THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

IRINGA DISTRICT REGISTRY

AT IRINGA

DC. CRIMINAL APPEAL NO. 66 OF 2021.

(Originating from Economic Case No. 42 of 2017, in the District Court of Iringa, at Iringa).

SPEDITO PASCAL TWANGE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

11th May & 25th July, 2022.

UTAMWA, J.

This appeal is against the conviction and sentence resulting from the judgment (impugned judgement) that was pronounced against the appellant, SPEDITO PASCAL TWANGE, by the District Court of Iringa District, at Iringa (the trial court) in the Economic Case No. 42 of 2017.

The appellant, together with two others who are not parties to this appeal (since they were acquitted by the trial court), were charged with the following nine counts: The first count was on the offence of leading organized crime contrary to paragraph 4 (1)(d) of the First Schedule and Sections 57 (1) and 60 (2) of the Economic and Organized Crime Control Act, Cap. 200 R.E 2002 (The EOCCA). The second and third counts were on the offence of unlawful possession of government trophy contrary to section 86 (1), 2 (c) (ii) and 3 (b) of the Wildlife Conservation Act, No. 5 of 2009 (henceforth the WCA) read together with Paragraph 14 of the First Schedule and section 57 (1) of the EOCCA.

Regarding the fourth count, the appellant and those others were charged with the offence of unlawful possession of firearm contrary to section 20(1) and (2) of the Firearms and Ammunitions Control Act No. 2 of 2015 (hereinafter called the FACA) read together with paragraph 31 of the First Schedule and Sections 57(1) and 60(2) of the EOCCA. The fifth and sixth counts against them related to the offence of unlawful possession of ammunition contrary to sections 21 and 60(1) of the FACA read together with paragraph 31 of the First Schedule, sections 57(1) and 60(2) of the EOCCA. The seventh, eighth and ninth counts related to the offence of unlawful entry into a National Park with a weapon contrary to sections 24(1) (b), (2), 29(1) and (2) of the National Park Act, Cap. 282 R.E 2002 (The NPA in short).

The appellant and the said others pleaded not guilty to all the charges and a full trial ensued. Upon the full trial, and through the

impugned judgment, the appellant alone was convicted of the fourth count (of unlawful possession of fire arms) only and sentenced to serve twenty years in prison. Under the said fourth count, it had been alleged that, on the material date (the 11th July, 2017), at Nyamakifu area within Ruaha National Park, in the District and Region of Iringa, the appellant and the said 2 others were found in possession of a muzzle loader without permit or licence.

The generality of the prosecution evidence was that, on 11th July, 2017 at Nyamakifu area within Ruaha National Park in the rural District and Region of Iringa the appellant and the 2 others willfully organized and managed a criminal racket to wit; accepting, collecting, financing, managing, and selling government trophies which included; four pieces of elephant tusks and four pieces of dik-dik horns. They were also found in an unlawful possession of muzzle-loader, 32 rounds of ammunitions, one shotgun empty cartridge, one axe, one normal knife and one bush knife without permit or license.

The appellant's defence before the trial court was essentially that, the three of them (appellant and two others) were arrested at their farm and not in the National Park. They were not found with any muzzle loader or elephant task. These exhibits were only planted to them. They were forced to sign cautioned statements. At the material time, the arresting officers were accompanied by other people whom were in a tag of war with the appellant for land disputes. The case was thus, concocted against him.

Aggrieved by the impugned judgment, the appellant has appealed to this court basing on six grounds of appeal couched in an unrepresented layman's language. Nonetheless, the same can be understood and safely condensed into only the following 3 substantive grounds of appeal:

i. That, the trial court erred in law and fact in convicting and sentencing the appellant basing on wrong provisions of the Criminal Procedure Act, Cap. 20 R.E 2002 (The CPA).
ii. That, the trial court erred in law and fact in convicting and sentencing the appellant thought the prosecution did not prove the case against him beyond reasonable doubts.
iii. That, the trial court erred in law and fact in convicting and sentencing the appellant basing on his weak defence.

Due to the above improvised grounds of appeal, the appellant urged this court to allow the appeal, quash the conviction and set aside the sentence. He further urged this court to order for his immediate release from the prison.

At the hearing of this appeal, the appellant appeared in person and unrepresented through a virtual court link while in the Iringa Prison. The respondent Republic was represented by Mr. Basilius Namkambe, learned Senior State Attorney (The SSA in short).

During the hearing of the appeal, the appellant only adopted his grounds of appeal. He thus, had nothing of substance to argued. It must however, be noted that, according to his petition of appeal, especially under the umbrella of the second improvised ground of appeal, the

appellant advanced a number of complaints. Among them, was the fact that, the prosecution did not prove the unbroken chain of custody of the exhibits related to the case.

On his part, the learned SSA, at the very outset of the hearing of the present appeal informed the court that, he supported the appeal. He focused his submissions on the appellant's complaint related to the failure by the prosecution to prove the unbroken chain of custody of the exhibits. He pointed out that, according to the evidence on record the appellant was arrested by the prosecution witness No. 1 (PW.1) one Slivester s/o Anyandwile. This witness testified that, on the material date he (and his colleagues) were in a patrol in the Ruaha Game Reserve. They then saw footsteps and followed them until when they found the appellant and others. They had various items including the government trophies at issue (the four elephant tusks) and the muzzle loader (a local made gun or *gobole* in Kiswahili) which was the subject matter of the fourth count, the conviction against the appellant and the appeal at hand. The appellant was convicted of being in possession of the muzzle loader only and not for the other items. The PW.1 however, did not identify it before it was produced in court. He did not also testify as to where the same had been kept from the time of arresting the appellant (i.e. on 11th July 2017) to the date when he testified in court (i.e. on 18th October 2018). That was in fact, a period of more than a year from the date of the arrest.

The learned SSA also faulted the accused's cautioned statement which was tendered in court by a police officer who testified as PW.3 (D/C.

John). He submitted that, the witness had testified that, he recorded the cautioned statements of the appellant and the two others. However, he did not testify if he wrote their respective statements separately. It is also doubtful if he followed the four hours' rule for recording such statements as provided by the law.

The learned SSA referred the court to a decision of the Court of Appeal of Tanzania (The CAT) in the case of **Petro Kilo Kinangai v. Republic**, **Criminal Appeal No. 565 of 2017**, **CAT at Arusha** (unreported). In that precedent he contended, the CAT discussed the principle of chain of custody. It then found that, there was a broken chain of custody, it hence allowed the appeal before it. The case also underlined a proper procedure for identifying an exhibit in court.

It was a further argument by the SSA that, the PW.1 also produced in evidence the four pieces of elephant tusks, four pieces of dik-dik horns, the muzzle loader, bush knife (*panga* in Kiswahili), and an axe. All the exhibits were admitted collectively. The trial court made no order as to the disposal of said exhibits after the trial. He thus, prayed for this court to make an order that the weapons be handled to the police to be dealt with according to the law. As to the trophies at issue, the learned SSA prayed for this court to make an order for the same to be under the Director of wildlife as per the law.

I have considered the appeal, the submissions by the parties and the law. In my settled view, the only fact that the present appeal is not objected, is not the reason why this court should not test its merits. That

fact is also not the sole ground for this court to allow the appeal. These views are based on the understanding that, it is a firm and trite judicial principle that, courts of law in this land are enjoined to decide matters before them in accordance with the law and the Constitution of the United Republic of Tanzania, 1977, Cap. 2 R. E. 2002 (henceforth the Constitution). This is indeed, the very spirit underscored under article 107B of the Constitution. It was also underlined in the case of **John Magendo v. N. E. Govan (1973) LRT n. 60**. Furthermore, the CAT emphasized it in the case of **Tryphone Elias @ Ryphone Elias and another v. Majaliwa Daudi Mayaya, Civil Appeal No. 186 of 2017, CAT at Mwanza,** (unreported Ruling). In that precedent, the CAT held, *inter alia*, that, the duty of courts is to apply and interpret the laws of the country. It added that, superior courts have the additional duty of ensuring proper application of the laws by the courts below. I will therefore, test the merits of the appeal despite the fact that the respondent supports it.

Now, in determining the appeal, I opt to firstly consider the second improvised ground of appeal. *The major issue here is whether or not the prosecution proved the case against the appellant before the trial court beyond reasonable doubts.* Regarding the complaint by the appellant related to the broken chain of custody, I am of the view that, it is settled principle, as correctly contended by the learned SSA that, in cases involving exhibits there has to be the unbroken chain of their custody. There has also to be a chronological documentation and/or paper trail showing the seizure, custody, control, transfer, analysis and disposition of evidence. The Court of Appeal (CAT) has in various cases underscored the importance of

maintaining the chain of custody. This was the legal position which was also underscored by the CAT in the case of **Paulo Maduka and Others v. Republic, Criminal Appeal No. 110 of 2007, CAT at Dodoma** (unreported). In that precedent, the CAT also underlined that, 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. It further remarked that, the chain of custody requires that from the moment the evidence is collected, it's very transfer from one person to another must be documented and it must be provable that nobody else could have accessed it. The requirement to prove the unbroken chain of custody was also underlined by the same CAT in the cases of **Anania Clavery Betela v Republic, Criminal Appeal No. 355 of 2017, CAT at Dar es Salaam** (unreported) and **Mussa Hassan Barie and Albert Peter @John v Republic, Criminal Appeal No. 292 of 2011, CAT at Arusha** (unreported).

I am also live of the legal stance that, a chain of custody of an exhibit can be proved by oral or documentary evidence since they both hold the same evidential weight. This position was underlined by the CAT in the cases of **Marceline Koivogui v. Republic, Criminal Appeal No. 469 of 2017, CAT, at Dar es Salaam** (unreported, at page 32) and **Khamis Said Bakar v. Republic, Criminal Appeal No. 359 of 2017, CAT, at Dar es Salaam** (unreported).

In the present case, as correctly submitted by the learned SSA, the PW.1 (the park ranger who arrested the appellant and others) did not

testify in court as to where the muzzle loader at issue and other exhibits allegedly found with the appellant (and 2 others) were kept or who handled them. PW.3 (the investigator of the case), did not also testify as to how the exhibits (including the muzzle loader which was involved in the fourth count) were handled from seizure to when they were tendered in court. This omission by the prosecution may raise doubts as to whether the muzzle loader (related to the fourth count) was the same as the one allegedly seized from the appellant.

Furthermore, I agree with the learned SSA on the weakness of the cautioned statement he highlighted above. The omission to indicate that the cautioned statements by all the three accused persons before the trial court (including the appellant) were recorded separately also create doubts on their admissibility. This is so because, such confessional statements cannot be taken collectively in relation to more than one suspect. Otherwise, the possibility that one suspect was influenced to confess by the other/others cannot be overruled.

Again, since the learned SSA admits that it was doubtful if the four hours' rule was followed in recording the appellant's confession (cautioned statement) and no evidence was offered for the delay to record the statement after four hours from the arrest of the appellant, such confession cannot be good evidence against him. This rule has been underlined by various precedents. In the case of **Eriot Ezekiel Dzombe v. Republic [2013] TLR. 173** the CAT held that, such kind of evidence

offends the mandatory provisions of section 50(1)(a) of the CPA, it must be disregarded.

The above pointed out doubts on the issue of broken chain of custody of the muzzle loader at issue and alleged appellant's cautioned statement must be resolved in fovour of the appellant as per the law. I therefore, expunge the cautioned statement from the record. I also find no other evidence on record that implicates the appellant upon discarding the evidence on the chain of custody of the muzzle loader and expunging the appellant's cautioned statement. No wonder the learned SSA promptly supported the appeal at hand for these reasons.

The defence given by the appellant before the trial court (narrated above) therefore, raised reasonable doubts which in law must be resolved in his favour.

Owing to the above findings, I answer the major issue posed above negatively that, the prosecution did not prove the case against the appellant before the trial court beyond reasonable doubts. I consequently uphold the second ground of appeal.

In my further legal opinion, the finding I have just made above in relation to the second ground of appeal, is capable enough to dispose of the entire appeal without testing the rest of the grounds of appeal. Otherwise, that will amount to performing an academic or superfluous exercise which is not the core objective of the adjudication process.

I accordingly allow the appeal, quash the conviction, set aside the sentence against the appellant and order that he shall be released from the prison forthwith unless held for any other legally justified cause.

Furthermore, since the trial court did not make necessary orders regarding the fate of the exhibits tendered in court as submitted by the learned SSA, and so long as the learned SSA prayed for this court to make the necessary orders, and as since the trial court gave no reasons for this omission, and as long as the appellant said nothing on the prayer made by the learned SSA regarding such exhibits, and as long as the record of the trial court does not show that the other two acquitted accused persons had a claim over the exhibits, the following order meets the justice of the case. It is hereby ordered that, the offensive weapons allegedly found with the appellant and others (listed above) and the four government trophies at issue (the elephant tusks) shall be forfeited for the Government. It is so ordered.

J. H. K. UTAMWA
JUDGE
25/07/2022.

25/07/2022
CORAM; JHK. Utamwa, J.
Appellant: present in person.
For Respondent; Ms. Jackline Nungu, State Attorney.
BC; Gloria, M.

Court; Judgment delivered in the presence of the appellant in person and Ms. Jackline Nungu, learned State Attorney for the respondent, in court, this 25th July, 2022. Right of appeal is explained.

JHK UTAMWA
JUDGE
25/07/2022.