IN THE HIGH COURT OF TANZANIA
(MUSOMA DISTRICT REGISTRY)

AT MUSOMA

CRIMINAL APPEAL NO. 169 OF 2019
(Originating from Economic Case No. 2/2017 in the Resident Magistrate Court of Mara at Musoma)

BHOKE S/O MWITA @MASUBO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGEMENT

Date of Last Order: 19/02/2020
Date of Jugdement: 6/03/2020

Kisanya, J.:

The appellant, Bhoke Mwita @ Masubo together with Gituni Mtatiro @ Wambura Mang'enyi, and Nyamhanga Mwita Mnaka @ Samson Mwita Mnaka were arraigned before the Court of Resident Magistrate of Musoma at Musoma for economic offences. The appellant faced four counts namely, Unlawful Entry into the National Park, contrary to section 21 (1) (a) (2) and 29 of the National Parks Act [Cap. 282, R.E. 2002] as amended by the Written Laws (Miscellaneous Amendments) Act No. 11 of 2003; Unlawful Possession of Weapon in the National Park, contrary to section 24 (1) (b) and (2) of the National Parks Act, Cap. 282 R.E. 2002; Unlawful Possession of Government Trophy, contrary to 86 (1) and (2) (b) of the Wildlife Conservation Act, No. 5 of 2009 (as amended) read together with paragraph 14 of the First Schedule to the Economic and Organized Crime Control Act [Cap. 200, R.E

2002] as amended; and Unlawful Dealing in Government Trophies, contrary to 84 (1) of the Wildlife Conservation Act, No. 5 of 2009 (as amended) read together with paragraph 14 of the First Schedule to the Economic and Organized Crime Control Act [Cap. 200, R.E 2002] as amended.

Upon examining evidence tendered during trial, the appellant was found guilty of the fourth count on offence of Unlawful Dealing in Government Trophies only. He was then sentenced to twenty years imprisonment for that offence. Other accused persons were discharged of all charged offences.

Aggrieved, the appellant has come to this Court by way of appeal. The memorandum of appeal filed by the appellant raised five grounds of complaints, namely:

1. That, the learned Principal Resident Magistrate erred in law and fact in convicting the appellant by admitting the prosecution evidence which was contradictory and insufficient to establish the guilty against appellant beyond all reasonable doubts;
2. That, the learned Principal Resident Magistrate erred in law and fact to convict the appellant without consent of the Director of Public Prosecutions under section 26(1) of the Economic and Organized Crime Control Act [Cap. 200, R.E. 2002] and certificate conferring jurisdiction to the subordinate court to entertain economic case under section 12(3) of the Act.
3. That, the learned trial Magistrate erred in law to convict and sentence the appellant on the defective charge as he observed

many defect and discrepancies but still he proceeded convicting and sentencing the appellant on those defectives;

4. That, the learned trial Magistrate erred in law and fact to convict and sentence the appellant relying on prosecution evidence which was cooked to facilitate conviction and sentence against the appellant as they claimed that the appellant admitted to have committed the alleged offences in his caution statement while the statement was obtained improperly as they intimidated, threatened, bitten and tortured severally the appellant to obtain such confession.
5. That, the learned trial Magistrate erred in law and fact to convict and sentence the appellant by admitting wring exhibit which was enacted by the Park rangers who cook the alleged exhibit in their office and gave it to the appellant purposely for obtaining conviction and sentence against the appellant.

As stated herein, the appellant was convicted and sentenced on the fourth count only. The prosecution alleged that on 3rd February, 2017 at Nyamakendo Village within Serengeti District in Mara Region, the appellant and other two accused persons were found involving themselves in prohibited dealing; to wit selling four elephants tusks weighing 15 Kgs, valued at Tshs 66, 000,000/= the property of the Government of Tanzania. In his defence, the appellant testified that the case was fabricated against him because he had refused to mention people who were engaging in elephant tusks business. He testified further that the elephant tusks were taken from the police station and used to implicate them in the charged offence.

At the hearing of this appeal, the appellant appeared in person, unrepresented while the Respondent was represented by Mr. Nimrod Byamungu, learned State Attorney.

Submitting in support of the appeal, the appellant reiterated his defence that, he was arrested at his house and charged with other accused persons. He submitted further that, the cautioned statement was fabricated by the police. He prayed to adopt the petition of appeal and urged me to allow the appeal, quash the conviction and set aside the sentence.

In reply, Mr. Byamungu, learned State Attorney, supported the appeal. He argued that the offence of Unlawful Dealing in Government Trophies was not proved beyond reasonable doubts. The learned State Attorney pointed out the contraction on how the appellant was arrested. That, while PW1 stated that the 2nd accused and the appellant were arrested following a trap set by his team, PW3 stated that the 2nd accused and 3rd accused were arrested at the scene of crime. On the other hand, PW11 testified that the accused person was arrested at the scene of crime. Mr. Byamungu was of the view that, the said contradiction on how the appellant was arrested raised doubt on the prosecution case.

The learned State Attorney submitted further that, the appellant was convicted based on the cautioned statement (Exhibit PE10). However, he argued that the cautioned statement was retracted by the appellant and was not corroborated by any evidence. Further, it was taken beyond four hours prescribed under section 50(1) of the Criminal Procedure Act [Cap. 200, R.E. 2002] (hereinafter referred to as CPA). For that reasons,

the cautioned statement was not required to be admitted in evidence because the respective witness did not state the reasons for failure to record the statement within time prescribed by the law. That said, the learned state attorney did not address other grounds of appeal. He advised me to quash the conviction and set aside the sentence under section 366 of the CPA.

I have gone through the evidence on record and submissions by both parties. The main issue is whether the prosecution proved its case beyond all reasonable doubts. As rightly stated by the appellant and the learned State Attorney, the appellant's conviction was based on the cautioned statement which was admitted as Exhibit PE10. This reflected in following extract of the trial court's judgement:

> *"This court is at the point that as the first accused person BHOKE MWITA @ MASABO admitted in his caution statement to commit this case on fourth count as per charge, therefore, the prosecution side managed to prove the case beyond reasonable doubt to the* ***fourth.****"*

The fourth ground of appeal is to the effect that, the cautioned statement was obtained improperly and that the appellant was intimidated, threatened, bitten and tortured. Hence, there is a need of addressing whether the statement recorded voluntarily and in accordance with the law.

The procedure of recording cautioned statement of the accused person is provided for under the Criminal Procedure Act [Cap. 20, R.E. 2002]. The law requires, among others, statement of the accused person who is under restraint be taken within four hours. The relevant provision is

section 50 (1) of the CPA, which provides that:

> *"50.-(1) For the purpose of this Act, the period available for interviewing a person who is in restraint in respect of an offence is-*
>
> *(a) subject to paragraph (b), the basic period available for interviewing the person, that is to say, the period of four hours commencing at the time when he was taken under restraint in respect of the offence;*
>
> *(b) if the basic period available for interviewing the person is extended under section 51, the basic period as so extended."*

Pursuant to section 50(2) of the CPA, the period within which the police officer investigating the offence refrains from interviewing the person, or causing the person to do any act connected with the investigation of the offence is excluded in calculating the specified period. Further, section 48 of the CPA provides for exclusion of certain period in calculating the basic period.

In order to ensure compliance with these provisions, where the statement is recored out of time prescribed by the law, the prosecution is duty bound to explain and advance the reasons for failure or delay to record the statement. If the explanation is missing, the statement is regarded to have been taken contrary to sections 48 and 51 of the Criminal Procedure Act and cannot be admitted in evidence. This position was also stated in the case of **Joseph Mkubwa and Another vs Republic,** Criminal Appeal No. 94 of 2007, CAT at Mbeya (unreported) where the Court of Appeal held:

> *"As the CPA is statute that governed when the appellant was arrested, prosecution had to explain the delays in terms of section 48(2) or 50(2). That explanation is lacking. It leads to the conclusion that the statement*

(Exh. P27) was taken two weeks after the appellant was arrested and put in restrain....It now settled that statements taken without adhering to the procedure laid down in section 48 to 51 of the CPA are in admissible."

In the case at hand, the appellant objected admission of the cautioned statement. One of the grounds stated thereto was that, the statement was recorded out of the time required by the law. In the inquiry proceedings, PW1 thereto conceded to have recorded beyond the required time and he did not give explanation for the delay. The said PW1 stated:

"The 1st accused was arrested at 15.00 hours and the cautioned statement was recorded from 17:00 hours and completed at 18:34 hours hence the accused was at the police while recording it exceed at four(4) (4:00hours)...I never have no reason only I failed to ***look*** *permission of this Court to extend time."*

I have noted further that, PW1 of the Inquiry Proceedings stated to have recorded the statement on 5/2/2017. But, the appellant testified that he was arrested on 4/2/2017. This evidence was not challenged by the prosecution. It follows therefore that the cautioned statement was recorded after one day, and hence, beyond the period of four hours. The prosecution did not give explanation for the delay. Therefore, I agree with the learned State Attorney that the cautioned Statement was not required to be admitted in evidence because it was taken contrary to the law.

Furthermore, it is settled law that cautioned statement must be procured voluntarily. A cautioned statement which is taken involuntarily cannot be admitted. The appellant claimed to have been tortured. After

conducting the inquiry, the trial court held that the objection on torture had no merit. The learned trial magistrate did not assign reasons for his ruling. He indicated that "other elaboration will be made in the judgement on its validity." However, the said elaboration was not given in the judgement. The ground for objecting admission of the cautioned statement was serious. That is why the inquiry was conducted to establish whether the statement was conducted voluntarily. There was a need for the trial magistrate to assign reasons for overruling or upholding the objection.

Another ground is that the cautioned statement was retracted by the appellant. I agree with the learned State Attorney that, retracted confession should be corroborated. An accused cannot be convicted basing on the retracted confession which is not corroborated. In the case at hand, the cautioned statement was not corroborated any of the prosecution witness. To the contrary, PW2 supported the appellant' defence when he stated:

> *"This case is fabricated one, even this court, will see the gap as there will be poor connection of testimonies. The police officers seems to have person conflict with the accused."*

Therefore, I am of the considered opinion that, the conviction cannot stand because the cautioned statement was not corroborated.

Finally, the above quoted evidence of PW2 brings me to other grounds of appeal on contradiction between the prosecution witnesses. I agree with both parties that there is contradiction on the evidence tendered by the prosecution. For instance, PW1 states that the 2nd accused and the

appellant were arrested following a trap set by the police. However, PW3 states that the 2nd accused and 3rd accused were arrested at the scene of crime while PW11 states that the appellant was arrested at the scene of crime. The said contradiction raises doubt on the prosecution case. This is when it is considered that the appellant denied to have been found in possession of government trophies and that he was arrested at his house. These contractions end in favour of the accused.

For the aforesaid reasons, I find merit on this appeal. The fourth count on offence of Unlawful dealing in Government Trophies was not proved beyond reasonable doubts. I accordingly quash the conviction and set aside the sentence imposed by the trial court. The appellant should be released, unless he is held for other lawful cause.

Order accordingly.

DATED at MUSOMA this 6th day of March, 2020.

E. S. Kisanya
JUDGE
6/3/2020