IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

(CORAM: LILA, J.A., KITUSI., J.A. And MWAMPASHI., J.A.)

CRIMINAL APPEAL NO. 25 OF 2020

ALEX MWALUPULAGE @ MAMBA..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania

at Songea)

(Arufani, J.)

dated the 29th day of July, 2019

in

DC. Criminal Appeal No. 18 of 2019

.....

JUDGMENT OF THE COURT

21st & 25th March, 2022

KITUSI, J.A.:

The appellant Alex Mwalupulage @ Mamba was allegedly found in possession of two elephant tusks, the property of the Government of the United Republic of Tanzania without a valid permit. Consequently he was charged before the District Court of Songea with unlawful possession of government trophy, under section 86 (1) and (2) (c) (iii) of the Wildlife Conservation Act No. 5 of 2009 (WCA) as amended by section 59 (b) of the Written Laws (Miscellaneous Amendments) Act No. 2 of 2016 read together with section 57 (1) of the Economic and Organized Crimes Control Act Cap. 200 R.E. 2002

(EOCCA) and paragraph 14 of the First Schedule of the EOCCA as amended by section 16 of the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016.

The trial court convicted and sentenced the appellant to 20 years imprisonment. After his unsuccessful appeal to the High Court, the appellant appeals before us on 3 grounds which are summarized as follows: -

1. *That the appellant was wrongly convicted on a charge whose particulars were not sufficiently disclosed.*
2. *That the first appellate court erred in failing to determine ground 3 of appeal which was pivotal to the just determination of the appeal.*
3. *That the appellant's conviction was bad because it was based on the weakness of his defence.*

At the trial, the prosecution adduced evidence to prove that the wildlife officers in Songea had prior information that the appellant was dealing in government trophies, so they set a trap masquerading to be interested buyers of trophies.

Gervas Stanlaus (PW1) and Ansikari Joseph Lyimo (PW2) travelled to Madaba where the appellant and PW2 had agreed to meet

after a telephone conversation. PW1 and PW2 were using a private hired vehicle in order not to raise suspicion on the trophy dealer. They pulled the vehicle along Njombe road at the junction of Madaba and directed the dealer to meet them there. The dealer turned up carrying a parcel on his head containing 2 elephant tusks. PW1 and PW2 introduced themselves to the dealer and put him under arrest.

They signed a certificate of seizure (Exhibit P1) and made the appellant sign it too. The appellant was taken to Songea Police Station along with the tusks and later charged in court. During the trial, the two tusks were tendered as exhibit but were admitted as 'Identification Exhibit E. 1.' As we shall later see, this fact is a crucial subject for our determination.

In defence the appellant stated that the tusks belonged to one Abunuwas Myoka who had asked him to escort him to meet PW1 and PW2. According to the appellant, Abunuwas Myoka was also arrested but he bribed his way out of police custody so he was not charged. He admitted to have met PW1 and PW2 as testified by the two witnesses but qualified that he was with Abunuwas Myoka and the latter was the one carrying the contraband, as the owner. The appellant's wife (DW2) testified in support of the fact that Abunuwas Myoka went to

their residence to request for the appellant's escort to Pachani which we take to be the junction where PW1 and PW2 had set the trap.

In further demonstration that he is not the person who was communicating with PW1 and PW2, the appellant challenged the prosecution to disclose the cellular number which was used. This the prosecution failed to do.

After much oscillation, the trial Senior Resident Magistrate concluded that the appellant was guilty of possession of the two elephant tusks because he had imputed knowledge of the said tusks. The court convicted the appellant and sentenced him to the jail term earlier referred to.

It occurs to us important to refer to a portion in the judgment of the trial court that says: -

> *"First, the questions generally portrayed a picture that the story about Abunuwas Myoka and the motorcycles might be or might not be a concocted story or a second thought. Secondly, failure by the Prosecution even to mention the cellular phone number the accused used to communicate with PW2 for about two days further casts doubts on the credibility and reliability of the Prosecution*

version about alleged trap set against the accused. It was duty of the Prosecution to leave no semblance of doubt as to the accused person's liability."

Then the High Court observed as follows: -

"Since the version of the evidence given by the prosecution and that of the appellant are different the court has found the issue to determine here is which version is more credible and more reliable."

The learned High Court proceeded to dismiss the appeal on the ground that the trial court believed the version of the prosecution case as true, and that there was no basis for faulting that conclusion. In view of the obvious doubts in the mind of the learned trial magistrate as demonstrated above, we would be tempted to question the conclusion of the two courts below, but for the fact that this appeal turns on a different consideration, altogether.

The appeal before us raises three grounds of appeal, but Mr. Maurice Mwamwenda, learned advocate who represented the appellant, resolved to argue only one ground. This is that, the prosecution did not prove the case beyond reasonable doubt, so the High Court erred in not finding merit in the ground of appeal that had

raised that complaint. In submitting in support of that ground of appeal, Mr. Mwamwenda raised all manner of attacks faulting the irregularity in not giving the appellant a copy of the seizure certificate, a broken chain of custody of the seized elephant tusks, that the conviction of the appellant was based on the weakness of the defence and lastly that the elephant tusks were tendered for identification only.

Ms. Tulibake Juntwa, learned State Attorney represented the respondent Republic, and supported the appeal. Initially, she also addressed the issue of the chain of custody but lastly, like the appellant's counsel, raised the non-production of the two tusks as exhibit. Aware that the prosecution had tendered an inventory of the elephant tusks instead of the actual tusks, we probed her on whether that was not enough compliance. The learned State Attorney responded in the negative and drew our attention to the fact that the tusks were presented in Court on 23/11/2018 subsequent to the inventory being prepared on 18/10/2017, and wondered why they were admitted "*merely for identification*". In addition, she submitted that the procedure of admitting an inventory instead of the actual exhibit only applies where the exhibit in question is perishable. The

learned State Attorney submitted that elephant tusks are not perishable.

Mr. Mwamwenda did not have any rejoinder to make.

Both learned counsel submitted on the consequences of the non-production of the elephant tusks. They submitted that since the elephant tusks were the cornerstone of the charge against the appellant, the omission by the prosecution to tender them as exhibit was fatal because the said tusks are not part of the record.

Without ado, we will proceed to determine this key issue, knowing that it has been a subject of our previous decisions, such as in **Samson Elias @ Michael v. Republic,** Criminal Appeal No. 283 of 2012 and; **Udaghwenga Bayay and 16 Others v. Halmashauri ya Kijiji cha Vilima Vitatu and Another,** Civil Appeal No. 77 of 2012 (both unreported). The two cases were cited in the case of **Rashid Amiri Jaba & Another v. Republic,** Criminal Appeal No. 204 of 2008 (unreported) where the Court observed: -

> *"The law is settled that any physical or documentary evidence marked for identification only and not produced as an exhibit does not form part of the evidence hence have no evidential value."*

Similarly, in this case, the elephant tusks which were tendered and admitted for identification only, have no evidential value. Since the charge, the basis of these proceedings, alleges that the appellant was found in unlawful possession of the elephant tusks which are not part of the evidence, it means the very bottom of the case collapses.

It is our duty to consider next, if the inventory that was tendered as Exhibit P3 covers up for the omission to tender the physical elephant tusks. Ms. Juntwa submitted that inventories are used in proceedings involving perishable items. We instantly agree with her because there would be no point of tendering an inventory of physical items which are lying in the store with no fear of their getting destroyed. This is exactly what we said in **Michael Gabriel v. Republic**, Criminal Appeal No. 240 of 2017 (unreported): -

> *"Normally a valuation report or an inventory may be tendered in the case of perishable items but the same must have been ordered by the magistrate to be disposed of before hearing of the case after being taken before him in the presence of the accused person."*

The above case cited the Court's earlier decision in **Mohamed Juma @ Mpakama v. Republic,** Criminal Appeal No. 385 of 2017

(unreported), in which the essence of powers of preparing inventories for exhibits was traced to paragraph 25 of PGO No. 229. It applies to perishable exhibits which cannot be easily preserved.

Paradoxically, Exhibit P3 has the following recorded as *"Remarks as to condition"*: -

> *"Meno hayo yapo hali nzuri tu. Naomba yakabidhiwe Ofisi ya Maliasili Idara ya Wanyamapori kwa hifadhi."*

In a free translation, the remarks mean; the tusks are in good condition and it is being prayed that they be handed over to the Wildlife office for custody. That is quite against the intention behind paragraph 25 of the PGO No. 2291 which envisages an order of disposal of the exhibit in question.

For the foregoing reasons, it is our conclusion that the inventory that was tendered as Exhibit P3 could not salvage the situation. It should be noted that the elephant tusks were tendered for identification almost one year since the inventory had been prepared. We therefore agree with both Mr. Mwamwenda and Ms. Juntwa that the prosecution did not prove the case against the appellant beyond reasonable doubt because the elephant tusks, the essence of the charge, were not tendered as exhibits.

On that ground alone, we find merit in this appeal and allow it. We quash the conviction and set aside the sentence that was imposed on the appellant. We order his immediate release unless held for some other lawful cause.

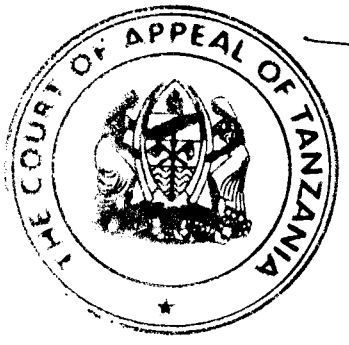
DATED at **IRINGA** this 25th day of March, 2022.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The judgment delivered this 25th day of March, 2022 in the presence of appellant in person and Ms. Edna Mwangulumba, learned State Attorney for the respondent/Republic is hereby certified the true copy original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL