IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

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

CRIMINAL APPEAL NO. 324 OF 2019

MT. 59505 SGT. AZIZ ATHUMAN YUSUF.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Mzuna, J.)

dated the 9th day of April, 2019

in

Criminal Appeal No. 115 of 2017

.....

JUDGMENT OF THE COURT

26th September & 14th November, 2022

MWANDAMBO, J.A.:

The District Court of Karatu tried and convicted MT. 59505. Sgt Aziz Athumani Yusuph of unlawful possession of government trophy an offence which is contrary to sections 85 (1) and 86 (2) (b) of the Wildlife Conservation Act read together with paragraph 14 of the schedule to, and sections 57 (1) and 60 (2) of the Economic and Organized Crime Control Act (the EOCCA). Upon such conviction, the trial court imposed a punishment of payment of a fine of TZS 220,451,000.00 and in default, serve a term of 20 years' imprisonment. His attempt to assail the

conviction and sentence before the High Court at Arusha did not succeed which resulted in the instant appeal.

Before the trial court, the charge on which the appellant was convicted alleged that on 20/01/2013 at Kilimamoja Village within Karatu District, Arusha Region, the appellant was found in possession of two elephant tusks weighing 26 kilograms valued at TZS 22,451,000.00 the property of the Government of Tanzania. The arrest, arraignment and prosecution of the appellant was triggered by a tip from an informer to the effect that a motor vehicle suspected of carrying government trophies had been involved in an accident along Arusha Road. Thereafter, a team of three police officers, comprised of D.6484 Sgt Samwel (PW1), H556 PC John (PW3) and PC Massaba who went to the scene together with an independent person and found the appellant carrying a fire arm; a rifle close to a parked car he admitted to be its driver. Upon initial introduction and interrogation, the appellant led the search team to the car where they retrieved several items; one rifle, four rounds of ammunition, two tusks suspected to be from an elephant, one axe and a knife. The retrieved items were recorded in a certificate of seizure signed by the said officers, counter-signed by the appellant and an independent witness (PW7). Immediately thereafter, the appellant was taken to a police station at

Karatu before he was taken to Ngorongoro Conservation Area Authority (NCAA) Post where he recorded a confessional statement before Assistant Inspector Kaitara (PW2). Meanwhile, the retrieved items including the motor vehicle were entrusted to an exhibit keeper, DC Humphrey (PW8) of Karatu Police Station and moments later, handed them over to another police officer who took them to NCAA. On 23/01/2013, Robert Monday, a conservator at NCAA was made to do evaluation of the trophies. These facts featured in the statement of facts during the preliminary hearing which the appellant disputed.

The evidence which the trial court relied upon in convicting the appellant and sustained by the first appellate court consisted of 10 witnesses and 12 exhibits. Central to the case, the evidence came from the arresting officers; PW1 and PW3 who narrated the story on the appellant's arrest at the scene of crime where he was found in possession of the items recorded in a certificate of seizure tendered in evidence by PW1 as exhibit P1. Whereas the tusks were admitted as exhibit P2, PW3 who recorded a cautioned statement from the appellant at NCAA police station tendered it and the trial court admitted it as exhibit P4. Since the appellant disowned his signatures and thumbprints in exhibits P1 and P4, the trial court had specimen signatures and thumbprints examined by a

handwriting and finger prints experts as the trial was going on. Eventually, the signatures and thumbprints were examined by Chrisantus Kitandala (PW5) and E 5137 Dsgt. Nassor (PW6) and turned out to belong to the appellant. The second category of the evidence consisted of proof of movement of the retrieved exhibits from the moment they were seized, stored and later tendered in court. This the trial court found sufficiently proved from through the evidence of the arresting officer who took the appellant along with the retrieved items to the police station where they handed them to the exhibit keeper, DC Humphrey who testified as PW8. This witness tendered a PF 16, an exhibit register (exhibit P11) containing particulars of the exhibits received and their movement at different times. Similarly, Assistant Inspector Barton Kamwaya who testified as PW9 gave explanation regarding his involvement in the handling of the exhibits in question in his capacity as an exhibit keeper at NCAA police station having received them on 20/01/2013 for custody before entrusting them to D. 7073 Dsgt. Yohana (PW10). The last category of the evidence came from Robert Monday (PW4) who had been instructed to go to NCAA police station to do valuation of the elephant tusks. His findings were posted on a Trophies Valuation Form (exhibit P5) said to have been prepared in pursuance of section 86 (4) and 114 (1), (3) and (4) of the WCA.

According to exhibit P5, the elephant tusks weighed 26 kgs having a value of TZS 22,451,000.00.

It is instructive to note that in the course of the trial, the appellant elected to stand mute by refusing to cross examine witnesses of the prosecution after the trial court's refusal to suspend the hearing pending determination of his complaint on the conduct of the trial by the High Court. To be exact, the appellant did not cross examine PW8, PW9 and PW10. After a ruling on the existence of a prima facie case requiring the appellant to defend and upon the trial court addressing him on his rights under section 231 (1) of the Criminal Procedure Act (the CPA), he elected not to say anything in defence.

At the end of it all, the trial court found the appellant guilty as charged having regard to the appellant's conduct standing mute after he was found to have a case to answer. The trial Resident Magistrate exercised the discretion vested on him by section 231 (3) of the CPA and drew adverse inference against the appellant's conduct as an admission of him committing the offence. Besides, the trial court relied on exhibits tendered by the prosecution witnesses particularly, the certificate of seizure (exhibit P1) and the caution statement (exhibit P4) and the oral evidence from the eye witnesses to the appellant's arrest at the scene of

crime through PW1, PW3 and PW7. In addition, it had regard to the fact that the appellant's admission that he had no permit to justify his possession of the government trophies retrieved in the motor vehicle (exhibit P3) he was driving on the material date.

It is equally instructive that the appellant's unsuccessful appeal before the High Court was predicated upon three grievances, to wit; that his conviction was grounded upon (1) a defective charge (2) contradictory evidence laden with discrepancies and (3) that the trial court relied on contradictory exhibits in convicting him. Having lost his battle, the appellant is now before the Court faulting his conviction and sentence on 11 grounds of complaint out of which, two are contained in a supplementary memorandum lodged ten days before the hearing of the appeal.

The appellant's grievances are in three categories ranging from jurisdictional defects, procedural irregularities and insufficiency of evidence all grounds being raised for the first-time except ground four that the charge was defective albeit on a ground other than that canvassed before the first appellate Court. Similarly, ground eight on the alleged inconsistencies in the evidence of the prosecution witnesses which did not prove the case beyond reasonable doubt, subject of ground seven.

It is significant that the first appellate court dealt with these two grounds in its judgment and dismissed them. Having re-evaluated the evidence on record, the learned first appellate judge (Mzuna, J.) was satisfied that in view of the appellant's failure to cross examine prosecution witnesses, his complaint on the alleged inconsistencies was misconceived. Like the trial court, the learned first appellate judge was satisfied that the unshaken prosecution evidence from 10 witnesses proved the charged offence beyond reasonable doubt resulting in sustaining conviction and sentence.

Stripped of the grammatical errors, the appellant faults the first appellate court and by extension the trial court on the following areas of complaint; **one,** denial of a fair trial; **two**, failure to address itself to the evidence of PW1, PW2 and PW7 on the chain of custody of exhibit P2; **three**, failure to step into the shoes of the trial court and assess the credibility of prosecution witnesses; **four**, conviction grounded upon a defective charge; **five**, failure to notice a variance between the charge and evidence; **six**, wrongful reliance on exhibits P1 and P5 which were wrongly admitted in evidence; **seven**, the evidence by the prosecution did not prove the case on the required standard; **eight**, failure to find that the prosecution evidence was laden with patent inconsistencies,

contradictions, deficiencies and embellishments and; **nine**, failure by the trial magistrate to conduct an inquiry before admitting the caution statement (exhibit P4). The grounds in the supplementary memorandum relate to; **one**, lack of jurisdiction by the trial court by reason of the absence of a certificate by the Director of Public Prosecutions (DPP) conferring jurisdiction on the trial court to try an economic offence on the one hand and, absence of the DPP's consent for the prosecution of the economic offence; and, **two**, irregularity in receiving the evidence of PW9 who was also a prosecutor in the case.

