**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**(CORAM: MKUYE, J.A., SEHEL, J.A., And GALEBA, J.A.)**

**CRIMINAL APPEAL NO. 5 OF 2020**

**1. PETER KABI**
**2. LEONIDA LOI KABI** .....APPELLANTS

**VERSUS**

**THE REPUBLIC**.....RESPONDENT

**(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)**

**(Mgeyekwa, J.)**

**dated the 13th day of July, 2018**

**in**

**HC. Criminal Appeal No. 127 of 2017**

.....

## JUDGMENT OF THE COURT

27th October , 2021 & 1st February, 2022

**MKUYE, J.A.:**

The appellants, Peter Kabi and Leonida Loi Kabi (the 1st and 2nd appellants) together with, one, Polisi Simon Malisa (the former 3rd accused) who was acquitted at the trial, were charged and convicted of three counts, to wit, 1st count of leading organized crime contrary to paragraph 4 (1) of the First Schedule to and section 57 (1) and 60 (1) of the Economic and Organized Crime Control Act [Cap 200 R.E. 2002] (henceforth "the EOCCA"); and in the 2nd and 3rd counts, each, of

unlawful possession of government trophies contrary to section 86 (1) (2) (c) (ii) and (3) (b) and Part I of the First Schedule to the Wildlife Conservation Act, No. 5 of 2009 (henceforth "the WCA") read together with paragraph 14 (d) of the First Schedule to and section 57 (1) and 60 (1) of the EOCCA. Upon a full trial, the Resident Magistrates' Court of Dar es Salaam at Kisutu (trial court) convicted them and each was sentenced to fifteen (15) years imprisonment for the 1st count and twenty (20) years imprisonment for each 2nd and 3rd counts.

The background of the case leading to this appeal is as follows: The appellants are husband and wife. On the material day, 27th October, 2012 the police received an information that the appellants were in possession of stolen properties. According to Insp. Emael Antonio Shila (PW1), they proceeded to the appellants' home located at Kimara Stopover in order to make a follow up on the complaint. Upon their arrival at that house, they found Leonida Loi, the 2nd appellant, present and upon conducting search in the main house the suspected stolen properties were found and identified by the complainant.

They moved to the servant quarter and they found a certain room that was locked. They asked for key but the 2nd appellant said it was with her husband. Later, they managed to get a key and opened it.

Upon searching into the said room, the search team discovered elephant tusks and bones in twelve sulphate bags covered with the Tanzanian National flag. It is alleged that the 2nd appellant in shock could not hold to what she saw and collapsed.

PW1 testified that they counted the elephant tusks and filled the certificate of seizure (Exh. P1) which was signed by all the witnesses who were there including Happiness Nshunju (PW3) and the 2nd appellant. Thereafter, the 2nd appellant together with the contraband were taken to Mbezi Police Station while the 2nd appellant was communicating with her husband. Later, the former 3rd accused arrived at the police station and was arrested.

At Mbezi Police Station, the elephant tusks were guarded by policemen who were assigned that task by PW1. Later, the 2nd appellant's husband (1st appellant herein) surrendered himself at the police station where he was also arrested despite pleading for assistance to resolve the matter.

On the following day, on 28th October, 2012, the elephant tusks were taken to Oysterbay Police Station where they were received by No. E 4150 CPL Innocent (PW2) for safe custody after being recorded in the handing over certificate (Exh P2) and signed by both PW1 and PW2 in

the presence of the Wildlife Officer. PW2 recorded the elephant tusks in the Register book and kept them in the store. He, then, on 30th October, 2012 transferred them to the Wildlife Office Headquarters where he handed them to Hemed Matiku (PW4). A Handing over certificate between PW2 and PW4 was prepared and signed by both and was admitted as Exh P2.

PW4 who was a wildlife officer at the Anti – Poaching Unit in Coastal Region testified to have on 28th October, 2012 gone to Oysterbay Police Station to see and value trophies. He together with Insp. Shila (PW1) and Cpl Innocent (PW2) went to the motor vehicle carrying trophies and off-loaded them. On counting them, they found 210 elephant tusks and 5 pieces of bones weighing 450.6 kgs which were valued at a total of USD 365,000 equivalent to Tshs. 2,206,611,000/=. He, then, filled the valuation form which he signed and was tendered and admitted as Exh P6.

On 30th October, 2012, PW4 received the elephant tusks and the bones from CPL Innocent (PW2) who brought them at his Office at Mpingo House and upon inspecting and verifying them he signed the handing over certificate (Exh P5). He kept them in the ivory room at Mpingo House in Dar es Salaam after recording them in the Exhibit

Register for Mpingo House which was admitted as Exh P7. PW4 kept the exhibits from then until on 6th June, 2016 when they were moved from Mpingo House to the Resident Magistrates' Court at Kisutu to be used as exhibits.

On that date, he handed them to Suzan Lucas Joseph (PW6) who took them to the trial court to be used as exhibits. Before leaving from Mpingo House they counted them and upon filling a special form, she took them to the said court where they were guarded by other police officers who were assigned that duty. Upon being received by the trial court as exhibits the court clerk handed over them to her and took them back to the ivory room for safe custody by PW4 who gave them to her. The handing over form used in handing over the ivory was tendered and admitted as Exh. P9.

Meanwhile, D 7628 Dsgt Minsimba (PW 5), after being assigned by PW1, recorded the 1st appellant's cautioned statement in which he allegedly admitted the commission of the offence and the same was admitted as Exh. P7.

In defence, both appellants denied involvent in the commission of the offence. The 1st appellant (DW1) denied to know anything regarding the elephant tusks though they were alleged to have been recovered

from his home as he was not at home when they were impounded. With regard to the recovery of the stolen properties he said they were kept as a security for the money advanced to the complainant so that he could buy medicine for his father who was indisposed.

As regards the 2nd appellant (DW3), she admitted to have been at home when police officers visited their home on 27th October, 2012. She admitted the recovery of the alleged stolen properties upon search conducted by the said police officers and that they were recorded on a piece of paper which she signed together with the police officers and the witnesses (neighbours) present. She also testified that, one of the police officers by the name of Ndege intimidated by calling her a thief while beating her. She said, she fell down and on regaining consciousness she signed on a paper and was taken to Mbezi kwa Yusufu police station where she was locked in until on 28th October, 2012 when she was taken to Oysterbay Police Station and that she was arraigned before the court on 8th November, 2012.

She testified further that on 29th October, 2012 she was transferred from Oysterbay Police Station to Central Police Station where they were taken to a Landcruiser vehicle loaded with trophies and the Regional Police Commander (RPC) Kova (CP) (as he then was) came

with journalists who photographed them with the contraband of trophies. She tendered the Habari Leo and Nipashe Newspapers containing the photographs of the incident and were admitted as Exh D1 collectively, though the said newspapers showed a different number of trophies and the value. In her testimony, she admitted that Happiness Ishunju (PW3) signed Exh P1 and tendered the search warrant as Exh D2. She denied the search team to have searched the servant quarter.

Upon the conclusion of the trial, the trial court was satisfied that the prosecution had proved beyond reasonable doubt that the 1st and 2nd appellants were found in possession of the trophies in issue and convicted them accordingly. It, however, discharged the former 3rd accused since there was no evidence to incriminate him with the offences.

On appeal to the High Court, their appeal was not successful as the High Court believed in the prosecution's evidence and confirmed the trial court's decision.

Still disgruntled, the appellants have appealed to this Court fronting a substantive memorandum of appeal containing eight (8) grounds of appeal and two supplementary memoranda each containing nine (9) grounds of appeal. They further lodged two other additional

grounds of appeal in their written submission. Besides that, the learned counsel for the appellants lodged another memorandum of appeal containing seven (7) grounds of appeal. However, having gone through all sets of memoranda of appeal, we have found that they boil down around the following heads:

1) Failure to re-issue the Director of Public Prosecutions (DPP's) consent and the certificate conferring jurisdiction to subordinate court to try economic offences after the original charge was amended and substituted to accommodate three accused persons instead of four.
2) Search to the appellants' house was illegal hence it affected the credibility of Exh. P1 and D2.
3) All documentary exhibits admitted in evidence were not read over in court.
4) Failure by the trial court to give and explain to the appellants their rights under section 231 (1) of the Criminal Procedure Act [Cap. 20 R.E. 2002; now R.E. 2019] (the CPA)
5) The trial court's judgment was defective as it contravened the provisions of section 312 (1) of the CPA.
6) The chain of custody of 210 elephant tusks (Exh. P1) and 5 bones of elephants (Exh. P3) was compromised or broken up.

7) Oral evidence and exhibits contradicted on material issues of the case hence, the credibility of the prosecution's evidence is doubtful.
8) The defence evidence, though raised reasonable doubts, was not considered.
9) The case was not proved beyond reasonable doubt.

When the appeal was called on for hearing on 27th October 2021, the appellants were represented by Mr. Nehemiah Nkoko learned advocate; whereas the respondent Republic had the services of Ms. Cecilia Mkonongo learned Senior State Attorney assisted by Ms. Tully Helela, learned State Attorney.

On being called upon to elaborate their grounds of appeal, Mr. Nkoko in the first place sought to adopt the written submission which was filed by the appellants on 21st September, 2021 to form part of his submission. After having done so, he made elaboration on certain few issues while also making reference to the list of authorities filed earlier on.

We wish to state at this juncture that, in dealing with this appeal, we shall begin with the issue of irregularities and then other grounds of appeal as we have paraphrased above.

There are several issues under the head of irregularities. The first appellants' complaint under this head is that there was no consent and certificate of the DPP issued after the charge was amended and substituted. In their written submission, the appellants contended that after the original charge sheet which had a consent and certificate conferring four accused persons to be tried by subordinate court was amended on 4th March 2016 leaving out the 3rd accused person, there was no new consent and certificate issued conferring jurisdiction on the subordinate court to try the remaining three accused persons and the matter proceeded with hearing without such new consent or certificate. In addition, it was argued that on 24th October 2016, the charge sheet was substituted after three prosecution witnesses had testified but the trial proceeded to its conclusion on the basis of the DPP's consent and certificate issued on 18th February 2016. In their view, failure to do so was a fatal irregularity which vitiated the whole trial. Reference was made to the case of **Nico Mhando and 2 Others v. Republic,** Criminal Appeal No. 332 of 2008 (unreported) which was quoted in the case of **Msafiri Chitama v. Republic,** Criminal Appeal No. 51 of 2018 (unreported) at page 14 where it was stated that:

*"Since the appellant's trial violated interlia, the mandatory requirement under section 12 (3) and 26 (1) of the Act, such trial was nullity ab initio".*

In further elaboration, Mr. Nkoko assailed the consent arguing that it related to the offence under paragraph 14 (d) and section 57 and 60 (2) of the EOCCA but the offence of leading organized crime was not mentioned. In this regard, he contended that the subordinate court lacked jurisdiction to try the latter offence and this was prejudicial to the appellants. He referred us to the case of **Kulwa Nassoro Mohamed v. Republic,** Criminal Appeal No. 183 of 2008 (unreported).

In response to this complaint, Ms. Helela, in the first place conceded that the charge was substituted. She went on explaining that the purpose of the consent and certificate of transfer is to grant jurisdiction to the lower court to try offences which are otherwise triable by the High Court. She said, the consent and certificate at pages 9 and 10 of the record of appeal were valid to grant power to the Resident Magistrates' Court of Dar es Salaam at Kisutu to entertain the matter it had no jurisdiction to entertain. She was of the view that the substitution of the charge after removing the former 3rd accused did not oust the courts' jurisdiction. At any rate, she said, there was no law

requiring re-issuance of consent and certificate after the substitution of the charge.

On our part, we agree that the initial charge involving four accused persons that was filed on 18th February, 2016 had its consent and certificate conferring the Resident Magistrates' Court of Dar es Salaam at Kisutu to try the economic offences. We note that the certificate related to the contravention of paragragh 14(d) of the First Schedule to, and sections 57 (1) and 60(2) of the EOCCA and it did not relate to the offence of leading organized crime contrary to paragraph 4 (1)(a) of the First Schedule to, and sections 57 (1) and 60 (2) of the EOCCA. It is equally without question that on 4th March 2016 the charge was substituted whereby the former 3rd accused was discharged under section 98 of the CPA and remained with three accused persons.

Nevertheless, we are of the considered view that, the omission to re-issue such consent and certificate after having removed the 3rd accused in the charge did not oust the trial court's jurisdiction in relation to the offences of unlawful possession of government trophies since the former consent and certificate had conferred jurisdiction to the Resident Magistrates' Court of Dar es Salaam at Kisutu to try such offences even in respect of the remaining accused persons. We say so because, we

think, as was argued by Ms Helela there was no need of filing a new consent and certificate as the remaining accused persons were already covered in the said documents. Thus, we find that cases of **Msafiri Chitama** (supra) and **Kulwa Nassoro Mohamed** (supra) with regard to this offence are distinguishable to this case because unlike in this case where the consent and a certificate of transfer for offences under paragraph 14 (d) of the First Schedule to, and sections 57 (1) and 60 (2) of the EOCCA was in place, in the former case the trial of the appellants was conducted without a consent and a certificate of transfer of the case to trial court; and in the latter case the consent and certificate each bore different provisions of the law from which the appellant was charged with as per the charge sheet.

In relation to the offence of leading organized crime, we agree that the trial court did not have jurisdiction to try it since there was no mention in both the consent and certificate of the said offence. As was stated in **Msafiri Chitama's** case (supra), since the trial of the appellants on the offence of leading organized crime was conducted without a consent and a certificate of transfer of the case to the trial court, the trial was nullity ab initio.

The other complaint on the consent and certificate of transfer is that section 86 (1) and (2) of the WCA was neither mentioned in consent nor certificate. However, we think, this argument is misconceived. This is because the consent and certificate are intended to confer jurisdiction for the economic offence to be tried in the subordinate court which otherwise does not have jurisdiction to try it. Section 86 (1) and (2) of the WCA being not an economic offence on its own does not require such consent or certificate. We are aware that in the case of **Kulwa Nassoro Mohamed** (supra) the Court found that lack of the consent and certificate conferring jurisdiction to the subordinate court to try an economic offence was erroneous and rendered the subordinate court (Ilala District Court) to lack jurisdiction to try the appellant on the offence was charged. However, we find that the said case is distinguishable to the case at hand since, in that case, the charging provision differed from those in the consent and certificate while in this case the provisions shown in the consent and certificate were the same.

In this regard, considering the circumstances of this case, we are of the settled view that failure to issue a new consent and certificate after having substituted the charge by removing the 3rd accused, did not

vitiate the former consent and certificate as the jurisdiction which was conferred to the Resident Magistrates' Court of Dar es Salaam at Kisutu in relation to the offences of unlawful possession of government trophies remained undisturbed. Therefore, except for the offence of leading organized crime, we find that this ground of appeal is devoid of merit and dismiss it.

We now move to the complaint that search was conducted illegally and thus it affected the credibility of Exh. P1 and Exh. D1. It was Mr. Nkoko's argument that PW1 conducted search at night without a search warrant as required by sections 38 (1) and 40 of the CPA. In support of his argument, he referred us to the case of **Director of Public Prosecutions v. Doreen John Mlemba,** Criminal Appeal No. 359 of 2019 (unreported). He said, having regard that they had gone to search stolen property they ought to have used the same search warrant even for the elephant tusks they recovered as it was not a search under emergency. In this regard, he submitted that Exh. P1 was not justified and that it should be disregarded.

In response to this ground of appeal, it was Ms. Mkonongo's position that the search was legally conducted under section 38 (3) of the CPA read together with section 106 (1) (c) of the WCA which

permits search to be conducted even without search warrant. Apart from that, she submitted, PW1, being the in charge of the police station had power to conduct it without search warrant. She therefore contended that the cases of **Justine Bruno @ Mkindamambwe v. Republic,** Criminal Appeal No. 523 of 2018 (unreported) and **Doreen John Mlemba** (supra) are distinguishable since in the former case the appellant did not witness the search, and in the latter case, the search did not comply with WCA. In this case, she said, search was conducted in the presence of the 2nd appellant.

It is without question that section 38 and 40 of the CPA require a search warrant to be issued to a police officer or any other person who is authorized to do so before the contemplated search is conducted - See **Selemani Nassoro Mpeli v Republic**, Criminal Appeal No. 3 of 2018 (unreported). It is also a requirement under section 38 (3) of the same Act for an officer who seizes anything in terms of section 38 (1) of the CPA to issue a receipt acknowledging the seized thing which is to be signed by the occupier of the premises, near relative or other person who is for the time being in possession or control of the premises, together with signatures of other witnesses to the search. Yet, as was rightly submitted by Ms. Mkonongo, section 106 (1) (c) of the WCA

allows an authorised officer, police officer inclusive, to conduct search without warrant.

Besides that, section 42 of the CPA also permits the police officer or any other person so authorized, under emergency circumstances to conduct search without warrant. Likewise, PGO No. 226 paragraphs 1 (a) (b) and (c) and 2 (a) provide for the circumstances where the police officer can search without search warrant. It provides as follows:

1. *The entry and search of premises shall only be effected, either -*
   *(a) on the authority of a warrant of search; or*
   *(b) in exercise of specific powers conferred by law on certain police officers to enter and search without warrant;*
   *(c) under no circumstances, may the police enter private premises unless they either hold a warrant or are empowered to enter under specific authority contained in the various laws of Tanzania.*

2. *(a) Whenever an O/C (Officer In Charge) station, O/C CID [Officer in Charge Criminal Investigation of the District], Unit or investigation officer considers it necessary to enter private premises in order to take possession of any article or thing by which, or in respect of which an offence has been committed, or anything which is necessary to the conduct of an investigation into any offence, he shall make application to a court for warrant of search under section 38 of the Criminal*

*Procedure Act, Cap 20 R.E. 2002. The person named in the warrant will conduct the search".*

In this case, PW1 explained the circumstances which led them to go to the appellant's house. They went to the appellant's house to follow up the information that they kept stolen properties and upon search, the things were recovered. When they searched the servant quarter, despite resistance from the 2nd appellant, they retrieved the elephant tusks and bones, the subject matter in this appeal. As they had no knowledge that they would encounter such a situation, there was no search warrant thus they had to fill an emergency certificate of seizure (Exh P1) as shown at page 96 of the record of appeal. Even if it is assumed, just for the sake of argument, that they ought to have had such a search warrant, it could have been certainly, in relation to the stolen property and not the elephant tusks as they went there being unaware that they might recover such contraband in which case search and recovery of the elephant tusks and the bones was an emergent search. Thus, this ground is also without merit. We dismiss it.

The appellants have also complained that the 1st appellate court erred to uphold the appellants' conviction while the case was not proved beyond reasonable doubt because all the documentary exhibits admitted

in evidence were not read out in court. Ms. Mkonongo conceded that all exhibits, that is, Exh. P1, P2, P4, P5 and P6 for the prosecution together with Exh. D1 and D2 for defence were not read over to the appellants in court after their admission in court and hence, liable for expungement. Nevertheless, while relying on the case of **Huang Qin and Another v. Republic**, Criminal Appeal No. 173 of 2018 (unreported), she urged us to find that there was still sufficient evidence to prove the case.

We have examined the record of appeal and we agree with both sides that all the exhibits were not read out after being cleared for admission in court. There is no doubt that the said exhibits were crucial in proving, particularly, the chain of custody of the elephant tusks (exh. P3). Such exhibits include the certificate of seizure (Exh. P1); Handing over certificate at Oysterbay (Exh. P2); Exhibit Register (Exh.P4); Handing over certificate at Mpingo House (Exh. P5), valuation report and certificate (Exh. P6), and Register for Mpingo House (Exh. P7) which were tendered by the prosecution witnesses. Also, Habari Leo and Nipashe Newspaper (Exh. D.1) and the search warrant for the stolen items (Exh. D2) for the defence side were not read over in court.

In the case of **Huang Qin and Another** (supra) while referring to the case of **Robison Mwanjisi and 3 Others v. Republic**, [2003] TLR

218, we restated the requirement of reading out the documents after having been cleared for admission and actually admitted. We went further to pronounce that failure to read over the exhibit after being admitted in evidence was wrong and prejudicial to the appellants and expunged such documents - (see also **Anania Clavery Betela v. Republic,** Criminal Appeal No. 195 of 2020 (unreported).

In this case, since Exhibits P1, P2, P4, P5, P6 and P7 for the prosecution and Exh. D1 and D2 for the defence were not read over after being admitted in evidence, that was a fatal omission not curable under section 388 of the CPA. Consequently, we expunge them from the record of appeal.

However, as to whether there still remains sufficient evidence in lieu thereof, we shall discuss it in the course of our judgment.

The other complaint is that section 231 of the CPA was not complied with. In their written submission, the appellants have contended that the trial magistrate did not inform the appellants of their rights under that section after the closure of the prosecution case. It is argued that, at page 75 of the record of appeal, it is clearly shown that after the prosecution closed its case, the trial court found that the appellants have a case to answer and fixed the case for defence hearing

on 8th December, 2016 without more. While citing the case of **Maduhu Sayi @ Nigho v. Republic,** Criminal Appeal No. 560 of 2016 (unreported) which quoted the case of **Maneno Mussa v. Republic,** Criminal Appeal No. 543 of 2016 (unreported), the appellants argued that non-compliance of the said provision which safeguards the rights of the accused persons to a fair trial, is a fatal omission. Mr. Nkoko, therefore, implored the Court to find that the omission is incurable and allow this ground. To fortify his argument, he cited to us the case of **Emmanuel Richard Humbe v. Republic,** Criminal Appeal No. 369 of 2018 (unreported) page 8.

On her part, Ms. Helela in the first place conceded that section 231 of the CPA requires the trial court to give certain rights to the accused after the closure of the prosecution case. She pointed out that, in this case the record of appeal does not bear out that the appellants were given such a chance. However, she was quick to state that the appellants were represented by an advocate, one, Ngudungi who was present at the closure of the prosecution case and at the opening of the defence case up to its end. She said, the appellants gave their testimonies under oath. She was of the view that the case of **Emmanuel Richard @ Humbe** (supra) was distinguishable because in

that case the appellant was not represented. In this regard, she urged the Court to find that this ground is unmerited and dismiss it.

We have perused the record of appeal and we agree with both parties that the provisions of section 231 of the CPA were not complied with. At page 75 of the record of appeal it is evident that after the State Attorney prayed to close his case and there being no objection from the defence counsel, the trial magistrate made an order to the effect that the appellants had a case to answer and immediately thereafter he made an order for the defence hearing to be on 18th December 2016. The order for the date of the next hearing was made even before the appellants were asked the manner, they would defend themselves whether on oath or not and whether they would call witnesses.

The gist of section 231 of the CPA was discussed in the case of **Frank Benson Msongole v. Republic**, Criminal Appeal No. 72A of 2016 (unreported) where the Court stated as follows:

> *"It is crystal clear that before the accused person makes his defence, the trial court is mandatorily required to address him on the rights and the manner in which he shall make his defence".*

Also, in the case of **Maduhu Sayi Nigho** (supra) which was cited by Mr. Nkoko, where it was not shown in the record of appeal the manner the appellant was to give his evidence and if he intended to call a witness or not, the Court underscored the following:

> *"... the trial magistrate was enjoined to record the appellant's answer on how he intended to exercise such right after having been informed of the same and after the substance of the charge has been explained to him. In the circumstances, the omission prejudiced the appellant.* ***This is more so because he was not represented by a counsel".*** *[Emphases added].*

In this case, as already alluded to above section 231 (1) of the CPA was not complied. If all things were equal, it would have vitiated the subsequent proceedings as was stated in **Mabula Julius and Another v. Republic,** Criminal Appeal No. 562 of 2016 (unreported). However, we think that the case of **Madulu Sayi Nigho** (supra) is distinguishable because unlike in that case where the appellant was unrepresented, the appellants in this case were represented by advocate Ngudungi, a very seasoned advocate. And the record bears out that there was no prejudice occasioned on them as they defended themselves on oath meaning that they knew their right of testifying on

oath. Although there is no indication in the record that they called witnesses we do not think the advocate could have not told them such right. In the circumstances, though section 231 (1) of the CPA may not seem to have been complied with to the letter, we are satisfied that failure to do so did not vitiate the subsequent proceedings. We, therefore, find this ground unmerited and we dismiss it.

The other complaint is that the judgment is defective for contravening section 312 of the CPA. It is argued that the trial magistrate only summarized the prosecution and defence evidence without raising issues for determination. Further to that the appellants have argued that their conviction contravened section 235 of CPA for not stating the provisions of the law they were charged with. In response to this ground, Ms. Helela submitted that section 312 of the CPA was complied with as the trial magistrate gave a reasoned judgment. That, it was sufficient for the trial magistrate to state that they were convicted as charged.

We note that the 1st appellate court also dealt with this issue and agreed with the appellants that the reasons for the trial court's decision were not well expounded. However, the learned first appellate judge relied on the case of **Chandrakant Joshubhai Patel v. Republic,**

Criminal Appeal No. 8 of 2002 (unreported) and observed that no judgment lacks errors.

On our part, we agree that there is no hard and fast rule on the manner judgments are to be written. What is important is for all judgments to meet a threshold requirement prescribed under section 312 of the CPA which states that:

> *"Every judgment under the provisions of section 311 shall, except as otherwise expressly provided by this Act, be written by or reduced to writing under the personal direction and superintendence of the presiding judge or magistrate in the language of the Court and* ***shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer*** *as of the date which it is pronounced in open court."* [Emphasis added]

In this case, we think that, indeed, points for determination were stated by the trial magistrate though not so eloquently. However, although they may not have been clearly indicated, we are of the considered view that, there were reasons given by the trial court for convicting the appellants. The trial court based its decision on the fact that since the appellants were in full control of the premises in which the

elephant tusks were found, then they were responsible for the contraband found in the premises. It can be deduced from that finding that the trial magistrate gave the reasons for his determination.

Regarding the issue that the appellant's conviction contravened section 235 of the CPA for not stating the provision of the law they were convicted with, we find that the complaint is unfounded. We are of a settled view that, the fact that the trial magistrate stated that he found them **"guilty as they stand charged"** served the purpose. The phrase **"as they stand charged"** makes reference to the offences to which they were charged which is leading organised crime contrary to paragraph 4 (1)(a) of the First Schedule to, read together with section 57 (1) and 60 (1) of the EOCCA as shown in the 1st count; and the two offences of unlawful possession of government trophies contrary to section 86 (1) (2) (c) (ii) and (3) (b) of the WCA (No. 5 of 2009) read together with paragraph 14 (d) of the First Scheduled to and section 57 (1) and 60 of the EOCCA as were reflected in the 2nd and 3rd counts, respectively.

In this regard, we are settled in our mind that the judgment complied with section 312 of the CPA and also section 235 of the same Act was complied with since the trial court in convicting the appellants

made reference to the offences they stood charged in the manner we have explained above. Hence, this ground is also without merit and we dismiss it.

Another complaint as paraphrased is that the chain of custody was broken up and that it was not intact. What we could gather from their written submission is that the appellants do not dispute that there were documentary exhibits showing chronological movement of Exhibit P3 from one person to another. Their area of controversy is that there are contradictions on **one,** who marked or labelled the elephant tusks between PW1 and PW2 as both claimed to have labelled them. Their argument is that while PW1 said he marked them with a marker pen at Oysterbay Police Station (page 36) in the presence of a wildlife officer, PW2 said that he labelled them with a case number after receiving them (page 42). Yet at page 46, PW2 said Insp. Shila (PW1) labelled the exhibits, and PW4 at page 64 of the record of appeal said the case number was written by Shila. **Two,** the total number and the value of the elephant tusks which was explained by RPC Kova to the journalists as per Exh. D1 that the elephant tusks were 214 in total and valued at Tshs. 2.1 billion was different from what was shown in Exh.P1. **Three,** that at Kimara police station the elephant tusks were not well guarded as PW1 was busy looking for the 1st appellant.

Also, in a strange manner, Mr. Nkoko seemed to challenge the 1st appellate court's reliance on the case of **Issa Hassan Uki v. Republic**, Criminal Appeal No. 26 of 2017 (unreported) in particular when it was held that the elephant tusks could not easily change hands and, thus, cannot be tampered with. According to him, this implies that the elephant tusks were tampered with. On the other hand, the learned counsel for the appellants conceded that the chain of custody from Oysterbay Police Station to Mpingo House was well established.

On her part, Ms. Mkonongo dismissed the appellants' argument contending that it has no basis. She submitted that there was no probability for the chain of custody to be broken up. She pointed out that, PW1 explained in details on how he retrieved the elephant tusks from the appellants' house, guarded them until in the morning before taking them to Oysterbay Police Station where they were handed over to PW2. Regarding the contradictory weight and value of the elephant tusks given by RPC Kova to the journalists, she said, the said RPC was neither a witness nor an expert in that area. She went further to challenge the appellants for not raising the issue of value during cross examination. She was, of the view, that the trial court found that the witnesses were credible.

Indeed, the issue of chain of custody was raised at the High Court and the same was discussed at length. In the end, while relying on the case of **Issa Hassan Uki** (supra) it was found that the chain of custody was not broken up for the reason that the item involved being elephant tusks could not easily change hands and, therefore, not easy to tamper with.

If we understood the appellants well, they did not dispute that the chain of custody was well documented. However, having expunged the documentary exhibits, we think, we need to look as to whether there is other evidence which proves the chain of custody.

As we have hinted earlier on, the appellants' bone of contention is basically on the chain of custody from when the elephant tusks were seized from the appellants' home to when they reached at Oysterbay Police Station; the process of labelling; and RPC Kova's announcement to the mass media. Indeed, in the case of **Paulo Maduka and Others v. Republic**, Criminal Appeal No. 110 of 2007 (unreported), the Court emphasized the chronological documentation or paper trail which would show the custody of the item from its seizure, control, transfer, analysis and tendering in court. This position was followed by numerous cases but in the case of **Joseph Leonard Manyota v. Republic**, Criminal

Appeal No. 485 of 2015 (unreported), apart from explaining the purpose of such requirement to prevent the possibilities of tampering with evidence, the Court went further to set a qualification as follows:

> *"... it is not in every time that when the chain of custody is broken, then the relevant item cannot be produced and accepted by the court as evidence, regardless of its nature. We are certain that this cannot be the case say, where the potential evidence is not in the danger of being destroyed or polluted, and or in any way tampered with. Where the circumstances may reasonably show the absence of such dangers, the court can safely receive such evidence despite the fact that the chain custody may have been broken. Of course,* ***this will depend on the prevailing circumstances in every particular case."*** [Emphasis added]

In the case of **Issa Hassan Uki** (supra) that was cited by Mr. Nkoko the Court took into account the nature of the item, that is, elephant tusks like in this case and found that it was an item which could not have changed hands easily - See also **Anania Clavery Betela** (supra).

In the present case, the chain of custody was well explained by PW1, PW2, PW4 and PW5 at pages 28 - 29, 43, 60 and 72 of the

record of appeal. Of particular interest on the issue raised by the appellants, PW1 clearly explained on how the elephant tusks (Exh P3) were seized from the appellants' house and how they were filled in the certificate of seizure, which was signed by the witnesses including the 2nd appellant. PW1's evidence was corroborated by PW3, an independent witness, who was called to witness the search to be conducted at the appellants' house where the elephant tusks were recovered.

PW1 explained further that after their seizure they were taken to Mbezi Police Station. As to how they were kept at Mbezi Police Station, PW1 stated as follows.

> *"At the police station we did not find a place to keep these ivories/properties. So, I ordered those police we had to guard those items however in my presence. We locked up Leonida and proceeded to look for her husband. Fortunately, he came at the police station with a plea to help him..."*

Looking at the above excerpt, it is not true that at Mbezi police station the elephant tusks were not well guarded as to leave room for their compromise but they were well guarded by the police officers under the supervision of PW1. Even the contention that PW1 proceeded

to look for the 1st appellant is not borne out by evidence as PW1 said the 1st appellant surrendered himself at the police station and was arrested thereafter.

PW1 testified further that in the next morning on 28th October 2012, the elephant tusks were taken to Oysterbay Police Station after being directed by RCO Kinondoni, for safe custody. He handed them to Cpl Innocent (PW2) who was the exhibits keeper in the presence of OCS and a handing over certificate (Exh. P2) was prepared and signed. At page 40 of the record of appeal, PW2 explained the procedure that when an exhibit is brought for safe custody, it must bear the number of the case IR/RB or CC and that upon physical examination of it, the exhibit is marked and labelled with a case number of the exhibit register. Thus, it is not true that PW2 labelled the exhibit with a case number as PW1. That contention is not supported by any evidence because PW2 marked and labbed it with an exhibit register. He could not label it with the case number in the same item because that would have been duplication of effort after PW1 had done the same.

In any case, having looked closely at the record of appeal it would appear that, PW2 meant that he entered them in the exhibit Register which contained thirteen spaces to be filled in including, the serial

number (S/No), IR number (the case number), date, particulars of exhibit, the one who handed over and the space for the name of the exhibits keeper. Also, there were spaces for the one who brought the exhibit, the person giving out the exhibit and who receives it, the time and date in the said Register. As it is, we think that each had a distinct task in relation to the record keeping for the elephant tusks in question. The said Exhibit register was signed by both PW1 and PW2. In this regard, although we have expunged the register, we find that there was no discrepancy as to who marked the elephant tusks.

Apart from that, PW2 also explained how on 30th October 2012 he handed over the elephant tusks to PW4 who was the exhibit keeper at Mpingo House whereupon a handing over certificate was prepared and signed by both. PW4 also confirmed this. Moreover, PW4 explained how he kept the elephant tusks from that date until on 30th June 2016 when the same were handed over to PW6 who took them to the the Resident Magistrates' Court of Dar es Salaam at Kisutu for being tendered as exhibit. PW 6 said she filled a special form (the permit form) allowing her to take them and when they arrived at the court, they were guarded by officers assigned that duty until they were tendered. Thereafter, the same was handed over to her by the court clerk and she took them to PW4.

On the other hand, Exh. D1 is the caption in Nipashe Newspaper and Habari Leo showing that RPC Kova explained to the journalists about the seizure of elephant tusks from the appellants. Though the appellants may say that the total number of tusks and its value in the newspapers (Exh, D1) is different from the one shown in Exh P1 and the evidence adduced in court, we think that what is contained in the newspaper was hearsay evidence as the RPC Kova was not involved in the team which impounded the tusks and he was not amongst the witnesses who testified before the trial. Apart from that, he did not possess any expertise to deal with them.

As it is, looking at the totality of the evidence relating to chain of custody, we are satisfied that despite the fact that the relevant documents are expunged still the remaining evidence form PW1, PW2, PW4 and PW6 proved that the chain of custody was not broken up.

To this end, although the appellants do not contest the chain of custody from Oysterbay Police Station up to Mpingo House and when the exhibits were taken to the court for tendering, having regard to what we have discussed above, we endorse the 1st appellate court's finding that the chain of custody was not compromised. We therefore, dismiss this ground of appeal.

With regard to the discrepancy in the two certificates of seizure (Exh. P1 and Exh. D2), the appellants have forcefully assailed them because they argued that they are marred with inconsistences regarding the dates and time the said search was conducted and the reason why they had to use two search warrants. Despite the fact that the said exhibits are expunged, we think, PW1 clearly explained the reason for having two certificates. This was because the two certificates of seizure served different purposes. Whereas Exh. D2 related to the items they had gone to search following the information they had received, Exh. P1 was an emergency certificate of seizure which was filled after impounding the elephant tusks from the appellants' house to which they had no prior knowledge of their existence. It shows the date, time and the items recovered and the persons who witnessed the exercise. We also note that Exh. P1 shows that it was filled on 27/10/2012 but was signed by the searching officer on 28/10/2012. This, however, was clearly explained by PW1 during cross examination that the exercise was conducted at night which was after 11.00 p.m. Considering the bulkiness of the contraband, the exercise must have ended in the next day on 28th October 2012 as shown by the search officer in Exh, P1. This was inevitable because they went for search on a different mission from the case at hand.

Another appellants' complaint is that their defence cases were not considered by the trial court. It is argued in their written submission that though the 1st appellant denied involvement in the commission of the offence and that the alleged elephant tusks were retrieved in his absence, the court failed to consider even his conduct of surrendering himself to the police station which is inconsistent with his guilty, if at all he committed the alleged offence. He further denied to have teamed up with the former 3rd accused and Charles Waineine to bribe the policemen at Mbezi Police Station.

On the other hand, the 2nd appellant who testified as DW3 admitted that search was conducted in their home where she lived with her husband and that the stolen properties were recovered. She also admitted to heave signed the certificate of seizure which in a way supported the prosecution's evidence.

On her part, Ms. Mkonongo agreed that it is true that the defence evidence was not considered by the trial court. The 1st appellate court was satisfied that the defence evidence was well considered when the trial magistrate said that he considered both the prosecution and defence evidence and found it to be too weak to displace the prosecution evidence.

On our part, having perused the record of appeal, we think, the appellants' complaint is tenable. It is true that the trial court did not consider the defence evidence apart from summarising it. This being the case it was incumbent upon the 1st appellate court to re –evaluate the evidence and come up to its own finding. As was alluded to above, that it did not do. However, we still think that we are entitled to look at the defence evidence and make our own finding - See **Mzee Ally Mwinyimkuu @ Babu Seya v. Republic,** Criminal Appeal No 499 of 2017 (unreported).

On the basis of that power, we have duly considered the appellants' defence evidence. Generally speaking, as alluded to above, the appellants' defence was a total denial to the offence. Both appellants did not raise doubt from the prosecution's evidence. That the 1st appellant's conduct was inconsistent with the commission of the offence, we think, it can be construed that he wanted to conceal the fact that he was involved. As to 2nd appellants' evidence that she was at home on the material date and that the stolen properties were recovered from the house she lived with her husband and that she signed the certificate of seizure, we think, it supports the prosecution's evidence. Therefore, we are still satisfied that their evidence did not raise any reasonable doubt to shake the prosecution case. (See **Issa**

**Said v. Republic**, Criminal Appeal No. 109 of 2014 (unreported) and **Justine Bruno Mkamba** (supra). This ground therefore is meritorious.

We now turn to consider the issue whether the prosecution managed to prove the case beyond reasonable doubt. Ms. Mkonongo submitted had that the evidence of PW1, PW2, PW3, PW4, PW5 and PW6 taken together proved beyond reasonable doubt the offences which the appellants were facing. She, therefore, implored the Court to dismiss the appeal in its entirety.

On the way forward of the 1st count of leading organized crime which had neither a consent nor a certificate of transfer, Ms. Mkonongo was of the view that there was no evidence led by the prosecution to prove it. She urged the Court to find the appellants not guilty with the 1st count and quash the conviction against them and set aside the sentence meted out against the appellants on that offence.

On our part, we agree with Ms. Mkonongo that except for the offence of leading organized crime, the other offences were proved beyond reasonable doubt. Based on what we have already endeavoured to explain earlier on, we are satisfied that the two counts of unlawful possession of government trophies were proved beyond reasonable doubt. As to the offence of leading organized crime contrary to

paragraph 4 (1) of the First Scheduled to, and sections 57 (1) and 60 (2) of the EOCCA we were unable to find evidence, albeit, reasonable one to prove it so as to condider ordering a retrial. We thus, exercise our revisional jurisdiction under section 4 (2) of the AJA and quash the conviction against both appellants and set aside the sentence meted out against them for the said offence.

As to the offences under the 2nd and 3rd counts, we find that they were proved beyond reasonable doubt and sustain both the convictions and sentences thereof.

Lastly, there was a complaint against the sentences of 25 years imprisonment that were imposed against the appellants with no order for them to run concurrently.

The learned State Attorney, Ms. Helela submitted that the appellants were each sentenced to 15 years imprisonment for the 1st count, and 20 years imprisonment, each, for the 2nd and 3rd counts, but the trial court did not order them to run concurrently. Yet, the 1st appellate court at page 174 of the record of appeal affirmed the sentence of 15 years imprisonment for the 1st count and enhanced the sentences for the 2nd and 3rd to 25 years imprisonment for each count

and appellant. Then it invoked the provisions of section 168 (2) of the CPA and ordered the sentences to run concurrently.

Ms. Helela pointed out that, apart from that the sentences for the 2nd and 3rd counts were imposed under the improper provisions of the law. She said, the appellants ought to have been sentenced under section 86 (1) (2) of the WCA. While relying on the case of **Huang Qin and Another** (supra), she urged us to revise the sentences under section 4 (2) of the AJA.

On our part, we are inclined to agree with the learned State Attorney that the provision of the law that was invoked in charging the appellants was improper in the sense that the provision providing for punishment was not indicated. However, we find that this is no longer an incurable anomaly in the wake of the case of **Jamali Ally @ Salum v. Republic**, Criminal Appeal No. 52 of 2017 (unreported) where it was held that failure to cite the punishment provision in a rape case was curable under section 388 (1) of the CPA.

Later on, this ratio *decidendi* was relied on the case of **Huang Qin & Another** (supra) and the Court revised the sentence that was meted out against the appellants on an offence like the one in this case of possession of government trophies while section 86 (2) (b) of the WCA

providing for sentence was not indicated is the charge sheet. We held that citation of section 86 (2) (c) (ii) which was not applicable instead of the applicable one was not incurable and was curable under section 388 of the CPA. Consequently, we revised the sentence to reflect the proper provision of the law.

In this case, the appellants were convicted on two counts of possession of government trophies and were sentenced by the trial court which sentences were enhanced by the 1st appellate court to 25 years imprisonment for each count with an order to run concurrently. This means that the sentences were predicated under section 86 (1) (2) (c) (ii) and (3) (b) of the WCA.

Ms. Helela urged the Court to sentence the appellants under the proper provision of section 86 (1) (2) (b) of the WCA.

On our part, we agree with the learned State Attorney's argument since we were unable to glean a reason why the sentence was enhanced.

Consequently, in terms of section 4 (2) of the AJA, we revise the sentence meted out against the appellants and reduce it under section 86 (1) (2) (b) of the WCA from twenty-five (25) years to twenty (20) years for each count and order that the appellants should as well pay an

amount of money equivalent to ten times the value of the government trophies they were found with.

In the final analysis, to the extent that we have allowed, we find the appeal unmerited. We, accordingly, dismiss it in its entirety.

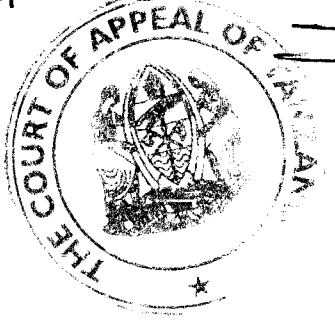
**DATED** at **DAR ES SALAAM** this 26th day of January, 2022.

R. K. MKUYE
**JUSTICE OF APPEAL**

B.M.A. SEHEL
**JUSTICE OF APPEAL**

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

This Judgment delivered this 1st day of February, 2022 in presence of Appellants in person via Video link from Segerea Prison and in presence of M/s Monica Ndakidemi, the learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.




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