IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF ARUSHA)

AT ARUSHA

CRIMINAL APPEAL NO. 21 OF 2020

(Originating from Economic Case No. 19 of 2019 in the District Court of Babati at Babati)

HASSAN ABDALLA.....1ST APPELLANT

AMASHA ATHUMANI .....2ND APPELLANT

VERSUS

D. P. P .....RESPONDENT

JUDGMENT

2/12/2020 & 17/02/2021

GWAE, J

The appellants, **Hassan s/o Abdallah and Amasha s/o Athumani** were arraigned, tried and convicted of the offence termed "unlawful possession of Government Trophy" contrary to section 86 (1) and (2) (ii) of the Wildlife Conservation Act No. 5 of 2009 ("the Act") read together with paragraph 14 of the 1st schedule to, and section 57 (1) and section 60 (2), both of the Economic and Organized Crimes Control Act, chapter 200, Revised Edition 2002 as amended by section 16 (a) of the Written Laws (Miscellaneous Amendment (No. 3) Act, 2016.

In the District Court of Babati at Babati ("trial court"), it was alleged that, the appellants named above on the 16th September 2019 at Kwadelo village, Kondoa District in Dodoma Region jointly and together were found in unlawful possession of Government Trophy to wit; one (1) elephant tusk equivalent to one killed elephant valued at USD 15,000 which is equivalent to Thirty-Four Million, Five Hundred Thousand Shillings only (Tshs. 34,500,000/= the Property of Government of the United Republic of Tanzania.

Brief substance of the prosecution evidence which led to the appellants' conviction can be conveniently recapitulated as follows; that, on the material date at Babati District, police sgt Emiliana Mseki -OCS got information from their informer that, there were persons who were selling elephant tusks. The trap was made by the Police. Babati Police officers and Tarangire Park Rangers were appointed to trace and arrest the suspects. Thereafter those officers started their journey with TANAPA's Motor vehicle from Babati District to Kondoa District at Kwadelo village where they communicated with their informer and eventually, they managed to apprehend appellants while in possession of one elephant tusk which were parked in black sulphate bag (PE1) without permit.

The prosecution evidence is further to the effect that, initially, the police officers (PW1) and park rangers (PW3) introduced to the appellants as buyers of the trophy and eventually they managed to arrest the appellants while on the

road at Kwadelo village while in unlawful possession of the one elephant tusk and embarked them into the motor vehicle. Certificate of seizure (PE2) was prepared, filled and signed by arresting officers (PW1, & PW3) as well as by the appellants. Then, the appellants were brought to Babati Police station where the 1st appellant's statement was recorded by way of caution (PEVI), he confessed to have committed the offence. The trophy (PE2) in question was evaluated by PW2 and it was also weighed (PEV) and the chain of custody was maintained from when it was handed over to the exhibit keeper (PEIV), PW4 stored the trophy in question in the Police Exhibits Room, when it was sent to PW2 for valuation and when it was returned to the Exhibits Room

On the other hand, the 1st appellant contended that on the material date he was merely arrested because of his act of farming nearby TANAPA. He challenged the weight of the prosecution evidence on the ground that he signed to sign the already written papers and that no independent witnesses that witnessed the search whereas the 2nd appellant contended that his arrest was due to his answers to police whom he met and wanted to be shown the way to Busa area. According to the 2nd appellant, his answers was unfriendly to the arresting officers as a result he was arrested and put into the motor vehicle where he found one person laying down and handcuffed.

Upon conviction, the trial court sentenced the appellants to term of twenty (20) years jail which is minimum statutory sentence. Aggrieved by both trial court's conviction and sentence, the appellants are now appealing to the court on the following grounds;

1. That, the learned trial magistrate grossly erred in law and fact in convicting the appellants basing on poor and weak evidence on certificate of seizure
2. That, the learned trial court totally erred in law and fact putting into conviction the appellants while the prosecution failed to prove the case beyond reasonable doubt
3. That, the learned trial magistrate erred in law and fact when he failed to analyze and evaluate the evidence in records, hence, reaching wrong decision

On 2· 12 2020, the appellants appeared in person, unrepresented whereas, the Director of Public Prosecutions ("DPP") was duly represented by **Mr. Ahmed Hatibu**, the learned state attorney.

