IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MKUYE, J.A., NDIKA, J.A. And MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 173 OF 2018

1. HUANG QIN
2. XU FUJIE } **.....APPELLANTS**

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from decision of the High Court of Tanzania at Dar es Salaam)

(Mwandambo, J.)

dated the 3rd day of July, 2016
in
HC. Criminal Appeal No. 106 of 2016

.....

JUDGMENT OF THE COURT

8th February & 25th May, 2021

MKUYE, J.A.:

The appellants Huang Qin and Xu Fujie (the 1st and 2nd appellants) together with one Chen Jinzhan who was acquitted by the Resident Magistrates' Court of Dar es Salaam at Kisutu and therefore not party in this appeal, were charged with three counts; to wit, the 1st count for unlawful possession of Government Trophies Contrary to section 86 (1) (2) (ii) and (3) (b) of the Wildlife Conservation Act, No. 5 of 2009 read together with paragraph 14 (d) of the First Schedule to, and sections 57 (1) and 60 (2) of the Economic and Organized Crimes Control Act, Cap 200 R.E. 2002; the 2nd count of unauthorized possession of ammunition contrary to section 4 (1) read together with section 34 (1) and (2) of the

Arms and Ammunition Act, Cap 223 R.E. 2002; and the 3rd count of corrupt transaction contrary to section 15 (1) (b) and (2) of the Prevention and Combating of Corruption Act No. 11 of 2007, (Now Cap 329 R.E. 2019).

Upon conclusion of the trial, the appellants herein were convicted of the 1st and 3rd counts and acquitted on the 2nd count. They were each sentenced to pay a fine of Tshs 54,358, 650,000/= for the 1st count and in default, to a custodial sentence of thirty years imprisonment. Also, they were sentenced to pay a fine of Tshs 1,000,000/= for the 3rd count and in default to serve a custodial sentence of five years imprisonment.

The background to the case leading to this appeal is as follows: On 1 /11/2013 Camisius Karamanga, Principal Officer of the Ministry of Natural Resources and Tourism (PW1) received an intelligence report that there was a consignment of government trophies at the appellant's residence. On the following day the police officers under supervision of Heri Rugaye (PW3) arranged surveillance. There was further information that the appellants were on a verge of picking-up government trophies. The police officers trailed the appellants up to their residence situated at Kifaru Street in Mikocheni Area within Kinondoni District in Dar es Salaam Region. According to PW3, Merisiana Kazizi (PW4) and Kessy Shomari (PW5) on 2/

11/2013, the search and seizure exercise was carried out in the appellant's residence and 706 pieces of elephant tusks were found in polythene bags which were later marked IR No. OB/112/10991/2013. DSSgt Gerwin Milinga (PW2), PW3 and Samson Sael (PW9) testified that while in the course of searching, the appellants attempted to bribe the officers who conducted the search and seizure so as to let them free.

Later, the elephant tusks were weighed and found to be 1889 kilogrammes. Also, three vehicles with Registration Numbers T317 BXG Toyota Noah, T777 BDT Hyundai and T728 BDP Toyota Hiace were also seized from the appellants.

A certificate of seizure was prepared and signed by among others the appellants and PW3, PW4 and PW5 who were independent witnesses. The elephant tusks were taken to Mpingo House and were received by Danford Muni (PW7), the exhibit keeper, from PW3. PW7 testified that he had been the custodian of the same throughout. He also explained the weight of the same as shown in the trophy valuation certificate and tendered the exhibit register which showed the number of tusks, their weight and the date when they were received by him.

On his part, Samson Saye (PW9), testified on a how he participated in the search and how being a Wildlife Officer was involved in the preparation of the trophy valuation certificate. The said document showed the weight, number of pieces of elephant tusks and species killed. PW9 also explained in his testimony that some small pieces of elephant tusks had been inserted inside the holes of the larger pieces which was unnoticed on the day of seizure. This led to the increase of the number of elephant tusks when the same were counted in court.

In defence, both appellants denied involvement in the commission of the offences. They each testified to have come to Tanzania in 2013 to look for jobs. They stayed at the house of one Lee at Kifaru Street where they used to park garlic and Chinese spices. They denied to have possessed keys for the containers as they were never locked. They also denied to have seen PW4 and PW5 and to have signed documents at Kifaru Street. As to the elephant tusks they denied to have been retrieved from their house as they just saw them being produced as exhibit in court. The appellants also denied to have signed Exhibit P1 and P2 as they did not understand Swahili or English.

After a full trial as alluded to earlier on, the trial court was satisfied that the prosecution sufficiently proved the charges in respect of the 1st and 3rd counts. It then proceeded to convict and sentence them accordingly.

Aggrieved by the conviction and sentence meted out against them, they appealed to the High Court but their appeal was dismissed. Still protesting their innocence, they have appealed to this Court on a second and final appeal. They filed three sets of memoranda of appeal. On 13/9/ 2019 they lodged a substantive memorandum of appeal consisting of 8 grounds of appeal. On 3/11/2020 they lodged a supplementary memorandum of appeal containing 3 grounds of appeal. Yet on 19/10/ 2018, Messrs Richard Rweyongeza and Edward Chuwa, learned advocates for appellants filed a joint memorandum of appeal with 9 grounds of appeal.

When the appeal was called on for hearing, both appellants were represented by Mr. Augustino Ndomba learned advocate; whereas the respondent Republic was represented by Mr. Salim Msemo assisted by Ms. Elizabeth Mkunde and Ms. Mossie Kaima, all learned State Attorneys. It is also noteworthy that as the appellants were Chinese, the hearing of the

appeal was conducted with the aid of interpretation services by Mr. Mulaba Didas Laurean, who before the commencement of hearing was sworn to interprete Kiswahili into Chinese and vice versa.

Upon examination of the memorandum of appeal, we have found that the appellants complaints are to the effect that **one,** the documents (some exhibits) were not read out after being admitted in evidence; **two** the chain of custody of the elephant tusks had broken down; **three,** the prosecution evidence was marred with discrepancies, inconsistencies and contradictions; **four,** the exhibits were not properly identified before being tendered in court; **five,** there was a confusion of the name in of the person who authored Exh. P8. **Six,** Tshs. 30,250,000/= allegedly used to bribe police officers was not tendered in court; **Seven,** there was a change of magistrates without the successor assigning reasons for taking over. **Eight,** PW3 adduced evidence in court without having been sworn or affirmed, and **nine,** the sentence of thirty years imprisonment on both appellants was excessive when taking into account that they were first offenders.

We have examined the submissions from either side, the grounds of appeal and the entire record of appeal and now, we think, we are in a position to deliberate on them.

The first appellants' complaint is that some exhibits were not read out after being tendered and admitted in court (ground No. 1 of the supplementary memorandum of appeal). In elaboration, Mr. Ndomba submitted that Exhs. P1, P2, P3, P5, P6 and P8 were not read over in court to enable the appellants understand their substance. He pointed out that, failure to read them was a fatal irregularity which prejudiced the appellants as they could not be in a position to defend themselves better. In this regard, he prayed that the same be expunged from the record of appeal. This complaint was readily conceded by Mr. Msemo that the said exhibits were not read out in court. He also urged the Court to expunge them from the record of appeal. However, he was quick to argue that even if such exhibits are expunged, the gist of such exhibits was explained by the witnesses in evidence. For instance, he said, PW3 explained the contents of Exhs. P1, P2 and P3 (the search order, certificate of seizure, and the Handing Over Certificate (Hati ya Makabidhiano) and PW9 explained Exh. P8 on the value of the government trophies. For that matter, Mr. Msemo while relying on the case of **Anania Clavery Betela v. Republic,**

Criminal Appeal No. 355 of 2017 (unreported) urged the Court to find this ground devoid of merit and dismiss it.

On our part, we agree with both parties that, indeed, the said exhibits were not read out in court after their admission in evidence. Such documents, that is, the Search Order (Exh P1), the Certificate of Seizure (Exh. P2), the Handing over Certificate (Exh P3), the witness statement of D 3746 D/SSg Gerwin (Exh. P5), the Court Exhibit Registrar (Exh. P6) and the Trophy Valuation Certificate (Exh. P8) were crucial in the determination of the case. Failure to read them in court was a fatal omission because it offended the principle of fair trial as the appellants could not have known the contents of the exhibits tendered against them.

In the case of **Robinson Mwanjisi and 3 Others v. Republic**, [2003] T.L.R 218 the Court emphasized the requirement of reading over the document after it has been cleared for admission and actually admitted. But again, in the case of **Anania Clavery Beteia** (supra) it was stated that failure to read over the exhibits after being cleared for admission and admitted in evidence was wrong and prejudicial.

Hence, based on the above cited authorities, it is our considered view that as Exhs. P1, P2, P3, P5, P6 and P8 were not read over after being

admitted in evidence, it is a fatal omission which cannot be cured under section 388 of the Criminal Procedure Act, Cap 20, R.E. 2019 (the CPA). In the result, we hereby expunge the said documents from the record of appeal.

Nevertheless, we agree with Mr. Msemo that even if the said exhibits are expunged from the record of appeal, the respective witnesses who tendered them in court sufficiently explained their contents. As was correctly argued by Mr. Msemo, Exh P1 was explained by PW3 as a search order in which the items belonging to the appellants were seized on 2/11/ 2013 at Mikocheni B. He also explained how they prepared the Certificate of Seizure (Exh. P2) indicating the items taken from the appellants. PW3 also explained Exh. P3 being the Handing Over Certificate that was used in handing over the seized items including 706 elephant tusks to the Wildlife Department at Mpingo House. The same contained the items handed over and was signed by those who witnessed the exercise.

As regards Exh. P5 which was a statement of A/Inspector Gerwin Milinga, it was explained by PW2 in his testimony. Regarding Exh P6 (the Exhibit Register) PW7 explained it to be the register in which he recorded the elephant tusks before storing them in special Ngorongoro Hall at

Mpingo House while awaiting to be taken to the court. He also elaborated at page 246 of the record of appeal that the said register showed the names of the person who handed over those tusks, the recipient and his name and the date when they were issued for the court process.

The Trophy Valuation Certificate (Exh P8) was explained by PW9 who conducted the valuation of the elephant tusks and filled the certificate evidencing the value of the government trophies which was Tshs. 5,535,836,000/= (page 262) together with their weight.

In this regard, we agree with Mr. Msemo that even though the said exhibits are expunged, they were sufficiently explained by PW2, PW3, PW7 and PW9 respectively.

Regarding the complaint that the chain of custody of the elephant tusks was broken (ground No. 2 of the substantive memorandum of appeal), Mr. Ndomba took issue on three aspects. One, that, although PW1, PW2 and PW3 were present when the search and seizure of the elephant tusks was carried out and at the appellant's arrest, they gave diverse accounts on them. He argued that, whereas PW3 said the elephant tusks were counted at Oysterbay Police Station after being seized from Mikocheni there is no evidence that the same were received at Oysterbay

Police Station as they were not recorded in that police station's Exhibit Book.

Two, while PW1, PW2 and PW3 testified that PW3 handed over the tusks to Danford Muni (PW7) and he signed, PW7 does not testify to have signed anywhere. At one stage PW3 said the exhibits were received by PW8. Three, in relation to the Handing Over Certifiacate, PW3 said he gave the documents to PW7 and PW8 said he received the vehicles from PW3. It was Mr. Ndomba's submission that the chain of custody ought to have been established by documentation as was stated in the case of **Paulo Maduka and Another v. Republic,** Criminal Appeal No. 107 of 2007 (unreported) at page 18 where it was stated that: -

"Chain of custody must be in paper trail."

He said, in the absence of paper trail, the possibility of tempering with the exhibit cannot be ruled out.

On the other hand, Mr. Msemo was of a firm view that the chain of custody was not broken from the seizure of the elephant tusks to the time they were tendered in court. He said, the chain of custody need not necessarily be in paper trail as even oral evidence can suffice. To support his argument, he referred us to the case of **Anania Clavery Betela**

(supra). He pointed out that PW3 and PW9 were at the arresting center and PW3 supervised the handling of exhibits from Mikocheni, Oyesterbay Police Station up to Mpingo House where they were handed over to PW7 for safe custody. He The learned State Attorney elaborated that the exhibits were kept in polythene bags which were assigned an IR number OB/IR/1099/2013. He went on submitting that PW7 kept the elephant tusks until when he handed over to PW3 for producing or tendering them in Court.

The learned State Attorney also invited the Court to consider the huge number of elephant tusks and its weight of about 1.9 tons which could not have changed hands easily. To bolster this argument, he referred us to the case of **Issa Hassani Uki v. Republic,** Criminal Appeal No. 129 of 2017 at page 11 (unreported). He stressed that as there was no evidence that the elephant tusks were tempered with, the prosecution witnesses were credible and urged the Court to dismiss this ground of appeal for lack of merit.

The appellants have challenged the chain of custody that it was broken on the basis of discrepancies in the prosecution witnesses' evidence

on the manner the elephant tusks were handled the fact that could have been cured had there been a paper trial.

We are aware that, that was a position taken by the Court in the case of **Paulo Maduka and 4 Others** (supra), when we expounded some guiding principles relating to chain of custody. In particular, we stated that:

> *"By chain of custody` we have in mind chorological documentation and or paper trail, showing the seizure, custody, control, transfer, analysis and disposition of evidence, be it physical or electronic. The idea behind recording the chain of custody, it is stressed, is to establish that the alleged evidence is in fact related to the alleged crime rather than, for instance having planted fraudulently to make someone appear guilty."*

In the case of **Chacha Jeremia Murimi and 3 Others v. Republic,** Criminal Appeal No. 551 of 2015 (unreported), the Court also stressed that:

> *"In order to have a solid chain of custody it is important to follow carefully the handling of what is seized from the suspect up to the time of laboratory analysis, until finally the exhibit seized is received in court as evidence... The movement of the exhibit from one person to another should be handled with*

great care to eliminate any possibility that there may have been to tampering of that exhibit."

However, in the case of **Joseph Leonard Manyota v. Republic,** Criminal Appeal No. 485 of 2015 (unreported), the Court went a further milestone and stated that:

> *"It is not every time that when chain of custody is broken, then the relevant item cannot be produced and accepted by the court as evidence, regardless of its nature. We are certain that this cannot be the case say, where the potential evidence is not in the danger of being destroyed, polluted and/or in any way tampered with. Where circumstances may reasonably show the absence of such dangers,* ***the court can safely receive such evidence despite the fact that the chain of custody may have been broken. Of course, this will depend on the prevaiiing circumstances in every particular case.*** *"*[Emphasis added]

In this case, we agree with both counsel that there was no documentation or paper trail on the handling of the elephant tusks produced in court. We equally agree that there may be discrepancies on the time and date when elephant tusks were counted; whether or not the same passed through Oysterbay Police Station and counted there; and the

number of elephant tusks when retrieved from Mikocheni and when they were recounted at the court. Except for the latter complaint, we find the former to be minor as they do not go to the root of the matter.

In any case, we agree with the learned State Attorney that the chain of custody of the elephant tusks was not broken from their seizure to the time they were tendered in court. There was evidence from PW2 and PW3 that the elephant tusks were seized at the appellant's house located at Kifaru Street at Mikocheni area. From there they passed through Oysterbay Police Station where the appellants were taken and obtained the case number (IR Number). Though PW3 said they were counted at Oysterbay Police Station PW2 denied it and, we think, PW2 is right as there was no exhibit register from that police station to that effect. From there on 2/11/2013 the elephant tusks were taken to Mpingo House and PW3 handed them over to PW7 and both signed the Exhibit Register admitted in evidence as Exh. P6 as opposed to the appellants' proposition that PW7 did not sign anywhere. When they counted them, they were 706 pieces of elephant tusks in 54 white sulphate bags. Thereafter, on 27/5/2015 PW3 retrieved them from PW7 for purpose of tendering them in court and returned to PW7 for safe custody. Of course, we take note that when they were re-counted in court the number increased to 728 elephant tusks but

there was an explanation on that. It is explained that small size tusks were shifted into the hollows of the big ones.

Admittedly, looking at the available evidence, none of the witnesses explained or produced any document showing the manner the elephant tusks moved from one person to another or how they were handled from their being seized until when they were tendered in court. As was rightly submitted by Mr. Ndomba there was no paper trail which would have made assurance of the safety of the item which was seized from the appellants – See **Paulo Maduka and 4 others** (supra) and of **Chacha Jeremia Murimi and 3 Others** (supra).

However, we agree with Mr Msemo that it is not in every case in which the chain of custody is broken, where the seized item cannot be produced and admitted especially items which are not in danger of being destroyed or tampered with as was stated in the case of **Joseph Leonard Manyota** (supra). (See also **Kadiria Said Kimaro v. Republic,** Criminal Appeal No. 301 of 2017 (unreported)). In the latter case, the stages of handling of the pellets were not documented but Court found them to have been properly admitted in evidence for the reason that they were items which could not change hands easily or be tampered with.

Of course, we are alive to the fact that the appellants' other complaint was the discrepancy in the total number of tusks between 706 and 728. However, we are satisfied with the explanation by PW3 that some small tusks were inserted in the big ones. We believe in this evidence because the weight of the contraband did change when they were 706 and 728. This confirms that the added 28 tusks were unbeknownst inserted in other tusks.

Also, we note that there may have been some confusion between PW7 and PW8 as to how and when the elephant tusks were received. But the evidence is very clear that the elephant tusks were handed over to PW7 as testified by PW3 and PW7 himself. PW8 received the motor vehicles from PW3 as indicated at page 255 of the record of appeal. Those vehicles, Reg. Nos. T777 BOT and T317 BXG were used for carriage of the government trophies. The third vehicle T728 BPD was received by PW8 from the same PW3 on the following day. All of them were admitted as Exh P7. Thus, we find that there was no discrepancy as to who received the elephant tusks as it was clearly testified that it was PW7 who received them.

On the basis of **Joseph Leonard Manyota** (supra) and **Kadiria Said Kimaro** (supra), we are satisfied that the chain of custody was not broken as the handling of the elephant tusks was sufficiently explained from the time of their seizure to the time they were produced in court. Apart from that, we have taken into account the nature of the items that they are items which could not be capable of changing hands easily be it in terms of quantity which was 728 pieces or weight of 1.8 tonnes which were huge. At any rate, there was no evidence availed in the trial court suggesting that there might have been tampered with them.

The third complaint relates to the discrepancies in the prosecution witnesses' evidence (grounds Nos. 1 and 2 of the substantive memorandum of appeal). On these grounds, the learned counsel for the appellants challenged the evidence of PW1, PW2 and PW3 for being contradictory in relation to the time they tracked the appellants. Whereas PW1 said it was on 1/10/2013 at 14:00 hrs., PW3 said, he together with PW1 and others, tracked them on 2/10/2013 at 00.00 hrs and PW2 said it was on 1/10/2013 at 19:00 hrs when they saw appellants at Biafra and tracked them up to Mikocheni.

Mr. Ndomba also pointed out that the time when the elephant tusks were received from PW3 varied. He explained that, while PW7 said he received the elephant tusks from PW3 on 1/10/2013 up to 22:00 hrs.; PW3 said they counted them up to 3/10/2013 and handed them to PW7. The other point of contradiction is that PW2 and PW3 contradicted themselves on whether the elephant tusks passed through Oysterbay Police Station or not. Whereas PW2 said they did not pass there, PW3 said they took the tusks together with the appellants to Oysterbay Police Station which was also confirmed by PW1.

The other contradiction was on the number of elephant tusks. Whereas the charge sheet, Exh P1 and Exh P2 refers to 706 pieces of elephant tusks, at the time they were tendered in court they were 728 suggesting an addition of 22 tusks. Mr. Ndomba argued that the contention by PW3 that the small tusks had been inserted in the bigger ones was unreliable not worthy believing. It seems to us that the appellant suggests that the witnesses were not reliable in this case.

Mr. Msemo, on the other hand, contended that there were no contradictions in the prosecution evidence. He argued, if there is any, such contradiction, did not go to the root of the matter. Mr. Msemo submitted

that though there may be discrepancies on the time PW1 and PW3 saw the appellants but there was no cross examination on that aspect. He added that on the difference of dates when elephant tusks were counted and whether the same passed through Oysterbay Police Station, PW2 said they passed there to prepare a charge sheet. Nevertheless, he conceded that there was a contradiction on the number of elephant tusks. He said there was no dispute as per PW1, PW2, PW3 and Exhibit P3 that the elephant tusks were 706. However, at the counting before tendering in court, they were 728 pieces. The learned State Attorney said, the prosecution gave explanation which was believed by both the trial court and the first appellate court that the smaller tucks had been inserted in the larger ones. To show that there were the same tusks, they weighed the same weight of 1,886 kilograms. At any rate, Mr. Msemo said, the witness (PW3) was not cross examined on that aspect. He referred us to the case of **Issa Hassan Uki** (page 17-19) (supra) in support and urged us to dismiss this ground of appeal.

In this case, we agree with both counsel that there are some discrepancies in the prosecution witnesses regarding the time the witnesses tracked the appellants whether it was at 14:00 hrs. as testified by PW1, 00.00 hrs as per PW3's testimony or 19:00 hrs. as testified by

PW2. The other contradiction was whether the elephant tusks passed at Oysterbay Police Station as was testified by PW3 or not as denied by PW2. Again, there was a contradiction as to the time when the elephant tusks were counted at Mpingo House; and the difference in the number of elephant tusks between 706 and 728 pieces of elephant tusks.

In the first place we wish to state that the law on contradictions or discrepancies is that it is not every discrepancy in the prosecution that will lead to the prosecution case to flop - see **Said Ally Ismail v. Republic,** Criminal Appeal No. 242 of 2010 (unreported) while citing the case of **Bakari Hamis Ling'ambe v. Republic,** Criminal Appeal No. 161 of 2014 (unreported) and **Said Ally Saif v. Republic,** Criminal Appeal No. 240 of 2008 (unreported). Moreover, it has been the position of this Court that contradictions by witness or between witnesses is something which cannot be avoided in any particular case. (See **Dickson Elia Nsamba Shapwata v. Republic,** Criminal Appeal No.92 of 2007 (unreported). This position was also taken in the case of **Issa Hassan Uki** (supra) while citing with approval the High Court's decision in **Evarist Kachembeho and Others v. Republic** [1978] LRT 70 where it was stated as follows:-

"Human recollection is not infallible. A witness is not expected to be right in minute details when retelling his story."

In the same case of **Issa Hassan Uki** (supra) the Court also referred to the case of **John Gilikola v. Republic**, Criminal Appeal No.31 of 1999 (unreported) where it was stated that due to frailty of human memory and if the discrepancies are on details, the Court may overlook such discrepancies.

We have considered the contradictions raised by the appellants. We agree with the appellants that there may be discrepancies in the prosecution witnesses. However, we are of the considered view that they do not go to the root of the matter. They are not material to shake the credibility and reliability of the prosecution witnesses. We think, only one discrepancy regarding the difference in number of the elephant tusks between 706 and 728 could be material. However, we do not agree with the appellants counsel that it is a material contradiction which goes to the root of the matter because of the explanation given by PW3 that it was due to the fact that the smaller tusks were unbeknown to them inserted in the larger tusks. We believe in his evidence due to the fact that even when they were re-weighed, their weight did not change.

Hence, we are satisfied that the prosecution witnesses were credible and reliable and their evidence cannot be discredited. In this regard this ground of appeal lacks merit and we dismiss it.

The fourth complaint is that the 706 elephant tusks were not properly identified by the witnesses before being tendered in evidence (ground No. 3 of the supplementary memorandum of appeal). In elaboration, Mr. Ndomba contended that PW3 did not give any description before tendering them in court. To support his argument, he referred us to the case of **Ally Zubery Mabukusela v. Republic**, Criminal Appeal No.242 of 2011 (unreported).

In reply, Mr. Msemo submitted that apart from there being no law on how to identify an exhibit before tendering in court, PW3 identified the elephant tusks through IR (case number), type of trophy, number of elephant tusks and the bags carrying them which were marked. He distinguished the case of **Ally Zubery Mabukusela** (supra) in that it related to mobile phones which could change hands easily.

We agree with Mr. Msemo that the case of **Ally Zuberi Mabukusela** (supra) is distinguishable from the case at hand because in that case it involved three stolen mobile phones in which the claimant did not give

their description. In that case, the Court emphasized the need for a proper procedure for identification of property in court before being tendered in evidence. It stated that:-

> *"The claimant should make a description of special marks on an item before it is shown to him and allowed to be tendered as an exhibit. That way an identification of the item can be established to the court, beyond reasonable doubt."*

In this case, PW3 gave his evidence and in identifying the elephant tusks before being tendered in evidence, he said:-

> *"... Yes, I can identify those elephant tusks and vehicles. The bags used to carry the elephant tusks. They were white in colour with red stripes. There were also white bags with blue strips. The elephant tusks had IR by the name OB/IR/0991/2013. There were 54 bags."*

Then, after the court had moved to Mpingo House where the exhibits were kept, PW3 went on to testify that:

> *"These are the very bags I referred to. I identify them by white colour as I earlier stated in court as well as OB/IR/0991 /2013."*

Thereafter, the trial court held that the GPO regarding identity of exhibit was not complied with to the letter. However, it admitted the elephant tusks on the basis that failure to adhere to those rules would go to the weight to be attached to evidence regard being given to other evidence. Of course, it is not vividly seen on how the trial court dealt with the issue and distinguished the case of **Ally Zuberi Mabukusela** (supra) which involved identification of mobile phones claimed to have been stolen by the appellant from the shop which entailed proof of ownership as opposed to the issue in the matter at hand which entailed proof of unlawful possession of elephant tusks found at the appellants' premises. Apart from that the trial court admitted the alleged objects (sacks and elephant tusks) as an exhibit having been satisfied that PW3 had identified them subject to assessing the weight to be attached to the evidence together with the entire evidence.

On our part, we do not have qualms with that determination because the elephant tusks were the main subject of the matter. The prosecution was required to prove unlawful possession of the same by the appellants. The prosecution witnesses proved how they retrieved them from the appellants. This is quite different from the case of **Zuberi Mabukusela** (supra) where the shop owner had to prove one of the

ingredients in the doctrine of recent possession being proving ownership of the stolen item. This being the case, we are satisfied that the trial magistrate was justified to admit the elephant tusks in evidence.

Next is the fifth complaint on the confusing evidence of Exh. P 8 (the trophy valuation certificate) the focus being who was the author thereof (ground No. 4 of the substantive memorandum of appeal). However, following the expungement of Exh. P 8, we do not intend to discuss it in depth. We have noted from the record of appeal that PW9 has been referred to by two different names. At page 262 of the same PW9 who was the Senior Wildelife Officer working with the Ministry of Tourism has been referred to as Samson Sael. At page 379(l) of the record of appeal he has been referred to Samson Saye who may be taken as a different person from Samson Sael. However, considering the manner the witness had been consistent in his testimony in court, we think, the difference in the names of PW9 might have been caused by a mere typographical error. In any case, we wonder why the appellants have raised this issue at this stage while they did not do so during the trial. Nor did they cross examine the witness on that aspect. In the premises, we take it that PW9's name is Samson Sael as it appears at page 262 of the record of appeal when he testified in court.

The sixth appellants' complaint is that it was wrong for the trial court to convict them with the offence of corruption as it was not proved beyond reasonable doubt (ground No. 4 of the substantive memorandum of appeal). Mr. Ndomba explained that, much as the prosecution witnesses said the appellants attempted to bribe them with Tshs. 30,250,000/= and the amount is shown in the certificate of seizure (Exh P2), the said amount was not tendered in court as evidence. The learned State Attorney submitted that failure to tender it in court did not vitiate the evidence that there was a corrupt transaction. He explained that there was sufficient evidence from PW1, PW2, PW3, PW4, PW5 and PW9 that the appellants attempted to bribe the witnesses. He added that the High Court dealt with it and it found that failure to produce it was inconsequential.

Having considered the submissions from either side, it is not in dispute that there was evidence that the appellants attempted to bribe the search team with Tshs. 30,250,000/=. In their testimonies all PW1, PW2, PW3, PW4, PW5 and PW9 testified to the effect that they were bribed. And, the certificate of seizure (Exh. P2) shows Tshs. 30,250,000/= as among the properties seized from the appellants. Ordinarily, as was rightly

submitted by the learned counsel for the appellants where the evidence involved an exhibit, it ought to have been tendered. Unfortunately, none of the witnesses tendered the said amount in court as an exhibit. PW3, for instance, gave generalized evidence that the amount of bribe offered by the appellants was 2800 notes of Tshs 10,000/=, 410 notes of 5,000/= and 100 notes of Tshs. 2,000/= but he did not produce the said notes in court. Neither were the said denominations recorded in Exh. P2 nor were the bank notes and their serial numbers listed in it for production in court. No reason was given by the prosecution for such failure and it appears that even their whereabouts is unknown. Given the circumstances, we are of the considered view that, failure to produce such a crucial exhibit (the money) creates a doubt which as our criminal jurisprudence dictates must be resolved in favour of the appellants. Hence, we find this count was not proved against the appellants beyond reasonable doubt and thereby quash the conviction in respect of the third count and set aside the sentence thereof.

The seventh complaint is that section 214 (1) of the Criminal Procedure Act, Cap 20 R.E. 2002 (the CPA) was not complied with as the case was tried successively by two magistrates without affording the appellants the right to recall the witnesses (ground No. 6 of the substantive

memorandum of appeal). The learned State Attorney, on the other hand, was firm that section 214 (1) of the CPA was complied with. He pointed out that both the prosecution and defence side knew that the predecessor magistrate had been transferred and the defence counsel did not raise any issue. In addition, he said, the High Court also dealt with the issue and was satisfied that there was no prejudice to the appellant.

Under section 214 of the CPA, a successor magistrate can assume jurisdiction over a matter and continue with trial on the evidence taken by the predecessor who is unable to complete the trial within reasonable time. (See **Salimu Hussein v. Republic,** Criminal Appeal No. 3 of 2011 (unreported). On top of that it is important to afford a fair trial to the accused and to let him know why there is a new magistrate - See **James Maro Mahende v. Republic,** Criminal Appeal No 83 of 2016 (unreported).

We have examined the record of appeal and found that indeed, Hon. Arufani, PRM (as he then was) commenced trial on 8/11/2013 and recorded the evidence of PW1, PW2 and PW3 up to 1/4/2015 when Hon. Mkeha, SRM (as he then was) took over and recorded the continuation of the evidence of PW3 and composed the ruling on admissibility of Handling

over Document (Exh. P3). He then recorded the evidence of PW4, PW5 PW6, PW7, PW8 and PW9 together with the appellants and composed the judgment.

However, we note that when Hon. Mkeha took over the trial both sides knew that the predecessor magistrate (Arufani PRM) had been transferred and the successor, Mkeha PRM had taken over. This is clearly shown at page 163 of the record of appeal when the learned Senior State Attorney (Mr. Kimaro, SSA) told the court that they did not know that the matter was formerly re-assigned to another magistrate after the transfer of the former trial magistrate. Then, after having made a prayer for the matter to be fixed for hearing, Mr. Chuwa who represented the appellants brought to the attention of the court that on next hearing date the prosecution side was required to respond on the admissibility of certain documents. He also said "Let us proceed from where we ended". To us, this statement implies that he was not only responding from the remarks made by the learned Senior State Attorney on the change of the magistrate but also expressed his agreement with the matter to proceed from where it had reached. Although the trial magistrate may not have recorded the reasons for taking over the matter to the appellants, we are of the considered view that the appellants were not prejudiced by such omission

considering that appellants were represented by an advocate - see **Salum Said Matangwa @ Pangadufu v. Republic,** Criminal Appeal No. 292 of 2018 (unreported). This ground is unmerited as well. We dismiss it.

We now turn to the eighth in which the appellants' complaint is that PW3 was not reminded that he was still under oath when the trial court moved to Mpingo House for tendering of the elephant tusks after having adjourned the proceedings from the Resident Magistrates' Court's at Kisutu premises (ground No. 2 of the supplementary memorandum of appeal). It was the appellant's counsel's argument that the unsworn evidence of PW3 taken at Mpingo House has no evidential value and that it has to be disregarded. On the other hand, Mr. Msemo had a different view. He said PW3 was still under oath he had taken earlier on as his evidence was still a continuation of his testimony from the Resident Magistrates' Court of Dar es Salaam at Kisutu.

This ground should not detain us much. We agree with Mr. Msemo that PW3 had taken oath at Kisutu. Even when the court moved to Mpingo House the witness was still testifying under the same oath as he was yet to be discharged. The trial court had just moved to another venue. An almost similar scenario happened in the case of **Bakari Jumanne @ Chigalawe**

and 3 others v. Republic, Criminal Appeal No. 197 of 2018 (unreported) where PW7 took oath on 9/8/2001 when he adduced his evidence in chief and the matter was adjournment until on 24/8/2001 when he came back to the court for cross examination. On the date set for cross examination, he was not reminded that he was still on oath. The Court found that at that time when PW7 was cross examined, he was still under oath he took previously, meaning that there was no need for him to retake oath.

Thus, guided by the above authority, we have no hesitation to find that in the matter at hand, at Mpingo House, the witness was still under oath he had taken earlier on. Hence, this ground of appeal is not merited as well and we dismiss it.

The last complaint by the appellants is that the punishment to pay a fine of Tshs. 54,358,650,000/= or imprisonment of 30 years is excessive (in ground No. 3 of the supplementary memorandum of appeal). They are of the view that considering that they were first offenders, the trial court ought not to award the maximum sentence. The case of **Ally Zuberi Mabukusela** (supra) was cited in support. On his part, the learned State Attorney submitted that the fine of Tshs 54,358,650,000/= or imprisonment of 30 years was proper. However, he said, by the nature of

the sentence the trial magistrate ought to forward it to the High Court for confirmation. In addition, he said section 86(1)(2)(c)(ii) under which the appellants were charged was not properly cited. He said the proper section ought to have been section 86(2)(b) instead of section 86(2)(c)(ii) of the Wildlife Conservation Act.

On our part, we agree with the learned State Attorney that besides the charge being laid under section 86(1)(2)(c)(ii) of the Wildlife Conservation Act, it ought to have reflected section 86(2)(b) of the same Act as the applicable punishment provision. However, in our considered view, the citation of section 86(2)(c)(ii) which was inapplicable instead of the applicable provision, was not fatal and is curable under section 388 of the CPA. This is because it did not occasion any miscarriage of justice to the appellants because they understood the offence they were facing – see **Jamali Ally @ Salum v. Republic,** Criminal Appeal No. 52 of 2017 (unreported).

In any case, the appellants were convicted with the offence of possession of government trophies and were each sentenced to pay a fine of Tshs. 54,358,650,000/= or to be jailed for thirty years in default. This was in terms of section 86(1)(2)(c)(ii) of Wildlife Conservation Act which

was wrongly cited. Besides that, in mitigation the counsel for appellants told the court among other factors that the appellants were first offenders. Unfortunately, the trial magistrate seems to have not considered such mitigation but he concentrated on the large number of elephants killed and how the appellants threatened to extinguish elephant's generation in the country. Nor did the first appellate court comment on it. However, it is trite law that being a first offender attracts leniency in sentencing.

On our part, having considered the circumstances of the case, we are settled in our mind that the appellants being first offenders deserved a statutory minimum sentence of imprisonment for twenty years and not the maximum sentence of thirty years imprisonment. Therefore, the sentence of imprisonment for thirty years was excessive.

Consequently, in terms of section 86(1)(2)(b) of the Wildlife Conservation Act, we reduce the said sentence from thirty years to twenty years and order that the appellants should pay a fine of not less than ten times the value of trophy.

In the result, except for ground No. 5 of the substantive memorandum of appeal and grounds Nos. 1 and 3 of the supplementary

memorandum of appeal which we have allowed to the extent we have explained, we find the appeal devoid of merit. We accordingly dismiss it.

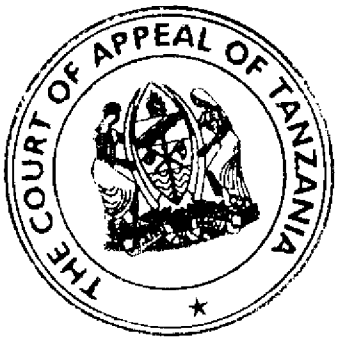
DATED at **DAR ES SALAAM** this 20th day of May, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

G. A. NDIKA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

The Judgment delivered this 25th day of May, 2021 in the presence of Mr. Augustino Ndomba learned counsel for the appellants, and Mr. Salim Msemo learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL