IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: JUMA, C.J., MWAMBEGELE, J.A., And KEREFU, J.A.)

CONSOLIDATED CRIMINAL APPEAL NOS. 503 OF 2018, 240 OF 2020 & 242 OF 2020

1. RUBENI LAZARO MAFUTA @ MBUNDE
2. PILIPILI NG'WANI MAGUTA @ BUPILIPILI
3. SHIMIYU LUBANDIKA @ MAHONA
4. DOTTO MACHIA @ MANG'OMBE } **..... APPELLANTS**

VERSUS

REPUBLIC ..... RESPONDENT

(Appeals from the Judgments of the High Court of Tanzania, at Dodoma)

(Mansoor, J.)

dated the 9th of May, 2019 & 25th day of October, 2019
in
Criminal Appeal Nos. 16 of 2018 & 91 0f 2018

.....

JUDGMENT OF THE COURT

26th May & 8th July, 2021

MWAMBEGELE, J.A.:

The four appellants, Rubeni Lazaro @ Mbunde, Pilipili Ng'wani Maguta @ Bupilipili, Shimiyu Lubandika @ Mahona and Dotto Machia @ Mang'ombe, together with another person going by the name of Elias William @ Maganga, who is not a party to this appeal, were arraigned in the District Court of Manyoni vide Economic Case No. 34 of 2016 for several counts of offences under the Economic and Organized Crime Control Act, Cap. 200 of the Revised

Edition, 2002 (the Economic and Organized Crime Control Act) and the Wildlife Conservation Act, 2009 (the Wildlife Conservation Act). The first, second and third counts were in respect of all the appellants. In the first count, they were charged with unlawful hunting a scheduled animal contrary to section 47 (a) (aa) of the Wildlife Conservation Act read together with paragraph 14 (a) of first schedule to, and sections 57 (1) and 60 (1) and (2) of the Economic and Organized Crimes Control Act.

It was alleged that the appellants together with Elias William @ Maganga, who is not a party to this appeal, on unknown date, day of May, 2016 at Rungwa Game Reserve within Manyoni District in Singida Region did unlawfully hunt one elephant valued at USD 15,000.00 which is equivalent to Tshs. 32,835,000/= only, the property of the United Republic of Tanzania.

In the second count, they were charged with unlawful possession of government trophy contrary to section 86 (1), (2) (c) (ii), 3(b) of the Wildlife Conservation Act read together with paragraph 14 (d) and sections 57 (1) and 60 (1) of Economic and Organized Crime Control Act.

It was alleged that the appellants, together with Elias William @ Maganga, who is not a party to this appeal, on 24th day of May 2016 at Kisingisa Village in Manyoni District, Singida Region, were found in unlawful

possession of government trophy to wit, two pieces of elephant tusks weighing 12.4 kilograms which are from one elephant valued at USD 15,000.00 which is equivalent to Tshs. 32,835,000/= only, the property of the United Republic of Tanzania.

In the third count, they were charged with unlawful dealing in government trophy contrary to sections 80 (1), 84 (1) and 111 (1) (a) of the Wildlife Conservation Act read together with paragraph 14 (b) of the first schedule to, and section 57(1) of the Economic and Organized Crimes Control Act.

It was alleged that the appellants, together with Elias William @ Maganga, who is not a party to this appeal, on 24th day of May 2016 at Kisingisa Village in Manyoni District, Singida Region, were found in unlawfully dealing in government trophy to wit, two pieces of elephant tusks weighing 12.4 kilograms which are from one elephant valued at USD 15,000.00 which is equivalent to Tshs. 32,835,000/= only, the property of the United Republic of Tanzania.

The fourth count was in respect of the third appellant and the person who is not party to this appeal. They were charged with unlawful possession of a weapon in certain circumstances contrary to 103 of the Wildlife

Conservation Act read together with paragraph 14 (d) and sections 57 (1) and 60 (1) of the Economic and Organized Crime Control Act.

It was alleged that the third appellant, together with Elias William @ Maganga, who is not a party to this appeal, on 25th day of May 2016 at Rwanzali Kasanii Village in Manyoni District, were found in unlawful possession of one sub machine gun (S.M.G) No. BLPNB 585233 which raises a reasonable presumption that they used the same to kill one elephant valued at USD 15,000.00 which is equivalent to Tshs 32,835,000/= only the property of the United Republic of Tanzania.

The fifth count was, again, in respect of the third appellant and the person who is not party to this appeal. They were charged with unlawful possession of a weapon contrary to section 4 (1) and (2) and section 34 (1) and (2) of the Arms and Ammunition Act, Cap. 223 of the Revised Edition, 2002 (the Arms and Ammunition Act).

