IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DODOMA DISTRICT REGISTRY)

AT DODOMA

(DC) CRIMINAL APPEAL NO. 70 OF 2022

(Original Economic Case No.01 of 2020 before the Resident Magistrate Court of Dodoma at Dodoma)

BENO NGOMOI...............................APPELLANT

VERSUS

THE REPUBLIC..............................RESPONDENT

JUDGEMENT

11/11/2022 & 15/12/2022

MASAJU, J.

The Appellant, Beno Ngomoi, and three others (who are not party to this appeal) were charged with the offence of **unlawful of possession of government trophy** contrary to section 86 (1) and (2) (b) of the Wildlife Conversation Act, No.5 of 2009 read together with paragraph 14 of the First Schedule to and section 57 (1) and 60(2) of the Economic and Organised Crimes Control Act [Cap 200, RE 2002] as amended by sections 16(a) and 13(b) of the Written Laws

(Miscellaneous Amendment) Act, No.3 of 2016 in the Resident Magistrates' Court of Dodoma.

At the end of trial, the Appellant was found guilty and sentenced to pay fine worth TZS 343,050,00/= or to in default to serve twenty years in jail. His other three co-accused were acquitted. Aggrieved by the conviction and sentence, the Appellant has come to the Court by way of an appeal.

The Petition of Appeal comprises three (3) grounds of appeal which can be summarised into one major point, that the prosecution case before the trial court was not proved beyond reasonable doubt, it was coupled with procedural illegalities.

When the Appeal was heard in the Court on the 10th day of November, 2022 and the 11th day of November, 2022 both parties were represented. The Appellant was represented by Mr. Godfrey Wasonga, the learned counsel whilst the Respondent Republic was represented by Ms. Bertha Kulwa and Mr. Salumu Matibu, the learned state Attorneys.

Arguing for the appeal, the Appellant opted to consolidate the first and second ground of appeal to form one ground hence the first ground of appeal whereas the third ground of appeal remained as the second ground of appeal.

On the first ground of appeal, The Appellant submitted that there were procedural irregularities such as; he was arrested at night without there being a Court order to that effect which the same is contrary to section 40 of the Criminal Procedure Act [Cap 20, RE 2019] and that since it was during the night there was likelihood of implantation of the evidence by the police at the scene, that he was un-procedurally searched contrary to section 38 (1) of the Criminal Procedure Act [Cap. 20, RE 2019] since there was no a search warrant and search order or either of the two, that he never signed the seizure certificate, the seizure certificate (Exhibit P3) did not bear his name, that the prosecution independent witness (PW7) denied eye witnessing the search and the seizure in his testimony, PW7 stated that he was only called to sign on the seizure certificate, that section 38 (3) of the Criminal Procedure Act [Cap RE 2019] was not complied with because

no receipt was issued to the Appellant, that the cautioned statement was recorded beyond time contrary to section 50 and 51 of the criminal Procedure Act, [Cap. 20 RE 2019].

To back up his points, the learned counsel for the Appellant referred the case of **Shaban Said Kindamba v. The Republic** (CAT) Criminal Appeal No. 390 of 2019, at Mtwara (unreported) the case of **Mathew Stephen @ Lawrence v. Republic** (CAT) Crimminal appeal No. 19 of 2007, Arusha Registry (unreported), the case of **Paul Maduka and 4 others v. The Republic**, (CAT) Criminal Case No. 110 of 2017, Dodoma Registry (unreported), **David Athanas @ Makasi and Another v. the Republic** (CAT) Criminal Appeal No. 168 of 2017, Dodoma Registry (unreported), **Said Bakari v. The Republic** (CAT) Criminal Appeal No. 422 of 2013, Tanga Registry (unreported).

As regards the second ground of appeal, the Appellant submitted that prosecution case was not proved beyond reasonable doubt because the evidence of PW2, PW4 and PW7 (as relied upon by the prosecutions) the government trophies, and that the motorcycle and the bag were not brought and tendered in the trial court as exhibit. At last,

the Appellant prayed the Court to allow the appeal, quash conviction and set aside the sentence against him.

The Respondent Republic contested the appeal. She argued that the Appellant was found in actual possession of the government trophy (Exhibit P2) as so testified by PW2, PW4, PW6 and PW7 (the eyewitnesses). That, the Appellant acknowledged the same because he signed on the seizure certificate (Exhibit P3), which bears his very own names as appearing in his (Exhibit D1). The Respondent Republic submitted that there was no receipt because the scene of the crime was at a highway not a premise as per section 38 (3) of the Criminal Procedure Act, [Cap 20 RE 2019]. She argued that non-issuance of a receipt in the existence of an independent witness does not invalidate the seizure as per the decision of **Jibril Okash Ahmed v. The Republic** (CAT) Criminal Case No. 331 of 2017, Arusha Registry (unreported).

The Respondent Republic submitted that as per the documentary evidence (the Register PF 16 (Exhibit P1) and oral evidences (PW 1, PW 2 PW4, PW 6 and PW7) the chain of custody against the Appellant was

undisturbed. He stated that the case of **Paul Maduka** (supra) is distinguishable from the instant case and that the case of **Issa Hassan Uki v. The Republic** (CAT) Criminal Case No. 127 of 2017, Mtwara Registry (unreported is relevant as the Court guided therein that government trophy does not change hands and decay easily.

The Respondent Republic went on submitting that the information was availed to PW2 a 14:00 hours and therefore the search was an emergency which section 40 of the Criminal Procedure Act [Cap. 20 RE 2019] cannot apply because it is not easy to secure the sitting of the Court at night and obtain an arrest warrant. He stated that the cautioned statement (Exhibit P4) was recorded in time because the Appellant was conveyed from Mbande to Dodoma Regional Crime office.

The Respondent Republic stated that the bag and sulphate thereof were brought in the trial court, identified accordingly and admitted in evidence along with the government trophy (Exhibit P2). That, the two motorcycles were hired by the Appellant and his accomplice that's why they were not brought and admitted in evidence. Finally, the

Respondent Republic prayed the Court to dismiss the appeal accordingly because the prosecution case was proved beyond all reasonable doubt.

In rejoinder, the Appellant maintained his submissions in chief and added that evidences of PW2, PW4, PW6 and PW7 are testimonies about the bag and not elephant tusks, that the case of **Jibril Okash Ahmed** (supra) is distinguishable as it concerned drugs and the forms thereof contrary to this one and that the evidence of the independent witness (PW7) is not reliable.

Briefly, that is what was submitted by the parties in this appeal.

The Court is of the considered position that, the prosecution case before the trial court was not proved to the required standard; *to wit*, beyond reasonable doubt for want of credibility of their key witness, insufficient evidence and procedural irregularities leaving uncertainties in their account which are to be resolved in favour of the Appellant.

From the evidence and both parties' submissions, it is undisputed that F8252 Corporal Swahibu (PW2) did not have a search warrant. The controversial issue for the Court's determination is whether the search

was an emergency one, thus warranting such conduct. In the trial court, PW2 testified that on the 22nd day of February, 2020 during morning he was informed by the Dodoma Regional Crime officer (RCO) that he and another police officer should go to Mbande in Kongwa District at the evening to join forces with some wildlife officers who had informed the RCO that there are illegal poachers. During the evening they left for Mbande and on 23rd day of February, 2020 during midnight hour two motorcycles arrived whereby the wildlife officers instructed them to detain the motorcycles.

Further, Prosper Kavishe (PW4) testified that on 22nd day of February, 2020 while in patrol accompanied with his other two fellows, he was phoned by his boss that there are illegal poachers in Mpwapwa thus around 22:00 pm they went to Mbande and around 12:45 midnight on the 23rd day of February, 2020 they arrested the suspects and searched them. In the circumstances, it is the Court's considered view that such scenario was not a situation of emergence (justifiable under section 42 of the Criminal Procedure Act. [Cap. 20, RE 2019] because the police officers (PW2 and PW4) were informed of the same since the

morning of the 22nd day of February 2020 yet the search was executed at 0000 hrs on the 23rd day of February, 2020. The scenario further suggests that the Regional Crimes Office had such information earlier than the sent police officers. Thus, the search was therefore contrary to section 38 (1) of the Criminal Procedure Act [Cap 20 RE 2019] for want of search warrant. The police officer who searched the Appellant ought to have had the written authority by the police Officer In charge of a Police Station where they worked to search the Appellant. Consequently, the search in the instant case was illegal and so is the subsequent substance of the evidence thereof.

Moreso, a receipt of acknowledgement of the seized property was not issued to the Appellant as required under section 38 (3) of the Criminal Procedure Act [Cap 20 RE 2019] and sections 20 and 22 (3) (b) of the Economic and Organised Crime Control Act [Cap 200 RE 2019]. Actually, non-issuance of the receipt of acknowledgment of the seized property to the Appellant in terms of section 38 (3) of the Criminal Procedure Act [Cap. 20 RE 2019] and section 22 (3) (b) of the Economic and Organised Crimes Control Act, [Cap 200 RE 2019] creates

reasonable doubt as to whether or not the property, in this particular case, the government trophy (Exhibit P2) were found in possession of the Appellant and so taken from him by the police officers who searched him at the scene of crime. And, this further destroys the would be chain of custody thereof.

