IN THE HIGH COURT OF TANZANIA
TABORA DISTRICT REGISTRY
AT TABORA

DC CRIMINAL APPEAL NO. 160 OF 2018
(Arising from Criminal Appeal No. 2 of 2012 of the District Court of Tanga)

MAGANGA DOTTO MASHISHANGA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Last Order: 28/05/2021
Date of Delivery: 19/07/2021

AMOUR S. KHAMIS, J:

In Economic Case No. 7 of 2015 lodged in the Resident Magistrate Court of Tabora, Maganga Dotto Mashishanga, Said Ndege Nzumbi and Cosmas Joachim Yakoloka were arraigned for two counts of unlawful possession of Government trophies contrary to Section 86 (1) and (2) (b) and 3 (b) of the Wildlife Conservation Act No. 5 of 2009 read together with Paragraph 14 (d) of the First Schedule to, and Section 57 910 and 60 (2) of the Economic and Organized Crime Control Act, Cap 200, R.E 2009 and two counts on

leading organized crime contrary to Paragraph 4 (1) (d) of the First Schedule to and Section 57 (1) and 60 (2) of the Economic and Organized Crime Control Act, Cap 200, R.E 2002.

In the first count, it was alleged that on 1st March 2015 during evening hours at Ndala Village, Uyui District, Tabora Region, the accused jointly and together were found in unlawful possession of Government trophies to wit 2 Elephant Tusks weighing 6.8 Kgs valued at Tanzania Shillings 27,495,000/= only the property of the United Republic without a permit from the Director of Wildlife Division.

In the second count, the particulars were that on 1st March 2015 during evening hours at Ndala Village, Uyui District, Tabora Region, the accused jointly and together were found in unlawful possession of Government Trophies to wit: 2 pieces of Hippopotamus teeth valued at Tanzania Shillings 3,482,700/= only the property of the United Republic of Tanzania without a permit from the Director of Wildlife Division.

In the third count, the prosecution alleged that on 1st March 2015 during evening hours at Ndala Village, Uyui District, Tabora Region, jointly and together, the accused intentionally promoted and furthered the objectives of a criminal racket by acquiring and possessing Government trophies to wit: 2 Elephant Tusks weighing 6.8 Kgs valued

at Tanzanian Shillings 27,495,000/= only the property of the United Republic of Tanzania without a permit from the Director of Wildlife Division.

In the fourth count, the prosecution particularized that on same date, time and location, the accused jointly and together, intentionally promoted and furthered the objectives of a criminal racket by acquiring and possessing Government Trophies to wit 2 pieces of Hippopotamus teeth valued at Tanzania Shillings 3,482,700/= only the property of the United Republic of Tanzania without a permit from the Director of Wildlife Division.

The accused denied the charges and the matter proceeded to trial whereupon the trial Court convicted Maganga Dotto Mashishanga on the first and second counts.

All accused were acquitted in respect of the third and fourth counts. On mitigation, Maganga Dotto Mashishanga was sentenced to twenty (20) years imprisonment.

Aggrieved by the conviction and sentence, Maganga Dotto Mashishanga approached this Court fronting four grounds of appeal, namely:

1. That the recovery and seizure of the alleged trophies was done against the law and it was danger for the trial magistrate to admit the same in evidence without any proof showing the seizure of the same.

2. That the trial magistrate erred to convict the appellant despite the failure by the prosecution to establish the chain of custody of the trophies in issue since there was no an iota evidence going to prove beyond reasonable doubt that the trophies tendered in evidence were the very ones which PW 5 Japhary had analysed and or evaluated.

3. That the trial magistrate erred when passed an omnibus sentence of twenty (20) years in prison despite the appellant being convicted of two counts.

4. That the trial magistrate erred for acting on the layman's view that the items were tendered in evidence were the elephant tusks and hippo teeth despite the same being not confirmed by any scientific method that they were elephant tusks and hippo teeth as particularized in the charge sheet.

At the time of hearing this appeal, the Republic was represented by Mr. Tumaini Pius, learned advocate. The appellant appeared in person by way of video conference.

The appellant chose to respond to the submissions by the learned state attorney.

Mr. Tumaini Pius resisted the appeal and submitted that the trial Court properly convicted the appellant.

The learned state attorney was of the view that the first, second and fourth grounds of appeal were interrelated and thus consolidated.

In support of the three grounds of appeal, Mr. Pius asserted that the appellant was arrested in possession of Government trophies; elephant tusks and pieces of hippopotamus teeth and was about to sale them.

Further, the learned counsel asserted that the appellant's cautioned statement and his testimony in Court proved that he was caught in possession of the trophies.

On further address, Mr. Pius contended it was not disputed that the elephant tusks were in sole custody of the appellant.

As regards to chain of custody, Mr. Pius contended that the trophies were analysed and valued by PW 5 who received them from the game warden. The game warden was involved in arresting the appellant and testified as PW 2.

Further Mr. Pius submitted that at the time of arresting the appellant, PW 2 was in the company of one Mr. Christopher who testified as PW 1.

Capping his submissions on that aspect, Mr. Pius asserted that immediately after seizure the tusks were in custody of the game rangers or wardens and thus chain of custody was not interrupted.

On omnibus sentence, Mr. Pius contended that the appellant's contention was not true because the sentence passed was in accordance to Section 60(2) of the Economic and Organised Crimes Control Act.

On scientific identity of the trophies, Mr. Pius strongly submitted that PW 2 and PW 5 were game wardens with expertise in recognition of trophies and testified on how they arrested the appellant, identified and valued the seized trophies.

On failure to prepare and sign a certificate of seizure, Mr. Pius contended that the omission was cured by the appellant's own testimony and cautioned statement which admitted his possession of the trophies.

The appellant adopted contents of the Petition of Appeal to form his submissions and added that the testimony of PW 1 was wrongly entertained because his evidence was not read during committal proceedings.

He contended that PW 1's evidence was heard for the first time during this appeal.

Further, the appellant asserted that the charge was fabricated on him allegedly because:

> *".....at the time of arrest, I held a bag containing shirts, two pairs of trousers, knives and sweet potatoes but the policemen who arrested me changed the bag and replaced it with elephant tusks and pieces of hippopotamus teeth that were subsequently alleged to have been found in my possession which was not true."*

The appellant equally addressed the Court on how he was arrested and kept in a vehicle that was subsequently changed and driven to the wildlife office.

Thereafter he was driven to Katavi Region where stayed in remand for nine (9) days before transported back to Tabora and arraigned in the trial Court.

To wind up, the appellant moved this Court to allow the appeal and acquit him on the charges.

This is the first appeal that requires this Court to make a fresh assessment of factual issues raised during trial and before this Court.

In so doing, I will scrutinize the grounds of appeal succesionally in line with the evidence on record.

In the first ground of appeal, the appellant faulted the trial magistrate for relying on seizure of the trophies whereas there was no proof of seizure.

Section 38 (3) of ***THE CRIMINAL PROCEDURE ACT, CAP 20, R.E 2019*** provides that where anything is being seized, the seizing officer must issue a receipt acknowledging the seizure of that thing, being the signature of the owner or occupier of the premises or his near relative or other person for the time being in possession or control of the premises, and signature of witnesses to the search, if any.

In ***MUSTAFA DARAJANI V REPUBLIC, CRIMINAL APPEAL NO. 277 OF 2008*** (unreported) the Court of Appeal held that:

> *"The whole purpose of issuing receipt to the seized items and obtaining signature of the witnesses is to*

make sure that the property seized came from no place other than the one shown therein. If the procedure is observed or followed, the complaints normally expressed by suspects that evidence arising from such search is fabricated will to great extent be minimized."

In the said case, the Court of Appeal further held that failure to comply with Section 38(3) of the Criminal Procedure Act was a fatal omission.

Five witness testified in support of the prosecution case and three were involved in arresting the appellant.