As alluded to earlier and to put the record clear, although most the grounds are by and large new, they involve issues of law and thus justiciable before the Court in terms of section 6 (7) (a) of the Appellate Jurisdiction Act (the AJA).This is notwithstanding the obvious fact that the attack against the first appellate court is misplaced because, largely, the grounds do not relate to objection to the impugned decision against points of law which are alleged to have been wrongly decided by the first appellate court in the context of rule 72 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules). Be it as is may, we shall consider the grounds from that perspective.

The appellant appeared to prosecute his appeal in person at the hearing whilst, the respondent Republic resisted it through Ms. Lilian Aloyce Mmassy, learned Senior State Attorney assisted by Ms. Grace Michael Madikenya and Ms. Penina Joachim Ngotea both learned State Attorneys.

The appellant began his onslaught with the impugned decision on ground one in the supplementary memorandum alleging that he was convicted and sentenced by a court which had no jurisdiction to try him is an economic offence neither did the DPP had consented to his prosecution. Ms. Mmassy did not disagree and rightly so in our view because, it is evident at page 33 of the record that, on 02/07/2015, one Ramadhani Juma Mazalau, State Attorney In-charge of Arusha Regional Prosecution Office consented to the appellant's prosecution as required by section 26 (2) of the EOCCA in the exercise of the power conferred upon him by Part II of the schedule to the Economic Offences (Specification of Offences Exercising Consent) Notice, Government Notice No. 284 of 2014. The record is equally conspicuous that, on the same date, a certificate was issued by the same person in exercise of the power conferred upon him by section 12 (3) of EOCCA conferring jurisdiction on the District Court of Karatu to try an economic offence in Criminal Case

No. 7 of 2014. Although there is no clear indication of the two documents being filed, on 02/07/2015, the prosecutor prayed to file a consent upon completion of investigation and the matter was scheduled for a preliminary hearing on 16/07/2015. In view of the certificate conferring jurisdiction for the subordinate to try an economic offence, eventually the trial took off. There is simply no merit in both complaints and we dismiss ground one in the supplementary memorandum of appeal.

Next is on the complaint directed at the charge alleged to be defective, subject of ground four. The appellant's complaint relates to the date shown in the charge sheet; 20/01/2013 as the date of the commission of the offence said to be at variance with PW3's testimony stating that it was 21/01/2013 in comparison with exhibit P4 allegedly showing that it was 20/01/2015. According to the appellant, this rendered the charge defective calling to his aid the Court's previous unreported decisions in **Abel Masikiti v. Republic**, Criminal Appeal No. 24 of 2015 and **Godfrey Simon & Another v. Republic,** Criminal Appeal No. 296 of 2018.

Ms. Mmassy argued that the alleged variance was not material to warrant amendment of the charge as contended by the appellant. We agree with the learned Senior State Attorney considering that PW1 and

PW7 were consistent that it was 20/01/2013 as shown in the charge sheet. The fact that PW3 stated that it was 21/01/2013 did not dent the prosecution case. If anything, that was a minor contradiction resulting from frailty and loss of memory considering the time lapse between the date of the incident and the date on which PW3 testified. It is apparent that in **Abel Masikiti** cited by the appellant there was no mention of any date in the evidence of PW2 to whom the victim of the offence of rape disclosed the ordeal whereas the charge sheet indicated that the offence was committed on 03/06/2013. The Court found the evidence proving commission of the offence on 03/06/2013 wanting which is not the case in the instant appeal. On the other hand, **Godfrey Simon v. Republic** (supra) referred to by the appellant has no application in this appeal considering that we have seen no variance between the charge and evidence which could have necessitated amendment of the charge. Consequently, we find no merit in this ground and we dismiss it. That takes us to ground one in the memorandum of appeal.

In this ground, the appellant complains against the first appellate court's alleged failure to notice irregularities in the trial court namely; denial of the appellant's right to be heard in violation of the Constitution of the United Republic of Tanzania, 1977 (the Constitution). His complaint

was that he was denied his right to present his case. He called to his aid **Sadick Athuman v. Republic** [1986] T.L.R. 235, a decision of the High Court underscoring the adherence to the requirement to afford an opportunity to a party to proceedings to present his case. He also contended that, his complaint against lack of confidence in the trial magistrate was not addressed. Ms. Mmassy argued and correctly so that the appellant was afforded the opportunity to present his case but elected to remain silent.

As we observed in **Abdallah Makongoro & 4 Others v. Hon. Attorney General**, Civil Appeal No. 8 of 1961 (unreported), it is one thing to be afforded a right to be heard and a different thing to the party concerned to exercise it. That means, a party who squanders that right cannot be heard to complain as the appellant does. The record shows plainly that after the ruling on a case to answer, the trial court addressed the appellant his right to present his case and call witnesses as required by section 231 (1) of the CPA. The appellant elected to remain silent and, the parliament in its wisdom anticipated that eventuality by enacting section 231 (3) of the CPA; allowing continuation of the case regardless of the accused person's silence at the risk of the trial court drawing an adverse inference. This is what the trial magistrate did following the

appellant's election to mute. As the appellant was afforded an opportunity to present his case and failed to exercise it at his own election, his complaint in ground one is misplaced. It is accordingly dismissed.

Ground two in the supplementary memorandum of appeal to which we now turn our attention is against the trial court receiving the evidence of Inspector Barton Kamwaya (PW9) who was also alleged to have acted as a prosecutor at some stage of the trial. It was alleged that this witness acted as a prosecutor when PW3 and PW4 gave their respective testimonies before he later on testified in the same case by tendering two exhibits. The appellant urged the Court to expunge the evidence of PW3 and PW4 for that reason. It is not clear why he chose to have such evidence expunged and not that of PW9 but, as submitted by Ms. Mmassy, and upon our examination of the original record, this complaint is farfetched. The record shows clearly that it was Felix Kwetukia who prosecuted the case when PW3 and PW4 gave their evidence. PW9 features nowhere as a prosecutor. Baseless as it is, ground two is dismissed.

We shall now discuss ground five in the memorandum of appeal on the variance between the charge and evidence in relation to the place where the appellant was found in possession of elephant tusks; whether

it was Kilimamoja Village as shown in the charge sheet or Manyara Kibaoni as stated by PW1, PW3 and PW7.

Ms. Mmassy conceded the variance but argued that it was inconsequential to the charge to render it defective. The learned Senior State Attorney reasoned that the circumstances of the case appeared to suggest that the two names refer to the same place. With respect, we are inclined to agree with her. The evidence shows that the place at which the appellant was arrested is Manyara Kibaoni. PW1 and PW7 were police officers at Manyara Kibaoni Police Post whereas PW7 was resident at a place called Manyara Kibaoni not far from the place where the appellant's motor vehicle met an accident. This is so because, as PW7 stated in his evidence, was able to hear a bhang at his residence as the motor vehicle met an accident. Indeed, the appellant's own caution statement (exhibit P4) refers to Manyara Kibaoni. We are inclined to find that this was a case of mix up of the name of the place rather than two distinct places which would have necessitated an amendment of the charge in pursuance of section 234 (1) of the CPA. Our view is reinforced by section 135 (f) of the CPA which enacts that, a charge is sufficient if it describes any place, time or thing which is necessary to refer therein in such manner as to indicate with reasonable clarity the place, time or thing.

Much as no evidence was led to explain away the nexus between the two names of the scene of crime, we are satisfied from the examination of the evidence that Kilimamoja Village appearing in the charge sheet within Karatu District, Arusha Region refers to the same place; Manyara Kibaoni stated by PW1, PW3 and PW7 in their respective testimonies. It was not suggested that the appellant was found at a place away from the referred place so as to prejudice him in his defence. In any case, the appellant had an opportunity to cross examine the prosecution witnesses as they testified if he was minded to do so but did not find it necessary. The Court's decision in **Godfrey Simon v. Republic** (supra) cited by the appellant is distinguishable in so far as, the appellant knew the place he was found in unlawful possession of the trophy be it Manyara Kibaoni or Kilimamoja Village within the precincts of Karatu District. The ground lacks merit and is dismissed.

Ground six relates to a complaint against reliance on exhibits P1 and P5 claimed to have been irregularly admitted in evidence during the trial. Despite the attack against the admission of exhibit P1, the appellant concentrated his arguments on exhibit P5. It was contended that, PW4 was not a qualified and competent person as a trophy valuer of the elephant tusks as that was contrary to the dictates of section 86 (4) of

the WCA. It was the appellant's further contention that at any rate, PW4 did not adduce any oral evidence on the weight of the elephant tusks. He thus urged the Court to expunge exhibit P5 from the record on the authority of our unreported decision in **Jason Pascal & Another v. Republic**, Criminal Appeal No. 615 of 2020.

Ms. Mmassy conceded to the wanting qualifications in relation to PW4 as well as the inadequate identification of the trophy thereby leaving doubt if they were indeed elephant tusks. Nonetheless, the learned Senior State Attorney argued that there was still sufficient evidence from the appellant's cautioned statement through exhibit P4 to ground his conviction.

It is significant that exhibit P5 was a trophy valuation certificate tendered by PW5 meant to establish the weight and value of the elephant tusks. We are alive to the dictates of sections 86 (4) and 114 (3) of the WCA on the certification of trophies by the Director of Wildlife or any wildlife officer defined under section 3 of the WCA. PW4 was a conservator who does not feature in the definition of a Wildlife Officer and, as conceded by Ms. Mmassy, he was not competent to do the valuation of the trophies and issue a certificate as he did. Consequently, we cannot resist the invitation to expunge exhibit P5 from the record as

we hereby do. Nevertheless, we are not prepared to go along with the appellant that the discarding of exhibit P5 has any consequences to his conviction in view of our decision in **Emmanuel Lyabonga & Another v. Republic**, Criminal Appeal No. 257 of 2019 (unreported). We said:

> "First, *that when a person is convicted of unlawful dealing in government trophy or unlawful possession of government trophy contrary to sections 84 (1) and 86 (1) of the WCA respectively, the value of the trophy involved is a statutory factor determining the punishment to be imposed as prescribed by sections 84 (1) and 86 (2) (a), (b) and (c) of the WCA correspondingly. Secondly, while section 86 (3) and (4) of the same Act regulates the assessment and computation of value of trophies for unlawful possession of government trophy contrary to section 86 (1) of the WCA, section 114 of the WCA is the general provision governing the assessment of value of the trophies for purposes of offences under the Act ...*" (at page 20).

We shall pause for a moment on this ground and revert to it later.

Our next discussion will be on ground two in which the appellant seeks to fault the integrity of chain of custody of exhibit P2. The appellant's attack was directed against prosecution's failure to call

Inspector Elikana mentioned by PW8 and PW9 to testify and explain if he handled the exhibits; particularly exhibit P2. The learned Senior State Attorney was half hearted in her submissions. She expressed her misgivings with PW1's evidence whether what he tendered in evidence mirrored the items seized from the appellant.

Be it as it may, we are unable to agree with the appellant and the learned Senior State Attorney. We shall explain. We shall start with the legendary principle underscoring the duty cast on the prosecution to account for the seizure, movement and storage of exhibits from an accused person at all stages up to the time they are tendered in evidence as articulated in **Paulo Maduka & Others v. Republic,** Criminal Appeal No. 110 of 2007 (unreported) and other subsequent decisions. Lately, the Court has taken a liberal approach to the treatment of chain of custody where the exhibits involved are not capable of changing hands easily in which case, the strict adherence to a paper trail is relaxed permitting oral evidence to account for the chain of custody. Items such as trophies and narcotic drugs have been held to fall under this category. See for instance, the Court's decision in **Issa Hassan Uki v. Republic**, Criminal Appeal No. 129 of 2017 and **Marceline Koivogui v. Republic**, Criminal Appeal No. 469 of 2017 (both unreported).

There is no dispute that PW1 was the police officer who, together with his colleagues seized the items from the appellant on the material date. The evidence shows that the items were taken to Karatu Police Station the same evening and handed over to PW8 who was the exhibit keeper and later on, Inspector Elikana took the exhibits to Ngorongoro Police and handed them to Barton Kamwaya (PW9). Upon PW9's transfer, Sgt Yohana (PW10) took over as exhibits keeper. It is plain from the record that the paper trail evidencing the movement of the exhibits was kept at all times as evidenced by the exhibit's registers (exhibits P11 and P12).

In our view, the fact that Inspector Elikana was not called to testify has no bearing on the integrity of the chain of custody considering the nature of the exhibits involved; elephant tusks which are not one of the items which can change hands easily. In view of this, the doubt expressed by Ms. Mmassy on PW1's evidence falls away. The upshot of this is that the complaint in ground two is misconceived and we dismiss it. This takes us to ground nine.

The appellant's complaint in ground nine is against the trial court's admission of the caution statement (exhibit P4) without conducting an inquiry upon his objection to its admission which was overruled without

giving reasons. The Court's decisions in **Bakari Jumanne @ Chigalawe & 3 others v. Republic,** Criminal Appeal No. 197 of 2018 and **Daniel Matiku v. Republic,** Criminal Appeal No. 450 of 2016 (both unreported) were cited to reinforce the argument on the need to conduct an inquiry whenever there is an objection against the admission of cautioned statement based on voluntariness. It was contended further that the foundation for its admission was not laid by the prosecution contrary to the principle stated in **Robinson Mwanjisi & 3 Others v. Republic** [2003] T. L.R 218. The learned Senior State Attorney urged that there was no need to conduct an inquiry and we respectfully agree with her and indeed, the decisions cited by the appellant are inapplicable to the instant appeal as they are relevant to situations where the trial court fails to conduct inquiry in fitting cases.

It is plain from the record that, initially, the appellant's objection was premised on section 28 of the Evidence Act which relates to confessions made before the justices of the peace rather than the admission of the statement on account of its voluntariness in terms of section 27 (2) of the said Act. The record shows that later on, the appellant abandoned his objection based on section 28 of the Evidence and chose to predicate his objection to the admission of the caution

statement upon section 57 of the CPA mainly because it was narrative rather than being in the form of questions and answers. In our view, violation of section 57 of the CPA did not call for conducting an inquiry and the confession recorded in a narrative form did not derogate from the fact that the appellant made a voluntary statement confessing to the offence he was eventually charged with. Fortunately, we have dealt with a similar complaint in **Amiri Ramadhani v. Republic**, Criminal Appeal No. 228 of 2005 (unreported) and observed that:

> *"We will say that section 57 of the Act was not meticulously followed. For example, the question-and-answer format was not adopted. Instead, the narrative style was adopted. But it is not mandatory for the question-and-answer style to be used. Section 57 (2) (a) of the Act speaks of* ***"so far as it is practicable to do so",*** *suggesting that where it is impracticable one may dispense with that style." [at page 16]*

Even though the Court noted that the cautioned statement was not in full compliance with section 57 of the Act, it concluded that despite existence of some shortcomings, the impugned statement was made in substantial compliance with section 57 of the CPA considering that there was no suggestion that the appellant was prejudiced thereby.

Regarding the complaint on the admission of exhibit P4 without giving reasons for the rejection of the appellant's objection, we agree that the trial court strayed into an error in doing so. However, we are satisfied that the failure to give reasons did not prejudice the appellant who had ample opportunity to cross examine PW2 after the admission of exhibit P4 let alone the fact that it was not denied that the appellant made the statement at all. Equally misconceived is the complaint premised on the rule in **Robinson Mwanjisi** which requires reading the contents of any document after clearing it for admission. The record speaks quite the opposite in so far as the trial court had the contents of exhibit P4 read out loudly after it was cleared for admission through PW2; the officer who recorded it from the appellant. This ground lacks merit and is dismissed.

Next is on ground three, seven and eight which boil down to the general complaint; whether the appellant's case was proved beyond reasonable doubt. It is contended that the trial court abdicated its duty to evaluate evidence which was allegedly laden with contradictions, inconsistencies and embellishments. The appellant would have the Court hold that had the first appellate court addressed itself properly and evaluated the evidence afresh, it should not have failed to find

contradictions in such evidence resulting into a finding that the case against him was not proved to the required standard.

It is trite that the first appellate court has power to re-evaluate the evidence afresh and come to its own findings of fact it being the law that a first appeal is in a form of a rehearing. Be it as it may, in all fairness, the attack against the first appellate court is misplaced. This is so because an examination of the judgment reveals at page 277 of the record that it had gone through the testimonies of all prosecution witnesses and concurred with the trial court that such witnesses were credible. A little later, the learned first appellate judge remarked: -

> *"I have gone through the testimonies of the prosecution witnesses. I am of the firm view, as did the trial Magistrate that all the prosecution witnesses were credible witnesses who narrated in court how the appellant was found in possession of the two elephant tusks.*

The learned judge discounted the appellant's complaint on the date of the caution statement pegged under section 50 and 51 of the CPA and concluded that the prosecution witnesses proved that the appellant was found in unlawful possession of government trophy. Although he did not address himself to the integrity of chain of custody, we have already held that the same was not broken at any stage. Besides, like the trial court,

the first appellate judge took into account the appellant's silence during defence and concluded that it rightly invoked section 231 (3) of the CPA drawing adverse inference of his guilt coupled with the confessions made in the caution statement. The totality of the foregoing is that the complaints in grounds three, seven and eight are all devoid of merit. If we may add, it is trite law that the best evidence in criminal cases is the accused's confession to a charged offence - see for instance: **Daniel Matiku v. Republic** (supra).

In terms of section 3 (1) of the Evidence Act confession may be by words, conduct or both. The appellant admitted during his arrest that he was the driver of the motor vehicle from which PW1 and PW3 retrieved the items listed in exhibit P1 which included the two elephant tusks, subject of the charge. The appellant admitted too that he had no permit from the Director of Wildlife to possess government trophies. Indeed, he signed the certificate of seizure acknowledging possession of the items retrieved from the motor vehicle he drove that material date. Furthermore, he opted to mute when it was his turn to present his case in defence and the two courts below rightly drew adverse inference against him. Accordingly, we find no merit in the three grounds and dismiss them all, which takes us to the issue in relation to sentence in the

absence of the Trophy Valuation Certificate prepared under section 86 (4) and 114 (3) of the WCA.

Fortunately, we are not traversing on unchartered territory. In **Emmanuel Lyabonga** (supra) we faced more or less similar situation in which a Trophy Valuation Certificate had been held to be wanting having been prepared and signed by an unqualified person contrary to section 86 (4) and 114 (3) of the WCA. The Court held that, firstly, the trial court is not bound by the certificate of value and secondly, the absence of any such certificate does not absolve a trial court from assessing the value of the trophy where there is other evidence in that regard.

In the instant appeal, PW4's evidence was that he was a conservator with 17 years' experience having attended wildlife courses. His line of duties was to ensure safety of all wildlife at NCAA and neighbouring parks. It was his further evidence that on 23/01/2013 he was instructed to go to NCAA police with a view to identifying whether exhibit P2 was from elephant and to take weight and carry out their evaluation. PW4 identified exhibit P2 in court and confirmed that it was the same he had dealt with on 23/01/2013. Nevertheless, PW4 did not tell the trial court if he took the weight of exhibit P2 recorded in the discarded exhibit P5. All the same, much as he was not a wildlife officer,

PW4 was knowledgeable of different types of trophies and we have no doubt that his evidence that exhibit P2 came from elephant cannot be doubted. We did alike in **Emmanuel Lyabonga** by relying on the oral evidence of the person who prepared a valuation certificate which was thrown out for lack of evidential value.

The problem in this appeal is that PW4's evidence on the weight is conspicuously wanting and so there could be no basis for pegging punishment on the value of the trophy based on its weight. Nevertheless, we do not think that should be a cause for any concern mindful of the dictates of section 60 (2) of the EOCCA in force on the date of the offence prescribing sentence to persons convicted of economic offences. For avoidance any doubt, section 86 (2) (b) of WCA prescribing a monetary penalty to a convict of a person found in unlawful possession of government trophy could not be resorted to in addition to the sentence prescribed under section 60 (2) of EOCCA had there been evidence of the value of the trophy; subject of the charge. This is because, the appellant was convicted of an economic offence; unlawful possession of Government trophy set out under paragraph 14 (d) of the First Schedule to the EOCCA. Before the amendments vide Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016 Section 60 (2) of the said Act provided:

(2) Subject to subsection (3), any person convicted of an economic offence shall be liable to imprisonment for a term not exceeding fifteen years, or to both that imprisonment and any other penal measure provided for in this Act.

The trial court imposed a sentence of 20 years imprisonment in default of payment of the fine equivalent to ten times the value of the trophy. It is our firm view that the trial court made an error in sentencing the appellant contrary to the dictates of the law in force on the date of the offence. The requirement to impose a fine was introduced by Act No. 3 of 2016 which amended section 60 (2) of the EOCCA to read:

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

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

There is a clear prohibition under Article 13 (6) (c) of the Constitution against imposition of a sentence to a convict of an offence

greater than that prescribed at the time of the commission of the offence. It is also the law under section 73 of the Interpretation of Laws Act that:

> *"Where an act constitutes an offence, and the penalty for such offence is amended between the time of the commission of such offence and the conviction therefore, the offender shall, unless the contrary intention appears, be liable to the penalty prescribed at the time of the commission of such offence."*

In the absence of any express provision to the contrary, the amendment to section 60 (2) of the EOCCA could not have applied retrospectively to the appellant who committed the offence before the amendment.

We are mindful that the issue did not feature during the hearing of the appeal. Nonetheless, as we held in **Marwa Mahende v. Republic** [1998] T.L.R 249, the superior courts have additional duty of ensuring that the laws are properly applied by the courts below including substituting improper sentences with the correct ones. In the circumstances, since the trial court imposed a fine which was not sanctioned by section 60 (2) of EOCCA, we are constrained to exercise the Court's power of revision under section 4 (2) of (the AJA) by setting

aside that sentence as we hereby do and substitute it with a sentence of 15 years' imprisonment.

The above said, we find no merit in the appeal and dismiss it except for the variation of the sentence.

DATED at **DAR ES SALAAM** this 11th 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 14th day of November, 2022 in the presence of the Appellant in person and Ms. Penina J. Ngotea, State Attorney for the Respondent/Republic, both appeared through Video Link from Arusha ICJ is hereby certified as a true copy of the original.

A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL