IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY
AT MOSHI

CRIMINAL APPEAL NO. 16 OF 2022

(From Economic Case No. 1 of 2020 before the District Court of Same at Same)

ABDALLAH PAULO SAREHE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Last Order: 5th December, 2022
Judgment: 24th January, 2023

MASABO, J.

On 17th December 2021, the District Court of Same, convicted the appellant and sentenced him to serve a prison term of 22 years after it found him guilty and convicted him of for dealing in Government Trophies to wit two (2) pieces of elephant tusks, contrary to section 86(1)(2)(b) of the Wildlife Conservation Act No. 5 of 2009 read together with paragraph 14 of the 1st schedule, section 60(2) and 57(1) of the Economic and Organised Crimes Control Act [Cap 200 RE 2019] [EOCCA] and being found in unlawful possession of the Government Trophies above mentioned contrary to section 86(1)(2)(b) of the Wildlife Conservation Act No. 5 of 2009 read in conjunction with paragraph 14 of the 1st schedule to, and section 60(2) and 57(1) of the EOCCA. It was alleged that on 27th March 2020 the appellant was, found in possession and dealing with the said Government Trophies at Kisiwani area

within Same District in Kilimanjaro region facts which were ardently disputed by the appellant.

The prosecution led evidence to prove that, on the material date the appellant was found transporting the two elephant tusks (Exhibit P5) on a bicycle. Suspecting that he was about to be arrested, he fled leaving the bicycle and the trophies in the hands of one Amiri Eliapenda (PW6), a 15 years old boy in whom he had placed the bicycle after he asked for help pretending that he was tired and unable to ride or push it further. Amiri was arrested and the Government trophies were seized and kept under police custody. Some days later, on 14/4/2020 the accussed was arrested at Korogwe area within Tanga region following a trap set by conservation rangers (PW1 and PW2) and police officers. He was then taken to Korogwe police station and transported to Same Police station. On interrogation by PW3 he confessed to have committed both offences. The caution statement bearing his confession was admitted as Exhibit P1. Further, on 16/4/2020, he made an extrajudicial statement (Exhibit P7) before a justice of peace at Same Urban Primary Court (PW5) confessing commission of the offence. On the same day, 16/4/2020, an identification parade was conducted whereby he was positively identified by PW10 and PW11 who were present when he escaped arrest. The appellant preferred a total denial for his defence. He stated that on 27/3/2020 he travelled to his grandfather's home at Mombo, Korogwe district in Tanga and stayed there until 14/4/2020 a date he was arrested as he was on his way returning to Same.

The trial ended in the prosecution's favour after the trial court found its case credible and thereby convicted and sentenced the appellant to a prison term. His appeal to this court is armed with the following grounds of appeals:

1. The caution statement, Exhibit P1, was wrongly admitted;
2. The seizure form, Exhibit P10, was wrongly admitted as it was not witnessed by an independent witness;
3. The extrajudicial statement, Exhibit P7, was wrongly admitted after the appellant objected its admission;
4. There was no proof that the appellant owned the elephant tusks;
5. There was no sufficient proof that he was unlawfully dealing in Government trophies.

During the hearing that proceeded in writing, the appellant was unrepresented whereas the respondent was represented by Ms. Mary Lucas, learned State Attorney. Submitting in support of the appeal, the appellant argued that when the cautioned statement was tabled for admission he objected because the officer who was tendering it was not the one who recorded it. Thus, the trial court was duty bound to conduct a trial within trial but it unlawfully overruled his objection and proceeded with hearing of the case. In fortification of this argument, he cited the case of **Twaha Ally & 5 others v R,** Criminal Appeal No.2008, CAT and **Frank Michael v** Criminal Appeal No.323 of 2013, CAT. In these two cases, the Court of Appeal underscored that when an objection is made against a confession, the court must conduct an inquiry or a trial within a trial, if the case is before the High Court, to ascertain the voluntariness of the confession.

On the 2nd ground, he cited the Court of Appeal in **Selemani Abdallah & Others v R**, Criminal Appeal No. 384 of 2008 and submitted that, as the certificate of seizure was not signed by an independent witness, its credibility is questionable. On the 3rd ground of appeal, he argued that exhibit P7, the extrajudicial statement, was wrongly admitted after he had objected and disputed to have been taken before PW5 for recording it. This too, he argued, ought to have been resolved through an inquiry.

Moving to the fourth ground, he argued that there was no credible evidence that he was the owner of the elephant tusks found in the possession of Amiri. The prosecution ought to have led credible evidence in proof that he was indeed the owner of the luggage but it failed. Hence, it was wrong for the trial court to rely on the evidence of PW6 who was himself a culprit.

Regarding the fifth ground, he referred the court to the definition of the term 'dealing' provided in Cambridge Dictionary and argued that dealing involves selling and buying. Thus, for the offence of dealing to be proved, there must be a seller and a buyer. He proceeded that, as this aspect was missing, the conviction in respect of dealing in Government Trophies cannot be sustained. He cited section 110 of the Evidence Act, Cap 6 RE 2019 and the case of **Hassan Singano @ Kang'ombe v R** Criminal Appeal No. 57 of 2022, CAT and concluded that the burden of proof rested on the prosecution to prove its case against the accussed beyond reasonable doubt, a duty which was not discharged.

The respondent was fervently opposed to the appeal. On the first ground of appeal, Ms. Lucas submitted that, the objection raised by the appellant did not warrant an inquiry as it was not on the voluntariness of the confession but on the person who recorded it. Thus, the case of **Twaha Ally & 5 others v R** (supra) is distinguishable as the objection addressed in that case concerned voluntariness.

On the second ground she submitted that, there was nothing to fault the trial court on admission of Exhibit P10 because, much as the presence of an independent witness during the seizure is paramount there are exceptional circumstances in which this requirement may be dispensed with especially where it is not possible to procure an independent witness. She argued that, the circumstances of the present case were such that it was difficult to procure an independent witness as there were no houses around the place at which the seizure took place. Hence, it falls within the exception expounded by the Court of Appeal in **Jibril Okash Ahmed v R**, Criminal Appeal No. 331 of 2017.

Having submitted on the first two grounds, the learned State Attorney skipped the third ground as regards the admissibility of Exhibit P7 and proceeded to submit jointly on the 4th and 5th grounds whereby she supported the argument that the charge on possession of Government Trophies was not proved as the appellant was not found in possession of the elephant tusks but they were found in the hands of Amiri. Implicitly, she reasoned, the court should discharge the appellant of the conviction on

possession and sustain the conviction on dealing as the evidence of PW6 considered conjointly with the Exhibit P1 proved that in deed he was dealing in Government Trophies.

In his rejoinder, the appellant reiterated his submission with regard to admission of Exhibit P1 and the failure to conduct an inquiry. As regards the argument that the seizure took place in the wilderness where it was impossible to procure a witness to sign the seizure certificate, he argued the explanation by the counsel are not reflected in the proceedings. They are mere words by the counsel. Hence, there is no reason to sustain Exhibit P10; it should be expunged from the record. He also reiterated that there was no evidence that the he was found in possession of or dealing in Government Trophies.

I have considered the submission by the parties and the lower court records which I have thoroughly examined. I will now proceed to re-assess the evidence on record in the light of the grounds of appeal and submissions thereto and ultimately make a finding on whether the prosecution ably proved its case to the required standards. In this undertaking, I shall be guided by the principle under section 110 of the Evidence Act [Cap 6 RE 2019] which places the burden on the prosecution to prove the charges against the accused person beyond reasonable doubt (see **DPP v. Yusufu Mohamed Yusuf**, Criminal Appeal No. 331 of 2014). With this prelude, I will now move to the grounds of appeal starting with the first and third

grounds of appeal which I prefer to consolidate and determine subsequently as they all concern the appellant's confession.

On the first ground of appeal, it has been argued that the appellant objected the admission of his caution statement (Exhibit P1) and his point of objection was that the person tendering it is other than the officer who recorded it. With respect of the extrajudicial statement which is the subject of the 3rd ground of appeal, he repudiated and claimed that he was never taken to the justice of peace. He has argued that, these two objections ought to have been resolved through an inquiry but this was never done. Contrary to the law, the trial court ignored and wrongly overruled his objections without conducting an inquiry. For the respondent, it has been argued that there was no need to conduct an inqiry in respect of Exhibit P1 as the objection was not on voluntariness while as aforementioned, no reply was advanced in respect of Exhibit P7.

The law attaches significant importance to a confession made by an accused person whom it regards as the best witness as held in **Chande Zuber Ngayaga & Another vs Republic**, Criminal Appeal No. 258 of 2020 where the Court of Appeal stated thus:

> "It is settled that an accused person who confesses to a crime is the best witness. The said principle was pronounced in the cases of **Jacob Asegellle Kakune v. The Director of Public Prosecutions,** Criminal Appeal No, 178 of 2017 and **Emmanuel Stephano v. Republic**, Criminal Appeal No. 413 of 2018 (both unreported). Specifically, in

Emmanuel Stephano (supra) the Court while reiterating the above principle stated that: -

> 'We may as well say it right here, that we have no problem with that principle because in a deserving situation, **no witness can better tell the perpetrator of a crime than the perpetrator himself who decides to confess.** " [Emphasis added].

It is similarly trite that, when a confession is made, it is presumed by law to have been voluntarily made unless an objection is raised as to its voluntariness in which case, the trial court will be obligated to conduct an inquiry or trial within a trial to determine its voluntariness. As held in ***Twaha Ali and Others v. Republic*** (supra):

> "If the objection is made after the 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 trial within trial) <u>into voluntariness or not of the alleged confession</u>. <u>Such an inquiry should be conducted before the confession is admitted in evidence</u>." [emphasis added]

As per this authority and as correctly argued by the learned State Attorney, an inquiry or trial within is only necessary when the objection on admission relates to the voluntariness of the alleged confession. In other words, it is only when the confession is retracted or repudiated. In the present case, much as the appellant objected the admission of his cautioned statement,

his objection, as seen in page 36 of the word-processed proceedings, was not on the voluntariness of the confession. It was on the recorder of the confession. The objection was overruled instantly by the trial court after it held that it was not a legal issue and proceeded to admit it as Exhibit P1. This finding aligns very well with the principle above as the objection on the recorder of the confession need no inquiry to resolve. The invitation to fault the trial magistrate on the ground that he committed a fatal irregularity by failure to conduct an inquiry is, therefore, with no merit. The same could only stand had the appellant retracted or repudiated the confession and not otherwise. In any case, this exhibit bears the name of PW3 who tendered it in court. Surprisingly also, the accussed did not raise this question in the course of cross examination of PW3. Instead, he asked whether before recording the statement he informed him of his rights a questioned which PW3 answered affirmatively. The first ground of appeal consequently fails.

With regard to the extrajudicial statement which was tendered for admission by PW5 and admitted as Exhibit P7, the record shows that, unlike Exhibit P1, the appellant repudiated the confession. He asserted that the statement should not be admitted as he never made it. Obviously, as per the authority above, it was upon the trial magistrate to stop everything and conduct an inquiry to ascertain if the extrajudicial statement was his but this was not done. No doubt, this omission constituted a fatal and an incurably irregularity. This could be the main reason why the learned State Attorney shunned away from this ground and made no attempt to reply to it. For that

reason, Exhibit P7 is expunged from the record and the 3rd ground of appeal is consequently allowed.

Reverting to the 2nd ground, it is the appellant's complaint that exhibit P10 was wrongly procured as it was not witnessed by an independent witness while on the other hand Ms. Lucas is of the view that much as the presence of an independent witness is paramount, it is not without exception. Expounding on the exceptions, she has suggested that, in areas where the seizure is done in the wilderness where there are no people around, the requirement is dispensable.

The requirement to procure an independent witness to a seizure is set out under section 38 (3) of the Criminal Procedure Code [Cap 20 RE 2019]. The paramountcy of this requirement notwithstanding it is, as correctly submitted by the learned State Attorney, not without an exception. As held by the Court of Appeal in **Tongora Wambura v. Republic**, Criminal Appeal No. 212 of 2006 CAT, the absence of an independent witnesses must be considered in view of the particular circumstances of the case. One of such circumstances is where the seizure is done under section 48 of the Drugs Control and Enforcement Act, No. 5 of 2015 (DCEA) as per **Jibril Okash Ahmed v R** (supra). The second exception pertains to seizure done under section 106 (1) of the Wildlife Conservation Act as held in **Jason Pascal & Another vs Republic** (Criminal Appeal 615 of 2020) and **Emmanuel Lyabonga vs Republic** (Criminal Appeal 257 of 2019. In both cases, the Court of Appeal held that the absence of an independent witness to seizure done in

wilderness where there are neither people nor residences or in other circumstances rendering the procurement of an independent witnesses impossible is excusable.

This is however not the case in point as the record show that the trophies were seized at Kisiwani village and two independent witnesses who are PW10, Dafroza Donis, an agricultural extension officer for Kisiwani village and PW11, Fatuma Sadala, a livestock officer at Kisiwani village were not only present but appended their signatures to Exhibit P10. They also positively identified the accussed during the identification parade and testified in court. Accordingly, the argument that there was no independent witness or that the procurement of such witness was impossible as the seizure took place in the wilderness are both materially misconceived and devoid of merit. The 2nd ground of appeal is consequently overruled for want of merit.

Moving on to the 4th ground of appeal, it is the appellant's averment that the offence of possession of Government Trophies was not proved against him. The learned State Attorney has conceded to this ground although on a reasoning different from the one advanced by the appellant. For the appellant it has been argued that the tusks were not found in his possession but under the possession of PW6, Amiri Eliapenda and there was no sufficient proof that the tusks were indeed his as the only evidence available is that of PW6 who was himself a culprit. On the respondent's side it has been argued that the fact that the appellant was not found in actual possession of the

trophies suffices a reversal of the conviction in respect of this count as there can be no conviction on possession for a person not found in actual possession of the thing.

As the prosecution alleged that the appellant was found in possession of the Government Trophies, there can be no doubt it was obligated to prove that the accussed was found in possession of the trophy. As stated above, the evidence on record shows that the trophies were found under the actual possession of PW6 and upon interrogation he mentioned the appellant who was walking ahead him as the culprit. Second, the appellant was not arrested on the said date as he fled. He was arrested on a later date at Mombo area. Two pieces of evidence implicated him, that is, the testimony of PW6 as corroborated by his own confession under in Exhibit P1. The rest of the evidence against him was circumstantial, in that he was seen walking a few paces ahead of Amiri who was pushing the bicycle carrying the trophies and that upon noticing that the said Amiri was stopped and interrogated, he run away presupposing that he well knew what Amiri was carrying otherwise he would not have run. The pertinent question emerging from these facts is whether a person under appellant's circumstance can be convicted of possession?

As the Wildlife Conservation Act and the EOCCA do not define the term "possession" I will, as done by the trial magistrate, turn to the definition of this term in Black's Law Dictionary. Further, I will seek assistance from the

Penal Code [Cap 16 RE 2022]. Black's law Dictionary, 10th Edition, defines the term "possession" as:

> "The fact of having or holding property in one's power, the exercise of dominion over property. The right under which one may exercise control over something to the exclusion of all others; the continuing exercise of the claim to the exclusive use of a material object. **Something that a person owns or controls.**" [the emphasis is mine].

On its part, section 2 of the Penal Code, Cap 16 RE 2019, provides the following definition:

> "possession" "be in possession of" or "have in possession" includes-
>
> (a) **not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person**, or having anything in any place (whether belonging to, or occupied by oneself or not) for the use or benefit of oneself or of any other person;
>
> (b) if there are two or more persons and **any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody** or possession, it shall be deemed and taken to be in the custody and

possession of each and all of them [Emphasis added].

Persuaded by the two definitions above I, respectfully, differ with the reasoning advanced by the learned State Attorney that possession only means actual possession of the thing as that would entails a narrow interpretation contrary to the definition above which encompasses aspects of control and knowledge. A purposive reading of the above definitions clearly shows that a person may be convicted of possession even where he has no physical possession of the thing provided that the court is satisfied that he had the control and necessary knowledge of the thing and consented to have it placed under another person. What remains to be determined to be answered, therefore, is whether the evidence on record established that the appellant had control of the Government Trophies tusks or had knowledge and placed them under PW6 as alleged.

Two pieces of evidence above stated are crucial in answering this question. Starting with the testimony of PW6 who was an accomplice, as per the law, evidence of an accomplice is credible evidence and suffices to enter a conviction. The Court of Appeal has held so in a plethora of authorities in which it has stated that, much as the evidence of an accomplice needs corroboration for it to be acted upon against an accused, a conviction is not necessarily illegal for being based on uncorroborated evidence of an accomplice (***Miraji Idd Waziri @ Simwana and Another v. Republic***

Criminal Appeal No. 14 of 2016 (unreported) and ***Godfrey James Ihuya and Another v. Republic,*** *[1980] T.L.R. 197).*

In the present case, the testimony of PW6 was not without corroboration. It was ably corroborated by the appellant's own confession under Exhibit P1 in which he eloquently stated how he got the two tusks, how he had them under his possession until on 27/3/2020, how on the material date while taking the consignment to a buyer at Mwanga he disguised it by placing his bicycle under PW6 in pretext that he needed help. It is my considered view that, through this evidence, a credible linkage was established between the trophies and the appellant who had the necessary knowledge and personally placed the trophies under PW6 in disguise. Under the premises, the 4th ground of appeal fails for want of merit.

In the fifth ground to which I now turn, the appellant has submitted that there was no sufficient proof that he was unlawfully dealing in the trophies as there was no buyer. This too is without merit as the offence of dealing in Government Trophies does not necessarily require the presence of a buyer to establish as it includes among other things, transfer and transportation of the trophies. Section 84(1) of the Wildlife Conservation Act under which this offence is established states that, a person shall be liable of dealing in Government Trophies if sells, buys, transfers, transports, accepts, exports or imports any trophy. As the appellant herein was found transporting the trophies and in his own volition confessed that he was in deed transporting

the same to Mwanga for sale, he has no excuse. His argument that this count was not proved is baseless and without any merit hence dismissed.

In the upshot of the above, the appeal fails in entirety. The judgment of the trial court is hereby upheld and the appeal is dismissed for want of merit.

DATED and **DELIVERED** at **MOSHI** this 24th day of January, 2023.

X

Signed by: J.L.MASABO

J.L. MASABO

JUDGE

24/1/2023