IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

CRIMINAL APPEAL NO. 287 OF 2018

(Originating from Economic Case No. 1 of 2015 in the District Court of Ilalal at Samora (Tarimo, SRM)

DOMIC CORNEL KOMBE.....1st APPELLANT
HELBERT RAVEL MACHAKA.....2ND APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

JUDGMENT

MASABO, J.:-

The appellants were on 11th December 2017 convicted of the offence of unlawful possession of Government Trophies contrary to section 86(1) and (2) (c) (ii) of the Wildlife Act, No. 5 of 2009 read together with paragraph 14(d) of the 1st Schedule and section 57(1) if the Economic and Organised Crime Control Act (Cao 200 R.E 2002) by the district court of Ilala. Each was sentenced to 20 years imprisonment. Aggrieved, they lodged this appeal against the conviction and sentence. They marshaled 6 grounds in support of their appeal and added a supplementary list constituted of 4 grounds thus making a total of 10 grounds of appeal.

In summary, the grounds were as follows: **First,** the court erred in law by failure to comply with legal requirements pertaining to transfer of magistrate and continuation of hearing by another magistrate (successor magistrate);

Second, the trial court erroneously relied on a retracted confession of the 2nd appellant; **Third**, the trial court erred in relying on a witness statement in contravention of section 34B of the Evidence Act, [Cap 6 RE 2020]; **Fourth,** the court erred in relying on elephant tusk which were admitted as exhibit P1 as they were unprocedurally tendered by the prosecutor who was incompetent to tender them; **Fifth,** in admitting and relying on exhibit P1, elephant tusks, the trial court did not comply with the principle of chain of custody; S**ixth**, the court erred in holding that the prosecution's case was proved beyond reasonable doubt while there were irreconcilable inconsistencies and contradictions in the prosecution's witnesses; **Seventh,** the trial court erred in failing to consider that the caution statement of the first accussed was not produced in court; and **Eighth** the court erred in convicting the 2nd appellant on the basis of the elephant tusk allegedly found in a Pemba bag which was not produced in court.

In upshot, the facts of this case are that, the accussed were found in possession of 28 pieces of elephant tusks valued at USD 120,000 equivalent to Tshs 200,400,000/=. 27 pieces were found in the 1st Appellant's main house and 1 was found hidden in a Pemba bag which was stored in a servant quarter. During the hearing, the Appellants were represented by Mr. Josephat Mabula, learned Counsel whereas the Respondent Republic, was represented by Ms. Elizabeth Mkunde Learned State Attorney.

Submitting in support of the appeal, Mr. Mabula abandoned the first ground regarding compliance with the legal requirement on transfer of presiding

magistrate and takeover by another magistrate. In respect of the ground that, the trial court erroneously relied on a retracted confession of the 2nd Appellant, it was argued that the procedures used was in contravention of the law because, after the caution statement was retracted by the Appellant, an inquiry was done but the ruling of which was not delivered. Instead, it was admitted as (ID No 1) which was relied upon by the court in its judgement. It was argued further that, in addition to being retracted, the caution statement had an additional statement whose source and author was not explained thus it was in contravention with section 58(3) of CPA [Cap 20. R.E. 2019].

Regarding the admissibility of witness statement, it was submitted section 34B of the Evidence Act was not complied with as there was no proof that indeed the witness could not be found owing to death, or being out of the country or any other cause stipulated under the said section. He added that, the summons in respect of the witness whose statement was admitted was taken to Tabata Local Government Offices while it was within the knowledge of the prosecution that her place of abode was Tanga and not Tabata. The case of J**oseph Shabani Mohamed Bay and 3 Others V. R.** Criminal Appeal No. 399/2016 (CAT unreported) was cited in support.

In respect to tendering and admission of the elephant tusks, it was argued that the law on tendering of exhibits was not adhered to as the evidence was tendered by the prosecutor. It was forcefully argued that in law, tending of exhibit was not the prosecutor's duty. The case of **Rahim Rashid @**

Masangano and 2 Others v. R. Criminal Appeal No. 6 of 2008 (CAT) (unreported) and **Frank Massawe v. R**. Criminal Appeal No. 302 of 2012, CAT (unreported) were cited in support. It was argued that, since this fundamental exhibit was tendered by an incompetent witness who could not be cross examined, it should be expunged and the appellants be discharged.

On compliance with the principle of chain of custody, it was argued that there was a breakdown of chain of custody. PW1 did not explain how the tusks were kept from the time they reached at Buguruni police station to the time when they were ultimately handled at the central police station and being tendered the court there is a likelihood that the said evidence was implanted.

On the issue of contradictory statements by the prosecution witnesses, it was argued that, there were a lot of contradictions and inconstancies in the testimonies of PW1, PW2 and PW7. The contradictious are in respect of the hours when the search begin to the hours the search ended. PW1 stated that the search stated from 10 hours to 12: 30 and on the other hand he stated that it started from 14:00 to 15:00, a time with which the caution statement was allegedly recorded. He argued that, this contradiction is fatal as it implies that the caution statement was taken while the search was still ongoing. Also, considering that the 2nd Appellant was not arrested at the same time and was not at the scene during the material time, it suggests that his caution statement was taken before he was arrested. It was argued that these contradictions go to the root of the matter and stands to benefit

the appellants. The case of M**atuki V. Republic** [1995] TLR3. In this case, the court held that:

> 'When the testimonies by witnesses contain inconsistences and contradictions the court has a duty to address the inconsistencies and try to resolve them when possible. As the court has to decide whether the inconsistencies and contradictious are only minor or whether they go to the roof of the matter."

Also the decision of the Court of Appeal in **Leonard Zedekia Marutu** V. R. Criminal Appeal No. 86 of 2005 CAT at Mwanza (unreported) was cited. It was submitted that in this case the court held that the appellant ought to be given the benefit of doubt due to inconsistencies and it consequently ordered acquittal.

Regarding the "Pemba bag" Mr. Mabula argued that it is a trite law that every article arrested by the police during the arresting of exhibits/the article which is alleged to have been involved in the crime must be tendered in court as exhibit. He added that, as part of this principle, iot is required that anything arrested by the police officers should not be only be explained in court. It should be tendered as exhibit. That the failure by PW1 to tender the "Pemba bag" in which one piece of the elephant tasks was allegedly found, and which is the only evidence connecting the 2nd appellant with the offence, was fatal. He also submitted that it was fatal for the prosecution to fail to produce the clothes which were found in the said 'Pemba bag' which was alleged to be the property of the 2nd accussed person. Mr. Mabula cited

the case of **Musa Abdallah Mwiba and Others V. R** Criminal Appeal No. 200 of 2016 CAT (unreported) and argued that, the "pemba bag" being the vessel that was used to carry the elephant tusks must have been produced in court and the failure implies that the prosecution failed to prove their case against the 2nd Appellant. In conclusion he submitted that the prosecution's case was not proved beyond reasonable doubt, hence the conviction and sentence metered on the appellants should be quashed and set aside.

In reply, Ms. Mkunde, learned State Attorney conceded to the irregularity in admission of the caution statement and prayed that the same be expunged from the records due to noncompliance with the law regarding conduct of inquiry in respect of retracted confessions. Having concede to this point she submitted that, the absence of the caution statement would not have effect on the case as the conviction was arrived at upon analysis and consideration of the testimony rendered by 12 witnesses which were sufficient to warrant conviction of the appellants.

On admission of the witness statement, Ms. Mkunde argued that there was proof that the witness could not be procured hence there was compliance to section 34 (B) of the Evidence Act. She argued that, compliance was through the notice given by the prosecution and the submission by the parties. She added that, this is the reason why the appellants did not object the admissibility of statement which was admitted as exhibit P5. She added that, Amina Mwijuma, in respect of whom the statement was tendered was an

independent witness. That, in addition there were other independent witness such as the ten-cell leader who testified as PW4. Thus, even if the statement is expunged, the prosecution's case would remain intact.

On the tendering of exhibit P2, the learned State Attorney submitted in principle the prosecutor is not allowed to tender exhibits because he is a witness. But that was not the case in the instant appeal because the contested exhibit was property tendered by PW1 who was in dock and he ably identified them using an IR No. She argued that, the case of **Rahim Rashid @ Masangano and 2 Others v. R** (supra) is distinguishable because unlike in that case where there was no witness in the instant case there was witness who tendered the exhibit in court. She added that, considering the circumstances of the case, after the witness had tendered the tusks in court, the court had to move outside as there were many tusks which could not be brought in the court room and that, it was at that state when the prosecutor showed the exhibit to the court. She also argued that the case of **Frank Massawe v. R**.(supra) is distinguished as the exhibit in that case was tendered by the prosecutor.

She also submitted that, after the exhibit was admitted, the appellants were given an opportunity to cross examine the witness but they opted not to, hence they forfeited their rights (see **Issa Hassan Uki V. Republic** , Criminal Appeal No. 129 of 2019 (CAT) unreported and **Chukundi Denis Okechukwe and 3 Others V. R**, Criminal Appeal No. 507 of 2015, CAT (unreported).

On the chain of custody, it was argued that the chain of custody was intact from the date time when the exhibit was tendered to the date it was admitted in court by PW1. PW1, ably explained how the exhibit was sent to Buguruni police station; PW7 and PW8 testified how the exhibit went to central police and how it was kept. All the witnesses rendered registers which were admitted as exhibit P6 and P7 and both were not objected. Besides, Ms. Mkunde argued that the principle of chain of custody in ivory tusks have changed as the tusks are of such a nature that they cannot easily change hands.

Relying on the case of **Issa Hassan Uki** (supra) she submitted that since the inconsistencies and contradictions are very minor and do not in any way prejudice the evidence that search was conducted, they should be ignored as they are merely human error and have no effect on the credibility of evidence as they are only human errors. She further argued that, even if the inconsistencies were found to be material they will be of no effect as they emanate from the caution statement which has been expunged.

On the last ground, 4th ground in the supplementary grounds, it was argued that the prosecutor found that the 2nd Appellant was found with ivory tusk and it tendered the tusks as evidence and the seizure certification thereto therefore, failure to tender the pemba bag is of effect as the Pemba bag was not a disputed fact and needed no proof. The proof was just in respect of the ivory tusks. it was argued that the case of **Musa Abdallah Mwiba,**

(supra) is distinguishable because the tusks were tendered in court and they well identified through IR No. The learned State Attorney, cited the **Simon Ndikulyaka V. R. Criminal** App No. 231 of 2014 (CAT) unreported and argued that, the Appellants were found in possession of ivory tusks, they had knowledge of the ivory tusks and they were in full control of the same hence their appeal should be dismissed.

In rejoinder, Mr. Mabula, reiterated that the admission of the witness statement was inconsistent with section 34 B (2) (a) to (f) of the Evidence Act. He argued that this observation was raised as an objection before the trial court but it overruled by the trial court. He stressed that prosecution has no role in tendering of exhibits and he is not permitted to help a witness in tender exhibit. Based on the case of Issa **Hassan Uki** (supra) he rejoined that the witness in the dock has two important duties that is to give evidence and secondly to tender exhibit in support of the evidence he/she has tendered. Thus, Exhibit P2 having being tendered by a wrong person it is not part of record and should be expunged from court records.

On the chain of custody, he reiterated that proper documentation of movement of exhibit is paramount. Thus, Exbibit P1, P6 and P7 ought to have shown clearly how the tusks changed hands. On the contradictions in the testimonies, he rejoined that since the respondent has admitted the inconsistencies, it is obvious that the prosecution did not prove their case to the required standard, ie beyond reasonable doubt. He cited the case of **Musa Abdallah Mwiba and 2 Others V. R** (supra) and rejoined that the

contradictions were major and incapable of being merely ignored. Lastly, he rejoined that the prosecution's failure to produce the "pemba bag" in evidence is fatal. The failure to produced it, arguably, watered down the prosecution's case.

I have given due consideration to the grounds of appeal and the submissions from both parties. Basically, there were eight issues for determination. However, upon the first ground of appeal being abandoned, I am invited to consider only seven grounds namely: whether the trial court erroneously **relied** on a retracted confession of the 2nd appellant; whether the admission of the witness statement contravened the law; whether exhibit P1 procedurally tendered; whether the principle of chain of custody was adhered to; whether the failure to produce the 'pemba bag' was a fatal commission; whether there were irreconcilable inconsistencies and contradictions in the prosecution's witnesses, and whether the prosecution's case was proved beyond reasonable doubt

Regarding the first issue, the Appellant's case that the trial court erred in relying on the caution statement of the 1st appellant. The law on admissibility of confession is very settled. When a confession is tendered for admission as evidence in a criminal trial, the accused may if he so wishes, object to the admissibility of a statement/confession prior to its admission (see **Juma Kaulule V R** Criminal Appeal No. 281 of 2006, CAT (unreported). Upon the objection being made, the court will proceed to conduct an inquiry (if the trial is in subordinate court) so as determine its voluntariness or otherwise

and make a ruling to that effect. Admission of the confession statement would depend on the outcome of the inquiry (**Twaha Ally And 5 Others V R** Criminal Appeal No. 78 of 2004 (unreported). In this case, the record indicate vividly that admission of the caution statement was objected. An inquiry was conducted but it was not finalized as no ruling was rendered by the trial court. Page 114 of the proceedings clearly reveal that, after the parties were heard, the court refrained from making any ruling but proceeded to admit the caution statement as 'ID 1'. In analysis of the evidence, the trial court, without assigning any reason, made reference to the caution statement and used it to convict. This was certainly a fatal irregularity and warrants the expungement of the caution statement from the record. Accordingly, I upheld this ground of appeal and expunge the caution statement from the court records.

The next point for consideration is the appropriateness or otherwise of the admission of the statement of one Amina Mwinyijuma, a house maid who was working for the 1st Appellant. The Appellants have forcefully argued that the statement of this witness was admitted in total disregard of the provision of section 34B of the Evidence Act, which regulates the admission of witness statements in criminal cases. According to this provision, a written statement of a witness may be admitted in criminal trial in lieu of oral evidence where the maker of the document is not called as a witness owing to death, bodily or mental infirmity or where the witness is outside Tanzania and is impracticable to call him as a witness. A witness statement may also be admitted if the court is satisfied that all reasonable steps to procure the

attendance of the witness have ended futile or where he cannot be found as he is not identifiable or cannot attend by operation of law. In addition, the law provides a long list of requirements to be complied with.

The applicability of this provision is not an untraversed area. It has been a subject of discussion in numerous cases. There is a plethora of authorities and these include the case Shaban **Mohamed Bay & 3 others** (supra); **Shilinde Bulaya v R**, Criminal Appeal No. 185 of 2013 (CAT) (unreported); **Fadhili Heri @ Selemani v R**, Criminal Appeal No. 183 of 2011(unreported); and **Director of Public Prosecution v Ophant Monyancha** [1985] 18. All these authorities converge that, the conditions for admission of witness stamen as stipulated under section 34B are cumulative. For a witness statement to be admissible under this section all the conditions stipulated under Section 34B (2) must be met.

In the present case, the prosecution prayed to tender the a statement of Amina Mwingijuma (page 97 of the proceedings). In support of the prayer, the prosecutor submitted that the witness could not be found and produced summons signed by a street chairman for Migombani are at Tabata area in Dar es salaam. Admission of this statement was forcefully contested by the Appellant counsel and the prosecution was accorded an opportunity to counter the objection. The trial court did not technically make a ruling. It only stated the point of law. However, a further scrutiny reveals that it was determined in the course of the judgment where it was found that the statement qualified for admission. With respect, the ruling was unfounded

as it was not based on any findings regarding compliance or otherwise of the cumulative requirements stipulated under section 34B.

Having carefully perused the records, it is my humble view that, the admission of the witness statements was not in compliance with the rule stipulated by in the authorities cited. From the records, Amina Mwinjuma was a material witness. It was therefore crucial that concerted efforts be made to procure her attendance. No tangible evidence was rendered to sufficiently establish that there were concerted efforts to procure the attendance of the witness. All what was stated is that a summons was issued at no avail. On this account, I agree with the appellants that the statement was wrongly admitted and I expunge it from the records as per **Shaban Mohamed Bay & 3 others v R** (supra).

The next question for determination is whether exhibit P2 constituting of 28 elephant tusks were correctly admitted. The bone of contention between the parties is on the person who tendered the exhibit. On the Applicants party, it is argued that the exhibit was tendered by the prosecuting attorney who was incompetent to tender the exhibit whereas on the Respondents side, it is argued there is no fault because the witness was present in the dock box and was available for cross examination.

Under the law of evidence, tendering of exhibits is the responsibility of the witness. As correctly submitted by the Applicants counsel, it is a trite law in our country that exhibits must only be tendered by a witness not the

prosecutor (see **Rahim Rashid @ Masangano and 2 Others v R.** Criminal Appeal No. 6 of 2008 (CAT) (unreported); Frank **Massawe v R.** Criminal Appeal No. 302 of 2012, CAT (unreported), **Thomas Ernest Msungu@ Nyoka Mkenya v R,** Criminal Appeal No. 78 of 2012 CAT (unreported); **Silvery Adriano v. R,** Criminal Appeal No. 121 of 2015 CAT (unreported); and **DPP v Festo Emmanuel Msongaleli & Nicodemu Emmanuel Msongaleli,** Criminal Appeal No. 62 of 2017 CAT (unreported). In **Thomas Ernest Msungu@ Nyoka Mkenya v R,** the Court of Appeal held as follows:

> "Under the general scheme of the Criminal Procedure Act (CAP20 R.E. 2002) (the Act), particularly sections 95, 96, 97, 98 and 99 thereof, it is evident that the key duty of a prosecutor is to prosecute. A prosecutor cannot assume the role of a prosecutor and a witness at the same time. In tendering the report, the prosecutor was actually assuming the role of a witness. With respect, that was wrong because in the process the prosecutor was not the sort of witness who could be capable of examination upon oath or affirmation in terms of section 198(1) of the
> Act. As it is, since the prosecutor was not a witness he could not be examined or cross-examined on the report."
>
> **Silvery Adriano v. R** (supra), the Court held that:
>
> "...the exhibit was tendered by the prosecuting attorney from the bar, at the end of the trial, which <u>was illegal because he was not a witness and could not be cross-examined"</u>

Applying the same principle in **DPP v Festo Emmanuel Msongaleli & Nicodemu Emmanuel Msongaleli** (supra) the Court stated that, the caution statement tendered in court by the prosecutor were wrongly admitted because the prosecutor is disqualified from tendering evidence as he is not a witness. In addition, the Court held that

> "……a prosecutor cannot assume the role of a prosecutor and a witness at the same time because the prosecutor is not a sort of a witness who could be capable of examination upon oath or affirmation in terms of section 98 (1) of the CPA because not being a witness he cannot be cross-examined.:

The records in the present case as appearing on page 22 brightly demonstrate what transpired in court in the course of tendering of exhibit P2. What is certain from the record and as admitted by both parties, after PW1 had laid a foundation for tendering of the tusks as exhibit, the prosecutor requested the court to move out of the court room to the vehicle where the tusks were stored. Having granted the prayer, the court moved outside to the place where the vehicle was packed. What transpired thereafter is as reproduced verbatim below:

> PW1: I found one piece of tusks at the servant quarter and the other 27 at the store. I found these three weights. These are made up of silver grass and the me one blue in colour those are less and those are the weight in leg written at each elephant tusks. There are 27 elephant tusks found at the store of the land lord and a one elephant tusk at the servant quarter.

PP: Your Honor I pray to tender 28 elephant tusks and three weighs as exhibits
MR. Josephat: I have no objection
MR. GODFREY: I have no objection
court: the court admitted 28 elephant tusks collectively as an exhibit P1 and three weighs collectively as an exhibit P2.
signed.

The questions emerging from this scenario is (i) whether under the circumstances the exhibit can be deemed to have been correctly admitted; (ii) if the answer to the first question is in the negative, can the exhibit be any how sustained? I will not labour on the first question because the records above produced speak quite loudly as to who between the witness (PW1) and the prosecutor tendered the exhibits. Ms. Mkunde admittedly submitted that the exhibit was tendered by the prosecutor but persuaded me to hold that the anomaly is not fatal as the witness was in the dock box. She has invited me to find the cases cited by Mr. Mabula as distinguishable from the instant case because in the cited cases, the witness was not available for cross examination. She has in addition persuaded me to find the appellants point untenable because during the hearing he did not object the admission of the exhibits.

With respect to the learned State Attorney, I am not inclined towards her line of argument. The authority in the cases above cited is not only binding on this court but is also very elaborate as regards tendering of exhibits by the prosecutors. The position of the law is to the effect that, the failure by

the accussed to cross examine does not change/regulise the exhibit otherwise tendered by an incompetent person. The Court of Appeal while considering a similar issue in **Thomas Ernest Msungu@ Nyoka Mkenya V R** (supra), held that:

> "is true the appellant did not object to the production in evidence of the report. But in our view the learned judge misdirected himself in making the above finding in view of our findings and conclusions above on the manner in which the report was produced and admitted in evidence. As already stated, the report ought not to have been produced by the prosecutor.

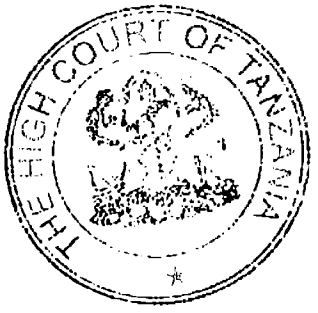
The case **Issa Hassan Uki v R** (supra) and **Chukwundi Denis Okechukwu & 3 others v R**, Criminal Appeal No. 507 of 2015, cited by the learned state Attorney are in my decided opinion, sharply distinguishable in respect to the point under determination. None of the two cases dealt with the issue of tendering of exhibit by an incompetent person. Unlike in the instant case, in **Issa Hassan Uki v R** (supra) the issue was on the failure of the appellant to cross examine a witness. The court found that such failure connoted acceptance of the veracity of the testimony tendered by the witness. In **Chukwundi Denis Okechukwu & 3 others v R**, (supra) what was at issue was the appellants failure to object tendering of a witness statement under section 34B of the CPA. These issues are dissimilar to the facts pertaining to this case. As it could be seen from the proceedings above reproduced, the prosecuting attorney, being an incompetent person to tender the exhibit, usurped the role of the witness and proceeded to tender

the exhibit as if he was a witness. As held in **Silvery Adriano v. R** (supra), tendering of the exhibit by the prosecuting attorney was illegal as he could not be examined. In light of the facts and authorities above, I find and hold that Exhibit P1and P2 was improperly admitted as evidence.

Having faulted the admission of P1and P2 which were the most fundamental evidence connecting the appellants to the crime, I see no need to procced with the remaining issues because the above finding sufficiently disposes of the appeal because. As the appellants conviction cannot be sustained in the absence of these two pieces of evidence, finding in the remaining issues will not change the verdict.

Accordingly, I allow the appeal, quash the convictions and set aside the sentence imposed on the appellants. The appellants are to be forthwith released from custody unless otherwise lawfully held.

Dated at Dar es Salaam this 26th day of August 2020.



J.L. MASABO

JUDGE