IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: NDIKA, J.A., KITUSI, J.A. And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 37 OF 2021

HAIKA D/O CHESAM MGAO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Kakolaki, J.)

dated the 1st day of December, 2020

in

Criminal Appeal No. 120 of 2020

.....

JUDGMENT OF THE COURT

14th March, 2023 & 4th January, 2024

MASHAKA, J.A.:

We heard this appeal on 14th March, 2023 and reserved our judgment hoping that we would be able to compose and deliver it within a reasonably short time in keeping with the adage, justice delayed is justice denied. For some reason however, we have not been able to render this decision earlier. We have decided to preface our decision with these remarks to demonstrate that we do not condone delays where they can be avoided.

Before us the appellant is challenging the decision of the High Court sustaining convictions and sentences on three counts; the first two counts

of which being unlawful possession of government trophies contrary to section 86 (1) (2), (c) (ii) and (3) (b) of the Wildlife Conservations Act, No. 5 of 2009 read together with paragraph 14 (d) of the First Schedule to, and section 57 (1) and 60 (2) of the Economic and Organized Crime Control Act [the EOCCA].

It was alleged in respect of the first two counts that the appellant was found in possession of four pieces of elephant tusks valued at USD 30,000 equivalent to TZS. 66,210,000/= and two hippopotamus teeth valued at USD 1,500 equivalent to TZS. 3,310,500/= the alleged trophies being the property of the Government of the United Republic of Tanzania without a permit from the Director of Wildlife.

In the third count, the appellant was charged with unlawful dealing in trophies contrary to section 80 (1) (2) and 84 (1) of the Wildlife Conservation (Act No. 5 of 2009) read together with paragraph 14 (b) of the First Schedule to, and section 57 (1) and 60 (2) of the EOCCA. It was alleged in respect of that count that on 19th November, 2015 at Kimara area within Kinondoni District in Dar es Salaam Region the appellant accepted trophies, that is four pieces of elephant tusks valued at USD 3,000 equivalent to TZS. 66,210,000/= and two hippopotamus teeth valued at USD 1,500 equivalent to TZS. 3,310,500/= properties of the

Government of the United Republic of Tanzania, without trophy dealer's license.

The prosecution relied on three witnesses and a number of exhibits to prove its case which as we have already indicated the trial Resident Magistrates' Court of Kisutu and the High Court on first appeal, accepted as being true. From the evidence of the prosecution, the bottom line is that the Wildlife Officers and the police were ahead of the culprits, having been tipped earlier. The Wildlife Officers informed the police that some people at Kimara area were in possession of and dealing in government trophies and that police assistance was required in bringing these suspects to book.

So, Assistant Inspector Salum Malugile (PW1) laid a trap aimed at arresting the suspects. According to PW1 he drove to the scene in a civilian car with Corporal John and Constable Ayubu so as not to risk being identified by the suspects. The three police officers were accompanied by one Abel Joel the Wildlife Officer who had earlier tipped them and it is alleged that this officer Abel Joel had the suspects' telephone number which he called to announce his arrival at the agreed area, him posing as an interested buyer of the trophies. Three people turned up in response and the two sides negotiated. When the deal was

done, the three venders left to a place from where they were to collect the trophies. However, only two people, a man and a woman, returned to the police officers' motor vehicle carrying a bag with a wrapped parcel in it.

The culprits joined the police officers in their car and they were made to unwrap the parcel for the decoy buyers to get satisfied with what they were going to purchase. Meanwhile, PW1 had communicated with a team of other police officers who arrived at the scene and placed the culprits as well as the decoy buyers under arrest.

It was PW1's evidence that the two culprits he and his team arrested one Anthony Philemon and Haika Chesam, the appellant. A certificate of seizure was prepared and signed on the spot. The advocate who represented the appellant at the trial, as there was only one accused, resisted the proposed admission of that certificate of seizure into evidence for the reason that it did not bear a signature of an independent witness as required, but he was overruled.

Apart from the evidence of one Said Ng'anzo Seleman (PW2) who proved himself to be a qualified wildlife officer, that he identified the trophies, weighed and valued them, matters which are not in dispute, the other piece of evidence was from a Woman Police Detective Corporal

Josephine (PW3). She recorded the appellant's cautioned statement which was admitted as exhibit P5; but not before a trial within a trial and a ruling clearing it.

The dust as to the cautioned statement seems to have not settled because the appellant raised it at the High Court on first appeal and it features as her ground one of appeal before us.

In defence, the appellant admitted that she was in the car that was being driven by one Anthony Simon Chibarangu a friend to Patrick Dunda, her co-tenant. She said she had merely been given a ride from Kimara area where she lived and was headed to Manzese area to visit her boyfriend. That vehicle was stopped by police officers who put all passengers including the appellant under arrest. She denied signing the seizure certificate at the scene of crime but that she was made to do so at Mikocheni area where a certain Task Force fighting illegal dealing with trophies, was operating from. The appellant further denied making a confession to PW3 who, she said, did not even put to her any questions relevant to the commission of the alleged offence. When cross-examined she raised the issue of the statement being recorded out of time.

Whether or not the tusks and teeth (exhibit P1) were government trophies poses little or no difficulty, as we stated earlier. From the

evidence of PW2 and the concurrent finding of the two courts below, we have no reason to disturb the finding that they were government trophies. It is the question of whether the appellant was in possession of those trophies which calls for our scrutiny and determination.

The trial court was satisfied that although only one witness (PW1) testified as to the fact that the appellant was in possession of the trophies, what matters, it held, is the quality of his testimony rather than the number of witnesses. It found PW1 credible and mounted its finding on his evidence. Conversely, it rejected the appellant's defence that suggested that she was an innocent passenger in the motor vehicle, mainly for the reason that she did not suggest that line of defence in the course of cross-examining PW1. It convicted the appellant, and the High Court took the same position by endorsing the finding as to PW1's credibility and also found the cautioned statement to be of evidential value implicating the appellant.

The appellant has raised five grounds of appeal but argued four, having abandoned ground five. When considered, the decision of the High Court dismissing the appeal before it was based on two factors which are, in our view, critical, and they have been raised as ground one and three. Ground one of appeal complains as follows:

1. *"That the Honourable High Court erred in law to hold that the trial court acted within the law to compute time for interviewing the appellant in terms of section 50 (2) of the Criminal Procedure Act in the case where there was no allegation that the time undisputedly spent outside the normal statutory interview duration was the time when the appellant was being conveyed to a police station or other place for any purpose connected with the investigation".*

Ground four of appeal raises the following issues:

4 "That the Honourable High Court erred in law to hold that in the present case where the two only persons (namely PW1 and DW1) who testified on the alleged arrest and possession of the government trophy by the appellant gave completely different stories, the unexplained failure to charge Anthony Philemon, who PW1 stated to be a co-culprit, and the unexplained absence of Abel Joram, who PW1 mentioned to have also been at the scene of the arrest and to have a better knowledge and longer history of the matter and more interest in it, did not constitute the circumstance where the law calls for adverse inference to be drawn".

The issue of the certificate of seizure not bearing a signature of an independent witness has been raised in the second ground of appeal, while the third ground of appeal faults the two courts below for acting on

documents that had been tendered earlier in a case other than the one from which this appeal arises.

Mr. Paschal Mshanga learned advocate argued the appeal on behalf of the appellant and through Ms. Flora Massawe, learned Principal State Attorney and Ms. Elizabeth Mkunde, learned Senior State Attorney, the respondent Republic resisted the appeal. Mr Mshanga had also filed written submissions ahead of the date of hearing, which we shall consider along with his oral address.

We shall avoid the husks and address the kernel right away, that is, what evidence grounded the conviction of the appellant. Mr. Mshanga has submitted that the trial court convicted the appellant on the basis of the following finding: -

> *" Therefore, in my opinion it is clear that the evidence of PW1 and the cautioned statement (Exh P5) revealed that the accused was dealing with government trophies".*

And that the High Court agreed with the trial court but went a step further, by, according to Mr. Mshanga, holding as follows: -

> *"The evidence in respect of possession is the evidence of PW1...and two documentary evidences i.e the certificate of seizure (Exh P1) and the cautioned statement of the accused person (Exh P5)".*

In our consideration, and upon reading the judgments of the two courts below, we agree with Mr. Mshanga that the finding of the appellant guilty flowed from those pieces of evidence.

We shall address the submissions regarding the cautioned statement, featuring as the first ground of appeal, simultaneously with the third ground of appeal. The complaint is in two fronts; first that the cautioned statement was recorded out of the statutory time of 4 hours. Ms. Massawe's response is that it is true that the statement was recorded out of time but the explanation that was offered by PW1 was sufficient to clear it. PW1's explanation was that the police did not record the statement within time because they were looking for other suspects. The second front, and this has been raised in the third ground of appeal, is that the said cautioned statement had previously been offered in evidence in the previous case, that is, Economic Case No. 36 of 2015 against this same appellant, but it was held inadmissible for having been recorded out of time. According to Mr. Mshanga, the prosecution decided to terminate the previous proceedings only to commence the ones that led to this appeal, using the same document. Mr Mshanga submitted before us that this issue was raised before the High Court but it was not sufficiently dealt with. Ms. Massawe submitted that the cautioned statement was not

the only evidence that grounded the appellant's conviction. As for that statement having been tendered in other proceedings, the learned Principal State Attorney submitted that there is no law that prohibits that course.

With respect, we think the High Court did not deal with this issue deservedly and Ms. Massawe's submissions are too simplistic, to go along with. If one Resident Magistrate of the same Magistrate's Court had ruled the cautioned statement inadmissible for having been recorded out of time, the High Court should have found the second introduction of the same statement into evidence unacceptable and an act of forum shopping. It is worth reminding that the provisions of sections 50 to 58 of the CPA were introduced as safeguards of principles of human rights. See the case of **Emmanuel Malahya v. Republic**, Criminal Appeal No 212 of 2004 (unreported). We also agree with Mr. Mshanga that for the exception to apply, the delay ought to be linked with the culprit being conveyed from one point to another for purposes of investigation. This was not the case here.

Besides, we take Ms. Massawe's submission that the cautioned statement was not the only piece of evidence that grounded the appellant's conviction, as being a concession that it was wrongly acted

upon. For the foregoing reasons, we hold the decisions of the two courts below on the admissibility of the cautioned statement to have been faulty. Consequently, we expunge it from the record. Thus, we find grounds one and three to be meritorious.

We turn to the other piece of evidence that grounded the appellant's conviction. We note that the two courts below found PW1 credible and relied on his testimony to conclude that the appellant was in possession of the trophies. The fourth ground of appeal raises three issues. The first issue relates to PW1's credibility, interrogating, why was PW1's story believed and that of the appellant disbelieved. The second issue questions why Abel Joram, the Wildlife Officer who was very instrumental in setting up the trap and a material witness was not called to testify. The third issue ponders why Anthony Philemon, the other suspect was not charged along with the appellant.

Before the High Court, it had been argued on behalf of the appellant that PW1 did not elaborate as to who Abel Joram had been communicating with prior to the arrest of the two suspects. In resolving that argument, the learned Judge held: -

> *"With regard to the contention of PW1's failure to tell whether it was the appellant who communicated with Abel Joram and concluded the deal before delivery of*

the trophies, Ms. Helela submitted that he did and his evidence was considered in the impugned judgment. It is true and I agree with Mr. Ndunguru that PW1 did not give explanation on this fact. However, I am of the opinion and finding that, that omission does not discredit PW1's evidence. A witness's credibility is not determined by a single omission to clarify on a certain fact but rather the totality of the evidence adduced by him. In this case the trial court having considered PW1's evidence in totality rightly found and held PW1 a credible witness. I subscribe to its findings as there is no material contradictions raised by the appellant to warrant intervention of this court and re-evaluation of PW1's evidence as suggested by Mr. Ndunguru".

Mr Mshanga submitted that the High Court should have drawn an inference adverse to the prosecution for their omission to call Abel Joram. To this, Ms. Massawe responded that Abel Joram was not a material witness.

In our view, the High Court made an obvious error by declining to re-evaluate the evidence, because that is the duty of the first appellate court. We consider this to have been a misapprehension of the law, justifying us stepping into the shoes of the High Court. And when we do so, we find the three issues raised under the fourth ground of appeal to

be of great essence. For one, we doubt PW1's credibility in that he did not explain how Anthony Philemon who features even in the seizure certificate, disappeared into thin air. In view of the appellant's account that she was an innocent passenger having been offered a ride, the omission to charge her companion raises eyebrows. We have once rebuked double standards in treating culprits when we said in **Richard Wambura v. Republic,** Criminal Appeal No. 167 of 2012 (unreported), that "*justice must never be rationed at all*". If PW1 had been credible he would tell the trial court what happened to Anthony Philemon that prevented the police or any other organ from prosecuting him.

Secondly, we find it difficulty to agree with Ms. Massawe that Abel Joram was an insignificant witness. The two courts below agreed, and rightly so, that evidence is weighed and not counted. And the often-cited section 143 of the CPA about the prosecution's discretion to call witnesses was relied upon. However, when the prosecution omits to call the only person who had the telephone contacts of the culprit who agreed on the phone to meet him, then there is nothing to weigh. The two courts below rejected the appellant's defence because she had not cross-examined PW1 on her line of defence. With respect, this would have been relevant in relation to Abel Joram if he had taken the stand. We cannot, therefore,

resist drawing an adverse inference against the prosecution. We allow the fourth ground of appeal.

In the end, when the cautioned statement is expunged, the credibility of PW1 watered down and an adverse inference drawn against the prosecution for not calling a relevant witness, there is nothing left to support the prosecution case. As these findings are sufficient to dispose of the appeal, we allow it.

We quash the judgment of the High Court and set aside the sentences imposed on the appellant. We order the appellant's immediate release if she is not being held in custody for some other lawful cause.

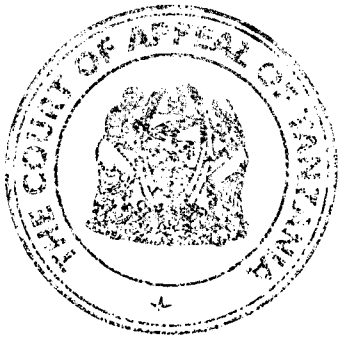
DATED at **DAR ES SALAAM** this 3rd day of January, 2024

G. A. M. NDIKA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 4th day of January, 2024 in the presence of the Appellant via video link from Segerea Prison, her advocate Mr. Joseph Rugambwa and Mr. Cathbert Mbiling'i, learned State Attorney for the Respondent, is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL