

TANZANIA / JUDGMENT

20190618 TZHC Arusha

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,. I ~ IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA · I ,.. _f' ·} ~)1J:~
DISTRICT REGISTRY OF ARUSHA i' AT ARUSHA f I CRIMINAL APPEAL NO. 56 OF 2018
(Originating from Economic Crime Case No. 04 of 2016 at RMs court of Manyara at Babati) I I I I
RAMADHAN IDD MCHAFU ~ .. APPELLANT VERSUS REPUBLIC ' 1 I
... RESPONDENT .

JUDGMENT

ID 8/4 & 18/06/2019 MZUNA, J.: Ramadhani Iddi Mchafu was arraigned before. Manyara, Rm's court I together with one Mohamed Miraji (who moved scot-free), for the offence I of unlawful possession of Government Trophy contrary to Section 86(1) and (2) (b) of the Wildlife Conservation Act (Act No~ 5/2009) read together ! with section 57 (1), 60 (2) and paragraph 14 (d) of theist schedule to the i Economic and Organiz~d Crimes Control Act, Cap 200 RE 2002. At the end of the day he was sentenced to s~rve twenty (20) years imprisonment. Aggrieved, he has appealed to this court so as to set aside both ; &O ' the conviction and sentence basing on the followin~ grounds:- 1 J.

1. That the learned trial magistrate erred in law and fact by wrongly convicting the appellant without considering the principles which have to I be taken into account in respect to chain of custody. I
2. That the learned trial magistrate erred in law and in fact by failing to I notice the variation between the charge sheet and the evidence of PWJ regarding the description of trophy. i I
3. That the learned trial magistrate erred in law and fact by finding the appellant guilty by relying on inconsistency andI contradictory evidence by the prosecution witnesses.
4. That the learned trial magistrate erred in law ttnd in fact in admitting fO exhibits PE1/ PE2/ PWJ/ PE4/ PE5; PE6, PE7, PEB, which were tendered by the prosecutor. ; I I
5. That the learned trial magistrate erred in law a!Jd in fact in that he did not take into account the evidence of defence sitle.

- I I I

6. That the learned trial Magistrate erred in law and intact when he misdirected himself in using the caution statement I of the appellant which was extracted out of time prescribed by the La_wJ I
7. That the Learned trial Magistrate erred in law a'(7d in fact for relying on cautioned statement to convict and sentence; the appellant without directing himself as to whether it was prop~r in law to admit the ~() purported cautioned statement which was recorded by PWS. I During hearing of this appeal Mr. Valentine J. Nyalu learned counsel I appeared for the appellant while Ms. Janeth Sekule, learned Senior State Attorney appeared for the respondent/Republic. The facts giving rise to this appeal is that the: appellant was looking for a purchaser of one elephant tusk (tendered as exhibit PE. 3). There 2 was laid a trap and was communicated through his mobile phone No. 0789668229 for a business deal. The appellant went to the agr~ed destination Magugu Mnadani area and was riding a motor cycle (exhibit PE. 2) and carried with him a polythene-sulphate bag and Mohamed Mi~aji (who was acquitted) as a passenger holding the bag with elephant tu_sk therein. Upon going to the scene he was arrested by PW1 A\$P Christopher, PW4 A/Inspector Aloyce and PW2 Herman Thomas, cell leader. A certificate of seizure (exhibit PE. 1) was signed at the scene by the arresting officers, witness and the appellant. The appellant and his colleague made their cautioned statement, received as exhibit PE. 5 and IO PE. 6 respectively. During their defence case, the appellant and his colleague pointed an accusing finger to another but the trial MaQistrate convicted him for the simple reason that he is the one who was making communication with the purported purchasers and even the mobile phone was his. The second accused was acquitted for the simple reason that he was a mere passenger. Both the elephant tusk and the motor cycle were forfeited to the United Republic of Tanzania. In this appeal as above shown, seven grounds of appeal have been filed. They touch on procedural defects, misapplication of the law and <Z,D insufficient evidence to ground a conviction. Let me start with the first ground of appeal where it is averred that, the learned trial magistrate erred in law and facts by wrongly convicting 3 the Appellant without considering the principles which have to be taken into account in respect to the 'chain of custody'. I It was submitted by Mr. Nyalu., learned cou~syl hat during the Trial I prosecution side tendered before the Court one elephant tusk (Exhibit P3) ! and the evidence on record does not show who had ;_the possession of the I said exhibit since it's seizure until it was tendered: before the court. He I cited the case of Paul Maduka and 4 Others v~ Republic, Criminal I Appeal No. 110 of 2007, CAT (unreported) whi~h in essence laid a I principle that there must be:- 1 "chronological documentation and/or paper trail, showing the seizure, IO custody, control, transfer, analysis, and dispositio(l of evidence, be it physical or electronic... to establish that the alleged evidence is in fact I related to the alleged crime-rather than, for instance) having been planted fraudulently to make someone appear guilty... " I I In essence the principle of chain of custody is to ensure that "nobody I else could have accessed it" or could not have beerh tempered with. I ' In response, Ms. Sekule, the learned S~nior State Attorney I, submitted that this case is distinguishable to the pr~sent case as that case I was about chain of custody of money in cash tha,t could change hands I easily and easily tempered with

