IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: KOROSSO, J.A., GALEBA, J.A., And MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 106 OF 2019

YASSINI SALUM KAGURUKILA .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Utamwa, J.)

dated the 13th day of March, 2019

in

Criminal Appeal No. 157 of 2018

.....

JUDGMENT OF THE COURT

28th October & 7th November, 2022

KOROSSO, J.A.:

The Resident Magistrate's Court of Tabora at Tabora convicted the appellant of being found in unlawful possession of Government Trophy, an offence under section 86(1) and (2) of Wildlife Conservation Act, No. 5 of 2009, now Cap 283 R.E 2022 (the WCA) read together with paragraph 14 of the First Schedule to and section 57 (1) and 60 (2) of the Economic and Organized Crime Control Act [Cap. 200 R.E. 2002 now, R.E 2022] (the EOCCA).

It was alleged that the appellant, Yassini Salum Kagurukila, on 13/6/2017 during morning hours at Kiloleli area, Mibono Ward within Sikonge District in Tabora Region, was found in unlawful possession of

Government Trophy, to wit, five (5) pieces of elephant tusks valued at Tshs. 33,675,000/=, the property of the Government of the United Republic of Tanzania. Upon being arraigned in the Resident Magistrates' Court of Tabora at Tabora, the appellant pleaded not guilty.

The prosecution evidence which led to the appellant's conviction came from six witnesses and six exhibits. Damas Paschal (PW1) testified that on 10/6/2017, he was directed by his boss to follow up on a tip from an informer on there being a person dealing with the business of selling government trophies. Having liaised with the said informer to get further details, on 12/6/2017 he traveled to Sikonge, Tabora, and later to Kiioleli village where the appellant was situated arriving there on 13/6/2017. Upon arrival there, a trap to catch the appellant was prepared. The appellant was then invited, and he heeded the invitation carrying a sulfate bag. He entered the car where PW1 and David Wilson Marwa (PW2) were waiting for him. Having introduced themselves as Game Officers, they then queried the appellant on whether he possessed a permit for the trophy he had, but he had none. Upon finding that the appellant had no permit, PW1 and PW2 arrested him and his sulphate bag allegedly containing five pieces of elephant tusks, and then drove to Sikonge Police Post. On arrival at the Police station, PW2 appraised the seized trophy and valued them to be worth Tshs. 33,675,000/=. Thereafter, according to G7998 D/C Paschal (PW3), a police officer from Sikonge Police Post, the

statements of PW1 and PW2 were recorded, and next, he also recorded the cautioned statement of the appellant which at the trial, was tendered and admitted into evidence as exhibit P4. At the Police station, a certificate of seizure was prepared, which later was admitted into evidence as exhibit P4. PW3 further stated that subsequently, the seized elephant tusks were handed to E.7035 Cpl. John (PW4) the storekeeper, for storage. On the side of the appellant, his defence was an adamant denial of liability. His evidence was mainly to allude to the circumstances of his arrest and condemn the fact that at the time there were no village leaders nor any independent witnesses to witness the alleged seizure of the elephant tusks.

At the end of the trial, the appellant was found guilty of the offence charged, convicted, and sentenced to serve twenty (20) years imprisonment. Dissatisfied with the conviction and sentence meted out by the trial court, his appeal to the High Court was unfortunately dismissed for want of merit. Still unfettered, the appellant has appealed to this Court, through a memorandum of appeal lodged on 4/6/2019 which is predicated on three grounds paraphrased as follows:

1. *That, the appellant was not accorded fair trial since the substance of the charge was not put to the appellant and his plea recorded before the testimony of the first prosecution witness, post the*

Preliminary Hearing Stage in contravention of section 228(1) and (3) and 229(1) of the Criminal Procedure Act Cap 20 R.E 2002.

2. *In the alternative to the above ground, there was a break in the chain of custody of the five pieces of elephant tusks which allegedly the appellant was found in possession of, tendered and admitted into evidence as exhibit P1 while PW4 did not identify them as what he had been handed and stored as the exhibit keeper having regard to their movement from Sikonge to Tabora and considering the absence of exhibit P5 in the record of appeal.*

3. *That, there was misdirection in the analysis and evaluation of the evidence by the two courts below leading to miscarriage of justice on the part of the appellant in that exhibit P1 was not scientifically established to be elephant tusks since PW2 was merely a game warden and thus not qualified to verify the same.*

At the hearing of the appeal, the appellant was present in person and fended for himself. He adopted his grounds of appeal and preferred to let the State Attorneys react to his grounds of appeal first, reserving the right to rejoin thereafter. Ms. Alice Thomas learned State Attorney who appeared for the respondent Republic assisted by Veronica Moshi, learned State Attorney, resisted the appeal.

Ms. Thomas, the lead State Attorney commenced her submission intimating that the grounds of appeal will be responded to *seriatim*. She

beseeched us to find the first ground of appeal to be misconceived for reason that the appellant's complaint therein is not supported by the record of appeal. She contended that the appellant's plea-taking was duly taken as discerned from page 10 of the record of appeal in compliance with the provisions of section 229 (1) of the Criminal Procedure Act [Cap 20 R.E. 2002, now R.E 2022] (the CPA), which does not impose a duty for undertaking another plea-taking exercise before the first prosecution witness is called to testify. The learned State Attorney maintained that the cited provision states that after plea-taking, the prosecution is expected to call its first witness, which is what transpired in the instant case. She, therefore, urged the Court to find the ground without merit.

On the second ground, which is in the alternative to the first ground, she urged the Court to find the complaint misconceived and not supported by the record of appeal. She also informed us that this is a new ground that was neither solicited, considered, or decided by the first appellate court and thus barring the Court the mandate to consider and determine it. To reinforce her argument, she cited the case of **Godfrey Wilson v. Republic**, Criminal Appeal No. 168 of 2018, (unreported), where the holding in the cases of **Galus Kitaya v. Republic,** Criminal Appeal No. 196 of 2015 and **Hassan Bundala @ Swaga v. Republic**, Criminal Appeal No. 386 of 2025 (both unreported) were referred to restate the position that new grounds of appeal which have not been

raised and decided by the first appellate court except for those which raise points of law cannot be considered by the Court on appeal. With regard to the second limb of the complaint on the absence of the exhibit register (exhibit P5) in the record of appeal, Ms. Thomas contended that the complaint does not further the case for the appellant because even if it was part of the record of appeal since it was not read aloud in court upon being admitted, it is liable to be expunged, a stance which has been established by case law and she cited the case of **Issa Hassan Uki v. Republic**, Criminal Appeal No. 129 of 2017 (unreported) to reinforce her argument.

According to the learned State Attorney, the third ground is also misconceived. She argued that the record of appeal plainly shows that the two lower courts summarized and duly analyzed the evidence of PW2 and the one touching on exhibit P1 as shown on pages 44-46 and 80 on the part of the trial and first appellate courts. Arguing on the complaint that the elephant tusks were not scientifically identified to be elephant tusks, Ms. Thomas averred that section 86(4) of the WCA identifies and mandates those who can conduct the valuation of government trophies including elephant tusks. She contended further that section 3 of WCA defines who is a game warden and that in the case of **Jamali Msombe v. Republic**, Criminal Appeal No. 28 of 2020 (unreported), the Court found the terms warden, game ranger, or conservation officer within the wildlife

protection arena can be used interchangeably with the same task of protecting wildlife and with the same powers, thus PW2's valuation of the elephant tusks seized from the appellant was proper. She thus prayed for us to find the ground to lack merit and dismiss it.

In conclusion, Ms. Thomas implored us to also consider the holding in the case of **Goodluck Kyando v. Republic** [2006] T.L.R. 363, that all witnesses are credible unless otherwise proved, and thus find that the prosecution witnesses were credible as held by both the trial and first appellate courts and that the case against the appellant was proved beyond reasonable doubt. She ended by urging us to dismiss the appeal, with a finding that the conviction and sentence against the appellant were proper.

The appellant's rejoinder was very brief, essentially, a reminder for the Court to consider his grounds of appeal, allow the appeal, and set him free.

We have diligently considered and examined the record of appeal, and the competing arguments of the parties not forgetting the cited authorities. In determining the issues of contention before us, we have decided to first address the second ground of appeal, which the learned State Attorney argued that it is a new ground of appeal, and we should thus refrain from considering and determining it. Suffice it to say, this ground was presented in the alternative to the first ground of appeal.

Indeed, in terms of section 4 of the Appellate Jurisdiction Act [Cap. 141 R.E. 2019] (the AJA), the Court is vested with jurisdiction to hear and determine grounds of appeal from the High Court and subordinate courts with extended jurisdiction. This position has been reiterated by the Court in various decisions including **Godfrey Wilson** (supra), **Hassan Bundala @ Swaga** (supra) **Emmanuel Kingamkono v. Republic**, Criminal Appeal No. 494 of 2017, **Athumani Rashidi v. Republic, Criminal Appeal No. 26 of 2016** (both unreported). In **Emmanuel Kingamkono** (supra), the Court stated that the Court cannot entertain new grounds of appeal where they were neither solicited nor addressed in the first appellate Court.

Having perused the record of appeal particularly, the grounds of appeal before the first appellate court, we agree with the learned State Attorney that the grievance found in the first limb of the second ground of appeal was neither canvassed nor decided in the High Court. Therefore, since the second ground of appeal does not address any point of law, we find ourselves without the requisite jurisdiction to entertain it, hence we shall refrain from considering it.

Regarding the second limb of the second ground, complaining about the non-inclusion of exhibit P5, the exhibits register in the record of appeal. Suffice it to say, before the day the appeal was called for hearing before us, a copy was traced and served to the appellant and the

respondent Republic to ensure they were availed of it. Therefore, the complaint became superfluous. Nevertheless, as argued by the learned State Attorney the appellant was not prejudiced in any way since exhibit P5 was not read aloud upon being admitted at the trial and should be disregarded. We agree with her submission and are satisfied that, upon being admitted, exhibit P5 was neither read in court nor its substance adduced. In essence, the appellant was deprived of the opportunity to appreciate the admitted exhibit. The omission is fatal since it is settled that once an exhibit has been cleared for admission and admitted in evidence it must be read out in court. We thus shall disregard exhibit P5 as it has been the practice of this Court. (See, **Issa Hassan Uki** (supra), **Manje Yohana and Another v. Republic**, Criminal Appeal No. 147 of 2016, **Sunni Amman Awenda v. Republic**, Criminal Appeal No. 393 of 2013 (both unreported).

Proceeding to the first ground of appeal, we understand the complaint is that the appellant was not accorded a fair trial for reason that the substance of the charge was not put to the appellant for him to plea before the start of the testimony of the first prosecution witness after the conduct of the Preliminary Hearing. The gist of the complaint is that this was in contravention of sections 228(1) and (3) and 229 (1) of the CPA. The learned State Attorney has urged us to find this complaint to be misconceived since the appellant has misconstrued and misapprehended

the requirements of the cited provisions. We find it pertinent to reproduce the provisions alleged to have been contravened by the trial court. Section 228(1), (3) and 229 (1) of the CPA stipulate that:

> *"S. 228 (1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge.*
>
> *(2) .....N/A*
>
> *(3) Where the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.*
>
> *S. 229 (1) where the accused person does not admit the truth of the charge, the prosecution shall open the case against the accused person and shall call witnesses and adduce evidence in support of the charge."*

Our thorough scrutiny of the record of appeal has revealed that in the trial subject to the instant appeal, plea taking which ended with the appellant pleading "not guilty" proceeded immediately after the trial court had obtained consent and the requisite certificate empowering the trial court to try the case from the learned State Attorney on 30/8/2017. On the said day, the appellant was also granted bail as found on page 9 of the record of appeal. Thereafter, the matter was adjourned for the preliminary hearing on 7/9/2017. On 7/9/2017, at the start of the

preliminary hearing, the appellant was reminded of the charge and maintained his plea of "not guilty". Subsequently, the preliminary hearing was conducted, and the date of the hearing was set for 14/9/2017. On 14/9/2017, the hearing did not proceed despite the presence of one witness for the prosecution as alluded to by the learned State Attorney. The trial Court adjourned the hearing to 26/9/2017. What transpired on that date is as reproduced hereunder:

> *"26/9/2017*
>
> *Coram: Hon. Ngigwana, RM.*
>
> *P.P: Mkandara (SA)*
>
> *Accd: Present*
>
> *C.C: Fatina*
>
> *S/A: The case is coming for hearing. I have four (4) witnesses thus ready to proceed.*
>
> *Accused: I am ready.*
>
> ***E. L. NGIGWANA, RM***
>
> *14/09/2017*
>
> ***HEARING OPENS:***
>
> *PW1 Damas s/o Paschal, 43 years, Christian, sworn and states as follows:"*

Thereafter, PW1's testimony was recorded, starting with his examination in chief. From the above excerpt, clearly, the court proceeded in accordance with the provision of sections 228 (1) (3) and 229 of the

CPA. Certainly, the trial court observed the above-cited provisions. As argued by the learned State Attorney, there is no legal requirement for the accused to be called to plea prior to the start of the testimonies of the prosecution witnesses. Therefore, this ground without a doubt is misconceived and devoid of merit.

The third ground of appeal has two limbs; one, it faults the trial and first appellate courts for failing to properly evaluate the evidence adduced at the trial, and two, a challenge on PW2's qualification particularly, challenging his qualification, as a game warden, to do valuation of the five tusks alleged to have been found in the appellant's possession and to prepare exhibit P1. On the first limb of the complaint, we agree with the learned State Attorney that from the record, there is no doubt that both the trial and first appellate court did evaluate the adduced evidence. The Court has in numerous decisions underscored the duty of trial courts to evaluate the evidence of each witness and make findings on the issue which extends to the first appellate court to re-appraise the evidence on record and draw its own inferences and findings of fact subject to having regard to the findings of the trial court which had the advantage of watching and assessing the witnesses when they testified. See, **Stanislaus Rugaba Kasusura and Another v. Phares Kabuye** [1982] T.L.R. 338, **Damson Ndaweka v. Ally Saidi Mtera**, Civil Appeal No. 5 of 1999, **Paulina Samson Ndawavya v. Theresia Thomas Madaha,**

Civil Appeal No. 45 of 2017, and **Omary Hamis @Mponela and Another v. Republic**, Criminal Appeal No. 414 of 2019 (All unreported).

In our perusal of the record, we are satisfied that on the part of the trial court, apart from summarizing the evidence of the prosecution and defence, on pages 45 and 46 of the record of appeal, was an analysis of the said evidence which concluded with the rejection of the defence evidence. On the part of the first appellate court, as expounded by the learned State Attorney, there was an analysis of the evidence of both prosecution and defence witnesses as found on pages 79- 82 of the record of appeal. At page 81, the High Court Judge stated:

> *"In my view, the evidence I have narrated above sufficed to prove the charge against the appellant beyond reasonable doubts without even considering other pieces of evidence. The evidence of PW1 and 2 proved that, the appellant was indeed, in possession of the tusks since he brought the tusk to them for sale unknowingly that they were set to arrest him. The two witnesses also proved that, the said possession was unlawful since the appellant could not show to them any instrument justifying the possession. He did not also give defence that, he was doing business lawfully. These two are vital ingredients of the offence with which the appellant was charged. There is no reason why the evidence adduced by PW.1 and 2 could not be believed.*

The appellant himself did not provide one. He did not allege any existence of grudges between him and the two witnesses. Besides, he declared himself in his defence that they were strange to him. It is also the law that, every witness is entitled to credence in his testimony and must be believed unless there are cogent grounds for not believing him or her..."

Taking into account the above excerpt and what we have highlighted about the complaint herein, plainly, both lower courts analyzed the evidence adduced from both sides as can be discerned from the record of appeal. Indeed, this renders limb one of the grounds of the appeal currently under scrutiny without legs to stand on and to lack substance.

In the second limb of the third ground of appeal, the appellant faults the trial and first appellate courts for admitting and considering exhibit P1 and its valuation found in the oral submissions of PW2, a game warden, not qualified to verify the same and thus perpetuating miscarriage of justice on his part.

In terms of section 86(4) of the WCA, a trophy evaluation certificate can only be issued by the Director or a wildlife officer from the rank of a wildlife officer. It provides that:

"In any proceedings for an offence under this section, a certificate signed by the Director or

wildlife officers from the rank of wildlife officer stating the value of any trophy involved in the proceedings shall be admissible in evidence and shall be prima facie evidence of the matters stated therein including the fact that the signature thereon is that of the person holding the office specified therein."

There is also section 3 of the WCA which is relevant to the current discussion since it defines a "wildlife officer" to mean:

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

In the instant appeal, it is PW2 who made the valuation of the seized five elephant tusks, a fact well established by evidence and not disputed by the appellant. The result of the valuation was that in exhibit P1, the five elephant tusks were found to weigh 12 Kilograms and that this constituted two full elephants valued at Tshs. 33,675,000/=. This information is also found in the Trophy valuation certificate tendered and admitted as exhibit P3 and in the evidence adduced by PW2. On page 15 of the record of appeal, at the start of his testimony, PW2 described himself as an officer working in Natural Resources and Tourism, Forest Ministry- Anti Poaching Unit as a game warden. That his duties included being a supervisor and involved in guarding wild animals and making trophy valuations and other related duties.

We are alive to a well-settled principle that every witness is entitled to be believed unless there are cogent reasons to the contrary as held in the case of **Goodluck Kyando** (supra). In the instant appeal, having perused through the record of appeal, we have not found any evidence to controvert PW2's assertion as regards his qualifications and experience in wildlife as a game warden with supervisory duties, guarding wild animals, and trophy valuation. We are thus satisfied that under the peculiar circumstances of this case and considering what PW2 adduced in evidence as his duties, his experience in the valuation of trophies and wildlife management, we are constrained to agree with the argument by the learned State Attorney that, PW2 is invariably a wildlife warden and thus a wildlife officer as designated under section 3 of WCA. It was thus proper for PW2 to conduct the valuation of government trophies in terms of section 86(4) of the WCA. See also the case of **Jamali Msombe and Another** (supra) and **Simon Shauri Awaki @ Dawi v. Republic**, Criminal Appeal No. 62 of 2020 (unreported). We thus find that there was no miscarriage of justice occasioned in the valuation of the five elephant tusks found with the appellant. For the foregoing, we find that the third ground of appeal lacks merit.

In the premises, we dismiss both grounds of appeal fronted before us and subscribe to the concurrent findings of the trial and first appellate

courts that the prosecution had proved their case to the standard required as against the appellant.

In the final analysis, we uphold the appellant's conviction and sentence, the appeal stands dismissed.

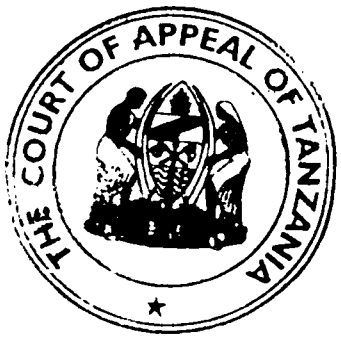
DATED at **TABORA** this 5th day of November, 2022.

W. B. KOROSSO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 7th day of November, 2022 in the presence of the appellant in person and Veronica Moshi, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



E. G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL