IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: NDIKA, J.A., LEVIRA, J.A., And MAKUNGU, J.A.)

CRIMINAL APPEAL NO. 48 OF 2020

THE DIRECTOR OF PUBLIC PROSECUTIONS ..... APPELLANT

VERSUS

PAPAA S/O OLESIKALADAI @ LENDEMU ..... FIRST RESPONDENT

BATIAN S/O MALEE @ PESHUTI ..... SECOND RESPONDENT

(Appeal from the Decision of the High Court of Tanzania, Corruption and Economic Crimes Division at Arusha)
(Matupa, J.)

dated the 12th day of July, 2019
in
Economic Crime Case No. 1 of 2019

.....

JUDGMENT OF THE COURT

7th & 14th February, 2023

NDIKA, J.A.:

Papaa s/o Olesikaladai alias Lendemu and Batian s/o Malee alias Peshuti, the first and second respondents respectively, were convicted by the High Court of Tanzania, Corruption and Economic Crimes Division sitting at Arusha (Matupa, J.) of unlawful possession of government trophies. The charge was laid under section 86 (1) and (2) (c) (ii) of the Wildlife Conservation Act, No. 5 of 2009 ("WCA") read together with paragraph 14 of the First Schedule to and sections 57 (1) and 60 (2) of the Economic and Organized Crime Control Act, Cap. 200 R.E. 2002 ("EOCCA") as amended

by sections 13 (b) and 16 (a) of the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016. Consequently, they were each sentenced under section 86 (2) (b) of the WCA to pay a fine of TZS. 71,519,800.00 being the established tenfold value of the trophies. In default thereof, they were ordered to serve a sentence of twenty years' imprisonment.

The Director of Public Prosecutions, the appellant herein, is aggrieved by the trial court's approach that culminated in the imposition of the aforesaid sentence, hence this appeal.

We find it apposite to provide a brief background to the respondents' conviction and sentence. It was the prosecution case that on 29th July, 2017 at Ndarakwai village within Siha District in Kilimanjaro Region the respondents were found in possession of government trophies, namely, three elephant tusks "equivalent to two killed elephants each valued at USD. 15,000.00, both valued at USD. 30,000.00, equivalent to Tanzania Shillings sixty-seven million two hundred sixty thousand (TZS. 67,260,000.00) only, the property of the Government of the United Republic of Tanzania without a permit from the Director of Wildlife."

Based on information received from an informer, PW2 Ronald Lyimo, a game officer, who was accompanied by one Joseph Masele from the Anti-

Poaching Unit at Arusha commonly known as *Kikosi Dhidi ya Ujangili* (KDU), entrapped and arrested the respondents at Ndarakwai village on 29th July, 2017. Upon searching them, they found the first respondent in possession of two pieces of elephant tusk and retrieved one piece of elephant tusk from the second respondent's clothes. At that point, they arrested the respondents and prepared a certificate of seizure (Exhibit P5), which they duly signed and had it thumb printed by the respondents. The trophies were then ferried to KDU at Arusha where they were handed over to PW1 James Anthony Kugusa, the storekeeper, for safe custody as evidenced by the handing over certificate dated 29th July, 2017 (Exhibit P1).

On 31st July, 2017, PW3 Ezron Joseph Mongi, a wildlife officer based at KDU Arusha, received the seized contraband from PW1, which he then examined and assessed its value in accordance with the Wildlife Conservation (Valuation of Trophies) Regulations, 2012, Government Notice No. 207 of 2012 published on 15th June, 2012 ("the Regulations"). According to him, the three pieces of elephant tusk were derived from two killed elephants each valued at USD. 15,000.00, the total value being USD. 30,000.00, equivalent to TZS. 67,260,000.00. The handing over certificate between PW1 and PW3 was admitted as Exhibit P2. So were the trophies, which were marked as Exhibit P3 (a), (b) and (c) and the valuation

certificate marked as Exhibit P6. Moreover, PW4 Assistant Inspector Kaitila Machinde testified at the trial that he recorded a cautioned statement made by the first respondent on the same day he was arrested. The statement was admitted as Exhibit P7.

The respondents emphatically denied the accusation against them in their defence. They disputed the prosecution's version on the manner of their arrest, averring that they were arrested when grazing their cattle in a bushy farm owned by a white person, popularly known as *Shamba la Mzungu*. They bewailed that they were tortured by the arresting officers and that the accusation against them was trumped up.

The learned trial Judge found the prosecution case credible and unassailable that the respondents were arrested at the scene in possession of the government trophies without any permit from the Director of Wildlife. That there was an unbroken chain of the tusks from the time they were seized from the respondents to the time they were tendered in evidence. Accordingly, he convicted each of them of the charged offence.

So far as sentencing was concerned, the learned trial Judge considered that in terms of section 114 of the WCA, the value of the trophies

calculated in accordance with regulation 3 of the Regulations was the most decisive factor. He then remarked that:

> *"The valuation serves the purpose of calculating the sentence on conviction. The rule is not universal. In the present case, the charge is in relation to possession of trophies and not unlawful hunting of trophies.* ***The [regulation] on reckoning of a part of an animal as a whole, has to do with the offence of unlawful hunting and not possession of trophies****. Again, the [Regulations] provide distinct valuation guidelines for the purposes of trophies. The value of elephant tusks is calculated by weight depending on whether the trophies were polished or not."* [Emphasis added]

Then learned trial Judge went on reasoning and finding as follows:

> *"In the present case, the witness agreed that the trophies are not polished. The witness also admitted that he managed to take measurement of the tusks, which was 5.8 kg. The value of a kilogram of unpolished elephant tusks is USD. 550. The correct value of the trophies, therefore, is Shillings 7,151,980.00.* ***In short, where it comes to the valuation of elephant tusks, the correct procedure is to calculate the value of the***

tusks in accordance with paragraph 87 of the Schedule to the Regulations. "[Emphasis added]

Having concluded that the value of the trophies was TZS. 7,151,980.00, not TZS. 67,260,000.00 alleged by the prosecution, the learned trial Judge sentenced the respondents in terms of section 86 (2) (b) of the WCA as stated earlier.

The appellant now contests the foregoing conclusion and the consequential penalty imposed on the respondents on three grounds: **one**, that the learned trial Judge erred in law and in fact by holding that valuation of elephant tusks for sentencing purposes must be made in accordance with Item 87 of the Schedule to the Regulations. **Two**, that the learned trial Judge erred in law and in fact by holding that the rule on reckoning of a part of an animal is only applicable to the offence of unlawful hunting, not unlawful possession of trophies. **Finally**, that the learned trial Judge erred in law by sentencing the respondents to pay a fine or serve imprisonment in default.

Ms. Penina Ngotea, learned State Attorney, who was accompanied by Ms. Eunice Otto Makala, also learned State Attorney, argued the appeal

before us on behalf of the appellant. The respondents, on the other hand, appeared in person, self-represented.

Prefacing her submissions on the first and second grounds of appeal canvassed conjointly, Ms. Ngotea referred to section 114 of the WCA regulating the assessment of the value of trophies or animals. It stipulates thus:

> *"114.-(1) In any proceedings under this Act, the Court in assessing the punishment to be awarded shall calculate the value of a trophy or animal in accordance with the certificate of value of trophies as prescribed by Minister in the regulations.*
>
> *(2) The value of a livestock shall be calculated on the basis of the normal price of the livestock on a sale in the open market between a buyer and a seller independent of each other.*
>
> *(3) In proceedings for an offence under this section, a certificate signed by the Director or wildlife officers of the rank of wildlife officer, shall be admissible in evidence and shall be prima facie evidence of the matters stated therein including the fact that the signature thereon is that of the person holding the office specified therein.*

(4) The certificate under subsection (3) shall state the value of a trophy involved in the proceedings."

The learned State Attorney submitted that in terms of the above section the value of the trophy involved in any proceedings under the WCA is a statutory factor determining the punishment to be imposed on the accused. She argued further that the calculation of the value of the trophy or animal by the court must be in accordance with a certificate of value issued under the Regulations by the Director of Wildlife or a wildlife officer of that rank or above. On being queried by the Court, she acknowledged, quite correctly, that such certificate would constitute *prima facie* evidence of the matters stated therein but that it would not necessarily constitute conclusive proof of such matters. It means the trial court must consider the certificate, but it is not bound by it.

Referring to regulation 3 (1) and (2) of the Regulations, Ms. Ngotea faulted the learned trial Judge for ignoring the valuation made by PW3 as presented in Exhibit P6. She contended that PW3 was correct in his statement that the three tusks constituted two killed elephants, each valued at USD. 15,000.00 as per Item 18 of the First Schedule to the Regulations, meaning that both elephants were valued at USD. 30,000.00, equivalent to TZS. 67,260,000.00. She was unswerving that the learned trial Judge

wrongly assessed the trophy value based upon Item 87 of the First Schedule specifying values for polished and unpolished tusks.

The respondents, on their part, had nothing much to say in reply except urging us to release them from prison.

In determining the sticking issue before us, we wish, at first, to recall what we observed in our decision in **Emmanuel Lyabonga v. Republic,** Criminal Appeal No. 257 of 2019 (unreported) so far it relates to the offence of unlawful possession of government trophy contrary to section 86 (1) of the WCA. First, that when a person is convicted of that offence, the value of the trophy involved, as rightly submitted by Ms. Ngotea, is set out as a key factor determining the punishment to be imposed as prescribed by section 86 (2) (a), (b) and (c) of the WCA. However, as it will be shown later, the application of the aforesaid section 86 (2) is subject to section 60 (2) of the EOCCA. Secondly, while section 114 of the WCA is the general provision governing the assessment of value of the trophies or animals for purposes of offences under the WCA, section 86 (3) and (4) of the WCA regulates the appraisal and computation of value of trophies for unlawful possession of government trophy laid under section 86 (1) of the WCA. All

things considered, section 86 (3) and (4) of WCA mirrors the letter and spirit of section 114 of the WCA.

As stated earlier, the learned trial Judge discounted PW3's valuation unveiled by Exhibit P6 on the ground that it pegged the value of the trophies involved as being the value of the entire animals (elephants) supposedly killed in terms of Item 18 of the First Schedule to the Regulations instead of the value of the trophies according to their weight and state as per Item 87 of the same schedule. He held that the approach by PW3 offended regulation 3 (2) of the Regulations. For clarity, we extract regulation 3 in its entirety:

> *"3.-(1)The value of any trophy for the purpose of proceedings for an offence under the Act shall be the* ***value of US Dollars or its equivalent as specified in the second column of the First Schedule to these Regulations****.*
>
> *(2)* ***Except where it is otherwise provided****, the value of any part of the animal shall* ***be calculated to be the value of the entire animal unlawfully hunted****."*[Emphasis added]

In **Emmanuel Lyabonga** (*supra*), where we dealt with a similar question, we interpreted regulation 3 (2) thus:

"It is quite plain that sub-regulation (2) of Regulation 3 above requires, as a general rule, for an assessment of any trophy for the purposes of proceedings to be based on ***'the value of the entire animal killed' as specified in the second column of the First Schedule to the Regulations.*** *However,* ***'where it is otherwise provided' the valuation shall not be based on the value of the entire animal killed.*** *Based on this scheme, the First Schedule to the Regulations prescribes distinct values for certain animals such as elephant and rhino. So far as it relates to this appeal, Item 18 of the Schedule prescribes the value of an elephant as an* ***entire animal at USD. 15,000.00 while Item 87 specifies the value of an elephant tusk as a trophy at USD. 550.00 per kilogramme of unpolished ivory and USD. 600.00 for a kilogramme of polished ivory."***
[Emphasis added]

We wish to stress that regulation 3 (2) generally requires for the value of a trophy or any part of an animal to be calculated as the value of the entire animal killed as specified in the second column of the First Schedule to the Regulations. However, where *"it is otherwise provided"* the valuation shall be based upon a specific value assigned, implying that the value of the

entire animal killed will not be the decisive factor. Without demur, we reaffirm the view that where a person is found in possession of an elephant tusk, it must be valued based upon its weight and state in accordance with Item 87 of the First Schedule to the Regulations. The specific values prescribed are USD. 550.00 per kilogramme of unpolished ivory and USD. 600.00 for a kilogramme of polished ivory.

As was the case in **Emmanuel Lyabonga** (*supra*), the learned trial Judge in the instant case was alive to the above position of the law. Applying it to the instant case, he rightly discounted PW3's valuation unveiled by Exhibit P6 and concluded that the unpolished trophies weighing 5.8 kilogrammes were valued at USD. 550 per kilogramme in terms of the aforesaid Item 87. Thus, their total value was USD. 3,190, equivalent to TZS. 7,151,980.00.

Concluding, we hold, as we must, that the first ground of appeal is lacking in merit as the learned trial Judge's approach in determining the value of the trophies was unblemished. However, we hold that the learned trial Judge slipped into error by holding that the rule on calculating the value of a part of an animal as being the value of the entire animal hunted or killed is only applicable to the offence of unlawful hunting, not unlawful

possession of government trophies. In our view, it is manifest from the provisions of sections 86 (4) and 114 (1), (3) and (4) of the WCA as well as regulation 3 (1) and (2) of the Regulations that the reckoning of a part of an animal as being the value of the entire animal hunted or killed applies to all offences including unlawful possession of government trophies laid under section 86 (1) of the WCA except where specific values are prescribed by the Regulations as is the case for valuation of elephant tusks.

We now turn to the propriety of the sentence imposed on the respondents, an issue stemming from the third ground of appeal.

Addressing us on the above ground, Ms. Ngotea was very brief. She faulted the trial court for levying the penalty against the respondents under section 86 (2) of the WCA instead of section 60 (2) of the EOCCA, which, she said, was the overriding penalty provision on the ground that the offence the respondents were convicted of was an economic offence. In terms of section 60 (2) of the EOCCA, she submitted, the trial court ought to have sentenced the respondents to a minimum of twenty years imprisonment without any option of a fine. The respondents, on their part, offered no rebuttal on the issue.

Admittedly, the offence with which the respondents were charged and convicted of was laid before the trial court under the WCA and the EOCCA as an economic offence. We would readily agree with the learned State Attorney that although section 86 (2) of the WCA provides punishment for the offence in issue, the trial court ought to have levied punishment against the respondents in accordance with section 60 (2) of the EOCCA instead of the former provision. This is discernible from the latter section, providing as follows:

> *"**60**.-(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."*

The construction of the above subsection poses no difficulty. First and foremost, it disapplies the imposition of any penalty prescribed under any other law for any corruption or economic offence. Secondly, it prescribes

the minimum penalty of twenty years imprisonment and the maximum imprisonment of thirty years or both such imprisonment and any other penal measure under the EOCCA for any person convicted of a corruption or economic offence. In determining the tariff of punishment to be imposed within the allowable range of punishment, the court must consider the factors enumerated by subsection (7) of section 60. Thirdly, the proviso to the above subsection allows the imposition of a punishment provided under any other law only if such penal measure is greater than what is provided under the EOCCA.

In the instant case, we uphold Ms. Ngotea's submission that the respondents, having been convicted of the charged economic offence, ought to have been sentenced under section 60 (2) of the EOCCA to a minimum of twenty years imprisonment without any option of fine. Certainly, the penal measure imposed on the respondents under section 86 (2) of the WCA is not greater than what is provided under the EOCCA to trigger the application of the proviso to subsection (2) of section 60. We, therefore, find merit in the third ground of appeal.

In the final analysis, we allow the appeal to the extent stated. In consequence, we set aside the sentence of fine of TZS. 71,519,800.00 or

twenty years imprisonment in default imposed by the trial court on the respondents and substitute for it the sentence of twenty years imprisonment on each respondent without any option of fine.

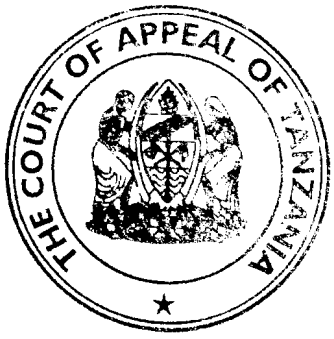
DATED at **ARUSHA** this 11th day of February, 2023

G. A. M. NDIKA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Judgment delivered this 14th day of February, 2023 in the presence of Ms. Penina Ngotea, learned State Attorney for the Appellant and the 1st & 2nd Respondents who appeared in person, is hereby certified as a true copy of the original.



E. G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL