IN THE COURT OF APPEAL OF TANZANIA

AT KIGOMA

(CORAM: WAMBALI, J.A., KITUSI, J.A. And KENTE, J.A.)

CRIMINAL APPEAL NO. 229 OF 2021

JADILI MUHUMBI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Kigoma)

(Matuma, J.)

dated the 16th day of April, 2021
in
Economic Appeal No. 4 of 2020

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JUDGMENT OF THE COURT

3rd & 10th June, 2022

KITUSI, J.A.:

After the necessary consent and certificate of transfer by the Director of Public Prosecutions, Jadili Muhumbi, the appellant and Maswanya Jackson were tried by the District Court of Kigoma for being in unlawful possession of two pieces of elephant tusks without any lawful permit from the Director of Wildlife, an economic offence.

It was alleged that the possession was in violation of section 86(1) and (2)(c)(iii) of the Wildlife Conservation Act No. 5 of 2009 (WCA) as amended by section 59(a) and (b) of Act No. 4 of the Written Laws (Miscellaneous Amendment) Act No. 2 of 2016 read together with paragraph 14 of the 1st schedule of the Economic and Organized Crime Control Act [Cap 200 R.E. 2002] (EOCCA) as amended by section 16 (a) of the Written Laws (Miscellaneous Amendment) Act, No. 3 of 2016 and sections 57 (1) and 60(2) of EOCCA as amended by section 13 (b) of the Written Laws (Miscellaneous Amendment) Act No 3 of 2016.

On the strength of the evidence that we will refer to below, the District Court convicted the appellant and the said Maswanya Jackson and sentenced each to 20 years imprisonment. They both appealed to the High Court where Maswanya Jackson's appeal was successful, leading to his release, while the appellant's conviction and sentence were confirmed. This is the appellant's second attempt.

Here is what allegedly happened prior to the trial and conviction. One Ahazi Philipo Sanya (PW2) a Wildlife Officer stationed at Tabora received information that at Mpeta village within Uvinza District some people were looking for a buyer of elephant tusks, the appellant as the

owner and Maswanya Jacskon as the broker. PW2 set out for Uvinza village where he recruited assistance of the police who assigned CPL Edward (PW1) to join him. PW1 and PW2 had PW3 the Village Chairman informed of what was going on and that they were going to set up a trap by pretending to be interested buyers.

Four people including the appellant and Maswanya arrived at the agreed point, the appellant carrying a gunny sack. According to PW1 and PW2, two out of the four suspects managed to escape on realizing that they had walked into a trap. However, the appellant and Maswanya were arrested allegedly in the presence of (PW3).

At the time of opening the sack, one Chacha Mwita (PW7) who was passing by, was asked to be an independent witness, and he testified in support of that fact. Two elephant tusks were found in the said gunny sack, and they were admitted during the trial as exhibit P2, while the certificate of seizure was admitted as exhibit P1. The tusks were handed over to PC Samson (PW5) on 4/4/2019 at the time of putting the suspects in police custody and on the same date PW5 handed over exhibit P2 to the police exhibit keeper PW6. On 10/4/2019 PW8 handed over exhibit P2 to PW4, a Wildlife Officer who identified and valued them as being worth USD

15,000. As we shall later see, PW4's real name and title was raised by the appellant's counsel as an issue. The prosecution also relied on a cautioned statement of the appellant that was recorded by PW10, and admitted as Exhibit P4.

In defence, the appellant retracted the statement reiterating the fact that he made it as a desperate way of avoiding continued torture in the hands of the police. As for the alleged possession of tusks, he disputed that fact and narrated how he found the police standing by a parked car with a sack in which the tusks were later retrieved from. He stated that he had nothing to do with the tusks but that the contraband was forced into him by the police. He denied the fact that he was arrested together with Maswanya and even pointed out that PW3 was not there at the time of his arrest.

On the basis of that evidence, the trial court convicted the appellant and Maswanya as already stated. On appeal however, the cautioned statement was expunged for having been recorded out of the prescribed time. The certificate of search and seizure was also expunged on the ground that the person who executed the search and seizure wrongly assumed powers under section 38(1) of the Criminal Procedure Act Cap 20

R.E. 2019 (the CPA). The learned judge did not stop there for, after satisfying himself that PW3 and PW7 did not witness the arrest of the culprits and reducing their testimonies to hearsay, he proceeded to expunge their respective testimonies.

Connected to the above, the learned judge concluded that PW1 and PW2 lied in stating that the search and seizure was witnessed by independent witnesses, PW3 and PW7. Although the learned judge found that lie told by PW1 and PW2 to be a dark spot in their evidence, he considered it not so damaging in their credence so he sustained the appellant's conviction on the very evidence of PW1 and PW2, accepting their account in relation to the fact that the appellant was found in possession of the two elephant tusks.

The appellant questions that decision. He initially filed four grounds of appeal which were later supplemented by two grounds of appeal filed by Mr. Thomas Matatizo Msasa, learned advocate, who argued the appeal on his behalf.

After synchronizing those grounds of appeal, Mr. Msasa argued only three grounds. The first ground is that the value of the tusks was not

proved because the person who made the valuation and signed the valuation report is not the one who testified as PW4. This is the complaint on PW4's name which we hinted on earlier. The second ground of appeal is that even if the valuation certificate was to be considered valid, the weight of the tusks indicated in the charge sheet was wrongly pegged on the whole elephant. The third ground is that the prosecution did not prove the case beyond reasonable doubt.

We shall commence with the third ground of appeal for the obvious reason that our determination of that ground of appeal will have a bearing on whether or not the first and second grounds of appeal will still need to be dealt with.

In relation to the third ground of appeal, Mr. Msasa pointed out that after expunging the evidence of PW3 and PW7 the case for the prosecution rested only on the evidence of PW1 and PW2. Then the learned counsel raised two arguments aimed at suggesting that those witnesses were unreliable. The first argument was that while PW1 and PW2 stated that PW3 was a witness to the arrest of the culprits, PW3 said to the contrary that he joined PW1 and PW2 later when they had already arrested the culprits. The second argument was that after the learned judge had found

PW1 and PW2 to be liars, it was wrong for him to believe them on the fact that they found the culprits in possession of the elephant tusks.

Mr. Robert Magige, learned Senior State Attorney representing the respondent Republic resisted. He submitted that PW1 and PW2 are entitled to credence, citing the case of **Goodluck Kyando v. Republic** [2006] T. L. R. 363, in support. The learned Senior State Attorney insisted that we should sustain the concurrent findings of the two courts below on the credibility of PW1 and PW2.

We called upon Mr. Magige learned Senior State Attorney and Mr. Msasa, learned advocate to comment on whether it was correct for the learned judge to expunge the testimonies of PW3 and PW7 after being satisfied that they adduced hearsay evidence. They were of the view that he was not. Mr. Msasa submitted that the learned judge should have simply attached little value to their testimonies.

In resolving the competing arguments in relation to the third ground of appeal, we begin by making it clear that the prosecution case eventually rests only on the evidence of PW1 and PW2, as submitted by Mr. Msasa. This is because; one PW3 and PW7 who would be independent witnesses

to the arrest did not witness that arrest so they would not be in a position to provide an answer to the pivotal question; whether the appellant and Maswanya were, in fact, found in possession of the tusks. Two, the testimonies of PW3 and PW7, the said independent witnesses were expunged.

The critical question for our immediate determination in our view, is whether it was correct for the learned judge to rely on the evidence of PW1 and PW2.

While we agree with the learned judge that PW1 and PW2 lied in stating that PW3 was there with them at the time of effecting the arrest of the culprits, we find it hard to go along with him that the accounts of these same witnesses would be acted upon in making a finding that the said culprits were found in possession of elephant tusks. We do not think that the principle in **Goodluck Kyando v. Republic** (supra) that every witness is entitled to credence, as argued by Mr. Magige, holds good even when such a witness is caught on a lie at some point, as in this case. In the present case we would reiterate the principle that a witness who tells a lie on a material point should hardly be believed on other points, unless justified by some other reasons [See the cases of **Misoji Ndebile @ Soji**

v. Republic [2015] T.L.R. 517; **Bahati Makeja v. Republic**, Criminal Appeal No. 118 of 2006 (unreported)].

The above scenario considered together with the appellant's defence that he found the police with the sack containing the elephant tusks, as well as the legal requirement under section 106 of the WCA for an independent witness, make the judge's conclusion that the appellant was found in possession of the tusks, all the more doubtful. That there is no certificate of search and seizure to consider after the same had been expunged, worsens the case for the prosecution. It is therefore our conclusion that the prosecution did not prove the case beyond reasonable doubt.

Although the above conclusion would have sufficed to dispose of this appeal, we desire to address the first and second grounds of appeal, albeit in passing. Mr. Msasa drew our attention to the name of PW4 as appearing on the record of appeal immediately before she testified. Her name is written; Imelda Mbarouk. He contrasted it with the name of Emelda Mbaruku the name of the Assistant Game Warden who signed the Trophy Valuation Certificate, (exhibit P3). Mr. Magige submitted that PW4 and the person who signed exhibit P3 are one and the same person. We agree with

him because we cannot permit criminal justice to hang on hairsplitting arguments. We also agree with the learned Senior State Attorney that on the decision of the Court in **Jamal Msombe & Another v. Republic,** Criminal Appeal No. 28 of 2020 (unreported), the difference of title of those who prepare valuation certificates do not exist so long as one is a game ranger, or a game warden. We therefore find no merit in the first ground of appeal.

In the second ground of appeal, Mr. Msasa submitted that the valuation of the two elephant tusks should have been made according to their value as per the first schedule to the Wildlife Conservation (Valuation of Trophies) Regulations, 2012, Government Notice No. 207 of 2012 as decided by the Court in the case of **Emmanuel Lyabonga v. Republic,** Criminal Appeal No. 257 of 2019 (unreported). On the other hand, Mr. Magige maintained that valuation has to be pegged on the value of the whole animal.

We have pronounced ourselves on this issue in **Emmanuel Lyabonga v. Republic** (supra) that: -

"However, "where it is otherwise provided" the valuation shall not be based on the value of the entire animal killed. Based on this scheme, the First Schedule to the Regulations prescribes distinct values for certain animals such as elephant and rhino".

For consistency, the same should have applied in this case, so there is merit in Mr. Msasa's complaint in the second ground of appeal. The second ground of appeal has merits, in our view.

Before we take leave of this appeal, we have to address the propriety of the learned judge's order of expunging the evidence of PW3 and PW7. We agree with Messrs. Magige and Msasa that the course taken by the learned judge was rather irregular because his finding that the evidence of those witnesses was hearsay did not justify his order expunging their testimonies. What is normally done with hearsay evidence is to attach little or no value to such evidence while it remains on record. [**Vumi Liapenda Mushi v. Republic**, Criminal Appeal No. 327 of 2016 (unreported)]. With respect, we think it is irregular for a judge or magistrate to expunge evidence for the reason that it is hearsay.

From our discussion in relation to the evidence of PW1 and PW2, which would not have changed even if the evidence of PW3 and PW7 had not been expunged, and having found merit in the third ground of appeal concluding that the case against the appellant was not proved beyond reasonable doubt, we allow the appeal, quash the conviction and set aside the sentence. We order the appellant's immediate release if he is not being held for another lawful cause.

DATED at **KIGOMA** this 9th day of June, 2022.

F. L. K. WAMBALI
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered on this 10th day of June, 2022 in the presence of the appellant who is represented by Mr. Thomas Matatizo Msasa and Ms. Happiness Mayunga, learned Senior State Attorney for the respondent/Republic is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL