IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 94 OF 2018

(Originating from the RMs' Court of Arusha in Economic Case No. 20 of 2016)

PAULO SAMWEL GIRENGI ..... 1ST APPELLANT

SAINGA WACHAKA METU ..... 2ND APPELLANT

Versus

REPUBLIC ..... RESPONDENT

JUDGMENT

ROBERT, J:

The Appellants, Paulo Samwel Girengi and Sainga Wachaka Metu, were jointly charged in the Resident Magistrates' Court of Arusha at Arusha with Unlawful possession of Government Trophy contrary to section 86(1)(2)(b) of the Wildlife Conservation Act, No. 5 of 2009 read together with paragraph 14(a) of the first schedule to, and sections 57(1) and 60(2) both of the Economic and Organised Crimes Control Act, Cap. 200 R.E 2002. After a full trial, the Appellants were convicted and sentenced to pay a fine at a tune of 10 times the value of the trophy indicated in the charge sheet which is TZS

325,246,500/= or imprisonment for 20 years under section 86 (1)(2)(b) of the Wildlife Conservation Act, No.5 of 2009. Aggrieved by the decision of the trial court the Appellants preferred an appeal to this court.

A brief factual background of this matter reveals that on 24th March, 2016 PW1, Daniel Ole Sereay, Anti-poaching officer at Lake Manyara reserved area while conducting patrol at Isimingori area with other officers namely Pay Mbaro and Zablon Maendeka, received a call from an informer alerting them about a bus with Registration No. T.177 DBV the property of Makara Company which was on transit from Babati to Arusha carrying government trophy. Having been alerted, they informed the traffic officers who stopped the bus at Makuyuni area. They searched the bus and found a racket bag with six elephant tusk and two pieces of tusks. The bus conductor informed them that the owner of the bag was one John Julius. They filled in the search warrant and interrogated John Julius who informed them that he was given the said tusks by one Paulo Samwel. He then helped them to arrest Paul Samwel in possession of one complete elephant tusk and a piece of elephant tusk. He prepared certificate of seizure which was received in court as exhibit P1 and seized the tusks which were admitted in court as exhibit P2. Paul Samwel informed them that he got the tusks from Sainga Wachaka and

one Kidaini and helped them to arrest Sainga Wachaka. The seized tusks were handed to one Jonsiano Magoda, a store keeper at Lake Manyara reserved area for custody. The handing over form was admitted by the court as exhibit P3. The seized elephant tusks were evaluated by PW2, Solomon Jeremiah Bhiroza who filled the evaluation form (exhibit P4) which showed the value of the seized tusks to be TZS 32,524,650/=. One elephant had the weight of 2.2 kg and the other one had the weight of 1kg. The statement of the accused Sainga Wachaka (appellant herein) was recorded by PW3, Ass. Inspector Kaitira Machude and admitted in court as exhibit P5 while the statement of the accused Paulo Samwel Girengi (appellant herein) was recorded by PW4, Inspector James Kilosa and admitted in court as exhibit P6.

In their defence, both Appellants denied to have been at the scene of crime or participate in the commission of the alleged offence.

The trial court made a finding that the 1st accused was found in possession of one elephant tusk and a piece of the tusk as evidenced in his own statement (exhibit P6) while the second accused is equally connected to the alleged tusks due to his statement (exhibit P5) where he admitted to have instructed the first accused to find the buyer of the said tusks. The court

proceeded to convict both Appellants for the offence charged and sentenced them to pay fine of TZS 325,246,500/= which is 10 times the value of the trophy indicated in the charge sheet or imprisonment for 20 years.

Dissatisfied with the decision of the court, the Appellants lodged this appeal faulting the decision of the trial court on seven grounds of appeal which I take the liberty to reproduce as follows: **One**, the trial court did not consider and evaluate the chain of custody of exhibit P2 as a result arrived at a wrong decision. **Two,** the trial court erred in law and fact by relying on cautioned statement to convict and sentence the appellants. **Three**, that the trial court erred in law and in fact by failing to scrutinize the said certificate of seizure according to the law. **Four,** the trial court erred in law and in fact by admitting exhibit P6 which was tendered by Public Prosecutor. **Five**, the trial court erred in law and in fact for convicting and sentencing the appellants in the absence of the evidence of an independent witness. **Six,** the sentenced meted out upon the second Appellant is excessive. **Seven**, the trial court erred in law and in fact in convicting the Appellants for an offence which was not proved by concrete evidence.

When the appeal came up for hearing on 21st May, 2020 both Appellants were present in person unrepresented whereas the Respondent was represented by Cecilia Foka, learned State Attorney.

Amplifying on his first ground of appeal, the first Appellant submitted that the trial court did not consider and evaluate the chain of custody of the alleged elephant tusks. He argued that PW1 testified that he kept the elephant tusks at the offices of Lake Manyara National park in Manyara. He didn't mention the name of the person he handled it to. He didn't tender the certificate of chain of custody as evidence.

Submitting on the second ground, the first Appellant argued that the trial court failed in his legal obligation of conducting a trial within trial. He submitted that when the State Attorney wanted to tender cautioned statement he objected but the trial court admitted it as exhibit without conducting trial within a trial. He submitted further that, the cautioned statement was recorded out of time because he was arrested on 24/3/2016 but he was made to sign his statement on 2/4/2016 which was out of 48 hours requirement.

Coming to the third ground, the first Appellant submitted that the trial court failed to scrutinize the certificate of seizure before admitting it as exhibit P1 because it had no signature of independent witness.

On the fourth ground, the first Appellant criticized the trial magistrate for admitting the cautioned statement allegedly recorded by him (exhibit P6). The person who requested to tender the extrajudicial statement was not the person who prepared it. He submitted that the exhibit should have been tendered by PW4. The exhibit was admitted against the law.

On his fifth ground of appeal, he faulted the trial court for convicting him based on evidence of PW1 which was not corroborated by any independent witness.

Submitting on the sixth ground of appeal, the first Appellant simply argued that the honourable magistrate erred by shifting the burden of proof to him. He further submitted that the sixth and seventh grounds will be covered by the second Appellant. On his part, the second Appellant argued that the sentence was delivered when he was below 18 years old. He asked the court to look at the propriety of that sentence.

On the seventh ground of appeal, the first accused submitted that exhibit P4 was not read in court after being admitted. He referred the court to page 8,9 and 13 of the proceedings.

Responding to the submissions by the Appellants, the learned state attorney started with the first ground of appeal. She submitted that the chain of custody of the elephant tusks indicate that exhibit P2 was seized by PW1 after that it was given to PW5, store keeper then it was brought to PW2 for valuation eventually it was brought to court and tendered as evidence. However, she admitted that once PW5 took exhibit P2 to Manyara the records do not indicate how it reached the valuer and how it was taken from the valuer to the court. In spite of the missing links in the chain of custody the learned state attorney submitted that the exhibit in question being the elephant tusk it could not exchange hands easily as opposed to other exhibits which can easily exchange hands. She made reference to the case of Isaa Hassan Uki versus Republic, Criminal Appeal No. 129 of 2017, Court of Appeal of Tanzania at Mtwara (unreported) in support of her argument.

On the second ground of appeal, she admitted that it is true that it was the state attorney who prayed to tender the cautioned statement and not the witness. However, she indicated that at page 24 of the proceedings it is

indicated that the statement was read by the witness himself and not the state attorney.

On the argument that the cautioned statement was admitted without conducting trial within a trial after the objection raised by the Appellants, she admitted that it is true as indicate at pages 23 and 24 of the proceedings. The first Appellant objected tendering of the cautioned statement but the court decided that it was a matter of evidence which could not hinder admission of that exhibit. She submitted that the trial court was supposed to conduct trial within trial. Failure to do that prejudiced the right of the Appellants to be heard and therefore the said exhibit was wrongly admitted.

Submitting on the third ground on the certificate of seizure not having the certificate of independent witness, the learned state attorney argued that in Economic crimes cases especially in crimes involving government trophies, the question of availability of independent witnesses depend on the circumstances of the place where the accused person is arrested. She argued that, in the present case, the Appellant was arrested in a forest where it wouldn't be easier to get an independent witness. She argued further that the absence of independent witnesses was not fatal because the Appellants were not prejudiced with that absence. She cited the case of Tongora

Wambura vs. DPP Criminal Appeal No. 212/2006, Court of Appeal of Tanzania, Arusha (unreported) at page 6 in support of her argument.

