IN THE HIGH COURT OF TANZANIA

AT TABORA

APPELLATE JURISDICTION

CRIMINAL APPEAL No. 184 OF 2018

(From Original Criminal Case No. 30 of 2018 of the District Court of Tabora at Tabora)

JUMA SHABAN MSHINDO ---------- APPELLANT

VERSUS

REPUBLIC ---------- RESPONDENT

JUDGMENT

27/03 & 03/04/2020

BONGOLE J.

As per the Judgement of the Resident Magistrate Court of Tabora in Criminal Case No. 30/2018 passed on 17/10/2018 the appellant herein **Juma Shaban Mshindo** was charged convicted and sentenced for the offence of Unlawful Possession of Government Trophies under section 86(1) and (2)(b) of the Wildlife Conservation Act No. 5 of 2009 read together with paragraph 14 of the First Shedule to and Sections 57(1) and 60(2) of the Economic and Organized Crime Control Act Cap 200 as amended by Written Laws (Miscellaneous Amendment) Act No. 3 of 2016.

After conviction, the appellant was sentenced to serve 20 years imprisonment and payment of fine to the tune of Six hundred eighty five million and two hundred thousand (Tshs 685,200,000/=)

Aggrieved and dissatisfied with the decision of the trial court the appellant has preferred this appeal against conviction and sentence armed with following grounds.

1. ***That, the trial court erred for acting on the laymen's view that the items alleged to have been found in possession of the appellant were elephant tusks, and as a result of its error convicted the appellant despite the same where not confirmed by any scientific method to prove that they were of elephant tusks.***
2. ***That, the trophy valuation certificate (Exh. P6) had no. evidence value in terms of section 47 of the TEA Cap 6 and should not have been acted upon by the trial Court because the author of the same (PW3) did not lay down his special knowledge and/or what qualification he had to able (sic) to give his opinion as he did.***
3. ***That, without prejudice to grounds of appeal above the possession did not prove the guilt of the appellant beyond all reasonable doubt as required by law and the appellant should not have been convicted at all.***
4. ***That, the trial Court had no jurisdiction to try the case (Economic Crime Case) without consent by the DPP.***
5. ***That, the trial Magistrate erred when acted on the cautioned statement of the appellant (Exh. P6) without first dealing with the legal circumstances in which the said statement was obtained since the appellant was arrested on 19.08.2018 and***

his statement was recorded on 23.08.2019 out of the prescribed time in terms of section 50 and 51 of Cap 20.

In adition to the grounds of appeal the appellant leveled other grounds that,

1. ***That, the trial Magistrate erred in law and fact for convicting the appellant without following a fundamental principles of our criminal justice that at the beginning of a criminal trial the accused must be arraigned.***
2. ***That, the trial Magistrate erred in law and fact by convicting the appellant while the available evidence adduced by prosecution failed to establish and prove the charge against the appellant beyond reasonable doubt.***

And on supplementary petition the appellant filed other additional grounds that:-

1. ***That, the trial Magistrate erred in law and fact by convicting the appellant by relying on defective caution statement***
2. ***That, the trial Magistrate erred in law and fact by convicting the appellant entertaining the evidence adduced by the appellant herein above.***
3. ***That, the trial Magistrate erred in law and fact by convicting the appellant while the charge was defective.***

When this appeal came for hearing the appellant was represented by Ms. Flavia learned advocate while the respondent republic was represented by Mr. John Mkonyi learned State Attorney.

With the permission of the court, parties filed Written submission in disposing the appeal.

In her submission Ms. Flavia prayed before this court to argue the appeal only on three grounds which were submitted before this court as additional petition of appeal and supplementary petition of appeal.

That, the charge which the accused stood charged was against section 86(1) and 2(b) of the Wildlife Conservation Act No. 5 of 2009 while the said section did not exist as was already amended by Misc. Amendment No. 2 of 2016, therefore the appellant was charged with non-existing law. That the charge is the foundation of the right of the accused meaning that, if the charge contains non-existing section or provision of the law then fair trial cannot exist; as provided for under section 135 (a) (ii) of CPA Cap 20 R.E 2002 which provides that

> *"the statement of offence shall describe the offence shortly in ordinary language avoiding as far as possible the use of technical terms and without necessarily stating all the essential elements of the offence and if the offence charged is one created by enactment creating the offence".*

That the charge did not comply with the provision stated above hence the trial was unfair in the eyes of the law.

That, the appellant in the subordinate Court was charged, tried and convicted on wrong provision of the law, therefore he could not in the circumstance align his defense properly as there was no proper charge in the Court of law. She cited the case of **Abdalla Ally vs The Republic Criminal Appeal No. 253 of 2013** (*unreported*) where the court held that

"Being found guilty on a defective charge based on wrong and/or nonexistence provision of the law it cannot be said that the appellant was fairly tried in the courts below".

Further that, the trial court did not read the charge to the accused and take his plea before it commenced to receive the evidence, the omission was fatal since it offended section 228(1) and (3) of the Criminal Procedure Act, Cap 20 R.E 2002 in which requires the accused to be arraigned by putting the substance of the charge to him and his plea taken before the court proceeds to record the evidence.

Furthermore that, the evidence on record did not prove the case and even the witnesses did not prove the charge to convict the appellant.

In reply Mr. Rwegira for the republic submitted that the ground levelled by the appellant that the trial magistrate erred in law and fact for convicting the appellant without following fundamental principles of Criminal justice on arraignment is devoid of merit since the charge was read to the accused before the hearing commenced. He added that the charge was read to the accused when consent and certificate were tendered to award the court with jurisdiction to try the case among other incidences.

On the second ground, Mr. Rwegira submitted that, the evidence adduced by the prosecution witnesses did prove the charge against the appellant so the appellant's argument that the prosecution had failed to establish and prove the charge is baseless and unfounded.

He added that, all the evidence of PW1 one F.6226 D/C Vicent who participated in arresting the appellant at Uyumbu 34 km in possession of

four pieces of elephant tusks is a clear evidence that the accused was arrested in possession of the said trophies.

Further that, the evidence of prosecution witnesses was corroborated by appellant's own admission in which he agreed to have been found in possession of the trophies in his caution statement.

That, the issue raised by the appellant through his advocate that the charge is defective is baseless and unfounded since the charge as laid on the court door had met all the minimum conditions as mandated by section 135 of criminal procedure Act, Cap. 20 R.E 2002 hence the same should not be faulted.

To start with the first ground as digested by both parties, I wish to reproduce section 86(1) and (2(b) which the appellant was charged with. It 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) .....

(b) where the trophy which is the subject matter of the charge or any part of such trophy is part of an animal specified in Part I of the First Schedule to this Act, and the value of the trophy exceeds one hundred thousand shillings, to a fine of a sum not less than ten times the value of the trophy or

imprisonment for a term of not less than twenty years but not exceeding thirty years or to both.

I also had time to read the amendments made to the Wildlife Conservation Act as argued by appellants' advocate; what I found about the amendment is that the **Written Laws (Miscellaneous Amendment) Act No. 2 of 2016** amended section 86 (2) (c) of the Wildlife Conservation Act No. 5 of 2009; neither of the two subsections quoted above were amended, the amendment added one more paragraph to sub-provision "c" not "subsection 1" or "2(b)" as stated by the respondent. To that end I see no defect on the law that the appellant was charged under.

Coming to the second ground on omission by the trial court to read the charge to the appellant before it commenced to receive evidence:-

Section 228 (1) and (3) of the Criminal Procedure Act Cap 20 R.E 2002 reads thus:-

(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge.

(2) .....

(3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.

It is appellant's advocate argument that the trial court ought to have the charge read to appellants and take his plea before start of prosecution evidence. Section 228 cited above requires the substance of the charge to

be read to the accused person by the court and ask the accused if he admits or denies, if he denies the court shall continue to hear the case.

The record of the trial court shows that, the appellant was sent to the court on 24/09/2018 and the prosecution brought to court DPP's Certificate of order for trial and Certificate of Consent on the same date before the charge could be read to the appellant.

There is no doubt that the court had jurisdiction to read the charge to the accused and ask him to enter plea as required by law. Page one of the typed proceedings shows that the charge was read to the appellant and called upon to plea thereto and he pleaded not guilty. Also the record of trial court shows that after entering accused's plea the facts were read to the accused person.

It is in the record that, the court started to receive prosecution evidence on the same day the charge was read to accused. There was no need for the trial court to re-read the charge to the accused while the same was read to him immediately before receiving prosecution evidence. If the evidence was received on different date re-reading the charge to accused could be the proper procedure.

However, having read the charge sheet and to be specific on the particulars of the offence I found that the charge sheet does not specifically state the time when the alleged offence was committed. It states that, I quote:-

> *"**JUMA s/o SHABANI @ MSHINDO** on the 20th day of September, 2018 during **day night hours** at Uyumbu 34 km village within Kaliua Districe....." (underline and bold is mine)*

It does not need legal knowledge for one to identify that error in the charge sheet since it doesn't describe the time when the offence was committed. Section 135 (f) of the Criminal Procedure Act Cap 20 R.E 2002 states it clear that:-

> *(f) Subject to any other provision of this section, it shall be sufficient to describe any place, time, thing, matter, act or omission of any kind to which it is necessary to refer in any charge or information in ordinary language in such manner as to indicate with reasonable clarity the place, time, thing matter, act or omission referred to.*

If you read the proceedings of the trial court you will find that, the facts that were read to accused person did not state the time when the offence was committed, also none of the three prosecution witnesses mentioned about time when the offence was committed.

Since the error was not corrected during trial of the appellant I have reason to believe that from day one the appellant never understood the particulars of the offence he was charged on in specific to the time when he was alleged to commit an offence so that he could properly give his defence.

Further, it is well known that there is no hard and fast rule as to how judgments should be written but the law provided for guidelines about content of any judgment and omission to abide with the guidelines renders the judgment insufficient.

Section 312 (1) of the Criminal Procedure Act Cap 20 R.E 2002 requires that a judgment must contain the point or points for determination, decision thereon and reasons for the decision. The trial magistrate never pointed out

the points which the case fell on and determination thereon instead he constructed a report like judgment and at the end convicted the appellant.

In **Republic vs Mbushuu alias Dominic Mnyaroje & Another** [1995] TLR 97 (TZCA) Ramadhani J. stated obita that

> *"We would like also to point out that the style he has used in writing the judgment dividing into parts and sections, with headings and sub-headings, is unusual. That style is suited for a thesis than for a judgment"*

With regard to the case at hand I would also say that the style used by the trial magistrate in writing the judgment is unusual since it does not conform with the guidelines outlined under section 312 of the CPA Cap 20 R.E 2002 the style is suited for news reporting.

Also there are statements in the judgment of the trial court which suggests that the trial court magistrate state of mind was biased against the accused person. Statements like

> *" As many accused used to do, the accused person denied the charge the act which prompted and compelled the prosecution side to procure witnesses" (page 2 of judgment)*

> *"As a means of exonerating himself from the responsibility the accused person denied the tusks of elephant to be his". (page 4 of judgment)*

According to **Black's Law Dictionary 8th Edition (2004)** it defines bias as an inclination or prejudice for or against one person or group, especially in a way considered to be unfair.

In **R v. Sussex Justices**, [1923] All ER 233 the case set the precedent in establishing the principle that a mere appearance of bias is sufficient to overturn a judicial decision. I am of the same view that appearance of bias in the above quoted statements is sufficient to overturn the decision of the trial court. In the upshot the trial court proceeding is nullified. The appellant conviction is quashed and sentence set aside.

That being said and done, I order that the appellant be tried *de novo* before another magistrate of competent jurisdiction. Taking into account that the appellant has been in prison since 2018, I direct that the retrial be conducted expeditiously.

S. B BONGOLE

JUDGE

03/04/2020

Ruling delivered under my hand and seal of the Court in chambers this 3/04/2020 in the presence of Ms. Flavia Francis learned Advocate for the Appellant and Mr. John Mkonyi learned State Attorney for the Respondent.

S. B BONGOLE

JUDGE

03/04/2020