IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 56 OF 2019

(C/F District Court of Same at Same, Economic Case No. 8 of 2017)

RABIETH FAHAMUEL RASHID @ MGONJA ..... APPELLANT

Versus

THE REPUBLIC.....RESPONDENT

24th August & 7st October, 2020

JUDGMENT

MKAPA, J:

The appellant Rabieth Fahamuel Rashid @ Mgonja and one Abdallah Rashid Alphani Mrutu (not a party to the present appeal) were arraigned before the District Court of Same at Same (trial court) in **Economic Case No. 8 of 2017** charged with the offence of unlawful possession of Government trophy contrary to section **86 (1) (2) (c) (ii) of the Wildlife Conservation Act, No. 5 of 2009** read together with **paragraph 14 (d) of the 1st Schedule to the Economic and Organised Crimes Control Act**, Cap 200 [R.E. 2002].

Brief facts which gave rise to this appeal is to the effect that, on 23rd April, 2017 at Mahuu area within Same District in Kilimanjaro Region, the appellant and his accomplice were found in unlawfully possession of Government Trophy to wit; one elephant tusk valued at USD 15,000 equivalent to Shillings 33,300,000/= property of the United Republic of

Tanzania. The respondent paraded a total of seven witnesses and tendered seven exhibits to prove their case while the appellant summoned a total of four witnesses. At the end of the trial the first accused (the appellant herein) was found guilty and sentenced to serve twenty years imprisonment while the 2nd accused was acquitted. Aggrieved, the appellant preferred this appeal advancing seven grounds as follows;

1. That the trial magistrate erred in law and fact in failing to comply with section 234 (1) of the Criminal Procedure Act, Cap 20 [R.E. 2002] (CPA) as section 14 (d) of the Economic and Organised Crime control Act, Cap 200 does not exist and the charge sheet was not amended to that effect.
2. That the trial magistrate erred in law and fact in relying on the appellant's alleged confession which was retracted and obtained after being tortured.
3. That the trial magistrate erred in law and fact in holding that the chain of custody was properly established.
4. That the trial magistrate erred in law and in fact in overlooking PW5 as a free agent witness while he was a TANAPA employee.
5. That the trial magistrate erred in law and in fact in holding the appellant guilty while explicitly noticed that PW1 PW2 and PW3 were liers hence their testimonies were unreliable.
6. That the trial magistrate erred in law and in fact in remaining adamant on the appellant's defence despite all the reasonable doubts showed by the respondent's witnesses.

7. That the trial magistrate erred in law and in fact in applying double standard by acquitting the 2nd accused alone while the same evidence also favoured the appellant's acquittal.

From the foregoing grounds, the appellant prayed for this Court to allow the appeal, quash the sentence and set him free. During the hearing of this appeal, the appellant appeared in person unrepresented while the respondent was represented by Ms. Grace Kabu, learned State Attorney. By consent the appeal was argued by way of filing written submissions.

Submitting in support of the appeal the appellant submitted on the 1st ground of appeal the fact that the trial court failed to notice that throughout the Economic and Organised Crimes Act, paragraph 14 (d) of the first Schedule which the appellant was charged with does not exist hence the charge was defective. He added that it was mandatory for the trial magistrate to apply the Criminal Procedure Act and order the respondent to substitute the charge before convicting the appellant as per section 234 (1) of the CPA.

On the 2nd ground the appellant argued that, the trial court relied on the retracted cautioned statement which was termed as confession despite the appellant denying to have recorded the same, as the same was not obtained voluntarily because he was beaten up and what was recorded was not what he stated and, further that he was detained for ten days at the police station while the law demands that an accused person has to be taken to court within 24 hours after his arrest. The appellant complained further that, the cautioned statement did not corroborate with other respondent's witnesses which proved the fact that they had malicious intention against the appellant.

As to the 3rd ground, the appellant argued that the chain of custody was not properly established, despite the trial magistrate observing the same, the trial Magistrate went on convicting the appellant. Further that, PW1 was able to identify exhibit P3 before its admission to the court, however the custodian of the exhibit did not produce the exhibit register to prove custody of Exhibit P3 instead he only signed a handover which does not substitute the P.F 16 as required by the PGO.

Arguing on the 4thground, the appellant submitted that PW5 was a liar a she pretended to be a free agent while he was one of TANAPA officers. That, it was unlawful for the trial magistrate to rely on his testimony while it was an essential ground which established appellant's innocence. To support his argument, he cited the case of **Mussa Timotheo and Another V R** [1993] TLR 123 where the court held that; the lies told corroborated his defence case that the respondent's case was embellishment.

Regarding the 5th, 6th and 7th grounds, the appellant argued that PW1, PW2 and PW3 had jointly lied and the trial magistrate was aware though he went on convicting the appellant. He contended further that, the trial magistrate decided to remain adamant and overlooked all unreliable testimonies of respondent's case which was enough to accord the defendant benefit of doubt. It was the appellant's view that trial magistrate applied double standard by taking advantage of the benefit of doubt and acquitted the 2ndaccused alone.

The appellant finally prayed for the court to find him innocent and set him free.

Opposing the appeal, Ms. Kabu submitted in relation to the 1st ground that, although paragraph 14 (d) of the first schedule to the Economic and Organised Crime Control Act had been amended by section 16 of the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016 the appellant was not prejudiced as the particulars of the offence which was read over and explained to him enabled him, to understand the nature of the offence.

Responding to the 2nd ground, Ms. Kabu argued that, the trial magistrate did not err in relying on appellant's confession since the trial court conducted an inquiry as to whether or not it was the appellant who made it. The trial court satisfied itself that the same was made voluntarily by the appellant and admitted it as Exhibit P6. Apart from that, the appellant did not raise the fact that he was tortured when such inquiry was conducted, thus, he cannot raise the same at this stage.

Regarding the 3rd ground on the issue of chain of custody, Ms. Kabu argued that, the case of **Yusuph Masalu Jiduvi and Three Others V The Republic**, Criminal Appeal No. 163 of 2017, (unreported) the Court of Appeal of Tanzania underscored the importance of observing a proper chain of custody in order to avoid the possibility of tampering with the exhibits. She argued that, in the instant appeal all the requirements which were cited in the above case were complied with.

With regard to the 4th ground, Ms. Kabu argued that, PW5 informed the court that he was a peasant and a business man and the absence of an independent agent during the arrest did not render the operation illegal nor prosecution case fatal as it was held in the case of **Tongora**

Wambura V the Director of Public Prosecution, Criminal Appeal No. 212 of 2006 (unreported).

On the last three grounds, Ms. Kabu argued them jointly that, appellant's allegations that PW1, PW2 and PW3 testimonies were lies is not reflected anywhere in the trial court's proceedings. Thus, their testimonies did not raise doubt that the case against the appellant was proved at the required standard. Finally the learned state attorney prayed for the appeal to be dismissed.

Having considered both parties arguments for and against the appeal the question for determination is whether the prosecution has proved its case beyond reasonable doubt to ground appellant's conviction. To begin with the 1st ground, the appellant claimed that **paragraph 14 (d) of the 1st Schedule to the Economic and Organised Crimes Control Act** does not exist and the fact that the respondent did not bother to amend and read proper charge to the appellant thus convicted the appellant on a defective charge sheet, while the respondent conceded to that fact and submitted that, the said paragraph had been amended by **section 16 of the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016**. However, the respondent argued that the appellant was not prejudiced in any way as the particulars of the offence enabled him to understand the nature of the offence. I am in agreement with the respondent's contention since the provision which establishes the offence is plain clear, to wit ,**section 86 (1) (2) (c) (ii) of the Wildlife Conservation Act** which reads;

"86. -(1) Subject to the provisions of this Act, a person shall not be in possession of, or buy, sell or otherwise deal in any government trophy.

(2) A person who contravenes any of the provisions of this section commits an offence and shall be liable on conviction-

(a) N/A

(b) N/A

(c) in any other case -

(i)N/A

(ii) 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."

It is my considered opinion that the above section as it is enabled the appellant to understand the charge against him and prepared his defence. This ground of appeal lacks merit and is hereby dismissed.

As to the 2nd ground of appeal, the appellant challenged the trial court's decision for relying on a retracted confession while the same was obtained involuntarily through torture. The respondent argued that an inquiry was conducted and it was proven that the same was made voluntarily by the appellant. In the case of **Meshaki Abel Ezekiel V The Republic**, Court of Appeal of Tanzania at Arusha in Criminal

Appeal No. 297 of 2013 (Unreported), the Court, at page 19 held, *inter alia,* that:-

> *"With due respect, apart from formalities under sections 57 and 58 of CPA, the first appellate Judge should have in addition evaluated exhibit P4 and determine whether the mandatory provisions of section 50 and 51 were also complied with. On this, our decision in* ***Mussa Mustapha Kusa and Beatus Shirima @ MANGI vs. R*** *(supra) which Ms Swai referred to us, underscores the position of the Court imposing a duty on the trial courts to satisfy themselves that cautioned statements sought to be exhibited as evidence were recorded by the police within the basic periods available for the interview of people under restraint as prescribed by sections 50 and 51 of CPA ...".*

Also in **Richard Lubilo and Mohamed Selemani Mohamed Selemani V R,** [2003] TLR 149 the Court emphasized the fact that placing of the accused person in police custody for fourteen (14) days before taking his cautioned statement and without taking him to court makes any such cautioned statement involuntary for the purposes of section 27 of the Evidence Act, 1967. In **Janta Joseph Komba, Adamu Omary, Seif Omary Mfaume and Cuthbert Mhagama V R,** Criminal Appeal No. 95 of 2006 (unreported), the Court observed at page 10:

> *"We agree with learned counsel for the appellants that being in police custody for a period beyond the prescribed period of time results into torture, either mental or*

otherwise. The legislature did limit the time within which a suspect could be in police custody for investigative purposes and we believe that this was done with sound reason."

Now, coming to the facts of the present appeal, according to the respondent's submission an inquiry was conducted and the appellant never raised that concern that he was tortured. Further, proceedings records have revealed that there were two cautioned statements which were tendered and admitted as Exhibit P6 and Exhibit P7 respectively, after two inquiries were conducted. The statement involved the appellant and the second was for the acquitted accused. On the 1st inquiry the appellant stated that he was beaten up and tortured but denied the involvement of PW6 (Inspector. James Kilosa) Regarding the 2nd cautioned statement the acquitted accused objected to the cautioned statement tendered by PW7 Ass. Inspector. Kaitira Machunde on the ground that the same was not procured voluntary as it was procured after days of torture which was conducted in Same and Arusha.

On the issue of timeframe, the appellant was arrested on 23rd April, 2017 around 18:30 hours, the confessional statement (exhibit P6) was alleged to have been recorded from 20:15 hours to 21:15 hours but it was not until 3rd May, 2017,(ten days after his arrest) the appellant was taken to court and there was no evidence that extensions of time was requested from the court and further that no explanation was furnished as to why the appellant had to be restrained for ten days before being arraigned to court.

It was held by the Court of Appeal in the case of **Peter Sanga V The Republic**, Criminal Appeal No. 91 of 2008 that, an accused who confesses to his guilty is the best witness but when the confession is retracted or repudiated, the independent witness is required for corroboration. It is plain clear in the present appeal that this was never the case. As the appellant retracted his confession, it is therefore expunged from the record. Thus this ground of appeal is meritorious and I allow it.

On the 3rd ground regarding the issue of chain of custody to the effect that the same was not established, in the case of **Paul Maduka V R, Criminal Appeal No. 110 of 2007,** (unreported) the Court of Appeal of Tanzania defined the chain of custody as follows;-

> *"1) .... By a chain of custody, we have in mind the chronological documentation and/or proper trail, showing the seizure, custody, control, transfer, analysis, and disposition of evidence, be it physical or electronic.*
>
> *2) The chain of custody requires that from the moment the evidence is collected, its every transfer from one person to another must be documented and that it be provable that nobody else could have accessed it...."*

In the present appeal the respondent managed to establish how the piece of elephant tusk was handled from when it was intercepted, taken to Police, received by a Police officer and recorded in the exhibit register. It was also established how the same was kept and the person

collected the tusks on the day it was brought to court and from the court where it was taken to the office of OC-CID for safe custody. I am therefore satisfied the fact that the chain of custody was established. This ground therefore is meritless and I dismiss it.

In respect to the 4th ground the appellant faulted PW5 for not being an independent witness as he was TANAPA officer. The trial magistrate also noticed the same and stated the following on page 6 of the judgment;

> *"... The accused allegation was never taken lightly by this court, some communications were made as between the court and some TANAPA officials and it was revealed that PW5 was an employee of TANAPA as alleged by the 1st accused. This court tried to ask itself as to why did PW5 decide to lie by stating that he was just passing on the road and was called to witness the search by PW1? What was his motive behind doing all of that?? Why did PW1 and PW4 decided to call their fellow officer to witness the search while we all know that Mahuu is a busy street with many people moving around?? All these questions were left unanswered in the eyes of the court. And since the same was not answered and it has been proved that PW5 lied to the court I hereby decide to disregard his testimony, in other words the testimony of PW5 will not be considered in determining the guilt or innocence of the accused person."*

From the above excerpt, it is established that PW5's testimony was disregarded. Surprisingly, the search warrant which PW5 witnessed was relied upon in convicting the appellant in the course of composing the

judgment. Since PW5's testimony was disregarded as he was TANAPA Officer, it is clear that under such circumstances, the principle of impartiality in searching and seizing the trophy alleged to have been found with the appellant was not adhered to in the absence of an independent witness. [See **Shauri Kapinga V R, Criminal Appeal** No. 337/2007 (unreported)]. I am of the view therefore that the search warrant which was exhibited as Exhibit P1 which PW5 was an independent witness thereto while lying about his identity, prejudiced the appellant. This ground of appeal has merit and I allow it.

Lastly on the 5th 6th and 7th grounds which the appellant challenges PW1, PW2 and PW3's testimony as lies and yet the trial magistrate continued to rely upon them in convicting the appellant without considering the doubts raised by the respondent's case, the respondent argued that, there were no proven lies throughout the proceedings and the trial court did not err in convicting the appellant based on the said testimonies.

I have had the opportunity of assessing each of the alleged witness testimonies and observed that, when cross examined by the acquitted accused PW1 had informed the court that he never searched the accused house, so as PW2 when cross examined PW4 and PW5 also stated the same at pages 13, 17, 28 and 33 of the typed proceedings. On the other hand, DW4 a ten cell leader, Namkunda Athumani Mrutu testified to have been involved in the search of the acquitted accused premises which was conducted by TANAPA Officers (as they introduced themselves) at around 23:00 hours and nothing was found. However the respondent was never cross examined on that piece of evidence as to whether the search was conducted.

The above facts notwithstanding the trial magistrate had this to say at page 10 of the judgment;

> *"... Her evidence was never countered off by the prosecution side on cross examination and so it remained in the eyes of this court that the 2nd accused's house was searched but the same was not stated by the prosecution maybe because they never found what they were expecting to get from it."*

It is plain clear from the above trial magistrate's observation the fact that those witnesses were not reliable. In the case of **Shaban Daudi V R**, Criminal Appeal No. 20 of 2000 as cited with authority in **DPP V Simon Mashuri**, Criminal Appeal No. 138 of 2016 CAT at Tanga (unreported) had this to say;

> *"The credibility of a witness can also be determined in two ways; one when assessing the coherence of the testimony of that witness, two, when the testimony of that witness is considered in relation to the evidence of other witness including that of the accused person. In these two other occasions the credibility of a witness can be determined* ***even by a second appellate court*** *when examining the findings of the first appellate court."* **[Emphasis mine]**

Subjecting the above legal position to the instant appeal since there was plain lie as to why they denied to have searched the 2nd accused's premises, their testimonies are no doubt questionable and this explains why the appellant challenged the trial magistrate for not addressing those reasonable doubts raised. In the case of **Said Ally Ismail V.R** the

court observed the fact that not every discrepancy in the prosecution may cause the case to flop but only on material and relevant contradictions adversely affecting the credence of witnesses. In the instant appeal in my view the discrepancies went to the root of the case. Thus, I found the last three grounds of appeal have merit.

In the event, I am satisfied that the case against the appellant was not proven at the required standard to ground conviction against the appellant. Consequently, the appeal is allowed and the conviction and sentence of the District court of Same at Same is set aside. I further order the appellant's immediate released from custody unless held for other lawful causes.

It is so ordered.

Dated and delivered at Moshi, this 7th day of October, 2020

S.B. MKAPA

JUDGE

07/10/2020