IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: MUGASHA, J.A., NDIKA, J.A., And LEVIRA, J.A.)

CRIMINAL APPEAL NO. 348 OF 2018

1. **MWINYI JAMAL KITALAMBA @ IGONZA**
2. **EMMANUEL DAUDI SINDANO**
3. **JUMA MATHEW MALYANGO** ..... **APPELLANTS**
4. **LUCAS PHILIPO HOSEA @ KAYAGO**
5. **LUCAS MAYAI @ DAMSON MAYAI**

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Dodoma)

(Mansoor, J.)

dated the 14th day of September, 2017
in
Criminal Appeal No. 122 of 2017

.....

JUDGMENT OF THE COURT

3rd & 16th June, 2020

NDIKA, J.A.:

The five appellants, Mwinyi Jamal Kitalamba, Emmanuel Daudi Sindano, Juma Mathew Malyango, Lucas Philipo Hosea @ Kayago and Lucas Mayai @ Damson Mayai, were tried before the Resident Magistrate's Court of Dodoma at Dodoma, along with three other persons, for various offences laid under the Wildlife Conversation Act, No. 5 of 2009 ("the WCA"). The appellants and two of the three other persons, namely, Daudi Makuwo Mwaja and Yohana Jackson Chuma Ulaya @ Kapelemela, were convicted of three offences, namely,

leading organized crime, unlawful dealing in trophies and unlawful possession of government trophies and each of them earned concurrent terms of imprisonment ranging from two years to twenty years. On first appeal, the High Court quashed and set aside the appellants' convictions and sentences for leading organized crime and unlawful dealing in trophies and also quashed and set aside all the convictions and sentences against Mwaja and Ulaya. However, that court sustained the appellants' respective convictions and sentences in respect of the third count of unlawful possession of government trophies, hence the present appeal.

The prosecution case was built upon the testimonies of thirteen prosecution witnesses supplemented by several documentary and physical exhibits. So far as the offence the subject of this appeal is concerned, the evidence aimed at proving that on 13th June, 2013 the appellants as well as the three other persons, at Ilangali Village within Chamwino District in Dodoma Region, jointly and together, were found in possession of government trophies, to wit, eighteen pieces of elephant tusks, valued at TZS. 228,825,000.00, the property of the Government of the United Republic of Tanzania without a permit from the Director of Wildlife.

Briefly, it was in evidence that acting on information received from a whistleblower that the third appellant was illegally dealing in government trophies, a contingent of police officers and game rangers went to his home at Ilangali Village arriving there in the wee hours of the morning on 13th June, 2014. The party included PW1 Jansen Mathias, a game ranger, and D.7847 D/Sgt Beatus (PW4), a police officer from the Special Anti-Poaching Task Force in Dar es Salaam. According to these witnesses, they found the third appellant at home and that after quizzing him he took them to the fourth appellant's farm. At the farm they got the attention of the fourth appellant's concubine, PW2 Zuhura Idd, who, also on being interrogated, directed the group to a certain hut located within the same farm. The first, second and fifth appellants were found in that hut, and, on being interrogated along with the third appellant, they led the investigating officers to a nearby spot, also within the fourth appellant's farm, where eighteen elephant tusks (Exhibit P.6) were retrieved and seized. PW4 marked the tusks with a code "CHAM" and numbered them CHAM 1 to 18. A seizure certificate (Exhibit P.3) was issued accordingly and was signed by the third appellant (allegedly in his other name of Sihiri s/o Simon), PW4 and two independent persons (Ndahani s/o Mandena and Emmanuel Mbaga). However, for an

obscure cause, none of these independent witnesses was called as a witness at the trial.

The aforesaid four appellants were later the same day conveyed along with the tusks to the Chamwino Police Station where ASP Maulid Mamu (PW5), the OC-CID, initially received the tusks but turned them over to the Exhibits Custodian, PW10 G.427 Cpl. Ismail, for storage under lock and key. Subsequently, PW4 recorded a cautioned statement allegedly made by the third appellant, followed up by another one made by the fifth appellant. After the fourth appellant had been brought to the Chamwino Police Station on 8th August, 2015 following his arrest at Chunya the previous day, PW4 too recorded his cautioned statement. The statements, by which the three appellants were alleged to have confessed to being found unlawfully possessing the tusks, were either repudiated or retracted by the appellants but they were admitted collectively as Exhibit P.7 after an inquiry was conducted into their voluntariness and validity. PW13 F.919 D/SSgt Philbert, also from the Special Anti-Poaching Task Force, tendered in evidence two further cautioned statements dated 14th June, 2014 attributed to the first and second appellants (Exhibit P.14). Like the first three statements, they were admitted collectively following an inquiry. Both of them were incriminating.

There was further evidence from PW6 Francis Kasambala, a Wildlife Officer. He examined the seized tusks on 18th June, 2014 at the Chamwino Police Station. As per the certificate of valuation (Exhibit P.9) that he tendered in evidence, the tusks weighed 326.5 kilogrammes and had an estimated market value of TZS. 228,825,000.00.

When placed on their defence, the appellants denied the charges against them. They refuted to have been found with the tusks and repudiated or retracted having voluntarily made any confessional statements. In particular, the first, second and fifth appellants averred in common to have been arrested at Chititu Village on 13th June, 2014 and that they were not at the scene at Ilangali Village as alleged. The third appellant too denied being at the scene when the tusks were uncovered, as he claimed to have been at a guest house in the village at the material time. The fourth appellant admitted having been arrested in Chunya District on 7th August, 2015 but protested that he had nothing to do with the tusks.

The trial court was satisfied that the charges, as against all but one accused, were proven. It then went on to convict and sentence the seven persons including the appellants as aforesaid. While the High Court acquitted the appellants of the charges on two counts, it

sustained the appellants' respective convictions and sentences for unlawful possession of government trophy charged on the third count on the following premises: first, that the court concurred with the trial court's finding, based on the testimonies of PW1, PW2 and PW4, that the first, second, third and fifth were found at the scene and that they willingly directed the police officers and game rangers to the spot where they had hidden the tusks. Secondly, that the fourth appellant confessed to the offence in his cautioned statement (Exhibit P.7). Thirdly, that the paper trail on the movement of the tusks was complete and that there was no sign of tampering with the tusks from their seizure to exhibition at the trial.

At the hearing of this appeal, Mr. Godfrey Sabato Wasonga, learned counsel, appeared to prosecute the appeal for the appellants who also appeared via a virtual link to the Isanga Central Prison, Dodoma where they stayed. On the other hand, Ms. Neema Mwanda, learned Principal State Attorney, teamed up with Mr. Nassor Katuga, learned Senior State Attorney, and Mr. Salim Msemo, learned State Attorney, to represent the respondent.

In his submissions, Mr. Wasonga canvassed four main complaints raised in common by the appellants in their respective memoranda of appeal. These were, **one**, that the charge was

defective; **two**, that certificate of seizure (Exhibit P.3) was defective; **three**, that the cautioned statements attributed to the appellants were recorded out of the prescribed time, hence illegal; and **finally**, that there was no proof beyond reasonable doubt to establish the offence of unlawful possession of government trophy.

Mr. Wasonga's attack on the charge sheet was two-pronged. First, he contended that the charge sheet was defective because the offences on all counts except the third count suffered badly for the lack of particularity, rendering the third count too being defective. To bolster his point, he cited the case of **David Athanas @ Makasi and Joseph Masima @ Shandoo v. Republic**, Criminal Appeal No. 168 of 2017 (unreported). Secondly, while noting that the third count was laid under section 86 (1), (2) (c) (ii) and (3) (b) of the WCA read together with Paragraph 14 (d) of the First Schedule to and section 57 (1) of the Economic and Organised Crime Control Act, Cap. 200 RE 2002 ("the EOCCA"), Mr. Wasonga posited that the offence charged was not an economic offence because following the repeal in 2009 of the old law (the Wildlife Conservation Act, Cap. 382) by the WCA, Paragraph 14 (d) of the First Schedule to the EOCCA still referred to the corresponding offence in the old law at the time the charged offence was allegedly committed.