PW 1 CHRISTOPHER BAHATI NZIGOTA was a game ranger who had information that some people were selling elephant tusks at Ndala Village.

He was accompanied by Edward Mlela, Abdul Mnyamza and Nshinje Nyanda in arresting the accused and posed as buyers of the trophies.

According to him, Said Ndege (second accused) was in touch with an informer and directed them to "Uwanja wa Ndege" area where he was picked in their vehicle.

Said Ndege led game rangers to a distant place where the appellant (first accused) and Cosmas Joachim Yakoloka (third accused) were waiting with the elephant tusks.

Immediately after boarding the vehicle, the appellant and Cosmas Joachim Yakoloka were arrested and driven to Tabora where their bag was opened and found to contain elephant tusks and 2 hippo teeth. from the bush further of

The two elephant tusks and two (2) hippo teeth were collectively admitted as Exhibit P 1.

PW 2 EDWARD MLELA was a game warden at Ngolongolo Reserve and involved in a special patrol carried in Tabora.

Acting on the prior information that three people were selling ivory tusks, he was connected to the second accused (Said Ndege) and posed as a buyer.

His team met Said Ndege on their way to Ndala from Tabora who led them to a distant place where the appellant and Cosmas Joachim surfaced with a plastic bag containing trophies.

According to him, the three accused were arrested immediately after boarding their green vehicle and drove them to Tabora.

Explaining what transpired at the time of seizure, PW 2 said that:

> *"While at Ndala we did not open that plastic bag because security wise the place not good, and that route from Ndala to Tabora no one dropped from (the) car. When we reached at our office Tabora we opened that bag and found two (2) ivory tusks and two (2) hippopotamus teeth. We reached at our office around 18.00 pm. And when we opened that we were with those accused. Then we decided to interrogate where they got those tusks....."*

PW 4 ABEL JORAM MANYANZA, a game warden at the Anti - Poaching Office Dar es Salaam was involved in the special patrol in Tabora.

He was a driver of a green vehicle in which the accused were arrested. According to him, the arresting and seizure team was under leadership of PW 2 Edward Mlela.

He testified in the same lines as PW 1 and PW 2. Respecting seizure, PW 4 said that:

> *"....They entered in our carI turned car by telling the place was not conducive for business then we left that place and they were told that they are under arrest. I drove the car back to Tabora, our aim was to arrest them. On the way from Ndala we did not stop anywhere up to Tabora office and we did not search on that bag until when we reached at the office. In car office when we searched we found two (2) ivory tusks and two (2) hippo teeth. That is all."*

The prosecution relied on the appellant's cautioned statement in a bid to show that he confessed to possess the trophies. The cautioned statement was admitted as Exhibit P 2.

However, the trial Court proceedings of 13/07/2015 showed that when PW 3 F 6526 D/C VICENT MALE prayed to tender the cautioned statement, the trial magistrate did not afford the accused a right to respond to the prayer.

Relevant proceedings from page 23 – 24 reads:

"PW 3 F 6526 D/C VICENT MALE, POLICE OFFICER AT RCO OFFICE TABORA, 35 YEARS OLD, CHRISTIAN, SWORN AND STATED:

.....Wrote statement which has my signature. I pray to tender that as exhibit.

(signed)

RESIDENT MAGISTRATE

COURT:

Caution Statement of 1st accused is hereby received in Court as Exhibit P 2.

(signed)

RESIDENT MAGISTRATE"

Proceedings of that day (13/07/2015) indicates that the three accused were present and it is not clear as to why were not afforded a chance to oppose or concede on the prayer to have the cautioned statement admitted.

In ***MUSSA MWAIKUNDA V REPUBLIC (2006) TLR 387,*** the Court of Appeal listed down minimum standards to ensure a fair trial, thus:

"The minimum standards which must be complied with for an accused person to undergo a fair trial are: he must understand the nature of the charge and this can be achieved if the charge discloses the essential elements of the offence charged, he must plead to the charge and exercise the right to challenge it, he must understand the nature of the proceedings to be an

inquiry into whether or not he committed the alleged offence, he must follow the course of proceedings, he must understand the substantial effect of any evidence that may be given against him, and he must make a defence or answer to the charge."

