**IN THE COURT OF APPEAL OF TANZANIA**

**AT MBEYA**

**(CORAM: MUGASHA, J.A., GALEBA, J.A, And FIKIRINI, J.A)**

**CRIMINAL APPEAL NO. 323 OF 2018**

**JUSTIN BRUNO@MKANDAMAMBWE.....APPELLANT**

**VERSUS**

**THE DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT**

**(Appeal from the Judgment of the High Court of Tanzania at Sumbawanga)**

**(Mrango, J.)**

**dated 20th day of September, 2018**

**in**

**Criminal Appeal No. 323 of 2018**

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# JUDGMENT OF THE COURT

13th September & 17th 2021.

## FIKIRINI, J.A.:

The appellant jointly with one Philbert Leo @ Uliza who is not part of this appeal were charged with one count of unlawful possession of Government Trophies contrary to section 86 (1) & (2) (b) and (c) (ii) 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 Crime Control Act [Cap. 200 R.E. 2002]. After a full trial, the Resident Magistrate's Court of Katavi at Mpanda convicted them and each was sentenced to 21 years' imprisonment. The appellant's appeal before the High Court was entirely dismissed. This is therefore the appellant's second appeal.

The facts as alleged by the prosecution at the trial court were that on the 17th day of November 2015 at about 1.30 hours at Usevya village Mpimbwe within Mlele District in Katavi Region, the appellant and his co-accused were found in unlawful possession of 4 elephant tusks weighing 47.6 kgs valued at USD 15,000 or at Tzs. 60,000,000/= the property of the United Republic of Tanzania without a permit.

Further facts as alleged by the prosecution were that on 16th November 2015 at about 23. 00 hours, PW2-Francis Kandeo a park ranger received information from an informer that there were people at Usevya looking for a buyer of elephant tusks. PW2 informed his colleagues and agreed to set a trap, by posing as buyers. The police were informed and PW1-Assistant Inspector Charles Makoye joined the team.

On early hours of the 17th November 2015, the formed team went to Tompola, Usevya village along Kibaoni road, where the business transaction was to take place. At the scene were PW3-Deusdedit Makwara a park ranger and PW4-Katanaro Busagala a civilian from Usevya village. The informer acted as a buyer while Frank Masaso also a park ranger posed as a buyer's driver. The rest of the team took cover nearby. Moments later they saw a motorcycle carrying two people, and another person coming riding a bicycle. The passenger on the motorcycle had a piece of luggage with him. With the light from a torch carried by one of the park rangers in the motor vehicle which had sufficient light to illuminate the place, the team was able to see the transaction.

The team which had taken cover came out and managed to arrest two people while a third person fled. Those arrested were the appellant Justin Bruno and Philbert Leo @ Uliza. PW1 seized from the appellant and the co-accused, 4 elephant tusks, a bicycle silver in colour, a weighing scale and a motorcycle make TOYO with registration number T 645 CUS. All these items were admitted as exhibits and marked as P2, P3, P4 and P5 respectively while a certificate of seizure was admitted and marked as exhibit P1. The appellant and the co-accused were taken to the Police station.

PW5-Alexander Gerald, a game warden identified and valued the trophies, concluding that the tusks were equal to 2 elephants and valued at Tzs. 60,000,000/=. He also weighed the 4 tusks which weighed 47.6 kgs. The valuation report was admitted and marked as exhibit P6. The case was investigated by PW6-F4373 D/C James. He interrogated them and recorded their cautioned statements as well as taking them to the Justice of Peace where they recorded their extrajudicial statements.

In his defence, the appellant testified as DW1 that on 16th November 2015 at about 1.00 hours he left his home for Mirumba village to attend his brother's funeral, using a bicycle. On his way home he found a motor vehicle parked at the roadside. Since it was dark, he found himself knocking on the motor vehicle. The appellant believed that to have led to his arrest and being taken to the Police station. On the 17th of November 2015, he was forced to sign a cautioned statement.

Countering the prosecution case, the appellant refuted the account by PW1, PW2, PW3 and PW4 to have seen him at the scene of the crime or possessing trophies. At the end, as already stated above, the appellant was

convicted and sentenced to 21 years' imprisonment. And his appeal before the High Court was entirely dismissed.

In this second appeal, the appellant has raised 10 grounds that can be clustered into 6 main grounds:

1. *Grounds number 1, 3 and part of ground number 10 are a general complaint that the case was not proved beyond reasonable doubt.*

2. *Grounds number 2, 4, and 5 are complaints on failure to call any village leader on the appellant's arrest.*

3. *Ground number 6 is a complaint on failure to tender the cautioned statement and extra-judicial statement recorded by PW6.*

4. *Grounds number 7 and 8 the complaints were that the appellant was not properly identified by PW4, his evidence was thus baseless.*

5. *Ground number 9 is a complaint that the certificate of seizure was not properly prepared.*

6. *The final ground is that the defence evidence was not considered.*

At the hearing on 13th September 2021, the appellant appeared in person unrepresented, whereas the respondent was represented by Mr. Paschal Marungu Principal State Attorney and Mr. Lugano Mwasubila State Attorney.

When the appellant was given chance to elaborate on his grounds of appeal, he prayed for the grounds of appeal filed to be adopted and decided upon.

On his part, the learned Principal State Attorney outright declared his position that he supported the appeal. He, however, prefaced his submission by raising a concern that some of the grounds of appeal before this Court were not raised and therefore had not been decided upon by the High Court. He clarified new grounds include the 2nd ground on failure to procure a leader in the area on appellant's arrest which relates to the 4th and 5th grounds, the 3rd ground on the proof of ownership of the weighing scale, motorcycle with registration number T

645 make Toyo and the bicycle silver in colour, the 7th ground on insufficient visual identification made by PW4 and the 8th ground on PW4's evidence that he was at the scene of crime with the TANAPA wardens.

The 9th ground on the certificate of seizure, he explained, even though was a new ground but since it has legal implication it deserves to be addressed by the Court. And that the remaining grounds number 1, 6, and 10 were the only grounds that were considered before the High Court.

In addition, the learned Principal State Attorney referred us to the case of **Emmanuel Josephat v R,** Criminal Appeal No. 323 of 2016, (unreported), in which the Court stressed that no new ground of appeal can be considered by this Court unless it is on a point of law.

Addressing us on the remaining grounds of appeal, the learned Principal State Attorney, started with ground number 6. The complaint in this ground was that the Judge erred by upholding the conviction on the account that the appellant confessed before PW6 who recorded the appellant's cautioned statement and later took him to the Justice of Peace

to record his extra-judicial statement as reflected on page 53 of the record of appeal. The learned Principal State Attorney's contention that despite the two statements not being tendered at the trial, there was still other good evidence such as PW1's testimony, the exhibits tendered, and the fact that the appellant was arrested at the scene of crime.

Ground number 10, partly covers ground number 1, that the charge was not proved beyond reasonable doubt and that the defence case was not considered. Starting with the latter, it was the Learned Principal State Attorney's submission that the complaint was not true. He referred us to pages 23 and 65 of the record of appeal which, he argued and showed that the defence was considered. And that on page 23, the High Court Judge concluded that the appellant's defence did not shake the prosecution case.

On ground number 1 which was argued together with ground number 10 on the proof of the case beyond the standard required in law, it was the learned Principal State Attorney's submission that the prosecution, had two types of evidence. Through its witnesses, namely

PW1, PW2, PW3, PW4, PW5, and PW6, the prosecution led two types of evidence, namely direct and documentary evidence. On direct evidence, there were testimonies of PW1, PW2, PW3, PW4, and PW6, who all witnessed the arrest of the appellant with the trophies. Whereas on documentary evidence the prosecution had tendered certificate of seizure admitted as P1, Trophy Valuation Certificate admitted as exhibit P6 and chain of custody document admitted as P7. The downside of this documentary evidence was that they were not read out in court, the result of which they were supposed to be expunged. This, he argued, was based on the legal position held by this Court in its previous decisions that once the contents of the document have not been read in court, such evidence must be expunged from the record.

In the absence of the documentary evidence, what other evidence was available to support the case, was our concern. The learned Principal State Attorney in responding to that contended that aside from the seizure of the trophies and arrest of the appellant witnessed by all prosecution witnesses except PW5, there would be no evidence to support the conviction. According to the Principal State Attorney, PW5

though was not at the scene of the crime, his evidence could have salvaged the situation. However, this was not the case. On page 52 of the record of appeal, while he admitted to having been able to identify the tusks by their weight and length, he could not state were from which animal in particular and how he did identify or recognize them. The learned Principal State Attorney contended that PW5 failed to point that out. In the absence of the valuation certificate, his oral evidence was weakened. The counsel also argued that aside from the weakened evidence and procedural irregularity which led to the expunging of exhibit P6, PW5 was not a competent witness. *First,* he was not qualified to conduct the valuation and issue valuation certificate, since he was a Game Warden, who is not covered under sections 86 (4) and 114 (3) of the Wildlife Conservation Act, No. 5 of 2009, and *second*, his appearance and testimony before the court as an expert was improper. Distinguishing the situation in the present appeal to that in **Emmanuel Lyabonga V R,** Criminal Appeal No. 257 of 2016, (unreported), he referred us to, the Principal State Attorney argued that although the witness was a Game Warden as in this case, in the cited case, there was no in-depth oral

account given and expertise in describing orally as to why he concluded those to be elephant tusks. This was completely different, as in, the present appeal, PW5 failed to articulate why he was saying the impounded items were elephant tusks.

The learned Principal State Attorney, invited us to be inspired by our recent decision in **Evarist Nyamtemba v R,** Criminal Appeal No. 196 of 2020, (unreported) pages 11-18, in which the Court ruled out the generalized statement from the Game Warden who testified as PW5 when explaining on the peculiar features which led him to conclude the tusks were truly elephant tusks.

Maintaining his stance of supporting the appeal, the learned Principal State Attorney urged us to allow the appeal, quash the conviction and set aside the sentence, and set free the appellant.

In a brief rejoinder, the appellant welcomed the learned Principal State Attorney's submission in his favour on the weak PW5's evidence and prayed that he be released.

In determining this appeal, our first port of call is concerning grounds number 2, 3, 4, 5, 7, and 8. We are in agreement with the learned Principal State Attorney that the grounds are new as they were not raised or decided upon by the first appellate court. Aside from the case of **Emmanuel Japhet** (supra) cited to us, there are a plethora of decisions on the subject. For instance, in the case of **Sadick Marwa Kisase v R,** Criminal Appeal No. 83 of 2012 (unreported), the Court stressed that:

> *"The Court has repeatedly held that* ***matters not raised in the first appellate court cannot be raised in a second appellate court****." [Emphasis added]*

See also: **Hassan Bundala @ Swaga v R,** Criminal Appeal No. 416 of 2013; **Yusuph Masalu @ Jiduvi v R,** Criminal appeal No. 163 of 2017; **Nasib Ramadhani v R**, Criminal Appeal No. 168 of 2018 (all unreported).

Therefore, this Court has no jurisdiction to entertain those new grounds, even though according to section 6 (1) of the Appellate Jurisdiction Act, Cap.

141 R.E. 2019, this Court is empowered to hear appeals from the High Court. See **Abeid Mponzi v R,** Criminal Appeal No. 476 of 2016 (unreported).

Coming to the rest of the grounds, we would wish to point out that ground number 9 on the certificate of seizure was improperly procured, was also new, but being a legal point, it will be considered. The remaining grounds namely numbers 1, 6, and 10 are not new. On ground number 6 the allegation is that the recorded cautioned and extra-judicial statements were not tendered. It is indeed correct that none of the statements were tendered in evidence. What witness or document should be used in proving the prosecution case squarely rests with them. In this instant case, as rightly submitted by the learned Principal State Attorney, the prosecution had other evidence. Besides the direct evidence of PW1, PW2, PW3, PW4, and PW6, there were exhibits P1, P2, P3, P4, P5, P6 and P7. Moreover, the appellant was arrested at the scene of the crime. We are of the considered view that the prosecution must have thoroughly contemplated their decision of what to tender into evidence in proving their case, otherwise, they are not obligated to tender the evidence they did not need. We thus find this ground baseless.

On ground number 10 on the complaint that the defence case was not considered, this will not detain us long. In the trial court judgment, it is evident that the defence case was not considered, however, that was not the case in the High Court. The High Court as reflected on page 23 of the record, the Judge considered the defence evidence and ruled out that it could not have shaken the prosecution case.

Despite the cogent direct evidence on one hand, on the other, the compelling documentary evidence suffered irregularity. After the documents are cleared for admission and admitted in evidence as exhibits, they must be read and explained to the accused to keep him abreast with what is going on in the case he is facing. The rationale behind the exercise is to allow the accused to first and foremost be able to cross-examine on the contents of the tendered and admitted documents and secondly, give him room to prepare his defence, which was not done in this case. In the case of **John Mghandi @ Ndovo v R,** Criminal Appeal No. 352 of 2018 (unreported) the Court had an opportunity of discussing the requirement and importance of reading over the admitted documentary exhibits in court to allow the accused person to know the contents about his case. In the present appeal although the documents were admitted

without objection failure to read them to the appellant in court was a fatal omission and consequently, we do expunge exhibits P1, P6, and P7.

After expunging those documents, the pertinent question is, would the remaining evidence suffice to hold together the prosecution case? The answer is certainly no. In the absence of exhibits P1 and P2, the evidence of PW1, PW2, PW3, PW4, and PW6 is weakened. Likewise, is the evidence of PW5, the one who prepared exhibit P6-valuation certificate. After exhibit P6 has been expunged, the only evidence which could be relied on is his oral evidence which can be found on pages 52 and 53 of the record of appeal. Whilst he was able to identify the 4 elephant tusks and that the 4 tusks were equal to two elephants and gave the value of the tusks to be Tzs. 60,000,000/= he could not give an in-depth explanation and expertise as to how he was able to tell that those were elephant's tusks and not any other animal horns.

Based on the reasons stated above, we are of the settled view that, had the trial court properly handled exhibits P1 and P2, the evidence of PW1, PW2, PW3, PW4, PW5, and PW6, the prosecution case would have been watertight. In the circumstances, we agree with the appellant and the prosecution who

supported the appeal that the appellant's conviction was grounded on insufficient evidence. As a consequence, we find the appeal meritorious.

In the event we allow the appeal, quash the conviction, and the sentence imposed by the trial court and upheld by the High Court is hereby set aside. We order the release of the appellant from prison forthwith unless he is held for some other lawful cause.

**DATED** at **MBEYA** this 17th day of September, 2021.

S. E. A. MUGASHA
**JUSTICE OF APPEAL**

Z. N. GALEBA
**JUSTICE OF APPEAL**

P. S. FIKIRINI
**JUSTICE OF APPEAL**

This judgment delivered this 17th day of September, 2021 in the presence of the Appellant in person unrepresented and Mr. Hebel Kihaka, learned Senior State Attorney for the Respondent / Republic, is hereby certified as a true copy of the original.


E. G. Mrangu
**DEPUTY REGISTRAR**
**COURT OF APPEAL**