As regards the seizure certificate, Mr. Wasonga urged that it be discounted on the ground that it was defective for non-compliance with section 38 (3) of the Criminal Procedure Act, Cap. 20 ("the CPA") in that it was not signed by any of the appellants from whom the tusks were allegedly seized. He particularly contended that the name of Sihiri s/o Simon appearing on the certificate did not refer to the third appellant and that even if he had signed it he could not have done so on behalf of his co-appellants that were allegedly at the scene. The learned counsel argued further that while the certificate appeared dated 13th June, 2014, it was endorsed by a Magistrate on 6th January, 2011, implying that it was fabricated well before the alleged offence was committed. In the absence of the seizure certificate, he added, there would be no proof of the seizure of the tusks.

On the cautioned statements, Mr. Wasonga contended that they were all recorded out of time contrary to sections 50 (1) and 51 of the CPA and, therefore, they were liable to be expunged from the record.

Coming to the issue whether the charge was proven or not, Mr. Wasonga boldly urged us to answer it in the negative. In this regard, he contended, first, that while the charge alluded to the offence having been committed on 13th June, 2013, evidence adduced at the

trial pointed to the offence having been committed a year later, on 13th June, 2014. He added that once the cautioned statements and the seizure certificate were expunged, there would be no semblance of proof of the charge against all the appellants. Accordingly, he urged us to allow the appeal.

For the respondent, Mr. Msemo sturdily opposed the appeal. Beginning with the propriety of the third count, he contended that whether the four other counts were defective or not was irrelevant to the validity of that count. He submitted that the said count was drawn in terms of sections 132 and 135 of the CPA. He distinguished the case of **David Athanas** (supra) relied upon by Mr. Wasonga on the ground that it concerned the charge for the offence of "unlawful dealing in government trophies" which in that case suffered from insufficient particularity. He further argued that the statement of offence in respect of the third count, citing Paragraph 14 (d) of the First Schedule to and section 57 (1) of the EOCCA, was proper and that it contained no error. However, at the Court's prompting, he conceded that the offence ought to have been laid under section 86 (1), (2) (b) of the WCA read together with Paragraph 14 (d) of the First Schedule to and section 57 (1) of the EOCCA. However, he submitted that error was curable under section 388 of the CPA as the

appellants were not prejudiced since the particulars given provided sufficient notice of the nature of the charge against them.

Although Mr. Msemo opposed Mr. Wasonga's submission on the irregularity and unreliability of the certificate of seizure, he relented, at the Court's prompting, that the said certificate was liable to be discounted on another ground, that it was not read out at the trial after it was admitted in evidence.

Mr. Msemo, then, addressed the legality of the cautioned statements, which he conceded to have been recorded out of time. However, having revisited the timeline in which each statement was recorded, he submitted that PW4 and PW12 gave justification for the delay that the appellants had to be conveyed from points of arrest to the Chamwino Police Station, that the investigations were complicated and that the hunt for other suspects was going on. On this point, he relied upon the case of **Yusuph Masalu @ Jiduvi & Three Others v. Republic**, Criminal Appeal No. 163 of 2017 (unreported).

Replying to the question whether the charge was proved or not, Mr. Msemo contended that based upon the evidence of PW1, PW2 and PW4, which the courts below found credible, it was proven that the tusks were in the appellants' possession. In particular, he referred to

the testimony of PW2, who, as an independent witness, confirmed the seizure of the tusks from the farm. He went on to say that the movement of the tusks from seizure to their exhibition at the trial was clearly documented and detailed by the witnesses that handled the tusks (that is, PW4, PW5, PW9 Leonora Msekwa, PW10 and PW12 D/Cpl. Abdulrahman). Citing a holding of the Court in the recent decision in **Marceline Koivogui v. Republic**, Criminal Appeal No. 469 of 2017 (unreported), at page 32 of the typed judgment, he said credible oral evidence of prosecution witnesses could be relied upon to establish the chain of custody.

On the issue that the prosecution case alluded to the offence having been committed on 13th June, 2014, not 13th June, 2013 as stated in the charge sheet, Mr. Msemo postulated that the mishap was a typographical error on the charge sheet as the entire proceedings consistently referred to 13th June, 2014 as being the date when the tusks were uncovered. He concluded that the appellants' confessional statements, supported by the evidence of PW1, PW2, PW5, PW9, PW10 and PW12, proved the charge against the appellant beyond reasonable doubt. Specifically referring to the fourth appellant, he argued that his confessional statement pointed to the fact that he was

a part of the criminal racket and that the tusks were retrieved from his farm.

On the part of Mr. Katuga, he emphasized that the charge was proper and that defect in a charge on one count would not vitiate another count. He also underlined that PW2 testified, as an independent witness, that the first, second, third and fifth appellants took the police officers and game rangers to the spot where they had hidden the tusks. He concluded by praying that the appeal be dismissed.

Rejoining, Mr. Wasonga submitted that oral evidence could not prove seizure of the tusks and that the case in **Marceline Koivogui** (supra) was distinguishable on that aspect. He then sought to distinguish the case of **Yusuph Masalu @ Jiduvi** (supra) from the present case on the validity of the cautioned statements.

We have carefully examined the record of appeal and taken account of the contending submissions of the learned counsel for the parties. We propose to address the contested matters in the same order they were canvassed by the parties.

We begin with the alleged defect in the charge. To put this complaint in its proper context, we find it apposite to reproduce the third count at the outset as follows:

3RD COUNT

STATEMENT OF OFFENCE

UNLAWFUL POSSESSION OF GOVERNMENT TROPHIES: Contrary to section 86 (1), (2) (c) (ii) and (3) (b) of the Wildlife Conservation Act, No. 5 of 2009 read together with Paragraph 14 (d) of the First Schedule to, and section 57 (1) of the Economic and Organised Crime Control Act [Cap. 200 R.E. 2002]

PARTICULARS OF OFFENCE

BONIFACE MATHEW MALYANGO @SHETANI HANA HURUMA, JUMA MATHEW MALYANGO @ SIHIRI SIMON @ JUMA, LUCAS PHILIPO HOSEA @ KAYAGO, MWINYI JAMAL KITALAMBA IGONZA, LUCAS MAYAI @ DAMSON MAYAI, EMMANUEL DAUDI SINDANO @ J4, DAUDI MAKUWO MWAJA and **YOHANA JACKSON CHAMAULAYA @ KAPELEMELA**, on 13th June, 2013 at Ilangali Village within Chamwino District in Dodoma Region, jointly and together, were found in possession of government trophies to wit, 18 pieces of elephant tusks valued at Tanzanian Shillings Two Hundred Twenty Eight Million Eight Hundred Twenty Five Hundred Thousand (T.Shs. 228,825,000.00) only, the property of the Government of the United Republic of Tanzania, without a permit from the Director of Wildlife.

We have examined the above charge in terms of sections 132 and 135 of the CPA, also cited by Mr. Msemo, governing the mode in which offences must be charged by specifying the statement as well as the particulars of the offence charged. While the statement of the offence is required to describe the offence charged shortly and refer to the section of the enactment creating the offence, the particulars of

the offence must set out the nature of the offence charged in the ordinary language.

In the instant case, Mr. Wasonga focused his attack on the statement of the offence while acknowledging that the particulars of the charge were adequate. At first, we should observe that since the trophy the subject matter of the charge was a part of "African elephant" specified in Part I of the First Schedule to the WCA, the charge should not have been laid under section 86 (1) and (2) (b) of the WCA. The said provisions state as follows:

> *"86.-(1) Subject to the provisions of this Act, a person shall not be **in possession of**, or buy, sell or otherwise deal in **any government trophy**.*
>
> *(2) A person who contravenes any of the provisions of this section commits an offence and shall be liable on conviction-*
>
> *(a) where the trophy which is the subject matter of the charge or any part of such trophy is part of an animal specified in Part I of the First Schedule to this Act, and the value of the trophy does not exceed one hundred thousand shillings, to imprisonment for a term of not less than five years but not exceeding fifteen years*

or to a fine of not less than twice the value of the trophy or to both; or

(b) where the trophy which is the subject matter of the charge or any part of such trophy is part of an animal specified in Part I of the First Schedule to this Act, and the value of the trophy exceeds one hundred thousand shillings, to a fine of a sum not less than ten times the value of the trophy or imprisonment for a term of not less than twenty years but not exceeding thirty years or to both."

Section 86 (2) (c) (ii) is a punishment provision only applicable in "any other case", which, in our view, means that the trophy the subject matter of the charge must be a part of any animal not specified in Part I of the First Schedule to the WCA with a value exceeding TZS. 1,000,000.00. We hasten to say, however, that this error is remediable under the curative provisions of section 388 of the CPA.

As regards the propriety of charging the offence as an economic offence, with respect, we do not agree with Mr. Wasonga that the citation in the charge to "Paragraph 14 (d) of the First Schedule to the EOCCA" only referred to offences under the old law (Cap. 283), not those under the WCA. Admittedly, following the repeal of the old law and enactment of the WCA in 2009, Paragraph 14 (d) was not

immediately amended to specify the offences under the WCA as economic offences. An amendment to that effect was finally effected vide section 16 of the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016. However, we think that prior to that amendment, the saving and transitional provisions of section 122 (1) and (2) of the WCA brought all corresponding offences under the WCA into the purview of the EOCCA. These state thus:

> *"122-(1) The Wildlife Conservation Act is hereby repealed.*
>
> *(2) Upon the commencement of this Act, a person who is convicted of an offence under the Wildlife Conservation Act shall, notwithstanding the provisions of other written law, be liable to be deemed as having been convicted under the corresponding offence under this Act."*

By dint of logic, we think, the reference to unlawful possession of a trophy under Paragraph 14 (d) of the First Schedule to the EOCCA would link with the corresponding offence under section 86 of the WCA in terms of the aforesaid saving provisions.

The contention that the third count was vitiated by defects in other counts is equally unfounded. While section 133 of the CPA

allows a joinder of counts in a charge sheet if the offences charged are founded on the same facts or if they form or are a part of a series of offences of the same or a similar character, each count exists as a distinct and separate complaint upon its own facts. Thus, we agree with the respondent that a defect in one count will not necessarily deface the propriety and legality of the rest of the counts in the charge sheet. Accordingly, we hold that the complaint under consideration is without any merit. We dismiss it.

The question of the legality of the certificate of seizure need not hold us back as Mr. Msemo conceded, at the Court's prompting, that the said document was not read out after it was cleared and admitted in evidence. Indeed, it is evident at page 54 of the record of appeal, that the said exhibit was not read out at the trial after admission. It is settled that such an omission is fatal as it contravenes the fair trial right of an accused person to know the content of the evidence tendered and admitted against him. It is wrong and prejudicial – see, for instance, **Robinson Mwanjisi & Three Others v. Republic** [2003] T.L.R. 21; and **Rashid Amir Jaba & Another v. Republic**, Criminal Appeal No. 204 of 2008 (unreported). In consequence, we find merit in the second ground of appeal and proceed to expunge Exhibit P.3 – the certificate of seizure. Whether that certificate was

defective, as alleged by Mr. Wasonga, is, therefore, immaterial at this point.

In dealing with the complaint on the legality of the cautioned statements attributed to the appellants, we examined each statement to determine its timeline while aware that Mr. Msemo acknowledged that they were recorded beyond the four hours' basic period prescribed by section 50 (1) of the CPA. It is in evidence, according to PW4, that all the appellants except the fourth appellant were apprehended at Ilangali Village in the early morning hours of 13th June, 2014 and that they were ferried to the Chamwino Police Station where they arrived around 11:00 hours on the same day. PW4 along with several police officers including Cpl. Abdul went back to the village looking for other suspects. The statements attributed to the four appellants were recorded on the following day. As regards the fourth appellant's statement, it was recorded from 07:00 hours on 8th July, 2014 after he was arrested in Chunya the previous day at 21:00 hours and then conveyed to the Chamwino Police Station where he arrived in the early hours of the morning.

We appreciate the circumstances of this case and agree with Mr. Msemo that the delay to record the statements within the prescribed basic period was justified because the appellants had to be conveyed

from points of arrest to the police station, that the hunt for other suspects was going on after initial arrests on 13th June, 2014 and that the investigations were complicated. This is particularly cemented by the evidence of PW4 who, apart from testifying on the circumstances of the arrest of the first, second, third and fifth appellants, adduced that the fourth appellant was pursued and arrested in Chunya, Songwe Region. Contrary to Mr. Wasonga's stance, we are of the view that the conditions in this case are similar to those in **Yusuph Masalu @ Jiduvi** (supra), which was relied upon by Mr. Msemo. In that case, the Court held that:

> *"In this case, the appellants were arrested on 8.7.2014, but the cautioned statements were recorded on the following day. The reasons for the failure to record the statements within time was stated to be the nature of the crime and the complications in the investigations. The fact that the appellants sometimes were to move from one place to the another as explained by PW1 and PW6 cannot be ignored. This shows that investigation was in progress. That being the case, the delay was with plausible explanation and in the circumstances, we find justification in recording the same outside the four hours prescribed under the provisions of section 50 (2)*

(a) of the CPA which provides an exception to the four hours' period prescribed by the law."

Accordingly, the complaint against the cautioned statements fails.

The foregoing takes us to the last ground of appeal whose thrust is the grievance that the offence of unlawful possession of government trophy was not proven against the appellants.

For a start, we do not go along, with respect, with Mr. Wasonga's contention that the citation in the charge sheet that the offence on the third count was committed on 13th June, 2013 was fatal to the prosecution case on the reason that no evidence to that effect was proffered. We firmly hold, in agreement with Mr. Msemo, that this was obviously an innocuous typographical error. That is more so because the date mentioned in the first two counts also is 13th June, 2014, not 13th June, 2013. That apart, the entire record of proceedings and evidence is consistent that the alleged offence was committed on 13th June, 2014.

We are cognizant that in convicting the appellants of unlawful possession of government trophy, the courts below, apart from relying upon the oral evidence of PW1, PW2 and PW4 which they found to be credible, acted upon the cautioned statements. We have reviewed the repudiated/retracted statements, which the trial court found to have

been made voluntarily after it had conducted inquiries into their voluntariness and validity. As did the courts below, we have found the statements incriminating. While the third appellant admitted to being the owner of, at least, four of the eighteen tusks, the first, second and fifth appellants confessed to being a part of a criminal venture involving the appellants and other persons and that each of them carried the tusks from the game reserve to the fourth appellant's farm where they hid them. The first and second appellants also confessed to have killed nine elephants from which they extracted 18 tusks while the fifth appellant admitted being involved in plucking out tusks from the elephants they had killed, which they subsequently took to the fourth appellant's farm for concealment. On the part of the fourth appellant, he too affirmed being part of the poaching racket and acknowledged that the tusks were concealed at his farm before being transported away.

Indeed, as stated earlier, the cautioned statements were repudiated/retracted by the appellants but were rightly relied upon by the courts below along with the evidence of PW1, PW2 and PW4. It is noteworthy that PW2 testified that the first, second, third and fifth appellants took the police officers and game rangers to the spot where they had hidden the tusks. Her evidence in particular, being

that of an independent witness, is unblemished and reliable. It is a single piece of evidence confirming that the tusks were retrieved from the fourth appellant's farm in the presence of the other four appellants who had led the police officers and game rangers to that spot.

In view of the evidence as reviewed above, we think that all the appellants retained control over the tusks and thus accordingly each of them had possession of the tusks. In the case of **Simon Ndikulyaka v. Republic**, Criminal Appeal No. 231 of 2014 (unreported), cited to us by Mr. Msemo, we applied our holding in the case of **Moses Charles Deo v. Republic** [1987] TLR 134 that:

> *"... for a person to be found to have possession, actual or constructive of goods, it must be proved either that he was aware of their presence and that he exercised control over them, or that the goods came, albeit in his absence, at his invitation and arrangement. But it is also true that mere possession denotes knowledge and control."*

All the five appellants were aware of the presence of the tusks in the fourth appellant's farm and thus they exercised control over them. The absence of the fourth appellant at the time the tusks were seized was inconsequential. Apart from being aware of the presence of the

tusks, the said tusks were concealed in his farm at his invitation and arrangement. In other words, he had knowledge on the concealment of the tusks in his farm.

On the continuous movement of the tusks after they were retrieved until their exhibition in court, we have reviewed the oral testimonies of witnesses who handled the tusks (that is, PW4, PW5, PW9, PW10 and PW12) as well as the records on the flow of the tusks (including dispatch book – Exhibit P.5; extract from the exhibits register – Exhibit P.8; letter of handing over of the tusks to PW9 dated 14th July, 2014 – Exhibit P.9; trophy valuation certificate – Exhibit P.10; and extract from the exhibits register – Exhibit P.12).

Briefly, as hinted at the beginning the tusks, upon seizure were marked "CHAM 1 up to 18", which was a distinctive mark, were conveyed from the crime scene to the Chamwino Police Station where PW4 handed them over to PW5 (the OC-CID) who then turned them over to PW10 (the Exhibits Custodian) for storage under lock and key on 13th June, 2014. Meanwhile, on 18th June, 2014, PW6 examined the tusks at the police station and assigned them value as per Exhibit P.9. Thereafter, on 26th June, 2014 they were conveyed to Dar es Salaam Police Head Quarters by D/SSgt Nico as shown by Exhibit P.8. They were brought back to the Chamwino Police Station on 7th July,

2014 by PW12 and received by the Exhibits Custodian (PW10) as per evidenced by Exhibit P.12. On 14th July, 2014, PW5 took the tusks to the offices of Swagaswaga Game Reserve at the Ministry of Natural Resources and Tourism where PW9 Leonora Msekwa, an accountant-cum-storekeeper, received them as shown by letter of handing over of the tusks to PW9 dated 14th July, 2014 – Exhibit P.9. Finally, the tusks (Exhibit P.6) were taken from PW9 by PW4 who then tendered them in evidence on 26th October, 2016. At the trial, all the witnesses involved in the handling of the tusks from seizure to their exhibition in court identified the tusks by the distinct mark on them – CHAM 1 to 18.

Looking at the above sequence of events and the corresponding documentation on the tusks, we are satisfied that the integrity and the evidentiary value of the seized tusks were preserved by the officers that handled the tusks until when they were tendered at the trial. In any case, as we held in **Issa Hassan Uki v. Republic**, Criminal Appeal No. 129 of 2017 (unreported), elephant tusks constitute an item that cannot change hands easily and thus it cannot be easily altered, swapped or tampered with – see also **Song Lei v. Director of Public Prosecutions**, Consolidated Criminal Appeals No. 16A of

2016 and 16 of 2017; **Vuyo Jack v. Director of Public Prosecutions**, Criminal Appeal No. 334 of 2016 (both unreported).

All told, we sustain the appellants' respective convictions as we are satisfied that the charge on the third count against each of them was sufficiently proven. Their defences of mere denial and *alibi* were duly considered by the trial court and the first appellate court but they could not prevail over the positive evidence for the prosecution. We find no cause to hold otherwise.

Finally, we deal with the propriety of the sentence imposed on the appellants. In view of our earlier holding that the offence of which the appellants were convicted ought to have been laid under section 86 (1) and (2) (b) of the WCA, it was an obvious error that they were punished under section 86 (2) (c) (ii) of that law following their conviction. Each appellant ought to have suffered punishment in accordance with the provisions of section 86 (2) (b) of the WCA, that is, to pay a fine of TZS. 2,288,250,000.00, being the amount of money equal to ten times the value of the trophy involved or in default serve a jail term of twenty years – see **Anania Clavery Betela v. Republic**, Criminal Appeal No. 355 of 2017 (unreported).

In the upshot of the matter, we conclude that the appeal lacks merit save for our finding on the propriety of the sentence. Consequently, we uphold the appellants' respective convictions and order that the twenty years' imprisonment imposed on each of them be served in default of payment of the fine of TZS. 2,288,250,000.00. Except for the adjustment of the sentence, the appeal stands dismissed.

DATED at **DODOMA** this 12th day of June, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

This Judgment delivered on 16th day of June, 2020 in the presence of Mr. Godfrey Wasonga, learned advocate for the appellants and Ms. Bertha Kulwa, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL