

**IN THE COURT OF APPEAL OF TANZANIA  
AT ARUSHA**

**(CORAM: MWARIJA, J.A., LILA, J.A., And KWARIKO, J.A.)**

**CRIMINAL APPEAL NO. 527 OF 2016**

**SYLIVESTER STEPHANO .....**  
**APPELLANT**

**VERSUS**

**THE REPUBLIC .....**  
**RESPONDENT**

**(Appeal from the Judgment of the High Court of Tanzania  
at Arusha)  
(Maghimbi, J)**

**Dated 14<sup>th</sup> day of December, 2015  
in  
(Criminal Appeal No. 36 of 2016)**  
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**JUDGMENT OF THE COURT**

*27<sup>th</sup> November. & 4<sup>th</sup> December, 2018*

**LILA, J.A.:**

In the District Court of Hanang' (henceforth the trial court), the appellant was charged with and tried for the offence of being found in unlawful possession of Government trophy contrary to paragraph 14(d) of the First Schedule to and sections 57(1) and 60(2) of the Economic and Organized Crimes Control Act, Cap. 200 R. E. 2002 (the Act) read together with sections 86(1) and (2) (b) of the Wildlife Conservation Act, No.5 of 2009. It was alleged that on 15/09/2013 at Endasack Village within Hanang' District in Manyara Region, the appellant was

found in unlawful possession of Hippopotamus teeth valued at Tzs 2,400,000/= the property of the United Republic of Tanzania. The trial ensued and at its conclusion he was convicted and sentenced to a term of seven years imprisonment. He lost the appeal in the High Court; hence this second appeal against both conviction and sentence.

The prosecution marshalled four witnesses in the bid to prove the charge against the appellant. D 5236 Detective Corporal Simon (PW1) and E. 9579 Detective corporal Sijaona (PW3) said on 15/9/20013 at around 17 Hrs together with Inspector Martin and PC Erick were on patrol and on being tipped by undisclosed person that the appellant was selling ivory, they proceeded to his homestead. Thereat, they conducted an emergency search and only the appellant, Inspector Martin, PW3 and the area chairman one Faustin Safari (PW2) searched the house and they came out with a black plastic bag containing two teeth they suspected to be elephant tusks. PW1 prepared a search warrant (Exh. PE1) and the same was signed by those who participated in the search. PW1 said the third policeman remained outside during the search in the appellant's house. PW3 said he participated in the search and

in the living and left side room, they found nothing hence moved to the right side room where the appellant sleeps and therein, under the bed, they found two elephant tusks kept in a black plastic bag. Faustin Safari (PW2) said he participated in the search and that as they were moving into the right side room, they found one policeman in the living room. PW2 and PW3 said they arrested the appellant and later found an expert from the Ministry of Natural Resources who identified the two teeth as being hippopotamus teeth. Adayo Karama (PW4), a Wild Life Officer with a twenty years' experience, said he identified the two teeth at Katesh police station as being hippopotamus teeth (Exh. PE2) which stem in the middle of the mouth and he valued them to be worth Tshs 2,400,000/= and that he prepared a certificate of value (Exh. PE3).

The appellant (DW1) gave a sworn defence in which he denied being found in possession of the hippopotamus teeth in his room. He claimed that he fell into the police hands just as he returned from grazing his cattle. That at the time his room was being searched, another policeman was at the living room and when they entered the other room belonging to another tenant, a policeman looked at the back of the door and took out

a plastic bag. That allegation was supported by Emanuel Valerian (DW2) who told the trial court that while outside the house, he saw a police car arriving, policemen disembarked from it and entered in the appellant's house. That at the time they were searching in one of the rooms, one police officer remained in the living room. That thereafter the appellant was arrested.

In convicting the appellant, the learned trial magistrate found that the emergency search in the appellant's house was properly conducted and a plastic bag containing hippopotamus teeth was found therein. He also found that the appellant signed Exh. PE1. He was also satisfied that PW2 and PW3 who witnessed the search proved that the house in which Exh. PE1 was found belonged to the appellant and that the teeth were identified by PW4 to be hippopotamus teeth valued at Tshs 2,400,000/=.

The learned Judge on appeal disagreed with Ms. Hyera, the learned Senior State Attorney, who supported the appeal on the ground that no certificate of seizure was prepared and filled after Exh. PE2 was found in the appellant's house hence offending the requirements of section 22(3) of the Act and

section 38(3) of the Criminal Procedure Act, Cap. 20 R. E. 2002 (the CPA). The learned Senior State Attorney also contended that it was doubtful as to whether the teeth seized during the search were the same as those tendered as exhibit in court (Exh. PE2). Such doubts, she contended, ought to have been resolved in favour of the appellant hence warranting his appeal being allowed. Conversely, the Judge reasoned that according to the evidence by PW2 and PW3, it was clear that the search was properly conducted and was witnessed by PW2, an independent witness. Regarding compliance with sections 22(3) of the Act, she was of the strong view that as it was an emergency search, Exh. PE1 was satisfactory in terms of its contents (substance) and the same was admitted without an objection from the appellant. She then proceeded to dismiss the appeal.

