IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IRINGA SUB REGISTRY)

AT IRINGA

CRIMINAL APPEAL NO. 33 OF 2023

(Original Economic Case No. 1 of 2022 of the District Court of Iringa before Hon. R. Mayagilo, SRM)

STEVEN BRYSON ..... 1ST APPELLANT

SHABANI OMARY @ KALLA..... 2ND APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

2nd & 30th October, 2023

I.C. MUGETA, J:

The appellants were arraigned before the District Court of Iringa and charged with the offence of unlawful possession of government trophy contrary to section 86(1) and 2(b) of the Wildlife Conservation Act, No. 5 of 2009 read together with paragraph 14 of the 1st schedule and sections 57(1) and 60(1) and (2) of the Economic and Organized Crimes Control Act [Cap. 200 R.E 2019]. The prosecution alleged that on the 26th day of December, 2021 at Kinyika Village within the district and region of Iringa, the appellants were found in possession of two pieces of elephant tusks value at Tshs. 34,575,300/= being the property of the Government of the United Republic of Tanzania without any permit or licence.

The appellants denied the charge, a full trial was conducted. At the end of trial, they were found guilty and sentenced to 20 years imprisonment.

Discontented with both the conviction and sentence, they filed their petition of appeal and supplementary grounds of appeal which can be summarized as follows:

1. That, they were not reminded of the charge everytime witnesses came to testify and before they entered their defence.
2. That, they were detained at an unknown place without reasonable cause.
3. That, the charge against them was not proved beyond reasonable doubt.
4. That, the chain of custody of the elephant tusks was broken.

At the oral hearing of the appeal, the appellants appeared in person. They agreed that the 2nd appellant would submit for both of them. The Republic was represented by Muzzna Mfinanga, learned State Attorney.

They argued on the first ground that they were not reminded of the charge every time a witness came to testify and before they entered their defence. In their view, this omission vitiated the trial court's proceedings. On the 2nd ground, they submitted that they were detained at an unknown

place without reasonable cause from 26/12/2021when they were arrested to 28/12/2021 when they were taken to the police station.

In the 3rd ground, they submitted that the charge against them was not proved beyond reasonable doubts. This complaint is three fold. **Firstly,** they faulted the evidence of PW5, the Ward Executive Officer, who, allegedly, witnessed the search. In their view, he was not a reliable witness as he came after they had already been arrested. **Secondly**, that the 1st appellant's caution statement was recorded outside the prescribed time of four hours as there is no evidence showing the time the 1st appellant was taken to the police station so as to reckon the time for recording the said statement. **Thirdly,** the prosecution evidence contains contradiction as PW1 and PW2's evidence contradicted each other on the type of the bag used to carry the tusks. That PW1 said the trophies were in a sulphate bag while PW2 said they were in a white bag with stripes.

The appellants submitted on the last ground about the chain of custody of the trophies that it was broken because PW1 testified that he did not know the name of the person he gave the trophies to. Further, in their view, the prosecution did not prove how the exhibits were received, stored and how they were retrieved for admission as evidence in court. They, thus, urged the court to expunge the said exhibit from the record.

In opposing the appeal, Muzzna Mfinanga argued on the first ground that the proceedings show that the appellants pleaded to the charge. Again, before hearing started, they pleaded to the charge. She argued further that indeed the appellants were not reminded of their charge thereafter. However, it is not a legal requirement that they be reminded and the omission did not prejudice them.

On the 2nd ground, the learned State Attorney contended that after the arrest, the appellants were taken to Nyangai to recover other trophies. Thus, the delay was for a reasonable cause. She contended further that section 50(1)(a) of the Criminal Procedure Act requires a caution statement to be recorded within 4 hours after being under restraint. However, there are exemptions where there is ongoing investigations. In her view, the caution statement was timely recorded as the duration from when the appellants were taken from Kanyika to Nyangai and finally to the police station ought to be excluded. To support her view, she cited the case of **Ngasa Sita Mabundu v. Republic**, Criminal Appeal No. 254/2017, Court of Appeal – Singida (unreported). She also cited the case of **Chacha Jeremiah Murimi and Others v. Republic**, Criminal Appeal No. 551/2015, Court of Appeal – Mwanza (unreported) where the court held that time extended before recording an accused's caution statement

depends on the complexity of issues involved in the investigation and that the statement cannot be invalidated if the information contained is relevant to the fact in issue.

On the 3rd ground, she submitted that the charge against the appellants was proved beyond reasonable doubt. She argued that section 42(1) of the Criminal Procedure Act and section 106(b) of the Wild Life Conservation [Cap. 283 R.E 2022] allows search in emergency situations like in the present case. Thus, the search was lawful. In addition to that PW5 was summoned upon the appellants being arrested. She argued that the charge was proved as the appellants were found with the trophies and they had no permit. Moreover, the appellants had the burden to prove that they held the trophies lawfully, which they failed.

In her view,PW3 and PW5 were credible independent witnesses who proved that the appellants were found with the trophies. The 1st appellant confessed in his caution statement to have committed the offence. She cited the case of **Mohamed Haruna @ Mtupeni and Another v. Republic**, Criminal Appeal No. 259/2002 Court of Appeal – Tabora (unreported) where the court held that the best witness is as accused who freely confesses his guilt.

In disposing the appeal, I will discuss each ground as raised by the appellants.

On the first ground, the record shows that on 11/01/2022, the charge was read to the appellants where they pleaded not guilty. The charge was read again on 25/1/2022 where they pleaded not guilty. There is no law which provides that a charge should be reminded to the accused person every time a witness testifies or before the accused gives evidence. As argued by Muzzna, even if that was the law, the omission did not prejudice the appellants as the appellants. They were fully aware of the charge against them from the commencement of trial. This ground fails.

The complaint in the 2nd ground is that the appellants were detained at unknown place without justifiable cause. PW1 testified that when they arrested the appellants on 26/12/2021, they informed him that there are other trophies at Nyangai. However, on the next day they did not retrieve any trophies at Nyangai. Thus, on 28/12/2021 they were taken to the police station. They were arraigned in court on 11/1/2022. No reasons were stated for the delay in arraigning them. Holding suspects illegally should be discouraged. In this case I do not see how the illegality prejudiced the trial.

The 3rd ground is that the charge was not proved beyond reasonable doubts. Beginning with the complaint that the search was illegal, the record shows that the WEO (PW5) arrived after the appellants had been arrested. Thus, PW5 did not see what the appellants were arrested with. As the arrest and search was planned, the park rangers ought to have an independent witness with them at the time of arrest. PW3 may be considered independent witness because he is a bodaboda driver who took PW1 to the scene of crime and, according to him, he witnessed the appellants being arrested with the trophies. However, his evidence ought to be attended with circumspection for want of coherence and material contradictions between his evidence and that of PW1. While PW1 said he met the appellants at Mbigama play grounds, PW3 had this to say:

> *"We reached at Mbigama and found two people who had a parcel. The person whom I took there went over to those people and as I was far from them I could not understand what transpired. The guy I went with came and told me to take him to the play ground, upon reaching there that person received a call, I did not understand the conversation but he told me to switch on the light on the motorcycle and after that two people came with a parcel ...".*

The phrases "the person I took" and "the guy I went" refers to PW1 which means PW1 met the accuseds at two different places before he arrested them. I have failed to reconcile the evidence regarding the two people with a parcel at Mbigama and the two people with a parcel at Mbigama play ground. This makes PW3 an unreliable witness because PW1 did not testify about meeting people with a parcel at two different places. Having discredited the evidence of PW3, the inevitable conclusion is that the appellants were arrested without an independent witness. That being the case there defence that they were arrested at different places with nothing ought to be believed. That conclusion brings a reasonable doubt in the prosecution's case.

The complaint regarding the 1st appellant's caution statement is that it was recorded out of the prescribed 4 hours. Indeed, the record does not show the time the appellants were taken to the police station. It just shows that the appellants were taken to the police station on 28/12/2021. The 1st appellant's statement was recorded from 14:00 hours the same day. It was upon the prosecution to prove that the caution statement was recorded timely. Since the time the 1st appellant arrived at the police station is not certain, this creates doubts on whether it was recorded in time. The doubts

have to be resolved in favour of the accused persons. I, therefore, hold that the 1st appellant's caution statement ought to be disregarded.

The complaint in relation to the evidence of PW1 and PW2 is that it contradicted each other on the bag used to carry the tusks. That while PW1 referred to a sulphate bag, PW2 referred to a white bag with stripes. In my view, this is not a contradiction because the two witnesses referred to the state of the exhibit at two different places. PW1 referred to the scene of the crime and PW2 described it at the police station. Nevertheless, the contradiction, if any, is minor. It does not go to the root of the case.

The 4thground of appeal is on chain of custody of the trophies from when they were seized to their being tendered in evidence during the trial of the appellants. It is settled principle that in cases involving exhibits, there has to be an unbroken chain of custody and there has to be a chronological documentation and/or paper trail showing the seizure, custody, control, transfer, analysis and disposition.

The Court of Appeal has underscored the importance of evidence maintaining chain of custody in **Paulo Maduka and Others v. Republic**, Criminal Appeal No. 110 of 2007, Court of Appeal – Dodoma (unreported).The court held that the idea behind recording the chain of custody is to establish that the alleged evidence is in fact related to the

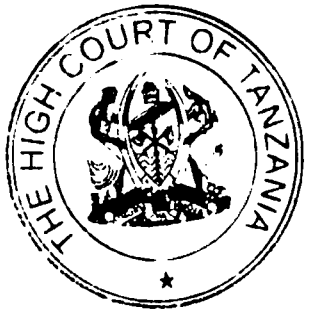
alleged crime rather than, for instance having been planted fraudulently to make someone guilty.

In the present appeal PW1 testified that upon arresting the appellants with the trophies he handed the elephant tusks to the store keeper at the police station whose name he had forgotten. PW2 who valued the elephant tusks testified to have obtained the trophies from one David and valued them. On his part, PW6 the store keeper at KDU, testified to have received the tusks from PC Mganga for custody and brought them in court whenever they were needed. There is no evidence to show if PC Mganga who took the tusks to PW6 of KDU is the same person to whom PW1 handed over the tusks at the police station. In the same vein, when PW2 valued the tusks, the same were given to him at the police station by David. It is unknown if David is the store keeper whose name PW1 forgot. Therefore, the movement of the tusks is not properly explained.

I understand elephant tusks cannot be easily substituted but in criminal justice maintaining the integrity of the process is of paramount importance. The above evidence does not provide a chronological sequence of how the tusks were handled. I, thus, agree with the appellants that the chain of custody for the trophies was broken and it cannot be

guaranteed that the tusks tendered in court actually related to the crime under discussion.

In the event, I hold that the prosecution's case against the appellants was not proved to the hilt. The appellants were erroneously convicted. I, hereby quash the conviction and set aside the sentence. I order for their release from custody unless otherwise lawfully held for another cause.



I.C. MUGETA

JUDGE

30/10/2023

Court: Judgment delivered in the presence of the 1st and 2nd appellants in person and Ms. Muzzna Mfinanga, learned State Attorney for the respondent.

Sgd. S.A. MKASIWA

Ag. DEPUTY REGISTRAR

30/10/2023