THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

AT IRINGA

DC. CRIMINAL APPEAL NO. 69 OF 2021.

(Originating from the District Court of Iringa District, at Iringa in Economic Case No. 12 of 2019).

GEORGE RICHARD KISWAGA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

9th May & 18th July, 2022.

UTAMWA, J:

Through the Economic Case No. 12 of 2019 before the District Court of Iringa District, at Iringa (the trial court), the appellant GEORGE RICHARD KISWAGA together with another (one Nelson Kigaru, not subject of this appeal) were charged with the offence of unlawful possession of government trophy. This was contrary to section 86(1) and (2)(b) of the Wildlife Conservation Act, Act No. 5 of 2009 (The WCA) read together with paragraph 14(d) of the first schedule and sections 57(1) and 60(1) and (2) of the Economic and Organized Crimes Control Act, Cap. 200 R.E 2002 (Now RE 2019), henceforth the EOCCA, as amended by section 16(a) and 13(b) of the Written Laws (Miscellaneous Amendment) Act, Act No. 3 of

2016.

In the charge sheet it was alleged by the prosecution that, on the 01st day of June, 2019 at Wenda area in the District and Region of Iringa, the appellant was found in possession of government trophy; to wit three elephant tusks valued at 30,000 United States Dollars (USD) equivalent to Tshs. 68,314,800/=, being the property of the government of The United Republic of Tanzania.

The appellant pleaded not guilty to the charge. However, upon a full trial, he was convicted and sentenced to pay a fine of Tanzanian Shillings (Tshs.) 683,148,000/= or to serve 20 years in imprison in default thereof. This was vide the Judgement of the trial court dated 27th February, 2020 (the impugned judgement).

Aggrieved by the impugned judgment, the appellant appealed to this court basing on the following grounds of appeal which I reproduce verbatim for a quick reference:

1. That, the charge was not supported by the fact and evidence of the case about names of the accused and number of tusks which were valued. These variances are confirmed that the charge was not proved.
2. That, the caution statement was prepared out of time as prescribed by laws while the statement was retracted and repudiated due to their preparation and recording were illegal.
3. That, the illegal and unfair search was proved by contradictions and inconsistence evidence of the prosecution side witness about how

PW.3 participated and informed presence of the tusks before the search.

4. That, failure of the prosecution to call for testimony somebody Erasto Rukwago (Ruhenge) as independent witness on the arrest and search it was required the trial court to make adverse inference against prosecution.
5. That, custody chain of exhibit P.1 was not proved planting exhibit as the evidence of handing over between PW.4 and PW.5 had discrepancies on the valuation which the appellant was not witnessed.
6. That, the trial court jurisdiction certificate and DPP consent were admitted after the State Attorney prays without any court order in the record neither opportunity of the accused's respond. So the procedure was illegal and unfair.

The appellant therefore, urged this court to allow his appeal, quash the conviction, set aside the sentence and release him from prison.

At the oral 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 Ms. Alice Thomas, learned State Attorney.

The appellant adopted his grounds of appeal as they appear in his petition of appeal and had nothing of substance to add.

The learned State Attorney for the respondent objected the appeal. She argued in opposing the first ground of appeal that, the elephant tusks

were found with the appellant according to PW.1 (Paulo Masawe, a game officer) and they were three (3). They were admitted as Exhibit P.I before the trial court. The tusks were also mentioned in the charge sheet. There was thus, no discrepancy between the charge sheet and the exhibit. She thus, prayed for this court to dismiss this ground of appeal.

On the second ground of appeal, the learned State Attorney submitted that, it is true that the cautioned statement was taken out of time. This was because, the appellant was arrested on 1st June, 2019 at 9:00 pm, but the statement was taken on 2nd June, 2019 at 7:15 am. Moreover, no reason was stated for the recording the statement out of the prescribed time, that is under Section 51(1) of the Criminal Procedure Act, Cap. 20 R.E 2019 (the CPA). She thus, prayed for the court to uphold this ground of appeal.

As to the third ground of appeal, the State Attorney contended that, PW.1 had stated in evidence that, the appellant went to him with another person in a motorcycle when PW.1 and other arresting officers pretended to be buyers of the tusks. That is when they arrested them with the said 3 elephant tusks which were in a plastic bag. After arresting them, the PW.1 and others (according to the PW.1 evidence) called the PW.3 (who was the chairman of the village) and they searched the bag. They seized the elephant tusks and the motorcycle used to carry them. It cannot therefore, be argued that the search was illegal. This ground should thus, be dismissed, she contended.

Regarding the fourth ground of appeal the learned State Attorney argued that, it also lacks merits and should be dismissed. This was because,

the PW.3 was involved in the search. She also submitted against the fifth ground of appeal that, the PW.1 had stated in his evidence that, when he arrived at Iringa Police Station he handed over the elephant tusks to the exhibit keeper. The exhibits were then evaluated by the PW.4 who then returned them to the exhibit keeper (PW.5). There was thus, evidence showing a proper chain of custody. She consequently urged this court to dismiss this ground of appeal too.

Concerning the sixth and last ground of appeal, the learned State Attorney contended that, according to page 5 of the typed proceedings of the trial court, the prosecution prayed to file the certificate and consent of the Director of Public Prosecution (The DPP) and a date of hearing was fixed. The law, under section 12(3) and 26(2) of the EOCCA provide that, the DPP shall file the documents. The law does not provide for an opportunity of the accused to react to the filing of the said documents in court. It was thus, not fatal for the trial court to refrain from asking the appellant if he agreed with the filing of the documents. The omission did not therefore, deprive the appellant of his right to be heard. She prayed for this court to overrule this ground of appeal as well.

Additionally, the learned State Attorney urged this court to appreciate that, though the cautioned statement had been recorded out of the prescribed time, there was other pieces of evidence supporting the charge. The expunging of the cautioned statement from the record will not thus, save the appellant from the liability. She therefore, insisted that the appeal should be dismissed.

In his rejoinder submissions, the appellant urged this court to uphold his grounds of appeal since he has a family depending on him.

I have gone through the grounds of appeal, the record, the submissions by the parties and the law. The major issue is whether this appeal has merits. In disposing this appeal, I will discuss each ground of appeal as raised by the appellant.

On the first ground of appeal, the sub-issue is *whether or not the charge was not supported by the evidence on the number of the elephant tasks at issue.* I do not think if the evidence on record attracts answering this sub-issue affirmatively. This is because, the charge against the appellant was unlawful possession of government trophy and the allegations against him were as shown earlier. At the trial the PW.1 (one Paulo, a game officer who arrested the appellant) tendered in court the three elephant tusks at issue (Exhibit P.1) which he said, were found in the possession of the appellant. This story was supported by PW.2 (DC. Wilson, a police officer) who was among the arresting officers of the appellant. PW.4 (also a game officer) testified that, he evaluated the 3 tusks and found them with the monetary value mentioned into the charge sheet as indicated herein above. I thus, answer the sub-issue posed above negatively and I dismiss the first ground of appeal.

Concerning the second ground of appeal related to the complaint against the cautioned statement, I am of the view that, since it is not disputed by the parties that the cautioned statement was recorded out of the time prescribed by the law (section 50(1)(a) of the CPA), it is liable to

be expunged from the record. This is the stance of the law as underlined by the Court of Appeal of Tanzania (The CAT) in the cases of **Emanuel Malabya v. Republic, Criminal Appeal No. 212 of 2004 CAT** (unreported) and **Lumuda Mahushi v. Republic, Criminal Appeal No. 239 of 2011, CAT** (unreported), **Joseph Mkumbwa and Another v. Republic, Criminal Appeal No. 9 of 2007, CAT** (unreported), **Emilia Aidan Fungo @ Alex and Another v. Republic, Criminal Appeal No. 278 of 2008** (unreported) and **Hamisi Juma @ Nyambanga and Another v. Republic, Criminal Appeal No. 126 of 2011, CAT** (unreported). The cautioned statement is thus, expunged from the record and I uphold the second ground of appeal.

Coming to the third ground, the sub-issue is *whether the search against the appellant was illegal, unfair and contradicted by the prosecution evidence*. I have scrutinized the evidence adduced before the trial court, but I found no such evidential contradictions alleged by the appellant. According to the PW.1 and PW.2, they made a trap by which some of the arresting officers pretended to be purchasers of the tusks. The appellant and another arrived at the agreed place to sale the tusks to the pretended buyers. They were in a motorcycle carrying a nylon bag. When they arrested them, they searched the bag and found the 3 tusks. This story was supported by the co-accused of the appellant before the trial court (Nelson Kigaru). Nelson testified in his defence that, the appellant had hired his motorcycle and he carried him with his nylon bag. When they were arrested, the bag was opened and elephant tusks were found in it. In his defence, the appellant himself did not dispute the story given by the said Nelson save that, he

claimed that his bag did not contain the tusks. Such tusks were planted to him by the arresting officers.

On my part, I do not see how illegal and unfair that kind of the search was. I do not also see how it was contradicted by the prosecution evidence. The appellant himself did not give any explanation to support his complaint under this ground of appeal. I accordingly answer the sub-issue negatively and I dismiss the third ground of appeal.

In relation to the fourth ground of appeal, the sub-issue is *whether the failure by the prosecution to call the said Erasto Rukwago as prosecution witness was fatal to its case*. This ground is also not supported by any law. It has been held in a number of precedents that, it is not the number of witnesses which matters in proving a case, but the weight of the evidence tendered in court. Section 143 of the Evidence Act, Cap. 6 RE. 2019 also provides that, no particular number of witnesses shall in any case be required for the proof of any fact. This rule was underlined in the cases of **Yohanes Msigwa v. Republic (1990) TLR 148, Gabriel Simon Mnyele v. Republic, Criminal Appeal No. 437 of 2007, CAT** (unreported) and **Godfrey Gabinus @ Ndimbo and 2 Others v. Republic, Criminal Appeal No. 273 of 2017, CAT** (unreported). I therefore, answer the above sub-issue negatively and dismiss the fourth ground of appeal.

The appellant's fifth ground of appeal hatches the sub-issue of *whether the chain of custody for the elephant trophies at issue (Exhibit P.1) had broken*. It is settled principle that, in cases involving exhibits there has to be unbroken chain of custody and there has to be a

chronological documentation and/or paper trail showing the seizure, custody, control, transfer, analysis and disposition of that evidence; see the holding 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 case, the CAT further held 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. The CAT further underlined 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 should be provable that nobody else could have accessed it. This legal position was also echoed 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).

In the instant appeal, the prosecution witnesses have elaborated on the handling of the elephant tusks (Exhibit P.1) from the time they were seized from the appellant. PW.1, for instance, testified that, he participated in apprehending the appellant and seizing the tusks from him. He then handled over the tusks to the PW.5 (PC. Emmanuel), the exhibit keeper of the police station. PW.5 also gave evidence that he received the tusks and later gave them to PW.4 (Msafiri Mashiku, another game officer) for evaluating them. The PW.4 himself testified to that effect. He added that, after the evaluation he returned the tusks to the exhibit

keeper (PW.5). All these handing-over processes were recorded in a specific form which was tendered in court as Exhibit P.3.

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).

Owing to the reasons shown above, I find that, the prosecution proved the existence of the unbroken chain of custody in handling the elephant tusks at issue (Exhibit P.1). I consequently answer the sub-issue posed above negatively and overrule the fifth ground of appeal.

In relation to the sixth and last ground of appeal the sub-issue *is whether the DPP's certificate and consent were illegally procured in the matter at hand.* The appellant's complaints are essentially that, the certificate and consent or the DPP were admitted after the State Attorney had prayed before the trial court to do so and there was no any order to that effect by the trial court. He (appellant) was not also given an opportunity to respond to the prayer.

In my view, the appellant's complaints do not have any legal support. The EOCCA empowers the DPP to grant a consent for trying an economic case before the same is tried. This is provided under section 26(1) of the Act. Section 26(2) of the same legislation empowers the DPP to delegate his powers to any officer subordinate to him so as to ensure expeditious

trial of cases. Furthermore, Section 12(3) of the same Act guides that, the DPP or any State Attorney duly authorised by him may, by a certificate direct that an economic offence be tried by a subordinate court.

In the matter at hand, the record of the trial court shows that, before the commencement of the trial (on 9th October, 2019) the learned prosecuting State Attorney prayed to file both the certificate and the consent of the DPP. In my view, the law was accordingly followed. What the appellant wanted the trial court to do was not a legal requirement and he did not cite any provisions of the law to that effect. I accordingly answer the sub-issue under this ground of appeal negatively and overrule it.

I have also considered the defence made by the appellant before the trial court. He only claimed that the elephant tasks were planted to him by the arresting officers. However, in the presence of the strong prosecution evidence discussed above under each ground of appeal, his defence is incapable of raising any reasonable doubts in the mind of this court. This is irrespective of the fact that, his second ground of appeal was upheld and the cautioned statement was accordingly expunged from the record. This is so because, such other prosecution evidence that remain on the plate proved the charge against him beyond reasonable doubts that. It proved that he was found with possession of the government trophies without any authorisation, which said act is an economic offence contrary to the provisions of the law under which he was charged as demonstrated previously.

Besides, the appellant did not tell the trial court and this court as to why the prosecution witnesses, especially PW.1 and PW.2 who arrested him *in flagrante delicto* with the trophies could tell lies against him. It must be born in mind that, in law, every witness is entitled to credence in his/her testimony and must be believed unless there are cogent grounds for not believing him/her; see the decision by the CAT in **Goodluck Kyando v. Republic, Criminal Appeal No. 118 of 2003, CAT at Mbeya** (unreported).

On the above reasons, I find that, the appellant's appeal lacks merit, hence a negative answer to the major issue posed earlier. I accordingly dismiss the appeal in its entirety. It is so ordered.

JHK UTAMWA
JUDGE
18/07/2022

18/07/2022
CORAM; JHK. Utamwa, J.
Appellant: present in person.
For Respondent; Ms. Pienzia Nichombe, State Attorney.
BC; Gloria, M.

Court; Judgment delivered in the presence of the appellant in person and Ms. Pienzie Nichombe, learned State Attorney for the respondent, in court, this 18th July, 2022. Right of appeal is explained.

JHK UTAMWA
JUDGE
18/07/2022