IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

(CORAM: MJASIRI, J.A., MMILLA, J.A. And MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 129 OF 2017

ISSA HASSAN UKI .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mtwara)

(Mlacha, J.)

dated the 24th day of February, 2017
in
Criminal Appeal No. 26 of 2016

JUDGMENT OF THE COURT

3rd & 10th May, 2018

MWAMBEGELE, J.A.:

Issa Hassan Uki, the appellant, was arraigned in the Resident Magistrates' Court of Lindi on two counts. In the first count, he was charged with unlawful possession of Government Trophy contrary to section 86 (1) and (2) (c) (ii) of the Wildlife Conservation Act, Act No. 5 of 2009 (henceforth "the Wildlife Act") read together with paragraph 14 (d) of the first schedule to, and section 57 (1) and 60 (2) of the Economic and

Organized Crimes Control Act, Cap. 200 of the Revised Edition, 2002 (henceforth "Cap. 200"). It was averred in the particulars of the offence in respect of the first count that on 28.02.2015 at Mbuli area within Liwale District in Lindi Region the appellant was found in possession of Government trophy to wit; two pieces of elephant tusk valued at Tanzania Shillings twenty nine million one hundred thousand (Tshs. 29,100,000/=) being the property of the Government of Tanzania without a valid permit.

In the second count, the appellant was charged with unlawful transportation of Government Trophy contrary to section 84 (1) of the Wildlife Conservation Act, 2009. The particulars of the offence had it that on 28.02.2015 at Mbuli area within Liwale District in Lindi Region he was found transporting Government trophy to wit; two pieces of elephant tusk valued at Tanzania Shillings twenty nine million one hundred thousand (Tshs. 29,100,000/=) being the property of the Government of Tanzania without a valid permit with a motor cycle with Registration Number MC. 4784 ABS make Sanlg.

After a full trial, the appellant was found guilty as charged. He was convicted and sentenced to pay a fine of Tshs. 25,000,000/= or to a prison term of twenty years in default thereof in respect of the first count and to

pay a fine of Tshs. 25,000,000/= or two years in jail in default in respect of the second count.

He was aggrieved. His first appeal to the High Court was partly successful as Mlacha, J., on 24.02.2017 reduced the sentence of twenty years in the first count to one of fifteen years (without an alternative to payment of fine) and the sentence of fine in the second count was enhanced to Tshs. 58,200,000/=.

Undeterred, through Mr. Rainery Norbert Songea of Phoenix Advocates, the appellant has lodged this second appeal on four grounds of complaint. For easy reference, we reproduce the grounds hereinbelow:

1. That the learned appellate judge erred in law and fact when he upheld conviction and sentence while the prosecution failed to prove the case beyond reasonable doubt;

2. That the learned appellate judge erred in law and fact when he upheld conviction and sentence while the trial court did not enter lawful conviction;

3. That the trial court wrongly admitted Exh. P3; and

4. That the trial court erred in law and in fact in admitting Exh. P1 collectively which was not properly handled and its chain of custody is unknown.

The appeal was heard before us on 03.05.2018 during which the appellant was represented by Mr. Rainery Norbert Songea, learned counsel and the respondent Republic appeared through Mr. Peter Jackson Msetti, learned State Attorney.

We find it apt to narrate, albeit briefly, the relevant factual background of the case leading to the present appeal before us. On 28.04.2015 Swedy Halfani Burulo and Emmanuel John Silao who are Game Reserve Officers and testified at the trial as PW2 and PW5 respectively, together with another Game Reserve Officer whose name was not disclosed, were on patrol in Selous National Park. At about 22:00 hours at Mbuli area they came across the appellant riding a motor cycle. Hardly had they interrogated him when he ran away leaving behind his motor cycle. On the motor cycle, they found two elephant tusks, a knife and some twenty litres of the illicit drink known as "gongo" in Kiswahili. The trio took the elephant tusks, the knife and the twenty litres of the illicit drink as well as the motor cycle to Salum Ramadhan Kurunge PW3; the Game Reserve

Officer in-charge of the zone. On the following day; that is on 29.04.2014 to be particular, PW3 reported the matter at Liwale Police Station.

On 30.04.2014, the appellant followed up his motor cycle and was arrested immediately. He was prosecuted for being found in possession of the illicit drink in Liwale District Court in which he allegedly pleaded guilty and sentenced to pay a fine which he did. Later, he was prosecuted in the Court of the Resident Magistrate of Lindi with the charges the subject of the present appeal.

In his defence, the appellant admitted to have been found in possession of the illicit drink and the consequent charge in Liwale District Court and the plea of guilty to that charge and the sentence of awarded to him. However, he vehemently denied to have been found in possession of Government trophies. Essentially, he stated that the case has been framed against him.

We wish to point out at this stage that at the hearing of the appeal, the appellant, technically, dropped the second ground which hinged on a complaint to the effect that he was found guilty in the second count but not convicted before the court meted out the sentence to him. The ground was inevitably left out because having scanned through the original record,

we realized and brought to the attention of the learned counsel that the trial court properly convicted the appellant. The typed record of appeal inadvertently left out the words "for the second count and proceed to convict the accused person". The learned counsel, having also realized that the shortcoming in the typed record of appeal was but an inadvertent one, dropped the ground.

Arguing on the third ground of appeal, the learned counsel submitted that Exh. P3 (the Certificate of Valuation) was improperly admitted in evidence in that despite the fact that the appellant did not object to its being tendered, it was not read out after admission. He contended that it was the law that having been cleared for admission, it ought to have been read out in Court. For this proposition, the learned counsel cited and supplied to us **Thomas Pius v. Republic**, Criminal Appeal No. 245 of 2012 and **Jumanne Mohamed & 2 others v. Republic**, Criminal Appeal No. 534 of 2015 (both unreported). In the premises, he beckoned upon us to expunge Exh. P3 and after that, he argued, there would be nothing to show the value of the trophies and the same would not have been identified to have been elephant tusks.

On the fourth ground of appeal, Mr. Songea submitted that the chain of custody of the elephant tusks; Exh. P1, was questionable. He argued that PW2 stated that after the seizure, they handed the same to "the in-charge of the zone" (P.25 of the Record of Appeal), but PW5 stated that they handed the same to "the authority" (P.34). That, he argued, is a discrepancy in evidence leaving the court ignorant as in whose custody were the tusks left. He argued that the transfer of the exhibit ought to have been clearly shown by documents. He thus argued that failure to document change of hands of the same created doubt as to whether the tendered elephant tusks were actually the ones allegedly found in possession of the appellant. The learned counsel relied on **Paulo Maduka & 4 others v. Republic**, Criminal Appeal No. 110 of 2007 (unreported) to buttress the position that the chain of custody must be clearly shown so as to establish that the exhibits are not tampered with. He thus prayed that Exh. P1 should not be taken into account by the Court as was the case in **Kashindye Bundala & another v. Republic**, Criminal Appeal No. 349 "B" & 352 "B" of 2009 (unreported).

On the first ground of appeal, the appellant complained that the High Court erred in law and fact in upholding a conviction while the case against

the appellant was not proved beyond reasonable doubt. The learned counsel submitted that the appellant was alleged to have been found in possession of the Government trophy and the illicit liquor known as *"gongo"*. He was charged with the offence in respect of the illicit drink in Liwale District Court and later charged with the present offence in the Court of the Resident Magistrate. It is not clear why the accused was charged with two different offences which were allegedly committed in the same transaction in two different courts. That, he argued, leaves doubts to be resolved in favour of the appellant.

The learned counsel added that there was another discrepancy in the testimony of PW2 and PW5. These witnesses were the ones who arrested the appellant but their testimony is contradictory. He stated that while PW5 stated that the registration number of the Motorcycle was MC 478 ABC, PW2 said it was MC 478 ABS. Again, that while PW2 stated that the appellant ran away after seeing them, PW5 stated that the appellant ran away after arresting him. The learned counsel admitted that the contradictions were not serious ones but all the same they ought to have been resolved in favour of the appellant.

Concluding, the learned counsel for the appellant prayed that Exh. P1 and Exh. P3 be expunged from the record after which there will be no evidence upon which to convict the appellant; just like what happened in **Justine Kakuru Kasusura @ John Laizer v. Republic**, Criminal Appeal No. 175 of 2010 (unreported).

Responding, Mr. Msetti supported the appeal. His support, hinged mainly on the first and fourth grounds of appeal. The learned state attorney argued that there was a problem in the chain of custody from seizure by PW2 and PW5 to the police in PW1's hands who finally came to produce them in court. He stated that the elephant tusks were taken from Liwale to Lindi by PW1 and the same handed over to PW6. In that process, he argued, there was no documentation, no proper trail from the time of seizure to show how they were collected, handled and tendered. He relied on **Paulo Maduka** (supra) and **Makoye Samwel @ Kashinje and 4 others v. Republic**, Criminal Appeal No. 32 of 2014 (both unreported) to underscore the point that the chain of custody must be documented.

Regarding the first ground of appeal, Mr. Msetti submitted that it was evident, having so argued on the fourth ground of appeal, it was obvious

that the case was not proved beyond reasonable doubt. He added that PW2 and PW5 never tendered and documentary evidence to show how the elephant tusks were seized, marked, kept, *et cetera*.

However, when prompted in respect of the fourth ground of appeal on failure to read out Exh. P3, after admission, the learned state attorney stated that the rights of the appellant were not prejudiced in any way.

Mr. Songea had nothing in rejoinder.

We have carefully considered the conceding arguments of the trained minds for both parties. On our part, with unfeigned respect to both Mr. Songea for the appellant and Mr. Msetti for the respondent Republic, we are unable to subscribe to their stance. The remaining part of this judgment herein below demonstrates why we think both trained minds have not correctly appreciated the law and misapprehended evidence.

We wish to start our determination with the fourth ground which is a complaint about the chain of custody of Exh. P1. Mr. Songea and Mr. Msetti, are at one that the chain of custody of the relevant exhibit in the present case left a lot to be desired as no documents were brought in evidence to show how it was seized, kept and changed hands. On this

argument both have brought authorities which hold that the chain of custody is very important in cases of this nature. Such authorities include **Paulo Maduka**, **Kashindye Bundala** and **Makoye Samwel @ Kashinje** (all supra). We have read the cases referred to us by both learned counsel. Having so done, we respectfully agree that they were about chain of custody and underlined correct principles on the point. With equal great respect, we think they are distinguishable from the present case. **Makoye Samwel @ Kashinje** was about chain of custody of a radio cassette recorder. **Paulo Maduka** was about chain of custody of money in cash. **Kashindye Bundala** was in respect of a sewing machine, suit case, television, two radio cassettes and four pieces of "vitenge". It will be appreciated that the items under scrutiny in the above cases were ones that could change hands easily and therefore could be easily tampered with.

In the instant case, the items under scrutiny are elephant tusks. We are of the considered view that elephant tusks cannot change hands easily and therefore not easy to tamper with. In cases relating to chain of custody, it is important to distinguish items which change hands easily in which the principle stated in **Paulo Maduka** and followed in **Makoye Samwel @**

Kashinje and **Kashindye Bundala** would apply. In cases relating to items which cannot change hands easily and therefore not easy to tamper with, the principle laid down in the above case can be relaxed.

We were confronted with an akin situation in **Joseph Leonard Manyota v. Republic,** Criminal Appeal No. 485 of 2015 (unreported). In that case, like in the instant one, the appellant challenged the chain of custody of a motor cycle. In differentiating the chain of custody in respect of goods which can change hands easily and those which cannot, we stated at pp. 18-19 of the typed judgment:

> *"... it is not every time that when the chain of custody is broken, then the relevant item cannot be produced and accepted by the court as evidence, regardless of its nature. We are certain that this cannot be the case say, where the potential evidence is not in the danger of being destroyed, or polluted, and/or in any way tampered with. Where the circumstances may reasonably show the absence of such dangers, the court can safely receive such evidence despite the fact that the chain of custody may have been broken. Of course, this will depend on the prevailing circumstances in every particular case."*

We fully subscribe to the position we took in **Joseph Leonard Manyota** (supra). The elephant tusks in the case at hand were such that they could not change hands easily and therefore could not easily be tampered with. Neither was there a danger to have them tampered with. They were therefore appositely received in evidence. The fourth ground of appeal, despite concession by the learned State Attorney, fails.

Next for consideration is the third ground of appeal which is a complaint to the effect that Ext. P3 was wrongly admitted in evidence. The appellant's complaint on this ground hinges on the fact that it was not read out in court after it was admitted. Admittedly, Ext. P3 was admitted in evidence and the proceedings do not show if the same was read out in court after admission. This omission is fatal as we held in a number of cases including **Thomas Pius** and **Jumanne Mohamed** (supra); the cases on which Mr. Songea made heavy reliance. It is fairly settled that once an exhibit has been cleared for admission and admitted in evidence, it must be read out in court. In **Thomas Pius** the documents under discussion were: Postmortem Report, cautioned statement, extra-judicial statement and sketch map. We relied on our previous unreported decision of **Sunni Amman Awenda v. Republic**, Criminal Appeal No. 393 of 2013

to hold that the omission to read them out was a fatal irregularity as it deprived the parties to hear what they were all about. We also quoted at pp. 5 and 6 of the typed judgment the following excerpt from the **Awenda** case which we think merits recitation here:

> *"We need to point out that both, the cautioned and extra judicial statement had a lot of details and immensely influenced the decision of the court ... to have not read those statements in court deprived the parties, the assessors in particular, the opportunity of appreciating the evidence tendered in court. Given such a situation, it is obvious that this omission too constituted a serious error amounting to miscarriage of justice and constituted a mistrial".*

Likewise, in **Jumanne Mohamed,** the documents complained of were cautioned and extra-judicial statements. We held that after a document is cleared for admission and admitted in evidence, it should be read out to the accused person to enable him understand the nature and substance of the facts contained therein. We held the same position in the recent past in **Manje Yohana & Another v. Republic**, Criminal Appeal No. 147 of 2016 (unreported); a decision we rendered in March this year.

In the case at hand the document complained of is Ext. P3 which is a valuation report showing the value of the trophy to be Tshs. 29,100,000/=. As already said, it was admitted in evidence but was not read out in court after admission. Given a plethora of authorities on the point some of which have been discussed above, we are of the considered view that the omission constituted a fatal irregularity. We thus expunge Ext. P3 from the record.

However, we haste the remark that even without Ext. P3, the testimony of Anthony Ndorozi Penia (PW4) is quite sufficient to cover the contents of Exh. P3. It is in the testimony of PW4 that he was summoned to Liwale Police Station to identify and evaluate the Government trophy which he did. Let his testimony appearing at p. 29 of the Record of Appeal paint the picture:

> *"On 30/04/2015 I was at my office then I was summoned to Liwale Police Station in order to identify and evaluate the Government trophy which were elephant tusks. I identified two elephant tusks which had 2.1 kg valuated at Tshs. 29,100,000/=. Then I completed a valuation Report certificate. This is a certificate Report I completed after valuation. It is my*

handwriting and signature. I prefer the same to be admitted as Exhibit."

The appellant did not challenge the testimony of the witness. This connotes that he was comfortable with the contents of the testimony of the witness. Had he any query or doubt as to the veracity of PW1's testimony, he would not have failed to cross-examine on the same. It is settled in this jurisdiction that failure to cross-examine a witness on a relevant matter ordinarily connotes acceptance of the veracity of the testimony – see: **Damian Ruhele v. Republic**, Criminal Appeal No. 501 of 2007, **Nyerere Nyague v. Republic**, Criminal Appeal No. 67 of 2010 and **George Maili Kemboge v. Republic**, Criminal Appeal No. 327 of 2013 (all unreported). In **Nyerere Nyague** for instance, we relied on our previous decisions of **Cyprian A. Kibogoyo v. Republic,** Criminal Appeal No. 88 of 1992 and **Paul Yusuf Nchia v. National Executive Secretary, Chama Cha Mapinduzi & Another**, Civil Appeal No. 85 of 2005 (both Unreported) to observe:

"As a matter of principle, a party who fails to cross examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from

asking the trial court to disbelieve what the witness said."

Likewise, in **Damian Ruhele**, again relying on the case of **Cyprian Athanas Kibogoyo** (supra), we underlined:

"We are aware that there is a useful guidance in law that a person should not cross-examine if he/she cannot contradict. But it is also trite law that failure to cross-examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness's evidence."

That is the reason why we think, despite expunging Ext. P3, there was ample evidence in its stead to show beyond reasonable doubt that the items were actually elephant tusks whose value was Tshs. 29,100,000/= as testified by PW4. The third ground of appeal, therefore, collapses.

The last ground for discussion is the first ground of appeal. This is a complaint to the effect that the prosecution did not prove the case beyond reasonable doubt. Encapsulated in this ground are two complaints; first, that there were contradictions in the testimonies of material witnesses and second, that the appellant was convicted of a non-existent offence in the second count.

We wish to start with the complaint regarding contradictions in the testimonies of material witnesses; PW2 and PW5. The appellant pegs this complaint on the fact that the witnesses gave a contradictory account regarding what happened when they met the appellant and the exact registration number of the motor cycle. That while PW2 testified that they "arrested him but he ran away", PW5 testified that they were on patrol and met somebody with a motorcycle and that they "stopped him but he left the motorcycle and ran away". We have considered this evidence. We think there is a slight discrepancy in the testimony of these two material witnesses. But this discrepancy, in our view, is trivial and does not go to the root of the matter; it can be overlooked – see: **Dickson Elia Nsamba Shapwata v. Republic**, Criminal Appeal No. 92 of 2007 (unreported). We are also highly persuaded by the observation of the High Court in **Evarist Kachembeho & Others v. R** [1978] LRT n. 70 wherein it was observed:

> *"Human recollection is not infallible. A witness is not expected to be right in minute details when retelling his story".*

In the same line of reasoning, we observed in **John Gilikola v. Republic**, Criminal Appeal No. 31 of 1999 (unreported) that due to the

frailty of human memory and if the discrepancies are on details, the Court may overlook such discrepancies.

Having dispassionately considered the discrepancies complained of, we do not, with respect, consider them to be material to the extent of affecting the credibility and reliability of PW2 PW5. Put differently, we, like the trial and first appellate court, are of the considered view that PW2 and PW5 are credible and reliable witnesses. As such their testimonies cannot be affected by minute discrepancies complained of.

Regarding the complaint to the effect that the appellant was convicted of a non-existent offence in the second count, we think this will not detain us. As can be discerned from the charge sheet, the subject of the second count was "unlawful transportation of Government trophy". The Record of Appeal shows at p. 65 that the appellant was found "guilty for the offence of transportation of trophy C/S 84 (1) of the Wildlife Conservation Act No. 5/20009". With due respect to Mr. Songea, we think the omission to include the word "unlawful" in the sentence was but an *elapsus calami* and inconsequential. Neither do we think it occasioned any injustice given the fact that the relevant provision under which he was charged was

mentioned. This complaint is therefore dismissed. The first ground also fails.

Regarding sentence, we can do no better than commend the first appellate court for a superb exposition of the law on the point. The first appellate court observed from p. 10 of the typed judgment:

> *"The first count is based on section 86(1) and (2)(c)(ii)of the Wildlife Conservation Act read together with paragraph 14 (d) of the first schedule and section 57 (1) and 60 (2) of the Economic and Organized Crime Control Act. The two laws create the offence of being in unlawful possession of government trophy and each has a different punishment. Section 86(1) and (2) (c) (ii) reads:-*
>
> *"86-(1) Subject to the provisions of this Act, a person shall not be in possession of, or buy, sell or otherwise deal with any government trophy.*
>
> *(2) A person who contravenes any of the provisions of this section commits an offence and shall be liable on conviction –*
>
> *.....*
>
> *.....*

In any other case –

(i).....

(ii) where the value of the trophy which is the subject matter of the charge exceeds one million shillings, to imprisonment for a term of not less than twenty years but not exceeding thirty years and the court may, in addition thereto, impose a fine not exceeding five million shillings or ten times the value of the trophy, whichever is larger amount."(Emphasis added)"

Then the first appellate court reproduced the relevant parts of section 60 (2) and (3) of Cap. 200:

"60 - (1).....

(2)Subject to subsection (3), any person convicted of an economic offence shall be liable to ***imprisonment for a term not exceeding fifteen years, or to both that imprisonment and any other penai measure in this Act.***

(3) in considering the propriety of the sentence to be imposed the court shall comply with the principle that –

a) *approved offence which is in the nature of* ***organized economy or public property, in the absence of***

mitigating circumstances, deserves the maximum penalty.

b) any other economic offence may be sentenced with a sentence that is suitably deterrent; and

c) a child shall be sentenced in accordance with the provisions of the Law of the Child Act."(Emphasis added)"

In respect t of the second count, the first appellate court observed at p. 13 of the typed judgment:

"I will now move to examine the sentence on the second count. Section 84-(1) of the Wildlife Conservation Act under which it is based reads:

84-(1) A person who sells, buys, transfers, ***transport,*** *accept exports or import any trophy in contravention of any of the provisions of this part or CITES requirements, commits an offence and shall be liable on conviction to* ***a fine of not less than twice the value of the trophy or imprisonment for a term of not less than two years but not exceeding five years or to both.***" *(Emphasis added)*

It is clear that, the appellant was wrongly sentenced to a fine of Tshs. 25,000,000/= or two years in jail. The proper sentence should have been a fine of Tshs.

29,100,000 (value of the trophy) x 2 = Tshs. 58,200,000/= or two years in jail in default. I exercise the revision powers of this court as contained under section 44 (1) (a) of the Magistrate's Courts Act, cap. 11 R.E. 2002to revise and vacated the sentence imposed and substitute thereof a fine of Tshs. 58,200,000/= or two years in jail in default."

Having so done, the first appellate court went on to sentence the appellant accordingly.

We, on our part, think the first appellate court, in respect of the first count, correctly resorted to the milder sentence under Cap. 200 as opposed to that under the Wildlife Act. We are fortified in this view by the principle that penal statutes must be interpreted in favour of an accused person.

For reasons stated in the judgment of the first appellate court as expounded above, the sentence in respect of the first count was correctly imposed under Cap. 200 and as not an alternative to fine. Likewise, the sentence of fine in respect of the second count was correctly pegged at double the value of the Government trophy.

The foregoing said and done, we are of the firm view that there is no scintilla of merit in the present appeal. That is the reason why we dismiss it in its entirety.

DATED at **MTWARA** this 9th day of May, 2018.

S. MJASIRI
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

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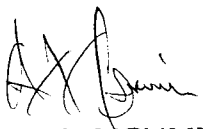

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