IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

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

CRIMINAL APPEAL NO. 28 OF 2020

JAMALI MSOMBE ..... 1ST APPELLANT

NICHOLAUS BILALI @ MYOVELA ..... 2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Matogolo, J.)

dated the 6th day of December, 2019
in

Economic Appeal No. 21 CF 22 of 2019

JUDGMENT OF THE COURT

18th & 30th March, 2022

MWAMPASHI, J.A.:

In the District Court of Iringa at Iringa, the appellants Jamali s/o Msombe and Nicholaus s/o Bilal @ Myovela (first and second appellant respectively), along with one Abas s/o Stephen Nyanga, who was acquitted and therefore not a party to this appeal, were jointly charged with the offence of being found in unlawful possession of government trophies contrary to section 86 (1) and (2)(b) of the Wildlife Conservation Act, No. 5 of 2009 ("the WCA") read together with paragraph 14 of the First Schedule to and sections 57 (1) and 60 (1) and (2) of the Economic and Organized Crimes Control Act, [Cap. 200 R.E. 2002] ("the EOCCA")

as amended by sections 13(b) and 16(a) of the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016.

It was alleged by the prosecution that on 19.01.2017 at Frelimo area within the District and Region of Iringa, the appellants were found in possession of government trophies, to wit, four (4) pieces of elephant tusks valued at TZS. 33,435,000/= being the property of the Government of the United Republic of Tanzania, without any permit or license thereof. After a full trial, the appellants were convicted as charged and were accordingly sentenced to serve twenty years imprisonment each. The appellants unsuccessfully appealed to the High Court hence the instant second appeal against both conviction and sentence.

Briefly, the facts leading to the appellants' arrest, arraignment, and conviction are as follows: In the morning hours of 19.01.2017, Emmanuel Nziku (PW2), a motor cycle hire business rider, commonly known as "Bodaboda", was approached by the appellants who were well known to him and who wanted to be given a ride to Kidamali. Upon reaching at Kidamali, the appellants who had a bag, boarded a min bus to Iringa town. Sometimes later, the first appellant texted and asked him to meet them at Ipamba junction but on getting there, alas, he was arrested by the

police and taken to the Central Police Station on accusations of being found in possession of government trophies.

PW2's evidence will later be relevant in the identification of the bag. Meanwhile, according to Silverster Anyabwere Mwakarua (PW5) who is a wildlife officer stationed at Ruaha National Park, on 17.01.2017 he was informed by his head of department that one Jamali Msombe, the first appellant, was in possession of elephant tusks and was looking for buyers. Acting on that tip, a trap was set up whereby a TANAPA wildlife officer, Godfrey s/o Kimaro (PW7) who was planted to pose as a buyer was directed to approach the first appellant. PW7 contacted the first appellant pretending to be a prospective buyer and the two agreed to meet on 19.01.2017 at Longai Guest House for the transaction of the said business. On that date, PW7 booked room No. 101 in the said Guest House and waited for the first appellant to appear. The first appellant arrived and got in the room and while the two were negotiating PW5 in the company of the street chairperson one Dorine Martin Mgongolwa (PW1), the Longai guest house receptionist Peter Malya (PW4) and F.9626 PC Mwinyivua (PW8), invaded the room and put the 1st appellant and PW7 under arrest. The room was searched and a spring balance was found under the bed while a bag was found hidden behind a sofa. When opened by PW5, in

the presence of the first appellant, PW1, PW4, PW7 and PW8, the bag was found to contain clothes and four pieces of elephant tusks. When asked the two denied to be the owners of the tusks until PW4 stated that he had seen the first appellant get in the room with the bag when the first appellant admitted and told them that it was his young brother who had brought the bag with the tusks to him from Kihesa. Thereafter a certificate of seizure was filled to that effect.

PW7's evidence was to the effect that after being directed to pose as the buyer, he on 18.01.2017, contacted the first appellant who agreed to sell to him the tusks but said that he was in partnership with the second appellant. In the morning hours of 19.01.2017 the first appellant called to tell him that the tusks were ready and the two agreed to meet at Longai Guest House where PW7 booked room No. 101. PW7 relayed the information to PW5 and his team who positioned themselves at the Guest House. At around 10.00 am the first appellant came in the room but with no tusks. He then called someone to bring the tusks and in a few minutes a youth riding a motorcycle got at the guest house and the appellant got out to meet him. When the appellant came back in the room, he had a bag in his hands. Before the bag could be opened, there was a knock on the door and the appellant hid the bag behind the sofa. The door was

opened and PW5 with his team who introduced themselves as police officers got in and put him and the first appellant under arrest.

Josephat Sylvester Msombe testified as PW3 telling the trial court that on 19.01.2017 at around 10.00 am the first appellant who is his brother, called and directed him to go at a place called Transformer Semtema and pick a bag from one Nicholaus Myovela (second appellant). Upon getting at the place, he found the second appellant who after communicating with the 1st appellant, handed him the bag which was black in colour. Thereafter, the first appellant directed him to take the bag to Longai Guest House where he handed the same to the first appellant who after receiving it, entered in the Guest House. After he had handed the bag to the 1st appellant, he left but half an hour later, the first appellant called and asked him to get back to the Guest House. When he got at the Guest House he was arrested and taken to room 101 where there were a number of people including the 1st appellant, PW1 and PW4. Then, the room was searched in his presence and he witnessed the same bag he had earlier handed to the 1st appellant, being found hidden behind the sofa.

Other prosecution witnesses were PW1, PW4, and PW8 whose evidence, as we have hinted above, was briefly to the effect that they were involved in the search conducted in room 101 and that they

witnessed the four pieces of elephant tusks being found in the bag. In addition, PW4 is on record testifying that he is the one who booked PW7 in room 101 and that he saw the first appellant getting in room 101 where he stayed for a short moment before he came out and picked a bag from PW3 and then got back to the room. On his part, PW8 also testified that he arrested the first appellant and PW3. He also tendered the spring balance and the four pieces of tusks as exhibit P2 collectively.

The prosecution evidence did also come from F. 7303 Cpl. Credo (PW6) whose evidence was that he recorded the 2nd appellant's cautioned statement on 24.01.2017. After an inquiry the said cautioned statement was admitted in evidence as exhibit P1. There was also a cautioned statement of the first appellant which was recorded by F. 5481 Cpl. Rashid (PW10) on 19.01.2017 and which was received in evidence as exhibit P4.

Mr. Manyama Solomon Kisagi (PW9), a game ranger, told the trial court that on 19.01.2017 he was directed to go at the police station where he was given four pieces of elephant tusks in a black bag for assessment. He weighed, assessed and valued the tusks and found that the tusks were elephant tusks because they had a hole in between. He also told the trial court that the tusks had been extracted from a single elephant and therefore that its value was USD 15,000.00 equivalent to TZS.

33,435,000/=. A trophy valuation certificate to that effect was filled by him and the same was tendered in evidence as exhibit P3. It is worth to also note here that, in exhibit P3 which was admitted in evidence without any objection from the appellants, PW9's designation is indicated as a wildlife officer and the weight of the four pieces of elephant tusks is shown to be 05 kgs.

The first appellant, who testified as DW1, did not deny that he was arrested in room 101 at Longai Guest House with the bag in which there were four pieces of elephant tusks. He however claimed that the bag was given to him by the second appellant who lives at Mlandege, the same area he used to live, so that he takes it to one Basili at Longai Guest House. He also testified that it was his young brother PW3 who took them to the said Guest House and that he did not know what was in the bag till when the bag was opened in room 101 by the police. DW1 lastly told the trial court that what was testified to by his young brother PW3 was true.

On his part, the second appellant, who defended himself as DW2, totally distanced himself from the charges. He testified that he was arrested on 19.01.2017 at Kihesa and taken to the police station where he was joined with two other persons. He also complained that he was

tortured by the police officers and forced to confess. The second appellant further contended that the bag was not found in his possession.

At this point, before proceeding any further, we find it apposite to make it clear that from the above narrated facts, it is established and not disputable that, in his defence evidence given under oath, the first appellant unequivocally admitted that the bag containing the four pieces of elephant tusks in question was taken to room 101 by him and also that the bag with its contents was found in the room by PW5 and his team when the room was invaded and searched by the said team. Also not in dispute is the fact that the second appellant was not arrested in room 101 and his involvement to the case was therefore based on the evidence from the first appellant, PW2 and PW3.

For avoidance of any doubt that might be raised on the first appellants unequivocal admission, let us reproduce the relevant part of his defence evidence as it can be observed at page 76 of the record:

> *"I was arrested at Longai with a bag. I was given the bag with (sic) the 2nd accused person. The 2nd accused is my village mate. When the bag was opened, we saw the ivory tusks. They told me that they need the owner of these tusks, I told them I will show them who gave me the bag.*

The 2nd accused person gave me the said bag at Mlandege, he told me to take it, to somebody called "Basili". He told me Basili is at Longai Guest House. He never told me what, was inside. I then took it to Longai Guest House. I then called my young brother who took us in (sic) a motorcycle to Longai Guest House".

As we have alluded to above, after a full trial, the evidence given by the prosecution was found to be strong and credible. Basing on that evidence, the case against the appellants was thus found proved beyond any reasonable doubt. It was also found by the trial court that it was very implausible that the first appellant could not know what was in the bag. As for the second appellant, it was found by the trial court that the evidence from DW1, PW2 and PW3 linked him to the government trophies in question. In the first appeal by the appellants, the trial court's findings were confirmed by the High Court hence this instant second appeal.

In support of their appeal, each appellant filed his own memorandum of appeal. While the first appellant's memorandum of appeal contains four grounds of appeal, the second appellant's memorandum is comprised of five grounds. However, we have examined both two memoranda and found that the appellants' complaints boil down into the following six grounds: **One**, that following the change of trial magistrates, the

appellants were not accorded their rights under section 214 (1) of the Criminal Procedure Act, [Cap. 20 R.E. 2019], **two**, that no search warrant was tendered in court as an exhibit, **three,** that the cautioned statements were not properly admitted in evidence and acted upon by the trial court, **four**, that the burden of proof was shifted to the appellants, **five**, that PW3's evidence against the second appellant was not conclusive and not corroborated and **six**, that the case against the appellants was not proved to the required standard.

At the hearing of the appeal, the appellants appeared in person and were not represented. On the other hand, the respondent Republic was represented by Mr. Alex Mwita, learned Senior State Attorney and Ms. Radhia Njovu, learned State Attorney.

Submitting for his appeal, the first appellant began by seeking leave to argue on two new grounds to wit, that after finding that the appellants had a case to answer, the charge was not read out for the plea to be taken and that PW7 and PW8 contradicted themselves on the exact place in room 101, the spring balance was found. As there was no objection from the other side, we, in terms of rule 81 (1) of the Tanzania Court of Appeal Rules, 2019 (the Rules), allowed the first appellant to argue on the said two new grounds.

Regarding the first substantive ground of appeal, it was argued by the first appellant that the case was tried by two magistrates but when the successor magistrate was taking over the trial, he did not let the appellants know that they had the right to opt for the witnesses who had already testified to be recalled. He then turned to the first new ground and complained that after finding that the appellants had a case to answer, the trial court did not read out the charge and take the appellants' plea. As on the second new ground, it was submitted by the first appellant that PW7 and PW8 gave contradictory evidence in regard to the spring balance. He argued that while PW7 told the trial court that the balance was found in the toilet, according to PW8 it was found under the bed. Regarding the second substantive ground, it was contended by the first appellant that no search warrant or certificate of seizure was tendered in evidence to prove that the search in room 101 was legally conducted and also to show what was really found in the room. Having made the above submissions, the first appellant asked the Court to also consider other grounds raised by him and allow the appeal. He insisted that the case against him was not proved to the hilt.

The second appellant simply prayed for the grounds listed in his memorandum of appeal to be considered and for his appeal to be allowed.

He pointed out that during his arrest, nothing illegal was found in his possession.

At the outset, it was intimated by Mr. Mwita that he was not resisting the appeal. He however argued on the first ground of appeal that although it is true that the trial was conducted by two magistrates there was no violation of any of the appellants' rights. He contended that at page 53 of the record, it is clearly indicated by the trial court that section 214(1) of the CPA was complied with and that the appellants were informed of the reasons for the change of the trial magistrates. He insisted that section 214 (1) of the CPA does not require recall of witnesses when there is a change of trial magistrates and further that sub section (2) of that provision provides that the High Court can only invalidate the trial where there is failure of justice, which is not the case in the instant case.

As regards to the second ground on the complaint relating to the search warrant, it was submitted by Mr. Mwita that room 101, in which the bag containing the four pieces of elephant tusks was found, was searched without there being a search warrant to that effect. He insisted that since the search was not emergent then a search warrant ought to have been procured first. It was argued by him that without a search warrant it is doubtful that the four pieces of elephant tusks were really

found in the room. The search conducted in room 101 was also faulted and doubted by Mr. Mwita on the ground that the evidence from PW1 show that when she got in the room for the purpose of witnessing the search, there were already four people in the room and that the arrest had already been done. This, he argued, raises some doubts on who might had taken the bag containing the four tusks in the room. He further wondered how the spring balance got in the room.

Turning to the third grounds on the cautioned statements, it was argued by Mr. Mwita that the second appellant's cautioned statement which was tendered in evidence by PW6 as exhibit P1 was recorded on 24.01.2017 while he was arrested on 19.01.2017. The statement, he contended, was therefore recorded out of the period of four hours as required by section 50 (1) of the CPA. The same was for the first appellant's cautioned statement tendered in evidence by PW10 which was recorded at 16.29 pm while the first appellant was arrested at 10.00 am. For this reason, Mr. Mwita urged the Court to expunge the said two cautioned statements from the record.

The fourth ground of appeal was supported by Mr. Mwita by simply referring us to pages 105 and 106 of the record. He argued that the

ground is meritorious because the trial court shifted the burden of proof to the appellants.

Mr. Mwita combined and argued the fifth and sixth grounds together. He submitted that since the second appellant was not arrested in room 101 then the evidence from PW3 which tended to connect him to the offence was not sufficient to support his conviction because there was no evidence that the bag, he allegedly handed to PW3, contained the four pieces of elephant tusks and also that there was no good evidence to prove that what was found in the bag in room 101 was what was in the bag which was allegedly handed to PW3 by the second appellant. He added that PW3 did not even know what was in the bag. At this point the Court was referred to the case of **Moses Charles Deo v. R** [1987] T.L.R. 134.

It was also argued by Mr. Mwita that the first appellant's admission in his defence that the four pieces of elephant tusks were given to him by the second appellant is, under the circumstances of this case, of no added value to the prosecution case because there was no proof that the relevant four pieces of tusks were really elephant tusks. He explained that PW9 was not a qualified witness to prove that the horns were elephant tusks and also that he was not qualified to even fill the trophy valuation

certificate (exhibit P3). It was argued by him that PW9 being a game ranger and not a wildlife officer, could not have examined the tusks in question or fill the trophy valuation certificate. Mr. Mwita contended that a game ranger is not one of the authorized officers allowed under section 86 (4) of the WCA, to examine government trophies and fill the trophy valuation reports. He insisted that the proof that the horns were elephant tusks and not of any other animal, was vital. To cement his argument, he cited the case of **Justine Bruno @ Mkandamambwe v. Republic**, Criminal Appeal No. 323 of 2018 (unreported).

As on the two new grounds of appeal, it was argued by Mr. Mwita that the omission by the trial court to read over the charge after finding the appellants with a case to answer was not fatal as it did not prejudice the appellants. He pointed out that the charge was read out and explained to the appellants at the beginning of the trial. Regarding the complaint that there was contradictory evidence on the place where the spring balance was found in room 101, it was agreed by Mr. Mwita that truly, while there is evidence that the balance was found under the bed, there is also evidence to the effect that it was found in the toilet. It was argued by him that the contradiction is material as it does not only go to the credibility of witnesses but also to the root and substance of the case.

On the above arguments and reasons, Mr. Mwita concluded by contending that the case against the appellants was not proved beyond reasonable doubt and therefore that the appeal should be allowed.

The appeal having not been opposed, the appellants had nothing of substance to argue in rejoinder. They agreed to what had been submitted by Mr. Mwita and prayed for their appeal to be allowed.

We have dispassionately considered the grounds raised in support of the appeal and the submissions made thereof. We will begin our deliberation with the third ground on the cautioned statements and then on the two new grounds. We agree with the appellants and Mr. Mwita that the two cautioned statements tendered in evidence as exhibits P1 and P4 were received in evidence un-procedurally. According to section 50(1)(a) of the CPA, the basic period available for interviewing a person who is in restraint in respect of an offence is four (4) hours commencing at the time when he was taken under restraint in respect of the offence. It is also trite law that violation of section 50 of the CPA is fatal. In **Ramadhani Mashaka v. Republic,** Criminal Appeal No. 311 of 2015 (unreported) the Court observed that:

> *"It is now settled that a cautioned statement recorded outside the prescribed time under*

section 50 (1) (a) and (b) renders it to be incompetent and liable to be expunged".

In the instant case, as rightly submitted by Mr. Mwita, while the first appellant was arrested on 19.01.2018 at 10.00 am, his statement was recorded by PW10 at 16.20 pm which is out of the prescribed four hours period. Likewise, while the second appellant was also arrested on 19.01.2018 his statement was not recoded till on 24.01.2018. The two cautioned statements are therefore liable for expunction as we hereby accordingly expunge them from the record.

The first new ground on the complaint that the charge was not read out and plea was not taken after the trial court had found the appellants with a case to answer, should not detain us. As rightly argued by Mr. Mwita, at page 73 of the record of appeal, it is indicated that the appellants were addressed by the trial magistrate in terms of section 231 of the CPA. After an accused is found with a case to answer and before he is called to give his defence, sub-section (1) of section 231 the CPA, requires, among other things, for the trial court to again explain the substance of the charge to the accused and inform him his right. Since, in the instant case it is indicated that the trial court addressed the appellants in terms of section 231 of the CPA and as it is shown that the appellant opted to give their respective defences on oath and that while

the first appellant had no witness to call in support of his defence, the second appellant had two witnesses to call, then it cannot be complained that they were not accorded their relevant rights. The complaint that the trial court did not again take their pleas at that stage, is baseless not only because it is not so required by the law but also because we do not see any prejudice or failure of justice to have been occasioned. We therefore dismiss the first new ground of appeal for being unmerited.

Regarding the second new ground on the complaint that PW7 and PW8 contradicted themselves on the place the spring balance was found in room 101, while we agree that there was a contradiction as PW7 told the trial court that the spring balance was found in the toilet whereas according to PW8 the balance was found under the bed, we do not agree with the appellants and Mr. Mwita that, under the circumstances of this case, the contradiction was material. Since it was not disputed by the first appellant that the four pieces of elephant tusks, which are the subject of this case, were found in room 101, the fact that there was such a contradiction on what place in the room the Spring balance, which is not the subject of this case, was found, is immaterial and it does not in any way shake the strong prosecution strong evidence that the tusks were

found in the room. For the above reasons the second new ground of appeal fails too.

Turning to the first substantive ground in which it is complained that section 214(1) of the CPA was not complied with by the trial court, it is our observation that as it can be deciphered from the record of appeal at page 53, the successor magistrate put it on record that section 214 of the CPA has been complied with and that the matter would proceed for hearing because his predecessor had been transferred. There was no objection from the appellants. We agree with Mr. Mwita and it is our considered view that since it is on record that section 214(1) of the CPA was complied with and that the hearing would proceed and also as the appellant did not raise any objection for the hearing to proceed from the stage it had reached under the predecessor magistrate, then the appellants cannot be heard complaining that they were denied the right for witnesses who had already testified to be recalled. Considering the circumstances of this case, there is nothing to infer that the successor magistrate wrongfully assumed jurisdiction or that the appellants were materially prejudiced.

In the case of **Charles Yona v. Republic**, Criminal Appeal No. 79 of 2019 (unreported) also cited in **Tumaini Jonas v. Republic,** Criminal

Appeal No. 337 of 2020 (unreported), the Court was faced with an akin complaint of non-compliance of section 214 (1) of the CPA and stated that when determining whether the provision has been fatally violated, it is important to consider the peculiarity of circumstances for each case. Most importantly, the Court held that before the conviction can be quashed for non-compliance of section 214 (1) of the CPA, the following two conditions must be satisfied:

1. *That the conviction was vitiated by the non-compliance of section 214 (1) of the CPA.*
2. *That the appellant has been materially prejudiced by the conviction by reason of the evidence not wholly recorded by the successor magistrate.*

Guided by the above conditions, we are of a settled mind that under the circumstances of this case, as we have observed above, it cannot be said that the conviction was vitiated by the change of the trial magistrates or that they were materially prejudiced. We therefore join hands with Mr. Mwita that this ground is baseless and proceed to dismiss it accordingly.

The second substantive ground of appeal is on the complaint that the search in room 101 was conducted without there being a search warrant. Admittedly, there is no evidence that in searching the room the

searching team was equipped by a search warrant. It is also clear that the search was not an emergency one. The search was therefore conducted contrary to section 38 (1) of the CPA. Notwithstanding the said ailment, the question that we have asked ourselves is whether, under the circumstances of the instant case, the omission was fatal and that the conviction cannot be sustained despite the omission. Having carefully examined the evidence on record, we are of a considered view that under the circumstances of this case the fact that room 101 was searched without a search warrant cannot vitiate the conviction.

The reason pushing us to the conclusion that, under the circumstances of this case, the procedural flaws in searching room 101 without a search warrant is not fatal, is the fact that the search was done in the first appellant's presence. Besides that, the first appellant admitted that the four pieces of elephant tusks in question were taken therein by him and that they were found in the room. We are of a settled view that such a procedural flaw is rendered irrelevant when it is not disputed by the first appellant that the tusks (exhibit P2) taken into room 101 by him before being found therein in his presence. For the above reasons we also find the second ground of appeal unmerited and dismiss it.

Next for our consideration, is the fourth ground on the complaint that the burden of proof was shifted to the appellants. This ground should not detain us at all. We do not agree with the appellants and Mr. Mwita that there is any part in the trial court's judgment, where it can even be inferred that the burden was shifted to the appellants. In his attempt to support his argument that the burden was shifted to the appellants, Mr. Mwita referred us to pages 105 and 106 of the record of appeal. We have revisited the said part of the trial court judgment and have observed no any indication that the burden was shifted to the appellants. At that part of the trial court judgment, the trial magistrate evaluated the defence evidence and disagreed with the first appellant that he took the bag to room 101 not knowing what was in the bag. The trial court found it illogical that the first appellant could have carried the bag therein without knowing its contents. Likewise, the second appellant's defence disassociating himself from the offence, was rejected by the trial court basing on the evidence given by the first appellant, PW2 and PW3 that linked him to the offence. In so doing the burden of proof was never shifted to the appellant. The fourth ground therefore also fails.

The fifth ground of appeal faults the two lower courts' stand in acting on PW3's evidence and making it the basis for the second appellant's

conviction. It is being complained that PW3's evidence was not conclusive against the second appellant and also that it was not corroborated. At the outset, we find no merits in this ground. The evidence by PW3 that he was sent by his brother, the first appellant, to pick the bag from the second appellant and that he was really given the bag by him was not only straight and not shaken, but it was also well corroborated by the evidence from the 1st appellant who in his defence evidence told the trial court that he called PW3 and asked him to take the bag containing the tusks from the second appellant to the Guest House. The trial court and the High Court having found PW3's evidence credible and reliable, we, sitting in this second appeal, have no mandate to interfere with the concurrent finding by the two lower courts on issues of credibility of witnesses unless there are circumstances on the record which call for reassessment of their credibility. We find no such circumstances in the instant case. See-**Omari Ahmed v. Republic** [1983] T.L.R. 52, **Saada Abdallah and Others v Republic** [1994] T.L.R. 132 and **Bashiru Salum Sudi v. Republic,** Criminal Appeal No. 379 of 2018 (unreported).

At this stage we should also deal with the argument that there was no sufficient evidence proving the case against the second appellant because he was not arrested in room 101 or while in possession of the

four pieces of elephant tusks in question. It is our observation that from the evidence on record the mere fact that the second appellant was not arrested in actual possession of the tusks as it was for the first appellant, does not save him from the crime in question. There was sufficient evidence from PW2, PW3 and DW1 (first appellant) tightly connecting him to the offence. PW2 told the trial court how on 19.01.2017 he gave the appellants a ride to Kidamali. He also testified that the two had in their possession the bag though he did not know its contents. There was also evidence from PW3 that on the same day, the second appellant handed to him the bag at Transformer Semtema so that he takes it to the first appellant who was at Longai Guest House waiting for the bag. As we have pointed out above, the trial court which had the advantage of observing the demeanour of DW1, PW2 and PW3 believed them to be credible and since the first appellate court concurred with the trial court's findings on the credibility of the said witnesses, the finding is binding on us.

The most disastrous evidence against the second appellant came from his colleague, the first appellant (DW1). As we have earlier displayed, DW1 did not only admit to have been found in possession of the tusks but he named the second appellant as his partner. The admission by DW1 which was made on oath before the trial court was

therefore the best evidence not only against him but against the second appellant too. The admission by the first appellant, we can say, was better than a confession which ordinarily is made not on oath and not before a trial court. The admission evidence from DW1 against the second appellant who was his co-accused, was well corroborated by the evidence from PW2 and PW3 as required by section 33 (1) and (2) of the Evidence Act [Cap. 6 R.E. 2019] under which it is provide that:

> "33 (1) *When two or more persons are being tried jointly for the same offence or for different offences arising out of the same transaction, and a confession of the offence or offences charged made by one of those persons affecting himself and some other of those persons is proved, the court may take that confession into consideration against that other person.*
>
> *(2) Notwithstanding subsection (1), a conviction of an accused person shall not be based solely on a confession by a co accused."*

It is our considered view, therefore, that the admission made by the first appellant before the trial court, did not only affect him but it also affected the second appellant. The trial court therefore properly considered and acted on the evidence from the first appellant against the second appellant because it was well corroborated by PW2 and PW3.

In his endeavour to support the appeal Mr. Mwita also attacked PW9's competence in assessing, valuing and issuing the trophy valuation certificate (exhibit P3) because PW3 was a mere game ranger. He also vehemently argued that the four pieces of tusks were not proved to be elephant tusks by PW3. First of all, while it is not disputable that on 31.10.2018 when giving his evidence, PW3 introduced himself as a game ranger, according to the trophy evaluation certificate (exhibit P3) filled and issued by him on 19.01.2017, his designation was shown to be a wildlife officer. Exhibit P3, is part of evidence on record and the same was executed before PW9's evidence was recorded. As rightly argued by Mr. Mwita, under section 86 (4) of the WCA, a trophy evaluation certificate can only be issued by the Director or a wildlife officer from the rank of wildlife officer. It is provided under Section 86 (4) of the WCA that:

> *"In any proceedings for an offence under this section, a certificate signed by the Director or Wildlife officers from the rank of wildlife officer, stating the value of any trophy involved in the proceedings shall be admissible in evidence and shall be prima facie evidence of the matters stated therein including the fact that the signature thereon is that of the person holding the office specified therein".*

Further, under section 3 of the WCA, a "wildlife officer". is defined to mean:

> *"a wildlife officer, wildlife warden and wildlife ranger engaged for purposes of enforcing this Act".*

Though PW9 did not, introduce himself as a "wildlife officer" when testifying before the trial court, he did so, as we have pointed out, when filling and issuing exhibit P3. The WCA does not define who is a "game ranger". However, according to https://www.postmatric.co.za a "game ranger" is defined as follows:

> *"A game ranger, also known as a game warden or conservation officer, is a member of law enforcement. This person is charged with protecting wildlife in specified area to ensure that population levels of certain types of wildlife are kept at biologically successful levels".*

It is our considered view, from the above discussion and the definition of who is "game ranger", that a game warden, wildlife officer, wildlife ranger and a game ranger are same persons whose main task is to protect wildlife. We find that, in substance, there is no difference between a "wildlife officer" a "wildlife ranger", a "game ranger" or a "wildlife ranger". In our view, the use of these terms is just a matter of semantics. That

being the case and as PW3 introduced himself in exhibit PW3 that he is a wildlife officer, then he was a designated officer within section 86 (4) of the WCA, to assess, value and issue the trophy valuation certificate (Exhibit P3) in question.

As regards the argument by Mr. Mwita that the four pieces of tusks were not proved to be of elephant tusks, it is our considered view that, under the circumstances of this case, where there is evidence from PW9 that the tusks are elephant tusks and where the doubt whether the tusks are elephant tusks or not, was neither raised before the trial court nor before the High Court by the appellants but where it is being raised from the bar by Mr. Mwita at this stage, there can be no valid ground to doubt PW9's evidence that the tusks are of elephant tusks. Basing on his experience, PW9 assessed the tusks and concluded that because the tusks had a hole in between, then they were not of any other animal but of elephant's. Even the first appellant admitted that the four tusks were elephant's tusks. As we have pointed out above, we therefore find no reason for not relying on PW9. We thus find the ground with no merit and proceed to dismiss it.

In fine, for the above reasons and observations, we also find the last ground that the case against the appellants was not proved to the

required standard, baseless. The case against the appellants was proved to the hilt. The first appellant admitted in his defence evidence before the trial court that he is the one who took the four pieces of elephant tusks to room 101 where the same were retrieved by PW5 and his team during the search that was conducted therein. In his admission, the 1st appellant did also name the second appellant as his partner, the evidence which was corroborated by the evidence from PW2 and PW3.

Consequently, we find that the appeal lacks merit and we accordingly dismiss it in its entirety.

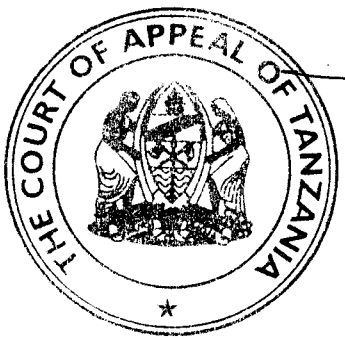
DATED at **IRINGA** this 30th day of March, 2022.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The judgment delivered this 30th day of March, 2022 in the presence of appellants in person and Ms. Alice Thomas, learned State Attorney for the respondent/Republic is hereby certified the true copy original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL