IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: MWARIJA, J.A., WAMBALI, J.A. And KOROSSO, J.A.)

CRIMINAL APPEAL NO. 280 OF 2017

MICHAEL CHARLES KIJANGWA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Aboud, J.)

Dated the 2nd day of June, 2017
in
Criminal Appeal No. 11 of 2017

JUDGMENT OF THE COURT

20th September, 2019 & 14th February, 2020

MWARIJA, J.A.:

In the Resident Magistrate's Court of Tanga at Tanga, the appellant, Michael Charles Kijangwa and four other persons, Michael Joseph Msuya, Bakari Salim, Morgan Malick and Nyaisa Makori (hereinafter the 2nd – 5th accused persons respectively) were jointly and severally charged with a total of 17 counts. In the 1st count, the appellant was separately charged with the offence of unlawful possession of Government trophies contrary to section 70 (1) and (2) (b) of the Wildlife Conservation Act [Cap. 283 R. E. 2002] (WCA) read together with paragraph 14 (d) of the First Schedule

to the Economic and Organized Crimes Control Act [Cap. 200 R.E 2002]. (EOCCA). It was alleged that on an unknown date between the month of November, 2005 and April, 2006 in Tanga Region, the appellant was in unlawful possession of Government trophies, that is; 500 kilograms of elephant tusks valued at TZS, 375,175,000.00 (hereinafter the trophies), the property of the Government of Tanzania.

In the 2nd Count, the appellant and the 2nd -5th accused persons were jointly charged with the offence of conspiracy to commit an offence contrary to section 384 of the Penal Code [Cap. 16 R.E. 2002] (the Penal Code). It was alleged that between 11/4/2006 and 18/4/2006 in Tanga City within the Tanga District and Regional, they conspired to unlawfully export the trophies.

The appellant was also jointly charged with the 2nd and 3rd accused persons in the 3rd – 6th counts. In the 3rd count, they were charged with the offence of forgery contrary to section 337 of the Penal Code, that on or about 12/4/2006 at the same place stated in the 2ndcount, with intent to deceive, they made false shipping document; that is, a single bill of entry No. 000072 purporting to show that the goods loaded in container No. MAEU 7915043 destined for Philippines were Sisal fibre and that, the goods

were being exported by Kraasel Company of Tanga. They were also charged in the 5th count with the offence of forgery. It was alleged that on or about 13/4/2006 they prepared a similar false document as in the 3rd count; a single bill of lading No. 000094 for goods loaded in another container No. PONU 071389-8 also destined for Philippines showing that the goods exported by the purported company was Sisal fibre.

In the 4th and 6th counts, the appellant and the 2nd -3rd accused persons were charged with the offence of uttering false documents contrary to section 342 read together with section 337 both of the Penal Code. The particulars thereof were that, on 13/4/2006, they uttered the single bills of entry for each of the two containers stated in the 3rd and 5th counts knowing that the same were false documents.

In the 9th – 11th counts, the appellant and the 2nd – 5th accused persons were charged with the offences of conspiracy to commit an offence contrary to section 384 of the Penal Code, destroying evidence contrary to section 109 read together with section 35 both of the Penal Code and loading goods outside approved place contrary to section 75(1) (c) and (2) read together with section 209 both of the East African Community Customs Management Act No. 1 of 2005.

It was alleged in the 9th count that, the appellant and the 2nd -5th accused persons conspired to destroy the 1st and 2nd copies of the single bill of entry No.000094 for container No. PONU 071381-8, which contained the customs examination report with the intention of preventing the said documents from being used in evidence. On the 10th count, it was alleged that they willfully destroyed the 1st and 2nd copies of the single bill of entry No. 000094 which contained customs examination report for container No. PONU 071389-8 with intent to prevent the copies from being used in evidence. That charge was also preferred in the 16th count against the appellant jointly with the 2nd and 3rd accused persons. It was alleged that, with intent to prevent the 4th copy of the delivery note No. 19549 issued from the book with serial No. 19501 -195550, from being used in evidence, the appellant and the 2nd – 3rd accused persons destroyed those documents which purported to show that container No. MAEU 1791504-3 was loaded at the port yard.

As for the 11th count, the particulars of the offence were that, between 17/4/ and 18/4/2006, the appellant and the 2nd -5th accused persons loaded goods in containers No. MAEU 791504-3 and PONU

071389-8 outside the approved place without written permission of the proper officer.

The appellant was also jointly charged with the 2nd – 5th accused persons in the 17th count with the offence of unlawful dealing in Government trophies contrary to section 68 and 66(1) of the WCA read together with paragraph 14(b) of the First Schedule to the EOCCA. The prosecution alleged that on 27/4/2006 at the same place as in the 2nd count, the appellant and the 2nd – 5th accused persons unlawfully exported the trophies in containers No. MAEU 791504-3 and No. PONU 971389-8 thus contravening the above stated provisions of the law.

With regard to the other counts, the 7th, 8th, 12th and 13th -15th, the same did not involve the appellant and are not therefore, relevant for the purpose of determination of this appeal.

The appellant and the 2nd – 5th accused persons denied the respective counts with which they were charged. As a result, the prosecution called a total of 14 witnesses and relied on 14 exhibits. At the close of the prosecution case, whereas the 4th accused person was found to have no case to answer, the trial court found that a *prima facie* case had been established against the appellant and the rest of the other accused

persons. In their defence, save for the appellant who did not give his defence because he absconded, the 2nd, 3rd and 5th accused persons relied on their own evidence.

Having considered the evidence of the prosecution witnesses, the tendered exhibits as well as the defence evidence, the trial court found that the 1st count had been proved against the appellant. It found also that the 2nd, 11th and 17th counts with which the appellant, the 2nd and 3rd accused persons were jointly charged, had been proved against them. Furthermore, whereas the 5th accused person was found not guilty of all the counts which were preferred against him (including the 7th count with which he was separately charged), the trial court found that the prosecution had failed to prove the 3rd -6th, 9th and 10th counts with which the appellant was jointly charged with the 2nd and 3rd accused persons. It found further that the prosecution had failed to prove the 12th -16th counts with which, the 2nd and 3rd accused persons were jointly charged. The appellant, the 2nd and 3rd accused persons were therefore acquitted of those charges. In the event, whereas the 4th and 5th accused persons, were acquitted, the appellant was convicted of the 1st count with which he was separately

charged and, together with the 2nd and 3rd accused persons were convicted of the 2nd, 11th and 17th counts with which they were jointly charged.

Consequently, whereas in the 1st count, the appellant was sentenced to imprisonment term of twenty five (25) years and a fine of TZS. 3,751,750.000, in the 2nd count, he was sentenced together with the 2nd and 3rd accused persons to imprisonment term of five (5) years on the 11th and 17th counts, each of them was sentenced to pay a fine of USD 5,000 or a jail term of five (5) years and a fine of TZS. 50,000.00 or a jail term of five (5) years respectively. The imprisonment sentences were ordered to run concurrently.

For ease of appreciation of the reasons which led to the arraignment and ultimate conviction of the appellant, it is instructive to state a brief background facts of the case. Sometime in July 2006, the Tanzania Police received information from the headquarters of the international Criminal Police Organization (the Interpol) in Lyon, France that two containers, No. PONU 071389-8 and MAEU 1719504-3 which were shipped from the port of Tanga in Tanzania were found abandoned at the port of Kaushum in Taiwan. Each of the two containers had elephant tusks covered with sisal

fibre. The elephant tusks found in both containers weighed a total of 5,000 kilograms.

Following that information, Inspector Henry Joel Lugaye who was at the material time one of the officers of the Interpol in Tanzania, was assigned the duty of investigating the incident. The said police officer who testified in the trial court as PW1, communicated with the Interpol headquarters and after being availed with the necessary details as regards the incident, he started to conduct investigation. He consulted the Tanzania Revenue Authority (the TRA), the institution which is responsible for inspection and clearance of goods for export. The TRA informed him that it had also been informed of the incident and that the containers were exported through the port of Tanga.

With that information, in the company of the official of the Wildlife Department, one John Ngowi and the official of the Interpol from Lusaka Agreement Task Force at Nairobi, one Clemency Mwale, PW1 went to Tanga to interrogate the customs officials who were responsible for inspection and clearance of the goods loaded in the two containers. The customs officials who were involved at different stages in dealing with the relevant shipment documents for the two containers and who were, as a

result, interrogated by PW1 and his team were Nyaisi Makori (the 5th accused person), Deogratius Mwakalobo, Vicky Mzee and Charles Sanga who was at the material time the head of Tanga Customs Department. In its further investigation, the team travelled to Hong Kong and later to Taipei and Kaushum port in Taiwan where they inspected the two containers and took photographs. They also received the report containing the details of how the containers were intercepted and a CD showing the elephant tusk in the two containers, the same having been covered by sisal fibre.

In his evidence, PW1 stated that the investigation carried out by his team revealed that the appellant was the consignor of the two containers within which the elephant tusks were transported. He also got the evidence as regards the owner of the trucks that were used to transport the two containers to the Tanga port and the names of the drivers of those trucks. He testified further that, according to investigation, through the appellant's conspiracy with the 2nd – 5th accused persons, the elephant tusks were fraudulently exported using false documents. The appellant and the 2nd -5th accused persons were thus charged as shown above.

Apart from the evidence of PW1 which was essentially on what the investigating team revealed out of its investigation, the prosecution relied on the evidence of 13 other witnesses. They included Innayat Mohamed, the owner of one of the trucks that were used to transport the two containers to the port. That person testified as PW6. He averred that on 13/4/2006, the 2nd accused person, one of the officials of K & K Clearing and Forwarding Company hired his (PW6's) truck Reg. No. T. 899 AGL and used it to transport cargo which was loaded in a container to an industry known as Ashers. The truck's driver was one Ally Issa (PW8). The witness went on to state that after having offloaded the cargo, the 2nd accused persons retained the container at the latter's house for four days and thereafter requested that the container be taken to Kange area for loading and transporting sisal bales. On that request, PW6 instructed his son, Arijad Innayat Mohamed (PW7) to drive the truck to Kange area as requested by the 2nd accused person.

According to his evidence, when he got out of the house, PW7 found one person waiting for him and in his company, the said witness drove the truck to Kange at a sisal factory. At that area, PW7 went on to state, that person identified himself by the name of Michael Kijangwa (the appellant).

It was PW7's evidence further that the appellant told him that the load of sisal was not completed as some of the consignment was still being awaited from somewhere else. He was advised by the appellant to leave the truck there and the appellant would call him when the load was complete. PW7 heeded to the advice and went back home leaving the truck on the hands of the appellant. Later on, he received a call from the appellant that the load was ready. When he arrived at Kange, PW7 went on to state, he found that the container had been loaded and locked with a padlock. He was instructed to drive the truck to the appellant's home at Kisosora area.

He did so led by the appellant who was driving a saloon car. PW7 testified further that, at the appellant's home, the appellant told him that there were more goods to be loaded in the container but the consignment was not ready. He was therefore, required to leave the truck there and when the consignment was complete, the appellant would call him. On the next day, (18/4/2006) he received a call from the appellant that the load was ready. When he arrived at the appellant's home at Kisosora, PW7 found the container intact and drove the truck to the port where he found

the truck's driver (PW8) and the 3rd accused person whereupon he handed over the truck to PW8 who drove it into the port yard.

In his testimony, PW8 supported what was stated by PW6 and PW7 as regards transportation of container No. MAEU 7915043-8 on the PW6's truck No. T. 899 AGL between 12/4/2016 and 18/4/2006. The witness testified that on 12/4/2006, he transported some goods in the said container to Ashers Industry. Having offloaded the goods, he returned the truck and the empty container to his employer's home. He reported back on duty on 18/4/2006 whereby his employer (PW6) required him to go to the port to await for the truck. At about 4.00 p.m the truck which was being driven by PW7 arrived at the port where he also noticed the presence of the 3rd accused person. It was PW8's evidence further that, he was handed over the truck on which was the container which had already been sealed and locked with a padlock. After he had obtained the requisite permit, he drove the truck into the port yard where the container was offloaded.

Another witness, Nassoro Amri (PW9), testified to the effect that his truck with Reg. No. T.455 ACX was hired to transport container No. PONU 071389-8. It was his evidence that on 16/4/2006, he received a call from

the 2nd accused person who wanted to hire a container truck. PW9 informed the 2nd accused person that his (PW9's) truck was available. They consequently agreed to meet at a certain place near the railway to load and transport goods to the port. PW9 arrived at the agreed point with the truck and met the appellant who arrived there driving a saloon car. As it turned out however, the appellant informed him that the load had not yet arrived there (at the appellant's residence) and therefore, he required PW9 to leave the truck there until the next day. He said that he was taken back home by the appellant in his saloon car.

On the next day, after having received a call from the appellant, PW9 went to the appellant's residence where he found the container having been loaded and sealed. He drove the truck to the port where he was received by the 3rd accused person. Having obtained the necessary permit, he drove the truck into the port yard where the container was offloaded.

As stated above the appellant did not give his defence because he jumped bail after the closure of the prosecution case and after having been found to have a case to answer. In convicting the appellant, the trial court was of the view that, although there was no direct evidence from the witnesses as regards the appellant's possession and transportation of the

trophies, the totality of the evidence led to the conclusion that the appellant was guilty of the offences against which he was convicted. In arriving at that finding, the learned Senior Resident Magistrate was guided by the principles governing the application of circumstantial evidence as stated in the case of **Hamidu Mussa Timoteo & Another v. R [1993] TLR 219.**

With regard to the 1st count, the trial court relied on the evidence of PW7 which the trial magistrate found to be credible as the same was not shaken by the appellant because he jumped bail and could not therefore, give his defence. On the 2nd count, the trial court relied on the evidence of PW6 – PW9 which, according to the trial magistrate, proved beyond reasonable doubt that the appellant possessed the trophies which were loaded in the two containers. The trial court found further that the appellant conspired with the 2nd and 3rd accused persons to export the trophies to Manila through the port of Tanga.

As to the 11th count, the trial court found that the evidence of PW2 and PW3 who were at the material time the security guards at the Tanga port, sufficiently proved that the two containers were taken into the port yard while they were already loaded. The trial court relied also on the

delivery orders, exhibits P8 (a) and (b) issued in respect of the containers by K & K Clearing and Forwarding Company indicating that the containers were "intact", meaning that they were loaded and sealed outside the port premises.

On the 17th count, the learned Senior Resident Magistrate was of the view that, since the evidence was overwhelming as regards the involvement of the appellant in the export of the two containers, he was guilty of the offence of unlawfully dealing in Government trophies.

The appellant was aggrieved by the decision of the trial court and appealed to the High Court. That Court (Aboud, J.), dismissed the appeal hence this second appeal. The learned first appellate Judge found that there was sufficient circumstantial evidence upon which the trial court acted to convict the appellant. She dismissed the appellant's contention that the evidence of PW6 and PW7, which was relied upon by the trial court, was not credit worthy because of inconsistencies and contradictions. She was of the view that there was sufficient circumstantial evidence linking the appellant with the offences with which he was convicted. As a result the appeal was dismissed in its entirety.

In his memorandum of appeal the appellant has raised the following five grounds of appeal:-

> *" 1. That the appellate judge erred in law and in fact by failing to be painstaking to analyze that (sic) the prosecution side did not prove the charge of unlawful possession of Government trophies against the appellant to the touch –stone required by the law.*
>
> *2. That the appellate judge misdirected herself in law and in fact by arriving at the conclusion that the testimony of PW7 in itself eliminated the possibility of mistaken identity of the appellant.*
>
> *3. that, the appellate judge erroneously misdirected (sic) herself in law and in fact by holding that the conviction of the appellant was based on circumstantial evidence.*
>
> *4. That, the appellate judge erroneously misdirected (sic) herself in law and in fact by holding that the charge of conspiracy was proved beyond reasonable doubt against the appellant.*
>
> *5. that, the appellate judge erred in law and in fact by failing to size up the evidence on record and*

evaluate it afresh as she was entitled to do since it was first appeal and it was by way of rehearing."

At the hearing of the appeal, the appellant appeared in person unrepresented. On its part, the respondent Republic was represented by Mr. Peter Maugo, learned Principal State Attorney assisted by Ms. Regina Kayuni, learned State Attorney.

The appellant's memorandum of appeal was accompanied by his written arguments in support of the appeal. Despite several discourteous comments made against the learned first appellate Judge by whoever prepared the appellant's written argument's, the substance of the submission as regards the grounds of appeal is as follows:

On the first ground of appeal, the appellant argued that the learned first appellate Judge erred in upholding the appellant's conviction on the first count while the evidence was insufficient to prove that count. He started with the argument based on the meaning of the word "possession" as defined in **Oxford Advanced Learner's Dictionary of Current English,** 8th Ed., **Longmans Dictionary of Contemporary English**, 8th Ed. and **Concise Law Dictionary, Abridged Ed**. He argued that the

offence was not proved because he was not found in physical possession of the trophies.

Submitting further in support of the 4th ground of appeal, the appellant argued that the tendered evidence did not prove that he conspired to commit any offence. Relying on the case of **John Paulo@ Shida v. R**, Criminal Appeal No. 335 of 2009 (unreported), he contended that, since the prosecution did not adduce evidence showing that he met with other persons and planned to commit the offence charged, his conviction on the 2nd count should not have been upheld.

With regard to the 2nd, 3rd and 5th grounds of appeal, he contended that the learned first appellant Judge did not reevaluate the evidence because, if she had carefully done so, she would have found that the evidence of PW7 was not credible and secondly, that there was insufficient circumstantial evidence warranting his conviction on the 2nd, 11th and 17th counts.

According to the appellant, the prosecution evidence did not implicate him with all the transactions involving transportation of the two containers to the port of Tanga. He argued that, from the evidence of PW6 and PW9, the owners of the trucks which transported the containers No.

MAEU 7915043-8 and PONU 071389-8 respectively, was not the one who hired the trucks to transport the containers to the port. He submitted that, for that reason, the learned first appellate Judge erred in upholding the decision of the trial court while from the evidence of the two witnesses (PW6 and PW9) their trucks were not hired by him but the 2nd accused person.

He stressed that, even the booking made to MAERK Shipping Line was not made by him but Arusha Cargo Clearing and Forwarding Agency. He relied on the evidence of PW2 to the effect that the booking was made by the 3rd accused persons who was the official of K & K Clearing and Forwarding Company. He added that from the evidence of PW11, Charles, Hassan who was the Officer In-charge of Tanga port, the proprietor of the cargo which was in the two containers was Frank Mtei who owned Kaasel Company. In the circumstances, the appellant argued that, had the learned first appellate Judge reevaluated the evidence in that perspective, she would have found that the same did not implicate him with any of the criminal offences against which he was convicted by the trial court.

On the evidence of PW7, the appellant submitted that the same was wrongly acted upon to found his conviction. He submitted that such

evidence was not credible because it was inconsistent and contradictory to that of PW6 and PW8. The appellant argued strenuously in his oral submission that, although in his evidence, PW7 said that on 7/4/2006, the day on which his father directed him to drive the truck to Kange sisal factory, he went with the appellant whom he (PW7) found outside the house and later communicated that fact to PW6 in his evidence, PW6 maintained that he only "did a business with the 2nd accused Michael Joseph Msuya and the 3rd accused Bakari Salim." It was the appellant's argument that such was a serious contradiction and the learned first appellate Judge should not have agreed with the trial magistrate that the evidence of PW7 was creditworthy notwithstanding the fact that the appellant did not, because of his absence, challenge it in his defence.

The appellant went on to argue that the evidence of PW7 should not have been acted upon because it was contradictory to that of PW8 as regards the state of container No. MAEU 7915043-8 which was transported to the port by PW6's truck. He contended that whereas PW7 said that the container was locked with a padlock, PW8 said that the same was sealed.

The learned Principal State Attorney opposed the appeal. He argued in his oral submission that the grounds are devoid of merit. With regard to

the 1st, 2nd, 4th and 5th grounds, Mr. Maugo disputed the appellant's contention that the learned first appellate Judge did not undertake the duty of reevaluating the evidence thus arriving at the conclusion that the appellant was rightly found guilty.

According to the learned Principal State Attorney, the fact that the learned Judge re-evaluated the evidence is borne out by the record of appeal at pages 518 -521. He submitted that the learned Judge considered the evidence, particularly that of PW1 – PW7 and concluded that, although the communication as regards the hiring of PW6's truck was between that witness and the 2nd accused person, it was the appellant who went with the truck to Kange where the container which was carried on PW6's truck was loaded. Mr. Maugo went on to argue that, the learned first appellate Judge also analyzed the evidence of PW2 and was satisfied that when the said container arrived at the port, it was already loaded and sealed. In the same vein, Mr. Maugo argued, the learned Judge reevaluated the evidence of PW7 and came to the conclusion that, although it had certain elements of contradictions with that of PW8 as regards whether the container which was carried on PW6's truck was sealed or padlocked, that contradiction was minor because all what it meant was that the container was not

loaded at the point but rather, it was brought into the port yard while intact.

On whether or not the evidence of PW7 was credible as regards the contention that it was the appellant who escorted him to the area where the container was loaded, Mr. Maugo submitted that PW7's evidence was cogent. He argued that PW7 did not encounter the appellant once. They met at PW6's house and went to Kange and later, after having communicated, PW7 went to the appellant's home at Kisosora where they again, met. The learned Principal State Attorney added that the evidence of PW9 also sufficiently proved that the appellant directly participated in the loading and transportation of the goods which were carried in the said witness truck. He argued that, it was on the basis of those facts that the appellant's conviction was properly based on circumstantial evidence. With regard to the weight of that evidence, Mr. Maugo submitted that, such evidence, particularly that of PW7 which, upon re-evaluation, the learned first appellate Judge found it to be credible, the trial court rightly convicted the appellant accordingly.

Having considered the arguments made by the appellant and the learned Principal State Attorney, we wish to determine first the points of

law raised by the appellant in the 1st and 4th grounds of appeal. First is the point that, to prove the offence of being found in unlawful possession of property, the accused person must be found in physical possession of the property in question. Secondly, the appellant contended in the 4th count that to prove the offence of conspiracy to commit and offence, there must be direct evidence of meeting of conspirators to that effect. In our considered view, those arguments are misconceived.

The definition of the word "possession" in the cited dictionaries, including the **Concise Law Dictionary** which the appellant relied on, does not support his argument. In those dictionaries, possession is not confined to the act of being physically found with the property. The cited definition in the **Concise Law Dictionary** for example, clearly shows that possession of a property may be actual, meaning that the property may be found in physical possession of a person or may "in the eyes of the law" be in the possession of that person. In that regard, under s. 2 of the Penal Code, to "be in possession" or "have in possession" means:-

> *"(a) not only having in ones own personal possession, but also knowingly having anything in actual possession or custody of any other person, or* ***having anything in***

> ***any place*** *(whether belonging to, or occupied by oneself or not) for the use or benefit of oneself or of any other person."* [Emphasis added].

It is obvious therefore, that the offence of being found in unlawful possession of property may be proved even though the property was not found in physical possession of the accused person.

With regard to the second point arising from the 4th ground of appeal, we agree with the learned Principal State Attorney that, to prove that offence it is not necessary that the prosecution must produce direct evidence showing that the accused persons sat and conspired to commit an offence as suggested by the appellant in his written arguments. The position of the law is that the offence may be proved by circumstantial evidence. We are supported in that view by a comment made by the learned authors Ratanlal and Dhirajlal in their book **The Indian Penal Code**, 32nd Ed., Reprint 2011, (Lexis Nexis Butterworths Wadliwa Nagapur, India). The learned authors make the following comment at page 620, which we subscribe to:-

"In order to prove criminal conspiracy which is punishable under section 120-B, there must be direct or circumstantial evidence to show that there was an agreement between two or more persons to commit an offence. This clearly envisages that there must be a meeting of minds resulting in an ultimate decision taken by the conspirators regarding the commission of an offence. It is true that in most cases it will be difficult to get direct evidence of an agreement to conspire but a conspiracy can be inferred even from circumstances giving rise to a conclusive or irresistible inference of an agreement between two or more persons to commit an offence."

Having determined that point, we now turn to determine the 1st, 2nd, 4th and 5th grounds of the appeal in which the appellant faults the High Court for having upheld the findings of the trial court. The main argument by the appellant was that the learned first appellate Judge failed to re-evaluate the evidence. It was his contention that, had the learned Judge done so, she would have found that the evidence was insufficient to found his conviction, particularly on the fact that PW7 identified him as the

person who was involved in the loading and transportation of one of the containers to the port.

To start with the contention that the learned first appellate Judge did not re-evaluate the evidence, we hasten to state that the argument is incorrect because, as submitted by the learned Principal State Attorney, the learned Judge undertook that duty. This can be gleaned from the record of appeal at pages 517 – 522. She re-evaluated the evidence of PW1, PW2, PW5, PW6 and PW7. She then concluded that the trial court rightly acted on that evidence to convict the appellant on the 1st, 2nd, 11th and 17th counts.

On the contention that the evidence of PW6 and PW7 was inconsistent and contradictory, the learned Judge observed as follows in her judgment at page 522 of the record of appeal:-

> *"...I cannot hold that there is contradiction and some inconsistency in their testimonies. The testimony of PW7 on how he met the appellant eliminates all possibilities of mistaken identity as he had ample time with him from his home to the factory [at] Kange then to the appellant's house at Kisosora. This piece of evidence was not*

challenged by the advocate of the appellant during cross examination on what made PW7 to remember the appellant. According to the chain of events based on circumstantial evidence adduced by the prosecution, it is my view that the evidence of PW7 is watertight as the container was left in the custody of the appellant at Kange area where [it was] loaded and locked with padlock by him and later transported to his home at Kange."

On the same page of the record of appeal, the learned first appellate Judge went on to state as follows:-

"The evidence of PW5 shows that the container was loaded and locked outside the port area. From the whole circumstantial evidence in this case, it is clearly proved beyond doubt the inference drawn as to the appellant's guilt has shown such evidence [is] closely connected to the ... fact that the appellant committed the offences charged in counts 1, 2, 11, and 17..."

Although in his grounds of appeal, the appellant contended that the learned first appellate Judge strayed into errors of law and fact, except in the 1st and 4th grounds of appeal, he contended generally that the learned

Judge erred in upholding the findings of the trial court. It is instructive therefore, to state here that, this being a second appeal, the guiding principle is that the Court cannot interfere with concurrent findings of facts by the two courts below unless there are pressing reasons to do so. – See for instance the cases of **Alfeo Valentino vs The Republic**, Criminal Appeal No. 92 of 2006 (unreported) and **Amratlal Damodor Maltaser and Another t/a Zanzibar Silk Stones vs A. H. Jariwalla t/a Zanzibar Hotel** [1980] TLR 31. In the former case, the Court had this to say on that principle:-

> *"It is now well established that Court rarely interferes with concurrent findings of fact. An appellate court can only interfere with the findings of fact by a trial court where it is satisfied that the trial court has misapprehended the evidence in such a manner as to make it clear that its conclusions are based on incorrect premises. See* ***Salum Bugu vs Mariam Kibwana****, Civil Appeal No. 29 of 1992* (unreported)."

In the case at hand, we could not find anything suggesting that the trial court misapprehended the evidence. The crucial evidence which linked the appellant with his involvement in the loading and transportation

of the two containers was that of PW7 and PW9. As stated above, in their evidence, they gave the details on how they went in the company of the appellant who led them to where the containers which were carried in the respective trucks were loaded with cargo and transported to the port. The trial court which heard the witnesses found that they were credible witnesses and after having re-evaluated their evidence the High Court did not find any reason to differ with the trial court. In the circumstances, there can be no justification for this Court to interfere with that finding of the two courts below. This is more so because, as observed by both the trial court and the High Court, the evidence of PW7 was not challenged by the appellant who jumped bail and could not therefore, give his defence. Upon the finding that the evidence of PW7 was watertight, the matters raised by the appellant in his oral submission, such as that the saloon car which is alleged that he was using was not described in terms of its colour and make or the contention that the evidence on how the loading was done was deficient, cannot be relevant.

Like in the High Court, the appellant stressed in his submission before this Court that the evidence of PW6 and PW7 was contradictory. We agree with the learned first appellate Judge that there was no such

contradictions. The evidence of PW6 was that it was the 2nd accused person who requested for the truck. But there is nowhere in his evidence where he stated that it was that accused person who went with PW7 to load the container. According to PW7, it was the appellant who appeared at PW6's house and went with PW7 to where the cargo was loaded in the circumstances stated by PW7.

On the existence of contradiction between the evidence of PW7 and PW8 concerning the status of container No. MAEU 7915043, that contradiction is, in our view, minor. As submitted by the learned Principal State Attorney the varying statements of PW7 that the container was locked with a padlock and that of PW 8 that the same was sealed entailed that the container was taken to the port yard while intact and such a contradiction is not therefore material as to render the evidence of the witnesses uncreditworthy.

To conclude, we find that the learned first appellate Judge correctly upheld the findings of the trial court that the available circumstantial evidence led irresistibly to the conclusion that the Government trophies found in the two container were loaded and exported by the appellant

through an illegal deal. His conviction on the 1st, 2nd, 11th and 17th counts were therefore, well founded.

For the foregoing reasons, we do not find merit in the appeal and thus hereby dismiss it in its entirety.

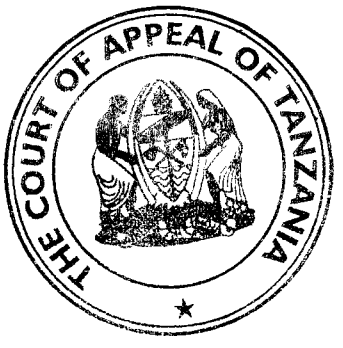
DATED at **DAR ES SALAAM** this 7th day of February, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

The Judgment delivered this 14th day of February 2020 in the presence of the Appellant in person and Mr. Peter B. Mauggo, learned Principal State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL