IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: JUMA, C.J., MUGASHA, J.A. And LEVIRA, J.A.)

CRIMINAL APPEAL NO 358 OF 2018

1. **BONIFACE MATHEW MALYANGO @SHETANI HANA HURUMA**
2. **LUCAS MATHAYO MALYANGO @RUKAS MPONZE @ SHIMIE** ..... **APPELLANTS**

VERSUS

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

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

(Kalombola, J.)

dated the 10th day of October, 2018

in

DC Criminal Case No 61 of 2017

JUDGMENT OF THE COURT

11th & 18th June, 2020

JUMA, C.J.:

This appeal was brought by BONIFACE MATHEW MALYANGO @ SHETANI HANA HURUMA (first appellant) and LUCAS MATHAYO MALYANGO @ RUCAS MPONZIE (second appellant). The appeal is against the decision of the High Court at Dodoma, delivered on 10th day of October 2018 which affirmed the Judgment of the Resident Magistrate's Court of

Dodoma (J.E. Fovo-RM) which convicted the two appellants, on two counts of: (1) Leading Organized Crime—*contrary to Paragraph 14 (1) (a) of the First Schedule to and section 57 (1) and 60 (2) of the Economic and Organized Crime Control Act, Cap. 200);* and (2) Unlawful Dealing in Trophies— *contrary to section 80 (1) and 84 (1) of the Wildlife Conservation Act No. 5 of 2009 read together with paragraph 14 (b) of the First Schedule to and section 57 (1) of the Economic and Organized Crime Control Act, Cap. 200).*

Following their convictions, each appellant was sentenced to serve ten years in prison for the first count, and two years in prison in the second count. The trial magistrate ordered the sentences in the two counts to run concurrently.

The particulars of Leading Organized Crime alleged that on diverse dates between 1st January, 2009 and 23rd October, 2015 at diverse places within Dodoma and Dar es Salaam Regions, the appellants jointly and wilfully organized and managed a criminal racket. This involved collecting, transporting and selling Government Trophies, that is, 118 elephant tusks, valued Tshs. 1,929,300,000/=. It was further alleged that they did not have any permit from the Director of Wildlife.

The particulars of Unlawful Dealing in Trophies levelled against the appellants jointly and together, were that at the same places and dates as in the first count, they wilfully organised and managed a criminal racket. This was by collecting, transporting and selling Government Trophies, that is, 118 elephant tusks, valued Tshs. 1,929,300,000/=. It was further alleged that they neither had a trophy dealers license nor a permit from the Director of Wildlife.

The background leading to the arrests of the appellants is as follows. D7846, Detective Sgt Beatus (PW2), testified how, on 23rd October 2015, Inspector Bony Mbange (PW10) informed him about confidential information that the first appellant, who was a suspect; was at a witch-doctor's house and was planning to return back to his house at Kimara Bonyokwa in Dar es Salaam. PW2 was amongst the police officers who paid a visit at appellant's house at Kimara Bonyokwa that same day. Inspector Bony (PW10) and Sgt Aliko (PW11) were the other police officers.

No sooner than the police vehicle arrived, the first appellant began to run away towards a nearby valley. The police gave chase and caught up with their suspect. He was taken back to his house where, upon search,

the police found vehicle registration cards and other documents. According to PW2, the first appellant showed the police where his vehicle, HONDA CRV with Registration No. T674 ARL had been parked.

The police conducted a search inside the car, and saw what appeared as whitish particles. The first appellant then led the police to a house of a traditional healer who he regularly consulted.

After searching the traditional healer's house, the police together with the first appellant, went back to their base at Mikocheni where the Assistant Inspector Aliko L. Mwakalindile (PW11) was waiting. PW11 supervised the search of the vehicle (HONDA CRV) in presence of the first appellant. D7312 Detective Sgt Jumanne (PW3), was asked by PW10 to be present when the police sniffer dog was guided by its handler (WP Jamila Ramadhani—PW6) around and inside the first appellant's vehicle.

It was during the course of the search that the sniffing dog, made a barking sound before stopping suddenly to signify a discovery of some suspicious substances. PW3 and PW11 were directed to collect samples. PW3 put on his surgical gloves and used an envelope to collect samples of small particles from the vehicle. The police officers seized the whitish

particles and PW11 prepared a certificate of seizure (exhibit P15), which was signed by PW11, the first appellant and PW3.

The samples were later taken to the Chief Government Chemist for analysis. Fidelis S. Segumba (PW9), a Manager for Forensic Biology and DNA Services at the office of the Chief Government Chemist, analyzed the samples to determine whether they were from an animal, and if so, which animal. PW9 prepared a report dated 5th September 2016 (Exhibit P10) which confirmed that the samples originated from an elephant tusk *(uchunguzi umedhihirisha kuwa vielelezo hivyo ni vya sehemu ya jino la Tembo)*.

Earlier on 30th November 2015, a Game Warden attached at the Anti-Poaching Unit, Mrekwa Simon Foka (PW7), had evaluated the value of 118 elephant tusks and compiled a valuation report. Although not a single piece of ivory was found in possession of the first appellant, PW7 used the information from the first appellant's caution statement to arrive at the value of 118 pieces of elephant tusks.

The prosecution had also relied on the caution statement of the first appellant (exhibit P9), which was recorded on 29th November, 2015 by E.9295 D/CPL Juma Koroto (PW8). In the first appellant's caution

statement, PW8 testified, confessed his role in illegal ivory business activities, and how he used special compartments modified in his vehicles to transport pieces of ivory. But the first appellate court expunged the caution statement because the trial court failed to determine its voluntariness before it was exhibited as evidence.

According to PW2, it was from what they learnt from the first appellant, the Police went to Vingunguti area of Dar es Salaam, where they searched Omary Hussein's house. They also travelled to Singida, Tabora and Katavi where they found properties which were part of the two appellants' ivory business. It was the prosecution's evidence that information they obtained from the first appellant, led to the arrests of the second appellant, Abdalah Ali Chaoga (DW1) and other suspects as well. An Assistant Superintendent of Police, Alinanuswe Reuben Mwakyembe (PW4), testified how the first appellant led him and other police officers, to various places outside Dar es Salaam in search of witnesses and evidence. They travelled to Dodoma, Manyoni, Kiomboi, Sikonge in Tabora and Mpanda in Katavi; where they impounded vehicles suspected to be part of appellant's illegal ivory business.

The two appellants and their co-accused, a registered traditional healer, Abdalah Ali Chaoga (DW1) testified in their own defences. DW1 highlighted on his traditional expertise to heal those possessed by spirits or ghosts. He knew the first appellant as one of his patients, who visited his home clinic seeking treatment for his sexual dysfunctions manifested by his failure to sustain sexual erections. He also wanted DW1 to make his business successful. The first appellant and DW1 were so close, that DW1 borrowed the first appellant's car to travel to his farm where the police traced him. During one of the encounters, he linked the first appellant up with the mechanic Omary Hussein (PW5). But he did not know the nature of transactions between the two.

In his defence, the first appellant (DW2) said that he is first and foremost, a businessman operating a shop and keep livestock in Dar es Salaam. He has farms in Handeni in Tanga, and Mpanda in Katavi. He confirmed that he knew the traditional healer (DW1), who not only cured his erectile dysfunction, but prescribed herbs which enabled his shop business to attract more customers. He also knew the second appellant, who is his relative. The second appellant would occasionally hire his vehicle

(Canter T765 DAC) to transport maize flour. His business is legitimate, he asserted. He denied dealing in illegal ivory trade.

In his defence, the second appellant (DW3) denied having any dealing with any illegal ivory trade. He described his business as operating paddy rice milling machines, from his base at Mpanda in Katavi. He also kept a register, he called "*Godown la Lucas,*" where his paddy business transactions (exhibit D13) are evident. He added that his milling business is facilitated by vehicles, including a Canter make (T.765 DAC) which is registered in the name of his brother, the first appellant.

In his decision, the learned trial magistrate underscored the significance of the oral confession which the first appellant made to police officers who had visited his home at Kimara Bonyokwa, and his oral confessions confirmed the first appellant's involvement in illegal ivory trade. This oral confession, the trial magistrate reckoned, set in motion a chain of events which led to the search of the Honda car, and ultimate discovery and seizure of whitish substances lifted from this car.

The trial court also highlighted the significance of the caution statement, which the first appellant made, as leading to all the vehicles suspected to be involved in illegal dealing in ivory business and to the

arrest of the second appellant. Although the first and second appellants were found guilty and convicted, the traditional healer, DW1, was acquitted.

On appeal to the High Court, the first appellate Judge (Kalombola, J.) expunged the first appellant's caution statement (exhibit P9) on the ground that the trial magistrate had failed to determine first its voluntariness before its exhibition. The learned Judge was, however, quick to agree with the trial court on other evidences which proved the prosecution case against the appellants beyond reasonable doubt.

At the hearing of this appeal the first and second appellants were not in Court physically. They appeared remotely by video link from Isanga Central Prison in Dodoma where they are serving their prison sentence of ten years for the first count, and two years in the second count. Mr. Godfrey Wasonga learned counsel argued the appeal for the first appellant. In a magnanimous gesture, Mr. Wasonga volunteered to also represent the second appellant who was unrepresented. The second appellant readily took the offer as he and the first appellant, followed the proceedings by video link.

In his Memorandum of Appeal which he filed on 1st June 2020; the first appellant raised five grounds of appeal. The first complaint contends that the prosecution case was not proved beyond reasonable doubt. Secondly, he complains that he was convicted on the basis of a defective charge sheet. In his third complaint, the first appellant raises the issue with jurisdiction, contending that the two courts below failed to consider whether the trial court had jurisdiction under section 29(1) of the Economic and Organised Crimes Control Act, Cap. 200 R.E. 2002. In his fourth ground, the first appellant faults the contradiction in evaluation of evidence; contending that while their charge was concerned with offence of Leading Organized Crime, the evidence on record showed possible offence of unlawful possession of government trophy. The fifth ground of complaint faults the trial and first appellate courts, for failing to resolve the issue of certificate of seizure.

The second appellant's memorandum of appeal contained the four (4) grounds, which can be paraphrased as follows. Firstly, he complains that his conviction was based on the oral confession by his co-accused; and there was no other corroborating evidence sufficient to sustain his conviction, and the trial and first appellate courts also failed to consider his

defence. His second complaint centres on the way his conviction was based on weak, insufficient, fabricated and contradictory evidence which cannot sustain his conviction beyond reasonable doubt.

The second appellant's third complaint faults the two courts below for convicting him without considering the issue of jurisdiction under section 29(1) of the Economic and Organised Crimes Control Act, Cap. 200 R.E. 2002. Lastly, he faults the charge sheet, which he described to be so defective that it cannot base any conviction.

The Principal State Attorney Mr. Faraja Nchimbi, Ms Chivanenda Luwongo, learned Senior State Attorney, and Mr. Salim Msemo, learned State Attorney appeared for the respondent Republic.

Mr. Nchimbi raised a jurisdictional issue challenging the competence of the first appeal to the High Court which he urged us to address first. We allowed him to present his submissions on the issue of law he had, however we directed Mr. Wasonga to reply the jurisdictional issue while submitting on the grounds of appeal. We informed the learned counsel that in case we sustain Mr. Nchimbi's issue of law, we will not consider their submissions on grounds of appeal.

As regards the jurisdictional issue, Mr. Nchimbi contended that the first appeal to the High Court (DC Criminal Appeal No. 61 of 2017) is defective because the two notices of intention of the appellants to appeal to the High Court are defective because they were not lodged at the trial court as the law requires, but were instead lodged in the High Court at Dodoma. By filing their notices of intention to appeal in the High Court which was not the trial court, he submitted, is contrary to the mandatory provisions of section 361 (1) (a) of the Criminal Procedure Act, Cap 20 (the CPA) as amended by the decision of this Court in **R. V. MWESIGE GEOFREY & TITO BUSHAHU**, CRIMINAL APPEAL NO. 355 OF 2014 (unreported).

For better perspective, Mr. Nchimbi submitted that before the decision of the Court in **MWESIGE GEOFREY & TITO BUSHAHU** (supra), section 361(1)(a) of the CPA did not specify where a person aggrieved with a decision of a subordinate court, would file his notice of intention to appeal to the High Court. Section 361(1)(a) of the CPA simply stated:

> *361 (1) Subject to subsection (2), no appeal from any finding, sentence or order referred to in section 359 shall be entertained unless the appellant–*
> *(a) has given notice of his intention to appeal within ten days from the date of the finding, sentence or order or, in the case of a sentence of*

corporal punishment only, within three days of the date of such sentence;

Mr. Nchimbi submitted that the Court in **MWESIGE GEOFREY & TITO BUSHAHU** (supra) intervened and specified that such notices should be filed in the same subordinate court which made the decision the appellant wants to appeal against. Following the intervention, the words "**to the trial subordinate court**" were added into paragraph (a) of section 361 (1) (a):

361 (1) Subject to subsection (2), no appeal from any finding, sentence or order referred to in section 359 shall be entertained unless the appellant–
*(a) has given notice of his intention to appeal to the **trial subordinate court** within ten days from the date of the finding, sentence or order or, in the case of a sentence of corporal punishment only, within three days of the date of such sentence;*

In essence, Mr. Nchimbi argued that because the two appellants failed to file the notices of their intention to appeal in the trial Resident Magistrate's Court of Dodoma as guided by the Court in **MWESIGE GEOFREY & TITO BUSHAHU** (supra), the notices of intention they

wrongly filed in the registry of the High Court at Dodoma were null and void. Subsequently, Mr. Nchimbi added, there was no appeal in the High Court, and by extension this appeal before us is a nullity and should be struck out.

Unfortunately, when the Court resumed the hearing to 11th June 2020, Mr. Wasonga did not address the jurisdictional issue. We shall as a result miss the advantage of his learned perspectives.

In accordance with established practice of the Court, we begun with the determination of jurisdictional issue over notice of intention to appeal to the High Court. We must point out that the appellants' notices substantially complied with section 361(1)(a) of the CPA as it stood before its "amendment" by the Court in **MWESIGE GEOFREY & TITO BUSHAHU** (supra). The record of appeal shows that after their conviction and sentence on 3rd March 2017, the Officer in-Charge of Isanga Central Prison in Dodoma filed the appellants' notices of appeal at the High Court Registry Dodoma on 6th March 2017, which was within the ten days prescribed by section 361(1)(a) of the CPA.

We considered whether to uphold Mr. Nchimbi's urging that because the appellants filed their intention to appeal in the High Court instead of

the trial court, their subsequent appeal to the High Court was incompetent and should be struck out.

Following the introduction of the principle of Overriding Objective into the Appellate Jurisdiction Act CAP 141 (the AJA), this Court is now obliged to take into account the overriding objective principles before hastening to strike out matters on procedural grounds. In that respect, section 3A of the AJA is instructive that the main role (overriding) of this Court is *to facilitate the just, expeditious, proportionate and affordable resolution of all matters governed by* the AJA. We shall as a result weigh the principles of overriding objective into our decision on jurisdictional issue.

Taking persuasive cue from the decision of Court of Appeal of Kenya in **SALAMA BEACH HOTEL LIMITED & 4 OTHERS V KENYARIRI & ASSOCIATES ADVOCATES & 4 OTHERS** [2016] eKLR, we shall *"... breathe life into an appeal notwithstanding technical lapses of procedure."* For our present purpose, the appellants timeously filed their Notices of Intention of Appeal in the High Court Registry Dodoma. We also note that our decision in **MWESIGE GEOFREY & TITO BUSHAHU** (supra) was delivered on 19th February 2015 well before Parliament introduced the overriding objective principle through Written Laws (Miscellaneous

Amendments) (No. 3) Act No. 8 of 2018. We further took note of the fact that, the root of the jurisdiction of the High Court to hear criminal appeals from subordinate courts is anchored where notices of intention are filed within ten days prescribed by section 361(1)(a) of the CPA. In light of the overriding objective, the High Court is seized with jurisdiction when a notice of intention to appeal is filed within ten days. To use the words of the Court of Appeal of Kenya in **SALAMA BEACH HOTEL LIMITED** (supra), by filing their notices of appeal in the High Court instead of the subordinate court, was a "deviation and lapse in formalities" which in our reckoning does not go to the root of the jurisdiction of the High Court as anchored in ten days within which to lodge the intention to appeal.

The aspect of "*just, expeditious, proportionate*" is an important consideration. After they had appended their thumb-prints on their notices and the officer in-charge of Isanga Central Prison took over; the appellants had no further control over where between High Court registry Dodoma and Resident Magistrates' Court registry, their notices were to be filed by prison officers. Interests of just, expeditious, proportionate and affordable resolution of this appeal oblige us to determine that the notices of intention

to appeal to the High Court which was filed in the High Court registry had properly moved the first appellate court to hear the appeal.

In the premises we overrule the jurisdictional objection which Mr. Nchimbi raised. We accordingly ordered the appeal to be heard on its merits.

In his submissions on the appellants' grounds of appeal, Mr. Wasonga collapsed the grounds of appeal into two, namely; illegality of the charge sheet, and insufficiency of evidence to prove the charge against the two appellants beyond reasonable doubt.

It is readily apparent from Mr. Wasonga's submissions, Mr. Wasonga did not submit on the issue of jurisdiction of the trial court under section 29(1) of the Economic and Organised Crimes Control Act, Cap. 200 R.E. 2002. Inevitably this ground must be deemed abandoned, and we shall not consider it.

On the other hand, during the course of his submissions on the two grounds, one contending that the charge sheet is defective, and another ground alleging that the two counts facing the appellants were not proved beyond reasonable doubt; both learned counsel in addition submitted on the other grounds which the two appellants had raised. We think, grounds

complaining over contradictions in evaluation of evidence, oral confession, and fabrication of evidence which the learned counsel for parties addressed during their submissions fall under the issue whether the prosecution proved its case beyond reasonable doubt.

Beginning with the ground on defective charge sheet, Mr. Wasonga submitted the particulars of the two counts of Leading Organized Crime and Unlawful Dealing in Trophies were so general that they prevented the appellants from properly defending themselves. These counts mention such important ingredients as organized and managed a criminal racket, or collection, transporting and selling 118 elephant tusks without any specificity to enable the appellants to prepare their respective defences.

To support his position that the two counts are defective for want of specificity, the learned counsel referred us to our decision in **DAVID ATHANAS @ MAKASI & JOSEPH MASIMA @ SHANDOO VS. R.**, CRIMINAL APPEAL NO. 168 OF 2017 (unreported) where appellants, just like appellants before us, faced a count on Unlawful Dealing in Trophies contrary to section 80 (1) and 84(1) of the Wildlife Conservation Act No. 5 of 2009. Before allowing the appeal, the Court in **DAVID ATHANAS @ MAKASI & JOSEPH MASIMA @ SHANDOO VS. R** (supra) had

concluded that by laying at the doors, a defective charge, the appellants were embarrassed and did not get a fair trial. Mr. Wasonga would like us to follow this decision and allow this appeal.

Moving on to the complaint that there was insufficient evidence on record, Mr. Wasonga submitted that there is no evidence to support any of what is alleged in the particulars of the two counts. In so far as he is concerned, two evidential questions beg for answers. First, he referred us to the Wildlife Conservation (Valuation of Trophies) Regulations, 2012 GN 207 of 2012 where the elephant as a Government Trophy is described as "African elephant". He submitted that there is no evidence that the 118 elephant tusks the appellants were charged for, belonged to "African elephant".

Secondly, the learned counsel for the appellants identified evidences which were anticipated from the charge sheet, but were missing out. He submitted that there is no evidence on the nature of criminal racket which linked the two appellants with anything to do with 118 pieces of elephant tusk. There is no evidence on the nature of "collection" of the elephant tusks, he submitted. Similarly, he submitted, there is no evidence on the nature of "transporting" or "selling" of the 118 pieces of elephant tusks.

Mr. Wasonga submitted that, when the first appellate court expunged the first appellant's caution statement (exhibit P9), no evidence remained on how the two appellants were linked to the 118 pieces of elephant tusks as alleged in the two counts of the charge sheet. He referred us to page 265 of the record of appeal where the learned trial magistrate explained the evidential basis of convicting the appellants. He argued that the 118 pieces of elephant tusks mentioned in the charge sheet was not supported by any prosecution evidence.

The learned counsel for the appellant also submitted that after the expungement of the first appellant's caution statement (exhibit P9), no evidence remained to convict the two appellants. Even the evidence of police officers who moved around seizing vehicles, did not prove the essential ingredients of the offences.

Mr. Wasonga faulted the first appellate Judge for relying on the oral confession the first appellant allegedly made to PW10. Poking holes in the prosecution's evidence, the learned counsel raised the issue of chain of custody of the small particles of whitish substances which were lifted from the first appellant's HONDA CRV car on 23/10/2015 at 16:45 hrs.

The learned counsel submitted that after scrutinizing the Certificate of Seizure (exhibit P15) which seized the first appellant's Honda car, he had his own doubts about the probity of evidence of whitish substances allegedly collected by the police from this vehicle at Mikocheni Dar es Salaam. He referred to the evidence of witnesses that the first appellant was arrested at Kimara Bonyokwa between 09:00 and 10:00. That it took six hours for the search of the vehicle to be carried out at Mikocheni. He submitted that from place of arrest at Kimara Bonyokwa to Mikocheni, the impounded car was being driven by a police officer assigned by PW10. Mr. Wasonga further submitted that although PW10 had maintained that the vehicle was not searched while it was at Kimara and he did not know what was in the car, yet, SGT Beatus (PW2) who was amongst the police officers who went to arrest the first appellant, stated that the police searched the car at Kimara and they saw "pieces of white things". He submitted that PW2 stated that the police had opened the HONDA in front of the first appellant at Kimara. He cited the decision of the Court in **MATHEW STEPHEN @ LAWRENCE VS R.,** CRIMINAL APPEAL NO. 19 OF 2007 (unreported) to support his submission that because the police had contaminated the car, the first appellant should not be taken to have been

in possession of whitish substances the police later collected from the seized HONDA car at Mikocheni.

Mr. Wasonga concluded by urging us to allow the two appellants' grounds of appeal.

On behalf of the respondent, Senior State Attorney, Ms. Chivanenda Luwongo opposed the appeal. She informed us that she will address the Court along the same two issues of defective charge and lack of proof addressed earlier by Mr Wasonga.

With regard to lack of proof, learned Senior State Attorney submitted that prosecution brought 11 witnesses and relied on 15 exhibits. Amongst the witnesses, there were police officers, independent witnesses as well as such experts as officers from the Government Chemist. She also listed the evidence of vehicles which were used to commit the offences, and certificates of seizures which were all presented as prosecution evidence. There were also oral confessions by the appellants, she submitted. In so far as the prosecution's case is concerned, the learned Senior State Attorney submitted, there was more than sufficient evidence to prove the case against the two appellants beyond reasonable doubt.

Ms. Luwongo nest gave the specific incidents of oral confessions received from the appellants. Narrating how the appellants confessed to DSGT Beatus (PW2), she referred to page 36, where PW2 testified how the appellant confessed that a car he bought for the traditional healer was to thank him for smoothing out and facilitation of ivory business. The appellants orally confessed to PW2 that Honda (exhibit P3), Toyota RAV 4 (exhibit P5) and Mitsubishi Canter (exhibit P4) were all bought out of ivory business and were used to facilitate that trade.

Ms. Luwongo submitted that similar oral confession was also made to ASP Alinanuswe Reuben Mwakyembe (PW4). She referred us to the testimony of PW4 on page 82 where he said that the first appellant had confessed that he owned a vehicle, Mitsubishi Canter, which he had handed over to his brother to facilitate ivory business. That it was from information which the first appellant provided to police which took PW4 and fellow police officers to Ilangali, Dodoma, Manyoni, Kiomboi, Sikonge, Tabora and Mpanda in Katavi. It was the appellants, she submitted, who led them to the vehicles which they seized as exhibits.

Inspector Bony Mbange (PW10) is another police witness who, was referred to us as having received oral confession. PW10 was amongst the

officer who visited the first appellant house at Kimara on 23rd October 2015. PW10 stated that he took part in chasing down the first appellant when he saw the approaching team of policemen.

To support her submission that the overwhelming evidence of oral confession was not contradicted by the appellants, the learned Senior State Attorney referred to the case of **PATRICK SANGA VS R.**, CRIMINAL APPEAL NO. 213 OF 2008 (unreported) which stated that oral confession is admissible evidence and can sustain a conviction. Ms. Luwongo also submitted that the oral confession is corroborated by the evidence of information given by the appellants, which led to the discovery of exhibits which are part of the prosecution evidence. This information led to discovery of how their ivory business was organized, with whom and by whom. She pointed out that it was the information from the first appellant which led the police to arrest the second appellant. She urged us to give the evidence of information leading to discovery the weight it deserves under section 31 of the Evidence Act, Cap 6. She cemented her submission by referring us to the decision of the Court in **TUMAINI DAUD IKERA V. R.**, CRIMINAL APPEAL NO. 158 OF 2009 and **DIRECTOR OF PUBLIC**

PROSECUTIONS VS. MIKULA MANDUGU, CRIMINAL APPEAL NO. 47 OF 1989 (both unreported).

Ms. Luwongo submitted that the evidence she has outlined in support of prosecution case is corroborated by the two appellants' respective defence evidences. The first appellant, she submitted, confirmed how he frequently moved from one region to another before returning back to Dar es Salaam. The finding of Mitsubishi Canter at the second appellant's premises, and seizure of Toyota RAV4 (exhibit 5) prove the ivory business connecting the two appellants and others. To support her submission that there is sufficient corroboration of some material particulars which implicate the two appellants, she cited the case of **MASUMBUKO MADIRISHA V. R.**, CRIMINAL APPEAL NO. 59 OF 2009 (unreported).

When we asked why Honda (exhibit P3) was not searched by a sniffer dog at Kimara-Bonyokwa where it was seized, but had to be searched several hours later at Mikocheni, Ms. Luwongo insisted that the chain of custody had not been broken and there was no possibility of contamination by implanting evidence while this vehicle was being moved from Kimara to Mikocheni. She referred to the evidence of PW10 who did not know what was inside this vehicle. Although she conceded that there is no

documentation on who drove the vehicle from Kimara to Mikocheni, she submitted that there is oral evidence that a police officer who drove the vehicle sat at the driver's seat, and other vehicles were so close by that no implanting of evidence could possibly take place. Citing the case of **ANANIA CLAVERY BETELA V. R.**, CRIMINAL APPEAL NO. 355 OF 2017 (unreported), she insisted that the chain of custody of HONDA vehicle was not broken during its movement from Kimara to Mikocheni.

in response to the questions asked by the Court, Ms. Luwongo conceded that the contents of oral submissions were same as what the first appellant had stated in his caution statement which was expunged by the first appellate. When asked why the charge sheet mentions 118 elephant tusks whilst no evidence was presented to support collection, transportation and selling of 118 elephant tusks, she conceded that the charge sheet was prepared with the hope that the evidence of caution statement would prove the transactions involving the 118 elephant tusks.

Learned Stated Attorney Mr. Salim Msemo took over from Ms. Luwongo to respond to the ground of defective charge. He insisted that the charge sheet is not defective and has sufficiently disclosed the two counts of Leading Organised Crime and Unlawful Dealing in Trophies.

In support of his submission that the charge sheet is not defective, and the prosecution's case was proved to the required standard; the learned State Attorney took us through the provisions of the Economic and Organised Crime Control Act, Cap 200 relevant to the counts of Leading Organised Crime and Unlawful Dealing in Trophies. He referred us to the case of **MEHBOOB AKBER HAJI AND TWO OTHERS V. R** [1991] T.L.R. 179 at page 190, where the Court considered a count of Leading Organised Crime, where, the particulars of this count of importing dangerous drugs were drafted in the same way as the second count has been drafted in the instant appeal.

Mr. Msemo rounded up his submissions by reiterating that all the essential elements constituting offences in the two counts were proved by evidence. He added that the case of **DAVID ATHANAS @ MAKASI & JOSEPH MASIMA @ SHANDOO VS. R.** (supra) which Mr. Wasonga relied on, is distinguishable in two ways. Firstly, its first count was based on possession. Secondly, its second count of unlawful dealing in Government Trophy has not specified the nature of dealing, whereas in our case it has specified as *"jointly and together willfully organised and*

managed a criminal racket of collecting, transporting and selling Government Trophy to wit, 118 Elephant Tusks..."

Learned State Attorney Mr. Salim Msemo rejected Mr. Wasonga's argument that the charge sheet is defective. He submitted that the Court had correctly found the charge sheet in **DAVID ATHANAS @ MAKASI & JOSEPH MASIMA @ SHANDOO** (supra) defective because the particulars of the offence of unlawful dealing in Government trophies were not specified. But in the instant appeal the charge sheet is not defective because the particulars of both counts were specified.

Mr. Nchimbi then rose to conclude the respondent's submissions. Like Mr. Msemo before him, Mr. Nchimbi took us through the provisions relevant to the first count of Leading Organised Crime and when an offence becomes 'an organized crime" and "criminal racket". He submitted that failure of evidence to establish the 118 elephant tusks does not diminish criminal racket. He submitted that in case we found that 118 elephant tusks in charge sheet was material, it should only affect the sentence but not the conviction of the two appellants. He concluded by reiterating that the prosecution had proved its case beyond reasonable doubt.

In his rejoinder, Mr. Godfrey Wasonga referred to the charge sheet which indicate the offences were committed between January 2009 and 23rd October 2015 at various areas of Dodoma and Dar es Salaam and submitted that not a single witness mentioned these dates. In addition, although the charge sheet identifies Dodoma and Dar es Salaam to be areas where the offences were committed, witnesses spoke of areas like Manyoni, Kiomboi, Sikonge Tabora, and Mpanda Katavi, which were not in the charge sheet.

The learned counsel for the appellants reiterated that none of the words "jointly and together," or "willfully," or "organized and managed a criminal racket," or "collecting," or "transporting," or" selling" appearing in the charge sheet were touched on by any prosecution witness. No witness testified or elaborated how the appellants collected or transported or bought or sold 118 elephant tusks or took part in the organization of any criminal racket involving 118 elephant tusks.

Mr. Wasonga urged us not to ignore the significance of 118 elephant tusks which are integral part of the two counts. He submitted that prosecution witnesses who were visiting various places collecting vehicles as exhibits did not give testimony on how the two appellants, were

involved with 118 elephant tusks. Even the much hyped "tool box" which was suggested to have been specially designed under the chassis of Mitsubishi Canter, was not found. He submitted that there is no evidence about how this vehicle was used either to collect or transport 118 elephant tusks. Mr. Wasonga pointed out that the case of **MEHBOOB AKBER HAJI AND TWO OTHERS** (supra) which Mr. Msemo cited, is not helpful to the prosecution's case. He submitted that while the appellants in that appeal were linked by circumstantial evidence to container number 2222-0 which landed in Dar es Salaam port with a cargo of drugs, *cannabis sativa resin*, the prosecution in the instant appeal have failed to link the appellants with non-existent 118 elephant tusks.

Mr. Wasonga next submitted that the first appellant cannot be linked to the particles of elephant tusks allegedly found in the Honda car (exhibit P3) which the police seized in Kimara Bonyokwa and drove it on their own to their Mikocheni offices. He argued that the chain of custody was broken and by the time exhibit P3 reached Mikocheni it had already been tampered with. On importance of ensuring chain of custody is not broken, the learned counsel submitted that the case of **ANANIA CLAVERY BETELA V. R.**, CRIMINAL APPEAL NO. 355 (unreported) offers useful

guidance. He argued further, even if it is assumed that the chain of custody was not broken, and whitish substances were found in the first appellant's car, the proper charge should have been possession contrary to section 86 of the Wildlife Conservation Act, 2009, instead of counts of Leading Organised Crime and Unlawful Dealing in Trophies which were not linked to the appellants even by circumstantial evidence.

Reacting to the way the learned counsel for the respondent had placed much reliance on oral confession, Mr. Wasonga submitted that because the first appellate High Court had expunged the caution statement of the first appellant, this Court should reject the backdoor way respondent is bringing back expunged confession under the cover of oral confessions. He submitted that the need for great caution before relying on oral confession was sounded in the case of **TUMAINI DAUD IKERA V. R.**, CRIMINAL APPEAL NO. 158 OF 2009 (unreported).

In his submissions on defective charge Mr. Wasonga contended that the particulars of the two counts, Leading Organized Crime and Unlawful Dealing in Trophies, were so general to the extent that they prevented the appellants from properly defending themselves. In urging us to allow the

appeal on account of defective charge, he relied on **DAVID ATHANAS @ MAKASI & JOSEPH MASIMA @ SHANDOO** (supra).

After hearing submissions of the learned counsel on the grounds of appeal, we shall begin with the issue of charge sheet, which Mr. Wasonga considered defective. With due respect, Mr. Msemo is correct to assert that the particulars of the offence of Leading Organised Crime in the case of **MEHBOOB AKBER HAJI AND TWO OTHERS V. R** (supra) bear semblance to the particulars of same offence in this appeal. In **MEHBOOB AKBER HAJI** the particulars of the offence of Leading Organised Crime are in the following way:

> *"Mehboob Akber Haji and Norman Francisco Toscano between the months of June and October, 1991 within the city of Dar es Salaam knowingly and intentionally financed a criminal racket, to wit, dealing in and importing dangerous drugs illegally, namely, 5.3 tons of cannabis sativa resin."*

Our earlier decision in **DAVID ATHANAS** (supra) where we declared charge sheet to be defective is distinguishable from this appeal before us. There is marked difference between the particulars of the offence in **DAVID ATHANAS** (supra) and the particulars of the two counts in the

instant appeal before us. Mr. Msemo is with due respect correct to submit that the particulars of unlawful dealing with Government trophy were not clearly specified to the appellants in **DAVID ATHANAS** (supra) while in the instant appeal the particulars of the nature of unlawful dealing with Government trophy were clearly specified: *"...**jointly and together willfully organized and managed a criminal racket: of collecting, transporting and selling Government Trophies to wit: 118 Elephant Tusks....".*** [Emphasis is added]

In the premises we agree with Mr. Msemo that the ground of appeal complaining that the charge sheet is defective has no merit at all which we accordingly dismiss.

The next ground of appeal which learned counsel for opposing parties spent much of their submissions on, is with regard to the threshold issue whether the prosecution proved the two counts against the appellants beyond reasonable doubt.

Ms. Luwongo opposed the claim that the case was not proved, and demonstrated to us how 11 witnesses and 15 exhibits which the appellant presented; sufficiently proved the prosecution case beyond reasonable doubt. She further demonstrated how oral confessions by the appellants,

and evidence of information which the first appellant provided to police; added much weight to the prosecution case.

On his part, Mr. Wasonga forcefully pointed out that apart from narrating incidents of travelling to several places, seizing vehicles as exhibits and arresting the second appellant, the prosecution did not do discharge its burden of proof. He submitted after the first appellate court had expunged the caution statement (exhibit P9), no concrete evidence remained to prove the two counts against the appellants. He submitted that the prosecution brought no evidence on nature of criminal racket, how the two appellants participated in that criminal racket. He argued that there is no evidence which linked the two appellants with the 118 pieces of elephant tusk shown in the two counts. He submitted that because the two counts accuse the two appellants of collection, transporting and selling of 188 elephant tusks, the respondent was obliged to prove all or any of these, but did not.

We considered two issues of law call for our determination. First is whether the prosecution brought evidence sufficient to prove the ingredients of the two counts of leading organized crime and unlawful dealing in trophies. Secondly, if there is such evidence, whether it proves

beyond reasonable doubt that the two appellants were the perpetrators of the offences in the two **counts**.

Looking at the particulars of the first count of leading organised crime as a guide, the prosecution is required to prove the ingredients of organizing and managing of a criminal racket, which the charge sheet specified as **collecting, transporting** and **selling 118 elephant tusks** which are government trophies. In the second count of unlawful dealing in trophies, the particulars of the offence specified ingredients requiring proof beyond reasonable doubt to be: **collecting, transporting** and **selling 118 elephant tusks** which are government trophies.

While Ms. Luwongo was very sure in her submission that the substances which were lifted from the first appellant's HONDA CRV car which the Government Chemist determined to be remains of an elephant tusk directly linked the first appellant to the offence, Mr. Wasonga submitted that for six hours the car remained under the control of the police before it searched at Mikocheni thereby breaking any link between the first appellant and his impounded car.

In our determination, although in both counts, of leading organized crime and unlawful dealing in trophies, the prosecution was expected to

prove the ingredients of **collection, transportation** and **selling of 118 elephant tusks**; no prosecution witness testified to prove how the appellants collected or transported or sold 118 elephant tusks. Even the Game Reserve Officer Mrekwa Simon Foka (PW7) who prepared the Valuation Report (exhibit P8) for 118 elephant tusks, conceded before the trial court, that the caution statement of the first appellant (exhibit P9) was the source of his information about 118 pieces of elephant tusks. With expungement of exhibit P9, the 118 elephant tusks and the evaluation report (exhibit P8) lack any evidential basis. Looking back, it seems to us apparent the Particulars of the two counts (Leading Organised Crime and Unlawful Dealing in Trophies) were so much based on caution statement of the first appellant (exhibit P9) that when this confession was much later expunged by the High Court, prosecution was forced to make do with oral confession.

Ms. Luwongo robustly submitted that in the case at hand, the prosecution relied on oral confession in proving the guilt of the appellants. She referred to the testimony of the first appellant confessing orally to DSGT Beatus (PW2) in the following instances:

> *"Accused told us that he bought a car for the witch doctor for the smooth facilitation of ivory business." -page 36*

"Accused person mentioned other guys named Omary Hussein who owned a Mitsubishi Canter which used to carry elephant tusks. That Omary constructed extra tank for hiding the tusks. A Canter No. T765 DAC. ... accused told us that a Canter used to carry the tusks from all over the region"-page 36

"We arrived at Mpanda where a car was stated to be there. We arrived at the house of Lucas Malyango. We found Lucas and he told us that he had information that Boniface had been arrested. He told a driver to run away before we arrived. But [Lucas] took us to a godown of Mpunga where a car was hidden. We were told that an extra tank was removed before we arrived..."—page 37

"Accused told us that he bought a car Toyota RAV 4 T922 ATZ for smooth facilitation of tusk business. —page 37

"Accused told us that his house at Kimara Bonyokwa was a fruit of the business of elephant tusks. The cars HONDA and CANTER were also product of that business..." page 37

With due respect, the supposedly oral confession which the first appellant made to PW2 does not in our view prove ingredients of **collection, transportation** and **selling of 118 elephant tusks** shown

in the particulars of the two counts. It is also clear to us that PW2 did not caution the first appellant that he was not obliged to say anything and if he chose to say anything, it would be recorded and used in evidence later against him. The trial and first appellate courts did not consider voluntariness of the first appellant's oral confession to PW2. Failure by the police to warn the first appellant who they suspected prior to his making an oral confession took much weight away from this evidence.

Ms. Luwongo also made much capital out of the oral confession the appellant made to ASP Alinanuswe Reuben Mwakyembe (PW4):

> *"Boniface told us that he owned that car [Mitsubishi Canter] but handed it over to his brother for* ***taking care of the ivory business.****"*
>
> *"...He started to run ...but got stuck in the bushes and we arrested him... we took him back at his place. I explained the entire allegation which he faced. He stated to know that before and that was a reason he tried to escape after seeing us.* ***He admitted the offences to me and tried [bribe] me not to arrest him but I refused his offer on the spot. I demanded him to show me a car which was used in illegal hunting.*** *We were toid there were more than three cars involved."* [Emphasis added].

PW10, a very senior police officer, had the best opportunity to caution the first appellant before receiving oral confession, he did not issue that warning.

In her submissions, Ms. Luwongo made no efforts to show how the first appellant's oral confession to PW2, PW4 and PW10 proved the ingredients of **collection, transportation** and **selling of 118 elephant tusks** appearing in the offences of leading organized crime (first count) and unlawful dealing in trophies (second count).

But, with due respect, we agree with Mr Wasonga that in **TUMAINI DAUD IKERA V. R** (supra) we reiterated that oral confessions of guilt are admissible and can be acted upon, but we also emphasized that great caution is required before courts rely on oral confession to convict. Admissibility of oral confession does not automatically mean this genre of evidence carries sufficient weight to convict. Even where the court is satisfied that an accused person made an oral confession, the court must take an extra distance to determine whether the oral confession is voluntary. What amounts to an involuntary confession is provided for under subsection (3) of section 27 of the Evidence Act, Cap 6 which states:

> *(3) A confession shall be held to be involuntary if the court believes that it was induced by any threat, promise or other*

prejudice held out by the police officer to whom it was made or by any member of the Police Force or by any other person in authority.

Neither the trial court, nor the first appellate court considered the question whether the first appellant was a free agent to give voluntary confession when he orally confessed to PW2 at Kimara Bonyokwa when he was arrested on 23rd October 2015, and when he orally confessed to PW4 and PW10 while he was being transported to various places outside Dar es Salaam to search for evidence.

Ms. Luwongo also placed much reliance on the evidence of information which police received from the first appellant while he was in police custody, which the learned Senior State Attorney asserts supports the prosecution's case. This information is relevant under section 31 of the Evidence Act, Cap. 6 which provides:

31. When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, is relevant.

While Ms. Luwongo is correct that the information which the first appellant gave to the police, led to the discovery of the vehicles which the police seized is relevant and was properly admitted, however, the outstanding issue which the learned Senior State Attorney did not address, is whether that evidence of information leading to the discoveries proved the ingredients of **collection, transportation** and **selling of 118 elephant tusks** salient in the offences of leading organized crime (first count) and unlawful dealing in trophies (second count). The prosecution in our view failed to show how the vehicles which police seized, were used by the two appellants to collect, transport or sell 118 elephant tusks as part of criminal racket.

The whitish particles which were collected from first appellant's HONDA (exhibit P13), were sent to Government Chemist for analysis. After the analysis, the Manager of Forensic Biology and D.N.A. of the office of Government Chemist, Fidelis Segumba (PW9) determined that it was the remains of a piece of elephant tusk. Again here, the prosecution evidence has not shown how these whitish remains were part of **collection, transportation** and **selling of 118 elephant tusks** involving the two appellants. The evidence of PW2 bear out Mr. Wasonga's assertion that the

police had broken the chain of custody when they searched the HONDA CRV Reg. T674 ARL at Kimara Bonyokwa well before it was driven by a police officer to their base at Mikocheni Dar es Salaam, where a formal search was conducted with assistance of sniffing dog. In his testimony on page 36 of the record PW2 confirms what Mr. Wasonga submitted on:

> *"We demanded to see the car and he took us where a car was parked. He sent a child to go and come with the car keys. After a while* ***a child came with a key and we opened a car for search. We searched a car. From the back place of a car there were pieces of white things****. ....."* [Emphasis added].

It is clear to us that the interlude between 10:00 hrs., when police searched and seized the vehicle at Kimara Bonyokwa, and between 16:00 to 17:00 hrs., when samples were finally collected from the car at Mikocheni; the police officers had exclusive custody of the vehicle. The possibility or potential danger of the Honda vehicle having been polluted, or in any way tampered before the sniffer dog was employed, cannot be

completely excluded. The first appellant is entitled to the benefit of doubt created.

On our part, we can reiterate here that chain of custody can be regarded as broken where circumstances of the case concerned show the possibility or potential danger of the item being destroyed or polluted, and/or in any way tampered with: See **MOSES MWAKASINDILE VS R.,** CRIMINAL APPEAL NO. 15 OF 2017 referring to **JOSEPH LEONARD MANYOTA V. R.,** CRIMINAL APPEAL NO. 485 OF 2015 (both unreported). We agree with Mr. Wasonga that the chain of custody of the samples which were taken to the Government Chemist after being uplifted from the first appellant's HONDA car at Mikocheni, had been broken earlier when the police officers entered the vehicle at Kimara Bonyokwa and conducted search.

The only pieces of evidence lined up against the second appellant were the first appellant's oral confession, and finding in his possession a vehicle Canter make T.765 DAC (exhibit P4) which is registered in the name of the first appellant. These pieces of evidence did not, in our view, prove as against the second appellant, the ingredients of the two counts he was charged and convicted for.

In the upshot, we find the appeal has merit and it is hereby allowed. The conviction against the two appellants is quashed, and their respective sentences are set aside and unless they are otherwise lawfully held, they shall be set at liberty forthwith.

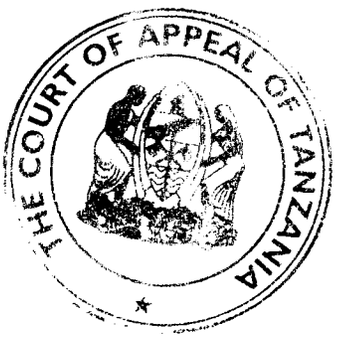
DATED at **DODOMA** this 18th day of June, 2020.

I. H. JUMA
CHIEF JUSTICE

S.E.A. MUGASHA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The Judgment delivered on 18th day of June, 2020 in the presence of Mr. Godfrey Wasonga, learned Counsel for Appellants and Mr. Tumaini Kweka, learned Principal State Attorney, and Mr. Pius Hilla, learned Senior State Attorney for the respondent/ Republic, is hereby certified as a true copy of the original.



K. D. MHINA
REGISTRAR
COURT OF APPEAL