We propose to pose here so as to interject a remark, albeit briefly, that Ms. Hyera's argument was in respect of the policeman who conducted the search not filling a certificate of seizure which is intimated under section 22(3) of the Act which the learned Judge reproduced in her judgment. Further, as it can be discerned from the record Exh. PE1 was tendered as a

search warrant not as a certificate of seizure. For avoidance of doubts it is categorically titled “Hati ya Upekuzi wa Dharura”.

Still aggrieved, the appellant, at first, filed a memorandum of appeal comprising of five grounds of complaint. But closely examined, central in the appellant’s complaints are failure by the High Court to note the inconsistencies and contradictions in the prosecution evidence, variation between the charge sheet and the evidence on record, that the search was not properly conducted and that no seizure certificate showing the things found in the course of search was tendered in court in accordance with section 38(3) of the CPA.

Just four days before we heard the appeal, the appellant lodged a supplementary memorandum of appeal comprised of only one ground of grievance which, to say the least, is patently incoherent. It states that;

*“ 1. That, both the trial Court and the first appellate Court did not consider that section 86(1) (2) of the Wildlife Conservation Act No. 5 of 2009 as was cited in the charge sheet, did not specifically state what kind of trophy the appellant was alleged to be found in the prosecution, hence the same is defective.”*

In all, the appellant is seeking to impugn the decision of the High Court.

The appellant appeared in person at the hearing of the appeal and was unrepresented. For the respondent Republic was Ms. Agness Hyera, learned Senior State Attorney and Azael Mweteni, learned State Attorney. They supported the appeal.

Arguing in support of the appeal after he had adopted his grounds of appeal, the appellant raised yet a new ground that the chain of custody was not observed particularly on the way the alleged trophies were handled right after being found in his house to police and then to PW4. He doubted how the same reached PW4.

In respect of the evidence being at variance with the charge sheet, the appellant contended that while the evidence and certificate of value (Exh. PE3) revealed that two hippopotamus teeth were found in his house, the charge is silent on the number of teeth found.

Elaborating on contradictions and inconsistencies in the prosecution evidence, the appellant pointed out that while PW1 and PW3 told the trial court that they found, in the course of

search, two elephant tusks which they later learned that they were hippopotamus teeth, PW2 said they found elephant tusks.

Another point raised by the appellant was that neither a search warrant nor a certificate of seizure were prepared and filled shortly after the search.

As hinted earlier herein, the respondent Republic supported the appeal. Mr. Mweteni did not mince words that he was at one with the appellant that the evidence on record could not support his conviction. He entirely agreed with the appellant's contentions that there were apparent contradictions in the prosecution evidence on what was actually found in the appellant's house. That PW2 and PW3 said elephant tusks while PW4 said Hippopotamus teeth. He argued that though PW4 who was called as an expert, did not satisfactorily discharge his burden of establishing that what was found was not elephant tusks but hippopotamus teeth by elaborately distinguishing them. He said PW4 barely asserted that they were hippopotamus teeth. For that reason he urged the Court not to attach any weight on it. In supporting his contention, he referred the Court to the decision in the case of **Republic Vs. Kerstin Cameron** [2003] T. L. R. 85.



Arguing in respect of a failure by the prosecution to prepare and produce as exhibit the certificate of seizure and search warrant, Mr. Mweteni said, at first, that the search was properly conducted as it was witnessed by the appellant, his wife and PW2, the “Mwenyekiti wa Kitongoji”. When reminded by the Court that according to PW2 another policeman remained at the living room when the search was being conducted in the first room where nothing was found and the bag containing teeth was found in the other room, he retreated and remarked that the searching exercise was not properly conducted.

On our prompting, whether on the face of it, Exh.PE1 clearly indicates what was found in the appellant’s house, he readily conceded that it is not explicitly clear as the relevant part is not easily readable. He said it was written “tembo” and then altered and “kiboko” written on it.

We propose to start with the complaint that there was variance between the charge and evidence. The contention here is that while the charge is silent on the number of hippopotamus teeth allegedly found in the appellant’s house, the evidence on record maintained that they were two

hippopotamus teeth. We think this should not detain us much. As rightly argued by the learned State Attorney, such variance was minor and did not prejudice the appellant. Right from the time the facts of the case were read to the appellant during the preliminary hearing the prosecution alleged that the appellant was found in possession of two teeth. Even the witnesses who testified for the prosecution maintained that fact. The appellant was therefore aware that he was, all along, being tried for being found in possession of two teeth. He also marshalled his defence in that line. We are therefore of the firm view that there was no prejudice on the part of the appellant and hence no injustice was thereby caused.

With regard to the contradictions, as alluded to above, the appellant submitted and Mr. Mweteni supported, and in our view rightly so, that the evidence of PW2 on what was found in the appellant's house fundamentally conflicts with that of PW1, PW3 and PW4. We will elaborate. However, before elaboration, we find it necessary that we should begin by highlighting the principles governing consideration of contradictions before we embark into determining the merits of that ground of appeal.

It is generally accepted that even where an event occurs in the presence of several people, their testimony in court is susceptible to normal discrepancies. This is normal for, there are errors of observation, memory failures due to time lapse from the time the event occurred to the time of testifying or even panic and horror associated with the incident (see **Dickson Elia Nsamba Shapwata &another Vs. Republic**, Criminal Appeal No. 92 of 2007 (unreported). It is for this reason that not every contradiction affects the prosecution case. Only material and relevant contradictions adversely affect the credence of the witnesses and hence cause the prosecution case to flop. This Court, in the case of **Said Ally Ismail Vs. R**, Criminal Appeal No. 249 of 2008 (unreported), categorically said;

*“It is not every discrepancy in the prosecution case that will cause the prosecution case to flop. It is only where the gist of the evidence is contradictory then the prosecution case will be dismantled.”*

Where there are inconsistencies, the Court’s duty is to consider them and determine whether they are minor not affecting the prosecution case or they go to the root of the

matter. That was said by the Court in the case of **Mohamed Said Matula Vs. R** [1995] TLR. 3 in the following words:

*“where the testimony by witnesses contain inconsistencies and contradictions, the court has a duty to address the inconsistencies and try to resolve them where possible , else the court has to decide whether the inconsistencies and contradictions are only minor or whether they go to the root of the matter”*

We will subject the facts in the present case to the foregoing sound principles succinctly enunciated in the above cited cases in considering the issue of contradictions in the prosecution evidence.

As it were, the appellant was facing a charge of being found in unlawful possession of Government trophy. The charge alleged the trophy to be hippopotamus teeth. One of the basic principles of our criminal justice is that the prosecution is, in every trial, duty bound to prove the charged offence beyond all reasonable doubts. In that accord the prosecution was bound to establish that the appellant was found in possession of the hippopotamus teeth and that the possession was unlawful. The contradiction complained of here is in respect of the kind of

trophy the appellant was found in possession. The contradiction would have been resolved by a properly filled certificate of search envisaged in section 22(3) of the Act. Unfortunately, Exh. PE1 is of no assistance at all on account of apparent deficiencies implored by the learned State Attorney that the part indicating the type of trophy has been altered. In the circumstances, as rightly argued by the learned State Attorney, it cannot, with certainty, be concluded that it referred to hippopotamus teeth. We, therefore, have no hesitation to state that the contradiction complained of is material and goes to the root of the prosecution case.

Worse still, as rightly argued by Mr. Mweteni, PW4, a Wildlife Officer, allegedly possessing a twenty years' experience told the trial court that Exh. PE2 was hippopotamus teeth. He simply told the trial court where the teeth are located. Having gone through the record we are unable to find sufficient evidence on how he was able to recognize them. There was an overriding need to describe the distinct features of hippopotamus teeth and elephant tusks which enabled him to correctly recognize Exh. PE1. Mere location of hippopotamus teeth was insufficient. We subscribe to the position set in the

persuasive decision of the High court in the case of **Republic Vs. Kerstin Cameron** (supra) cited by the learned State Attorney that the duty of an expert is to furnish the court with the necessary scientific criteria for testing the accuracy of their conclusions so as to enable the court to form its own independent judgment by application of these criteria to the facts proven in evidence. In that case the judge went further to rightly hold that since the evidence of an expert is likely to carry more weight than that of an ordinary witness, highest standards of accuracy and objectivity are required from him. That he should provide independent assistance to the court by way of objective unbiased opinion in relation to matters of his expertise and should never assume the role of an advocate. Evidence meeting those requirements, in the present case, is lacking. Without elaborating the scientific criteria, PW4 asserted that he recognized Exh. PE1. That was insufficient. It was a mere bare assertion. The recognition was highly suspicious and unreliable and the certificate of value (Exh. PE3) issued was, for that reason, also unreliable.

Lastly, we will consider the appellant's grievance that the search was improperly conducted in his house. It is

uncontroverted that the search was conducted in the appellant's house. There is, however, evidence by PW2 and DW2 that a policeman was found at the sitting room after the first room was searched and Exh. PE1 was found in that other room. No explanation was ever given to explain away any evil intent he might had. Like the learned State Attorney, we entertain doubts that Exh. PE1 was in the appellant's house before the search was conducted. The possibility that Exh. PE1 was planted into the appellant's room cannot very easily be overruled. It is our finding that the circumstances under which the search was conducted was not free from suspicions. Unlike both the lower courts, we find and hold that the search was therefore not properly conducted.

It is unfortunate that, although the appellant's conviction was founded on the testimonies of PW1, PW2, PW3, and PW4 as well as Exhibits PE1, PE2 and PE3, both the trial court and the High Court on appeal never addressed themselves to the above fundamental shortcomings in the prosecution evidence. Had they done so and analyzed the evidence properly and in the above contexts, they would have not entered the verdict of guilty.

For the foregoing reasons, we allow the appeal, quash the conviction and set aside the sentence. We order that the appellant be released forthwith if not held behind bars for any other lawful cause.

**DATED** at **ARUSHA** this 3<sup>rd</sup> day of December, 2018.

A. G. MWARIJA  
**JUSTICE OF APPEAL**

S. A. LILA  
**JUSTICE OF APPEAL**

M. A. KWARIKO  
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original

S.J. KAINDA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**