

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MTWARA)

AT MTWARA

ECONOMIC CRIMINAL APPEAL NO. 4 OF 2020

*(Original from judgement of the District Court of Liwale,
in Economic Case No. 15 of 2018)*

CHANDE ZUBERI NGAYAGA.....1ST APPELLANT

MOHAMED RASHID RUPEMBE.....2ND APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

Hearing on: 15/05/2020

Judgement on: 02/06/2020

NGWEMBE, J:

The appellants Chande Zuberi Ngayaga and Mohamed Rashid Rupembe are in this court against their conviction and each was sentenced to pay fine to a tune of TZS 63 million shillings, upon failure to pay such fine, shall suffer imprisonment for a period of twenty (20) years. It is alleged that on 20th January, 2018, at Makata Village within Liwale District in Lindi region, the two appellants were found in possession of Government Trophy to wit, one piece of Elephant Tusk valued at Shillings 31, 500,000/= . Following that

arrest, they were arraigned in court, charged with the offence of unlawful possession of Government Trophy contrary to section 86 (1) & (2) (c) (iii) of the Wildlife Conservation Act No. 5 of 2009 as amended by Act No. 3 of 2016, read together with paragraph 14 (d) of the first schedule to and section 57 (1) of Economic and Organized Crime Control Act, Cap 200 R.E 2002 now referred to as Revised Edition of 2019.

Being aggrieved with that conviction and sentence, just four days thereafter, (sentenced on 3rd December, 2019) that is on 7th December, 2019, both appellants lodged their notice of intention to appeal and the actual appeal was filed in this court on 7th January, 2020. Their joint grounds of appeal comprised eleven (11) grounds faulting the trial court's judgement, which may be summarized into three grounds namely:-

1. The trial magistrate erred in convicting the appellants based on weak defence evidences instead of relying on strong prosecution evidences;
2. That there was no proper identification of the appellant; and
3. The trial magistrate erred to convict and sentence the appellants in a case which the prosecution failed to prove it beyond reasonable doubt.

On the hearing date of this appeal, the appellants did not procure services of learned advocate, hence they appeared in persons and their inputs were very much limited, while the Republic/Respondent enjoyed the legal services of Mr. Meshack Lyabonga, learned State Attorney. Since the

appellants were not represented, they preferred to respond from the State Attorney, thus the first right to argue the appeal was given to the Republic.

Accepting such right to begin, the learned State Attorney supported the conviction and sentence meted by the trial magistrate, since the prosecution proved the case against the appellants to the standard required. He further argued that the evidences of PW1 & PW2 were watertight. PW1 recorded the caution statement of 1st Appellant as appears in page 24 of the proceedings. In such statement the 1st appellant confessed on how he was found with unlawful possession of Elephant Tusk. That even during tendering of such caution statement, both appellants while represented by an advocate did not oppose, thus admission of its contents by the maker.

Likewise, the 2nd appellant confessed on the offence when he recorded his caution statement, which was likewise, admitted unopposed during trial. That all those statements were legally admitted in court and properly read over as required by law. To comprehend on his submission, he referred this court to the case of **Tuwamoi Vs. Uganda [1967] E.A. 51**, that even confession alone may lead into conviction.

The 1st appellant when was called upon to respond on the submission by the State Attorney, he generally denied his involvement in possession of the said trophy. He repeated that on 22/4/2018 he was arrested by militiamen, while had nothing in his hands. When he was in police custody, he was forced to record a caution statement. Further submitted that the

alleged Elephant Tusk was found on 20/1/2018 at Makata village, but no witness testified in court on the finding of the said tusk. He rested his arguments by stating that he confessed after being beaten almost to death by police. Therefore, he prayed this court to find him not liable on the offence.

The 2nd appellant likewise, submitted that he was arrested on the same date that is, on 22nd April, 2018 when he was at the village. That he met with Wildlife Officers who arrested him, took him to police. He recorded the statement after one week from the date he was arrested and incarcerated to police custody. Despite being beaten by police, yet he did not confess on the offence, but police recorded that he confessed on the offence and was forced to sign that statement without knowing its contents.

Having painfully summarized the parties' arguments, I find the glaring issue for determination is whether the prosecution proved the offence against the appellants, secondly, whether the caution statement was recorded within the prescribed time; and lastly whether there was proper identification of the appellants.

This is the first appellate court, I find it is important to reevaluate the whole evidences adduced in court during trial. The mandate of the first appellate court to reevaluate the whole evidences of the trial court was also promulgated in the case of **Leonard Mwanashoka Vs. R, Criminal Appeal No. 226 of 2014** (Unreported) where the Court of Appeal held:-

"The first appellate court should have treated evidence as a whole to a fresh and exhaustive scrutiny which the appellant was entitled to expect. It was therefore, expected of the first appellate court, to not only summarize but also to objectively evaluate the gist and value of the defence evidence, and weigh it against the prosecution case. This is what evaluation is all about"

This being the current legal requirement and this court being the first appellate court, I think, reevaluation of the whole evidence recorded by the trial court, is inevitable.

Accordingly, PW1 a Police Sargent, testified that he recorded a caution statement of the 1st appellant in this appeal. Such statement was read over in court after being admitted and marked exhibit P1. The contents of P1 is purely a confession and detailed expression of what exactly happened in the scene of crime. Such confession cannot be recorded by another person who was not involved therein.

The caution statement of the 2nd appellant was recorded by PW2 who testified in court and the caution statement was admitted in court, marked as exhibit P2, its contents was similar to the contents of exhibit P1. Therefore, conclusively the two who testified in exhibit P1 and P2 were fully aware of the scene of crime and actually participated therein.

The contents of testimonies of PW3 indicates that he was the brain behind arresting the appellants, while were carrying an Elephant Tusk having a

motorcycle. Though they jumped and ran away, leaving behind the said motor cycle and the Elephant Tusk, yet were later found, arrested and arraigned in court. The motorcycle bearing registration No. T. 839 CLA make King Lion was admitted in court marked as exhibit P3. Again the Elephant Tusk was likewise tendered in court and was admitted marked exhibit P4.

Another key witness was PW4 who tendered in court a Valuation Certificate dated 22/1/2018, which was admitted and marked as exhibit P5. The last prosecution witness was WP 7148 DC Fredina (PW 5) who testified that on 23/4/2018, she participated in arresting the appellants, who confessed to have in possession of that Government Trophy.

In defence, both testified on how they were arrested, while having nothing in their hands. They denied generally to own the said motor cycle and the alleged Elephant Tusk. Further, testified that they were arrested without having nothing in their hands. That they admitted to have been arrested on 23/4/2018 while having nothing in their hands.

Having those testimonies in mind, I now turn to consider grounds of appeal as summarized above. The first issue is related to the allegations that the trial magistrate convicted the appellants based on weak defence evidence, instead of relying on strong prosecution evidence. Considering in depth the weight of the prosecution evidence together with exhibits tendered and admitted in court unopposed, I think, I have no reason to doubt the propriety of the judgement of the trial court. In essence the defence

evidence supported the prosecution case in many ways. As such this ground of appeal is baseless same is dismissed.

On the second issue that they were not properly identified, likewise, I have deeply considered and find same is irrelevant because the contents of both caution statements were purely admission of what they did and how they were illegally conducting business since 2014 to 2018. May be I need to discuss a bit more on the meaning of confession and its ingredients, for better understanding.

Confession is defined by **Black's Law Dictionary** (8th Edition at page 317) to mean "*a criminal suspect's oral or written acknowledgement of guilt, often including details about the crime.*" Confession is an acknowledgement in express words, by the accused in a criminal case of the truth of the main fact charged or of some essential part of it. **Sarkar: Law of Evidence** (17th Edition 2010) discussed in details on confession to mean "*an admission made at any time by a person charged with crime, stating or suggesting the inference that he committed the crime*" Confession is a statement of direct acknowledgement of guilty and detailed expression of how the offence was committed.

Justice of Appeal Mnzavas J.A in **Luhuye Vs. R, [1994] TLR. 181** at page 185 had this to say:-

"With respect to the learned judge we agree with his finding that appellant's cautioned statement to the police was so detailed, elaborate and thorough that no other person could

have made the statement but the appellant. His caution statement to the effect that he decided to attack the deceased with a panga and a stick on the head after he was told by witch doctors that it was the deceased who had made him (appellant) important by means of a witchcraft was so personal that no other person would have such information”

The Court of Appeal said, such detailed caution statement amounted into confession, despite the fact that the appellants retracted his confession during trial, still the Court found him reliable and his statement corroborated the occurrence of the offence.

In the same vein, Justice of Appeal Kisanga J.A. in the case of **Hamisi Athuman & 2 others Vs. R, [1993] T.L.R. 110 at page 114**, upheld the decision of the trial court because the appellants were convicted on a confession statements, which were retracted, but carried all truth of the subject matter. Thus, confession must portray truth of the event and detailed of what exactly happened.

In this appeal the caution statements left nothing but detailed on the whole process of possession of the said Government Trophy. Above all they confessed that they started such illegal business since 2014 to the date they were arrested. Such details cannot be made by another person but by the appellants themselves.

Section 27 of the Evidence Act [Cap.6 R.E 2019] is clear as quoted hereunder:

"27 (1) A confession voluntarily made to a Police Officer by a person accused of an offence may be proved as against that person.

(2) The onus of proving that any confession made by an accused person was voluntarily made by him shall lie on the prosecution.

(3) A confession shall be held to be involuntarily if the court believes that it was not induced by any threat, promise or other prejudice held out by the police officer to whom it was made or by any member of the police force or by any other person in authority"

This section governs admissibility of voluntary confession against the maker in a trial. Even involuntary confession is also admissible if the Court believes it to be true. Section 29 of the Evidence Act speaks louder on it. These two sections were likewise considered by the Court of Appeal in the case of **Thadei Mlomo & Others Vs. R, [1995] T.L.R. 187 at 191** where the court held:-

"Under section 27 once a confession has been proved to be voluntarily made then it would appear a court will accept it as the truth. However, if a confession was involuntary, then it will be accepted under section 29 if the court is of the opinion that the confession constitutes the truth. So in the former section the truth of the confession is presumed by the court while in the latter the truth has to be conceived by the court"

Having those legal principles in mind, the question is what do they apply in this appeal? The two appellants recorded their cautioned statements before police, which statements amounted into confession. P1 is a statement made by the 1st appellant which part of it is quoted hereunder:-

"Mohamed Lupembe na Mimi tulichukua jino hilo la Tembo na kukodi bodaboda ambaye simjui jina lake, na kumpelekea tajiri wetu jino hilotukiwa tumepanda pikipiki hiyoghafila walitokea askari wa maliasili wakiwa kwenye gari lao la kazi na kusimamisha pikipiki yetu ndipo boda boda huyo akatupa pikipiki hiyo na sisi pamoja na yeye tulikimbia na tukaliacha jino hilo moja la tembo pamoja na pikipikihiyo. Mimi ninakiri jino hilo la tembo ni mali yetu sisi wawili yaani mimi na Mohamed Lupembe"

This piece of evidence carries the same contents with the statement recorded by Mohamed Rashid Rupembe. Both confessions, corroborated the evidences testified by PW3, PW4 and PW5. The event which was testified by PW3 in court, is the same event detailed in the confession statements of the appellants. I think the learned trial magistrate was right in admitting their caution statements and upon referring to the case of **Tuwamoi Vs. Uganda [1967] E.A 91, and in Criminal Appeal No. 10 of 1995 (CAT) at Mwanza, between Richard Lubilo and Mohamed Seleman Vs. R,** arrived into a correct conclusion, which I have no reason to depart from it.

At this juncture, I think it is important to consider just briefly on the sentence meted by the trial court. The trial court sentenced both appellants to pay fine to the tune of TZS 63,000,000/= each in default they should serve custodial sentence to the period of twenty (20) years. What does the law provide on this sentence? Section 86 (2) (iii) as amended by Act No 2 of 2016 is hereby quoted for clarity and for better understanding:-

“ Where the value of the trophy which is the subject matter of the charge exceeds one million shillings, to imprisonment for a term of not less than twenty years but not exceeding thirty years and the court may in addition thereto, impose a fine not exceeding five million shillings or ten times the value of the trophy, whichever is larger amount”

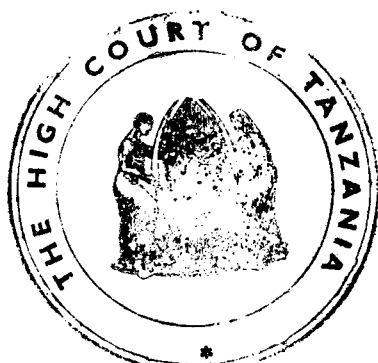
In line to this section, the trial court sentenced the appellants into twenty (20) years imprisonment or payment of fine to the tune of TZS 63,000,000/= each. Unfortunate may be to the appellants, the ancestors of legal jurisprudence left us with a long living precedents including the well-spoken maxim that courts must apply the law as it is, even if, the sky will fall. If the law is a bad law, amendment or repealing it, is a duty of the legislature not of the court of law. In respect of this appeal, the legislature dutifully enacted the referred section with fixed sentence of minimum and maximum, giving no room to the court to exercise its discretion. The only available discretion is to punish the offender any period from twenty (20) years to thirty (30) years imprisonment. Such long imprisonment has already drawn attention of law makers in many ways, but still the section is not yet amended and this court cannot refuse to use


it. Therefore the trial magistrate rightly applied the law in convicting and sentencing the appellants.

For the reasons so stated, I have no reason to depart from the judgement of the trial court, accordingly, this appeal lacks merit same is dismissed forthwith.

I Order Accordingly.

Dated at Mtwara this 2nd day of June, 2020.





P.J. NGWEMBE
JUDGE
02/06/2020

Court: Delivered at Mtwara in Chambers on this 2nd day of June, 2020 in the presence of the Appellants and Mr. Meshack Lyabonga, State Attorney for the Republic/Respondent.

Right to appeal to the Court of Appeal explained.




P.J. NGWEMBE
JUDGE
02/6/2020