IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MUGASHA, J.A., SEHEL, J.A. And KAIRO, J.A.)

CRIMINAL APPEAL NO. 62 OF 2020

SIMON S/O SHAURI AWAKI@ DAWI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Corruption and Economic Crimes Division) at Arusha)

(Luvanda, J.)

dated the 19th day of November, 2019
in
Economic Case No. 17 of 2019

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JUDGEMENT OF THE COURT

8th & 23rd February 2022.

KAIRO, JA.:

Before the High Court of Tanzania (Corruption and Economic Crimes Division) at Arusha (hence forth the trial court), the Appellant above mentioned was charged with and tried for the offence of unlawful possession of Government Trophies contrary to section 86 (1) and (2) (c) (iii) and part I of the First schedule to the Wildlife Conservation Act No. 5 of 2009 (the WCA) read together with paragraph 14 of the First schedule to, and section

57 (1) of the Economic and Organized Crime Control Act, Cap 200 R. E. 2002 as amended by sections 16(a) and 13(b) respectively of the Written Laws (Miscellaneous Amendment) Act No. 3 of 2016 (the EOCCA).

It was alleged that, the appellant on 1st December, 2016 at Majengo Mto wa Mbu within Monduli District in Arusha Region, was found in unlawful possession of government trophies to wit; seven (7) pieces of elephant tusks which is equivalent to one killed elephant valued at USD 15,000.00 equivalent to TZS. 32,910,000.00, the property of the United Republic of Tanzania without a permit from the Director of Wildlife. The appellant pleaded not guilty to the charge.

The trial was conducted and at its conclusion, the appellant was convicted and sentenced to a term of 20 years imprisonment and to pay a fine of TZS. 3,291,000,000.00. He was aggrieved by both conviction and sentence, hence this appeal.

A brief factual background of the case is that, on 30th November, 2016 an officer of the Anti-Poaching Unit (KDU) stationed at DSM one, Japhet Maro (PW5) was informed by an informer that there was a person with a consignment of government trophy who was looking for buyers at Mto wa Mbu, Arusha.

He relayed the information to his in-charge who in turn instructed him to prepare and arrest the suspect. The in-charge also assigned another officer; Isack Elisaria Nanyaro who testified as PW6 to team up with PW5.

On 1st December, 2016, PW5 and PW6 posing as the would be buyers, travelled to Mto wa Mbu Town to meet the prospective seller. They were received by the said seller who happened to be the appellant. Later, the appellant took PW5 and PW6 at the outskirts of Mto wa Mbu Township in the forest situate at the area known as Majengo where the consignment was hidden. On reaching there, they met three appellant's friends who were introduced by the appellant as Janaa, Abed and Ngereza. It was the evidence of PW5 that the appellant instructed Abed and Ngereza to retrieve the consignment from where it was hidden and they did so. The consignment was kept in a white sulphate bag. PW5 testified that the bag was opened by the appellant and Janaa. That, PW5 then illuminated at the consignment with a torch and together with PW6, they saw seven pieces of elephant tusks which were later admitted at the trial as Exhibit P2. After seeing that, and while the appellant and Janaa were in the process of weighing the pieces of elephant tusks, PW5 and PW6 tried to apprehend the appellant and his friends, but managed to arrest only the appellant as the other three escaped.

PW5 then prepared a certificate of seizure (exhibit P8) which was signed by PW5, and witnessed by PW 6. Exhibit P8 was also signed and thumb printed by the appellant.

PW5 also testified that, together with PW6, they took the appellant and exhibit P2 to Ngorongoro Police station where he ordered PW6 to hand over the elephant tusks to D/SSG. Yohana (PW2). On the following day, they went back to the Ngorongoro Police Station and collected the appellant together with the seven pieces of elephant tusks and took them to Arusha, at KDU office, North Zone.

It was the evidence of PW2 that the seven pieces of elephant tusks were handed over to him by PW6 on 1st December, 2016 and taken back by PW6 on 2nd December, 2016 via handing over certificates tendered and admitted at the trial as exhibits P3 and P4 respectively.

The trio arrived on the same day at KDU offices at Arusha, and handed over the elephant tusks to an exhibit keeper; one Burchard Mkandara (PW4) in the presence of PW5 and the appellant who was later taken to the police. A handing over certificate was again prepared after exhibit P2 was handed over to PW4 by PW6 and signed by both parties. The certificate was tendered by PW4 as exhibit P7. When testifying, PW4 told the trial Court that on the

same day; that is 2nd December, 2016, he handed over the exhibits (P2) to Godfrey Sechambo (PW3) through a handing over certificate admitted as exhibit P6 for the purpose of evaluating the pieces of tusks after being instructed by his in charge.

In his evidence, PW3 stated that, he examined exhibit P2 in accordance with GN. 207 of 2012 and upon examining it he found the value of the trophy to be USD 15,000.00 equivalent to TZS. 32,910,000.00 He added in his evidence that, he then filled the trophy valuation certificate which at the trial was admitted as exhibit P5. PW3 then handed exhibit P2 to PW4 for safe custody through the same handing over certificate (exhibit P6).

It was PW4's evidence that, later on 31st January, 2018, he was instructed to hand over his duties as the exhibit keeper at KDU-Arusha office to James Kugusa (PW1) as he was about to retire. PW4 also testified that, among the exhibits handed over to PW1 was exhibit P2 which he handed over to him through a handing over certificate admitted as exhibit P1. PW1 testified that the elephant tusks (exhibit P2) were under his custody till when he tendered them at the trial Court on 8th November, 2019 and admitted as exhibit P2.

In his defence, the appellant denied committing the offence he was charged of. He came with a counter story that on the fateful day, he was arrested by PW5 and PW6 alongside the road at Majengo Mto wa Mbu where he was waiting for transport to go back to his home after meeting one Hamza Ally Mkomwa (DW2). He added that he was arrested in the presence of DW2 and forced to enter into a motor vehicle on allegation that he was involved in poaching. He called DW2 to support his story on how he was arrested.

It was DW1's evidence that when he entered the motor vehicle, he saw other four (4) persons and a sulphate bag into which he was told there were elephant tusks which belonged to him. That, he was severely beaten and forced to admit to possess the said elephant tusks. On 8th December 2016 he was taken to court and issued with PF3 (exhibit D1) so that he can be taken to the hospital.

After analyzing the evidence on record, the trial court was satisfied that the charge leveled against the appellant was proved beyond reasonable doubt. He was thus convicted and sentenced as earlier stated.

Aggrieved by the decision, the appellant lodged this appeal. In the memorandum of appeal, the appellant raised eight (8) grounds lodged on 15th October 2020 by Mr. David Haraka couched as hereunder: -

1. *That the Learned Trial Judge erred in law and in fact by convicting the appellant through the contradicting evidence of the prosecution.*
2. *The Learned Trial Judge grossly erred in fact and in evidence for his failure to properly analyze and evaluated the evidence of both parties and decided on the strength of the evidence available on records.*
3. *That the Learned Trial judge erred in law and in fact when he failed to consider that PW5 and PW6 had their own interest to serve.*
4. *That the trial judge erred in law and in fact by relying on exhibit P8 which is defective.*
5. *That the trial judge erred in law and in fact by holding that the evidence of the appellant and his witness had serious contradiction which goes to the root of the subject matter of being found in possession of the government trophy.*
6. *That the Honourable Trial Judge erred in law and in fact to hold that the offense which the appellant stood charged was proved by the prosecution beyond reasonable doubt.*
7. *That the Honourable Trial Judge seriously erred in fact and in law for failure to draw adverse inference on the prosecution failure to call material witness who tipped them on the alleged transaction between the Appellant and the informer.*

8. *That the Honourable Trial Judge erred in law and in fact by failing to consider weakness on prosecution case on failure to produce evidence on communication between PW5 & PW6 and the appellant and further produce evidence on mobile money transfer from key prosecution witness to the appellant.*

Mr. Haraka had also filed written submissions in support of the appeal on 2nd November, 2020.

The appellant has further added four grounds of appeal in the supplementary memorandum lodged on 31st January, 2022 by Mr. John Materu, as follows:-

1. *That, the learned trial judge erred in law and in fact in convicting the appellant on defective charge.*
2. *That, the learned trial judge erred in law and in fact in convicting and sentencing the appellant relying on exhibit P2 whose chain of custody was broken and unestablished.*
3. *That, the learned trial judge erred in law and in fact in convicting and sentencing the appellant based on the evidence of PW1 whose evidence was not read during committal proceedings and PW6 whose evidence was taken without taking an oath.*
4. *That the trial judge erred in law and in fact in not finding that the trial of the appellant was preceded by defective committal proceedings.*

At the hearing of the appeal, the appellant was represented by Mr. Materu learned counsel whereas the respondent Republic had the services of Ms. Sabina Silayo, learned Senior State Attorney assisted by Misses. Blandina Msawa and Eunice Makala, both learned State Attorneys.

When invited to amplify the grounds of appeal, Mr. Materu informed the Court that he will argue all grounds of appeal in the supplementary memorandum except the 1st ground which he has decided to abandon. He further told the Court that he will combine grounds Nos. 2,3, 4, 7 and 8 when arguing ground No. 6 of the memorandum of appeal and prayed to adopt the written submission filed by Mr. Haraka. To start with, Mr. Materu prayed to begin arguing the 4th ground of appeal in the supplementary memorandum of appeal contending that it is a point of law which can dispose of the appeal. Mindful of the legal practice regarding the point of law, we let him proceed. However, we wish to point out that its determination shall be alongside other grounds which shall be determined as argued.

We begin with the 4th ground of supplementary memorandum as its determination has a bearing on the propriety or otherwise of the committal proceedings on the following: **One,** that the appellant was not committed for trial; **two,** some of the documentary exhibits to wit, the handing over

certificates were not read out to the appellant at the committal; **three**, the non-supply of committal proceedings to the appellant.

On the question as to whether the appellant was committed or not, before this ground was argued, it transpired that in the original record the committal was properly conducted. As this was brought to the attention of the parties, Mr. Materu opted to abandon the complaint and it was so marked.

In respect of the four handing over certificates not being read out during committal but were tendered at the trial, that is exhibits P1, P3, P4, P6 and P7, it was Mr. Materu's submission that in the event only one certificate was read out at the committal, it cannot be ascertained as to which one was read out. He contended that since such evidence was not made known to the appellant at the committal stage, it was irregular to tender the same as prosecution documentary evidence at the trial. He thus urged the Court to expunge all handing over certificates.

Replying on the complaint with regards to the failure to read the exhibit at issue to the appellant during the committal proceedings, Ms. Silayo conceded that the record shows that only one handing over certificate was read, but it is not indicated which one was read. On that basis, she joined

hands with Mr. Materu's argument that, the exhibits ought to have been expunged from the record.

On our part, we agree with both learned counsel that since it is not certain as to which handing over certificate was read out during committal, it is not safe to conclude that any of the certificates was read out to the accused at the committal to enable the appellant to know the nature of evidence against him. This offended the provision of section 246 (2) of the Criminal Procedure Act, Cap 20 R.E 2019 (the CPA) which stipulates what is mandatorily required to be done during committal as follows:

> *"Sec. 246(2)* ***Upon appearance of the accused person before it, the subordinate court shall read and explain or cause to be read to the accused person the information brought against him as well as the statements or documents containing the substance of the evidence of witnesses whom the Director of Public Prosecutions intends to call at the trial"*** [emphasis added].

Therefore, the pointed exhibits were wrongly admitted at the trial and we accordingly expunge them all.

On the non-supply of committal proceedings, Mr. Materu faulted the committal court arguing that without the committal proceedings while the appellant was not represented at the committal stage, it cannot be said that the appellant knew the substance of the evidence against him. He argued this to have contravened rule 9(3) of the Economic and Organised Crime Control Rules, 2016 GN No. 267 of 2016 (EOCCA Rules), and as a result the trial was vitiated. This was opposed by Ms. Silayo. She argued that Rule 9(1) stipulates that a person who has been committed for trial has to be availed with the record of the committal proceedings any time before the trial. She went on to argue that, though the appellant had no legal representation during the committal proceedings but that is not the practice because at that stage an accused person is not required to enter any plea. She argued further that, since Mr. Haraka represented the appellant at the trial, it is definite that he had the committal proceedings on the basis of which he managed to defend the appellant. She concluded that before the trial the committal proceedings were in the hands of the defence counsel for the appellant and urged the Court to find the complaint not merited.