It was alleged that the third appellant, together with Elias William @ Maganga, who is not a party to this appeal, on 25th day of May 2016 at Rwanzali Kasanii Village in Manyoni District, were found in unlawful possession of one sub machine gun (S.M.G) No. BLPNB 585233.

All appellants were convicted in respect of the first, second and third counts and sentenced as follows: in the first count, they were each sentenced under section 47 (aa) of the Wildlife Conservation Act to imprisonment for a term of three years without a fine. In the second count, they were each sentenced under section 86 (2) (c) (ii) to serve imprisonment of twenty (20) years without a fine. With regard to the third count, they were each sentenced under section 84 (1) of the wildlife Conservation Act to pay a fine of Tshs. 65,670,000/= which is twice the value of the trophy or to imprisonment for three years in default.

The third appellant was also convicted on the fourth and fifth counts and was sentenced under section 103 of the Wildlife Conservation Act to pay a fine of Tshs. 300,000/= or to an imprisonment of three years in default in respect of the fourth count and sentenced under section 34 (2) of the Arms and Ammunitions Act to a fine of Tshs. 1,000,000/= or a prison term of three years in default in respect of the fifth count.

The appellants were aggrieved by the convictions and sentences meted out to them. They pursued two different appeals to the High Court; while the first appellant preferred Criminal Appeal No. 16 of 2018, the second, third and fourth appellants preferred Criminal Appeal No. 91 of 2018. The first

appellant's appeal; Criminal Appeal No. 16 of 2018, was heard by Mansoor, J. and dismissed on 09.05.2019. The appeal in respect of the other appellants; Criminal Appeal No. 91 of 2018 was also heard by Mansoor, J. and dismissed on 25.10.2019.

Still aggrieved, the appellants preferred three separate appeals to the Court; the first appellant preferred Criminal Appeal No. 503 of 2019 and the second appellant preferred Criminal Appeal No. 240 of 2020. The third and fourth appellants preferred Criminal Appeal No. 242 of 2020.

When Criminal Appeal No. 503 of 2019 was called on for hearing on 15.06.2020, it was brought to the attention of the Court that Criminal Appeal No. 242 of 2020 by two appellants, which stems from the same decision of the District Court, was pending in the Court. As prudence dictated, the Court ordered that the two appeals be consolidated so that they are determined as one appeal. Hearing of Criminal Appeal No. 503 of 2019 was thus adjourned to pave way for the consolidation of the two appeals as ordered by the Court.

It was learnt later that Criminal Appeal No. 240 of 2020 preferred by the second appellant was also pending for hearing in the Court.

The three appeals were cause-listed for hearing on 26.05.2021 during which the Court, to comply with its previous order given on 15.06.2020, and

in terms of rule 69 (1) of the Tanzania Court of Appeal Rules, consolidated them and arranged Rubeni Lazaro @ Mbunde, Pilipili Ng'wani Maguta @ Bupilipili, Shimiyu Lubandika @ Mahona and Dotto Machia @ Mang'ombe as the first, second, third and fourth appellants respectively, as indicated in the title to this judgment.

Before we go further, we find it apt to narrate, albeit briefly, the material background facts leading to the arraignment of the appellants. It all started with a tip by an informer to a certain Kenneth Sanga; a Zonal Commander of the Zonal Anti-Poaching Unit based at Manyoni that there were people at Manyoni looking for buyers of elephant tusks. The said Kenneth Sanga assigned Daudi Thomas Mahenge (PW2); a game warden, to take up the matter. PW2 was given a telephone number of the first appellant who, as it will come to light in due course, was a middleman for the transaction. Pretending to be a prospective buyer of the elephant tusks, PW2 called the first appellant and, after some conversation, they agreed to meet on 23.05.2016. For some reason, they could not meet on that date.

On 24.05.2016, PW2 was called by the first appellant asking to meet him around 22:00 hours at Kisingisa Village in Manyoni District and where the elephant tusks were located. The duo negotiated over the phone and agreed

that a kilogram of the tusks would sell at Tshs. 130,000/=. After the telephone conversation, PW2 organized a trap and started his trip to the village with Paul Mwizarubi, Thomasi Santi, Isaack Nanyaro and others whose names he could not disclose in his evidence. They met the first appellant at Kisingisa Centre who took them to Kisingisa Village by motor cycles where they met about eight people including the appellants. They were all by the hearth outside the residence of a certain Malunguja waiting for the buyers of the elephant tusks. After arrival, the third appellant introduced himself to be the in-charge of the group and introduced others as well. After some conversation, the third appellant asked the fourth appellant in Kisukuma vernacular to bring the elephant tusks. The two elephant tusks were brought from inside the house by the fourth appellant. The tusks were weighed and found to be 12.4 kilograms. It was at that point in time when PW2 beckoned his fellows to take the weapons out and arrest the culprits. In a bizarre twist of things, except for the third appellant, all the culprits took to their heels and disappeared until they were arrested at different times later. The trophies were seized and a certificate of seizure (Exh. P4) filled.

The third appellant was arrested there and then and taken to the offices of the Zonal Anti-Poaching Unit and later to the Police Station where he confessed before WP 5324 D/Cpl Josephine (PW4) in a cautioned statement

(Exh. P7) to possess a gun which was kept by Elias William @ Maganga; the accused person who is not a party to this appeal. A search party went to where the gun was allegedly kept and succeeded to retrieve a gun make SMG (Exh. P3).

The appellants were arraigned and convicted in the manner stated above. Their attempts to challenge their convictions and attendant sentences to the High Court in two different appeals were barren of fruit. Their appeals to the Court have the following grounds. In respect of the first appellant, he filed grounds of appeal which his advocate; Mr. Godfrey Wasonga, learned advocate, sought to abandon at the hearing of the appeal. In their stead the learned advocate had filed the following grounds:

1. That, both the trial and first appellate courts erred in law and fact by convicting the appellant while the prosecution failed to prove their case beyond reasonable doubt;
2. That, both the trial and first appellate court erred in law and facts by not considering and evaluating any evidence of the witnesses called;
3. That, the proceedings were marred by procedural irregularities; and

4. That, both the trial and appellate courts erred in law as the conviction was based on a defective charge.

The second, third and fourth appellants filed the following paraphrased joint grounds:

1. THAT, the appellants were convicted and sentenced while the prosecution case and proceedings as well was marred with irregularities in procedure;

2. THAT, the appellants were convicted and sentenced while the requirement of section 38 (3) of the Criminal Procedure Act, Cap. 20 of the Revised Edition, 2002 read together with section 22 (3) (ii) of the Economic and Organized Crime Control Act, Cap. 200 of the of the Revised Edition, 2002 as a result there was a miscarriage of justice on the part of the appellant;

3. THAT, the trial court and the first appellate court erred in law and fact for attaching weight on unreliable evidence hence reached to erroneous decision;

   (i) There was no cogent evidence that the appellants were found in unlawful possession of government trophies; and

(ii) The search was conducted without an independent witness; that is, a local leader and no reasons why were assigned.

4. THAT, the trial court and the first appellate court erred in law and fact in relying on the evidence of PW3 when he said the tusks and found to be 12.4kg contrary to PW2 who claimed they were 24.4kg thus contradictory evidence which should have given the appellants a benefit of doubt;

5. THAT, the trial court and the first appellate court erred in law due to convict the appellants the evidence and the charge were at variance;

6. THAT, Exh. P7 made out of the time required by law, it was involuntary and contrasted with another made by PW4; ought to have been expunge out of record;

7. THAT, the whole evidence and proceedings of the trial court and the first appellate court were marred with procedural irregularities; and

8. THAT, the trial court and the first appellate court erred in law and fact in their finding that the prosecution proved the case against the appellants beyond reasonable doubt.

At the hearing of the consolidated appeals, the first appellant was represented by Mr. Godfrey Wasonga, learned advocate. The second, third and fourth appellants were self represented. All the appellants appeared remotely, for the appeal was held by video conferencing through the virtual court facility of the Judiciary of Tanzania. They were linked to the Court from Isanga Prison where they are serving their respective prison terms. Ms. Elianenyi Njiro, learned Senior State Attorney, Mr. Amani Mghamba, learned State Attorney and Ms. Grace Mpatili, also learned State Attorney, joined forces to represent the respondent Republic.

We first gave the floor to Mr. Wasonga to argue the appeal of the first appellant. The learned counsel started his onslaught that the counts on which his client was convicted were counts one, two and three which were on the offences of unlawful hunting a scheduled animal, unlawful possession of government trophy and unlawful dealing in government trophy respectively.

In respect of the first count, the learned counsel was very brief. He submitted that no witness fielded by the prosecution testified on this count. He thus, right away, argued that the first count was not proved against his client and implored the Court to find that the two courts below should have found the first appellant not guilty on this count.

