IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IRINGA DISTRICT REGISTRY)
AT IRINGA

APPELLATE JURISDICTION

(DC) CRIMINAL APPEAL NO. 62 OF 2019

(Originating from Economic Case No. 01 of 2017 of Mufindi District Court at Mafinga)

SALUM ANDREW KAMANDE ..... APPELLANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT

Date of Last Order: 15/07/2020
Date of Judgment: 04/09/2020

JUDGMENT

MATOGOLO, J.

In the District Court of Mufindi, Salum Andrew Kamande who is the appellant in this appeal was charged in Economic Case No. 1 of 2017 with two counts; namely unlawful possession of Government Trophy contrary to Section 86(1) (2)(b) of the Wildlife Conservation Act No. 05 of 2009 read together with paragraph 14 (d) of the 1st schedule to and Section 57(1) and 60(2) of the Economic and Organized Crime Control Act [Cap. 200 R.E. 2002] as amended by Section 16(b) and 13(b) of the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016, in the first count. It was alleged that he was found possessing eight pieces of elephant tusks worth Tshs. 64,000,000/= without permit or licence.

In the second count, he was charged with operating on unspecified route contrary to rule 19(1) and 32(1) (c) of the Transport Licence (Road Passengers Vehicles) Regulations, GN. No. 218 of 2007. In which it was alleged that on 31st August, 2016 at Nyololo area within Mufindi District operated the motor vehicle with Registration No. T. 377 DCX Toyota Hiace Commuter property of Deogratias Abel Chaula on the route not specified in the licence. At the end the appellant was convicted on both counts and sentenced to pay five of Tshs 640,000,000/= or to served 20 years imprisonment in defaulted in respect of the 1st count and payment of fine of T.shs. 300,000/= or to serve six months imprisonment in default in respect of the second count.

The appellant was aggrieved with both conviction and sentence. He has appealed to this court where he filed a petition of appeal consisting five grounds couched as follows:-

1. That, the trial court erred in law by conducting preliminary hearing contrary to the requirements of the law.
2. That, the trial court erred in law and in fact by improperly admitting exhibits tendered by the prosecution.
3. That, the trial court erred in law by making the finding contrary to the evidence on record regarding the route of the motor vehicle.
4. That, the trial court erred in law and in fact by not taking into account the chain of custody of the alleged Government Trophy leave a number of doubt regarding the guiltiness of the accused.

5. That, the trial court erred in law and in fact by making the finding that Appellant is guilty as charged without taking into account the standard of proof in criminal case.

The appellant therefore prayed for the appeal to be allowed.

The appellant was represented by Mr. Atranus Method learned advocate, Margreth Mahundi learned State Attorney appeared for the Respondent the DPP. The appeal was argued by way of written submissions.

It is the submission by the learned counsel for the Appellant in respect of the 1st ground of appeal that the preliminary hearing was done contrary to the requirements of law and the records of the preliminary hearing is contrary to the requirement of recording and signing the prescribed form CR FORM NO. 14 established under Government Notice No. 42 of 2017, the Criminal Procedure (Approved Forms) Notice, 2017. **Second**, the requirement of recording only memorandum of agreed facts was not addressed to by the trial court.

Third; the dictates of Section 192 of the Criminal Procedure Act was not complied with, the memorandum of the agreed matters was not read and explained to the accused, at page 13 of proceeding it is clear on the record, the accused was only required to sign.

Fourth; it is on the records that at page 21, the prosecution made a prayer to substitute the charge and the prayer was granted. But then no preliminary hearing was done, and within the dictates of section 192 (1) of

the Criminal Procedure Act. He said a preliminary hearing is a mandatory stage after the accused person's plea of not guilty.

He argued that non-adhering to the law with regard to the conducting of preliminary hearing did prejudice the appellant's right to a fair hearing.

As to the second ground of appeal, it is the appellant's counsel submission that the trial court erred to improperly admitting the exhibits tendered by the prosecution. As the extra judicial statement and cautioned statement exhibits P1 and P2 respectively were wrongly admitted by the trial court, the same exhibits were admitted before the appellant is given opportunity to object or not. He also said there was double standard in admitting exhibits. While on prosecution exhibits the same were admitted before the appellant is given chance to object, on the defence side things were different as before the exhibits were admitted the prosecution was given opportunity first to respond and later the court admitted the defence exhibits thus there was double standard which is unfair. The respondent supported his argument by citing the case of ***Alberto Mendez vs. The Republic***, Criminal Appeal No. 473 of 2017 at Dar es Salaam where it was held:

> *" the cautioned statement was illegally obtained and it deserves to be expunged from the record as we hereby do"*

The learned counsel prayed to this court to do the same. On the third ground that the trial court erred in law by making the finding contrary to the evidence on records regarding the route of the motor vehicle. He said the case of ***Rashidi Kiranda*** was wrongly applied as in that case the accused admitted possession of the Government trophy but in the case at hand, the appellant did not admit to be the possessor of the alleged Government Trophy. Secondly the exhibit admitted, (D exhibit 1) is the TLA which according to DW1 is a licence issued for seven days only authorizing a route of Tunduma – Mbeya – Dar es Salaam the motor vehicle, according to D-exhibit 1 was authorized for the route of Tunduma Mbeya – Dar es Salaam. He said without been there a licence for the said route it would not have been possible for the motor vehicle to travel from Tunduma through Mbeya to Iringa Region. DW1 testified at page 56 of the proceedings that at Igulusi and later at Makambako was inspected by the traffic police and permitted to proceed with the journey. He argued that in making the finding that the accused is guilty as charged did not evaluate the evidence of the defence. He could not remember D exhibit 1. He argued that giving reasons for a decision in the judgment is a cardinal principle of law. On the fourth ground of appeal on the chain of custody, Mr. Atranus Method submitted that the testimony of PWVI is to the effect that it was a driver of the lorry who lifted down the luggage. But that witness did not tell from where the luggage come from. However the driver of the lorry was not responsible in any way whatsoever over the motor vehicle driven by the appellant.

The learned counsel further submitted that there was exchange of hands happened as PW1 told the court that he took the luggage which had elephant tusks and put it into his car and chased after the appellant's car. He sought help from Ken the resident of Nyororo. He gave him his car to drive, and he (PW1) decided to drive the Hiace. He asked if the elephant tusks were in the car of PW1 why gave the said car to be driven by the said Ken. But there was no documentation.

The said Ken is only known to PW1 and he was not called as a witness in court. The court was not told as to how Ken drove the motor vehicle and under whose supervision. To him it is possible Ken to tamper with the luggage.

The learned counsel submitted further that PW1 was called in court for the second time but he seemed to have changed the story to cover up the question of chain of custody and told the court a different story that the Hiace was driven by Ken and he drove his car to Nyololo stand. The learned counsel cited the case of ***Zainabu d/o Nassoro @ Zena vs. Republic (2017) TLSLR 83*** where the Court of Appeal held:

> *"the underlining rationale for establishing a chain of custody was to show a reasonable possibility that the item that was finally exhibited in court as evidence had not been tempered with or contaminated along its way to the court"*

It is the argument by the appellant's counsel that the chain of custody was broken in this matter since the alleged Ken was accorded with the possibility of tempering with the luggage by being given the car containing the luggage.

On the fifth ground of appeal that the trail court erred in law and in fact by making the finding that the appellant was guilty as charged without taking into account the standard of proof in Criminal Cases. He said there is a number of reasonable doubts on the face of the record regarding the story of the prosecution.

He said PW1 who was called in court three times as shown at page 14, 24 and 37 of the proceedings is not good and reliable witness he tended to change now and then. He had two contradicting stories on what was uttered by the appellant in respect of ownership of the luggage on the day of arrest. He is the witness who was at the scene on the date of incidence and a key witness but his testimony is contradictory which bring reasonable doubt. He said there is evidence from the prosecution as well as defence that prior to the conversation referring the alleged Government Trophy, PW1 and accused had a quarrel. As revealed at pages 25, 49 and 54. PW1 told the accused that he has exceeded passengers and thus was liable to a fine of Tshs 40,000/=. But accused said the fine is Tshs. 30,000/= and not 40,000/= and refused to pay hence quarrel issued. And out of the quarrel the issue of Government Trophy came in. But there is contradiction as to who was driving the motor vehicle after the allegation

of availability of the alleged Government Trophy. He said the contradiction goes to the roof of the matter.

He also said there is contradiction in the testimony of PW1 with regard to how and why the boot of the car was opened. While PW.VI said after passengers have stepped down they demanded for their luggage so that they could take there from jackets and sweaters as it was cold, after took one beg remained then the driver of the lorry opened it. But PW1 at page 15 said he ordered him to inspect the car, went to the boot of the car where there was luggage. Then he ordered all passengers to carry their luggage and left one luggage. He said it appears from the record that on the date the said Government Trophy was seized there was a lorry near the motor vehicle which has been driven by the appellant, if so why PW1 did not tell the court on the involvement of that driver of the lorry and why he was not called as a witness. He argued that those contradictions were not minor as they go to the roots of the matter.

He therefore prayed for the appeal to be allowed and the decision and orders of the trial court be quashed and set aside.

On her part Ms. Margreth Mahundi learned State Attorney regarding the 1st ground of appeal she submitted that the trial court recorded both disputed and undisputed facts instead of recording undisputed facts only per the requirements of Section 192(3) of the Criminal Procedure Act. However she said that does not vitiate the proceedings because such omission did not result in unfair trial and the appellant was not prejudiced.

To support her argument she cited the case of ***Mkombozi Rashidi Nassoro vs. Republic*** Criminal Appeal N. 59 of 2002 CAT in which the decision of ***Pagi Msamakweli vs. Republic (1997) TLR 331*** was referred in which it was held non compliance with Section 192(3) of the Criminal Procedure Act does not vitiate the proceedings if such omission does not result in unfair trial leading to a failure of justice. The learned State Attorney submitted further that it is true the charge against the appellant was substituted. But she argued that there was no need of conducting a preliminary hearing according to Section 234(2) of the Criminal Procedure Act. The learned State Attorney submitted that the requirements of Section 234 was complied with and viewed this ground to have no merit.

As to the second ground of appeal Magreth Mahundi conceded to it and prayed for the exhibits wrong admitted in court to be expunged from the court record.

As to the third grounds of appeal the learned State Attorney admitted that there was misdirection by the trial magistrate to hold that the appellant failed to prove that the route from Mbeya to Dar es Salaam was specified because he did not tender any document to support that while he tendered a licence (TLA) which was admitted as D Exhibit P1. However it was her submission that the defence exhibit 1 was not read before the court after it was tendered as emphasized in the case of ***Robinson Mwanjisi and Other vs. Republic (2003) TLR 218,*** as the same was not read in court the remedy is to expunge it from the court record.

She said at page 56 of the proceedings appellant told the court that the one who seeks TLA is the owner of the car. The owner of that car is Deodatus Abel Chaula who testified as PW2 and in his testimony at page 29 of the proceedings he stated that he did not permit the route of Tunduma – Mbeya – Dar es Salaam. The route he permitted was that of Tunduma – Mlowo. The appellant did not cross-examine him on that.

That is why the trial court did not put weight on the appellant's defence having a TLA for the route of Tunduma – Mbeya – Dar es Salaam she also view this ground to have no merit.

Regarding the issue of chain of custody, it is the submission by the learned State Attorney that there were no doubts regarding it, she said at page 25 and 26 of the proceedings PW1 told the court that after he found the unclaimed luggage on the boot of the car which was driven by the appellant, he ordered him to open the luggage. But appellant refused to open it. One of the passengers opened it and they saw elephant tusks. Upon seeing the elephant tusks the appellant drove the car fast and fled from the scene. PW1 took the luggage containing the elephant tusks, put it in his car and chased the appellant and found the car abandoned at about ½ KM from the scene.

He asked one villager named Kenneth to help him to drive the abandoned car while he drove his car that contained the elephant tusks to Mafinga police station. This evidence is also corroborated by the evidence of PW6 one of the passengers who was in the motor vehicle which was being driven by the appellant.

Regarding evidence on page 15 of the proceedings Ms. Magreth Mahundi submitted that the said evidence is not part of the proceedings because at page 16 of the proceedings appellant raised objection against the testimony of PW1. The court ruled on 03/01/2018 where it ordered PW1 to be recalled and testified again on 30/04/2018 as shown as pages 24 -27 of the proceedings. With regard to 5th ground of appeal Ms. Magreth Mahundi reiterated what she submitted regarding evidence of PW1. That the evidence given on 12/10/2017 should be disregarded due to the ruling of the Court dated 03/01/2018 which ordered PW1 to be recalled. She said the testimony of PW1 which should be regarded is that of 30/04/2018 and that of 18/12/2018 such that there are no contradictions in his evidence. The learned State Attorney is of the view that the prosecution side proved its case beyond reasonable doubt and prayed for the appeal to be dismissed for want of merit.

Having carefully read the submissions by the learned counsel regard to the grounds of appeal raised, my starting point is on the grounds of appeal which were conceded by the learned Stated Attorney that is grounds No. 1, 2 and 3.

In ground No. 1 for the trial court to record both facts not in dispute and those in dispute, it was correctly submitted by the learned State Attorney and on the basis of the decision of the court of Appeal in ***Mkombozi Rashidi Nassoro case*** (supra) that non- compliance with Section (192)(3) of the Criminal Procedure Act does not vitiate the proceedings if such omission does not result in unfair trial leading to failure

of justice. Even where there was an amendment to the charge against the accused, that alone does not require for another preliminary hearing to be conducted. What is required is as provided under Section 234(2) of the Criminal Procedure Act that is to call the accused to plead to the amended charge, if there is a witness or witnesses have so far testified they must be recalled for further cross-examination by the accused or his advocate. In this case the charge was amended before the prosecution witnesses have testified. The appellant was called and pleaded to that amended charge as shown at page 21 of the trial court proceedings. But the learned counsel did not explain how the appellant was prejudiced for the trial court's act of recording both undisputed facts along with those disputed facts. That being the position thereof this ground fails.

Regarding ground No. 2 there is no doubt that there was omission committed by the trial court first for admitting the exhibit without first giving the appellant opportunity to say regarding the said exhibit.

This is contrary to the law and the instruction given in ***Robinson Mwanjisi case*** (supra).

For that reasons exhibit P3, appellant extra-judicial statement and the appellant's cautioned statement, exhibit P.4 are hereby expunged from the record.

As to ground No.3, the learned State Attorney submission is that the fact that there were misdirection committed by the trial court first for stating that the appellant failed to prove that the route from Mbeya to Dar

es Salaam was specified because he did not tender any document to support that the route was specified while appellant tendered a licence (TLA) which was admitted and marked as D exhibit 1 to show he had a licence which permitted him to drive the motor vehicle from Tunduma – Mbeya – Dar es Salaam. But the learned Stated Attorney argued that the defence exhibit 1 was not read before the court after it was tendered and for that she prayed for it to be expunged from the court record basing on the decision of ***Robinson Mwanjisi case***. The begging question here, was that fault of the appellant as witness or the trial magistrate who admitted the documents. I believe if the trial court admitted the document after it was cleared for admission it should have required the witness who tendered it to read its contents in court, if that was not done then the appellant is not to blame. Also, it should be noted that at the trial the appellant was not represented.

He could not be expected to be well vest with the court procedure, under such circumstances I am of the considered view that the principle laid in ***Robinson Mwanjisi case*** cannot affect him. However during preliminary hearing this issue was one of the facts not in dispute. The same need not to be raised at this appeal stage, the proprietor of the said motor vehicle testified in court and denied to have authorized the appellant to take the route of Tunduma – Mbeya – Dar es Salaam and that he only authorized him to ply between Tunduma and Mlowo although such evidence does not alter the route prescribed in D exhibit 1 and he tendered no any document to support his assertion. But the failure by the appellant

to cross-examine PW1 on his testimony impliedly mean that he agreed with what his employer (PW2) told the court in regard to the route the motor vehicle was plying.

In regard to the chain of custody, the appellant's counsel has submitted at length regarding this. But the evidence received is very clear and straight forward. According to the testimony of PW1 E. 7998 CPL Kaisi who was a traffic police officer at Mafinga, while coming from Malangali driving his motor vehicles Toyota Progress, he saw one lorry driving along the high way at a high speed. He therefore drove fast so as to overtake it. After do so he block the said lorry. He suddenly saw one motor vehicle Toyota Hiace during at high speed, being the traffic police officer stopped it for purpose of inspecting the said motor vehicle which has been driven by the appellant, he told the appellant to open the motor vehicle boot and required each of the passenger to pick his/her luggage. They did so but only one bag remained, he asked the appellant as the driver of the motor vehicle as to whom that bag belonged but appellant denied to know. PW1 told appellant to open the same but he refused. One of the passengers in the said Hiace opened, it is when 8 pieces of elephant tusks were found inside. As to what can be interpreted as to destroy evidence, appellant drove away the said motor vehicle in which the said bag was put. PW1 was forced to chase up the said appellant to find the motor vehicle abandoned and appellant had fled. He asked one villager of Nyololo one Benny to drive his motor vehicle and PW1 drove the said Toyota Hiace while Benny drove his motor vehicle to Mafinga police station. The passengers who were in

the Toyota Hiace walked up to where the Toyota Hiace was abandoned and boarded the same up to the police station Mafinga. This shows how the said bag was seized until when the same reached the police station Mafinga until the same was exhibited in court.

The appellant deliberately fled for the purpose of disowning the said luggage containing elephant tusks, he drove away leaving the same at the scene, abandoned the Toyota Hiace then he fled until when he was arrested. Although there were no documentation of the said elephant tusks how exchanged hands. But the evidence of PW1 proves that chain of custody which appellant's counsel has been complaining was maintained.

By that complaint the learned counsel meant that Section 38(3) of the Criminal Procedure Act was violated.

The same provides as follows:-

> *"38(3) 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 owners 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 the witnesses to the search if any".*

I must point out that there is the importance of documentation to show the chain of custody and how the exhibit exchanged hands. This of cause is aimed at avoiding the exhibit to be planted on innocent persons or possibility of the seized property to be exchanged to another. But in the case of ***Charo Said Kimilu and Mbwana Rua Kubo vs. Republic***, Criminal Appeal No. 111 of 2015, the Court of Appeal held that chain of custody can be proved by witnesses who testified in court provided that the same are believed. It is cardinal principle of law that, every witness is entitled to credence and his evidence believed unless there are good and cogent reasons for not believing him. This was decided in the case of ***Goodluck Kyando vs. Republic (2006) TLR 363 CAT*** at page 367. The appellant's counsel also complained as to why the person (passenger) who opened up the bag was not called. This argument of course has no any legal force for, it is the prosecution side who has the burden of proof and has to prove the case beyond reasonable doubt. The same prosecution side had the choice as to what witness to call as the issue is not the number of witnesses to be called to testify as provided under Section 143 of the Evidence Act Cap. 6 R. E. 2002, but important is the value of evidence required. Failure to call the person who opened the said luggage after the appellant has refused to open it in my view did not in any way weaken the prosecution case. The opening was done among other passengers who were in the Toyota Hiace. In actual fact there was no reason as to why the appellant refused to open the luggage which by then it was unclaimed property. But he had also admitted before PW1 that the bag belong to him per the testimony of PW1 at page 25 paragraph 3 of

trial court typed proceedings. The evidence of PW1 was corroborated by the evidence of one of the passengers of the appellant in the Toyota Hiace who witnessed while the bag being opened and the elephant tusks found inside. The appellant was reluctant to open the bag for no good reasons. Even the one who opened the bag was because time has been wasted by the appellant arguing but reluctant to open the bag, the act which even PW6 interpreted that he was just escaping liability. That is the true position as there was no reason for the appellant to fled from the scene using the motor vehicle he was driving leaving behind the bag and his passengers. But the evidence on record established that the appellant is the one who is responsible for the bag which contained the elephant tusks, more so by the conduct he displayed of absconding from the scene and went to abandone the motor vehicle and fled to unknown place.

The issue of tempering with the exhibit as alleged by the appellant's counsel and his reliance to the decision of the Court of Appeal in the case of ***Zainab d/o Nassoro @ Zena*** (supra) could not arise because before appellant has fled the Government trophies were already recovered, they are the same Government Trophies that were tendered as evidence at the trial. It is the recovery of the Government Trophies which made the appellant to flee, for what reasons that is best known by the appellant. The appellant's act of absconding from the scene immediately after the elephant tusks were discovered from the motor vehicle he was driving he assumed the burden to prove that he did not know about the said Government Trophies and more so after the owner of the motor vehicle

has denied to have authorized him to drive the said motor vehicle from Tunduma to Dar es Salaam.

The prosecution side has discharged its duty by proving that the said Government Trophies were found inside the motor vehicle which appellant was driving, it is therefore the duty of the appellant to prove that the same were inside the motor vehicle lawfully but he failed to do prove instead he fled leaving behind the government trophies with no good explanation as to why he fled. Any reasonable person can conclude that he was escaping liability. This ground therefore lack merit in actual fact the issue of unspecified route was not among the disputed fact admitted that. As to the issue of contradiction of the testimony of PW1, the learned State Attorney had put it correctly that for the first time when PW1 was called to testify and after he has actually testified and after appellant was given opportunity to cross-examine him, appellant raised the issue of sickness and asserted that he was unable to follow and understand what PW1 was telling the court.

The trial magistrate put on record that by stating:

> ***COURT:*** *since accused raised the complaint before this court for the matter of justice the court will rule out on the complaint of the accused.*
>
> ***Order:*** *ruling on 16/10/2017*

AFRIC

Sgd

L. M. Ndelwa RM

12/10/2017"

On 3/1/2018 the ruling was delivered in which the trial court held:

> *"At this juncture the court found that it is prudent and just to recall the named witness PW1 to appear and testify again subject to the health condition of the accused persons.*
>
> *It is so ordered.*
>
> *Sgd*
>
> *L. M. Ndelwa RM*
>
> *3/1/2018"*

What does this mean, it means that the evidence received 12/10/2017 on the date appellant alleged he was sick and unable to follow proceedings, though he did not raise that at the beginning and following the trial court ruling that the witnesses PW1 shall be recalled and the same was called and testified afresh the testimony he gave on 12/10/2019 cannot be considered as appellant alleged that he was unable to follow proceedings..

If so then appellant cannot be heard complaining that the evidence of PW1 of 12/10/2019 and that he gave later on 14/5/2018 is contradictory. The complaint is misplaced.

In actual fact there is no any contradiction in his evidence. The variations which the appellant's counsel has pointed out in regard to the testimony of PW1 if at all present are minor variations which do not go to the roots of the case. They are common due to human faliability.

But generally the prosecution evidence proved the offence beyond reasonable doubt. I find this appeal without sufficient grounds of complaint the same is dismissed.

F. N. MATOGOLO

JUDGE

04/09/2020

Date: 04/09/2020
Coram: Hon. F. N. Matogolo - Judge
Appellant: Present
Respondent: Kasana Maziku - State Attorney
C/C: Charles

Mr. Atranus Method - Advocate:

My Lord I am appearing for the appellant.

Kasana Maziku - Senior State Attorney:

My Lord I am appearing for the Director of Public Prosecution. The appeal is for judgment we are ready.

COURT:

Judgment delivered.

F. N. MATOGOLO

JUDGE

04/09/2020

Mr. Atranus Method - Advocate:

Much obliged My Lord but on part of the appellant we intend to appeal against this decision. This should be taken as our oral Notice of Appeal.

ROFC

THE HIGH COURT OF TANZANIA

F. N. MATOGOLO

JUDGE

04/09/2020