In ***KABULA D/O LUHENDE V REPUBLIC, CRIMINAL APPEAL NO. 281 OF 2014*** (unreported), the Court of Appeal underscored among others, that a fair trial, first and foremost, encompasses strict adherence to the rules of natural justice, whose breach would lead to the nullification of the proceedings.

In the present case, as earlier on stated, the accused persons were not accorded a right to comment on the introduction of a cautioned statement it into evidence which was a clear breach of rules of natural justice.

Exhibit P 2 suffered another omission. It was not read over in to the accused to enable them understand the nature and substance of its contents.

The requirement to read over contents of admitted exhibits was restated by the Court of Appeal in ***IDDI ABDALLAH @ ADAM V THE REPUBLIC, CRIMINAL APPEAL NO. 202 OF 2014*** (unreported) thus:

"Apart from what we have just said above, the record does not show that the said document was read over to the appellant after it was tendered as evidence to afford him chance to know its contents. In view of

these defects, and because that statement was heavily relied upon in founding the appellant's guilty, it cannot be said that he was fairly tried."

Furthermore, the Court of Appeal in the above stated case of ***IDDI ABDALLAH @ ADAM*** held that:

"In all instances where the Court had occasion to hold that such an error was established, and because it has consistently held it as a fundamental irregularity, it had no hesitation in expunging such evidence from the record....."

On that authority and for the forestated reasons, Exhibit P 2 is hereby expunged from the record.

The next issue is related to the effect of expunging Exhibit P 2 from the record and finding that the appellant was not accorded a fair trial.

Under Section 178 of ***THE EVIDENCE ACT, CAP 6, R.E 2019,*** the improper admission or rejection of evidence shall not, of itself, constitute grounds for a new trial or reversal of any decision in any case if it appears to the Court that independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that the rejected evidence, had it been received, the Court would not have varied the decision.

The trial magistrate relied on testimony of the appellant in concluding that he did not contest being found

in possession of the trophies. However, the evidence of DW 1 varied sharply from that of PW 1, PW 2 and PW 4.

Whereas PW 1, PW 2 and PW 4 said that the appellant was arrested in possession of the plastic bag after boarding the green patrol vehicle, DW 1 MAGANGA DOTTO MASHISHANGA said that he was arrested at home.

It is clear from the evidence on record that no receipt (seizure certificate) was recorded and or issued at the time of seizure. Such certificate was neither mentioned nor produced in evidence.

The unanswered question therefore remains whether the trophies were recovered at the appellant's home or in the green patrol vehicle driven by PW 4.

PW 1, PW 2 and PW 4 said despite of arresting the accused and seizing the bag in Ndala Village, Nzega District, the bag was not opened and inspected until their arrival in Tabora Urban, many miles away.

The proceedings are silent as to who had custody of the disputed plastic bag while on safari from Ndala Village to Tabora.

Another anomaly was the prosecution's failure to describe the seized trophies. Apart from generally referring them as two pieces of elephant tusks and two hippopotamus teeth, the arresting officers did not describe the trophies by stating their special identification marks or description.

Drawing inspiration from the case of ***MUSTAFA DARAJANI V REPUBLIC*** (supra) in which the Court of Appeal held that failure to comply with Section 38 (3) of the Criminal Procedure Act was fatal, I am inclined to find this ground of appeal sufficiently disposed of the entire appeal with merits.

Consequently the appellant's conviction is quashed and a sentence meted on him is set aside. In the result, I order his immediate release from prison unless lawfully held for other lawful causes. It is so ordered.

Dated at Tabora this 19th day of July 2021.

AMOUR S. KHAMIS
JUDGE
19/7/2021

Judgment delivered in chambers in presence of Ms. Juliana Moka, Senior State Attorney and the appellant in person (under custody). Right of Appeal explained.

AMOUR S. KHAMIS
JUDGE
19/7/2021

THE HIGH COURT OF TANZANIA