IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MWAMBEGELE, J.A., KEREFU, J.A. And KIHWELO, J.A.)

CRIMINAL APPEAL NO. 44 OF 2020

GITABEKA GIYAYA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mzuna, J.)

dated the 20th day of September, 2019
in
Criminal Appeal No. 98 of 2017

.....

JUDGMENT OF THE COURT

28th November & 28th December, 2022

MWAMBEGELE, J.A.:

Before the District Court of Karatu, Gitabeka Giyaya, the appellant herein, stood charged with the offence of unlawful possession of Government trophy contrary to section 86 (1) and (2) (b) of the Wildlife Conservation Act, Act No. 5 of 2009 (henceforth "the Wildlife Act") read together with paragraph 14 (d) of the First Schedule to, and sections 57 (1) and 60 (2) of the Economic and Organized Crimes Control Act, Cap. 200 of the Revised Edition, 2002 (henceforth "Cap. 200"). It was alleged in the

particulars of the offence that on 04.12.2014 at Mang'ola Ghorofani village within Karatu District in Arusha Region the appellant was found in unlawful possession of thirteen (13) pieces of elephant tusks weighing 13 Kgs valued at Tshs. 25,965,000/=, the property of the Government of Tanzania. He pleaded not guilty to the charge. After a full trial, he was found guilty, convicted and sentenced to pay fine of Tshs. 120,155,000/= or a jail term of twenty years in default. His first appeal to the High Court was not decided on its merits, for Maghimbi, J. found that the appellant was sentenced without being convicted. She thus remitted the matter to the trial court for rectification of the error. After the trial court complied with the order of the High Court, his second attempt to appeal to the High Court was barren of fruit, for Mzuna, J. dismissed the appeal on 20.09.2019.

Undeterred, the appellant has come to this Court premising his appeal on a twelve-ground memorandum of appeal lodged on 17.11.2021. The twelve grounds of appeal may be paraphrased as follows: **one**, that the charge was defective for being at variance with the evidence; **two**, that the evidence for the prosecution was weak, incredible, contradictory, full of doubts and insufficient to prove a case beyond reasonable doubt; **three**, that there was no witness who testified that the appellant was found in

possession of thirteen kilograms of elephant tusks valued at Tshs. 12,155,000/= as alleged in the charge; **four**, that PW1 was not sworn before testifying; **five**; that the seizure certificate (Exh. P1) was prepared by PW1 who was not at the scene of crime during the arrest and thus unprocedurally admitted in evidence; **six**, that Exh. P2 (the elephant tusks) was unprocedurally admitted in evidence because its chain of custody was broken; **seven**; that there was no evidence that the elephant tusks allegedly found in possession of the appellant are the very ones that were tendered in court; **eight**, that the finding on the chain of custody was unsatisfactory; **nine**, that the case against the appellant was not proved beyond reasonable doubt because PW1 and PW2 did not testify on whether they went with the appellant to the police station, to whom the trophy were handed and how did PW2 repossess the same to tender in court; **ten**, that the evidence of PW4 cast doubt on the case against the appellant; **eleven**, that the appellant was not addressed in terms of section 231 (1) of the Criminal Procedure Act, Cap. 20 of the Revised Laws of Tanzania (the CPA); and **twelve**, that the appellant's defence was not properly considered.

At the hearing of the appeal, the appellant appeared in person, unrepresented. The respondent Republic was represented by Ms. Lilian

Mmassy, learned Senior State Attorney assisted by Ms. Upendo Shemkole and Charles Kagirwa, learned State Attorneys. As the appellant was not versed with the language of the Court, Isack Ginyoka Asecheka was sworn to interpret Kiswahili into Barbaig, the language of the appellant and vice versa.

The appellant had earlier on lodged written submissions in support of the appeal which he sought to adopt together with the memorandum of appeal as his oral submissions before us. In the written submissions, the appellant submitted on the first ground of appeal that the charge was defective because it was at variance with the evidence. He submitted that while the charge shows that the value of the trophy was Tshs. 12,155,000/=, the trophy valuation certificate (Exh. P3) shows the value of the same to be Tshs. 25,965,000/=. He submitted that, in the circumstances, it was incumbent upon the prosecution to amend or substitute the charge in terms of section 234 (1) of the CPA. That was not done, he argued, and thus the prosecution did not prove the case beyond reasonable doubt as was held in **Issa Athumani Maluwa & Two Others v. Republic** [2017] T.L.S.L.R 366.

The third ground of appeal is intertwined with the first. The appellant argued it in the alternative to ground one. He submitted that the value of the elephant tusks in the charge was never proved by any prosecution witness. The appellant argued that this was a fatal shortfall which made the case against him short of proof beyond reasonable doubt.

Ms. Mmassy responded to both grounds. She conceded that indeed, the value of the trophy in the charge differed with the one shown in the trophy valuation certificate (Exh. P3) and no witness made reference to the value in the charge. She also conceded that the prosecution ought to have amended the charge in terms of section 234 (1) of the CPA as correctly put by the appellant. The learned Senior State Attorney, however, was quick to submit that the ailment was curable. She cited to us our unreported decision in **Emmanuel Lyabonga v. Republic**, Criminal Appeal No. 257 of 2019 to buttress this position in which we held that the Court is enjoined to consider the certificate as prima facie evidence but not bound by it. She also referred us to p. 27 of that decision at which the trial Judge discounted the certificate and calculated the value of the trophy and sentenced the accused person accordingly and the Court upheld that course of action.

We have scanned the record of appeal and, having so done, we find that the argument by the appellant and the concession of the learned Senior State Attorney is misconceived. The misconception must have been caused by the charge which appears at pp. 1-3 of the record of appeal. There are two charges in the record of appeal. The first one, to which the appellant pleaded, was lodged on 12.03.2015. It shows the value of the elephant tusks to be Tshs. 25,965,000/=. The second one is shown to have been admitted on 10.09.2015 and the value of the tusks is shown to be Tshs. 12,155,000/=. However, despite the fact that this second charge is scribbled at the foot "Admit", signed and dated 10.09.2015, the record does not bear out anywhere that it substituted the first charge. Neither does the record show it was read to the appellant and pleaded thereto. This means that the first charge was not substituted. We find solace in this stance by the fact that the trial court and the High Court before both Maghimbi, J. and Mzuna, J. made reference to the first charge which cited Tshs. 25,965,000/= as the value of the thirteen pieces of elephant tusks.

Given the above discussion, we think reference to the second charge by both the appellant and the learned Senior State Attorney is but a misconception. We do not think it will be legally correct to make reference

to the second charge which never substituted the first charge and the appellant never pleaded to it. To us, there was only one charge filed against the appellant, for an intention to substitute it, if any, was never manifested.

The complaint in the third ground, in view of the above discussion, will have no substance. It is in evidence that Cosmas Kireti (PW3) prepared Exh. P3, the trophy valuation certificate. Exh. P3 shows the value of the thirteen pieces of elephant tusks to be Tshs. 25,965,000/=. This is the value shown in the first charge which we have held prevails over the second one which purported to replace it.

We thus find and hold that the first and third grounds of appeal are misconceived and dismiss the complaint under these grounds.

We now turn to consider ground two, a complaint that the evidence for the prosecution was weak, incredible, contradictory, full of doubts and thus incapable of proving the case against the appellant beyond reasonable doubt. The gravamen of the appellant's complaint on this ground is that PW1 and PW2 contradicted on where the former was when he was arrested. That PW1 testified that he was there when the appellant brought the elephant tusks in a polythene bag while PW2 stated that he was in the car

at that moment. The appellant referred us to our decision in, *inter alia*, **Goodluck Kyando v. Republic** [2006] T.L.R. 363 in which we held that every witness is entitled to credence unless there are reasons not to believe him.

Responding to this ground of appeal, Ms. Mmassy submitted that the evidence of the prosecution witnesses was neither discrepant, inconsistent nor marred with contradictions. She argued that the difference in the testimony of PW1 and PW2, if any, were minor which did not affect the credibility of these witnesses. She referred us to our decision in **Emmanuel Lyabonga** (supra) in which we relied on our previous decisions in **John Gilikola v. Republic**, Criminal Appeal No. 31 of 1999 (unreported) and **Dickson Elia Nsamba Shapwata v. Republic**, Criminal Appeal No. 92 of 2007 (also unreported) and subscribed to the decision of the High Court (Mnzavas, J. – as he then was) in **Evarist Kachembeho & Others v. Republic** 1978 LRT n. 70, to hold that human recollection is not infallible and that due to frailty of human memory, the Court will overlook contradictions and discrepancies which are minor and do not go to the root of the matter.

We agree with the learned Senior State Attorney on the position regarding discrepant evidence. That is the position the Court has taken in a number of its decisions in eventualities when there is such a complaint – see: **Dickson Elia Nsamba Shapwata** (supra), **Issa Hassan Uki v. Republic,** Criminal Appeal No. 129 of 2017, **Athumani James v. Republic**, Criminal Appeal No. 69 of 2017 (both unreported) and **Emmanuel Lyabonga** (supra) cited to us by the learned Senior State Attorney. In those decisions of the Court, we pronounced ourselves in no uncertain terms that contradictions in the testimony of any particular witness or among witnesses are inescapable due to frailty of human memory. We thus took the view that discrepancies which do not go to the root of the matter, can be overlooked. In **Issa Hassan Uki** (supra), **Athumani James** (supra) and **Emmanuel Lyabonga** (supra) we subscribed to the observation the High Court made in **Evarist Kachembeho** (supra) and we cannot resist the urge to recite here:

> *"Human recollection is not infallible. A witness is not expected to be right in minute details when retelling his story."*

In view of the above discussion, we are now comfortable to recap that as human recollection is not infallible and due to the frailty of human memory and if the discrepancies complained of are on details, the Court may overlook such discrepancies.

In the appeal before us, the discrepancy and contradiction complained of is in the testimony of PW1 and PW2. We have scanned through the testimony of PW1 and PW2. While PW2 testified that at the time the appellant was being arrested, he was with Aloyce Mtui and PW1 was in the car, PW1 did not make reference to that fact. We will let their testimonies paint the picture: PW1, as seen at p. 19 of the record of appeal testified:

> *"... we stayed there until 06:00 hrs it is when the accused brought the tusks which were in a sulphate bag ... we went to the accused as buyers ...*
>
> *Since the accused was not in a position to sell us the tusks due to prlce bargaining being low ... we then arrested him"*

And PW2 testified at p. 23 of the same record:

> *"... at 06:00 am it is when we arrested him with the said elephant tusks packed in a sulphate bag. I was with Aloyce Mtui. At this time DC Athumani was in*

the car. We thus called DC Athumani who kept the accused under arrest and DC Athumani prepared the certificate of seizure and we all signed it."

We agree that the story is not retold the same way by the two witnesses. Indeed, the car episode does not feature in the testimony of PW1. In our view this is a minor discrepancy which, in view of the authorities above, cannot make the witnesses unreliable. We take note that the offence was committed on 04.12.2014 and the witnesses testified in March, 2016, more than a year after the offence was committed. Due to frailty of human memory, we do not think the witnesses were expected to retell their story the same way and take the discrepancy a minor one which did not go to the root of the matter as to affect their evidence. Accordingly, we find and hold that the second ground of appeal is arid of merit and dismiss it.

Next for consideration is a complaint in ground 4, that PW1 was not sworn before testifying. Determination of this complaint will not detain us. We are aware that the appellant submitted, and to our mind rightly so, that failure of a witness to take oath or affirm before testifying flouts the provisions of section 198 of the CPA. However, as rightly put by the learned Senior State Attorney, the original record of appeal shows that the appellant

was affirmed before testifying. This ground of appeal is therefore a result of an inadvertence occasioned by the typed script of the record of appeal. It omitted the affirming part. As the ground is not supported by the original record of appeal, we find it misconceived and dismiss it.

Another ground of complaint is that the certificate of seizure was prepared by PW1 who was not at the scene of crime during the arrest, the subject of ground five. The appellant submitted that the certificate of seizure was supposed to be prepared by Aloyce Mtui who was present during the arrest and not PW1 who was not there the moment the appellant was arrested. In addition, the appellant submitted, no receipt was issued after the seizure certificate was prepared. That, he argued, offended the provisions of section 38 (3) of the CPA. In the premises, he argued, the certificate of seizure should be expunged.

Ms. Mmassy did not directly respond to this complaint. As she combined grounds two and five in her response, she burnt a lot of fuel on the second ground forgetting the fifth.

We do not think the determination of this complaint will detain us, for the evidence on record speaks loudly and clearly that PW1 remained in the

car at some distance when Edwin Nyirembe (PW2) and Aloyce Mtui who disguised themselves as prospective buyers of the elephant tusks, went to negotiate price with the appellant. PW1 went there immediately after the appellant refused to sell the trophy without weighing them. That was at the point in time when PW2 called PW1 and the appellant was put under arrest. The appellant was caught red handed in possession of the thirteen pieces of elephant tusks, negotiated the price with PW2 and Aloyce Mtui and consequently arrested. We are not prepared to go along with the appellant that PW1 was incompetent to prepare the certificate of seizure. On the contrary, we find and hold that PW1 was for all intents and purposes, competent to prepare Exh. P1.

We now turn to determine the second limb of complaint in ground five, that the provisions of section 38 (3) of the CPA were disregarded for not issuing a receipt. This kind of complaint has been a subject of discussion in many of our previous decisions. In a number of those decisions, we have made ourselves clear that failure to comply with section 38 (3) of the CPA or its kith, section 22 (3) of Cap. 200, is not a fatal ailment. In a judgment we rendered as recent as 11th ultimo in **Ramadhan Idd Mchafu v. Republic**,

Criminal Appeal No. 328 of 2019 (unreported), we confronted a similar complaint and reiterated our stance in the following terms:

> *"... absence of the official receipt is inconsequential in establishing that the appellant was found in possession of the Government trophy. The omission to issue a receipt was not therefore fatal."*

In the above appeal, we also referred to our previous decision in **Abdalah Said Mwingereza v. Republic,** Criminal Appeal No. 258 of 2013 (unreported) in which we observed:

> *"It may be observed however that normally under section 38(3) of the Criminal Procedure Act seizure receipts are issued following issue of search warrants. But even if the seizure certificate were to be ignored still there was sufficient evidence from PW1 and PW2 which proved that the appellant was found with the pistol and seven rounds of ammunition."*

Likewise, we faced the same complaint in **Matata Nassoro & Another v. Republic**, Criminal Appeal No. 329 of 2019 (unreported), that after the seizure of the Government trophy, no receipt was issued as required by section 38 (3) of the CPA. In a judgment we handed down on 02.11.2022, we held:

"There is no dispute that PW1 did not issue a receipt following seizure but in view of the fact that the appellant 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 the independent witness."

In the case the subject of this appeal, the appellant signed a certificate of seizure and there is evidence from PW1 and PW2 that he was found in possession of the elephant tusks during a transaction in which PW2 and one Aloyce Mtui posed as prospective buyers of the same. Given these circumstances, and in the light of the authorities referred to above, we find the omission to issue a receipt in terms of sections 38 (3) of the CPA or 22 (3) of Cap. 200 not fatal, it is curable under the provisions of section 388 of the CPA. For the avoidance of doubt, we are aware that the term "shall" is used in both provisions. However, as the Full Bench held in **Bahati Makeja v. Republic** [2010] T.L.R. 49, the word "shall" in the CPA is not imperative as provided by section 53 (2) of the Interpretation of Laws Act, Cap. 1 of the laws of Tanzania, but is relative and is subjected to section 388 of the CPA. In the same token, we are of the view that "shall" in section 22 (3) of Cap. 200 is not imperative. This complaint by the appellant is dismissed as well.

Next for consideration is the complaint on the chain of custody of the trophy. This is a complaint under grounds six, seven, eight, nine and ten of the memorandum of appeal. The appellant submitted that the chain of custody of the Government trophy was broken to the extent that one cannot ascertain as to whether the elephant tusks allegedly found in possession of the appellant are the very ones that were tendered in court. He argued that the chain of custody requires that from the moment the evidence is collected, its every transfer from one person must be documented and there must be proof that nobody else could have access to it. To reinforce this position, the appellant cited to us our unreported decision in **Michael Gabriel v. Republic**, Criminal Appeal No. 240 of 2017. As there is no paper trail of Exh. P2 (the thirteen pieces of elephant tusks), the same must be expunged, he argued.

For her part, Ms. Mmassy agreed on the contention of the appellant to the effect that the custody of elephant tusks must be kept in a manner that its chain cannot be broken. She, however, argued that elephant tusks are items which cannot change hands easily, as such, in situations of such items, the principle can be relaxed. She cited our unreported decision in **Jason**

Pascal & Another v. Republic, Criminal Appeal No. 615 of 2020 in which we so held.

We agree with the learned Senior State Attorney. The law relating to the chain of custody of items which cannot change hands easily is now fairly settled. We observed in **Jason Pascal** (supra) relying on our previous decisions in **Joseph Leonard Manyota v. Republic,** Criminal Appeal No. 485 of 2015 (unreported) and **Issa Hassan Uki** (supra) that initially, in line with our decision in **Paulo Maduka & Four others v. Republic,** Criminal Appeal No. 110 of 2007 (unreported) and a string of decisions that followed it, the position was that chain of custody of any item must strictly be established by documentation. However, the law as it stands now, that principle has been relaxed to apply to only items which change hands easily. We quoted an excerpt from **Issa Hassan Uki** which we find worth recitation here:

> *"We are of the considered view that elephant tusks cannot change hands easily and therefore not easy to tamper with. In cases relating to chain of 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* ***Kashindye 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 case can be relaxed.***"
> [Emphasis supplied]

Flowing from the above discussion, we think the position we took in **Issa Hassan Uki** is still good law today. We thus are increasingly of the view that in cases, like the present, relating to items which cannot change hands easily and therefore not easy to tamper with, the principle on the chain of custody laid down in **Paulo Maduka** followed in many of our decisions thereafter, can be relaxed to cover only items which change hands easily. This said, we find the complaint on the chain of custody of the elephant tusks (Exh. P2) without substance and dismiss it.

Next we deal with the appellant's complaint that he was not addressed in terms of section 231 (1) of the CPA, the subject of the eleventh ground of appeal. The appellant submitted that at the closure of the prosecution case, he was not addressed in terms of section 231 (1) of the CPA. The provisions of that section, he contended, are mandatory, noncompliance of which

makes the proceedings fatal. He thus implored us to find this ground meritorious and allow the appeal.

For her part, Ms. Mmassy conceded that indeed the record of appeal does not show if the appellant was addressed in terms of section 231 (1) of the CPA. However, the learned Senior State Attorney was quick to submit that despite the fact that the record does not show that the appellant was addressed in terms of section 231 (1) of the CPA after the closure of the prosecution case, the proceedings that followed thereafter impliedly show that he was. This is deciphered from what transpired thereafter, she contended, where the appellant is recorded to have testified on affirmation and called one witness.

We have scanned the record of appeal especially on what transpired after the prosecution case was closed. The record of appeal bears out at p. 31 that, on 21.07.2016, after the trial court found out that a prima facie case had been made out against the appellant to warrant him enter defence, the appellant is recorded as saying:

> *"I shall have 1 witness, Uchorodi Momoya. I won't have any exhibit."*

The matter was then adjourned to 04.08.2016 for defence hearing. On the scheduled date, the defence hearing could not take off and the record is silent on the reason why. It was deferred to 11.08.2016 but could also not take off on the ground that the appellant's witness could not show up. The matter was again adjourned to 18.08.2016 during which the appellant testified on affirmation. He was affirmed because he said he did not profess any religion. After DW2 testified, the appellant closed his case as evident at p. 34 of the record of appeal.

We have taken time and space to show what transpired after the case for the prosecution was closed with a view to seeing whether the appellant was prejudiced for the omission, if any. The learned Senior State Attorney submitted that from what transpired after the prosecution case was closed, despite not appearing on record, the provisions of section 231 (1) of the CPA were complied with. We agree and proceed to demonstrate hereunder why we are in such agreement.

The provisions of section 231 (1) of the CPA which the appellant avers to have been flouted read:

> *"231.-(1) At the close of the evidence in support of the charge, if it appears to the court that a case is*

made against the accused person sufficiently to require him to make a defence either in relation to the offence with which he is charge or in relation to any other offence of which, under the provisions of sections 300 to 309 of this Act, he is liable to be convicted the court shall again explain the substance of the charge to the accused and inform him of his right-

(a) to give evidence whether or not on oath or affirmation, on his own behalf; and

(b) to call witness in his defence,

and shall then ask the accused person or his advocate if it is intended to exercise any of the above rights and shall record the answer; and the court shall then call on the accused person to enter on his defence save where the accused person does not wish to exercise any of those rights."

As already stated above, the evidence of the appellant was given on affirmation thereby complying with subsection (1) (a) of section 231 above. The appellant also indicated that he will call and actually called one witness in line with subsection (1) (b) of the same section. In the circumstances, we are constrained to find and hold that the appellant was addressed in terms of subsection (1) (a) and (b) of section 231 of the CPA and that is why

he testified on affirmation and called a witness. We are of the opinion that, the fact that the trial court, out of inadvertency, did not indicate that the appellant was addressed on that section, did not prejudice anybody, not even the appellant. For this stance we have taken, we find solace in the maxim of equity which goes: **equity regards as done what should have been done**. As we observed in **Musa Mohamed v. Republic**, Criminal Appeal No. 216 of 2005 (unreported) when confronted with an analogous situation whereby a trial court sentenced an accused person but the record did not indicate that he was convicted before sentencing, we, as an apex court of the land, are enjoined to render justice according to law and equity. We held:

> *"This Court being the final court of justice of the land, apart from rendering justice according to law also administer justice according to equity. We are of the considered opinion that we have to resort to equity to render justice, but at the same time making sure that the Court records are in order."*

We went on:

> *"One of the Maxims of Equity is that 'Equity treats as done that which ought to have been done'. Here as already said, the learned Resident Magistrate for all*

intents and purposes convicted the appellant and that is why he sentenced him. So, this Court should treat as done that which ought to have been done. That is, we take it that the Resident Magistrate convicted the appellant."

In the light of the above discussion, that is the reason why we have observed above that we think no injustice was occasioned by the inadvertence of the trial court to record compliance with section 231 (1) of the CPA. We regard as done what should have been done. The complaint on the noncompliance with the provisions of section 231 (1) of the CPA is therefore without merit and dismissed.

We now turn to consider the complaint by the appellant that his defence was not properly considered, the subject of the last ground of appeal. The gist of the appellant's complaint under this arm is that the courts below did not give reasons for his defence. That is perhaps encapsulated in the use of the word "properly" in the ground of appeal. The appellant made reliance on **Mwita & Two Others v. Republic** [1971] H.C.D n. 54 for the proposition that his duty was just to raise a reasonable doubt in the prosecution's case, and no more. He also invited us to see our decisions in

Elias Stephen v. Republic [1982] T.L.R. 313 and **Hussein Idd & Another v. Republic** [1986] T.L.R. 166 on the same proposition.

For her part, Ms. Mmassy admitted that the trial court and the first appellate court did not give any reason for rejecting the appellant's defence. The learned Senior State Attorney implored us to invoke our revisional powers bestowed upon us by section 4 (2) of the AJA to do what the High Court should have done on first appeal.

We agree with the appellant and learned Senior State Attorney that the trial court and the first appellate court did not consider the defence adequately. We also agree with the learned Senior State Attorney that the Court has powers to do what the first appellate court should have done. However, as the complaint comprised a ground of appeal, we are hesitant to invoke our powers of revision under section 4 (2) of the AJA. We thus decline the invitation extended to us by the learned Senior State Attorney.

In **Dinkerrai Ramkrishan Pandya v. Rex** [1957] 1 EA 336, the erstwhile Court of Appeal for East Africa held that a second appellate court is enjoined to consider evidence and draw its own inferences. In that case, like in the present, one of the complaints by the appellant was that the trial

magistrate did not give proper consideration to the evidence for the defence by balancing it against that for the Crown. His first appeal to the High Court was dismissed without considering the defence evidence. The Court of Appeal for East Africa held:

> *"... the first appellate court erred in law in that it had not treated the evidence as a whole to that fresh and exhaustive scrutiny which the appellant was entitled to expect, and, as a result of its error, affirmed a conviction resting on evidence which, had it been duly reviewed, must have been seen to be so defective as to render the conviction manifestly unsafe."*

The Court of Appeal for East Africa thus considered the appellant's defence and found that the conviction was unsafe. The appeal was allowed. We followed that position in the unreported **Mzee Ally Mwinyimkuu @ Babu Seya v. Republic**, Criminal Appeal No. 499 of 2017. We have also taken that stance in a number of cases – see: **Iddi Kondo v. Republic** [2004J T.L.R. 362, **Cosmas Kumburu v. Republic**, Criminal Appeal No. 426 of 2016 and **Julius Josephat v. Republic**, Criminal Appeal No. 3 of 2017 (all unreported), to mention but a few.

Given the above position of the law, we shall step into the shoes of the first appellate court and do what it should have done. That is, we will consider the defence of the appellant and come to our own conclusion.

The appellant's defence is contained in a single paragraph containing only nine lines at p. 33 of the record of appeal. That defence is but a general denial to the effect that he did commit the offence against which he was charged. He testified that he was sleeping at home on the night of 03.12.2014 when his wife woke him up telling him that there were people knocking at the door. That he got out and was arrested by two people who went there with a motor vehicle and took him to the police station at Karatu where he was locked up and made to sign some papers and later arraigned.

The appellant fielded one witness, Ochorodi Momoyo (DW2), presumably his wife, who testified that on 03.12.2014 at night, two people knocked at their door and when she went to open the door, they said they were after the appellant. When the appellant went out, he was arrested and never went back.

The prosecution story was that PW1 was informed that an informer told park rangers Aloyce Mtui and PW2 that there was a person selling

elephant tusks at Mang'ola Ghorofani Village. They lay a trap pretending to be buyers of the elephant tusks and arrested the appellant in possession of thirteen pieces of elephant tusks in a polythene bag. The evidence of PW1 and PW2 was supported by PW3, a wildlife officer who valued the elephant tusks and filled in a trophy valuation certificate which was tendered in evidence as Exh. P3 and F. 6441 DC Humphrey (PW4) who investigated the case.

The general denial of the appellant, we are afraid, did not raise any reasonable doubt in the prosecution's case. We agree with him that his duty was to raise a reasonable doubt and to punch holes in the prosecution's case. That, however, was not successfully done and therefore, juxtaposing the appellant's defence with the case for the prosecution, we think the prosecution established the case against the appellant to the required standard; that is, beyond reasonable doubt. This also answers the complaint by the appellant to the effect that the case was not proved beyond reasonable doubt.

With regard to the sentence, it is not clear on the source on which the courts below pegged the fine of Tshs. 120,155,000/=, for it is not even the tenfold of the value of the trophy in the purported new charge. In terms of

section 86 (2) (b) of the Wildlife Act under which the appellant was, *inter alia*, charged, the sentence in respect of fine ought to have been ten times the value of the trophy; that is, Tshs. 25,965,000/- times ten which is Tshs. 259,650,000/=. We thus revise the sentence of fine to be Tshs. 259,650,000/= which is ten times the value of the trophy with which the appellant was charged.

In view of the reasons we have endeavoured to assign, except for the variation of the sentence of fine, this appeal stands dismissed.

DATED at **DAR ES SALAAM** this 21st day of December, 2022.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Judgment delivered this 28th day of December, 2022 via video conference in the presence of Appellant in person, also in presence of interpreter Basil Julius from Iraq to Kiswahili) and Mr. M/s Akisa Mhando, learned Senior 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