IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IRINGA SUB REGISTRY)

AT IRINGA

DC CRIMINAL APPEAL NO. 7 OF 2023

(Original Criminal Case No. 2/2021 of the District Court of Iringa before Hon. S. A. Mkasiwa, PRM.)

BRYTON S/O KAUNDAMA ..... **APPELLANT**

VERSUS

REPUBLIC ..... **RESPONDENT**

JUDGMENT

3rd May & 24th May, 2023

I.C. MUGETA, J:

Before the trial court, the appellant stood charged with four counts. In the first count he was charged with the offence of unlawful possession of government trophy contrary to sections 86(1) & 2(b) of the Wildlife Conservation Act, No. 5 of 2009 read together with Paragraph 14 of the First Schedule and sections 57(1) & 60(1), (2) of the Economic and Organized Crimes Control Act, [Cap. 200 R.E 2019] as amended by sections 16(a) and 13(b) of the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016 where the prosecution alleged that on the 29th day of January, 2021 at Matalawe village within the rural district and region of Iringa, the appellant was found in possession of six pieces of elephant

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tusks valued at Tshs. 34,787,250/= being the property of the Government of the United Republic of Tanzania without any permit or licence.

In the second and third counts, the appellant was charged with the offence of unlawful possession of firearm contrary to sections 20(1)(a) & 2 of the Firearms and Ammunition Control Act, 2015 read together with paragraph 31 of the first schedule and sections 57(1) and 60 of the Economic and Organized Crime Control Act, [Cap. 200 R.E 2019] as amended by sections 16(b) and 13(b) of the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016 where it was alleged that on 29th day of January, 2021 at Matalawe village within the rural district and region of Iringa the appellant was found in possession of firearms to wit; one muzzle loading gun (gobore) and one singe of short gun machine without any permit or licence. In the third count, the appellant was charged with the offence of unlawful possession of ammunition contrary to sections 21(a) and (b) of the Firearms and Ammunition Control Act, Act No. 2 of 2015 read together with paragraph 14 of the First Schedule to and sections 57(1) and 60(2) of the Economic and Organized Crime Control Act, [Cap. 200 R.E 2019].

The appellant pleaded not guilty to the charge hence a full trial ensued. At the end of trial, he was found guilty on the first count only. He was sentenced to serve thirty years imprisonment and pay a fine of Tshs. 347,872,500/=. Discontented with both the conviction and sentence he filed a petition of appeal consisting of six grounds as follows:-

1. *That the learned trial magistrate erred in law and fact to hear and determine this case before the consent and certificate were filed thus the court had no jurisdiction.*
2. *That the trial court erred in law and fact to allow the appellant to sign memorandum of agreed facts without the same being read over to the appellant as required by the law.*
3. *That, the learned trial magistrate erred in law and facts for holding that the appellant confessed to have committed the alleged offence without taking into account that caution statement (exhibit P.9) was recorded out of time.*
4. *That the trial court wrongly convicted and sentenced the appellant based on prosecution contradictory evidence of the prosecution side of PW.1 and PW.4 on when the appellant and elephant tusks were taken to Iringa Central Police.*
5. *That the learned trial magistrate erred in law and facts for failure to draw the inference adverse towards the*

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prosecution side as to why the bodaboda driver was not called to testify for the interest of justice.

6. *That the prosecution side failed totally to prove the case against the appellant beyond reasonable doubt.*

At the oral hearing of the appeal, the appellant appeared in person. The republic was represented by Nashon Simon, Burton Mayage and Majid Matitu, learned State Attorneys. The appellant had nothing to add to his petition of appeal. He urged the court to allow his appeal.

In opposing the appeal, Nashon Simon argued on the first ground that both certificate and consent from the DPP were filed in court on 11th October 2021 as reflected at page 11 of the proceedings. The court thus had jurisdiction as it was held in **Thadeo Bilunda & another v. Republic**, Criminal Appeal No. 68 of 2020, Court of Appeal – Arusha.

On the second ground, the learned State Attorney argued that the record is silent on whether the memorandum of agreed facts was read to the appellant. However, in his view this did not prejudice the appellant as the purpose of preliminary hearing is to speed up trial.

The learned State Attorney supported the appellant's third ground that the cautioned statement was recorded out of the prescribed time. The arresting officer (PW1) testified that the appellant was arrested on

29/1/2021. However, his statement was recorded on 31/1/2021 as shown at page 37 of the proceedings. He thus urged the court to expunge the appellant's cautioned statement from the record. Besides supporting expunging exhibit P1 from record, he added that there is still sufficient evidence to sustain the appellant's conviction.

On the fourth ground, he argued that there are no contradictions as alleged by the appellant. That PW.1 had testified that the trophies were taken to Iringa Police Station on 29/1/2021 and PW.4 testified that on the same day he received a phone call requiring him to collect the trophies from Iringa Police Station to TANAPA offices at Ipogolo, Therefore, there are no contradictions.

On the fifth ground, the learned State Attorney submitted that the court cannot draw an adverse inference on the failure to call the motor cyclist as the appellant was arrested with the trophies before the Village Executive Officer. He added that, the said motor cyclist cannot be traced that is why the prosecution could not summon him.

On the last ground, he submitted that the case was proved to the required standard as PW.1 who was the arresting officer arrested the

appellant with the trophies in the presence of an independent witness (PW.2) who are credible witnesses.

In rejoinder, the appellant argued that the Village Executive Officer who was an independent witness was the VEO of Kidamali while the appellant is the resident of Matalawe village. Moreover, the VEO was called after he was arrested. In addition, he argued that he never showed any weapon at Matalawe as when he was arrested at Kidamali he was taken to Ipogolo TANAPA offices and later to the police station. Thus, the VEO of Matalawe was not involved.

In disposing the appeal, I will discuss each ground as raised by the appellant. On the first ground the record shows that on 11/10/2021 the State Attorney prayed to tender the DPP consent together with certificate conferring the trial court with jurisdiction. The prayer was granted and the consent and certificate were filed in court. The same are also in the court file. This ground lacks merit.

The complaint in the second ground is on the failure to read the memorandum of agreed facts to the appellant. I agree with both parties that the record does not show that the memorandum of agreed facts was read out in court. Section 192(3) of the Criminal Procedure Act, [Cap. 20

R.E 2022] provides that at the conclusion of a preliminary hearing the court shall prepare a memorandum of agreed matters and the same shall be read over and explained to the accused person in a language he understands, signed by the accused person and his advocate if any and by the public prosecutor. Failure to read out the agreed facts, indeed, violated the provision of section 192(3) of the CPA. The question is whether this omission vitiated the trial.

The purpose of preliminary hearing is to speed up trials. Nothing more nothing less. The history of preliminary hearing can be traced back from **MT. 7479 Sgt. Ben Jamin Holela V. R.** [1992] TLR 121. In **Efraim Lutambi V. R.** [2000] TLR 265 a retrial was ordered because contents of documents admitted during preliminary hearing were not read to the accused person. In **Joseph Munene and Ally Hassan V. R.** [2005] TLR 141 it was held that the proceedings that was held without invoking procedures laid down under section 192 of the CPA were not vitiated because the appellant denied each fact alleged which necessitated the prosecution to call witnesses to prove them. In **Bernard Masumbuko Shio & Another V. R.** Criminal Appeal No. 213/2007, Court of Appeal – Arusha (unreported) it was held that failure to hold preliminary hearing does not vitiate the trial if the accused person was not prejudiced.

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Therefore, in a case where preliminary hearing is not conducted it does not automatically vitiate the trial. The proceedings could be vitiated depending on the nature of a particular case. In **R. V. Abalallah Salum @ Haji**, Criminal Revision No. 4 of 2019, Court of Appeal – Dar es Salaam (unreported) it was held that the trial was vitiated because a PF 3 admitted during preliminary hearing was not read to the accused. All those cases are Court of Appeal decisions. Therefore, irregularities in conducting preliminary hearing does not automatically vitiate the trial unless failure of justice has been accessioned. This has to be decided on case by case basis. The rationale is as was stated in **Bahati Mkeja V. R.**, Criminal Appeal No. 118/2006, Court of Appeal – Dar es Salaam (unreported) that the word 'shall' in the CPA is not imperative as provided by section 53(2) of Cap. 1 but is relative and is subject to section 388 of the CPA.

In this case the appellant was not convicted on account of any agreed fact. This is the only incident which could have been said to have prejudiced him. Regarding the trial, no party was prevented from summoning a witness on account of the unread memorandum of undisputed facts which are about the appellant's personal particulars, the nature of the allegation and appellant having recorded a caution

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statement. Therefore as the trial and the accused were not prejudiced, the omission is saved by section 388 of the CPA.

In the third ground, the appellant's complaint is that his cautioned statement was recorded out of time. The record shows that the appellant was arrested on 29th January 2021 at around 14:00 hours. Then, according to PW1, they headed to Iringa Police Station where the elephant tusks were handed over to the police. PW1 said after handing over the tusks, they left for Matalawe village to retrieve a "gobore" which the appellant said he had at his home place. PW.1 explained that since it was late, they had to sleep at Ruaha National Park and on 30th January 2021 they went to the Matalawe Village for the search. PW.3, E. 8741 D/Sgt Mrisho testified that on 31st January he was assigned to record the accused cautioned statement and he started at 18:55 hours after the appellant was brought to the police station at 17:00 hours. However, PW1 testified that after the search was completed at Matalawe Village on 30/1/2021, the appellant was taken to the police station. Therefore, the evidence of PW1 and PW3 contradicts as to when the appellant arrived at the police station from Matalawe Village. This contradiction ought to be resolved in favour of the appellant. I hold that the appellant was back to the police station from 30/1/2021as said by PW1. Therefore, the caution statement was recorded

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outside the prescribed time required under section 50(1) of the Criminal Procedure Act. As no reason has been assigned for the delay, I expunge exhibit P9 from the record.

In the fourth ground, the appellant faulted the trial court for relying on the evidence of PW.1 and PW.4 which contradict each other as to when the appellant and the elephant tusks were taken to Iringa Central Police. I have visited the evidence of PW.1, he testified that on 29th January 2021 after apprehending the appellant, they went to Iringa Central Police Station together with the pieces of elephant tusks. Then they went back to Ruaha National Park and came back later on 30th January 2021. On his part, PW.4 testified that he was called by phone on 1st February 2021 to go to Iringa Central Police so as to collect the elephant tusks. In my view, his evidence does not contradict the evidence of PW.1 as he did not testify on when the appellant and the elephant tusks were taken to the police station. This ground, therefore, lacks merit.

The next ground for consideration is centered on the appellant's complaint that the court should draw adverse inference for the prosecution failure to call the motor cyclist. As correctly argued by the learned State Attorney, there is no particular number of witnesses required for the proof of any fact. This is according to section 143 of the Evidence Act [Cap. 6 R.E

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2022] and the holding in **Yohanis Msigwa v. Republic** [1990] TLR 148. Thus, it was not necessary for the prosecution to call the motor cyclist who just droped the appellant and drove away making it difficult to trace him.

Lastly, the appellant faulted the trial magistrate for convicting him while the prosecution did not prove the charge beyond reasonable doubts. In his defence, the appellant refused to have been found in possession of elephant tusks. That he was arrested on his way to the market to buy children's clothes and his Tshs. 250,000/= was confiscated.

In convicting the appellant, the trial court believed the evidence of PW1 to the effect that he arrested the appellant with the tusks. PW1 was in the company of PW2 who is the Village Executive Officer of Kidamali Village, the place of arrest. He also relied on the caution statement (exhibit P9) which I have expunged from the record. The said defence of the appellant was not referred to at all by the trial court in its decision. At page 33 of the judgment, the trial court stated in passing that the accused person failed to raise any reasonable doubt in the prosecution's case. I have traversed the trial court judgment there is not a statement which identifies to the appellant's evidence which failed to raise any reasonable doubt and reasons thereof. This was an error. The complaint has merits. However, as first appellate court, I shall step into the shoes of the trial

court to consider whether the prosecution proved its case in light of the defence evidence that the appellant he was not arrested with the tusks.

After expunging exhibit P9, the remaining relevant evidence is that of PW1 and PW2. According to PW1, he got information from an informer that the appellant wished to sell the tusks. By conversation through the cell phone of the informer, they agreed to meet at Kidamali on 29/1/2021 at 13:30 hours. PW1 arrived at the appointed place together with PW2. PW1 was not familiar with the appellant and the informer was not there to identify him. At page 21 of the proceedings PW1 is recorded to have said:-

> *"... at about 14:00 hour we saw a motorcycle where one person came down. He carried a bag heading to the direction where we were staying. ... When he arrived at our area we arrested him ... He said that he was holding elephant tusks kept in his bag. He opened the plastic bag and found six (6) pieces of elephant tusks"*

On his part PW2, at page 31 of the proceedings had this to say:-

> *"... we saw a bodaboda (motor cycle) came (sic) with a rider and one passenger. The passenger came down with a bag of shangazi kaja with a picture of banana. ... the TANAPA Officer did put that passenger under arrest. ... They said that they wanted to search him where they opened that bag and found therein ... a white sulphate bag. ... sulphate bag opened I saw six (6) pieces of elephant tasks".*

There are three fundamental problems with the foregoing material evidence from PW1 and PW2. **Firstly**, it is unclear as to why PW1 believed, in the absence of the informer, that the appellant was the dealer of the elephant tusks he talked to over phone. **Secondly**, it is unclear why PW1 decided to arrest him immediately before the negotiation about the sale of the elephant tusk started while the deal was to start with sale negotiation as a method of identification. **Thirdly**, PW1 says the suspect opened the bag while PW2 said it is the arresting officers who opened the bag. This is a contradiction and it is not a minor contraction. Two persons watching same occurrence cannot see it differently unless there is a plausible explanation to that effect. I do not find one in this case, therefore, the contradiction is irreconcilable.

In the midst of the above inconsistencies regarding the arrest of the appellant, is his evidence that he was arrested with nothing. It is my view that the facts that PW1 was unfamiliar with the appellant but arrested him immediately upon seeing him, that PW1 said the appellant opened the bag while PW2 said it is the arresting officer who opened it make PW1 and PW2 incredible. The defence of the appellant, under the circumstances, cannot be said that does not raised a reasonable doubt in the prosecution's case. Since the reason for setting the trap to arrest the culprit was a tip from

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informer, PW1 was reasonably expected to start negotiating with the appellant about the ivory sale before arresting. Due to there unfamiliarity, that was the only way to ensure the appellant was the actual target.

Further, if PW1's story about retrieving the weapons and firearms from the appellant in the 2nd to 4th counts could not be believed by the trial court, I see no reason why it believed him about the elephant tusks considering the unproven chain of custody of the elephant tusks which is also wanting as I demonstrate hereunder.

PW1 in his evidence said that he handed over the tusks at the police station on 29/1/2021 and signed the chain of custody form which was not tendered in evidence. PW1 did not tell to whom he handed over the tusks though. The exhibit keeper of the police (PW5) said he received them from Emmanuel Mbaga (PW1) on 1st February, 2021. He later handed the same over to PW4 for custody at KDU Offices. If PW1 is to be believed, there is no record in evidence on how the ivory were stored from 29/1/2021 when they were surrendered to the police to 1/2/2021 when they were given to the exhibit keeper. This broken chain of custody creates a reasonable doubt in the prosecution's case and is consistent with the defence evidence that the appellant was not arrested with those tusks. If PW1 received the ivory from PW1 on 1/2/2021, since PW2 did not state to whom he handed

over the ivory at police station on 29/1/2021 and since the chain of custody has not been proved, then it is likely that no ivory was taken to the police station together with appellant on 29/1/2021. This makes the defence of the appellant that he had not the tusks when he was arrested highly probable.

In the event, I hold that the prosecution case was not proved to the hilt. The trial court erred to convict the appellant. Consequently, I quash the conviction and set aside his sentence. I order his immediate release unless otherwise lawfully held for another cause.

I.C. MUGETA

JUDGE

24/5/2023

Court: Judgment delivered in chambers in the presence of the appellant and Rehema Ndege for the respondent.

Sgd. I.C. MUGETA

JUDGE

24/5/2023