The evidence of the independent witness, Samson Mwaluko (PW7) who witnessed the search and signed the seizure certificate is materially self-contradictory, weak and disintegrated. In examination in chief, PW7 testified that he was called by the police, he found three people under arrest who searched by the police, the Appellant had a bag and was ordered by the police to open it, then the police explained to him that the objects in the bag are elephant tusks, he concluded that he does not know elephant tusks.

During cross examination, PW7 stated that he does not know how to read and write, he does not know Certificate of Seizure (Exhibit P3) as the police did not inform him what he was signing, that it was the police who told him that Exhibit P2 were elephant tusks and they showed him, that he has not identified the people he found at Mbande,

that he found the people were already arrested, he stated that one among the persons carried a bag. In re-examination, PW7 stated that he does not know to read and write perfectly save for his name, signature and some numbers.

What can be learnt from the above testimony of PW7 (the key witness) is that, his testimony does not establish the key ingredient of the Appellant being found in actual or constructive possession of the government trophies. On the other hand, it devalues the certificate of seizure (Exhibit P3), distorts the chain of custody at large and renders the whole midnight search exercise suspect. Further, it does not in itself complement the rest of the prosecution case. In further consideration to the fact that the search was neither preceded by a warrant of an authorized officer nor concluded by a receipt of acknowledgement of the seized property to the Appellant, the evidence of PW7 as it is fails short of remedying the procedural omissions. Furthermore, the other independent witness (Lameck Mazengo) was not brought to the trial court despite that PW2 testified that they took two independent witness who saw the Appellant carrying the bag which he searched and found

elephant tusks. The motorcyclist whose motorcycle the Appellant had allegedly boarded when he was arrested with a bag which allegedly contained the elephant tusks (Exhibit P2) didn't testify before the trial court in support of the arrest and what the Appellant had in his bag by then. These omissions leave much to be desired on the credibility of the prosecution case.

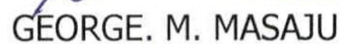
As per the prosecution evidence on record, the Appellant was arrested on the 23rd day of February, 2020 at 00:45 hours at Mbande Village within Kongwa District and was transferred to Dodoma Central Police Station where he arrived at 04:00 hrs. The cautioned statement (Exhibit P4) was recorded from 07:15 hrs to 08:00 hrs. Taking into consideration the nature of the offence the Court finds the cautioned statement (Exhibit P4) to be in contravention of section 50 of the Criminal Procedure Act [Cap 20, RE 2019] as it remains sceptical to this court as to why the cautioned statement was not recorded immediately there at Mbande Village upon his arrest. From the record of proceedings, there is no suggestion that the Appellant and his fellow co-accused or the cyclist attempted to resist or escape the police officers at

the scene of crime despite that it was late night and they had no warrant. The cautioned statement could have been timely recorded within four (4) hours of his arrest or in the extended time pursuant to section 50 (1) (a) and 51 of the Criminal Procedure Act, [Cap 20 RE 2019]. Consequently, the illegal recorded cautioned statement (Exhibit P4) is hereby expunged from the record.

In defence, the Appellant denied the charge. He testified that he was on a hired motorcycle upon arriving Mbande, he was suddenly arrested by the police who came out of the van and had carried bags with different colours one of it was red in colour, that he had carried his own black bag which he tendered in the trial court. He queried the unfinished testimony of PW2 who testified that, the Appellant had carried a bag mgongoni and upon opening it there was a sulphate bag which had elephant tusks inside it. From the record of proceedings PW2 did not complete his evidence and was not available for cross examination, he went for training and was never back to the end of the case. Noteworthy, the Appellant had no opportunity to cross-examine PW2 whose evidence was solely relied upon by the trial court to

establish his guilty. Section 147 (5) of the Evidence Act [6 RE 2019] only permits adjournment of a witness examination and not otherwise. To say the least, in the circumstances of this case the prosecution case against Appellant was not proved beyond reasonable doubt.

The appeal is hereby allowed accordingly. His conviction and sentence meted by the trial court are hereby quashed and set aside respectively. The appellant shall be released from prison forthwith unless otherwise held for another lawful cause.



GEORGE. M. MASAJU

JUDGE

16/12/2022