On the fourth ground of appeal, the learned counsel preferred to adopt her submissions on the second ground of appeal as she observed that the reasoning is the same.

Similarly, on the fifth ground of appeal, the learned state attorney submitted that it relates to the third ground of appeal. She argued that since there was no independent witness in relation to the third ground there would not be evidence in relation to the independent witness.

On the sixth ground of appeal, she argued that there was no exhibit in court to prove that the second Appellant was 17 years old. She proceeded to submit that the court did not decide on the age of the second Appellant and further that it was the burden of the accused person to prove that he was below the age of majority.

On the seventh ground that exhibit P1, P3 and p4 were not read in court after being admitted, the learned state attorney addressed how each exhibit was admitted in court. With regards to exhibit P1, she argued that at page 8 of the proceedings records do not show that after admission of the exhibit

the document was read in court. However, she argued that the characteristics of the exhibit were explained to the Appellants therefore they were not prejudice. As for exhibit P3, she argued that, at page 9 of the proceedings the exhibit was admitted, though it was not read but it was explained to the Appellants so the Appellants knew the contents of exhibit P3. Similarly on exhibit P4, the valuation report was admitted as exhibit without being read but at para 5 of page 13 of the proceedings the witness explained the exhibit in court.

In rejoinder, the second Appellant opposed the argument by the state attorney that there was no independent witness because they were arrested in the forest. He argued that the preliminary hearing and the judgment indicates that they were not arrested at the forest as stated by the state attorney. He insisted that there was a need for an independent witness. Adding to this argument, the first Appellant submitted that the two of them were arrested on different dates but the arrest warrant shows that they were arrested on the same date.

Having carefully considered submissions of the parties, I will now deliberate on the grounds of appeal based on the submissions of parties and the evidence on record. I will start with the second, fourth and seventh

grounds of appeal which touches on the admissibility of some exhibits and their evidential value. The reasons for starting with the said grounds will be divulged in the process.

Starting with the second and fourth grounds of appeal, having looked at the manner in which the cautioned statement of the first Appellant was admitted at page 23 and 24 of the trial court proceedings, I am in agreement with the submissions made by both parties that the trial court was misdirected in admitting exhibit P6 without conducting an inquiry or trial within trial to ascertain the voluntariness of the said statement after the objection made by the first Appellant. It was also wrong for the exhibit to be tendered by the State attorney instead of the witness. Exhibit P6 was therefore wrongly admitted as evidence by the trial court and should be expunged from the court records.

On the seventh ground, the Appellants submitted that exhibit P1, P3, and P4 were not read in court after being admitted. The learned state attorney admitted that the said exhibits were not read in court but argued that there was some sort of explanation given to the exhibits by the witnesses which would enable the Appellants to understand the gist of the exhibits. This court has examined the manner in which the said exhibits were admitted by the

trial court at pages 8, 9, and 13 and confirmed the argument made by the Appellants. It was not appropriate for the documents which were admitted as exhibits not to be read out for the parties to understand the contents of the documents and make an informed determination on their intended defence. Clarification or explanation on the contents of the document can only be done after reading the contents of the document in order to avoid any subjective interpretation.

In the case of **JUMANNE MOHAMED & Others vs Republic, Crim. App. No. 534 of 2015**, it was held:-

> *"It is necessary to read the document to the accused person after its admission as exhibit. In all fairness an accused person is entitled to know the contents of any document tendered as exhibit to enable him marshal a proper defence wherever they contain any information adversely affecting him."*

Having faulted the manner in which the exhibits were admitted in court, I find that the said exhibits (P1, P3, and P4) could not be relied on by the court to prove the offence charged and must be expunged from the court records.

This court finds that in the absence of exhibits (P1, P3, P4, and P6) which are expunged by this court in the deliberations of the second, fourth and seventh grounds above, the weight of the remaining evidence cannot establish the offence preferred against the Appellants. That said, I find no pressing need to deliberate on the remaining grounds raised by the Appellants.

All said, I allow this appeal for the reasons given, quash the conviction and set aside the sentence and orders of the trial court. The Appellants should be released forthwith from prison unless they are otherwise lawfully held in connection to other matters.

It is so ordered.

K.N.ROBERT

JUDGE

5.10.2020