IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB-REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 92 OF 2023

VICENT MAGELA MTEKELA ..... 1ST APPELLANT

CHRISTOPHER KIPILIPILI ..... 2ND APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGEMENT

14th February & 3rd April, 2024

MWANGA, J.

The two appellants mentioned above were arraigned in the RMS Court of Dar es Salaam at Kisutu with unlawful possession of a Government Trophy contrary to section 86(1) and (2) (b) of the Wildlife Conservation Act No. 5 of 2009 read together with paragraph 14 of the First Schedule and Section 57 of the Economic and Organized Crime Control Act, Cap 200 R. E 2002. The particulars of the offense were that on 9th May 2018, the appellants who were at the Mburahati Kisiwani area within Kinondoni District in Dar es Salaam Region, were found in possession of leopard skin valued at Tshs. 8,050,000/= which is the property of the United Republic of Tanzania without a permit or license from the Director of Wildlife.

The background of the case is brief and straightforward. On the stated date, the OCCID at Kigogo Police Station received information that the appellants had in possession of the leopard skin at their residence in the Kigogo area and they were about to sell it. Accompanied by an informer, a team of three investigators went to the 2nd appellant's home. They could not trace a local leader in the area, so they had to find one Jeremia Muhando as an independent witness. When they reached the place, they introduced themselves as customers of the leopard skin. The appellants showed them the trophy and assured them that the skin belonged to them.

Afterward, they introduced themselves as police officers. They seized the leopard skin and listed it in the certificate of seizure where the appellants and so-called independent witnesses signed the certificate of seizure. Subsequently, the appellants were arrested and taken to Magomeni Police Station. The leopard skin was handed over to Mr. Elias Korrosso, an officer from the Ministry of Natural Resources. The handover documents were signed.

During the hearing, the prosecution case produced five witnesses and the appellants testified on their own. The certificate of seizure was admitted as exhibit P1, and the chain of Custody record was admitted as exhibit P2 whereas the leopard skin was admitted as exhibit P3. Also, the cautioned statement of the 1st appellant was admitted as exhibit P4.

After the conclusion of the trial, the appellants were found guilty, and convicted to pay a fine of Tshs. 80,500,000/= which is the fine ten times the value of the government trophy found in possession or sentence of imprisonment of twelve years. The leopard skin in exhibit P3 was forfeited by the government.

The appellant was aggrieved with both the conviction and sentence, hence this appeal contains the following grounds;

1. That the learned trial Magistrate erred in law and fact in convicting the appellant when the search and seizure were conducted in contravention of the provisions of section 38 of the CPA. The omission renders the said search a nullity for the lack of a search warrant.
2. That the learned trial Magistrate erred in law and fact in convicting the appellant when there is no cogent evidence establishing beyond reasonable doubt that the alleged searched house belonged to any of these appellants, the omission of which cast doubt on the prosecution case.
3. That the learned trial Magistrate erred in law and fact in convicting the appellant when the exhibits P1 - Certificate of seizure and P2 - Chain of custody from and P3 - Leopard skin were tainted with doubt as to whether they were the said leopard skin was retrieved from the appellant premises and not somewhere else as neither PW1 nor PW4

stated in court to have seen the alleged P3 in the bad of Kiroba as stated by PW2.

4. That the learned trial Magistrate erred in law and fact in convicting the appellant when the prosecution failed to take any photographs of the appellant with the said leopard skin at the scene of the crime and tendered it in court to prove the fact in issue.
5. That the learned trial Magistrate erred in law and fact in convicting the appellant when exhibit P4- cautioned statement of the first appellant was unprocedurally admitted in court at the ruling stage without assigning its reasons for its admissibility.
6. That the learned trial Magistrate erred in law and fact in convicting the appellant when the trial magistrate wrongly disregarded the appellant's defense evidence without making a critical evaluation, analysis, weighing, and consideration of the same before reaching her conclusion, the omission which resulted to a serious error amounting to a miscarriage of justice and constituted a mistrial.
7. That the learned trial Magistrate erred in law and fact in convicting the appellant when the prosecution case was never proved beyond reasonable doubt against the appellant as mandatorily required by law.

Based on the above grounds of appeal, the appellants pray to the court for the appeal to be allowed, quash the conviction, sentence to be set aside, and be released from prison.

During the hearing, the appellant appeared in person whereas the respondent was represented by Ms. Magiri Phoibe, the learned State Attorney. The appeal was argued by way of written submissions.

In the first ground of appeal, the appellant raised contentions that the search and seizure of the said trophy was illegal since it contravened the provisions of section 38 where the requirement is that there must be a search warrant and issuance of receipt to the accused to prove seizure. On the other hand, Ms. Magiri agreed that the appellants were not issued a receipt, but the non-issuance of a receipt cannot be considered that the trophy was not seized from them. According to her, the appellants signed the seizure certificate which indicated the item seized, thus proving seizure. The learned State Attorney cited the case of **Gitabeka Giyaya Versus Republic,** Criminal Appeal No. 44 of 2022 where the court holding was that non-issuance of receipt under section 38 of CPA is curable under section 388 of CPA. The argument that the search was conducted without a search warrant, hence illegal was also conceded by the learned State Attorney who submitted that the nature of the search was not under emergency to cause it to be conducted without a search warrant and search order, hence the position of the law is that it is indeed illegal. She referred to the case of **Remina**

Omary Abdul Versus Republic, Criminal Appeal No. 189 of 2020. However, she insisted that despite such a position of the law, two sets of evidence can still incriminate the appellants. **One,** the first appellant cautioned statement where he confessed that he possessed the trophy and he was seized with it. According to her, the position of the law is that the accused who confesses is also the best witness. **Two,** the confession was corroborated by the evidence of an independent witness (PW4) whose testimony is that the appellants were found with the trophy and that he was there during the said search.

I have gone through the submissions of the parties. The appellants had raised one of the fundamental issues regarding search without a search warrant. The provisions of section 38 (1) and (3) of the CPA are relevant to the power of search and seizure. It is provided hereunder:

> ***"38. -(1) Where a police officer in charge of a police station is satisfied that there is reasonable ground for suspecting that there is in any building, vessel, carriage, box receptacle, or place.***
>
> ***(a) Anything concerning which an offense has been committed;***
>
> ***(b) Anything in respect of which there are reasonable grounds to believe that it will afford evidence as to the commission of an offense;***

(c) anything in respect of which there are reasonable grounds to believe that it is intended to be used to commit an offense, and the officer is satisfied that any delay would result in the removal or destruction of that thing or would endanger life or property, he may search or issue a written authority to any police officer under him to search the building, vessel, carriage, box, receptacle or place as the case may be.

(2) N/A

(3) 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, bearing 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."

The case of **Samweli Kibundali Mgaya Vs Republic,** Criminal Appeal No. 180 of 2020 (CAT-Unreported) provided an elucidated explanation of the cited provision above. As rightly pointed out by the learned State Attorney, the court took the view that the provision requires that no search of premises shall be conducted without, **One**, Search warrant or order, **two**, presence of the owner or occupier of premises, **third**, independent witness who is also to sign the search warrant/order.

We all agree that this was not an emergency search under section 42 of the CPA. The prosecution witness (PW1) told the court that on 9th May 2018 at around 16:00hrs while at the police station, he received information that, the appellants residing at Mburahati had the leopard skin and that they were in the process of selling it. It followed that, he organized a team of other three police officers and went straight to the crime scene. In that regard, they had enough time to collect the search warrant and order before heading to the crime scene.

Given that, therefore, there was no exception to compliance with the mandatory provision of the CPA requiring a Search warrant or order before the search is conducted, the absence of which renders the search illegal. In the cited case of **Samweli Kibundali Mgaya Vs Republic (supra),** the court had this observation:

> ***"The pointed-out flaws create doubts if at all the search was conducted, and as the rule of thumb goes, the doubts are resolved in favor of the accused. To say the least, the conducted search was illegal and so was the seizure, as such, it was wrong to ground conviction of the appellant based on exhibit PI..."***

With the above legal position, I entirely agree that the appellants and the leaner State Attorney that exhibit P1 (Certificate of Seizure) were obtained contrary to section 38(1) of the CPA, hence illegal. Because of that,

it is liable to be expunged from the court record for being obtained in contravention of the law.

On top of that, the appellants invited this court also disregard the testimonies of PW1, PW2, PW3, and PW4 because the alleged leopard skin was obtained from an illegal search. Further to that, therefore, he called this court to expunge the leopard skin in exhibit P2 from the court record for it was obtained from an illegal search as well.

Ms. Magiri conceded the fact that searching without a search warrant was illegal. However, she argued that, despite such anomalies or faults in the prosecution evidence there is other incriminating evidence in the cautioned statement of the first appellant who confessed that he possessed the trophy and it was seized from him. According to her, the accused who confesses is also the best witness. She added that his confession is corroborated by the evidence of an independent witness (PW4) who testified that it was the appellants who were found with the trophy and that he was there during the said search. The appellants on the other hand submitted that the caution statement was not admitted according to law and, hence should also be expunged from the record. The appellants relied on the facts that, the trial magistrate did not give a decision or ruling or reasons after the conclusion of an inquiry before the admissibility of the caution statement as exhibit.

I have also perused the record. Truly, PW5 recorded the cautioned statement of the first appellant. According to PW5, the first appellant got the

said leopard skin in Kigoma-Kasulu, and he was arrested at Mburahati National Housing residence. Based on the available records, it appears that the first appellant repudiated his caution statement and stated further that, there were no independent witnesses at the time of the arrest.

As a matter of procedures and law, the trial court conducted an inquiry that led to the reception of the caution statement as exhibit P4. However, after the admission, the trial court did not deliver the ruling or reasons why the caution statement shall be admitted as an exhibit. The trial magistrate was conscious to the extent that no decision was given after the conclusion of an inquiry.

Instead, he constructed the proposed ruling in the following words, which for ease of appreciation, I quote:

> ***"In order to serve time of the court this court receives the caution statement of the accused persons. The reasons to rely on it or not are reserved. The reasons to that effect will be stated in the final findings of the court".***

Now, the above statement is central to the appellant's contentions. According to them, such a statement does not amount to a ruling of the court, decision, or reasons for the admissibility of the caution statement as an exhibit.

I am inclined to state that, I entirely agree with the appellants' submissions. The purported "ruling" is not a decision or reason in the

meaning of an inquiry after the conclusion of the hearing. In the case of **Paulo Maduka and 4 Others Vs Republic,** Criminal Appeal No. 110 of 2007 (CAT-Unreported) it was emphasized that a confession to an offense made to a police officer is admissible in evidence. And the very best of witnesses in any criminal trial is an accused person who confesses his guilt. However, the court observed further that:

> ***"such claims of accused persons having made confessions should not be treated casually by courts of justice. The prosecution should always prove that there was a confession made and the same was made freely and voluntarily. The confession should have been "free from the blemishes of compulsion, inducements, promises or even self-hallucinations/' See, TWAHA ALI AND 5 OTHERS v R, Criminal Appeal No. 78 of 2004 CAT (unreported) Were the alleged confessions of the appellants, assuming without deciding herem that they were made, so freely made? To answer satisfactorily the above question, it will be instructive to return to the case of TWAHA ALI (supra). The Court lucidly said that the law is that a confession or statement will be presumed to have been voluntarily made until objection to it is made by the defense on the ground that it was not so or it was not made at all. The Court went on to hold "... If that objection is made after the trial court has informed the accused of his right to***

say something in connection with the alleged confession, the trial court must stop everything and proceed to conduct an inquiry (or a trial within a trial) into the voluntariness or not of the alleged confession. Such an inquiry should be conducted before the confession is admitted in evidence ..." [Emphasis is ours.]. Omission to inform the accused of this right and/or to conduct an inquiry or a trial within a trial in case there is an objection raised, the Court held, results in a "fundamental and incurable irregularity." This is because if the objected confession is the only crucial and/or corroborative evidence, an accused would be convicted on evidence whose source is not free of doubt or suspicion. For this reason, as no such inquiries were made to decide".

What can be gathered from the above-cited case is that an inquiry is conducted with the sole purpose of determining the voluntariness or not of the alleged confession or whether it was not made at all. However, such f**indings** or **inquiry** should be conducted before the confession is admitted in evidence.

On perusal of pages 36, to 43 the trial court conducted an inquiry. However, the caution statement was admitted without any findings on whether the trial court was satisfied that the first appellant confessed or not before the admission of the statement as exhibit P4.

In my considered view, this is an irregularity that cannot be cured by being addressed in the judgment of the court because the question of admissibility of the evidence is one thing and the weight to be attached to an admitted exhibit is another. The court in **TUWAMOI v UGANDA (1967) E.A 91** held that even if a confession is found to be voluntary and admitted, the trial court is still saddled with the duty of evaluating the weight to be attached to such evidence given the circumstances of each case.

In my further view, an inquiry or trial within a trial is a minor mini-trial within the main trial. Therefore, the two should not be confused. Hence, after the conclusion of an inquiry or trial, a trial is the right time for the trial court to resolve whether the accused recorded the statement or not. As in this case, the time of composing judgment is when the trial magistrate would assess and give weight attached to the cautioned statement admitted as exhibit.

For further emphasis, an inquiry or trial within a trial is a separate trial on its own from the main trial. Therefore, the decision or reasons for the admissibility or not of the caution statement ought to be delivered thereon. This would assist the accused to prepare and enter his defence accordingly

The above is enjoined by Section 169 of the CPA which talks about the exclusion of evidence illegally obtained. The section also provides the duty of the trial court before the reception of the evidence as exhibited. That before the admission of the evidence the court should satisfy that such admission

would specifically and substantially benefit the public interest without unduly prejudicing the rights and freedom of any person. For ease of reference, the section reads;

> *"169.-(1) Where, in any proceedings in a court in respect of an offense, objection is taken to the admission of evidence on the ground that the evidence was obtained in contravention of, or in consequence of a contravention of, or of a failure to comply with a provision of this Act or any other law, in relation to a person,* ***the court shall, in its absolute discretion, not admit the evidence unless it is, on the balance of probabilities, satisfied that the admission of the evidence would specifically and substantially benefit the public interest without unduly prejudicing the rights and freedom of any person****".*

Further, my holding is that much as one of the best evidence in a criminal trial is a voluntary confession from the accused himself **(See Paulo Maduka and 4 Others v R,** (supra), the decision of the trial court on such matters can be faulted if it can be shown, that the admission or rejection of such evidence was objected to and that the court did not properly exercise its judicial discretion, or at all, in rejecting or admitting it.

Given the above, failure to deliver a decision or ruling after the conclusion of the mini-trial or inquiry and further admitting the caution statement as exhibit is entirely a failure of the trial court to properly exercise

its judicial discretion. Hence, exhibit P4 is, liable to be expunged from the record and this, therefore cannot be corroborated by the evidence of an independent witness which is the only remaining piece of evidence for the prosecution. The court in **Mashimba Dotto @ Lukubanija V the Republic,** Criminal Appeal No. 317 of 2013(CAT-Unreported) had expunged the cautioned statement on the ground that the ruling subject to the trial within trial in respect of the admissibility of the or otherwise of the cautioned statement was not delivered in court. When dealing with such an issue, the court stated that:

> ***"With respect to the above points raised by Mr. Byabusha on the cautioned statement are sound. We say so because in our appreciation of the record, after looking at it thoroughly, we are satisfied that there is merit in Mr, Byabushas's submissions".***

In my analysis and findings, if the certificate of seizure in exhibit P1 and the Caution statement in exhibit P4 crumbles, the evidence of PW4 has nothing to corroborate. Therefore, the prosecution case became weak and consequently, was not proved against the appellants beyond reasonable doubt. This, in turn, also disposes of grounds of appeal No. 5, 6, and 7 in favor of the appellants.

For the foregoing, these grounds have merits and are sufficient to dispose of the appeal. In the circumstances, I find no need to address other grounds of appeal.

In the end, this appeal is allowed. I, therefore, quash the conviction and set aside the sentence imposed on the appellants. I order the appellants' immediate release from prison unless they are being held for another lawful cause.

Order accordingly.

H. R. MWANGA

JUDGE

03/04/2024