IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DODOMA DISTRICT REGISTRY)
AT DODOMA

DC CRIMINAL APPEAL NO. 90 OF 2021
(Originating from Economic Case No. 06 of 2020 of the Resident Magistrate Court of Dodoma at Dodoma)

MANENO OMARY @ DUTU .....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

01/12/2021 & 10/12/2021

KAGOMBA, J

On 27th May 2021, MANENO OMARY @ DUTU (henceforth "the appellant") was convicted by the Resident Magistrate Court of Dodoma at Dodoma (henceforth "the trial Court") for the offence of unlawful possession of government trophy contrary to section 85(1)(d) and 86(1), (2) (c) (iii) and 3(b) of the Wildlife Conservation Act No. 5 of 2009 as amended by section 59 (a) and (b) of the Written Laws (Miscellaneous Amendment) Act No. 2 of 2016 read together with paragraph 14 of the First Schedule to, and section 57 (1) and 60(2) of the Economic and Organized Crime Control Act, [Cap 200 R.E 2019] as amended by section 16(a) of the Written Laws (Miscellaneous Amendment) Act, No. 3 of 2016, whereupon he was sentenced to serve a twenty-years jail term. He was obviously unhappy with the said decision of the trial court, thus lodged this appeal to challenge it.

It was alleged before the trial Court that on 2nd June, 2017 at Malecela Village within Chamwino District in Dodoma Region, the appellant was found in unlawful possession of two (2) elephant tusks valued at Tshs. 67,350,000/= being the property of the government of the United Republic of Tanzania. Despite the appellant pleading not guilty and offering his defence, the trial Court convicted him relying upon the testimonies of PW2 David Marwa and PW4 Damas Pascal, who testified that their trap managed to arrest the appellant in possession of the said trophies.

It was the prosecution evidence that on that material date and place, PW2 and PW4 met with the appellant and hoodwinked him that they were serious buyers of his elephant tusks. The appellant went to collect the tusks and when he returned, he entered inside the motor vehicle where they started measuring the tusks and agreed on the price of Tshs. 300,000/= per kilogram only to surprise the appellant with his unexpected arrest. They testified further that the appellant was in a company of another person who had a *boda boda,* but that person ran away after realizing that the deal had turned sour. PW4 identified the said two elephant tusks (exhibit P1) and tendered a certificate of seizure which had a thumbprint denied by the appellant to be his.

The order of the trial Court requiring expert proof of the disputed thumbprint was not complied with by the prosecution. Nevertheless, the trial Court was satisfied that the prosecution side had proved the case beyond reasonable doubt. It is under such circumstances the appellant is aggrieved.

In his appeal, the appellant has listed the following eleven (11) grievances against the impugned decision of the trial court, namely:

1. That, the trial court erred in law and fact when convicted him while the prosecution side did not prove its case beyond reasonable doubt.

2. That, the trial court erred in law and in fact when convicted the appellant based on procedural irregularities.

3. That, the trial court erred in law and fact for basing conviction on illegal evidence of the defective certificate of seizure as there was violation of section 38(3) of the Criminal Procedure Act, [Cap 20 R.E 2019] and section 22(3)(i)&(ii) of the Economic and Organized Crime Control Act, [Cap 200 R.E 2019].

4. That, there was no evidence which proved that the appellant was wrongly found in possession of government trophy.

5. That, there was contradiction in the evidence of PW4 and PW2 who alleged that when the appellant was arrested they were together, but PW4 testified that the agreed price per kilogram of the tusks was Tshs. 300,000/= while PW2 testified that the agreed price was Tshs. 160,000/= per kilogram.

6. That, there was no conviction in law as the trial magistrate convicted the appellant under section 235 of the **CPA** instead of following clear direction of the law under section 312(2) of the **CPA**.

7. That, the trial court erred in law and fact by not warning itself that the appellant disputed the thumb print to be his and for not conducting trial within trial so as to ascertain its genuineness.

8. That, the trial court erred in law and fact by not considering the appellant's defence when analyzing and evaluating the evidence adduced by both sides.

9. That, the trial court erred in law and fact by not warning itself that a person can be convicted on the strength of prosecution evidence and not weaknesses of the defence.

10. That, there was no evidence established by the prosecution in respect of chain of custody of the alleged trophies.

11. That, the trial court erred in law and fact when acted on different weight of the said trophies from the charge sheet and the evidence of the witnesses, which was contradictory and totally not certain, implying that the case against the appellant was fabricated.

On the date of hearing, the appellant appeared in person, while the respondent was represented by Mr. Sarara, learned Senior State Attorney. The appellant could only tell the court that justice was not rendered by the trial court. Being a lay person, he could not expound further on his appeal.

Mr. Sarara, for the respondent, did not object the appeal. He was categorical that the third and fourth grounds of appeal were full of merit,

hence he supported the appeal. To expound his position, he argued that the Republic was required to prove that the trophies were found in the appellant's possession but with the certificate of seizure (exhibit P4) being admitted without proof of the appellant's thumbprint, proof of possession was not established.

He explained further that since the appellant denied to have affixed a thumbprint on the said certificate of seizure, and since the trial court ordered a thumbprint expert to be summoned to establish the truth, an order which was neither implemented nor vacated, there was no proof of possession made by the prosecution. To cement his argument, Mr. Sarara argued that after expunging the certificate of seizure for being unlawfully admitted in evidence, the only remaining evidence to prove possession would have been the oral testimonies of PW4 and PW2, which was however unreliable for being contradictory. He rested his case by recalling the position of the law that when there is doubt in evidence, the same should be used in favour of the accused person, who was the appellant.

Looking at all the eleven grounds of appeal filed before this court, the grand complaint by the appellant is that he was convicted without his case being proved at the required standard. I have heard the short submissions made by the parties. I should remark here that despite the appeal sailing without opposition from the respondent, it is incumbent upon this court to determine the merits of the appeal. As such the court has one major issue

to determine, which is, whether the case against the appellant was proved beyond reasonable doubt.

After a careful perusal of the trial proceedings and the resultant judgment, I concur with the views of both parties that, indeed, the case against the appellant was not proved beyond reasonable doubts.

As correctly submitted by Mr. Sarara, since the appellant was alleged to be found in unlawful possession of the elephant tusks, contrary to the cited provisions of the law, the prosecution side was duty bound to prove that the said tusks were, in deed, found in the appellant's possession. The main evidence which was relied upon by the trial court to land conviction was that of PW4-Damas Pascal and PW2-Davis Marwa who testified that they arrested him with the said trophies after posing as buyers.

However, there are two undisputed shortfalls pertaining to the testimonies of these two key prosecution witnesses. Firstly; while the duo testified that they carried the mission jointly together, there was contradiction as to the price they allegedly agreed with the appellant for buying the trophies. While PW2 testified that they agreed at Tshs. 160,000/= per kilogram, PW4 testified that it was Tshs. 300,000/= per kilogram. In numerous decisions of the Court of Appeal, it has repeatedly been held that prosecution case can not fail on account of minor contradictions or inconsistencies which do not go to the root of the case. (See the cases of **Mohamed Said Matula v. R** [1995] T.L.R 3; **Shabani Mpunzo @Elia**

Mpunzo v. R, Criminal Appeal No. 12 of 2002; **Said Ally Ismail vs Republic,** Criminal Appeal No. 241 of 2008 and **Shukuru Tunugu V. R**, (Criminal Appeal 243 of 2015) [2016] TZCA 304 (13 April 2016), among many others).

In **Said Ally Ismail vs Republic,** (supra), for example, it was held thus:-

> *"....it is not every discrepancy in the prosecution's witness that will cause the prosecution case to flop.* ***It is only where the gist of the evidence is contradictory then the prosecution case will be dismantled...".*** [Emphasis added]

Since the gist of the evidence by PW4 and PW2 was to show that they arrested the appellant after setting up a trap whereby they pretended to be buyers, and since negotiation and agreement on price was a crucial aspect of the said trap where both PW2 and PW4 testified their full participation, the discrepancy as to which price was eventually agreed makes the gist of the evidence contradictory. In my opinion, since there was very little conversations during the alleged trap, basically touching on personal introductions and price negotiation, the witnesses ought not to differ about the price they eventually agreed upon. Such a contradiction is of significant legal value and necessarily dismantles the prosecution case.

Secondly; the certificate of seizure which was tendered by PW4 Damas Pascal and admitted as exhibit P4 was also intended to establish the

allegation that the appellant was found in possession of the said two elephant tusks. However, the appellant has questioned the legality of admission of the said exhibit P4 in his third ground of appeal.

According to the trial proceedings, PW4 Damas Pascal testified that after the appellant was arrested, he took the certificate of seizure and filled it. That, PW2 David Marwa signed it as the witness and the accused person signed by putting his thumb print. The proceedings further reveal that the appellant objected the admission of exhibit P4 stating categorically that the thumb print on the exhibit was not his. The appellant added that on 2nd June 2017 when he was arrested the certificate of seizure was not filled in. After the appellant's objection, the prosecutor rejoined by praying the trial court to summon an expert to examine the thumb print, which prayer was granted. The trial court ordered the summoning of a thumb print expert to verify if the said thumb print belonged to the appellant. Nowhere in the proceedings it was shown that the said order of the court was implemented. Ironically, the trial Magistrate found that the case was proved beyond reasonable doubts.

With due respect to the learned trial Magistrate, the evidence on record left much to be desired. After the appellant had disputed the thumb print on the certificate of seizure claiming that on the date of his arrest the certificate of seizure was not filled in, non-compliance with the order calling for an expert to verify the disputed thumb print rendered the certificate of seizure a mere worthless piece of paper. Such an exhibit was admitted with illegality

and the same is hereby expunged. Under those circumstances, it cannot be said that there was a proof of seizure of the two elephant tusks from the appellant as far as the impugned certificate of seizure is concerned.

After expunging the impugned certificate of seizure from trial court's records, the court remains with no any other credible evidence to prove that the appellant was in possession of the elephant tusks, bearing in mind that the oral evidence of PW2 and PW4 was embedded with contradiction on a significant point of evidence, as demonstrated earlier. For these reasons, therefore, it was unsafe for the trial court to conclude that the case against the appellant was proved beyond reasonable doubt. With that weakness in the prosecution evidence, the first, seventh and tenth grounds of appeal are full of merit. For this reason, the main issue in this appeal as whether the case against the appellant was proved beyond reasonable doubt is answered in the negative.

While the determination above sufficiently disposes of this appeal, I would like to comment, albeit briefly, on the manner the conviction was entered and recorded in the trial court's judgment. In the last paragraph of the said judgment, the learned trial Magistrate wrote:

> *"I find the accused person guilty and he is hereby convicted under section 235 of the Criminal Procedure Act, Cap 20 R.E 2019".*

The cited section 235 of the CPA has two subsections. It is subsection (1) which has relevancy to what the trial court was doing, which is to convict the appellant. However, this subsection (1) of section 235 is not a convicting provision. All what it provides is a directive to the trial court, upon conclusion of trial, to convict the accused, if it found that conviction was warranted, and to pass a sentence upon conviction, or to make an order against the accused person according to the law. The cited provision also required the trial court to, alternatively, acquit or discharge the accused person under section 38 of the Penal Code, [Cap 16 R.E 2019]. The provision referred by the trial court states as follows:

> *"235.-(1) The court, having heard both the complainant and the accused person and their witnesses and the evidence,* ***shall convict the accused and pass sentence upon or make an order against him according to law*** *or shall acquit or discharge him under section 38 of the Penal Code".* [Emphasis added].

Since the trial Magistrate had found the appellant guilty, what was expected of her was to convict him by mentioning the offence and the provision of the law upon which the conviction was entered. It was wrong for the trial Magistrate not to mention the offence done. It was also wrong for her to convict the appellant under section 235 of the CPA, a provision which does not establish any offence. This irregularity in conviction is what the appellant complained about under the sixth ground of appeal where he stated that there was no conviction in law as the trial Magistrate convicted

him under section 235 of the **CPA** instead of observing what she was directed to do under section 312(2) of the **CPA**. The latter provision states as follows:

> *"(2) In the case of conviction* ***the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted*** *and the punishment to which he is sentenced".* [Emphasis added].

In the light of the above cited mandatory provision of the law, I agree with the appellant that there was no conviction made against him by the trial court in the eyes of law.

In the final analysis, the appeal is allowed. The conviction and sentence are respectively quashed and set aside. Consequently, the appellant is set to liberty forthwith unless he is held for some other lawful cause.

Dated at **Dodoma** this 10th day of December, 2021.

THE HIGH COURT TANZANIA

ABDI S. KAGOMBA

JUDGE