The provision which regulates the modality of supplying the committal proceedings to the accused is Rule 9(1) of the EOCCA. The same provides

that the accused person has to be supplied with the committal proceedings at any time before the trial. For ease of reference, we wish to quote Rule 9(1). It states:-

> *"9(1) A person who has been committed for trial before the Court shall, at any time before the trial, be entitled to obtain a copy of the record of the committal proceedings without payment"*

Basing on the quoted Rule above, we are of the view that Mr. Materu's interpretation, is with respect misconceived. We agree with the reasoning of Ms. Silayo that, the non-requesting of the said record by Mr. Haraka who represented the appellant during trial suggests that the same was supplied to him or else he could not have managed to defend the appellant during the trial. Moreover, as the supply of the committal proceedings is an aftermath of the committal of an accused for trial, we do not agree with Mr. Materu that the non-supply vitiated the trial because the accused was made aware of the evidence against him at the committal stage and not thereafter. We thus find the complaint not merited. In the circumstances, the 4th ground in the supplementary memorandum of appeal is partly allowed to the extent explained.

The complaint in the 3rd ground of the supplementary memorandum is twofold: **one**, that the evidence of PW1 was not read out during committal. However, on a reflection Mr. Materu decided to abandon it and we marked it so. **Two**, is the complaint on procedural irregularities touching on non-swearing of PW6 before giving his evidence. Amplifying on the infraction, Mr. Materu argued that the evidence of PW6 was taken in contravention of section 198(1) of the CPA for failure to swear him before testifying. He continued to argue that, the omission is fatal and the only remedy is to expunge his evidence from the record. He referred us to the case of **Hamis Juma @ Hando Mhoja and Manyeri Kuya vs. The Republic,** Criminal Appeal No. 371 of 2015 and urged the Court to order the same. According to him, after expunging PW6's evidence, the chain of custody is broken being the witness who initiated the chain of custody by handing over exhibit P2 to PW2 after it was been seized.

In reply to the complaint in the 3rd ground of the supplementary memorandum, Ms. Silayo right away conceded that PW6 testified without being sworn in. She stated that since swearing of a witness is a mandatory requirement before testifying, she joined hands with Mr. Materu to have PW6's evidence expunged from the record. She however disputed the

argument by Mr. Materu that the chain of custody was broken down as PW6's evidence is non-existing. She argued that there was still enough evidence to prove the case against the appellant.

Indeed, the record shows that PW6 was not sworn by the trial Court before taking his evidence. The omission is contrary to the requirement of section 198 (1) of the CPA and the evidence taken in breach of the said provision has no evidential value. The Court has times and again reiterated the said stance in its decisions. See: **Godi Kasenegale vs. Republic, Criminal** Appeal No. 10 of 2008, **Salum s/o Said Kanduru vs. Republic**, Criminal Appeal No. 122 of 2018 and **Nestory Simchimba vs. Republic,** Criminal Appeal No. 454 of 2017 (all unreported) to mention but a few. We thus accept the invitation by both learned counsel to discard PW6 evidence as we hereby do. Thus the 3rd ground of the supplementary memorandum of appeal is partly merited. We shall deal with the issue of the chain of custody when determining the 2nd ground of the supplementary memorandum of appeal.

The remaining contentious complaints to be determined hinge on: **one,** the place where the appellant was arrested and found in possession of elephant tusks which is the gist of the 3rd and 7th grounds in the

memorandum of appeal; **two,** the propriety or otherwise of the certificate of search and seizure in the absence of the respective search warrant which is in relation to the 4th ground in the memorandum of appeal; **three**, the competence or otherwise of the trophy valuation officer which covers the 6th ground in the memorandum of appeal; **four**, whether or not the chain of custody was broken which covers the 2nd ground in the supplementary memorandum of appeal; **five,** and finally whether the charge was proved beyond reasonable doubt.

Being the first appellate Court, we are aware of the salutary principle of law that a first appeal is in the form of re-hearing. Therefore, the first appellate court, has a duty to re-evaluate the entire evidence on record by reading it together and subjecting it to a critical scrutiny and if warranted arrive at its own conclusions of fact. We are fortified in that regard in the cases of **D.R. Pandya vs. Republic** (1957) EA 336, **Martha Wejja vs. AG and others** [1982] TLR 35, and **Vuyo Jack vs. Republic**, Criminal Appeal No. 334 of 2016 (unreported). It is also a settled position of the law that every witness is entitled to credence unless there are good and cogent reasons to the contrary. See: **Goodluck Kyando vs. Republic** [2006] TLR 363. On this, it is our understanding that the credibility of a witness is the

monopoly of the trial court but only in so far as the demeanor is concerned, while on appeal the court can assess the credibility of the witness basing on the coherence and consistency of such witness when the testimony is considered in relation to the evidence of other witnesses, including that of the accused person. See: **Vuyo Jack** (supra) and **Shaban Daudi vs. Republic**, Criminal Appeal No. 28 of 2001 (unreported). We shall be guided by among others, the stated principles.

Regarding the place of arrest, the learned counsel had rival contentions: While Mr. Materu contends that there is no proof that the appellant was arrested in the bush of Majengo at Mto wa Mbu where the alleged elephant tusks were found but at the road side, Ms. Silayo asserted that the appellant was arrested at the bush where the tusks were hidden. Mr. Materu also contended that PW5's evidence to the effect that he was communicating with the appellant through a mobile phone is doubtful in the absence of a printout to show the alleged conversation and the mobile telephone number used. Further to that, he faulted the trial court for failing to draw an adverse inference against the prosecution for failing to call the said informer to court to testify. That apart, Mr. Materu blames the trial court for what he alleged to be failure to find out that PW5 had his own interest

to serve in arresting the appellant. He amplified that, in his testimony, PW5 had stated that their target was to apprehend the appellant despite alleging that there were other suspects.

The complaint was refuted by Ms. Silayo arguing that the contention is not supported by evidence. She contended that the appellant was arrested in the scene of crime in possession of the elephant tusks as per evidence of PW5. She further submitted that though neither a printout nor mobile telephone number used were tendered as evidence, but the prosecution case was not weakened in any way as the appellant was apprehended at the scene of crime. She argued this to be irrespective of the informer not being paraded as a witness.

According to the evidence of PW5 which was not shaken by the defence, it is glaring that the appellant was arrested at the scene of crime with the alleged elephant tusks. We also agree with the argument of Ms. Silayo that even if the print out evidence would have been brought together with the telephone mobile number used, they would not have added any probative value to the prosecution case as the record shows that the appellant was apprehended at the scene of incident, thus the complaint has no base. This as well addresses the complaint of not calling an informer as

a witness and in our considered view, he was not a material witness because the communication with PW5 was before the appellant's arrest. We thus find the 3rd and 7th grounds in the memorandum of appeal unmerited.

In respect of the 4th ground of appeal in the memorandum of appeal, the trial court was faulted in the manner it acted upon an irregular certificate of seizure (exhibit P8) which was filled by PW5. Elaborating, Mr. Materu argued that there was no search warrant obtained by PW5 as required under section 38(1) of the CPA, yet there is no evidence showing that the search was an emergency one. He further argued that the said search was conducted at around 8.00 p.m. during night hours which is contrary to the dictates of section 40 of the CPA and on top of that, the certificate of seizure (P8) was not witnessed by an independent witness. He added that the appellant was not issued with a receipt of the seized items to show that he was really found with the seven pieces of elephant tusks which is a requirement under section 38(3) of the CPA. He concluded that, in the presence of all the pointed-out infractions, exhibit P8 was obtained without following the laid down legal procedure. As such, he argued, it was not to be relied on to mount conviction against the appellant and urged the Court to find out that exhibit P8 was obtained illegally and expunge it from the

record as well. He cited the cases of **Shabani Said Kindamba vs. Republic**, Criminal Appeal No. 390 of 2019 and **Paulo Maduka and 4 others vs Republic**, Criminal Appeal No. 110 of 2007 to back up his argument. On the other hand, Ms. Silayo conceded on the shortfall surrounding exhibit P8. However, she argued that the remaining oral evidence proved that the appellant was apprehended with the consignment of the elephant tusks.

The search and seizure of items connected in the commission of crime is regulated by section 38(1) of the CPA which provides as follows:-

> *"38.-(1) Where a police officer in charge of a police station is satisfied that there is reasonable ground for suspecting that there is in any building, vessel, carriage, box, receptacle or place-*
>
> *(a) anything with respect to which an offence has been committed;*
>
> *(b) anything in respect of which there are reasonable grounds to believe that it will afford evidence as to the commission of an offence;*
>
> *(c) anything in respect of which there are reasonable grounds to believe that it is*

intended to be used for the purpose of committing an offence,

and the officer is satisfied that any delay would result in the removal or destruction of that thing or would endanger life or property, ***he may search or issue a written authority to any police officer under him to search the building, vessel, carriage, box, receptacle or place as the case may be.***

(2) Where an authority referred to in subsection (1) is issued, the police officer concerned shall, as soon as practicable, report the issue of the authority, the grounds on which it was issued and the result of any search made under it to a magistrate.

(3) Where anything is seized in pursuance of the powers conferred by subsection (1) ***the officer seizing the thing shall issue a receipt acknowledging the seizure of that thing,*** *bearing the signature of the owner or occupier of the premises or his near relative or other person for the time being in possession or control of the premises, and the signature of witnesses to the search, if any."* [emphasis added]

Again section 40 of the CPA provides for time to conduct the search as follows:-

> *40. A search warrant may be issued and executed on any day (including Sunday)* ***and may be executed between the hours of sunrise and sunset but the court may, upon application by a police officer or other person to whom it is addressed, permit him to execute it at any hour.*** [emphasis added]

Applying the quoted provisions to the facts at hand, it is true that **one**, no search warrant was issued to authorize the search; **two**, there was no independent person to witness the said search and seizure; **three**, no receipt was issued acknowledging the seizure; and **four**, the search was conducted during night hours without the required permission. The pointed-out flaws have rendered the obtaining of the certificate of seizure illegal as the relevant provisions were not complied with. We are therefore constrained to expunge exhibit P8 as we hereby do. Ground 4 is therefore merited.

On the validity of the trophy valuation certificate (exhibit P5), both learned counsel were at one that it was certified by PW3, a Game Warden II who was not authorized officer to issue it. This is according to the dictates of section 86(4) and 114(3) of the WCA Act No. 5 of 2009 and prayed the court to expunge it. However, Ms. Silayo pointed out that there was still credible oral prosecution account to substantiate the charge.

We need not be detained by this complaint. It is true as rightly observed by both counsel that exhibit P5 was certified by PW3 who introduced himself when testifying to be a Game Warden II. According to section 86(4) and 114(3) of the WCA, an officer who is authorized to issue a trophy valuation certificate is either the Director of Wildlife or any wildlife officer. The designation "Wildlife Officer" is defined under section 3 of the WCA to mean *"a wildlife officer, Wildlife warden and Wildlife ranger engaged of the purpose of enforcing the Act"*

It goes therefore, Game Warden II does not fall within the scope and purview of "Wildlife officer." The position has been stated in a number of our cases like **Petro Kilo Kinangai vs. Republic**, Criminal Appeal No. 565 of 2017, **Emmanuel Lyabonga vs. Republic**, Criminal Appeal No. 257 of 2019 to mention but a few. (both unreported). In both cases the remedy was to discount the certificates concerned after ruling out that the same had no evidential value. We hold the same for exhibit P5 and discount it.

Having discounted exhibit P5, the question for our determination is whether we can rely on PW3's oral account to conclude that the valuation conducted was proper hence valid. In his testimony, PW3 told the Court the courses he attended, among them was of Wildlife Ranger and obtained his

diploma. He further explained methods of recognizing wild animals and demonstrated at the trial how he verified exhibit P2 to be elephant tusks. He also testified to have been guided by the directive prescribed in GN 207 of 2012 to conduct the said evaluation. Coupled with the consistent and coherent evidence of PW3, we are satisfied that he had sufficient knowledge and experience to enable him know the elephant tusks as opposed to those of other animals.

In ground 2 of the supplementary memorandum, the trial court is faulted to have convicted the appellant basing on the broken chain of custody in a manner which exhibit P2 was handled from arrest to when exhibited in the evidence.

It was Mr. Materu's argument that in the absence of the evidence of PW6, the valuation report and the certificate of seizure, the charge was not proved against the appellant. He as well, raised a concern on the unexplained reason of marking/ labelling of the elephant tusks.

In reply, Ms. Silayo reiterated that the remaining oral account of PW5, PW2 PW3, PW1 and PW4 did establish that the appellant was arrested in possession of seven pieces of elephant tusks which were seized, preserved and tendered at the trial whereby the said tusks were identified by PW3,

PW1 and PW4. She added that the credible oral evidence of those witness was not in any way dented.

Elaborating, Ms. Silayo contended that PW5 apprehended the appellant with was seven pieces of elephant tusks which are government trophies. This was corroborated by PW2 to whom the seven pieces of tusks (exhibit P2) were handed over to him. She went on to submit that exhibit P2 was labelled by PW4 when it was handed over to him. She argued that, the marking and labeling done by PW1 and PW4 was for the purpose of differentiating them from other exhibits of the like type. She added that, the same were correctly identified by the PW1 and PW4 when testifying and confirmed to be the same marks and labels put when exhibit P2 was handed over to them. She therefore concluded that nowhere is it expressed that exhibit P2 was tempered and the chain of custody was never broken. She substantiated her arguments by citing to us the case of **Issa Hassan Uki vs. Republic**, Criminal Appeal No. 129 of 2017 (unreported) which observed that elephant tusks are items which do not change hands easily and thus not easy to tamper with.

In rejoinder, Mr. Materu insisted that the chain of custody was violated following discarding of the evidence of PW6 and expunging of exhibits P1,

P3, P4, P6 and P7 and P8. He argued that the oral evidence of the remaining witnesses cannot prove the offence. Reacting to the observation in **Issa Hassan Uki vs. Republic** (supra) on the possibility of changing hands for the elephant tusks, cited by Ms. Silayo, Mr. Materu stated that there is an exception to the general rule observation in the cited case and referred us the case of **Pascal Mwinuka vs. The Republic**, Criminal Appeal No. 258 of 2019 (unreported), into which he argued that, the Court observed that the chain of custody was violated while the items involved were elephant tusks as well.

It is the stance of law that oral evidence can prove the case in the absence of a documentary evidence and mount a conviction provided the said oral evidence is credible and sufficient to prove the offence concerned. See: **Emmanuel Mwaluko Kanyusi and 4 Others vs The Republic,** Consolidated Criminal Appeals No. 110 of 2019 and 553 of 2020, and **Saganda Saganda Kasanzu vs Republic**, Criminal Appeal No. 53 of 2019 (both unreported). The issue for determination therefore is whether the oral account of the prosecution witnesses is sufficient to prove the case against the appellant.

It is on record that, PW5 was involved in apprehending and seizing exhibit P2. That the exhibit P2 was then handed over to PW2; the exhibit keeper at Ngorongoro police station at the presence of PW5 and the appellant. The next day they took the exhibits from PW2 and went Arusha at KDU offices where they were handed over to PW4 who was a KDU exhibit keeper in Arusha. According to PW4, when the handing over was done, the appellant was present as well and that, after inspecting them, he labeled each piece of the tusks with number 500,501,502,503,504,505 and 506 and the name of the suspect concerned as reflected at Pages 52-53 of the record of appeal.

It is worthy noting that, the handing over exhibit P2 to PW2 at Ngorongoro and to PW4 at KDU Arusha were done at the presence of both the appellant and PW5. The presence of PW5 can be verified at page 61 of the record of appeal whereby PW5 when testifying stated "*we parted (from Ngorongoro) and proceeded at KDU North Zone at Arusha, where we handed over to the exhibit keeper to one Burchard*" (PW4). It is our view that, the word *'we'* referred by PW5 during the handover to PW2 and PW4 denotes that, the exhibit was handed over at his presence. Our view is further fortified by the fact that, the appellant did not controvert that evidence

during the trial. It is a well-established principle of law that, when a party fails to cross-examine on a certain matter, he/ she is deemed to have admitted the said facts. See: **Nyerere Nyegue vs. Republic**, Criminal Appeal No. 67 of 2010 and **Mustapha Khamis vs. Republic**, Criminal Appeal No. 70 of 2016 (both unreported). The record further denotes that PW4 was then instructed to hand over exhibit P2 to PW3 for the purpose of evaluation to which PW3 did, and handed back exhibit P2 to PW4. The evidence of PW4 and PW3 is corroborative to each other on the said aspect. Later according to record, PW4 handed over the exhibit keeping role to PW1 as his retirement time was about to be due. Among the exhibits PW4 handed over to PW1 was exhibit P2. PW1 also testified that, he had also marked exhibit P2 with a red marker pen. He added that, the marking was for identification and differentiating them from other likeness items. PW1 later tendered the tusks in court and were admitted as exhibit P2. Both PW1 and PW4 recognized their marks when testifying at the trial. The witnesses also recognized them by the way they were cut and when connecting them, they formed a complete tusk (PW1, PW3 and PW5).

Basing on the evidence as analysesd above, we are convinced that the chronological events that is when the exhibit P2 was apprehended and

seized, its transfer, custody until tendered in trial court, nowhere is it shown that exhibit P2 was tampered with. Rather, the chain of custody has clearly connected the accused person with the charged offence. Besides, the items involved are the ones which cannot change hands easily as rightly argued by Ms. Silayo. We wish to reiterate the similar position we took in **Issa Hassan Uki vs Republic**, (supra) cited to us by Ms. Silayo Criminal Appeal No. 129 of 2017 (unreported) wherein we observed as follows:-

> *"In the instant case, the items under scrutiny are elephant tusks. We are of considered view that elephant tusks cannot change hands easily and therefore not easy to tamper with. In cases relating to custody, it is important to distinguish items which change hands easily in which the principle stated in* ***Paulo Maduka*** *and followed in* ***Makoye Samwel @ Kashinje*** *and* ***Kashinje Bundala*** *would apply.* ***In cases relating to items which cannot change hands easily and therefore not easy to tamper with, the principle laid down in the above cases can be relaxed."*** [emphasis added]

Gauging from the quoted excerpt to the facts of the case at hand, we are with firm conviction that exhibit P2, being the items, which do not change hands easily, the same were not tampered with from the moment it was

seized by PW5 to the time when it was tendered in court by PW1. The conclusion is more reinforced by the labelling aspect which differentiated exhibit P2 from other items of the like and basing on the firm corroborative evidence of the prosecution witnesses.

We are aware Mr. Materu referred to us to the case of **Paschal Mwinuka** (supra) to impress on us that chain of custody can be held to have been violated as well even where the items involved are elephant tusks as in this case. Suffice to state that, in the cited case, the Court observed so after doubting the credence of the prosecution witnesses therein, particularly PW1, PW3 and PW4 and discredited their evidence. However, in the case at hand the prosecution witnesses were found to be credible. As such, the circumstances of the two cases differ.

In the wake of the credible evidence of PW1, PW2, PW3, PW4 and PW5, we satisfied that their evidence is entitled to credence as they were consistent and coherent in respect of the manner of arresting the appellant in possession of the tusks, seizure of the tusks, storage and preservation of the tusks up to when it was tendered. Thus, the chain of custody was not broken as was argued by Mr. Materu. The 2nd ground in the supplementary memo is therefore unmerited.

At the end, basing on what we have endeavored to discuss, this appeal is unfounded and we dismiss it.

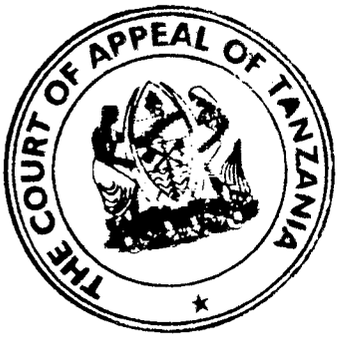
DATED at **ARUSHA** this 23rd day of February, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The Judgment delivered this 23rd day of February, 2022 in the presence of Mr. Ombeni Kimaro hold brief for Mr. John Materu counsel for the Appellant and Ms. Unice Makala learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL