

TANZANIA / JUDGMENT

oleyetuyetu oshumu laizer others vs republic 2018 tzhc 2246 30 october 2018

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (ARUSHA DISTRICT REGISTRY)
AT ARUSHA CRIMINAL APPEAL N04 104 OF 2017 (Originating from Economic Case No. 04 of
2015 of Karatu District Court as per Hon. A.A. Mkama, RM.) OLEYETUYETU OSHUMU @
LAIZER 1st appellant SAITABAU LOMAYAN 2nd APPELLANT ASSANAL
MUSHI..... 3rd APPELLANT VERSUS THE REPUBLIC.....
RESPONDENT

JUDGMENT

Maige, J. At the District Court of Karatu, the appellants, OLEYETUYETU OSHUMU @ LAIZER, SAITABAU LOYOMAN and ASSANALI MUSHI together with BILALI ATHUMAN who absconded and JOSEPH LULU whom was found innocent, were charged with the offence of being found in unlawful possession of Government trophy contrary to section 86(1) and (2) (b) of the Wildlife Conservation Act 2009 (Act No. 5 of 2009) read together with section 57(1) and paragraph 14(d) of the first the Economic and Organised Crime Control Act [Cap. 200 R.E 2002]. They were sentenced to pay fine of TZS 230,550,000/- each and in default thereof 20 years imprisonment each. Being aggrieved, the appellants have appealed against both the conviction and sentence on five grounds which in essence raise two substantial issues for consideration. First, whether the charge against the appellants was proved beyond reasonable doubt. Two, whether the caution statements were legally admitted into evidence. The prosecution case at the trial court was that, on 4th day of August 2012, the appellants and said two persons, at Mang'ola Road within Karatu District Manyara Region, were jointly and together found in unlawful possession of two Elephant tusks worth TZS 23,550,000/=-, the property of the Government of the United Republic of Tanzania. In convicting the appellants, the trial court among others, drew a negative inference against the appellants, under section 231(3) of the CPA, for failure to testify in defense despite a prima facie case against them being made out. The correctness or otherwise of the trial magistrate drawing the inference, I have noticed, is neither in the grounds of appeal nor in the submissions in support of the appeal. In my view, it being one of the basis for the decision of the trial court, the appellants were expected to challenge the same if they were aggrieved thereby. Their silence to address the same can be taken as a constructive waiver of their right to be heard on the issue. Nevertheless, it being a pure point of law, I find myself bound to address it before I jump into the

issues raised in the appeal. To decide whether the trial magistrate properly invoked the provision, I find it imperative to reproduce here below the provision of section 230(1),(2) and (3) of the Criminal Procedure Act (Cap. 20 R.E. 2002), herein after referred to as "the CPA". It is as follows:-

"231-(1) At the dose o f the evidence in support o f the charge, if it appears to the court that a case is made against the accused person sufficiently to require him to make a defense either in relation to the offence with which he is charged or in relation to any other offences, which, under the provisions o f sections 300 to 309 o f this A c t , he is liable to be convicted the court shall again explain the substance o f the charge to the accused and inform him o f his right-

- (a) to give evidence whether or not on oath or affirmation, on his own behalf; and
 - (b) to call witness in his defense, and ask the accused person or his advocate it is intended to exercise any o f the above rights and shall record the answer ; and the court shall then call on the accused person to enter on his defense save where the accused person does not wish to exercise any o f those rights.
- (2) Notwithstanding that an accused person elects to give evidence not on oath or affirmation, he shall be subject to cross examination by the prosecution.
- (3) if the accused, after he has been informed in terms o f subsection (1), elects to remain silent the court shall be entitled to draw an adverse inference against him and the court as well as the prosecution shall be permitted to comment on the failure by the accused to give evidence". It is clear from the quoted provision that; for the entitlement under the provision of subsection (3) to be exercised, the conditions set out in 3 subsection (1) must be duly complied with. There are three conditions in my reading. First, the substance of the charge must, as soon as the trial court finds out that a prima facie has been made out, be explained to the accused. Two, the accused must be informed of his right to give evidence and call witnesses. Three, he should be asked if he is intending to use such rights and his answer must be in the record. In accordance with the typed proceedings of the trial court, the finding that a prima facie case had been made out was made on 17.11.2016. There is nothing in the proceedings to suggest that such rights were duly explained to the appellants immediate upon such finding being made. Neither is there anything to establish that the rights of the appellants under section 231(1) of CPA were duly explained to them. The proceedings suggest that after closure of the defense evidence of DW-2, the state attorney successfully invited the Court to invoke its powers under the said provision. Quite unprocedurally, the second and third appellants against whom the adverse inference was drawn, were denied an opportunity to comment on the prayer. There is no doubt from what I have explained herein above that the invocation of the provision of section 231(1) of the CPA by the trial magistrate against the appellants was premature and therefore illegal for non compliance of the mandatory requirements under section 231(1) of the same. 4 On the evidence, the trial magistrate relied on three substances of evidence to sustain conviction against the appellants. First, the confessional statements of the appellants in exhibit P5; Two, the oral testimony of PW-1, PW-2, PW-5, PW-6 and DW -lto the effect that the appellants were found in possession of Government trophies. Three, the evidence in exhibit P2 (the two

Elephant tusks). I will, in line with the submissions for and against the motion, consider each of the substances of evidence. I will start with the evidence in caution statement(exhibit P-5). It is a settled position of law according to sections 57 and 58 of the CPA read together with section under 27 of the Evidence Act that; a cautioned statement procured voluntarily and in due compliance with the law can be relied upon to sustain conviction. In his submissions, Mr. John Shirima, learned advocate for the appellants attacks the legality of exhibit P-5 on account of being procured outside the 4 hours time limitation prescribed in section 50 and 51 of the CPA. Relying on the authority of the Court of Appeal in MESHAKI ABEL EZEKIEL VS. THE REPUBLIC, CRIMINAL APPEAL NO. 297/2013, the counsel has invited the Court to expunge exhibit P5 from the record. Submitting for the Respondent, Miss. Sicilia Foka, learned state attorney conceded, in the first place that;exhibit P5 were extracted out of time. She however submitted that, the delay was justified in the evidence of PW-1 appearing at page 18 of the proceedings. I have gone through the testimony of PW-1 on the record and,with respect,I could not gather any evidential justification of the delay as claimed or at all. In any event, PW-1 did not claim in evidence to have taken a cautioned statement of any of the appellants. Neither did he tender any cautioned statement. Exhibit P5 was produced by PW-5. He did not account for the delay. In my opinion therefore, exhibit P5 was extracted outside the prescribed statutory period of four hours from the date of the arrest and detention of a suspect. It is a settled position of law that extraction of a cautioned statement out of time vitiates the caution statement. See for instance, PAMBANO MFIHINGE VS .THE REPUBLIC. CRIMINAL APPEAL NO. 283 of 2009.For that reason therefore, exhibit P-5, I will agree with Mr. Shirima, were illegally admitted into evidence and it is hereby expunged from the record. The removal of exhibits P-5 on the record apart, Miss. Sicilia thought that there was sufficient evidence on the record to sustain conviction. There is oral evidence from PW-1,PW2, PW3, PW4 and DW-1 to establish that the appellants were found in possession of exhibit P-2, the learned state attorney contended in her submissions in rebuttal. On his part, Mr. Shirima had submitted in chief that the evidence adduced was too weak to sustain conviction. As such, it was in his submissions, the prosecution evidence on the record leaves much to be desired. He started by attacking the evidence in exhibit P-2 for want of proper chain of custody. He clarified that; while the appellants were arrested by PW-1 and PW-3 on 4.8.2012, exhibit P2 was tendered on 1.11.2015 without the witness making an account of proper chain of the custody of the exhibit. He submitted further that; while according to the prosecution case it was PW-7 who kept the exhibit, there is nothing in the prosecution evidence to establish from whom did PW7 get the exhibit. There is nothing in evidence to suggest it was PW-3 who handed over the exhibit to PW-7, the counsel further clarified. By way of conclusion, the counsel invited the Court to look at the evidence in exhibit P-2 suspiciously. He placed heavy reliance in the decision of the Court of Appeal in MESHAKI ABEL EZEKIEL VS. R {supra}. Still on the issue of sufficiency of evidence, Mr. Shirima criticizes the trial court in not observing the material contradictions apparent on the prosecution evidence. He clarified that; while the oral testimony of PW- 1 suggests that exhibit P-2 was found in a car, the evidence of PW-3 suggests that the same was found in

possession of the appellants upon being inspected by PW-3. In the view of the counsel, the contradiction pointed out was material enough to affect the credibility of the prosecution evidence. Miss. Sicilia viewed the contradiction as merely trivial which would be ignored without leading to any failure of justice. 7 On the issue of proper chain of custody, Miss. Sicilia submitted in the first place that, the same was accounted for by the oral testimony of PW-7 as well as the documentary evidence in the certificate of seizure (exhibit P-1). In the alternative, she submitted, the principle of proper chain of custody was inapplicable in the instant case in view of the recent authority of the Court of Appeal in ISSA HASSANI UKI VS. R, CRIMINAL APPEAL NO. 129 OF 2017, because elephant tusk is an item which cannot easily be tampered with by passing through different hands. She invited the Court to hold that the authority in MESHAKI ABEIL EZEKIEL CASE is distinguishable in this matter. With the exposure of the substances of the counsel submissions, it may be appropriate to consider if sufficient evidence exists notwithstanding the expurgation of exhibit P5 from the record. I will start with the principle of proper chain of custody of the exhibit which was propounded in the celebrated case of PAULO MADUKA AND ANOTHER v. R CRIMINAL APPEAL NO. 110 of 2007 (UNREPORTED) where the Court of Appeal stated as follows;- By chain of "a chain of custody" we have in mind the chronological documentation and/or paper trail\ showing the seizure, custody, control transfer analysis and disposition of evidence be it physical or electronic. The idea behind recording the chain of custody, is to establish that the alleged evidence is in fact related to the alleged crime -rather than, for instance, having been planted fraudulently to make someone appear guilty....the chain of custody requires that from the moment the evidence is collected\ its every transfer from one person to another must be documented and that it be provable that nobody else could have accessed it." From the above wordings of the decision, the principle of proper chain of custody applies in both physical and electronic evidence. The rationale behind the rule is to establish nexus between the exhibit and the crime and thereby preventing possibility of the exhibit being fabricated to incriminate the accused. In ISSA HASSAN UKI VS. R {supra}, I have read, the Court of Appeal did not depart from its decision in PAUL MADUKA. It only narrowed down the scope of the application of the principle so that it does not apply strictly to the exhibits that which cannot be easily tampered with. Appreciating the relevancy of the principle in PAUL MADUKA CASE {supra}, the Court of Appeal stated at page 11 of the judgment as hereunder:- 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 principle on the point. With equal great respect, we think they are distinguishable from the present case. 9 Having remarked as such, the Court of Appeal renovated its principle in PAUL MADUKA CASE in the following words:- 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. Much as whether or not an item is that which can be easily

tempered with remains to be a question of fact, elephant tasks, which is the theme of this appeal, has been expressly held, in ISSA HASSAN CASE to be as such. I am bound by the decision. I minded however with the use of verb "relaxed" in the last clause of above the above extract. Whatever rule of interpretation may be employed, the same cannot, in my humble view, mean "inapplicable". I understand my Lords Justices of the Court of Appeal to mean in their decision that, the principle in PAULO MADUKA CASE should not be strictly applied when the object involved is that which cannot easily be tempered with. In such a kind of situation, it has to be applied with relaxation as the facts of the case may dictate. Guided by the principle as aforesaid, I will determine the relevancy of the principle in the instant case after considering the evidence in totality. The arrest of the appellants and the seizure of exhibit P2 was by PW-1 (GODWIN CONSTATINE) and PW-3 (COSMAS KIRETI). The former was at the material time, a park ranger stationed at Ngorongoro National Park while the latter was a police officer stationed at Olden Police Post. In his evidence, PW-1 claims to have arrested the appellants in the car in exhibit P4 carrying exhibit P2. The evidence is silent on what did PW-1 do with the said exhibit. It is equally silent as to who among the five accused persons was in the possession of the exhibit P2. On top of that, far from naming DW1 (JOSEPH LULU) as the person who was driving exhibit P4, the prosecution evidence in totality does not disclose who was the owner of the same. It is worthy of note that DW1 was found innocent by the trial court. The evidence of PW-3 establishes that soon after the seizure of exhibits P2 and P4, there was prepared a certificate of seizure (exhibit P1). After being exhibited into evidence, PW-4 (ROBERT MONDAY), a wildlife manager who identified exhibit P2 in the material time and filled in trophy identification form (exhibit P3), confirmed that said exhibit was that which he identified before preparing exhibit P3. Just like PW4, PW7, the police officer who had been in the custody of the exhibit, confirmed that exhibit P2 constituted the same exhibit that was handed to him for custody and which was documented in the register in exhibit P-7. From the prosecution evidence pointed out above and, for the reason that the prosecution witnesses were not cross examined on the authenticity of exhibit P-2, I am in all four with the learned state attorney that, exhibit P2 is nothing else other than the two elephant tasks which were found, on 4.8.2012, in exhibit P-4. In view of the nature of the items, am satisfied, according to the evidence that, the exhibit was correctly received despite the absence of proper chain of its custody. Perhaps, the issue which I have to consider before I conclude my judgment, is whether the principle of recent possession was correctly invoked by the trial magistrate. In my understanding of the law, for a person to be convicted with an offence related to illegal possession of items, it is not necessary that the possession must be physical. It would suffice if the accused is found in constructive possession of the same. Constructive possession occurs when a person has knowingly "the power and intention at a given time to exercise dominion and control over an object, either directly or through others" (STATE VS. WILLIAMS 623. W.2 121.) In essence, constructive possession applies when it is clear that an item belongs to an individual or in the individual's immediate physical control. In here, exhibit P-2 is said to have been found in the motor vehicle in exhibit P-4. Far from establishing that the appellants and DW-1 were in the said car when it was being arrested, neither of the prosecution witnesses established

if the appellants or either of them was in immediate physical control of exhibit P4 when the same was being arrested. PW-1 and PW-3, the persons who arrested P4, mentioned DW-1 to be the person who was driving it. They did not say in evidence to whom the car belonged. The appellants did not give any testimony in defense to associate themselves with the car. In the absence of clear evidence linking them with the ownership or any immediate physical control of the car, there is a reasonable probability that the appellants were passengers without any control of the same. Conceivably, the trial magistrate was impressed by the defense evidence of DW-1. I do not think that he was correct. I will explain. The defense evidence of DW-1 appears at page 59 and 60 of the proceedings. There is nothing therein to suggest that the appellants were afforded an opportunity to cross examine DW-1. Since his evidence was adverse to them, by receiving the evidence without affording the appellants such right, it is obvious that they were curtailed adequate opportunity to defend themselves as against the incriminating evidence of DW-1. That aside, the said evidence has not been corroborated by any independent evidence while in law the evidence of an accomplice requires corroboration. (See for instance, YOHANA SAID NGUYEJE VS. THE REPUBLIC, CRIMINAL APPEAL NO. 206 OF 2015, CAT, UNREPORTED) 13 It is on that account that, I find that the case against the appellants was not proved beyond reasonable doubts. The appeal is thus allowed to the extent as afore stated. The conviction of the appellants and each of them is hereby set aside and the sentence thereof quashed. They are hereby set free unless withheld for other lawful reasons It is so ordered. ISSA MAIGE JUDGE 30/10/2018 Judgment delivered this 30th day of October in the presence of Mr. John Shirima, learned advocate for the appellant and Miss. Sicilia, learned state attorney, for the Responc ISSA MAIGE JUDGE 30/10/2018 14

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