Moving to the second count, Mr. Wasonga submitted that the evidence for the prosecution which touched the first appellant with regard to unlawful possession of government trophy was that of PW2 as found in the record of appeal at p. 55. He submitted that the witness testified that the first appellant was a middleman who took the prospective buyers where the tusks were. He argued that given the evidence of PW2, the first appellant was not in possession of the elephant tusks intended to be sold to the prosecution witnesses who disguised as buyers. The learned counsel referred us to p. 65 of the record of appeal where it is shown that it was the fourth appellant who retrieved the elephant tusks from inside a house after being told so by the third appellant in Kisukuma vernacular. The learned counsel submitted further that the first appellant was not found in possession of the government trophy and was arrested four months later as seen at p. 67 of the record of appeal. Even in Exh. P11, the learned counsel submitted, the first appellant never confessed to have been found in possession of the elephant tusks complained of.

The learned counsel thus submitted that the second count was not proved against the first appellant and thus the two courts below erred in convicting him on that count.

With regard to the third count which is on unlawful dealing in government trophy, the learned counsel submitted that the ingredients of the offence as prescribed by sections 80 (1) and 84 (1) of the Wildlife Conservation Act were not proved by the prosecution. He submitted that the first appellant was neither found selling, buying, transferring, transporting, accepting, exporting nor importing any trophy. He submitted that those are the ingredients of the offence of unlawful dealing in government trophy in sections 80 (1) and 84 (1) of the Wildlife Conservation Act under which the first appellant was, *inter alia*, charged but were not proved at all. The learned counsel urged us to find that the two courts below were wrong to find the first appellant guilty of the offence in this count.

Having submitted as above, Mr. Wasonga abandoned grounds three and four and surmised that the case against the first appellant was not proved to the hilt. He thus urged us to allow the appeal in favour of the first appellant and release him from prison.

After the submission of Mr. Wasonga in respect of the appeal of the first appellant, we invited the second, third and fourth appellants to address us on their appeal as reflected in the joint memorandum of appeal. The trio, at different times, declined the invitation and preferred to first hear the response

of the Republic on their joint grounds of appeal. They however reserved their right to rejoinder, need arising.

Rebutting, Ms. Njiro submitted first in respect of the first appellant's grounds of appeal as argued by Mr. Wasonga. She started her response that the respondent Republic was in essence opposing the appeals of all the appellants except for some grounds. On the first count, she submitted that the first appellant was not found hunting the elephant tusks admitted in Exh. P11 to have been involved in hunting prohibited animals. However, upon being prompted by the Court, she admitted that the alleged confession was retracted and, on the authority of **Tuwamoi v. Uganda** [1967] 1 E.A. 84; a decision of the erstwhile Court of Appeal for East Africa, such evidence may be used to found a conviction against an accused person only if corroborated by independent evidence and, in the absence of such corroboration, if the court warns itself on the dangers of convicting on such evidence without such corroboration. The learned Senior State Attorney admitted that the trial court did not direct itself to this important consideration. She thus admitted that there was merit in this complaint.

Regarding unlawful possession of government trophy, Ms. Njiro submitted that the first appellant may not have been found in actual

possession of the trophies but by being a middleman and negotiating the price that the tusks would sell, he was surely in constructive possession of the elephant tusks. The count of possession was thus proved beyond reasonable doubt against the first appellant, she argued.

With regard to the third count, Ms. Njiro submitted that the first appellant communicated with PW2 that he had "cassava" (meaning elephant tusks) for sale and knew its weight and negotiated the price and eventually took PW2 and his colleagues to where the commodity was. Despite the fact that the details of "dealing" as per section 80 (1) and 84 (1) were not explicit in the particulars of the offence, that infraction, she submitted, did not prejudice the first appellant.

In view of the above submissions, the learned Senior State Attorney concluded that the case against the first appellant was proved in respect of the second and third counts beyond reasonable doubt.

As regards the three appellants, the learned Senior State Attorney responded on each of the grounds of the joint Memorandum of Appeal lodged on 11.01.2021 which has been reproduced above. Regarding the first count which is about exhibits being not procedurally received in evidence, Ms. Njiro conceded that the contents of some exhibits were not read out after they

were admitted in evidence. She pointed to Exh. P1; the handing over statement at p. 43 of the record of appeal, Exh. P4; the Certificate of Seizure at p. 63 of the record in respect of the two elephant tusks, Exh. P5 at p. 64; the Certificate of Seizure of a gun make SMG No. BLPNB585253 and Exh. P6; the Certificate of Valuation of the trophies at p. 73 of the record. That infraction, she submitted, was fatal and the exhibits deserved to be expunged from the record. She reinforced her submission on the point with our decision in **Robinson Mwanjisi & Three Others v. Republic** [2003] T.L.R. 21 in which we expunged exhibits whose contents were not read out in court after they were admitted in evidence.

However, despite the fact that she submitted as appearing in the foregoing paragraph, the learned Senior State Attorney was of a firm view that even if we expunge such documents, there was ample evidence implicating the second, third and fourth appellants to the hilt. She referred us to the testimonies of PW1, PW2 and PW3 contending that they gave adequate evidence on the same. For this proposition, Ms. Njiro cited to us **Mandela Masikini @ Kasalama v. Republic**, Criminal Appeal No. 471 of 2015 (unreported) in which we expunged the exhibits whose contents were not read out loud after admission but relied on the oral evidence of the witnesses.

With regard to the second count; a complaint on the absence of an independent witness to witness the search, Ms. Njiro submitted that the searches were not done in terms of sections 38 (3) or 22 (1) of the CPA and under section 106 (1) of the Wildlife Conservation Act which impose the condition of the presence of only one independent witness. For the first appellant, he contended, there were wife and child. With regard to the second and third appellants, although she conceded that there was no independent witness, she argued that the appellants were not prejudiced as nothing was retrieved. The learned Senior State Attorney thus submitted that the ground had no merit and implored us to dismiss it.

The third and eighth grounds were argued together for their being intertwined. She submitted that the case was proved to the required standard through the evidence of PW2 which was supported by PW1 and PW3 as well as the cautioned statements of the appellants.

On ground four, the learned Senior State Attorney countered that there was no contradiction at all between the testimonies of PW2 and PW3 on the weight of Exh. P2 because over the telephone conversation between PW2 and the first appellant, the latter said the tusks weighed 24.1 kilograms but when PW3 weighed them they were actually 12.4 kilograms. She thus submitted

that the complaint on contradictions between evidence and the preliminary hearing was unfounded.

Regarding the cautioned statement being taken out of time, the learned Senior State Attorney submitted that the complaint had no legal basis, for after an inquiry was conducted, the same was cleared for admission and was read out in court after being admitted.

In a short rejoinder, Mr. Wasonga submitted that the cautioned statement of the first appellant does not prove unlawful hunting. On constructive possession, he submitted, knowledge and control must be proved. Control was not established, he submitted. Regarding the count on unlawful dealing in government trophies, the learned counsel reiterated his arguments in submissions in chief.

The remaining three appellants, in rejoinder, reiterated their innocence and urged the Court to determine their appeals according to the dictates of law and justice.

Having summarised the evidence and submissions of the parties as appearing hereinabove, we will determine the appeal adopting the style taken by Mr. Wasonga pegging the arguments on the counts with which the appellants were charged.

The first count was in respect of all the appellants. We have read the testimonies of the witnesses at the trial and considered the appellants' grounds of appeal in respect of this count. Having so done, we agree with Mr. Wasonga that there was no witness who testified to have seen or found the first appellant hunting any scheduled animal. Indeed, the same is the position in respect of the rest of the appellants. No evidence was led by the prosecution touching any of the appellants on this count. Ms. Njiro told the Court that the first appellant confessed to have been hunting scheduled animals but, as a true officer of the Court, she was quick to tell the Court that the confession was retracted and thus the trial court ought to have warned itself on the dangers of relying on the retracted confession to found a conviction which it did not do. On this proposition, she relied on **Tuwamoi v. Uganda** (supra). She thus agreed that this count was not proved against the appellants to the required standard. We agree. Indeed, even the other appellants made cautioned statements in which they admitted to have been involved in hunting scheduled animals. This is evident in Exh. P7, P8 and Exh. P9; the cautioned statements of the third, fourth and second appellants respectively. However, like the first appellant, the second, third and fourth appellants also retracted their cautioned statements. In the circumstances, on the authority of **Tuwamoi v. Uganda** (supra), the trial court ought to have

warned itself on the dangers of founding the convictions on the retracted confessions of the appellants without corroboration, failure of which we are of the considered view that the appellants were prejudiced. In **Tuwamoi v. Uganda** (supra) the erstwhile Court of Appeal for East Africa, made reference to the summary of the principle by **Woodroffe and Ameer Ali** (9th Edn.) at p. 277, in the following words:

> *"It is unsafe for a court to rely on and act on a confession which has been retracted, unless after consideration of the whole evidence in the case the court is in the position to come to the unhesitating conclusion that the confession is true, that is to say, usually unless the confession is corroborated in material particulars by credible independent evidence or unless the character of the confession and the circumstances under which it was taken indicate its truth."*

We therefore allow the complaint on the first count and, in consequence, quash the convictions set aside the sentences meted out to the appellants on this count.

The second count was, again, in respect of all the appellants. The prosecution evidence on this count features in the narration of the background facts of the case we have made above. For necessary repetition we shall very

briefly restate them here. It is in the testimony of PW2 that he was told by Kenneth Sanga; in charge of the Zonal Anti-Poaching Unit that there were people who wanted to sell elephant tusks. He was given a cell phone number of the middleman and communicated with him. PW2 set a trap, went to Kisingisa Village where they found eight people by the hearth. After some conversation, the third appellant asked the fourth appellant in Kisukuma vernacular to bring the elephant tusks. The fourth appellant brought two elephant tusks and eventually the appellants were arrested. In these circumstances, can it be safely said that all the appellants were found in possession of the elephant tusks? We have serious doubts.

We have pondered over the issue and reached a conclusion that it will be to the prejudice to the first, second and third appellants to assume that they all possessed the elephant tusks under discussion. We respectfully think that the facts surrounding the case and what actually obtained at the scene of the crime unveil the fact that it is only the fourth appellant who was in possession of the tusks. We reject the constructive possession theory brought to the fore by Ms. Njiro. As good luck would have it, this is not the first time we are dealing with this issue, we grappled with an identical situation in the recent past in **Emmanuel Mwaluko Kanyusi & 4 Others v. Republic**, Consolidated Criminal Appeals Nos. 110 of 2019 & 553 of 2020 (unreported);

an appeal whose background material facts fall in all fours with the ones in the appeal under scrutiny. In that case, like in the present, the appellants were charged with, *inter alia*, unlawful possession of government trophy. In the judgment we rendered on 28.05.2021, we found and held that the appellant who was found in actual possession of the government trophy was the one who was guilty of the offence. We held in that case that:

> *"... the evidence points at the fourth appellant and convicts him on the count of possession of government trophy. Mere presence of the other appellants when the game warden retrieved two elephant tusks from the fourth appellant's land does not make them to be in possession."*

We are guided by the foregoing stance we took in **Emmanuel Mwaluko Kanyusi** (supra). In the same token, we are of the considered view that mere presence of the first, second and third appellants when the fourth appellant retrieved the two elephant tusks, does not make them also in possession of the same. For avoidance of doubt, we agree with Ms. Njiro that the Certificate of Seizure for the two elephant tusks appearing at p. 63 of the record of appeal and the Certificate of Valuation of the trophies appearing at p. 73 of the record which were admitted in evidence as exhibits P2 and P6, respectively must be expunged from the record because they were not read

out loud in court after their admission. We agree and expunge them. We also agree with her that even after expunging them, the testimony of PW1, PW2 and PW3 suffice to implicate the fourth appellant to the hilt – see also: **Huang Qin and Xu Fujie v. Republic**, Criminal Appeal No. 173 of 2018 and **Anania Clavery Betela v. Republic**, Criminal Appeal No. 355 of 2017 and **Zheng Zhi Chao v. The Director of Public Prosecutions**, Criminal Appeal No. 506 of 2019 (all unreported)

We therefore acquit the first, second and third appellants on the second count, quash the convictions against them and set aside the sentence meted out to them in respect of this count.

The third count was also in respect of all the appellants. They were accused of unlawful dealing in government trophies. As rightly submitted by Mr. Wasonga and rightly admitted by Ms. Njiro, the ingredients of the offence under section 80 (1) and 84 (1) of the Wildlife Conservation Act were not proved. We take the liberty of reproducing the two sections below. Section 80 (1) reads:

> *"A person shall not deal in trophy or manufacture an article from a trophy for sale or carry on the business of a trophy dealer except under and in accordance with the conditions of a trophy dealer's licence."*

And section 84 (1) reads:

> *"A person who sells, buys, transfers, transports, accepts, exports or imports any trophy in contravention of any of the provisions of this Part or CITES requirements, commits an offence and shall be liable on conviction to a fine of not less than twice the value of the trophy or to imprisonment for a term of not less than two years but not exceeding five years or to both."*

The kernel of the two subsections is that any person who **sells, buys, transfers, transports, accepts, exports or imports any trophy**, offends against these provisions and commits an offence of unlawful dealing in government trophy. In the appeal before us, as the conceding submissions of the trained minds for the parties show, the prosecution led no evidence to show and suggest that the appellants were involved in selling, buying, transferring, transporting, accepting, exporting or importing any government trophy.

We had an occasion to deal with an identical scenario in the recent past in **Emmanuel Mwaluko Kanyusi** (supra), a case whose facts fall in all fours with the facts in the instant case. In that case, like in the present, the prosecution led evidence regarding a charge of unlawful dealing in

government trophy taking the game wardens to the village where the culprit had buried the same. There, they retrieved the government trophy without establishing evidence that would later guide the drafters of the charge to show aspects of buying and selling the trophies. Instead, the wardens rushed to introduce themselves and arrested the culprits. No aspects of **selling, buying, transferring, transporting, accepting, exports nor importing** any trophy were established. In holding that the count respecting unlawful dealing in government trophy was defective, we quoted the following excerpt from our unreported previous decision in **David Athanas @ Makasi & Joseph Masima @ Shandoo v. Republic,** Criminal Appeal No. 168 of 2017:

> *"As to the second count it is obvious that the Statement of the Offence does not disclose to the appellants the nature of the* ***unlawful dealing in*** *Government trophy for which they were charged. A close look of sections 80(1) and 84(1) of the WCA, the same have the categories of the offence of Unlawful Dealing with Government trophy which would have guided the drafting of the particulars of the offence in the second count."*

We thus proceeded to expunge the count on unlawful dealing in government trophy and acquitted the appellants on that charged.

In the instant appeal, PW2 who was assigned by his boss to deal with the matter communicated with the first appellant who led him to the village where they found the appellants among others. After the third appellant asked the fourth appellant in Kisukuma vernacular to bring the elephant tusks from inside the house, PW2 ordered his colleagues to arrest the appellants. No foundation was laid to unveil the ingredients of the offence of unlawful dealing in government trophy. In the premises, like we did in **Emmanuel Mwaluko Kanyusi** and **David Athanas @ Makasi & Joseph Masima @ Shandoo** (supra), we find and hold that the charge on unlawful dealing in government trophy against the appellants was not established and thus the trial and first appellate court erred in convicting them of the same. We acquit all the appellants of the charge of unlawful dealing in government trophy and set aside the sentence meted out to them.

The fourth count was in respect of the third appellant and the person who is not party to this appeal. This count will not detain us, for like the third count, no evidence at all was led by the prosecution to show how the third appellant killed the elephant. It was just taken for granted that as the third appellant was allegedly found in possession of two elephant tusks and confessed before the police in a cautioned statement to possess a gun, he must have killed one elephant. That presumption cannot be acceptable. We,

right away, dismiss it. The fourth count was therefore not proved against the third appellant.

The fifth count was against the third appellant and the person who is not party to this appeal in which they were charged with unlawful possession of a gun contrary to the provisions of the Arms and Ammunition Act. The determination in respect of this count should not detain us much. We say so because the third appellant was charged under a dead law. The Arms and Ammunition Act under which the third appellant was charged was repealed by section 73 of the Firearms and Ammunition Control Act, 2015 (hereinafter the Firearms and Ammunition Control Act). The Firearms and Ammunition Control Act came into force on 22.05.2015 vide GN No. 22 of 2015.

The appellant is alleged to have committed the offence on 25.05.2016, about twelve months after the Firearms and Ammunition Control Act became operational. Thus, the appellant ought to have been charged under the Firearms and Ammunition Control Act. By being charged under a repealed legislation, the third appellant was certainly prejudiced. We are not prepared to buy the argument brought to the fore by Ms. Grace Mpatili, learned State Attorney, who wanted to impress upon us that the path taken was not fatal and that it did not prejudice the third appellant. As good luck would have it,

we have traversed on the effect of charging an accused under a repealed statute in our previous decisions – see: **George Moshi v. Republic**, Criminal Appeal No. 517 of 2016 and **Amos Robare @ James v. Republic**, Criminal Appeal No. 401 of 2017 (both unreported). In **George Moshi**, for instance, like in the present, the appellant was arraigned for contravening the provisions of section 4 (1) of the Arms and Ammunition Act. It was alleged that he committed the offence on 29.09.2015 well after the Firearms and Ammunition Control Act came into force. We found and held that the omission was fatal proceeded to nullify the proceedings of the trial court and those of the first appellate court.

In the current appeal, we are enjoined to follow the position we took in **George Moshi** and **Amos Robare @ James** (both supra). Consequently, we invoke our powers of revision under section 4 (2) of the Appellant Jurisdiction Act, Cap. 41 of the Revised Edition, 2019 to nullify the proceedings in respect of this count before the trial court. We also nullify the proceedings in respect of this count before the first appellate court having stemmed from nullity proceedings. In consequence, we set aside the sentence meted out to the third appellant in respect of the fifth count.

The sum total of the above findings is that, except for the fourth appellant, all the appellants are acquitted of the convictions in the first, second and third counts and sentences meted out to them are set aside. The third appellant is also acquitted of the offence under the fourth and fifth counts. With regard to the fifth count which we have said the third appellant was charged under a repealed law and quashed the proceedings in its respect, and set aside the sentence, as he has served a big chunk of the sentence of the illegal sentence of imprisonment for five years since he was imprisoned on 23.11.2017, we refrain from ordering a retrial under the Firearms and Ammunition Control Act under which he should have been legally charged. Taking that course, we think, will be tantamount to persecuting the third appellant rather than prosecuting him. We think justice will triumph if we set the third appellant free on this count and order no retrial on a proper law.

In the upshot we allow the appeals in respect of the appellants Rubeni Lazaro Mafuta @ Mbunde, Pilipili Ng'wani Maguta @ Bupilipili and Shimiyu Lubandika @ Mahona. We order their immediate release from prison unless lawfully held there for some other lawful cause.

As for the fourth appellant, Dotto Machia @ Mang'ombe, we have held that the prosecution evidence in respect of the second count was

overwhelming. We understand, however, that he was charged under the provisions of section 86 (1), (2) (c) (ii), 3(b) of the Wildlife Conservation Act read together with paragraph 14 (d) and sections 57 (1) and 60 (1) of Economic and Organized Crime Control Act. The proper provisions under the Wildlife Conservation Act should have been section 86 (1), (2) (b). We say so because the elephant whose tusks the fourth appellant was found in possession of falls under part I of the schedule to the Wildlife Conservation Act. As we held in **Zheng Zhi Chao** (supra):

> *"It is on record that the animal involved in the current matter falls under Part I of the First Schedule to the WCA and the value of the trophy exceeds one hundred thousand shillings (TZS 100,000.00). Therefore, ... the proper and applicable provision of the law which was supposed to be cited in the seventh and ninth counts is section 86 (1), (2) (b) of the WCA and not section 86 (1), (2), (c) (iii) cited in the said counts. However, having considered the said defect, we agree with Ms. Gwaltu that the same was not fatal and is curable under section 388 of the CPA. We have further noted that the said defect did not occasion any miscarriage of justice to the appellant as he understood the offence he was facing and his sentence in respect of those counts was properly pronounced."*

We also observed in **Mwinyi Jamal Kitalamba @ Igonza and 4 Others v. Republic**, Criminal Appeal No. 348 of 2018 (unreported):

> *"Finally, we deal with the propriety of the sentence imposed on the appellants. In view of our earlier holding that the offence of which the appellants were convicted ought to have been laid under section 86 (1) and (2) (b) of the WCA, it was an obvious error that they were punished under section 86 (2) (c) (ii) of that law following their conviction. Each appellant ought to have suffered punishment in accordance with the provisions of section 86 (2) (b) of the WCA ...."*
> [See also: **Anania Clavery Betela** (supra)].

We proceeded to hold that the appeal lacked merit and upheld the appellants' respective convictions but ordered that the twenty years' imprisonment imposed on each of them be served in default of payment of the requisite fine. In view of the positions we took in **Huang Qin and Xu Fujie** and **Zheng Zhi Chao** the infraction did not prejudice the fourth appellant. And in further view of what we held in **Anania Clavery Betela and Mwinyi Jamal Kitalamba @ Igonza and 4 Others** (both supra), we hold that the appeal by the fourth appellant in respect of the second count is without merit. We uphold the fourth appellant's conviction in respect of this count and order that the prison term of twenty years imposed on him be

served in default of the payment of fine of Tshs. 328,350,000/= being the amount of money equal to ten times the value of the trophy involved.

The above said and done, except for the modification on the sentence, the appeal against the fourth appellant in respect of the second count stands dismissed.

DATED at **DAR ES SALAAM** this 5th day of July, 2021.

I. H. JUMA
CHIEF JUSTICE

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The judgment delivered this 8th day of July, 2021 in the presence of the Appellants in person connected through video conferencing facility linked to Isanga Prison, Mr. Godfrey Wasonga, learned counsel for the first appellant and Mr. Amani Kyando, learned State Attorney for the Respondent/Republic linked from High Court of Tanzania at Dodoma, is hereby certified as a true copy of the original.

H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL