IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

(CORAM: MUNUO, J.A., MBAROUK, J.A., And BWANA, J.A.)

CRIMINAL APPEAL NO. 44 OF 2009

JEROME HAMISI .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mtwara)

(Lila, J.)

dated the 9th day of February, 2009

in

Economic Crime Appeal No. 1 of 2008

JUDGMENT OF THE COURT

28 September & 5 October 2011

MUNUO, J.A.:

The appellant, Jerome Hamisi is challenging the decision in Economic Crime Appeal No. 1 of 2008 in the High Court of Tanzania at Mtwara, wherein Lila, J. dismissed the appeal from the conviction and sentence in Economic Crime Case No. 3 of 2002 in the District Court of Nachingwea at Nachingwea in Lindi Region.

In the said Economic Crime Case, the appellant then Accused No. 2, jointly with three others who are not parties to this appeal, were charged under the provisions of sections 67 (1) (2) (b) and (2A) of the Wildlife Conservation Act, 1974 as amended by Act No. 10 of 1989, read together with paragraph 15 (d) of the 1st Schedule to and Section 59 both of the Economic and Organised Crime Control Act, 1984 as amended by Act No. 10 of 1989.

The prosecution alleged that on the 9th October, 2002 at Namanga Village within Nachingwea Distict, the appellant and his co-suspects, jointly and together, were found in possession of government trophies namely 6 pieces of elephant tusks valued at TShs. 633,114/43 the property of the Government of the United Republic of Tanzania, without a permit or licence. The appellant denied the charge.

In the course of patrolling the Masasi Game Reserve, PW1 Juma Mandindi Swalehe was tipped that some villagers were looking for purchasers of elephant tusks. It was on the 9th October, 2002 at about 8.00 p.m. when PW1 and his fellow Game Reserve Officers Alex Makingi,

Abdallah Jaffer and Juma Issa Mwachu got the said information at Naipingo Village in Nachingwea. The purported seller of elephant tusks, the game reserve officers learnt, was Jerome Hamisi, the present appellant.

The game reserve officers traced the appellant. Pretending to be interested buyers, the appellant allegedly told PW1 that the tusks for sale were at Makanjila so the parties went to Makanjila. There, the appellant took a hoe from a house and went to dig out, from the ground, the elephant tusks for the purchasing party. Shortly, PW1 stated, the appellant returned carrying a sulphate bag in which there were six tusks, Exhibit P1, later certified under a Certificate Ref.No. WD/NH/CF2/74/4/177 dated the 8th June, 2004 to be valued at Tshs. 833,114/45.

The case was investigated by PW3 E 8151 Detective Station Sergeant Athumani who visited the scene of crime and drew a sketch map, Exh. P2.

The appellant gave a sworn defence denying the charge. He narrated at length that the game officer requested him to go to help them

trace rice sellers at Makanjila, not to get tusks or to buy trophies as the prosecution witnesses alleged. The appellant lamented that the case was concocted. He stated, furthermore, that some tusks in the game officers vehicle and that Exhibit P1, the 6 tusks were found at the home of Accused No. 3, Fatuma Chingulile. He was not involved in any transaction, the appellant insisted.

The appellant was unrepresented. He filed 9 grounds of appeal which he adopted when he appeared before us. In his memorandum of appeal, the appellant complained that the conviction was wrongly grounded because no independent evidence corroborated the evidence of game officer, PW1. He further argued that PW1 and the investigating officer, PW3 Detective Station Sergeant Athumani gave contradictory evidence on the number of tusks the appellant allegedly possessed because whereas PW1 and PW2 stated that there were six tusks, PW3 said that the tusks numbered three only. He claimed that the tusks, Exhibit P1, were in the vehicle of the game officers. Moreover, the appellant alleged the prosecutor framed up the case because he wanted them to bribe him.

The respondent Republic was represented by Mr. Prudens Rweyongeza, learned Senior State Attorney, assisted by Mr. Ismail Manjoti, learned State Attorney. Mr. Rweyongeza supported the conviction and sentence imposed by the trial court and upheld by the learned judge on the ground that unknown to the appellant, the game reserve officers led by PW1, set up a trap of pretending to be interested in buying elephant tusks from the culprit. The appellant took PW1 to a place he had buried the tusks he was offering for sale and it was after he had dug them out of the ground and brought them for sale in sulphate bag that he was apprehended and turned over to the police for prosecution.

The Senior State Attorney referred us to the case of **Thadei Mlomo and Others versus Republic** (1995) TLR 187 at page 91 wherein the Court upheld a conviction in a case in which the appellant went to dig out a gun he had buried in the ground. Here, the appellant hid not a gun but 6 elephant tusks he dug out from the place he had buried them, brought the said tusks believing that PW1 and his party were genuine trophy buyers, whereas they were game reserve officers on patrol, out to trap poachers and trophy smugglers.

With regard to the number of witnesses the prosecution called to prove the case, the learned Senior State Attorney observed that under the provisions of section 143 of the Evidence Act Cap. 6 R.E. 2002, no specific number of witnesses is required to prove a case. The section states, and we quote:

> "S. 143. Subject to the provisions of any other written law, no particular number of witnesses shall in any case be required for the proof of a fact."

It was the appellant who led to the discovery of the 6 tusks, Exhibit PW1, he was offering the said tusks for sale and in the process he was arrested and charged, Mr. Rweyongeza submitted. He possessed the tusks illegally because he neither had a permit nor licence to possess them. The offence has been charged with was a scheduled economic crime at the material time, the learned Senior State Attorney argued, urging us to dismiss the appeal because it is lacking in merit.

The issue is whether the appellant was found in unlawful possession the 6 elephant tusks, Exhibit P1.

In this case, the appellant led the game reserve officer to the place he had buried the 6 tusks he wanted to sell to them after they posed as interested purchasers of such trophies. The 6 tusks were brought by the appellant in a sulphate bag he dug out of the ground at the farm of accused No. 3. Had the appellant not hidden the tusks there, he would not have led to their discovery. PW3, the investigating officer was not present when the appellant led to the discovery of the 6 tusks which he brought to PW1 in a sulphate bag, for purchase only to have PW1 turn against him, arrest and take him to the police to answer the present charge.

This being a second appeal we find no ground for upsetting the trial court's findings on credibility. As the learned judge rightly observed:

> "--- The trial magistrate heard and saw PW1 testifying in court. He accepted his evidence and raised no doubts on his credibility. I have

> accepted his evidence and raised no doubts on his credibility. I have read PW1's evidence and I have noted nothing suggesting that he was of doubtful credibility. I cannot therefore interfere with the trial court findings of fact regarding credibility of PW1 for I have had no opportunity of seeing and assessing his credibility."

We maintain the same position because we would only be able to interfere with findings of fact by a trial court if –

- the trial court had failed to consider a material fact/s or
- the trial was flawed by fundamental irregularities such as failing to include assessors in a case triable with assessors which omission would render the trial illegal or
- there are apparent contradictions and discrepancies which the trial court ought to have considered but failed to do so

resulting in erroneous findings on the credibility of material witnesses or

- any other grounds justifying interference.

We find it pertinent to reaffirm the decision of the Court on credibility in the case **Goodluck Kyando versus Republic,** Criminal Appeal No. 118 of 2003 (CA) (unreported) in which the Court held;

> "It is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness."

In this case we simply have no reason for disbelieving the evidence of the game officer who testified as PW1. He accompanied the appellant to Namanga Village, not to buy rice as the appellant stated in his defence but to by elephant tusks the appellant had hidden there.

We stated *supra* that this being a second appeal, the Court rarely interferes with the concurrent findings of fact by the courts below. The Court reaffirmed this principle in the case of **Director of Public**

We accordingly dismiss the appeal.

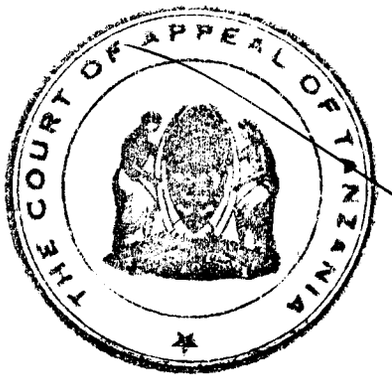
DATED at MTWARA this 3rd day of October, 2011.

E.N. MUNUO
JUSTICE OF APPEAL

M.S. MBAROUK
JUSTICE OF APPEAL

S.J. BWANA
JUSTICE OF APPEAL

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



(M.A. Malewo)
DEPUTY REGISTRAR