IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MWARIJA, J. A., SEHEL, J.A And MAIGE, J. A.)

CRIMINAL APPEAL NO. 613 OF 2020

1. PAULO ANDREA @ MBWILANDE
2. JOHN PAUL } **.....APPELLANTS**

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania, Corruption and Economic Crimes Division, at Bukoba)

(Mashaka, J.)

dated the 17th day of August, 2020

in

Economic Case No. 01 of 2020

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JUDGMENT OF THE COURT

18th & 22nd July, 2022.

SEHEL, J.A.:

The appellants were jointly and together arraigned before the High Court of Tanzania, Corruption and Economic Crimes Division, Bukoba Sub Registry (the trial court) for the offence of unlawful possession of government trophy contrary to section 86 (1) and 2 (b) of the Wildlife Conservation Act No. 5 of 2009 read together with Paragraph 14 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] (now R.E. 2022) ("the EOCCA"). It was alleged that, on 22nd July, 2018 at Nyamigere village within Biharamulo District in Kagera Region, the appellants were found in unlawful possession of government trophy, to wit, three (3) pieces of elephant tusks valued at USD 30,000.00 equivalent to TZS. 683,820,000.00, the property of the United Republic of Tanzania.

After the appellants pleaded not guilty to the information, a full trial ensued. The prosecution called a total of six (6) witnesses and tendered six (6) exhibits whereas the appellants defended themselves.

According to the evidence of the Assistant Inspector of Police, Jordan Mkuwele (PW1), on 22nd July, 2018 while in his office at Kalenge police post, he received officers from the Wildlife, one of them was Paulo Mbeya. They informed him that there were poachers dealing with selling government trophies particularly elephant tusks in his area of work and that they had already set a trap but needed extra support from the police to arrest the culprits. Mr. Paulo Mbeya further informed PW1 that they had an informer who was with the suspects posing as a buyer of the contraband. PWI and E. 9360 Detective Corporal Daniel joined the team and went to Nyamigere village where the suspects were

said to have been conducting their illegal business. Upon reaching there, they hid themselves in a forest where there are no houses. Along a pathway, they saw three people coming. Then, Paulo Mbeya pointed to PW1, the two suspects and the informer. Among the three, one was carrying a small bag, another one was carrying a black nylon bag and the third person who covered himself with a Maasai cloth, was carrying nothing. PW1 stopped them, introduced himself and ordered them to sit down with their bags. He then sent Detective Corporal Daniel to get the chairman of the village to witness the search.

When Jacob Petro Kihelele (PW2) arrived at the scene, PW1 started to search the appellants in the presence of PW2, Wildlife Officers and the appellants. He found nothing in the small bag that was carried by the first appellant, whereas, in the nylon bag carried by the second appellant, he found a worn-out bag and inside it there were three pieces of suspected elephant tusks. He filled in a certificate of seizure (exhibit P1), signed by him, PW2 and the 2nd appellant.

From there, they went to the house of the first appellant to conduct search but nothing was found. PW1 then took the retrieved items, three prices of suspected elephant tusks (exhibit P2A), a black nylon bag (exhibit P2B) and a worn out small black bag (exhibit P2C)

together with the appellants to Kalenge police post. At the police post, he labelled the suspected elephant tusks KAL/RB/73/2018 using a black marker pen. On the same date, he took exhibit P2 to Biharamulo police station for safe keeping. At Biharamulo, he handed it over to WP. 8334 PC Maria and filled the chain of custody record (exhibit P3).

G. 7973 PC Elimboto, exhibit keepers at Biharamulo police station, received exhibit P2 from WP. 8334 PC Maria and labelled each item of exhibit P2 with a black marker pen BI/IR/1265/2018. He then registered it with registration number 48/2018 and issued a receipt (exhibit P4). On 23rd July, 2018, he handed it over to Detective Corporal Nyanda (PW4), an investigative police officer, for investigation and returned it on the same day.

Neema Christine Uronu (PW5), a Weight and Measures officer attached at Weight and Measures, Custom area told the trial court that on 30th July, 2018 she received three (3) pieces of elephant tusks from a police officer Evodius who came with a letter requesting for the verification of the weight of the exhibit. She measured and found that the three pieces of elephant tusks weighed eight (8) kilograms. She thus wrote a letter (exhibit P5) to reply to the request.

On 23rd July, 2018 Frank Mapunda (PW6) a wildlife officer attached at Burigi, Biharamulo and Kimisi Game Reserves, in Kagera Region told the trial court that he received three (3) pieces of elephant tusks and a letter from PW4 requesting him to examine and value the trophies and he did. According to PW6, the three pieces were elephant tusks, two came from one elephant and the other came from another elephant. He valued the tusks at TZS. 68,328,000.00 (USD 30,000). He recorded his findings in the trophy valuation certificate, exhibit P6.

In their defence, both the appellants admitted to have been arrested by police officers. They also identified exhibit P2B that it was seized at the scene of the crime. Nevertheless, they disowned it. The first appellant (DW1) told the trial court that on 22nd July, 2018, he prepared himself to go to Church to bid farewell to their Parish Priest. He took his small bag, a phone and TZS. 5000.00 to buy soap and candles. He then called his son, the second appellant and together, went to Church. But when they reached at the main road, they saw police officers' motorcycle parked along the way, on the road. The police officers arrested them together with another man who had Sukuma intonation. PW1 started to search them. In his bag, the police officer found nothing. He said, the second appellant did not carry any bag while

the other person had a bag. That other person dropped it and ran away. When the police officers searched the bag, they found the three pieces of elephant tusks.

The second appellant (DW2) gave a similar account that on 22nd July, 2018 he took his empty red bag and went to Church with his father, DW1. On their way, upon reaching at the highway road of Biharamulo to Kigoma, there was someone on the road who threw a bag near them and ran away. As there were police officers nearby, they were stopped and searched. In that thrown bag, he said, the police officers retrieved the three pieces of elephant tusks. Hence, they were arrested and charged.

The trial court was satisfied that the second appellant was found in actual possession of the three elephant tusks while the first appellant was found in constructive possession. It therefore, dismissed the contention of the appellants that the bag was thrown to them. In that regard, they were found guilty, convicted and sentenced each to pay a fine of TZS. 683,820,000.00 or serve twenty (20) years imprisonment. Aggrieved, they filed the present appeal advancing the following grounds in their joint memorandum of appeal:

1. ***That**, the learned Trial Judge, erred in law and facts to convict the Appellants while the prosecution side did not prove the case beyond reasonable doubt.*

2. ***That**, the learned Trial Judge, erred in law and facts to rely on the fabricated and doubtful evidence placed before her to reach a conviction.*

3. ***That**, the learned Trial Judge, erred in law and facts to convict the 1st appellant basing on actual or constructive knowledge while the same were not proved against him by the prosecution.*

4. ***That**, the learned Trial Judge, erred in law and facts for failure to recognize that the chain of custody record was broken and full of doubts, thus not reliable.*

5. ***That**, the learned Trial Judge, erred in law and facts for failure to consider the evidence adduce by the Appellants, thus un just on part of the appellants.*

6. ***That**, the learned Trial Judge, erred in law and facts to rely on the exhibits tendered by the prosecution side to reach conviction, while the exhibits had no sole identification features labelled to avoid lose of, and mix with other related cases when the said exhibits were handled by the police officers during the investigation process.*

At the hearing of the appeal, Messrs. Anesius Stewart and Ibrahim Mswadick, learned advocates appeared for the appellants, whereas Mr.

Hezron Mwasimba, learned Senior State Attorney assisted by Ms. Suzan Masule and Ms. Veronica Moshi, both learned State Attorneys, appeared for the respondent Republic.

Mr. Stewart, at first, informed the Court that he would argue the first and second grounds together while Mr. Mswadick would submit on the third ground. The rest of the grounds of appeal were abandoned.

Arguing the first and second grounds, Mr. Stewart contended that there were a lot of doubts on the prosecution evidence which ought to have been resolved in favour of the appellants. **First**, he submitted that the material witnesses, namely the informer, who could have given a true account on the incident, was not called to testify and no explanation was given that he was not within reach. He contended that the explanation given by PW1 that, the said informer could be exposed, is not justifiable because he was already exposed to the appellants and the village chairman. He thus urged the Court to draw adverse inferences for failure to call the informer. To cement his argument, he cited the case of **Esther Aman v. The Republic**, Criminal Appeal No. 69 of 2019 (unreported) at page 14.

Two, he argued that the local leaders were not involved at the time of arrest hence raised doubts. He queried as to why the chairman

of the village was not involved when the appellants were arrested. He said, PW2 was only involved during search. He thus argued that failure to involve the village chairman in the process of arresting the appellants raised doubts as to their involvement of the alleged crime given that they were together with the informer.

On his part, Mr. Mswadick faulted the learned trial Judge in convicting the second appellant on constructive possession while there is no evidence on record to suggest that the second appellant had knowledge or was aware of what the second appellant was carrying. At the end, the counsel for the appellants beseeched the Court to allow the appeal.

It was Ms. Masule who replied to the appeal. She first expressed the respondent's stance that they were supporting the conviction of the appellants. On failure to call material witnesses, she contended that the informer was not a material witness because he accomplished his mission and PW1 explained as to why he could not be called, that, he would be exposed. She distinguished the case of **Esther Aman v. The Republic** (supra) that the material witness, Said Amri Ramadhani discussed by the Court in that appeal, was not an informer.

Concerning the village chairman, she submitted that he was called at the right time, during search because his role was to witness the search and not to assist the police in effecting arrest or trap. She added that the offence of unlawful possession of government trophy was proved against the appellants beyond reasonable doubt because PW1 told the trial court how he received the information from Paulo Mbeya, acted on such information and managed to arrest the appellants with the government trophies. She added that the evidence of PW1 is corroborated by the evidence of PW2 who witnessed the search conducted upon the appellants, wherefrom the three elephant tusks were retrieved.

Regarding constructive possession, Ms. Masule supported the findings of the learned trial Jude that the first appellant was in constructive possession because he was together with the second appellant from whom the three elephant tusks were retrieved. Further, she argued that the arrest of the first appellant was the result of the information from the informer that he was dealing in government trophy. It was her submission that the first appellant knew and was dealing with the second appellant thus he was rightly convicted.

Before she could rest her submission, Ms. Masule beseeched the Court to invoke its revisional power under section 4 (2) of the Appellate Jurisdiction Act, [Cap. 141 R.E. 2019] (the AJA) to revise the illegal sentence imposed by the learned trial Judge. She referred us to page 160 of the record of appeal where the learned trial Judge correctly cited the provisions of section 60 (2) of the EOCCA but imposed an illegal sentence of an option of payment of fine or serve a custodial sentence of twenty years. She contended that section 60 (2) of the EOCCA does not provide for an option. It was her submission that the law requires the trial court to impose custodial sentence of not less than twenty years but not exceeding thirty years or to both that imprisonment and any other penal measures.

Further, Ms. Masule argued that the learned trial Judge directed the prison officers to consider the time spent in remand prison by the appellants as time already served towards the sentence. The learned State Attorney argued that such a direction is administratively impracticable. She wondered how can a prison officer reduce the proper sentence of twenty years imposed by the learned trial Judge. She thus urged the Court to interfere with the illegal sentence and impose a proper sentence in accordance with the law.

In re-joinder, Mr. Stewart reiterated his earlier submissions that the informer was a material witness and urged the Court to draw adverse inferences on failure to call him. On sentence, he concurred with the submission of the learned State Attorney but added that on the weaknesses of the prosecution evidence, the appellants are entitled to acquittal.

We have dispassionately considered the rival arguments by the parties and examined the record of appeal. We start with Rule 36 (1) (a) of the Tanzania Court of Appeal Rules, 2009 as amended that enjoins the Court to re-evaluate the evidence and draw its own inference of fact or conclusions subject to the usual difference to the trial court's findings based on credibility of witnesses – see: the case of the **Director of Public Prosecutions v. Orestus Mbawala @ Bonge**, Criminal Appeal No. 119 of 2019 (unreported). We shall thus do the same in the present appeal.

We wish to start with the complaint that there was no solid evidence to infer possession, be it actual or constructive, against the first appellant. The learned trial Judge found that the first appellant was in *constructive possession* because he was in the same journey for the same purpose with his son, the second appellant and that, they were

together with the informer. The principle of *constructive possession* was lucidly clarified in the case of **Moses Charles Deo v. The Republic** [1987] T.L.R. 134 that:

> *"... for a person to be found to have had possession,* ***actual or constructive****, of goods it* ***must be proven either that he was aware of their presence and that he exercised some control over them****, or that* ***the goods came****, albeit in his absence,* ***at his invitation and arrangement****. But it is also true that mere possession sometimes denotes knowledge and control."* [Emphasis added]

On our appraisal of the entire evidence, we failed to find any evidence tending to show that the first appellant was aware of the presence of exhibit P2A, B and C in the bag which belonged to the second appellant. Mere fact that he was arrested together with the second appellant and the informer does not mean that he had knowledge or control of what the second appellant was possessing.

In the case of **Emmanuel Mwaluko Kanyusi & 4 Others v. The Republic**, Consolidated Criminal Appeals No. 110 of 2019 and 553 of 2020 (unreported), the Court was faced with similar scenario. In that

appeal, the government trophy was retrieved from the fourth appellant's house in the presence of other appellants. The Court said:

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

In the light of the above, we are satisfied that the first appellant cannot be said to be in constructive possession of the government trophy simply because he was arrested together with the second appellant. Furthermore, the evidence of PW1 and PW2 exonerate him as PW1 told the trial court that exhibit P1 was not signed by the first appellant because they did not find anything in his bag and even at his residence. We therefore, find merit on the third ground of appeal and acquit the first appellant, quash the conviction and set aside the sentence meted out to him.

Having found merit on the third ground of appeal and acquitted the first appellant, we are remained with the first and second grounds of appeal in respect of the second appellant. We shall deal with them in

unison as it was argued by the counsel for the parties. Starting with the complaint regarding failure to call an informer as a witness, on this, we shall not dwell much because section 53 (2) of EOCCA introduced the **Whistleblower and Witness Protection Act**, [Cap. 446 R.E. 2022] that guarantees protection to informers against disclosure of their identity. It is in that respect, in the case of **Khamis Said Bakari v. The Republic**, Criminal Appeal No. 359 of 2017 (unreported) when the Court was confronted with akin argument stated as follows:

> *"As regards the informer, there was no particular reason why the prosecution should have called him as their witness. At any rate, that person, being a whistle-blower, deserved a measure of protection against disclosure of his identity by not calling him as a witness."*

Further, PW1 told the trial court the reason as to why the informer could not be called as a witness, that, he would be exposed. We fail to go along with the submission of Mr. Stewart that since he was exposed to the appellants, then there was no need to hide his identity. We believe that the learned counsel is aware of the proverb that two wrongs do not make right. If at all, the police officers wronged at the time of the arrest of the appellants, it does not mean that the informer is not

entitled to protection. In that respect, we find that the informer was not a material witness and he is protected by law. Further, we entirely agree with Ms. Masule that the case of **Esther Aman v. The Republic** (supra) is distinguishable and thus, not relevant to the present appeal.

Concerning the complaint that the village chairman ought to have been called at the time of arrest, the learned State Attorney was correct to argued that PW2's role was to witness search and nothing more. Therefore, we failed to go along with Mr. Stewart that PW2 should have been called to participate in arresting the appellants.

We now turn as to whether the prosecution proved the offence of unlawful possession against the second appellant beyond reasonable doubt. The evidence connecting the second appellant with the offence comes from PW1 who effected the arrest, PW2 who witnessed the search, the seizure certificate (exhibit P1) signed by the second appellant himself acknowledging that he was found with three pieces of suspected elephant tusks (exhibit P2A, B and C), PW6 who examined the trophies and established that they are elephant tusks, and the trophy valuation certificate (exhibit P6) proving that the trophies valued at TZS. 683, 820,000.00 (USD 30,000). In addition, the second appellant himself did not dispute that exhibit P2 was retrieved from the black bag.

With that evidence in the record of appeal, we are satisfied that the offence was proved beyond reasonable doubt against the second appellant. We therefore dismiss the first and second grounds of appeal for lacking merit.

Lastly, we turn on the propriety of the sentence imposed on the second appellant. According to the record of appeal, the learned trial Judge having convicted the appellants of the offence of unlawful possession of government trophies, she sentenced each to pay a fine of TZS. 68,328,000.00 or to serve a term of twenty years in prison. It be noted that, the sentence for a person convicted of an economic offence is provided under section 60 of EOCCA and sub-section (2) of that section provides:

> *"Notwithstanding provision of a different penalty under any other law and subject to subsection (7), a person convicted of corruption or economic offence shall be liable to imprisonment for a term of not less than twenty years but not exceeding thirty years, or to both such imprisonment and any other penal measure provided for under this Act;*

Provided that, where the law imposes penal measures greater than those provided by this Act, the Court shall impose such sentence."

It is clear from the above provision that, notwithstanding provision of a different penalty under any other law, the trial court is mandatorily required to impose a custodial term of not less than twenty years but not exceeding thirty years or to both that imprisonment and any other provided penal measure. Since the second appellant was convicted of an economic offence, we find that the sentence imposed by the learned trial Judge was illegal because there is no option of payment of fine. In that regard, we invoke revisional powers under section 4 (2) of the AJA and revise the sentence and set it aside. In lieu thereof, given that the second appellant was a first offender, we substitute it with twenty years imprisonment to be counted from the date when he was sentenced by the trial court.

For completeness on the issues of sentence, we agree with the submission of Ms. Masule that the directive issued by the learned trial Judge was uncalled for because its implementation is impracticable as the order of the trial court was twenty years imprisonment.

In the end and for avoidance of doubt, we allow the appeal by the first appellant, quash his conviction and set aside the sentence meted out to him. However, the appeal by the second appellant is dismissed and his conviction is upheld. The sentence imposed upon him is substituted thereof with twenty years imprisonment to be counted from the date when he was sentenced by the trial court. For the first appellant, **Paulo Andrea @ Mbwilande,** we order for his immediate release from prison unless held for other lawful cause.

DATED at **BUKOBA** this 22nd day of July, 2022.

A. G. MWARIJA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 22nd day of July, 2022 in the presence of Mr. Ibrahim Mswadick, learned advocate for the appellants and Mr. Hezron Mwasimba, learned senior State Attorney and Mr. Amani Kirua, Senior State Attorney for the Respondent/ Republic is hereby certified as a true copy of the original.

O. A. Amworo
DEPUTY REGISTRAR
COURT OF APPEAL