IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPEAL NO 263 OF 2017

(Originating from Morogoro District Court, Criminal Case No. 17/2014)

IBRAHIM NENA YONTORO ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT:

LUVANDA, J:

The appellant was indicated before the District Court of Morogoro for three counts; the first and second court relating to unlawful possession of government trophy contrary to Section 86(1),(2)(b) & (3) of the Wildlife Conversation 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 Cap 200 R.E 2002 and the third count pertaining to unlawful dealing in trophies contrary to Section 84 of the Wildlife Conservation Act No. 5/2009 read together with Paragraph 14(b) of the First schedule to and Sections 57(1) and 60(2) of the Economic and Organized Crime Control Act, Cap 200 R.E 2002.

It was a prosecution case that on 13/11/2014 at about 16 hrs – 17 hrs at Bwawani Morogoro the appellant and two others

to wit John Lazaro Yontoro(1st accused) and Scolastica Aron (3rd accused (who were acquited at the trial court) were arrested into a bus registration No. T 558 AGG, upon search into their belonging (which was witnessed by a bus conductor – PW3 and passengers – unonymous) were found 11 pieces of elephant tusks into a bag of John Lazaro Yontoro (1st accused at a trial) and 7 pieces of elephant tusks including 2 tails of elephant and 5 tails of giraffe were found inside a bag of Scolastica Aron (3rd accused at a trial), all valued total USD 210,000. It was a prosecution case that the appellant was actually their target into that bus, being a mastermind of a deal and owner of the trophies as per his confession into a cautioned statement (exhibit P II). At defence John Lazaro Yontoro (DW1) implicated the appellant as owner of the elephant tusks impounded into his bag. The appellant denied to had gave the 1st and 3rd accused those tusks Scolastica Aron (DW3) likewise incriminated the appeallant as the one who had parked or loaded those government trophies into her bag together with the 1st accused, without her knowledge. The trial court believed the prosecution story and the defence by 1st accused (DW1) and 3rd accused (DW3), found the appellant guilty in respect of all three counts of unlawful possession government trophies (count one and two) and unlawful dealings in trophies (count three). The trial court let at large under escort free the 1st and 3rd accused.

Aggrieved, the appellant prefered this appeal with a total of thirteen grounds. The appellant complaints are basically that, the

matter was reasigned to another magistrate without explanation. Secondly he was not called to plead to a charge, thirdly the evidence of PW1 was based on hearsay, fourthly there was no certificate of seizure, fifth a cautioned statement was extracted through torture and was not corroborated, sixth the evidence of PW1 and PW3 were contradicting, seventh he was not addressed properly in terms of Section 231 Cap 20 R.E 2002, eight the trial magistrate erred to convict him based on the discredited testimony of an accompolice (3rd accused) finally the prosecution did not prove their case beyond reasonable doubt.

At the hearing the appellant was unrepresented while Ms. Elizabeth Mkunda learned State Attorney and Mr. Kandid Nasua learned State Attorney appared for the Republic (respondent).

I will start with the fifth and sixth ground of appeal which goes that the learned Resident Magistrate erred in law and fact by convicting the appellant relied on uncorrobarated caution statement (exhibit PII) which were made through torture. Regarding to this ground Ms. Elizabeth Mkunda learned State Attorney submitted that this ground was discussed properly by the trial court which conducted an inquiry and was satisfied that the same was made properly, hence admitted it in evidence. The learned State Attorney submitted that the trial court considered the evidence of eye witnesses to the seizure of those trophies, arresting officers, exhibits tendered including a cautioned statement, altogether led to conviction.

The ground of torture was raised by the appellant at a trial within trial (inquiry) where he complained to had been beaten severelly. He also explained to have been taken to Dar es Salaam immediately after being arrested on 13/11/2014 where he was forced to sign a caution statement on 17/11/2014. It is very unfortunate that the trial magistrate did not make any findings over these concerns of torture including a crucial question as to whether a caution statement was recorded at Morogoro on 13/11/2014 at 20 hrs as alleged by prosecution or was recorded on 17/11/2014 at Dar es Salaam as put by the appellant. According to the evidence on record, PW4 stated that on 14/11/2014 he conducted an indefication and valuation of seized trophies, at the task office of Game Office Dar es Salaam in the presence of all three accused. Even at defence all three accused stated consistently that they were all taken to Dar es Salaam immediately after arrested. This fact makes explanation by prosecution that the appellant and his fellow were not taken to Dar es Salaam at all, to be more suspect. Again an impugned caution statement (Exhibit PII) is silent as to a date to when the interview was completed. At the end of a certificate, it bears no date, only shows time to be 22:30 hrs. So far at the commencement it shows it started to be recorded on 13/11/2014 at 20:30 hrs and so far all eight pages are dated except the last page, this make it suspect as to an exact date and time of its completion. Section 57(2)(e) Cap 20 R.e 2002 make it mandatory for time of interview to be recorded. In the circumstances of this

case where a venue and date of an interview is questionable, it is my findings that a date was crucial. So far all these question were not answered by the trial court as aforestated, it goes without saying that an inqiry conducted by the trial court did not serve any useful purpose. It is a trite law that a trial within trial (an inquiry for this purpose) is conducted to determine the validity of a retracted or repudiated cautioned statement and whether was made voluntarily or not. In a case of **Nyerere Nyague Vs. Republic**, Criminal Appeal No. 67/2010 CAT at Arusha (unreported) at page 7, the Court held, I quote:-

> *"Where objection is taken under the Evidence Act, the trial court has to conduct .... an inquiry in subordinate court to determine its admissiblity. There the trial court only deterimines whether the accused made the statement at all, or whether he made it voluntarily"*

In the circumstances, I find that the caution statement was not cleared for admission, as the trial court did not properly exercise it is judicial discretion in admitting it. Therefore the same is expunged from the court record.

Regarding the twelveth ground of appeal that the trial court erred in law and fact by convicting the appeallant relying on the discredited testimonies of an accomplice.

Responding to this ground, the learned State Attorney submitted that there was ample evidence adduced against the

appellant and implicated the appellant that the government trohies belonged to the appellant.

Basically the evidence on records reveal that the seized trophies were impounded into the bags belonging to the 1st and 3rd accused who were acquited. In convicting the appellant, the trial court apart from relying on a cautioned statement (which have been expunged) also relied on evidence of an accomplice. It is a rule that an accomplice is a competent witness against an accused person. However in the circumstances of this case where the 1st and 3rd accused had an interest to serve as were struggling to exculpate themselves from liability, given that the trophies were seized in their actual possession, it was not safe to ground conviction based on that evidence.

In a case of **Asia Idd Vs. Republic** (1989) T.L.R. Page 175 this court held, I quote;-

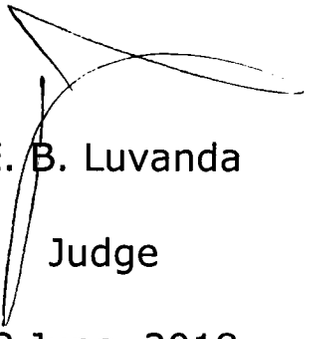
> *"evidence of a person who has interest to serve also needs corroboration as such it cannot be used to corroborate other evidence"*

In the circumstances a remained piece of evidence is a confession by the 3rd accused which cannot suffice to sustain conviction of the appellant. Section 33 (2) Cap 6 R.E 2002 provides that a conviction of an accused person shall not be based solely on confension by a co-accused (see also **Augustino Mponda Vs. Republic** (1991) TLR page 97).

So far the above adumbrated grounds suffice to dispose this appeal, I find no reason to dwel upon other grounds of appeal.

In the upshot, I find that the conviction of the appellant was mounted on unsufficient evidence and therefore cannot let to stand. The conviction of the trial court is quashed and sentence imposed set aside. The appellant is to be discharged forthwith.

The appeal is allowed. It is ordered.



E. B. Luvanda

Judge

12 June, 2018