Arguing for their appeal, both appellants sought adoption of their grounds of appeal contained in the joint petition of appeal. In addition to the grounds of appeal, the 2nd appellant verbally added that the evidence adduced by PW1 has not been supported by that of pack rangers namely; Benjamin and Juma as well

as one Olungana and that the one who testified during trial are the ones who were not at the scene of crime. He also argued that it was improper for the trial court to rely on his cautioned statement (PEVI) to form basis of conviction. The 2nd appellant also challenged credibility of the seizure note (PEII) prepared and conducted by only police officers.

Resisting this appeal, the leaned counsel for the respondent vigorously stated that, the seizure note is legally valid as it was filled by a competent people (police) and that the same was duly signed by the appellants as well as its admission by the trial court procedurally and its contents were read over after its procedural admission. He added that it was not possible to secure or procure an independent witness at the scene of crime since it was night on that material date. Finally, Mr. Hatibu argued that the charge against the appellants was proved in the required standard and that the testimony of PW1 was supported by that of a park Ranger (PW3).

In their rejoinder, the 1st appellant stated that, they were neither given their rights as no independent witnesses that were involved nor were they sent to the nearest police station whereas the 2nd appellant stated that the PW3 was not among arresting officers and that they were not found in unlawful possession of government trophy that is why village leaders or any independent witness was not involved.

Looking at the petition of appeal as well as the parties' oral arguments, I am of the considered view that the issue for determination or the main complaint given by the appellants is on the trial court's evaluation of evidence adduced by the parties and procedural aspect which can be divided into four issues namely; **firstly**; whether the 1st appellant's cautioned statement (PEVI) was procedurally recorded and admitted, **secondly,** whether, there is a mandatory requirement to involve independent witnesses in the search and seizure thereof, **thirdly,** whether the appellants were to be firstly sent to the nearest police station within Kondoa District and then sent to Babati Police Station and **fourthly**, whether the prosecution proved the charge against the appellants to the required standard.

On the complaint on admission and reliance of the cautioned statement, the record reveals that, the 1st appellant patently objected the tendering of the cautioned statement on the ground that, despite the fact that he signed each page but he was beaten and forced to sign the same

> "It is true that I did signed (sic) these documents in every page.
> On that, I was bitten (sic) by the police".

In the light of the 1st appellant's repudiation as to the sought tendering by the prosecution, I am of the view that, the trial magistrate ought to have conducted trial within trial to ascertain voluntariness or otherwise of making of that statement. A mere signing of a statement by a force or due to threats or

inducement does not mean that he voluntarily signed the cautioned statement. The 1st appellant glaringly challenged voluntariness of the statement in question. Thus, trial within trial or an inquiry was inevitable. In **Mazambi v. Republic** [1990–1994] 1 EA 356 (CAT) where it was stated:

> "The repudiated confession of the appellant was inadmissible for failure to hold a trial within a trial, notwithstanding that the appellant's trial advocate had withdrawn his request for the trial within a trial".

According to the case law cited above, it is therefore legal requirement to conduct a trial within trial whenever an accused person objects tendering of a cautioned statement. Had the 1st appellant not objected the sought tendering of the cautioned statement allegedly made by him, the same could have been admitted as trial within trial is not necessary whenever there is no objection on the part of an accused person (**Felix Lucas v. Republic** Criminal Appeal No. 129 of 2002 (unreported -CAT).

Since in our instant case, the trial within trial was not conducted while the 1st appellant seriously and evidently objected its admission, thus, exhibit ((PEVI) is hereby expunged from the record. This ground is thus allowed.

In the **second issue** on whether there was mandatory requirement to involve independent witness in the search and filling of the seizure note **(PEIII).**

Generally, it is requirement of the law that whenever search is conducted in any person, building or carriage or place, box or any personal belonging/vessel by a police officer or any other authorized person, there must be an independent witness to witness such exercise in order to ensure that nothing is fabricated against the person searched or to avoid unnecessary complaints against officers who conduct search however there are circumstances which may be permissible for example in a situation where no civilian or independent witness is available or where presence of other independent witnesses would endanger life of searching officers (See provisions of section 38 of the Criminal Procedure Act, Cap 20 Revised Edition, 2019-CPA).

In our instant case, the reasons as why the independent witnesses were not involved were given by the arresting officers (PW1 & PW3) these were; that, on the material date and time (16/09/2019 at 22: 30 hrs) it was night hours and **secondly;** that, there were no independent witnesses at the place where the appellants were arrested (along the road). Moreover, the police exercised their power as provided under section 42 & 43 of CPA to search any person and seize anything connected with an offence provided that he had reasonable grounds and the offence is serious requiring urgent action.

Regarding the **3rd issue** above, whether the appellants were to be firstly sent to the nearest police station within Kondoa District and then be sent to

Babati Police Station. When I carefully look at the trial court's record and appellants' arguments on this appeal, I observe that the appellants' concern is mainly on as to why Kwadelo village authority was not involved by the arresting officers and or why they were not sent to Babati via nearest police station within Kondoa District.

I am aware that, the police particularly officer in-charge of the station (OCS) may requires any officer subordinate to effect arrest without a warrant , if has reasonable ground to believe that a person has committed an offence or is about to commit an offence or a certain unauthorized property or item is being a carried, he may issue a written authority to such police officer under him to arrest and search a building, vessel or person and seize and any weapon or property or prohibited item within his area of locality in order to prevent removal or loss or destruction of the property connected with an offence (see section 15 of CPA).

Nevertheless, in our instant case, the OCS-Babati Police station instructed the arresting officer to work out of his area of command, he therefore ought to have requested the arresting officers in writing and those police officers be issued with movement orders in order to execute duties outside their working station. This is in accordance with PGO. 33 which reads and I quote;

1. A movement order (PF.58) authorizing an officer's movement outside his normal duty area shall be issued to all members of inspectorate and Rank & File who are about to leave their station or units whether temporarily or permanently one
    a. Transfer
    b. leave
    c. Temporary postings
    d. Special course
    e. Escort
    f. all other duties which take them outside the area or district to which they are posted (excluding distance patrol carried out in accordance with PGO 302

According to the testimony of PW1 and PW3, it is apparently clear that, Babati police officers accompanied with Tarangire National Park Rangers went to Kondoa District at Kwadelo village, arrested the appellants on 16/09/2019 at about 22: 30 hrs without reporting to either the nearest police station at the point of their destination or village authority (See PGO 33 (4) (d) within Kondoa District or to Kwadelo village authority.

Initially, the police officers from Babati and park rangers, to my considered opinion, were right or justified to go and arrest the appellants without notice to Police in Kondoa District or Kwadelo village authority in order to prevent spreading or linkage of information and consequently removal or hiding of the trophy and escape of the offenders or were merely justified to perform their duty without reporting to the nearest police station because they met the appellants

on the road while on the way to Kwadelo village. However, after the arrest of the appellants, the arresting officers were supposed to report the incident to the nearest police station or any local authority where the culprits were apprehended otherwise a lot is left to be desired since a person under police restraint are entitled some of rights such as right to communicate with a lawyer or relative or friend (See section 54 of CPA and PGO P.G.O 272). I am of that view simply because police officers and any other government employees work in their specified areas (area of jurisdiction-territorial jurisdiction). Doing otherwise should pertain with sufficient reason and authority.

Jurisdiction of any established body must be respected in day-to-day activities, be it in adjudicative or executive functions for instance police from Kilimanjaro Region cannot effect arrest in Arusha Region without involving Arusha Police or in case of seriousness and urgency, they may arrest and then report to Arusha Police likewise Tanzania Police cannot go to Kenya and effect arrest to offenders and turn back to Tanzania without formal notice to their colleagues in Kenyan. Doing otherwise may leave a lot to be desired. This ground is therefore mereted.

In the **last issue**, it is always the duty of the prosecution to prove the case beyond reasonable doubt and the defence has no duty to prove its innocence except to raise doubts as to the prosecution evidence. This court

being the 1st appellate court has to ascertain if the charge against the appellants was proved to the standard required by the law. As explained earlier, even if I were to look at the cautioned statement yet it was doubtful since no witness or documentary evidence (exhibit) that touches about motorcycle allegedly used in carrying the elephant tusk in question and driven by the 2nd appellant as per the cautioned statement.

I have also thought of violation of necessary procedure by Babati police of Manyara Region immediately after the appellants' arrest at Kwadelo village within Kondoa District in Dodoma Region as explained above.

In the light of the observations made hereinabove, this appeal is allowed. The trial court's decision is thus quashed and set aside. The appellants shall expeditiously as possible be released from Prison forthwith

It is so ordered.

M. R. GWAE
JUDGE
17/02/2021

Court: Right of appeal to the Court of Appeal of Tanzania is fully explained.

HIGH COURT OF TANZANIA

M. R. GWAE
JUDGE
17/02/2021