IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: JUMA, C.J., MWARIJA, J.A., And MZIRAY, J.A.)

CRIMINAL APPEAL NO. 168 OF 2017

1. DAVID ATHANAS@ MAKASI
2. JOSEPH MASIMA@ SHANDOO ..... **APPELLANTS**

VERSUS

THE REPUBLIC.....**RESPONDENT**

(Appeal from the Judgment of the High Court of Tanzania at Dodoma)

(Mansoor, J.)

Dated the 8th day of May, 2017
in
Criminal Appeal No. 78 of 2016

.....

JUDGMENT OF THE COURT

4th July & 10th July, 2018

MZIRAY, J. A.:

The appellants, David Athanas @ Makasi and Joseph Masima @ Shandoo appeared before the Resident Magistrates' Court of Singida wherein, they were jointly charged with two counts. The first count related to the offence of unlawful possession of Government trophy c/s 86(1) and (2) (c)(ii) and 113(2) of the Wildlife Conservation Act No 5 of 2009 (WCA) read together with paragraph 14(d) of the first schedule and section 60 of the Organised Crimes Control Act, Cap 200 R.E 2002.

The second count related to the offence of unlawful dealing with Government trophy contrary to section 84(1) and 113(2) of the WCA read together with paragraph 14(d) of the first schedule and section 60 of the Organised Crime Control Act, Cap 200 R.E 2002. They pleaded not guilty to the two counts of the charge.

After a full trial, the appellants were convicted as charged in both counts. On the first count they were sentenced to a fine of Tshs. 136,840,000/= or to serve a term of twenty (20) years imprisonment in default. On the second count they were sentenced to pay a fine of Tshs. 54,736,000/= or, in default, to serve a term of two (2) years imprisonment. The custodial sentences were ordered to run concurrently. The appellants were aggrieved. They unsuccessfully appealed to the High Court at Dodoma, hence this second appeal.

Briefly, the facts of the case, as discerned from the record, are as follows. Following a tip from an informer on 28/3/2014 at around 10.00 hours, PW1, PW2 and PW4, game officers were dispatched to Nyerere Square in Chamwino District where the informer who was a decoy had an appointment to meet with the appellants for purpose of transacting on elephant tusks business. On arrival, the informer communicated with the

appellants who emerged in a short period of time. PW1 and the informer sat closely whereas PW2 and PW4 sat just nearby observing what was going on. The appellants informed them that they had six elephant tusks kept at Chinangali II area and that they were selling them at Tshs 150,000/=per kilogram. They did not object the price but they told the appellants that their motor vehicle had mechanical problem so they had to go and fix it first and once it is repaired they will come and finalise the transaction. The three witnesses together with the informer left the place in order to have time to plan for the trap. Later on, at around 16.00hrs the informer communicated with the appellants that their motor vehicle had been repaired and was in order and they were ready for the business. On arrival at Chinangali II, the appellants turned off the sack of charcoal and told them "***mzigo wenyewe ndo huu hapa***" The six elephant tusks were in a sulphate bag. Upon seizing the contraband the three witnesses arrested the appellants and conveyed them at the Wildlife Offices in Manyoni. After some interrogations, the appellants were taken to the trial court and charged with the two offences.

In defence, the appellants denied that they were arrested whilst in possession of six elephant tusks. In particular the first appellant stated

that he was arrested in the presence of DW1 with nothing in his charcoal store, forced to board a truck and subsequently taken to Manyoni Wildlife offices. The version of the second appellant is that his house at Chalinze Nyama area in Dodoma was searched but nothing was seized therein. He did not know why he was implicated with the crime.

Mr. Wasonga canvassed four grounds of appeal which reads:-

1. *That both the trial magistrate and honourable judge erred in law by convicting the appellants without considering that the prosecution failed to establish chain of custody as to whether the purported trophy were the same alleged to have found in possession of the appellants.*

2. *That, both the trial magistrate and honourable Judge proceeded to hear and determine the matter without considering that the charge sheet was defective.*

3. *That, both the trial magistrate and honourable Judge entered judgment against the appellants without considering that the prosecution failed to prove their case beyond reasonable doubt.*

4. *That the whole proceedings were marred by procedural irregularities which amounts to dismissal of the matter in total.*

At the hearing of the appeal, the appellants were represented by Mr. Godfrey Wasonga, learned advocate while the respondent Republic had the services of Ms. Beatrice Nsana, learned State Attorney.

In elaboration on the first ground, Mr. Wasonga citing the case of **Paulo Maduka and Others vs. R.,** Criminal Appeal No. 110 of 2007 (unreported) was of the strong view that there is no proof of the chain of custody of the items seized (six elephant tusks) to have been established as it is not explained who took care of the seized exhibit from where it was found at the appellants' godown, up to the point when they were tendered in the trial court as exhibit. He insisted that there was also no proof that the six elephant tusks that were tendered in the trial court were the same as those earlier on found at the appellants' godown. In view of those missing links he was of the opinion that the tendered elephant tusks were not related to the alleged offence.

On the contention of the defective charge, he forcefully submitted that the charge levelled against the appellants was defective and confusing in that it was not properly drawn so as to have enabled the appellants to understand the nature of the charge preferred against them. He pointed out that section 60 of the Organised Crimes Control Act; referred in the

first count is too general. He stressed that the charge sheet should have specified, in the statement of the offence, the sub-section in which the offence was created. He also countered the provision of section 113(2) of the WCA by stating that the same does not create any offence.

He submitted further that the charge sheet was also defective by citing in the second count, section 86(2) of WCA which provides for punishment for the offence of unlawful possession of Government trophy without specifying which of its paragraphs (a), (b) and (c) creates the punishment that was imposed on the appellants. Since the charge sheet was defective, Mr. Wasonga cited the recent case of this Court - the case of **Nelson Mang'ati vs. R**, Criminal Appeal No. 346 of 2017 (unreported) and urged this Court to allow the appeal in the circumstance.

Arguing on the anomalies in the search and the seizure certificate tendered, Mr. Wasonga submitted that the search was conducted at Chinangali, Dodoma and the certificate of seizure (Exh P3) was filled at Manyoni. He said, this was not proper as section 38 (3) of the Criminal Procedure Act, CAP 20 R.E 2002 was contravened. He stated that, the certificate of seizure ought to have been signed and issued at Dodoma the

place where search was conducted in the presence of an independent witness.

On the above highlighted lacunas, the learned Advocate asked for the conviction to be quashed, sentence be set aside and the appellants be set at liberty.

On the other hand, Ms. Beatrice Nsana, learned State Attorney joined hands with Mr. Wasonga and did not support the conviction and sentence by the trial court which apparently was confirmed by the first appellate court. She was in agreement with Mr. Wasonga that the Prosecution failed to prove the case against the appellants beyond reasonable doubt.

Arguing the 1st ground of appeal, the learned State Attorney readily conceded that the chain of custody was not consistent as the prosecution witnesses failed to show where and how the exhibits were stored for safe custody before tendering them in court.

Addressing on the charge sheet, the learned State Attorney supported the argument of the learned defence counsel that the charge sheet filed in the trial Court against the appellants was defective. She argued that the proper section in the charge should have been section 86(1) and (2)(b) of the WCA and not sub-section (c). She went on to

submit that the defect in the charge sheet extended to the particulars of the offence in that the particulars in the second count did not support the statement of the offence. She further argued that the particulars of the offence did not specify the nature of the unlawful dealing which the appellants did, to fall under the scope of the statement of the offence specified as **unlawful dealing in Government trophy**. She contended that the defects were fatal and prejudicial to the appellants in that they could not have properly understood the nature of the charge levelled against them.

We have carefully considered the arguments from both parties which appear to be similar in content. In determining the matter we will first determine the issue of search and chain of custody. It is in evidence that the search was conducted at Chinangali, Dodoma and the certificate of seizure (Exh P3) was filled at Manyoni. With due respect, as per section 38 (3) of the Criminal Procedure Act, CAP 20 R.E 2002, the certificate of seizure ought to have been signed at the place where the search was conducted and in the presence of an independent witness. Since the certificate of seizure was not signed at Chinangali, the place where the search was conducted and considering that there was no independent

witness present as required by law, the said certificate cannot be accorded weight.

As to the issue of chain of custody, we fully subscribe the views expressed by both counsels in that, in establishing a chain of custody of the exhibit (six elephant tusks), it was necessary to afford reasonable assurance that the exhibit tendered at the trial court was the same as the one seized from the appellants' godown.

In **Onesmo s/o Mlwilo vs. R.,** Criminal Appeal No. 213 of 2010 (unreported) the Court found no proof of the chain of custody of the items found regarding the person who took care of them from where they were found up to the point when they were tendered as exhibits in the trial court. The Court concluded that without such proper explanation of the custody of those exhibits, there would be no cogent evidence to prove the authenticity of such evidence. The Court also referred to its decision in **Iluminatus Mkoka vs. Republic** [2003] TLR 245, where it had emphasized that a trial court should know in whose custody those exhibits were kept. The Court concluded that:

> *"...In view of those missing links in the instant case, we are of considered opinion that the improper or absence*

of a proper account of the chain of custody of Exhibits P3 and P4 leaves open the possibility of those exhibits being concocted or planted in the house of the appellant."

In **Mussa Hassan Barie and Albert Peter @ John vs. R.,** Criminal Appeal No. 292 of 2011 (unreported) the Court referred to its earlier decision to emphasize the importance of chain of custody:-

*In **Paulo Maduka and Others vs. R.,** Criminal Appeal No. 110 of 2007 (unreported) this Court underscored the importance of proper chain of custody of exhibits and that there should be:-*

"..... 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....."

In the case at hand, there is no explanation from all the Prosecution witnesses on how the exhibits were taken care of, from when they were found at the appellants' godown right up to the point when they were tendered in court as exhibits. In the circumstances, we find merit in this ground of appeal.

We now move to the next issue concerning the validity of the charge sheet. It is now beyond controversy that one of the principles of fair trial in our system of criminal justice is that an accused person must know the nature of the case facing him, and that this can only be achieved if a charge discloses the essential elements of an offence. (See **Mussa Mwaikunda vs. R** [2006] TLR 387). And for that reason, it has been sounded that no charge should be put to an accused unless the Court is satisfied that it discloses an offence known to law. (See **Oswald Mangula vs. R**, Criminal Appeal No. 153 of 1994 (unreported). A clear charge drawn in terms of section 135 of the CPA would give an accused person an opportunity to fully appreciate the nature of the allegations against him so as to have a proper opportunity to present his or her own case.

As hinted earlier on, the appellants in the present case were tried on two counts. The first count is related to the offence of Unlawful possession of Government trophy c/s 86(1) and (2) (c)(ii) and 113(2) of the WCA read together with paragraph 14(d) of the first schedule and section 60 of the Organised Crime Control Act. It's particulars of offence reads:

"PARTICULARS OF OFFENCE

DAVID ATHANA @ MAKASI and JOSEPH MALIMA @ SHANDOO *are jointly and together charged on 28th day of march, 2014 Chinangali II Village within Chamwino District in Dodoma Region were found in unlawful possession of the Government trophies to wit six(6) pieces of ELEPHANT TUSKS which weigh 31.1 kgs valued at Tshs 27,368,00/= the property of united Republic of Tanzania.*

The second count related to the offence of unlawful dealing with Government trophy contrary to section 84(1) and 113(2) of the Wildlife Conservation Act no 5 of 2009 read together with paragraph 14(d) of the first schedule and section 60 of the Organised Crime Control Act It's particulars of the offence reads:

"PARTICULARS OF OFFENCE

DAVID ATHANA@MAKASI and JOSEPH MALIMA @SHANDOO *are jointly and together charged on 28th day of march, 2014 Chinangali II Village within Chamwino District in Dodoma Region were unlawful found dealing Government trophy to wit six(6) pieces of ELEPHANT TUSKS which weigh 31.1 kgs valued at Tshs 27,368,000/= the property of united Republic of Tanzania."*

Looking at the statements of offences and the particulars thereof, it is obvious that the proper section in the charge in respect of the first count should have been section 86(1) and (2)(b) of the Wildlife Conservation Act No 5 of 2009 and not subsection (c) as correctly submitted by the learned State Attorney.

As to the second count it is obvious that the Statement of the Offence does not disclose to the appellants the nature of the **unlawful dealing** in Government trophy for which they were charged. A close look of section 80(1) and 84(1) of the WCA, the same have the categories of the offence of Unlawful Dealing with Government trophy which would have guided the drafting of the particulars of the offence in the second count.

Sections 80(1) and 84 (1) of the WCA for which the appellants were charged in the second count provides examples of "unlawful dealings" which should have featured in the particulars of the offence in the second count. Section 80 states:

> *"80 (1).-A person shall not deal in trophy or* ***manufacture from a trophy for sale*** *or* ***carry on the business of a trophy dealer*** *except under and in accordance with the conditions of a trophy dealer's licence."* [Emphasis provided].

In our reckoning, particulars of the offence of "Unlawful Dealing" under section 80(1) specify the nature of dealing in the form of "***manufacture from a trophy for sale***" or "***carry on the business of a trophy dealer.***" By citing section 80 of the WCA in the Statement of the Offence in the second count, one would have expected the particulars of this count to show whether the appellants were manufacturing for sale any Government trophy, or explain what type of business involving Government trophy the appellants were engaged in.

Section 84(1) which features in the Statement of Offence in the second count states:

> *"84(1).- A person who **sells**, **transfers**, **transports**, **accepts**, **exports** or **imports** any trophy in contravention of any of the provisions of this Part....."* [Emphasis provided].

One would have expected the particulars of Unlawful Dealing under section 84(1) to specify the nature of "*selling*", or "*transferring*", or "*transporting*" or "*accepting*", or "*exporting*" or "*importing*" the appellants were engaged in. Unfortunately the particulars of the offence did not elaborate on this.

We observed that neither the particulars of the offence in the second count, nor the Memorandum of Facts, drew the appellants' attention to any of the categories of unlawful dealings under sections 80(1) and 84(1) of the WCA. For failing in the second count, to specify the nature of "unlawful dealing" the appellants were engaged in, we cannot say that the appellants were fairly tried.

For the above reasons, we are constrained to find that by laying at their doors, a defective charge, the appellants were embarrassed and did not get a fair trial. The trial was therefore vitiated, and so were the proceedings and judgment of the High Court on first appeal. As we have demonstrated above that the charge was defective we are of the settled mind that the irregularity was such that it prejudiced the accused and therefore occasioned a failure of justice. We have pondered on what should be our next step. Should we order a re-trial? This would entail an amendment of the charge followed by a rehearing of the case. We have considered all the circumstances of the case and we do not think that it will be in the best interest of justice to take such a course.

In the event, and for reasons stated above, we allow the appeal, quash the conviction and set aside the sentence. We order that the appellants be released from prison forthwith unless otherwise lawfully detained. We so order.

DATED at **DODOMA** this 7th day of July, 2018.

I. H. JUMA
CHIEF JUSTICE

A. G. MWARIJA
JUSTICE OF APPEAL

R. E. S. MZIRAY
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL