and urged this court to dismiss the ground as it is baseless.

Ms. Mgoma assailed the appellant's last ground alleging the trial magistrate did not convict him thus contravening section 335 (1) of the Criminal Procedure Act [CAP 20 RE 2002]. She argued he was convicted as is shown in the proceedings.

As to the appellant's complaint that the trial court failed to comply with section 312 (2) of the CPA requiring a magistrate/judge to specify the offence and section that an accused is convicted of, she responded that this irregularity is curable and does not prejudice the rights of the accused. In concluding, she said the prosecution proved its case beyond reasonable doubt against the appellant and urged this court to uphold the conviction and sentence of the trial court.

In his rejoinder submissions in regard to the 1st ground of appeal, the appellant said he was arrested in the centre of Chandama village where he went to buy medicine for his asthma condition. And

there were many people who could have had been called as independent witnesses. He refuted the respondent's claim he was arrested in the bush. He went on to say the game wardens asked where he was heading and he told them he was heading for his village called Jangalo. He further said he found the box in the game warden's vehicle and that village leaders were not called to witness the arrest or seizure.

In response to the State Attorney's argument on the 2nd ground of appeal, he said he only came to see the leopard skins when they were tendered in court. He denied the said skins belonged to him and that he was forced to carry the said box when he got off the vehicle at the police station after his arrest.

As to to the 3rd ground of appeal, he said he was forced to write the said statement without the presence of his relative or lawyer.

In relation to the last ground of appeal, he argued the trial court did not convict him or state the offence and the section in the law that he was convicted of.

Having heard the parties and their contending arguments and after perusal of the trial court's record, I now give my due consideration to the appeal.

I will deal with the 1st ground of appeal claiming that the prosecution had failed to establish a chain of custody of the leopard skins admitted as Exhibit P1. It was conceded by Ms. Mgoma for the

respondent that indeed the prosecution did not explain the chain of custody as she claimed:

"...the prosecution witnesses were not led in that direction"

Dealing with the question of a chain of custody, the Court of Appeal of Tanzania in **Paulo Maduka and Four Others Vs Republic,** Criminal Appeal No. 110 of 2007, (unreported) had this to say;

> ***"By "a chain of custody" we have in mind the chronological documentation and/or paper trial, showing the seizure, custody, control, transfer, analysis and disposition of evidence, be it physical or electronic. The idea behind recording the chain on custody... is to establish that the alleged evidence is in fact related to the alleged crime-rather than, for instance, having been planted fraudulently to make someone appear guilty ... the chain of custody requires that from the moment the evidence is collected, its every transfer from one person to another must be documented and that it be provable that nobody else could have accessed it."***

In the light of the foregoing passage, it is clear the Special Task Force (KDU) failed to ensure the chain of custody of the alleged skins were found with the appellant was intact. This failure commenced from the moment they were seized from the appellant to when they were tendered in evidence in court.

The appellant's 2nd complaint, which is the substance of his 2nd to 4th grounds of appeal, is that there was no independent witness who witnessed the seizure of the two leopard skins he is alleged to have been found with. Section 22 (3) (ii) reads:

> **"3. *Where anything is seized after a search conducted pursuant to this section, the police officer seizing it shall;***
>
> ***(ii) issue an official receipt evidencing such seizure and which the value of the property is ascertained and bearing in addition to his signature, the signature of the owner of the premises searched and that of at least one independent person who witnessed the search" (emphasis supplied)***

Applying the above provision to the instant case, it is clear as admitted by the learned State Attorney, no independent witness was called to witness the seizure and therefore the Task Force officers did not comply with the law. It was argued by the respondent that the provisions of section 38 (3) of the Criminal Procedure Act Cap 20 RE 2002 would cure this aberrance as it is the principal piece of legislation governing criminal procedure. The said provision is couched in the following terms:

> ***"Where anything is seized in pursuance of the powers conferred by subsection (1) 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 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."***

With respect, I disagree with the respondent's assertion that the above provision cures the non-compliance with section 22 (3) of the Economic and Organized Crime Control Act [Cap 200 RE 2202]. The word "shall" is used in this provision and is thus mandatory. Section 53 (2) of the Interpretation of Laws [Cap 1 RE 2002] provides:

> ***"Where in a written law the word "shall" is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be conferred"***

If the Legislature had intended the provisions of section 38(3) to apply to all seizures, it would have said so. But in its wisdom and for specific reasons, it chose to enact a new provision to wit section 22 in the Economic and Organized Crime Control Act in to cater for offences scheduled in that Act. As such, I am content that section 22(3) is mandatory.

Having said so, I find that the Special task Force officers who seized the alleged items found with the appellant contravened the provisions of the law by failing to have an independent witness to witness the said seizure as is requisite under section 22(3) of the Economic and Organized Crime Control Act. Section 169 of the Criminal Procedure Act provides for exclusion of evidence illegally obtained. This position is consistent with the principle laid in by the Court of Appeal in **Ally Said @ Nassoro V R,** Criminal Appeal No. 1 of 2010, at Tanga).

In passing, I gather from the record that officers of the Special Task Force had been tipped by their informer of the appellant's offer for sale of the alleged skins. That being the case, I am of the view the wardens had ample time to plan for the operation which ought to have made provision for an independent witness being found beforehand. Had the seizure been in an exigency such as in an arrest and seizure in a game reserve where finding an independent witness would pose some challenge, then that necessity could have had been exempted. It is also seen, in that operation, the officers were able to bring the informer from Dodoma to Chandoma. In the instant case, PW4 stated the appellant was arrested near a place where villagers were living which tallies with the appellant's claim. I am therefore satisfied; there was no exigency to justify the exclusion of an independent witness at the scene of seizure as many were at hand a stone's throw away.

I now move to the 7th ground of appeal in which the appellant complains he was not informed of his rights in connection with the admitted cautioned statement which was based to convict him. The said statement Exhibit P3 was taken in accordance with the provisions of section 58 of the Criminal Procedure Act. The relevant part reads:

> ***"(1) where a person under restraint informs a police officer that he wishes to write out a statement, the police officer-***
>
> ***(a) Shall cause him to be furnished with any writing material he requires for writing out the statement; and***
>
> ***(b) Shall ask him, if he has been cautioned as required by paragraph (c) of section 53, to set out at the commencement of the statement the terms of the caution given to him, so far as he recalls them."***

At page 1 of the caution statement the appellant wrote:

> ***" Ningependa <u>kuhojiwa</u> nikiwa peke yangu na maelezo yangu nitayaandika mwenyewe"***

And at the last page of the statement, the PW2 (the police officer) wrote:

"UTHIBITISHO; Mimi D7312 Jumanne nathibitisha kuwa <u>nimemhoji</u> mtuhumiwa na ameandika maelezo yake kwa mujibu wa k/f 58 cha cPA Cap 20 RE 2002.

Signed D/Ssgt D7312"

(Emphasis supplied)

From the above, PW2 D7312 D/Sgt interviewed the appellant by asking him questions and the appellant wrote the responses to those questions in the statement sheet. It is also evident the appellant did not volunteer to give the statement but was required to do so. I am satisfied this is not what the provisions of section 58 (1) state. This hybrid procedure appears to be a "refined" one from that under section 57 of the Criminal Procedure Act where a Police officer records responses from questions directed to the suspect. The Court of Appeal had occasion to discuss the import of section 58 of the Criminal Procedure Act in **Seko Samwel v. The Republic**, Criminal Appeal No. 7 of 2003 (unreported) in regard to a caution statement which had been tendered as Exhibit P3 in the trial court. The Court said –

"In addition Exhibit P3, the cautioned statement, has another problem. PW3 recorded it by putting questions to the appellant who then answered them instead of

leaving her to tell her story without being led. So, in fact what has all along been taken as a cautioned statement, that is, a statement under section 58 of the CPA, is in fact a record of an interview under section 57. The initiative in a cautioned statement under section 58 comes from the suspect and there is a requirement for the recording officer to ensure that the suspect has been cautioned under section 53 (1) (c) of CPA."

Furthermore, in the case of **Ramadhani Salum V R**, Criminal Appeal No. 5 of 2004, the Court of Appeal had this to say:

"As correctly stated in the Seko Samwel case cited above the initiative in a caution statement under section 58 is from the suspect. Subsection (1) of section 58 reads –

"58 (1) Where a person under restraint informs a police officer that he wishes to write out a statement, the police officer –

(a) shall cause him to be furnished with any writing materials he

requires for writing out the statement; and

(b) shall ask him, if he has been cautioned as required by paragraph (c) of subsection (1) of section 53, and to set out at the commencement of the statement the terms of the caution given to him, so far as he recalls them.

The Seko Samwel case was cited with approval in a subsequent decision of this Court – Rashid Ally Mtiliga and 2 Others v. The Republic, Criminal Appeal No. 240 of 2004 (unreported). In that case three exhibits – P3, P4 and P5 purported to be caution statements given under section 58 of the Criminal Procedure Act, 1985. The Court found that they were interviews under section 57 of the said Act and disregarded them. We take it that the basis for that decision was that the exhibits were not volunteered statements under section 58 as they purported to be."

Bearing the above proposition in mind, it is clear the statement was taken in contravention of the law. I am satisfied the provisions of

section 58 of the Criminal Procedure Act were not complied with as the appellant's statement was not willingly written. I accordingly disregard the cautioned statement from the record.

After expunging the seizure certificate and the cautioned statement, what is left of the prosecution's evidence? There are the testimonies of P1, PW2, PW3 and PW4 which essentially detail the story that the appellant was arrested on the material day with a box containing two leopard skins wrapped in a blue plastic bag at a place in the bush near Chandama village. In his defence, the appellant had admitted that he had helped one Beka –whom he had been communicating with on the phone- to carry a brown box to the vehicle where he was arrested. Beka had already entered the said vehicle. I am of the view this fact was insufficient to prove or infer the appellant knew the contents of the box. In any case this question was not canvassed by the trial court.

After the foregoing, it is clear that is inadequate evidence to convict the appellant. I accordingly allow the appeal; quash the conviction and sentence of the trial court. The appellant is to be set at liberty unless held for another lawful cause.

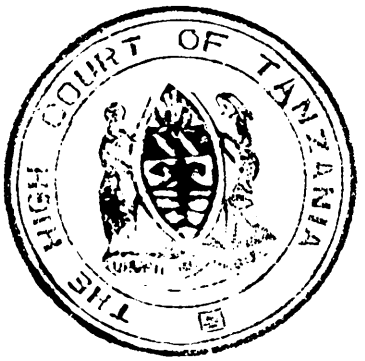
It is so ordered.

A. MOHAMED

JUDGE

22/2/2017

The right of appeal explained



A. MOHAMED

JUDGE

22/2/2017