IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUM B AW AN GA

DC. CRIMINAL APPEAL NO. 41 OF 2022

(Originating from the Resident Magistrates'Court of Katavi atMpanda in Economic Case No. 12/2017)

RAFAEL CHAGULA..... ...APPLICANT

VERSUS

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

JUDGMENT

Date of Last Order: 28/11/2022
Date of Judgement:25/01/2023

MWENEMPAZI, J.

The appellant herein was arraigned before the Resident Magistrates' Court of Katavi at Mpanda (trial court) for the offence of Unlawful Possession of Government Trophies c/s 86 (1) & (2)(c)(ii) of the Wildlife Conservation No. 5 of 200.9 as amended by Section 16 (a) of the Written Laws (Miscellaneous Amendments) Act, No. of 2016, and Sections 57 (1) and 60 (2) of the Economic and Organized Crime Control Act, [CAP. 200 R. E. 2002]

It was alleged that on the 16th day of February, 2017 on or about 02:00 hours at Kapalamsenga village within the District of Tanganyika in Katavi Region, the appellant was found in unlawful possession of government trophy, to wit, two elephant tusks weighing fifteen (15) Kilograms and 102.33 kgs of elephant meat

valued at Fifteen Thousands USD equivalent to TShs. Thirty- Three Million, Four hundred and ninety-four thousands eight hundred and fifty (33,494,850/=) only, the property of the Government of the United Republic of Tanzania,

As the charge was read to the appellant, he denied to have committed the offence, whereas the trial court entered the plea of not guilty, but at the end of the trial, the appellant was found guilty and therefore he was convicted of the offence charged against him and then sentenced to serve twenty (20) years imprisonment.

Aggrieved by both the decision and the sentence, the appellant opted to file his appeal to this court which consisted of eight (8) grounds of appeal of which, if one reads through them all, it would suffice to condense them into one major ground that, the appellant claims to be convicted and sentenced over the charges which were not proved beyond the required standards in criminal cases. The appellant therefore prays for this court to give judgement in his favour and release him from imprisonment by setting him at liberty.

As the matter was brought before me for hearing, the appellant appeared in person meaning he had no legal representation meanwhile, the respondent was represented by Mr. John Kabengula learned State Attorney.

As he was invited to submit for his grounds of appeal, the appellant wished that the counsel for the respondent submits first and he will make a rejoinder to the submission made by the counsel.

And therefore Mr. Kabengula submitted that, the appellant is basically complaining that the offence has not been proved to the required standard, which

is beyond reasonable doubt. He prayed to respond to the grounds of appeal through the first ground of appeal that the prosecution side has not been able to prove the case beyond reasonable doubts.

Mr. Kabengula added that, commencing with the second ground of appeal his side admit that there was no an independent witness, but PW8 testified and the prosecution side prayed to cross examine under Section 163 of the Evidence Act, Cap 6 and that the witness was cross examined but the court did not order any declaration, he insisted that the court ought to have declared him as a hostile witness, and in that, Mr. Kabengula believes that the trial court did not follow the procedure. And as PW8 was the only independent witness and yet the trial court did not deciare him a hostile witness, hence he believes the ground that there was no any independent witness is meritless,

Mr. Kabengula added that the certificate of seizure which was issued by the investigators at the crime scene and tendered in court as evidence, during admission of the same, it was not read over in court and he believes that the said certificate of seizure deserves to be expunged, but he added that still the evidence is strong against the appellant.

The counsel proceeds that the appellant questioned the chain of custody which was also tendered in court as evidence, he added that the typed proceedings of the trial court reveals that the chain of custody too was not read over in court, despite that the appellant never objected its admission in evidence. Mr. Kabengula added that, despite the fact that the documentary evidences were not read over in

court, but the oral evidence did rescue them ail, as the records reveal that it was the appellant who had taken the investigators to the place where the trophies were hidden despite the search being conducted in the night.

Mr. Kabengula concluded that his object that the defense was not considered, whereas at page 12 and 13 of the trial court's judgement it is revealed that as the trial Magistrate was analyzing the evidence before him, he did consider the defense evidence. However, he insists that the evidence proved that the appellant was found in unlawful possession of the government trophies as he was the one who revealed the hidden place of the same, and when PW2 was tendering the exhibits in court, the appellant did not object to the tendering and at page 7 of the typed proceedings, the appellant did admit orally and at page 8 of the same, he did show where the trophies where hidden, In that, Mr. Kabengula stressed that his side do support the conviction and pray this court to upheld the sentence.

In rejoinder, the appellant submitted that he was deprived his freedom as he was tortured to admit while at the Police Station, he added that the evidence was fabricated. He believes as he started to defend himself, the trial magistrate was not recording his testimony, but he believes he was charged as a result of a woman known as Mbuke John and not as he was found with government trophy. In that, the appellant believes that charges against him were not proved to the required standards and he prays for this court to allow his appeal and set him at liberty.

After reading between the lines the submissions made by both sides, weighing the grounds of appeal against the record of the trial court before me, the

only issue for determining this appeal is ***whether the charges against the appellant was proved beyond the required standards of the law/*** I am well aware of the duties of the first appellate court as rightly quoted in **GAPCO UG. LTD vs AS TRANSPORTS LTD CA 7/2007,** that is to subject the whole evidence to a fresh exhaustive scrutiny and draw fresh conclusions therefrom; but taking cognisance of the fact that it never had chance to examine the witnesses.

Going through the entire trial court proceedings, as rightly submitted by the counsel by the respondent, all the documentary evidences which were tendered during the trial and had passed admission were not read over in court as procedurally required. It has now become an established principle of the law that when documentary evidence is admitted, it must be read loudly in court to give right to the other party to challenge it. In the case of **Robert P. Mayunga and David Charles Ndaki vs Republic, Criminal Appeal No. 514 of 2016,** CAT at Tabora where the Court of Appeal of Tanzania emphasized that:-

> *",.. documentary evidence which is admitted in court without it being read out to the accused is taken to have been irregularly admitted and suffers the natural consequences of being expunged from the record of proceedings."*

The court went further to state that:-

> *"In essence the requirement to have the document read out to the appellant after it is cleared for admission is meant to let the appellant aware of what was written in the document so that he can properly exercise his fight to cross-examine the witness effectively."*

Therefore, failure to read the admitted documentary evidences tendered in court such documents suffer the consequence of being expunged from the records. Based on this principle of the law, I hereby expunge the seizure certificate (exhibit Pl), Valuation Certificate (exhibit P4), appellant's cautioned statement (exhibit P6), Chain of Custody (exhibit P7) and the witness statement (exhibit P8) from the record of the trial court.

As for now that I have only the oral evidence to work withy I again thoroughly read the testimonies of the witnesses summoned and it came to my knowledge that PW1 testified that as he is a police officer, together with his work mates, they were alerted by an informer that there is a person who involves himself in an illegal hunting of wild animals particularly elephants. This was the core of the whole scenario as claimed by the prosecution side that led to the arrest of the appellant. Therefore, the whole process of arresting the appellant was not under emergency circumstance.

It is my holding that, the relevant provisions in search and seizure are sections 38 (1) and (3) of the Criminal Procedure Act, Cap 33 [R.E. 2019] which provides that a search warrant has to be Issued where it is not an emergency, and sub section (3) of the same section provides that after the seizure a receipt must be issued.

It is clear as a broad day light that in the case at hand, the scenario was not an emergency and in that, the arresting officers were supposed to issue a search warrant and thereafter issue a receipt to the appellant of the things they seized

from him. The absence of the search warrant, in my understanding did affect the the credibility of the search.

In clarification of the seriousness of this aspect, I am inclined to go through the Police General Orders (P.G.O) whereas at 226 it shows the seriousness with which search warrants should be taken. Part of it reads: -

"I. *The entry and search of premises shall only be affected either: - (a) on the authority of a warrant of search; or*

(b) in exercise of specific powers conferred bylawon certain Police Officers to enter and search without warrant,

(c) ***Under no circumstances may police officer enter private premises unfess they either hold a warrant or are empowered to enter under specific authority contained in the various Laws of Tanzania."***

[emphasis supplied].

In addition to that under paragraph 2 (a) and (b) of the P.G.O, there is even a requirement of obtaining permission from a Magistrate before effecting search, it shows that the intention was to prevent abuse of powers of search and arrest. The requirement to obtain approval of a Magistrate is echoed in section 38 (2) of the CPA. Since the general rule under the CPA is that search of a suspect shall be authorized by a search warrant unless it falls under the exceptions provided for under section 42 of the CPA, and since the instant case does not fall under any of

the exceptions, I am fortified to conclude that the search was illegally conducted.

Whether this illegality affected the credibility of the search is my next consideration, whereas as I have gone through the grounds of appeal as filed by the appellant ground number seven (7), he did complain on the search which was conducted during the night and without an authorised search warrant. In addition to that, at ground three of the petition of appeal, the appellant complained that during the search, there was no any independent witness who witnessed the search, this was also submitted by the learned counsel representing the respondent. That fact makes me understand as to why there was no any receipt issued to the appellant as the law requires under section 38 (3) of the CPA.

In **Selemani Abdallah and Others vs Republic, Criminal Appeal No. 354 of 2008** (unreported) it was 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 the evidence arising from such search Is fabricated will to a great extent be minimized."*

My analysis of this case as explained above, coupled with the unexplained choice of conducting the search at night despite the early prior knowledge by the police, they leave doubts which ought to have been resolved in favour of the appellant. It must be pointed out that under section 40 of the CPA search may be executed between the hours of sunrise and sunset, except with leave of the court.

This is the same as what is provided under Regulation 2 (b) of the P.G.O 226. Therefore, I still wonder what was the rush of conducting the search at night, not being an emergency, and without permission of the court. This aspect compounds the illegality of the search in this case.

In view of the position as explained above, I find it scarcely necessary for me to consider the remaining grounds of appeal except the first ground, which faults the learned trial Magistrate for convicting the appellant in a case that was not proved beyond reasonable doubt. My conclusion is that the search that was conducted illegally at night without permission, and without proof that it was an emergency, and the same having been witnessed by a witness who was not independent, raises doubts as to whether the trophies were indeed found at the appellant's house. Therefore, the prosecution failed to prove that the appellant was indeed found in possession of the said trophies, and thus failed to prove the case beyond reasonable doubt.

Consequently, I proceed to allow the appeal, quash the conviction and set aside the sentence. I order the appellant's immediate release unless he is being held for another lawful cause.

Ordered accordingly.

Dated at Sumbawanga this 25th day of January, 2023.

HIGH COURT OF TANZANIA

T. M. MWENEMPAZI

JUDGE