IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: LILA, J.A., MWANDAMBO, J.A, And FIKIRINI, J.A.)

CRIMINAL APPEAL NO. 329 OF 2019

MATATA NASSORO.....1st APPELLANT

ROBERT THOMAS @ HORONDI.....2nd APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Arusha)

(Gwae, J.)

dated the 3rd day of July, 2019

in

Criminal Appeal No. 88 of 2018

.....

JUDGMENT OF THE COURT

26th September & 2nd November, 2022.

FIKIRINI, J.A.:

The appellants, Matata Nassoro and Robert Thomas @ Horondi, were jointly charged before the District Court of Babati at Babati for unlawful possession of Government Trophies contrary to Paragraph 14 of the 1st Schedule to and sections 57 (1) and 60 (2) of the Economic and Organized Crimes Control Act, Cap. 200 R. E. 2019 as amended by sections 15 (a) and 13 (b) of the Written Laws (Miscellaneous

Amendment) Act, No. 3 of 2016 read together with section 86 (1) (2) (b) of the Wildlife Conservation Act, No. 5 of 2009. They pleaded not guilty. However, after a full trial, they were convicted and sentenced to a fine of Tzs. 172,500,000/= each or in default, to serve twenty (20) years imprisonment. They failed to pay the fine hence each is now serving twenty (20) years imprisonment.

The prosecution case was that on 5th November, 2017 at Mawemairo village within Babati District in Manyara Region, the appellants were found in possession of two (2) elephant tusks weighing twenty five (25) kilograms valued at Tzs. 34,500,000/= (Tanzania shillings thirty four million five hundred thousand only), the property of Tanzania Government without a permit from the Director of Wildlife.

The factual background of the case went thus: On 5th November, 2017, at about 17:00 hours, Inspector Yuda Shayo (PW1) received information from Ruleg and Albano Mkeha (PW4), both Park rangers, that there was a person selling elephant tusks. Acting on the information, PW1 and PW4 set a trap and agreed to meet appellants at Mamire village, pretending to be prospective buyers. PW1 and PW4 acting as buyers, arrived at around 20.00 hours, carrying a weighing scale. The appellants

came in a motorcycle and parked about 20-30 meters from where the buyers parked their vehicle. The appellants approached them, each carrying a piece of luggage. Pretending to measure the weight, PW1 and PW4 checked the luggage to satisfy themselves that it contained elephant tusks. Satisfied, they proceeded to arrest the appellants and the motorcycle that brought them left in the process. The search conducted by PW1 was witnessed by Nasri Jambia (PW5), an independent witness, who was passing by. PW1 prepared a seizure certificate which was signed by the appellants, PW5 and the two arresting officers. The seizure certificate and two elephant tusks were admitted as exhibits P1 and P2, respectively.

The very night, at about 20:45 hours PW1 handed the impounded tusks to D. 7540 SSGT Masoud (PW3), who registered them in the exhibit register. The following day PW3 handed exhibit P2 to Christopher Peter Laizer (PW2), a wildlife officer who identified and valued the trophies. The trophies were worth Tzs. 34, 500,000/=. The valuation certificate was admitted in evidence as exhibit P3. Exhibit P2 was later at 13:20 hours on the same day returned by PW2 to PW3 for safekeeping. Exhibit P2 was at some point taken by H. 5935 DC Fadhili (PW6) for weight measurement and returned to PW3 on the same date. A documentation aimed at

establishing chain of custody from when the tusks were impounded up to the time they were tendered in court was through exhibit P4 - a chain of custody form.

Satisfied that the appellants had a case to answer, the court called upon them to mount their defence. In his defence, the 1st appellant who testified as DW1, stated that, on 5th November, 2017, he was arrested suspected of chasing wild animals and taken to the Police station where he met the 2nd appellant. While in Police custody, he learnt that he was arrested for being in unlawful possession of elephant tusks.

The 2nd appellant testified as DW2 and summoned two (2) witnesses, Martha Qwaang (DW3) and Ramadhani Sokona (DW4). His defence was that on 4th November, 2017, while at his farm near Tarangire National Park, being a Youth Secretary, park rangers stopped and interrogated him if he was aware of wild animals going to their village. As he denied knowing anything, he was arrested and taken to the Police station. DW3 witnessed his arrest and informed DW4. On 5th November, 2017, DW1 was brought in, and on 6th November, 2017, they were interrogated and that was the time when they learnt that they were accused of being in unlawful possession of elephant tusks.

Convinced that the prosecution had proved its case, the trial court convicted and sentenced the appellants accordingly. Dissatisfied with the decision, the appellants unsuccessfully appealed to the High Court. This is a second appeal on the following paraphrased grounds of appeal: **one,** that the charge was defective on account of variance between the charge and the evidence on record; **two,** that despite objecting admission of exhibit P1, the court wrongly admitted it; **three**, that exhibits P1, P3, P4 and P6 were wrongly admitted; **four,** that PW5's testimony was not credible as it contradicted with other prosecution witnesses; and **five,** that the case was not proved beyond reasonable doubt due to contradiction between PW1's and PW4's testimonies.

On the date when the appeal was called on for hearing, the appellants were present in Court unrepresented whereas the respondent Republic enjoyed the services of Ms. Lilian Aloyce Mmassy, learned Senior State Attorney assisted by Ms. Grace Michael Madikenya and Ms. Penina Joachim Ngotea, both learned State Attorneys.

Taking the floor, the 2nd appellant started with the first ground on the defective charge in which he contended that witnesses gave contradictory evidence on where the offence was committed. Considering

that on page 15 of the record of appeal, PW1 testified that the offence to have been committed at Mamairo village near Babati – Arusha road at the road junction to Mamire village. In contrast, PW4 testified that he travelled to Mamire area with PW1 and PW5 mentioned Mamairo, while the charge sheet refers to Mawe Mairo and not Mamire, Mamairo, or Endagire. With the variance observed the prosecution should have amended its charge sheet, contended the 2nd appellant. Reinforcing his submission, he cited the case of **Godfrey Simon & Another v. R,** Criminal Appeal No. 296 of 2018 (unreported) in which the Court observed that omission to amend the charge not only occasioned a miscarriage of justice but also rendered the prosecution case not proved to the required standard.

The second ground was on the reliance of exhibit P1. The 2nd appellant contended that, despite objecting to the tendering of the exhibit, the court did not conduct an inquiry. Instead, it embarked on querying the signatures on the seizure certificate. Supporting his submission, he referred us to the case of **Josephat Melchior Shirima @ Temba v. R**, Criminal Appeal No. 261 of 2014 (unreported). In addition, the 2nd appellant argued that compliance with section 38 (3) of the Criminal Procedure Act (the CPA) was not observed as a receipt did not accompany

the seizure certificate. Fortifying the submission, he cited the case of **Andrea Augustino @ Msigara & Another v. R**, Criminal Appeal No. 365 of 2018 (unreported). In that case, the Court underscored the need to issue receipts acknowledging receipt of seized items as required by section 38 (3) of the CPA.

Wrongly admitted exhibits P1, P3, P4, and P6 was the subject of the appellants' complaint in the third ground of appeal, that all the documents were tendered and admitted but contents were not read out aloud in court. The 2nd appellant cited our decision in **Robinson Mwanjisi and Three Others v. R** [2003] T. L. R 218 to bolster his argument.

The credibility of witnesses, particularly PW5, and whether the prosecution case was proved beyond reasonable doubt featured as the appellants' fourth ground of appeal. The 2nd appellant contended that, on page 31 of the record of appeal, PW5 introduced himself as Nasri Jambia of Mamairo. In contrast, on page 12 of the record of appeal, the prosecution list of witnesses shows his name as Nasri Tambai of Mawemairo Magugu, which was different from Nasri Jambia of Mamairo.

Furthermore, it was contended that PW1 and PW5 had contradictory accounts of where the offence and arrest of the appellants occurred. Whereas PW1 stated that the appellants were arrested at Mamairo near Babati Arusha road, at the road to Mamire village as reflected on page 15 of the record of appeal, PW5 recounted that the arrest occurred at Mamire junction. On the other hand, the appellant contended, PW5 renounced what he stated before when he said that he did not know the exact name of the place of the appellants' arrest, whereas, PW4 stated on page 29 that the place was Mamire.

Other contradictions were alleged to be on the source of light used to identify the impounded tusks. On page 31, PW5 stated that he and the Police had torches which was different from what PW1 stated that they used their mobile phone torches only, which was contradicted by PW4, who, on page 30 of the record of appeal, adduced that no mobile phone torches were used.

Again, it was pointed out that on page 32, while PW5 stated that no altercation occurred, PW1, on page 16 of the record of appeal insinuated that the appellants resisted arrest. Also, the identification of the tusks revealed contradictory observations, with PW4 on page 30 stating that he

identified the tusks as one being long and the other having a crack on the upper part, while PW1 on page 16 has that, one of the tusks had a hole and the other had a crack. The 2nd appellant invited us to find PW1's, PW4's, and PW5's accounts full of material contradictions. To back up their submission, they cited the cases of **Mohamed Said Matula v. R** [1995] T. L. R. 3 and **Goodluck Kyando v. R** [2006] T. L. R. 363. The 2nd appellant also pointed out that the prosecution failed to bring Richard Shilunga whom they considered to be an essential witness and thus, the trial court ought to have drawn an adverse inference on the authority of the case of **Aziz Abdallah v. R** [1991] T. L. R. 71.

With the above submissions presented by the 2nd appellant and supported by the 1st appellant, they urged us to allow their appeal, quash the conviction, set aside the sentence and release them from imprisonment.

In response, Ms. Ngotea stated outrightly that they did not support the appeal. Instead, the respondent supported the conviction and sentence meted out. She contended that all the grounds of appeal raised had no merit. On the first ground regarding the defective charge, she conceded the variance on the place where the offence was committed

with that indicated in the charge sheet. She, however, contended that the omission was minor as it did not go to the root of the case since the Mawe Mairo area is near Babati Arusha road towards Mamire village as testified by PW1. The appellants were, therefore, not prejudiced as they had room to cross-examine the witnesses, she argued.

Responding to the second ground of appeal on irregular admission of exhibit P1, she argued that since the admission of exhibit P1, as reflected on pages 16 to 17 of the record of appeal was done after the court was content with the authenticity of the signatures on the document, it did not require the trial magistrate to conduct an inquiry. She further submitted that even the complaint on non-compliance with section 38 (3) of the CPA had no basis as the seizure certificate was sufficient.

Ms. Ngotea conceded the complaint in the third ground regarding irregular admission of exhibits P1, P3, P4 and P6 as their contents were not read out aloud in court after they were cleared for admission. She thus invited us to expunge those exhibits from the record on the authority of our decision in **Shabani Rulabisa v. R,** Criminal Appeal No. 88 of 2018 (unreported). Ms. Ngotea, nevertheless, argued that after expunging those exhibits, there was still sufficient oral evidence the trial court could

rely on to ground conviction. She referred us to page 17 of the record of appeal whereby PW1 gave a detailed account of the contents of exhibit P1, and so was PW2 who described the details of exhibit P3. To bolster this argument, Ms. Ngotea cited the case of **Simon Shauri Awaki @Dawi v. R,** Criminal Appeal No. 62 of 2020 (unreported).

The fourth and fifth grounds were on contradictions of the evidence of prosecution witnesses and whether the prosecution case was proved to the hilt. Starting with PW5's differing names, Ms. Ngotea initially admitted the difference whereby the name Nasri Tambai featured during the preliminary hearing and Nasri Jambia before the court. Nonetheless, upon perusal of the original court record, she changed her stance and argued that the complaint was baseless as no such difference existed.

On the source of light used to identify the tusks, Ms. Ngotea admitted there being contradictory accounts considering that PW1 admitted using both torches and flashlights from the mobile phones. At the same time, PW4, on page 30 of the record of appeal refuted the use of flashlights from mobile phones. The learned State Attorney downplayed the contradiction as minor, on the ground that the appellants were arrested red-handed, searched immediately, a seizure certificate was

prepared, signed and the appellants were taken to the Police station on the same night. She thus implored us to ignore them as they did not go to the root of the case and the prosecution ably proved its case beyond reasonable doubt. On the strength of the submission, Ms. Ngotea urged us to dismiss the appeal for lacking in merit.

The appellants had nothing to rejoin apart from reiterating their prayer for the Court to consider their grounds and allow the appeal.

With the foregoing exposition of the competing arguments in the appeal, we shall now proceed with the discussion and determination of the grounds of appeal in the same order argued by the appellants and the learned Senior State Attorney.

With regard to the first ground of appeal, there is no dispute that there was variance between the charge and the evidence of the place where the arrest occurred. This is apparent on the record. However, we agree with the learned State Attorney that the appellants were not prejudiced and that they were able to prepare their defence. This is because they knew the charges against them and that they were arrested

in Magugu ward on the Babati-Arusha road at the junction of Mamire village.

In the case of **Godfrey Simon & Another** (supra) cited to us by the appellants the Court allowed the appeal upon a finding that the charge and evidence were at variance. We find the facts in that case, differ from those in the present appeal. In that case, the charge sheet showed that the offence was committed at Dofa village, but PW1 and PW3 testified that the offence was committed at Matofarini. The Court considered the variance too conspicuous to salvage the charge and proceeded to allow the appeal considering that the prosecution had failed to amend the charge when it came to light that the evidence revealed a different place.

Similarly, in the case of **Michael Gabriel v. R,** Criminal Appeal No. 240 of 2017 (unreported), faced with an akin situation, we allowed the appeal after the prosecution had failed to amend its charge. Facts were that the appellant was charged with being found in unlawful possession of two leopard skins at Ng'arwa-Orikiu area in Ngorongoro District. The arresting officers, PW1 and PW4 testified during the trial that the appellant was found in possession of skins at a distance of about one kilometre out of Loliondo town where he was arrested. The Court found that it was

necessary to amend the charge failure of which had the effect that the prosecution case remained unproven.

In the present appeal, PW1 in his testimony, as shown on page 15 of the record of appeal, stated to have travelled from Babati to Mamairo village Magugu ward on Babati - Arusha road and met the appellants at the junction road leading to Mamire village. PW4's account supported this piece of evidence on page 29 of the record of appeal that after receiving information from an informer that there were people engaged in the elephant tusks business in Mamire area, they went to the place. It was also in evidence that after a short while upon arrival at Mamire area, the appellants arrived in a motorcycle from Endagire direction. PW5 is also on record on page 32 of the record of appeal that on his way to Mamairo at Magugu – Mamire junction, he heard screams and responded by going to where the screams were coming from. Another witness was PW7 who on page 38 of the record of appeal stated to have travelled to Mawemairo village to visit the crime scene. In explaining the keys in the sketch map he drew, he indicated "A" as the place the appellants were arrested and "B" as the road to Mamire while "C" is Arusha – Babati road.

From the foregoing, we are convinced that Mawe Mairo and Mamairo are places within the same area, if not one and the same place in Magugu ward on the Babati - Arusha road at the junction to Mamire village as described by all the witnesses. What appears to be a variance could have been caused by the way people pronounced the names making it look like two places far apart. This assertion, is in our view, supported by what PW1, PW4, PW5 and PW7 stated in their testimonies which is different from the circumstances, in **Godfrey Simon and Another** (supra) where "Dofa area" and "Matofarini" were found to be two different places or in **Gabriel Michael's** case (supra) where Ng'arwa-Orikiu area in Ngorongoro District was a distance of about one kilometre out of Loliondo town where the appellant in that case was arrested.

Moreover, there is overwhelming evidence that the appellants were caught read-handed, searched and found in possession of two elephant tusks. A certificate of seizure was prepared followed by counter-signing by the appellants, PW1, PW4 and PW5. The very night, the appellants were taken to Babati Police Station. In the upshot, we find no merit in this ground and dismiss it.

The second ground was on irregular admission of exhibit P1. The complaint has two prongs; ***one,*** is the complaint against the trial magistrate admitting without conducting an inquiry after an objection. ***Two,*** after the seizure, no receipt was issued as required under section 38 (3) of the CPA.

Answering the first limb on the trial magistrate not conducting an inquiry after overruling the appellants' objection, we firmly hold that there was no need to conduct an inquiry. This is because an inquiry could only be conducted where there is an objection to the tendering and admission of a cautioned statement. The case of **Josephat Melchior Shirima @ Temba** (supra) referred to us by the appellants is inapplicable in the circumstances of this appeal as the issue arose during tendering of a cautioned statement, which is not the case in the instant appeal.

Next is the second prong; non-compliance with section 38 (3) of the CPA for failure to issue a receipt after search and seizure. Ms. Mmassy conceded to the shortfall but argued that the omission had no adverse effect. There is no dispute that PW1 did not issue a receipt following seizure but in view of the fact that the appellants counter-signed a certificate of seizure containing a list of items seized from them, such

certificate was sufficient under the circumstances considering that there was also oral evidence from the arresting witnesses and the independent witness. In any case, as we held in **Nyerere Nyague v. R,** Criminal Appeal No. 67 of 2010 (unreported) not every apparent contravention of the CPA would result in the automatic exclusion of the evidence in question. The second ground is without merit and is dismissed.

The third ground shall not detain us long as it is an extension of the second ground, irregular admission of exhibits. Without much ado, we find the complaint justified because all these exhibits, P1, P3, P4, and P6 while properly processed for admission, their contents were not read out aloud in court. In line with our decision in **Robinson Mwanjisi & Three Others** (supra), *et al,* we hereby expunge them from the record. However, as urged by Ms. Ngotea, the expunging of the exhibits has no material effect on the prosecution case. We agree with her, guided by the Court's decisions amongst others, the case of **Simon Shauri Awaki@Dawi** (supra), **Emmanuel Mwaluko Kanyusi & Four Others v. R,** Consolidated Criminal Appeals No. 110 of 2019 and 553 of 2020 and **Saganda Saganda Kasanzu v. R,** Criminal Appeal No. 53 of 2019 (both

unreported) that oral evidence could still suffice to prove the case in the absence of documentary evidence and sustain conviction.

From our examination of the record, there was still the evidence of PW1 whose oral evidence on page 17 of the record of appeal clearly explains how the appellants were arrested, searched and exhibit P1 generated after retrieving the tusks. Similarly, PW2 described how he carried out the valuation process resulting in exhibit P3. There is also sufficient oral account on pages 22 – 23, PW3 explaining the movement of the exhibits from the day they were entrusted to him up to the time those tusks were tendered in court. Finally, PW7 on pages 37-39 explained all about the sketch map of the scene of the crime. That explanation was sufficient in the absence of the exhibit itself.

The two courts below made concurrent findings of facts and considered the prosecution witnesses credible. We find no reason to interfere with their findings in the absence of any indication that such concurrent findings resulted from mis-directions or non-directions on the evidence occasioning miscarriage of justice. This ground is equally baseless and we dismiss it.

Grounds four and five shall be addressed together. The appellants complained about PW5's credibility and the contradictory account given by the rest of the prosecution witnesses on the one hand, and existing contradiction between PW1 and PW4's versions on the other as a result of which it cannot be said that the prosecution case was proved to the hilt.

We shall start with PW5's inconsistent names complained about by the appellants. It is indeed correct that on page 12 of the record of appeal, the name appearing on the list of intended prosecution witnesses features the name Nasri Tambai of Mawemairo Magugu. In contrast, on page 31 of the same record, the name appears as Nasri Jambia of Mamairo. However, the original record reflects the exact name to be Nasri Jambia. Therefore, the name Nasri Tambai was simply a typo error which cannot be said to be a contradiction on the evidence.

Another variance was the source of light used to identify the tusks. According to PW1, torches and flashlights from mobile phones were used and PW4, on the contrary, referred to the use of mobile phones. Another one was whether there was an altercation during the arrest of the appellants or not, as testified by PW1 on page 16 and PW5 on page 32 of the record of appeal. The appellants also pointed to PW1's and PW4's

differing accounts on the named informers that while PW4 referred to them as reflected on page 29, PW1 preferred to refer to them as informers.

We agree with the parties on the existence of those contradictions but, to us, they were not fundamental and did not go to the root of the case. This is because, there was abundant evidence that the appellants were arrested red-handed, searched and thereafter they signed a certificate of seizure prepared by PW1. The very night they were taken to the Police station. Therefore, the evidence against the appellants outweighed the contradictions highlighted. In the case of **Luziro Sichone vs. Republic,** Criminal Appeal No. 231 of 2010 (unreported) this Court had this to say on the issue of inconsistencies:-

> *"We shall remain alive to the fact that not every discrepancy or inconsistency in witness' evidence is fatal to the case. Minor discrepancies in details or due lapses of memory on account of passages of time should always be disregarded.* ***It is only fundamental discrepancies going to discredit the witness which counts.***"(Emphasis added).

We have seen no reason to discredit the evidence of PW1 and PW5 which appears to us to be cogent. For that reason, we find this ground of appeal lacking in merit alive to the principle elucidated in **Goodluck Kyando** and **Mohamed Said Matula** (supra) and **Maramo Slaa Hofu and Others v. R**, Criminal Appeal No. 146 of 2011 (unreported), that every witness is entitled to credence and his evidence believed unless there are reasons doing otherwise. We have not seen any reason to do otherwise in this appeal.

Equally baseless is the complaint on the prosecution's failure to call one Richard Shilunda mentioned by PW4 on page 29 of the record of appeal as a witness. This is because the prosecution was at liberty to bring only those witnesses who could advance their case regardless of the number. Failure to call the said Richard Shilunga would have only adversely impacted the prosecution case as held in **Aziz Abdallah's** case (supra) had he been a material witness. What is gathered from PW4's account is that Richard Shilunga was a supervisor and in this case, he was the one who assigned PW4 to follow up on the tip, a fact which was not controverted. It was, in our view not necessary for him to be part of every

step to be taken to accomplish the task assigned including coming to court to testify. These two grounds are without merit and are dismissed.

All said and done we find the appeal without merit and we dismiss it in its entirety.

DATED at **DAR ES SALAAM** this 1st day of November, 2022.

S. A. LILA

JUSTICE OF APPEAL

L. J. S. MWANDAMBO

JUSTICE OF APPEAL

P. S. FIKIRINI

JUSTICE OF APPEAL

The Judgment delivered this 02nd day of November, 2022 in the presence of Appellants in persons and Ms. Grace Madikenya, learned State Attorney for the Respondent/Republic, both appeared through Video Link is hereby certified as a true copy of the original.

A. L. KALEGEYA

DEPUTY REGISTRAR

COURT OF APPEAL