IN THE HIGH COURT OF TANZANIA

SUB-REGISTRY OF GEITA

AT GEITA

CRIMINAL APPEAL NO. NO. 11061 OF 2024

BETWEEN

MARANDO PHILIPO.....1st APPELLANT

KADOGO BAHATI.....2nd APPELLANT

AND

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last Order: 28/05/2024
Date of Judgment: 13/06/2024

K. D. MHINA, J.

This appeal stems from the decision of the District Court of Chato, at Chato, before which the appellants Marando Philipo and Kadogo Bahati were arraigned together for two counts.

On the first count, they were charged with criminal trespass contrary to sections 299 (a) and (b) of the Penal Code [Cap. 16 R.E. 2022]. It was alleged that on 8 February 2024, at Kibandala area, the duo jointly and together entered Rubondo Island National Park within the District and

Region of Geita without a permit from the Conservation Commissioner of Tanzania National Parks with the intent to commit an offence.

On the second count, they were charged with unlawful possession of monofilament net within the national park contrary to Regulations 66(1) (a) and 66(4) of the Fisheries Regulation GN No.308 of 2009. It was alleged that on 08 February 2024, at about 03:00 hours, at Kibandala area within Rubondo Island National Park, they were found in unlawful possession of one monofilament net for the purpose of fishing in freshwater.

The appellants, maintaining their innocence, firmly pleaded not guilty, which led to the case proceeding to a hearing. The prosecution relied on the testimony of three witnesses, while the appellants, equally steadfast, presented their own evidence, challenging the prosecution's case.

The events that led to the appellants' arrest unfolded as follows: On 8 February 2024, the Game Rangers of Rubondo National Park, Arnold Isaya and Leonard Kadiko, were on a routine patrol at the Kibandala area. During their patrol, they noticed a canoe and decided to investigate. This led to the discovery of the appellants, whom they apprehended. The appellants were then taken to Kageye Camp and subsequently transferred to Rubambangwe Police Station.

During the trial, the prosecution presented the testimony of one game ranger, Arnold Isaya, as PW1. Isaya testified that after apprehending the appellants, they searched the canoe and discovered a monofilament net, which was subsequently seized. To support this claim, PW1 tendered the seized net and a certificate of seizure as evidence, both of which were admitted without objection and marked as exhibits P1 and P2, respectively.

He also took the coordinates of that area for the purpose of drawing the sketch map of the scene of crime.

PW2, Sijali Omary Sagile, a game ranger whose speciality was to prepare sketch maps, testified that he received data from PW1 to prepare the sketch map. He also stated that at Rubondo National Park, when the game rangers were on patrol, those in charge must have a GPS machine or a mobile phone with an Android application that allows them to capture/ take information. Therefore, after receiving information from PW1, he prepared the sketch map indicating the date, time, place and point where the offences were committed (exhibit P3).

In his evidence, PW3, G.8176 D/ Sergeant Masinde, a police officer stationed at Rubambangwe Police Station as an exhibit keeper, testified that on 13 February 2024, he received a blue monofilament net (exhibit

P1) from Arnold Isaya (PW1). Then, he registered it in the exhibit register as No. 01/2024 and kept it in the exhibit room.

In their defences, the appellants had a similar story: on 8 February 2024, while fishing in Lake Victoria, their colleague, whom the 2nd appellant mentioned his name as Innocent, got sick; thus, they decided to take him out of the water so that he could get relief. When they returned to the lake to guard their fishing nets, they were arrested by the Rubondo game rangers. The game rangers started to beat them and pulled their fishing nets, which were outside the boundaries of Rubondo. They also both denied being found with a monofilament net.

In its judgment, the trial court found that the prosecution had proved its case beyond reasonable doubt and eventually convicted the appellants on both counts. On the first count, they were each sentenced to serve twelve (12) months in prison, and on the second count, they were each sentenced to serve three years in prison.

Undaunted, the appellants preferred this appeal based on four (4) grounds as follows:

i. *The trial court erred in law and fact by convicting the Appellants without ascertaining and/or considering the chain of custody.*

ii. *The trial court erred in law and facts in relying on the sketch map*

(GPS) tendered by PW2 without considering its authenticity and justification.

iii. The trial court erred both in law and fact in convicting and sentencing the Appellants based on a defective certificate of seizure that never contained an independent witness, as there was no urgency.

iv. The trial court erred in delivering the judgment against the Appellants while the case was not proved beyond reasonable doubt.

At the hearing of this appeal, the appellants had the services of Mr. Bartholomeo Musyangi, learned advocate, whereas the respondent Republic was represented by Ms. Scolastica Teffe, learned State Attorney.

Mr. Musyanga started to argue the 1st and 3rd grounds together by submitting that at the trial, the evidence regarding how the appellants were arrested and the exhibits seized and tendered was not followed because the chain of custody was not established. He explained that PW1's evidence on how he arrested the appellants, seized the exhibits, and prepared a certificate of seizure was not just a minor deviation but a significant departure from the law as provided under Section 38 (3) of the CPA R: E 2022 because of lack of independence witness.

He further submitted that PW1 was with his colleague when they arrested the appellants, but the appellants and PW1 alone signed the certificate of seizure.

Therefore, he stated that failure to call for an independent witness is fatal as per the cases of the Court of Appeal in **DPP vs Mussa Khatibu Sembe**, Criminal Appeal No. 130 of 2021 (Tanzlii) and **Paul Maduka and 4 Others vs. Republic**, Criminal Appeal No. 110 of 2007 (Tanzlii).

Next, Mr. Musyangi argued the 2nd ground of appeal, in which he initially complained that the trial court erred in law and facts in relying on the sketch map (GPS) tendered by PW2 without considering its authenticity and justification.

He explained that PW1 took the coordinates (GPS) of the area where the appellants were arrested, but PW2 drew the sketch map. Therefore, there was confusion because PW2 was not required to use only the coordinates he received but was also supposed to visit the scene of the crime. However, in the evidence, nothing indicated that he visited the scene of the crime.

On the last ground, he submitted that the prosecution evidence was characterised by doubts, the procedure of search and seizure was not followed, and the sketch map drawn was doubtful.

Therefore, the case was not proved beyond reasonable doubt as per section 3 of the Law of Evidence Act.

In response, Ms. Teffe testified that, in law, the evidence of the chain of custody may be oral.

She explained that, in this case, PW3 testified that he received the exhibit from PW1, who seized it. Then, he registered and kept it, as shown on page 6 of the trial court's proceedings.

Therefore, she argued that the chain of custody was observed correctly.

Further, she submitted that the procedure of seizure procedures, the certificate of seizure and the issue of an independent witness were not objected to at the trial.

On this, she argued that in law, once the evidence is not objected to or cross-examined, it is taken to be admitted, as per the case of **Nyerere Nyague vs R**, Criminal Appeal No 67 of 2010 (Tanzlii).

She also argued that the crime scene was in the forest, making procuring an independent witness impossible.

On the 2nd ground of appeal, Ms. Teffe submitted that at page 14 of the trial court's proceeding, it was shown how PW2, as an expert in drawing sketch maps by using coordinates, prepared the sketch map after ensuring that the working tools used were functioning properly.

Further, the sketch map was not objected to its admission PW2 was not cross-examined on it.

On the last ground, she submitted that the case was proved beyond reasonable doubt.

In a brief rejoinder, Mr. Musyangi submitted that in criminal trials, it is the duty of the prosecution to prove the case beyond a reasonable doubt. But at the trial, there were doubts, though the appellants did not object to the admission of exhibits. He argued that weakness could not be taken to convict the appellants.

I have carefully considered the oral arguments presented by the learned State Attorney for the respondent and the learned Advocate for the appellants, and I propose to start with the complaints on the 1st and 3rd grounds of appeal.

The contention here is whether the prosecution side maintained the chain of custody properly established and whether the certificate of seizure was proper and according to the law.

As I alluded to earlier, Mr. Musyangi complained that since the procedure of search and seizure was contravened for failing to call an independent witness, the chain of custody could not be established.

On the other hand, Ms. Teffe insisted that the evidence of PW1 and PW3 established the chain of custody orally.

From above, it is trite that the evidence to establish a chain of custody may be oral or by way of document(s)/ paper trail. This was already settled by the Court of Appeal in several cases. In **Chacha Jeremiah Murimi and three Others vs. Republic**, Criminal Appeal No. 551 of 2015, CAT (Tanzlii) that: -

> *"In establishing a chain of custody, we are convinced that the most accurate method is on documentation as stated in Paulo Maduka and Others vs* ***R, Criminal Appeal No. 110 of 2007*** *and followed in* ***Makoye Samwel @ Kashinje and Kashindye Bundala,*** *Criminal Appeal No. 32 of 2014 cases (both unreported). However, documentation will not be the only requirement in dealing with exhibits. An exhibit will not fail the test merely because there was no documentation. Other factors have to be looked at depending on the prevailing circumstances in every particular case. For instance, in cases relating to items which cannot change hands easily and therefore not easy to tamper with, the principle laid down in* ***Paulo Maduka*** *(supra) would be relaxed."*

Therefore, the critical issue here is whether or not the prosecution's evidence maintained the chain of custody by oral evidence from the search

stage and seizure until they tendered the certificate of seizure at the trial court. That is why, in criminal cases, the procedure of search and seizure is essential. It is a foundation for establishing the chain of custody of seized properties. Thus, the prosecution is not only required to comply with the laws governing search and seizure but also must prove that the evidence on search and seizure meets the standard set in criminal cases.

In analysing the prosecution evidence at the trial on search, seizure, and chain of custody as a whole, the evidence of PW1 shows that he was with his colleague Leonard Kadiko when they apprehended and searched the appellants. However, he was the only witness who testified that he signed the certificate of seizure.

On this, unlike the Drugs Control and Enforcement Act or the Wildlife Conservation Act, which provides for the procedure for search and seizure, the Fisheries Regulation G.N No.308 of 2009, in which the appellants were prosecuted in the second count, does not have that provision. Therefore, in such a circumstance, the law applicable is the Criminal Procedure Act, Cap 20, and the relevant section is Section 38 (3).

That section provides that;

> *"Where anything is seized in pursuance of the powers conferred by subsection (1), the officer seizing the thing shall issue a receipt acknowledging the seizure of that thing, being the signature of*

the owner or occupier of the premises or his near relative or other person for the time being in possession or control of the premises, and the signature of witnesses to the search, if any".

Under the CPA, calling for an independent witness is a mandatory requirement. Section 38 (3), cited above, imperatively provided for the need for an independent witness.

In her submission, Ms. Teffe raised two issues; **one**, the evidence on the procedure of seizure procedures, the certificate of seizure and the issue of an independent witness were not objected to at the trial. **Two**, the crime scene was in the forest, making procuring an independent witness impossible.

I agree that is the position of the law, that once evidence goes into the record unchallenged, it is taken to have been admitted. And there is a plethora of authorities on the subject. For instance, in **Anna Moises Chissano vs. The Republic,** Criminal Appeal No. 273 of 2019 (Tanzlii), it was held that;

"An accused is expected to challenge a witness's testimony by cross-examination or object to the tendering of a documentary or physical exhibit during the trial. Once certain evidence goes into the record unchallenged, it is, in law, taken to have been admitted by the accused".

However, the Court of Appeal has now developed exceptions to that position of law.

One, if the question of the illegality of the document is raised and proved. The Court can discard and render the document valueless. This is a position of the Court of Appeal in **Majaliwa Ernest vs. The Republic**, Criminal Appeal No. 465 of 2022 (Tanzlii)

On page 13 of the judgment, the Court of Appeal pointed out that;

> *"Thus, here is a cautioned statement, which was admitted without objection on one hand but which was recorded 3 days out of time on the other. The issue within our focus is whether this Court of Appeal can question the illegality of that cautioned statement. In that respect, there are two conflicting positions developed by this court through case law".*

From pages 13 -20, the court discussed the two positions of law and on page 20, it held that;

> *"Thus, in this case, we adopt the position taken in the case of* ***Mohamed Juma @Mpakama*** *(supra) and other cases in that category. Therefore, in this case our decision is that, although the cautioned statement was not objected to at the trial, having been recorded about three days from when the appellant was restrained in police custody, the confession was offensive of the*

provisions of section 50 (1) of the CPA. For that reason, we discard exhibit P2 and render it evidentially valueless".

Two, failure to cross-examine is not an absolute rule. On this, the Court of Appeal in **Zakaria Jackson Magayo vs. The Republic**, Criminal Appeal No. 411 of 2018 (Tanzlii) held that;

"We are mindful of the settled law that failure to cross-examine the prosecution witnesses on material part of evidence adverse to the other party is tantamount to its acceptance.....

It appears to us to be clear that the rule is not absolute. Our understanding of it is that it focuses on the material evidence adverse to the other party excluding incredible evidence. We are inspired by the decision of the High Court in ***Kwiga Masa v. Samweli Mtubatwa [1989] T.L.R. 103*** *in which Samatta, J (as he then was) stated:*

A failure to cross-examine is merely a consideration to be weighed up with all other factors in the case in deciding the issue of truthfulness or otherwise of the unchallenged evidence. The failure does not necessarily prevent the court from accepting the version of the omitting party on the point. The witness' story may be so improbable, vague or contradictory that the court would be justified to reject it, notwithstanding the opposite party's failure to challenge it during cross-examination. In any case, it may be

apparent on the record of the case, as it is in the instant case, that the opposite party, in omitting to cross-examine the witness, was not making a concession that the evidence of the witness was true.

We are satisfied that the above reflects a correct position which will guide us in this appeal".

Therefore, because of the complaint by the appellants in the 1st and 3rd grounds of appeal, this court is entitled to evaluate the illegality of the certificate of seizure.

Having gone through the certificate of seizure (Exhibit PE1), it reveals that it was signed by PW1 as arresting and seizing officers and Leonard Kadiko as a witness. However, that witness was not summoned to testify at the trial.

Admittedly, it is trite that the prosecution was not bound to summon any particular number of witnesses in the case, as what matters is credibility, not numbers.

Nevertheless, why was a witness who signed exhibit PE1 not called to testify at the trial, and why was no explanation given for that failure?

From above, the witness who witnessed the search and seizure becomes more important in my view because of the requirements of section 38 (3) of the CPA.

Therefore, though exhibit PE1 was admitted, the failure to summon the witness who witnessed the search watered its weight and affected its validity.

Thus, what is left is exhibit PE1, with PW1 as the only witness who signed it and testified at the trial. This is contrary to section 38 (3) of the CPA, which imperatively provides for the need for an independent witness during search and seizure.

Therefore, in this appeal, the search and seizure were not conducted properly according to the law. Exhibit PE1 is, thus, discarded and rendered valueless in the evidence, which affected the whole chain of custody.

The holding above directly affected the 2nd count in which the appellants were found with a monofilament net. This is because, apart from exhibit PE1, the uncorroborated oral evidence of the PW1 remains that the appellants were found with monofilament net within the National Park. In my view, in a situation where the appellants testified that they were not at Rubondo National Park, the evidence of PW1 needed corroboration.

Reverting to the 2nd ground of appeal, where the appellants have complained regarding the authenticity of the sketch map, this should not detain me long.

At the trial, PW1 testified that he collected GPS data from the scene of crime and sent it to PW2, who prepared the sketch map (Exhibit PE3). PW2 testified that he received data from PW2.

However, PW1 did not testify to how he collected that data or which tool (s) he used to collect it.

When data is collected to generate documents or evidence to be relied on in court, it is essential for the collector to testify on how he collected the data, the method used to collect it, the tools used to collect it, how he stored up to the stage he handed over to PW2. This is very important as it touches on the authenticity of the data collected and the evidence generated from that data.

In his evidence, PW2 testified that usually, when they are on patrol, the patrol charges must carry a GPS or Android Mobile Phone for collecting data. That was a general statement which cannot "rescue" the situation; this is because, one, PW2 did not state which the data presented to him by PW2 was from which tool and two, as I alluded to earlier, PW1 did not testify which tool he used in collecting data.

Therefore, the sketch map (Exhibit PE3), which indicated that the appellants were arrested within Rubondo National Park, fails the authenticity test for the reasons I elaborated above.

Following the expungement of exhibit PE3, the remaining oral evidence of PW1 is insufficient to prove the charges against the appellants. That evidence alone is insufficient to prove that the appellants were within the statutory boundaries of the National Park.

In offences of this nature, the Court of Appeal has already elaborated in **Mosi s/o Chacha @ Iranga vs. The Republic**, Criminal Appeal No. 508 of 2019 (Tanzlii) that;

> *"...the evidence must prove that the game scouts arrested the appellants strictly within the statutory boundaries of this game reserve. It will not suffice, for the prosecution witnesses to merely allege that the scouts stopped the appellants 'at Mto Rubanda area into Ikongo Game Reserve' the trial court must evaluate competing evidence and be satisfied that the 'Mto Rubanda area' is within the Ikongo Game Reserve".*

From the above observation, the prosecution evidence is insufficient to establish that the appellants were found within Rubondo National Park. The evidence of PW1, PW2 and PW3 alone does not suffice to discharge that burden.

Flowing from above, since the 1st, 2nd, and 3rd grounds of appeal dispose of the appeal, then it is automatically that in the 4th ground of

appeal, the prosecution side failed to prove the offences beyond reasonable doubt as the evidence against the appellants was weak.

In the final analysis, the prosecution's evidence did not prove the case against the appellants on the required standard, justifying a finding of guilt and conviction. In the upshot, I find merit in the appeal and allow it.

Accordingly, we quash the appellants' conviction and substitute it with an acquittal, setting aside the sentences and orders. The appellants shall be released from prison forthwith unless their continued incarceration is due to any other lawful cause.

K. D. MHINA
JUDGE
13/06/2024

Court:-

Right to appeal explained.

K. D. MHINA
JUDGE
13/06/2024