IN THE HIGH COURT O THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF ARUSHA)

AT ARUSHA

CRIMINAL APPEAL NO. 142 OF 2017

(Originating from Monduli District Court Economic Crime No. 3/2016)

WILLIAM RASHID HAPALE.....1ST APPLICANT

KORDUN SIMINDE NGARE.....2ND APPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT ON APPEAL.

S.M. MAGHIMBI, J:

At the District Court of Monduli, the two appellants herein, along another person not a party to this appeal (the accused persons), stood charged with three counts. The first count was the offence of Unlawful possession of Government Trophy, c/s 86(1) and 2(b) of the Wildlife Conservation Act, No. 05/2009 (Wildlife Conservation Act) read together with Paragraph 14 of the First Schedule to as amended by Section 16(a) of the Written Laws (Misc. Amendments) Act No. 3/2016; Section 57(1) and 60 as amended by Section 13(b)(2) of the Written Laws (Misc. Amendments) Act No. 3/2016 both of the Economic and Organized Crimes Control Act, Cap. 200 R.E 2002 (The Act). At the trial, it was alleged that on the 14/08/2016 at Lolkisale in Monduli District of Arusha Region, the accused persons were

found in unlawful possession of two pieces of elephant tusks valued at Tshs. 32,250,000/- the property of the Tanzania Government.

The second count was the second accused who is also second appellant herein, was unlawful possession of firearm c/s 20(1)(a) and (2) of the Firearms and Ammunitions Control Act, No. 02/2015. In this count, the 2nd appellant was alleged to have been found in unlawful possession of firearm make Rifle 404 with Serial No. 42948 at Lobosweiti area within Simanjiro District of Manyara Region on the 17/08/2016.

The third count involved the then 3rd accused one Protas Joseph Massawe @ Kidile, who is not a party to this appeal, the offence was unlawful dealing in trophies c/s 84(1) of the Wildlife Conservation Act. The 3rd accused was alleged to have unlawfully dealt in trophy by facilitating the selling of two pieces of elephant tusks valued at Tshs. 32,250,000/- the property of the Tanzania Government. Upon full trial, the third accused was acquitted and the 1st and 2nd accused were convicted of the 1st count for both of them and were both sentenced to serve an imprisonment of 20 years and the 2nd appellant was further convicted of the 2nd count and was sentenced to serve a sentence of five years. Aggrieved by both the convictions and sentences so passed, the appellants have lodged this appeal raising five grounds of appeal that:

1. That, the learned trial Magistrate misdirected herself when she based on cautioned statements to find the appellant guilty.
2. That, the learned trial Magistrate erred in Law and in fact in convicting the Appellants without proper evaluation of the evidence and exhibits and admitted in the course of hearing.

3. That, the learned trial Magistrate erred in law and in fact by admitting Exhibits P.2 which was tendered by the State Attorney.
4. That, the learned trial Magistrate failed miserably to evaluate the evidence on record as a result he relied on his speculative ideas which influenced his judgment.
5. That, the learned trial Magistrate erred in law by not complying with the Mandatory Provisions of Section 312(2) of the CPA Cap. 20 R.E. 2002 in Composing judgment of judgment of the case.

The Appellants hence prayed that this appeal is allowed by quashing the Conviction, setting aside the sentence and letting them at liberty. When this appeal came for hearing, both the appellants appeared in person and unrepresented while the respondent, the Republic was represented by Ms. Tarsila Asenga, learned State Attorney.

Submitting in support of the appeal, the 1st appellant submitted that the trial magistrate erred in convicting him basing on the cautioned statement which was taken outside the time. That he was arrested on 14/08/2016 and as per the evidence of PW6 who recorded the statement, it was taken outside the prescribed time. He therefore prayed that the court expunge the statement from the record.

The 1st appellant submitted further that the trial magistrate erred in law by receiving a seizure certificate and the alleged elephant task which were tendered against the procedure. He argued that the person who prayed to tender the exhibit was the State Attorney instead of the PW1. The 1st appellant submitted further that the trial magistrate did not analyse the evidence of PW1 and PW3. That PW1 testified that the PW3 filled the

seizure certificate while the PW3 did not talk of the certificate, hence the evidence did not support each other. That the witness was also not involved in signing the certificate. The 1st appellant hence prayed that his grounds of appeal are allowed and he is set free.

On his part, the 2nd appellant submitted that the statement alleged to be cautioned statement were tendered in court against the law and procedure as the person who prayed to tender the exhibit was Chacha, a State Attorney instead of PW5. That in the evidence of PW5, there is no place showing that the said statement was read over to him after finishing writing while he informed the court that he doesn't know how to read or write. He therefore prayed that the court expunge the statement from record.

The 2nd appellant submitted further that the seizure certificate for seizure of the firearm was tendered by the State Attorney, an act which is against the law and procedure. He argued that the person who was supposed to tender the exhibits was PW1 who is the person he would have cross examined. He prayed that this honorable court allows his grounds of appeal and set him free.

In her reply, Ms. Asenga started by bringing to the attention of this court a legal issue affecting the jurisdiction of the trial court to proceed with trial. Her submission was that at the trial court, the appellants were charged with two economic offences and one non-economic offence. That as per the Act, the court with jurisdiction to hear economic offence is the High Court-Economic Crimes Division, however, Section 26(1) and 12(3) & (4) of the Act has conferred power to the DPP or any State Attorney authorized

by him, to issue a consent and certificate conferring jurisdiction to the lower courts. She submitted further that in this case, the lower court received a certificate u/s 12(3) while the certificate was to be filed u/s 12(4) of the Act. That since the certificate did not cite the proper provision to confer jurisdiction to the lower court, the trial court did not have jurisdiction to try the matter. To support her submissions, Ms. Asenga cited the case of **Kaunguza s/o Machemba Vs. Republic, Criminal Appeal No 157B/2013**, where the court gave its stance when there was a wrong citation by the DPP in the certificate conferring bail to the lower court in hearing economic and non-economic offences. She submitted that in the cited case, the Court of Appeal quashed the proceeding and set aside the convictions and ordered a re-trial.

Ms. Asenga then prayed to submit on the grounds of appeal where she submitted that there was a direct evidence of PW1 the arresting officer. In his evidence he testified that he interrogated the accused and they told him that they deal in trophy and they own firearms. That when cross examined by the accused, they did not ask him on whether they admitted to him or not hence matter not cross examined have to be admitted. She submitted further that on page 9 and 10 when the seizure certificate and the firearms were tendered, the accused persons did not deny their admission and instead they said they did not know the exhibits. She hence argued that it is not only their cautioned statements that led to their conviction as there was sufficient evidence apart from that.

Ms. Asenga submitted further that the evidence of PW2 on page 10 shows that the first accused is the one who went to show them where the firearm

was hidden. That on the page 11, PW3 explained how they arrested the appellants with the trophy contained in a Sulphate which were two elephant tasks. She argued that the appellants did not cross examine the witness on this issue and that from that direct evidence, it is not true as they allege that the trial court convicted them basing on their cautioned statement.

Ms. Asenga submitted further that when the appellants were asked if they had a licence for possessing the trophy, none of them managed to show any certificate showing that they possess the trophy. She hence argued that as per Wildlife Act, an accused is required to show that he possess government trophy lawfully, in this case both the appellants could not do that. She concluded that their first ground of appeal is hence baseless and should be dismissed.

On the appellants' second ground of appeal that the trial court did not analyse the evidence or how the exhibits were tendered, Ms. Asenga submitted that in the judgment of the trial court the evidence was analysed. Further that the court on page 35 even analysed their defence of alibi and on page 36 he talked of the cautioned statements and later he came to the decision he made. She submitted that the argument that the trial magistrate did not analyze the evidence is baseless.

On the exhibits tendered, Ms. Asenga submitted that on page 07 of the proceedings, the witness PW1 said he is the one who arrested the accused, filled the certificate of seizure which was signed by him and he also explained how the trophy looked like and the date and time he filled the certificate. That the witness tendering the exhibit must explain of the

exhibit, his knowledge of the exhibit and whether he was the custodian. She argued that all witnesses were able to lay foundation hence the trial magistrate analyzed all these issues and came to that decision. She prayed that this ground is dismissed.

On the third ground that the exhibit P2 was tendered by the State Attorney, she submitted that it is true that the court recorded the State Attorney as a person who prayed to tender the exhibit; however the foundation made was that it was the witness who identified the exhibit and not the State Attorney. She argued that it may also be the style of recording of the magistrate and that even when the accused persons were cross examining the witness they did not cross examine the State Attorney but the witness and the questions were in connection with those exhibits.

On the 4th ground, Ms. Asenga prayed to adopt her submissions on the 1st ground. She submitted further that the trial court judgment only talked of the evidence adduced by both sides and did not bring any evidence not adduced from both sides.

On the last ground of appeal on non-compliance of Section 312(2) of the Criminal Procedure Act, Cap. 20 R.E 2002 (The CPA). She started by citing the case of **Hamisi Rajabu Dibagula Vs. R, Criminal Appeal No. 53/2001**, when the Court of Appeal sitting in Dar-es-salaam, held on page 21:

> *"a good judgment is clear, systematic and straight forward. Every judgment should state the facts of the case, establishing each fact by reference to a particular evidence by which it is supported and it should give sufficiently and plainly the reasons which justify the*

finding and it should state sufficient particulars to enable the court of appeal to know what facts are found and how"

She argued that on page 36 of the typed judgment, the trial magistrate did not mention the offence Section and law but he used the word "count" which is available on the charge sheet and the law is also on the charge sheet. That the phrase sufficed to say that the Section 312(2) of the CPA was complied with. She hence prayed that this ground is also dismissed and there was no contravention of the Section 312(2) of the CPA.

On the ground that the cautioned statement was taken outside the time and was not read, Ms. Asenga submitted that on page 4 of the typed proceedings, when the PW5 said that he recorded the statement of 2nd accused on 14/08/2016 at 1000 hrs. and he wanted to tender the document, the 2nd accused objected because none of his relatives were called and he was beaten. That an inquiry was conducted and the court concluded that there was no evidence showing that the 2nd accused was beaten or his statement taken outside the prescribed time. She submitted further that the cautioned statement of the second accused (EXP4) shows that it was read to him before he signed it at police.

As for the 1st accused, Ms. Asenga submitted that his statement was recorded on 15th and as per the evidence of PW6, it was because they had to take him to show them where the firearm was hidden. That he was arrested on 14th but since they were looking for a firearm, his statement was taken on 15th. Ms. Asenga submitted further that Section 50(2) of the CPA allows the extraction of time when the investigation was ongoing while computing the time that the statement of accused was recorded. That the

argument that the statement was taken outside the time is baseless and the statement was read out loud.

On those submissions and basing on the first point of jurisdiction, Ms. Asenga prayed that the court orders a retrial because there is sufficient evidence against the accused persons. On the substance of the appeal, Ms. Asenga concluded that the appeal lacks merits and prayed that the appeal is dismissed by upholding the conviction and sentence passed by the trial court.

In his rejoinder, the first appellant questioned the number of days he is supposed to be kept before being arraigned in court. He submitted that he was arrested on the 14/08/2016 and was arraigned in court on 22/08/2016. He denied to have taken anyone to show them a firearm because the case he was convicted with was unlawful possession of government trophy and was not arrested with a firearm. He reiterated his prayer that the court analyse the evidence and set him free.

The 2nd appellant rejoinder submission was that the witnesses say that the 1st accused is the one who showed them where the firearm was, but at conviction he was the one convicted of unlawful possession of firearm. He prayed that the court analyses the evidence thoroughly and reiterated his prayer that he is set free so that he can join his family.

I shall begin the determination of this appeal by the first argument raised by the first appellant that the trial magistrate erred in convicting him basing on the cautioned statement which was taken outside the time. That he was arrested on 14/08/2016 and as per the evidence of PW6 who recorded the statement, it was taken outside the prescribed time. Having

gone through the records of the trial the 1st and 2nd appellants were arrested on the 14/08/2016 at around 0800 hrs and at 1000 hrs of the same day they were at the Monduli Police Station. However, as per the evidence of the PW6, the police officer who recorded the cautioned statement of the 1st appellant, she recorded the statement on the 15/08/2016 at around 1100 am. An inquiry was conducted and the PW6 admitted to have recorded the statement of the 1st appellant on the 15/08/2016 while he was arrested on the 14/08/2016. While making its brief decision on the inquiry, the trial magistrate wrote:

> *"Court decides to admit the cautioned statement of the accused and then reason thereof shall follow. That reason shall appear in judgment."*

In his judgment, the trial magistrate made the following comments on the voluntariness of the cautioned statement:

> *"The first accused further told the court that the cautioned statement was written after expiration of two days instead of the time required by the law. That he was beaten up before signing the said cautioned statement.* ***The court observed that the 1st accused did not prove his allegation*** *because of the following:*
>
> *As the issue of torture that he was eaten* ***up he do not have PF3 to support the allegation*** *then he do not deny his signature."(*Emphasis is mine)

From the wording of the trial magistrate, that *the 1st accused did not prove his allegation*, he completely shifted the burden of proof to the 1st

appellant. The argument tabled by the 1st appellant was that the statement was recorded outside the prescribed time hence c/s 50(1)(a) of the CPA. It was the duty of the prosecution to provide reason as to why the said statement was taken outside the time. Furthermore, since the 1st appellant retracted his statement, the onus of proving that it was so voluntarily taken lied on the prosecution and not the then 1st accused as it was the reasoning of the trial magistrate. That said the said, the statement admitted as EXP5 was received contrary to the law, the said statement is hereby expunged from the records.

The second appellant also raised an argument on how his cautioned statement was admitted. He submitted that the statement alleged to be cautioned statement was tendered in court against the law and procedure as the person who prayed to tender the exhibit was Chacha, a State Attorney instead of PW5. He also contended that in the evidence of PW5, there is no place showing that the said statement was read over to him after finishing writing while he informed the court that he doesn't know how to read or write. He therefore prayed that the court expunge the statement from record. In her reply submissions, Ms. Asenga did not make any counter arguments on this issue.

Having gone through the records of the trial court, in his ruling, the trial magistrate did not at all address the issue of whether the 2nd appellant knew how to read and write. He admitted the statement because some of the preliminary facts (like the number of wives the 2nd accused's father had) stated therein were admitted by the 2nd appellant. However, the issue raised by the 2nd appellant during trial was that he did not know how to

read and write and the said statement was never read to him. Section 57(4) of the CPA provides:

> *(4) Where the person who is interviewed by a police officer is* ***unable to read the record of the interview*** *or refuses to read, or appears to the police officer not to read the record when it is shown to him in accordance with subsection (3)* ***the police officer shall–***
>
> *(a)* ***read the record to him****, or cause the record to be read to him;*
>
> *(b) ask him whether he would like to correct or add anything to the record;*
>
> *(c) permit him to correct, alter or add to the record, or make any corrections, alterations or additions to the record that he requests the police officer to make;*
>
> *(d) ask him to sign the certificate at the end of the record; and*
>
> *(e)* ***certify under his hand,*** *at the end of the record,* ***what he has done*** *in pursuance of this subsection.*

Having gone through the EXP4, the part where the Police Officer recording the statement of accused is required to specify whether the accused read the statement or the same was read him is not proper because the witness PW5 did not specify whether the statement was read to the accused or he read it himself. I have further gone through the records of the trial court in particular the records of the inquiry on admissibility of the statement of the second appellant. In his evidence during inquiry, the PW5 who testified as PW1 in the inquiry did not at all say whether the statement was read to the

accused or not. Owing to that, and since the 2nd appellant had raised the issue of his illiteracy during trial and it was not proved that the statement was read over to him, the said statement (EXP4) is hereby expunged from the records.

The 2nd appellant also raised an issue that during trial, the prosecution witnesses testified that it was the 1st accused who showed the witnesses where the firearm was but he was the one convicted of that offence. As per the charge sheet, the 2nd appellant (then 2nd accused) was the one charged with the 2nd count of unlawful possession of firearm. However, during hearing, PW1 testified that during interrogation, the 1st accused admitted that he owns a firearm without a licence and that on the evening of the 15/08/2016 he took them to Lobositi area within District of Simanjiro and showed them where he hid the firearm which they did not find. He testified further that on 17/08/2016 at noon is when the 1st accused took them to the caves and pulled a plastic bag with the firearm. The firearm and its seizure certificate were then admitted in court as EXP2. Throughout the rosecution evidence, there is no place or any witness that has connected the 2nd appellant with the firearm (EXP2). It is surpiring as to why the trail magistrate convicted the 2nd accused of the 2nd count while all the evidence adduced with regard to the said firearm pointed at the 1st appellant. It is obvious that during trial, the prosecution side failed to prove the offence of unlawful possession of firearm against the second appellant. Consequently, the conviction and sentence passed on the 2nd appellant with regard to the 2nd count of unlawful possession of firearm c/s 20(1)(a) and (2) of the Firearms and Ammunitions Control Act, No. 02/2015 is hereby quashed and set aside.

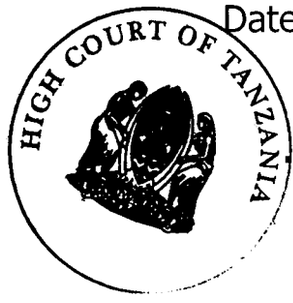
As for the remaining count of unlawful possession of government trophy, let us now see what is the available evidence on record having expunged the cautioned statements of both the first and the second appellants. The only remaining evidence is that of PW1 and PW3. On his part, PW1 testified to have received the information about the two appellant's possession of government trophy from an informer. PW3 on his part was assigned to go with PW1 to arrest the appellants following an informer's report. The PW1 tendered EXP1, the seizure certificate dated 14/08/2016 and the ivory. On her part PW4 was the valuer who tendered EXP3 the valuation certificate. This is all the evidence relied by the prosecution in the offence of being found in unlawful possession of government trophy. However, the evidence of prosecution totally failed to prove that what the appellants were allegedly arrested with (the trophy) is what was brought to court and tendered as exhibit.

To start with, the appellants are alleged to have been found in unlawful possession of trophy on 14/08/2016 and EXP1 was filled on that day. The PW4 was called to the Monduli Police Station to identify the trophy on 16/08/2016. There is however no information showing how the said exhibit was stored. Where the PW4 got the trophy and in whose custody did the PW1 leave the exhibits with. The PW4 merely said I went to police station and identify two tusks. The chain has further broken on how and where the exhibits were kept until the day they were tendered in court two months later. In the absence of the established chain of custody, it was improper to have concluded that what was brought to court is what was actually found with the appellants. Since that was the only remaining evidence by the prosecution; it is conclusive that during trial, the

prosecution side failed to prove the guilt of the appellants beyond reasonable doubt. Consequently, this appeal is allowed. The judgment and conviction passed by the trial court is hereby quashed and the sentence meted on the appellants set aside. The appellants are to be released from custody henceforth unless they are otherwise held for other lawful causes.

Appeal Allowed

Dated at Arusha this 29th day of August, 2018



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S. M. MAGHIMBI

JUDGE