IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 02 OF 2020

(C/F Economic Case No. 58 of 2015, in the Resident Magistrate's Court of Arusha at Arusha)

SAMWEL SLAA @ SAREA.....1ST APPELLANT

BARIE TARMO @ KONGI.....2ND APPELLANT

VERSUS

THE D.P.P.....RESPONDENT

JUDGMENT

25/11/2020 & 17/02/2021

GWAE, J.

In the Resident Magistrates' Court of Arusha at Arusha (the trial Court), **Samwel Slaa @ Sarea and Barie Tarmo @ Kongi** the appellants here in were arraigned of the offence of Unlawful Possession of Government Trophy contrary to section 86 (1) and (2) (b) of the Wildlife Conservation Act, 2009 No. 05 of 2009 read together with paragraph 14 (d) of the 1st schedule to, and sections 57 (1) and 60 (2) both of the Economic and Organized Crimes Control Act, Cap 200 R.E. 2002.

It was alleged by the prosecution that on the 2nd October 2015 at Qarulambo area within Karatu District the appellants herein jointly and together were found in unlawful possession of six (6) pieces of Elephant tusks valued at Tshs. 65,040,000/= the property of the Tanzania Government.

The charge was read to the appellants who pleaded not guilty. The trial court deliberated the evidence before it and found the appellants herein guilty as charged and consequently sentenced the appellants to pay fine of 300,000/= USD each or to serve twenty years imprisonment.

In essence, the appellants are before this court on a second bite, the records reveal that the appellants had previously appealed before this court vide Economic Criminal Appeal No. 121 of 2017 before **Hon. Mzuna**, J where in the course of determining the appeal he discovered that, the trial Magistrate sentenced the appellants without convicting them. Following this anomaly, the Hon. Judge gave directives that the case file be remitted back to the trial court for a proper composition of a judgment with conviction and sentence pursuant to section 235 (1) and 312 (2) of the Criminal Procedure Act, Cap 20 R.E.

Having complied to the order of this court and being aggrieved by the decision of the trial court, the appellants have now knocked the doors of this court by presenting a joint petition of appeal which is comprised of six grounds of appeal, namely;

1. That, the trial court did not consider and evaluate the chain of custody of exhibit P.2 as per testimony of PW1, PW2, and PW5 as a result arrived at a wrong verdict.
2. That, the purported cautioned statements of the appellants were taken contrary to the mandatory provisions of the law.
3. That, the trial court erred in law and in fact for relying on exhibit P.1, P.2, P.4 and P.5 contrary to the law.
4. That, the prosecution case was not proved beyond reasonable doubt as there was inconsistencies between PW1 and PW2 which the trial court ought to have scrutinized and analyzed such inconsistencies.
5. That, the prosecution failed to account the chain of custody of the exhibit P.3 which was tendered by PW1 i. e ownership of the motorcycle was not proved at all the chain of custody was also not established.
6. That, the trial court erred in law and in fact by failure to evaluate the evidence tendered by defence side which raised reasonable doubt.

On the date fixed for hearing of this appeal, the appellants appeared in person unrepresented, whereas the respondent was represented by **Mr. Ahmed Hatibu** State Attorney.

Submitting on the grounds of appeal, the 1st appellant argued that the evidence of PW1 and that of PW2 is weak as they failed to produce a handing over

of the Government trophy PE2 from them as arresting officers to PW5 an exhibit keeper. According to him the chain of custody had broken to establish that the appellants were found in possession of the trophies. Further to that the appellant claimed that even the ownership of the motorcycle that is allegedly to have been used to carry the trophies was not established.

The 1st appellant went on submitting that it was wrong for the trial court to rely on the cautioned statement which according to him was recorded out of the prescribed period and more so the cautioned statements were recorded by a police officer (Insp. Kaitira PW40) which he believed to be contrary to what the law provides. In light of the above he thus urged this court to expunge the said cautioned statements.

Moreover, the 1st appellant submitted that the trial Magistrate misdirected himself by relying on the certificate of seizure and valuation reports (PE2 and PE4) which were not read out or caused to be read over by the trial court. He referred this court to the case of Abuhi Omari Abdallah & 3others vs. The republic, Criminal Appeal No. 28 of 2010 CAT (Unreported).

The appellant went submitting on the credibility of PW1 and PW2 whom he contended to be incredible witnesses due to the inconsistency of their testimonies especially on the dates on which the appellants were arrested.

Lastly, the appellant complained that his defence was not considered by ıe trial court in toto which he claimed to be against the law whilst the 2nd appellant had nothing useful to add to the grounds of appeal, he basically adopted the arguments of his colleague.

On the other hand, the respondent's representative vigorously supported both conviction and sentence meted against the appellants by arguing as follows; regarding the first and second grounds of appeal the learned State Attorney admitted on the shortfall in handing over of the certificates of PE2 and PE3 however he was of the view that the evidence on record in particular that of PW1, PW2 and PW5 carries weight to hold that the appellants were found in unlawful possession of the trophies. More so the learned counsel stated that the trophies cannot be easily changed from one hand to other as the exhibits are kept by KDU and not at Police Station, he cited the case of **Kadiria Kimaro vs. The Republic**, Criminal Appeal No. 301 of 2017 CAT (Unreported)

In the appellants' complaint on the appellants' cautioned statements, the counsel admittedly argued that the cautioned statements and the valuation report **were not read** over and that the cautioned statements were recorded beyond the prescribed time because of the distance from where the appellants were arrested which is said to be in the forest to the Karatu Police Station. However,

following the fact that the cautioned statements were not read over, the counsel prayed for an order expunging the said documents from the records.

On the complaints raised by the appellants that it was against the law for the Police officer to record the cautioned statements of the appellants, the learned counsel was of the view that the law does not prevent one policer officer to record the cautioned statement of more than one accused person, nevertheless, according to the learned counsel, the evidence on record was credibly sufficient to secure conviction.

Regarding the complained contradictions as to the dates/year of occurrence the learned counsel was of the view that those are human errors which are curable in law.

On the last ground of appeal, the counsel submitted that the defence of alibi by the appellants was taken into consideration by being not accorded any weight for the reasons adduced by the trial Magistrate in the judgment.

In his short rejoinder, the 1st appellant stated that it is not true that the trophies could not change hands easily more so, without the certificate of seizure the alleged possession of tusks cannot stand.

The 1st appellant went on stating that, it was vitally important for the establishment of the ownership of the motorcycle seized as there was evidence on

record that PW1 and PW2 came to the scene of the crime by a motorcycle therefore it was important to establish whose motorcycle was tendered and received.

Furthermore, on the issue of the delay in recording the cautioned statement, the 1st appellant stated that PW1 and PW2 when testifying told this court that the cautioned statements could not have been recorded since it was at night and nothing was stated that they were brought at the Police station on 03/10/2015.

Having considered the parties' oral submissions together with the supporting authorities, it is now the ample time of this court to determine this appeal which I find it pertinent to determine the grounds raised in the manner they have been advanced in the appellants' joint petition of appeal.

On the **first ground** of appeal, the appellants are challenging the chain of custody of exhibit P2 which were the trophies alleged to have been unlawfully found in the appellants' possession in relation to the testimony of PW1, PW2 and PW5. In their submissions the appellants argued that there was no enough evidence on the handing over of the trophies from the arresting officers to PW5 the exhibit keeper therefore, they were of the view that the chain of custody of exhibit PE2 was broken.

It has been a well-established position of the law that for a substance to be relied upon by the court to convict the accused persons, its chain of custody from the time of its seizure to when it is tendered in Court as an exhibit, has to be

satisfactorily established. The rationale is not farfetched, it includes, **one,** to ensure the integrity of the chain of custody to eliminate the possibility of the exhibit being tampered with. **Two,** to establish that, the alleged evidence is in fact related to the alleged crime in which it is being tendered, rather than for instance having been manufactured fraudulently to make someone guilty. See: **Chukwudi Denis Okechukwu & 3 others vs. The Republic,** Criminal Appeal No. 507 of 2015, CAT (Unreported).

The question that follows is, whether the chain of custody of PE2 was well established by the prosecution to the required standard during trial. In order to establish the chain of custody, I had to revisit the evidence on record as follows; PW1 and PW2 testified to have been park ranger and police officer respectively who arrested the appellants at the scene of crime and prepared a certificate of seizure, there after they took the appellants together with the exhibits to Karatu Police station for further actions and the same were handed over to exhibits keeper, D/C. Humphrey (PW5).

PW3, Mlungwana Abedi Mchomvu comes with his testimony that he was the valuation officer who evaluated the 6 pieces of elephant tusks alleged to have been found with the appellants. One D/C. Humphrey, PW5 introduced himself as the custodian of all exhibits at Karatu police station, his evidence is to the effect that he was handled by the OC – CID Karatu 6 pieces of elephant tusks for

purposes of safe keeping and it is through the PW3's testimony that after evaluation the exhibits were handed over to the exhibits' keeper which denotes the PE2 were haded over to the exhibits' keeper immediately after evaluation.

In the case of **Paulo Maduka and Four Others v. Republic,** Criminal Appeal No. 110 of 2007 (unreported), the Court of Appeal gave an elaboration as to what is a chain of custody by stating that;

> " ...chain of custody is the chronological documentation and/or paper trail, showing the seizure, custody, control, transfer, analysis, and disposition of evidence, be it physical or electronic. The idea behind recording the chain of custody ... is to establish that the alleged evidence is in fact related to the alleged crime - rather than, for instance, having been planted fraudulently to make someone guilty. The chain of custody requires that from the moment the evidence is collected its very transfer from one person to another must be documented and that it be provable that nobody else could have accessed it. "

Following the series of events explained above, it is apparent that there has been change of hands of exhibit PE2 from different persons, that is to, say from the police officer, PW1 who seized six (6) pieces of elephant tusks to the exhibit keeper (PW5) who stored the exhibits (PE2) in the exhibits room via Exhibits Register (PE6). The exhibiter keeper, PW5 also handed over the exhibits for valuer,

PW3 who instantly made valuation and handed over the same back to the police exhibits' keeper.

More so the elephant tusks cannot change hands easily as opposed to other exhibits such narcotic drugs as was correctly elaborated in the case of **Joseph Leonard Manyota v. Republic**, Criminal Appeal No. 485 of 2015 (unreported), the Court of Appeal held;

> "It is not every time that when the chain of custody is broken, then the relevant item cannot be produced and accepted by the court as evidence, regardless of its nature. We are certain that this cannot be the case, say, where the potential evidence is not in the danger of being destroyed, or polluted and/or in any way tempered with".

The above position was also demonstrated in the case of **Issa Hassani Uki vs. Republic,** Criminal Appeal No. 129 of 2017 (unreported) where the Court of Appeal of Tanzania dealing with similar predicament had these to say;

> "In the instant case, the items under scrutiny are elephant tusks, we are of the considered view that the elephant tusks cannot change hands easily, and therefore not easy to temper with".

In the light of the above judicial precedents and since in our instant case, the items to be probed are elephant tusks which are not easily changed from hands of one person to another person' hands, therefore, I think I am not supposed to ado as the decisions of the Court of Appeal quoted above in **Uki and Manyota's**

case (supra) are self- explanatory. This ground of appeal is thus dismissed in its entirety.

On the **second ground** of appeal, the appellants are challenging that the cautioned statements were recorded contrary to the time set by the law which is four hours. In this case the evidence on records reveals that the appellants were arrested on 02/10/2015 at around 23:00 and their cautioned statements were recorded on the following day that is on 03/10/2015.

The reasons for failure to record the appellants' cautioned statements within the prescribed time was stated to be due to; **firstly**, the nature of the place where the appellants were arrested, and **secondly**, that, they were arrested in the forest which is far from the Karatu Police Station. With due respect to the Learned State Attorney, I think his argument is contrary to the testimony of his witness PW1, Ponsiano Magoda (National Park Ranger) who vividly testified that, they left Karatu to Kalurambo which is the scene of crime at 22:00 hours and went further testifying that they were able to arrest the appellants at around 23:00. Quick calculations of any prudent person will tell that the distance from Karatu to the area of the scene of crime is less than an hour for the reason that if PW1 and his team were able to leave Karatu police station at 22:00 to the scene of crime and at around 23:00 they had already arrested the appellants then the time from the scene of crime to Karatu Police is more than two hours.

For this reason, I am not convinced by the arguments raised by the State Attorney who is trying to sail on the provisions of section 50 (2) (a) of the Criminal Procedure Act Cap 20 R.E, 2019 which provides for an exception to the four hours required by the law. In the case of **Abasi Selemani Mbiga vs. Republic,** Criminal Appeal No. 250/008 (Unreported-CAT at Mtwara) where lapse of four days without plausible explanation and no evidence as extension of time sought and granted invalidated the cautioned statement resulting into an order expunging it from the record.

Following failure by the prosecution to record that the appellants' cautioned statements were over and considering that the said two cautioned statements were recorded by one police officer, I think that was wrong in terms of procedurally fairness as by recording statement of one suspect envisages that, the recorder of the same became knowledgeable of the incidence when subsequently recording the cautioned statement of another accused now appellant. For the reason herein above, I hereby expunge the said cautioned statement from the record.

In the **third ground** of appeal, this ground need not curtail me since I am convinced that the appellants' cautioned statements were read over by the trial court as and not as wrongly argued by the appellants and readily conceded by the counsel for the DPP since the record glaringly reveals that, the admitted cautioned statements (PE5 &PE6) were accordingly read over by the trial court (see typed

proceedings at page 34 and 47). Equally, the seizure certificate, PEI was read over as required by the law (See page 9 of the typed proceedings) however PEII would not be read over since was all about six pieces of elephant tusks which did not have any contents to be read over.

Regarding the **fourth ground** of appeal, the appellants are complaining on the inconsistences of the evidence of PW1 and PW2 in particular on the dates when the appellants were arrested. PW1 stated that the appellants were arrested on 27th September 2015 while PW2 gave a sworn testimony that, they arrested the appellants on the 2nd October 2015

In considering the effect of the contradiction in relation to the prosecution evidence of the dates 27th September 2015 and 2nd October 2015, this court must therefore determine, whether there are serious contractions and discrepancies when considered as a wholesome and or if the same contradictions go to the root of the case as our courts do not pick out some few pieces of words and consider them in isolation from the rest of the evidence. See: **Mohamed Said Matula Vs Republic** [1995] TLR 3. I am certain bold of the position that, it is not all the inconsistencies or discrepancies in the prosecution evidence 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. See: **Said Ally Ismail v. Republic**, Criminal Appeal No. 249 of 2008 CAT (unreported).

As rightly submitted by the learned counsel some inconsistencies are memory errors due to lapse of time but they do not discredit the evidence of the witness as it is in the case at hand, the variation of the date between of arrest does not discredit the evidence that, the appellants were arrested while in unlawful possession of the Government trophies. The court of Appeal of Tanzania in the case of **Maramo s/o Slaa Hofu & 3 Others v. Republic,** Criminal Appeal No. 246 of 2011 (unreported) had the following to say with regard to minor contradictions as follows;

> "... normal discrepancies are bound to occur in the testimonies of witnesses due to normal errors of observations such as errors in memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Minor contradictions or inconsistencies, embellishments or Improvements on trivial matters which do not affect the case for the prosecution should not be made a ground on which the evidence can be rejected in its entirety."

For the above reasons, I am of the considered view that the contradictions pointed out by the appellants were inconsequential and did not go to the root of the prosecution case.

As to the **fifth ground** of appeal, the appellants are complaining that the exhibit P3, a motor cycle which was alleged to have carried the tusks, was tendered

in court without establishing neither its ownership nor the chain of custody. Absolutely as rightly submitted by the appellants, the records of the trial court do not support any fact on the chain of custody of the alleged motor cycle, vessel which was seized together with the trophies. However, I am of the considered view that given the circumstances of this case, it was not vital for its failure to establish ownership of the motorcycle since the same was not necessary and above all the issue in question was on the trophies allegedly found in unlawful possession of the appellants, therefore even where the chain of custody was not established with regard to exhibit P3 yet the same does not distort the prosecution evidence relating to the offence of being found in unlawful possession of government trophies.

On the **last ground** the appellants are complaining that the trial court failed to evaluate the defence evidence, with due respect with the appellants, I think this fact is incorrect, in fact, at page three of the typed copy of the judgement the trial Magistrate gave his consideration on the defence of alibi as opposed to the appellants' complaint. The defence of alibi was not accorded any weight and reason was given thereof. The defence evidence was also considered by the trial Magistrate at page 8 of the typed copy of the judgment and I wish to quote part of the judgment as follows;

> "The evidence against both accused persons is watertight such that the defence of alibi raised by both accused persons raises no doubt against the prosecution side. As a matter of fact, the defence is a mere deliberate exoneration from the truth and the same is dismissed."

Having said the above this ground of appeal is also bound to fail as I hereby dismiss it

Consequently, the appellants' appeal is dismissed save to the ground two of their appeal. The trial court's conviction and sentence are upheld.

It is ordered.

M. R. GWAE
JUDGE
17/02/2021