while the exhibit in the present case is on 'O I elephant tusk that cannot change hands easily and easily be tempered with. 4 I I I She referred this court to the case of Issa Hassan Uki vs I Republic, Criminal Appeal No. 129 of 2017 (unreported) at page 12 citing ' with approval the case of Joseph Leonard Manyota vs Republic, I Criminal Appeal No. 485 of 2015 (unreported) and held that; "It is not every time that when the chain of custody is broken, then I • the relevant item cannot be produced and accepted by the court as I evidence, regardless of its nature. We are certain: that this cannot be I the case say, where the potential evidence is not in danger of being destroyed or polluted, and/or in any way tampered with. Where the circumstances may reasonably show the absence of such dangers, I O I the court can safely receive such evidence despite the fact that the chain of custody may have been broken. Of course, that would I depend on the prevailing circumstances in every particular I case. " I I I agree entirely with the learned Senior State Attorney that the cited I case of Paul Maduka and 4 Others vs Republic, supra, in actual fact I the Court of Appeal dealt with this principle at length giving various I incidences which distinguish it with other incidences like the one under I consideration and held at page 13 that "the elephant tusks ... cannot I change hands easily and therefore could not easily be tampered with." I The first ground of appeal therefore fails. 1 JO In the second ground it is submitted that the trial Magistrate is I faulted in that he failed to notice the variation between the charge sheet and the evidence of PW3 regarding the description 'of the trophy. 5 In this connection, he made reference to the variance on the figure given by PW3 on the value of the said trophy to be Tshs. 6,549,125/- vis a vis the figure shown in the charge sheet, being Tshs. 6,459,125/-. The variation which he says has fundamental impact as the adduced evidence may as well be in respect of other trophies. In response, the learned Senior State Attorney submitted that the alleged variation by PW3 might have mistakenly testified due to human error but that cannot diminish his gist of evidence. That, what is important is the essence of matter and not minor details in his evidence. He referred this court to the case of Evarist Kachembeh and Others vs. IO Republic 1978 LRT n. 70, where it was held that:- "Human recollection is not infallible. A witness is not expected to be right in the Minute/ details when retelling his story. " She further made reference to the case of Dickson Elia Nsamba Shapwata Versus Republic Criminal Appeal No. 92 of 2007 (unreported) at page 7. Reading from the above submission, according to the learned defence counsel, the point which he says should move this court decide in favour of his client is on the dissimilarities on the evidence of PW3 that the trophy was worth Tshs. 6,549,125/- as opposed to the figure shown in the charge sheet Tshs. 6,459, 125/-. In any case the value of the trophy is well stated in the trophy valuation certificate Exhibit P4, prepared by PW3 Halid Jumanne which tallies with the figure appearing in the charge sheet, Tshs 6,549,125/- calculated from the weight of the trophy 5.5 kg x 580 U\$ (Tshs 2,165) x 325= 6,549, 125/-. Again there was an argument that the offence according to PW1 was ' committed at Mnadani Magugu while PW2 said that the scene of the crime was Mnadani. These are mere minor contradictions which in view of the

- ' decision in the case of Mohamed Matula v. R(!pa;tblic [1995] TLR 3, I does not "go to the root of the matter." It goes further to show that the ' prosecution witnesses were not tutored. If I can go further, it is only when ' the contradictions are so 'serious' that would make,' the 'credibility' of a I witness questionable as it was so held in the case of Evarist / 0 Kachembeh and Others vs. Republic, supra, at ' page 351. As well ' . submitted by the learned Senior State Attorney, ~his point is or;ily an afterthought as the appellant had the opportunity: to cross examjne a I witness on this aspect at the trial, but never bothered to do so. It is too . ' late to raise it on appeal. Ground number three therefore equally fails. I I I I As for the allegation that the tendered exhipits PE1- PE 7 w_ere wrongly tendered as it was the prosecutor who tendered them. The record shows the contrary because the prosecutor was ohe MMari Bugaba and I Stella while a witness was one Asp Christoph:er PW1, and other ' prosecution witnesses. The mere fact that it was Mr.: Mmari who made the &O ' prayer to tender it does not on the face of it mean that he is the one who tendered it. This scenario is distinguishable to the cited case of Thomas I Ernest Msungu @ Mkenya v. The Republic, Criminal Appeal No. 78 of 2012, CAT at Arusha, unreported, where a ballistic expert's report was ' ' 7 tendered by the prosecutor without summoning a witness who prepared
- I I , I it. The Court of Appeal in allowing the appeal said i that there wa\$ an ' I anomaly because the appellant had no chance to :cross examine the I witness unlike in the case before me where a witness was summoned and I I the appellant had the opportunity to cross exan:iine him (not the' I prosecutor). I say so because PW1, is the arresting officer who posed ~s I I a buyer. In his evidence he talked about the certificat~ of seizure (exhibit I PE 1), the Motor cycle (exhibit PE2) and the elephant tusk (exhibit PE3) I I to mention but few and therefore could be cross exao/lined. I I I VO I This point that the court should decide in favor of the appellant simply because it was the prosecutor who proposed ~n tendering it lacks I merit and the same is bound to fail. I see no any miscarriage I of justice that was occasioned as the procedures of conductin:g criminal trials was I I followed and the appellant was made to understand it and exercised his rights. The fifth ground was dropped. I revert to t~e sixth and seven~h I grounds of appeal. In ground number six the app~llant claims that the learned trial Magistrate erred in law and in fact, yvhen he misdirected I I himself in using the cautioned statement of the appellant which was I I extracted out of time prescribed by the Law. Again in ground number I ~O I seven it is alleged that it was received without cond;ucting an inquiry. I I I In response, the learned Senior State Attorney I said that the lower I court proceeding is silent as it does not show at/ what time appellant I I I I 8 arrived at Police Station after his arrest. Apart' from that the appellant.\ alleged being beaten during interrogation and an inquiry of legality of t~e caution statement was crucial. In any case, she says, even if the caution I statement is expunged from the r~cord because of the irregularjty I mentioned above, the conviction and the sentence a9ainst the appellant would still stand as there was sufficient evidence. I agree, the appellant said that he was beaten when the cautioned statement was recorded by PWS No. E 6749 D/C Donald. In other words, it was not voluntarily made. Nevertheless, even if the cautioned statement of the appellant (Exhibit P6) is expunged as I hereby do, but still the \ () conviction cannot be faulted; There was proved

possession in a physical manner and the appellant had control over one elephant tusk which he never gave explanation if he lawfully possessed it. It is evident from record through PW1, PW2 AND PW4 (eye witness) they found the appellant with one elephant tusk which was inside a sulphate bag. A certificate of seizure of one elephant tusk, and trophy valuation certificate were tendered as proof that the appellant was indeed arrested while in the possession of Government Trophy. He had no permit. Upon interrogation, appellant failed to account for being in possession of Government Trophy. This was in violation of the Wildlife Conservation Act No. 5 of 2009 and other laws. I ~0 The appeal lack merit. The conviction and, sentence is hereby upheld. Appeal stands dismissed. · ~) M. G. MZUNA, . JUDGE. 18/06/2019 9

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