IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: KWARIKO, J.A., GALEBA, J.A, And KHAMIS, J.A.)

CRIMINAL APPEAL NO. 420 OF 2020

LENGUME LENEMAS LESEI..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Banzi, J.)

dated the 23rd day of July, 2020

in

Economic Case No. 31 of 2019

.....

JUDGMENT OF THE COURT

16th & 30th August 2023

GALEBA, J.A.:

Lengume Lenemas Lesei, the appellant in this appeal, was charged before the Corruption and Economic Crimes Division of the High Court of Tanzania at Arusha (the High Court or the trial court), in Economic Case No. 31 of 2019. He was charged on two counts of unlawful possession of Government trophy, contrary to section 86 (1) and (2) (b) of the Wildlife Conservation Act, 2009 (the WCA), and unlawful dealing in Government trophy, contrary to sections 80 (1) and 84 (2) (b) of the WCA), both read together with paragraph 14 of the First Schedule to, and sections 57 (1)

and 60 (2) both of the Economic and Organized Crime Control Act. He denied the charge, such that five witnesses were called to prove the case. At the end of the trial, he was found guilty and convicted on both counts. As for the punishment, he was sentenced to twenty years imprisonment on each count, which were ordered to run concurrently. Aggrieved, the appellant lodged this appeal to challenge both the conviction and the sentence.

According to the particulars of offence in the information, on 28th November, 2017, at Engaruka area within Monduli District in Arusha Region, the appellant without any permit from the Director of Wildlife, was found in unlawful possession of one piece of elephant tusk, the property of the Government of the United Republic of Tanzania, which he was in the process of selling.

The background facts that led to the appellants arrest and subsequent trial are that, Novatus Haule (PW3) a wildlife warden working at KDU Arusha, on 28th November, 2017, he learned from his informer that there were people who were selling elephant tusks. After organizing office logistics, together with his colleague Joseph Masele (PW4), they proceeded to Selela, a place neighbouring Mto wa Mbu area. Upon getting there, the informer, who was in constant communication with both PW3

and the vendors of the tusks, disclosed to him that the vendors would no longer come to Selela, so PW3 and PW4 had to go to Engaruka, a location that the vendors recommended to be the *rendezvous* point. They went to Ngorongoro Conservation Area, where they got a motor vehicle which took them straight to Engaruka where they arrived between 20:00 and 21:00 hours. Before getting to the exact point of the arrest, they got off the vehicle and walked on foot towards the location where the vendors were, in order to conceal their true identities and their actual motive. After walking for a while, they saw a lighting motorcycle ahead of them, and walked towards it. Upon arrival, they noted that there were three people; two on the motor cycle, and one stood a few paces aside. PW3 and PW4 greeted them and asked if they were the vendors and whether they had the subject matter of "the business", that is, the elephant tusks. The vendors agreed but wanted to confirm whether "the buyers" had the money with them. After confirmation of availability of the money, the appellant, from his Maasai outfit, pulled out a plastic bag from which he took a piece of elephant tusk and handed it over to PW3 who, with assistance of the torch light from the appellant and also his own mobile phone torch, managed to confirm that indeed the item in their hands was a piece of elephant tusk, exhibit P2. After that confirmation, PW3

withdrew a gun, and identified himself and his colleague as game officers and instantly, the appellant was arrested. As that was happening, the other persons who were with him took to their heels and disappeared to the unknown in the dark night. After that, the appellant introduced himself as Lengume Lenemas. He also, confirmed to them that he did not have any permit to be in possession of the trophy or to sell it. They filled in a seizure certificate, exhibit P5. The certificate was signed by PW3, PW4 and the appellant himself. After perfection of the certificate, PW3 and PW4 took the appellant and the seized exhibit P2 to Mto wa Mbu Police Station in order to keep the appellant in custody, as they were waiting their office vehicle from KDU in Arusha. After the car arrived at Mto wa Mbu, both the appellant and the exhibit were transferred to KDU in Arusha, where PW3 handed over exhibit P2 to the exhibits' keeper, one James Kugusa (PW1). Petro Owigo (PW2) identified exhibit P2 as an elephant tusk because all elephant tusks have Schreger lines which is a unique and distinguishing feature only found in elephant tusks, throughout the animal kingdom.

The appellant's defence was that the piece of the elephant tusk was not his, although he was arrested with it. According to him, he requested for, and was given a free ride to Engaruka by Shongoni and Lemeli on their motorcycle, who carried the piece of elephant tusk. He added that,

during the ride he was made to sit on the said Government trophy but before they were to arrive at their destination, they were intercepted by PW3, PW4 and other game officers who arrested him. During his arrest, Shongoni and Lemeli, fled from the scene and disappeared, leaving behind not only the motorcycle, but also the piece of elephant tusk.

After considering the above versions of the facts, the High Court believed the prosecution case and convicted the appellant and sentenced him as indicated earlier on. As alluded to above, the decision of the High Court aggrieved the appellant. Thus, he first filed a memorandum of appeal containing five grounds, and later through Mr. John Shirima, learned advocate, filed a supplementary memorandum containing two more grounds. When this appeal was called on for hearing, Mr. Shirima appeared for the appellant, and teaming up for the respondent Republic, were Ms. Janeth Sekule, learned Senior State Attorney, assisted by Mses. Lilian Kowelo, Neema Mbwana and Tusaje Samwel, all learned State Attorneys.

At the outset, Mr. Shirima abandoned three grounds which left the appeal predicated upon a total of four grounds; two from the initial memorandum of appeal, and the other two, from the supplementary memorandum; which are the following: -

"1. That, the trial court proceedings is tainted with gross and incurable procedural irregularities which render the whole decision null and void.

2. That, the learned trial Judge erred in law and in fact by failing to notice the patent inconsistencies and contradictions in the evidence of the prosecution witnesses.

3. That, the learned trial Judge erred in law and in fact by convicting and sentencing the appellant without considering that the prosecution failed to call material witnesses.

4. That, the learned trial Judge erred in law and in fact for failure to evaluate the evidence which was tendered by PW1 which raised reasonable doubt."

The appellant's grievance in the first ground was that the original charge in the committal court, indicated that the offences in both counts, were committed in Longido District within Arusha Region, while in the information filed in the High Court indicated that, the offences were committed at Engaruka area in Monduli District also within Arusha Region. It was Mr. Shirima's contention that, as long as there was no amendment of the original charge, the trial based on the information which was not in conformity with the charge in the committal court, was a nullity. To

support his position, he referred us to the case of **Michael Gabriel v. R,** Criminal Appeal No. 240 of 2017 (unreported). On that score, he prayed that the said ground of appeal be upheld and the trial be nullified.

In reply, Ms. Mbwana was brief. She first conceded that indeed, the information was not in conformity with the charge in the committal court, but was quick to add that, the charge upon which the appellant was tried was the information that was presented to the High Court and all evidence that was adduced supported the information in the High Court and not the charge in the committal court. According to her, as long as the appellant was tried on an information presented to the High Court, which was the court clothed with jurisdiction to try the offence, it was immaterial that the information was not conforming to the charge in the committal court. Her point was that the appellant was not prejudiced, because he was tried and convicted on an information that pointed out the ingredients of the offence which were well understood to the appellant and the same was proved. She thus, moved the court to dismiss the first ground of appeal for want of merit.

We have carefully considered the appellant's complaint in the ground of appeal under consideration together with arguments of learned counsel and we think, the appropriate issue to resolve is whether a

decision of the High Court can be vitiated by a mere fact that an information upon which the trial was conducted, did not conform to the charge sheet which was presented to the committal court for inquiry purposes.

In this case we patiently studied the record of appeal and we have noted that indeed, whereas in the original charge it is indicated that the offences were committed in Longido District, the information showed that the scene of crime was at Engaruka in the District of Monduli, a completely different geographical location. The question to be determined is whether, that discrepancy is material to vitiate the proceedings in the High Court.

Fortunately, this is not the first time that this Court entertains a similar scenario. In **Sano Sadiki and Another v. R**, Criminal Appeal No. 623 of 2021 (unreported), the charging section as well as the value of the narcotic drugs in the charge sheet at the committal court, were different from the section of the law and the value of the illicit drugs in the information before the High Court. Considering the effect of the stated non-conformity of the information to the charge, this Court stated: -

> *"The 2nd appellant's second limb on the information was that the charge as read out in the committal court and the High Court differed, to which complaint the learned State Attorney conceded.*

However, she contended that the charge at the committal court was of no effect as the appellants were not allowed to enter a plea while the information on which they were asked to enter their plea was filed in the court with competent jurisdiction. We agree with the learned State Attorney's line of argument. Even if the two charges were different in the number of packets and value of the drugs, the former charge had no bearing to their trial and conviction, since everything was pegged on the latter charge. In this regard, the appellants could not have been prejudiced ".

In this case, the place at which the appellant committed the offence is what was different. In the charge at the committal court, it shows that the offences were committed in Longido District, while the information shows the offences to have been committed at Engaruka area in Monduli District. However, PW3 and PW4 testified that, the offences were committed at Engaruka in Monduli District. This evidence matches in all fours with that of the appellant who also testified that, he was arrested with the Government trophy at the same location, Engaruka area in Monduli District, the place mentioned in the information. As observed in the case of **Sano Sadiki** (supra), we are of a firm position that the appellant was not prejudiced at all, because even his own evidence

confirms the particulars of offence in the information, as to the place he was arrested with the piece of elephant tusk.

In this case, we differ with Mr. Shirima's reasoning and application of the case of **Michael Gabriel** (supra), because in that case; **First,** whereas the charge indicated that the offence was committed at Ng'arwa-Orikiu in Ngorongoro District, the evidence was that the offence was committed about one kilometre from Loliondo town. So, there was a discrepancy between the charge and the evidence, unlike in this case where there is no discrepancy between the information and the evidence. **Second,** in that case, the court was the same and the charge was the same, while in this case the difference is the charge in the committal court and the information in the High Court. For these reasons, the first ground of appeal has no merit, and we dismiss it.

Next is the second ground of appeal. The appellant's complaint in that ground is that the High Court failed to note that the prosecution evidence was contradictory and inconsistent, thus vitiating the prosecution case. In support of that ground, Mr. Shirima highlighted one contradiction between the evidence of PW3 and PW4. He contended that, whereas PW3 testified that from Mto wa Mbu the appellant was taken straight to KDU in Arusha, PW4 testified that from Mto wa Mbu, the

appellant was taken to Arusha Central Police Station as the first destination from Mto wa Mbu. He submitted that those statements were inconsistent with the statement of PW5 who testified that, during the night at 03:00 hours on 29th November, 2017, he recorded the cautioned statement of the appellant at KDU. Mr. Shirima referred us to this Court's decision in **Elisha Edward v. R**, Criminal Appeal No. 33 of 2018 (unreported), moving us to hold that those witnesses' evidence had no weight, and for that reason, we discredit it and hold that the case against the appellant was not proved to the required standard.

In reply, Ms. Mbwana agreed with her counterpart on the inconsistence between PW3 and PW4, but disagreed with him on the impact; arguing that, the inconsistence did not go to the root of the prosecution case. She submitted that the inconsistence complained of, was minor and insignificant such that, it did not at all affect the prosecution case. She even argued that minor inconsistencies in a party's case are healthy because then, the court is assured that the case was not a framed case, and that the witnesses were not couched on what to testify in court. On the latter point, the learned Senior State Attorney referred us to the case of **EX G 2434 PC George v. R**, Criminal Appeal No. 8 of 2018 (unreported). She thus beseeched us to dismiss the ground of

appeal because, the inconsistence complained of, was minor and inconsequential.

We have duly considered the contending arguments of counsel for the parties in view of the evidence of PW3, PW4 and PW5, and we think that the issue for determination in this ground is whether the inconsistence complained of, was material to the extent of going to the very root of the case for the prosecution. A careful study of the aspect of the case complained of, is the place or the destination where the appellant was taken when the arresting officers left Mto wa Mbu towards Arusha. Clearly, PW3 stated that from Mto wa Mbu, the appellant was taken to KDU and then later to Arusha Central Police Station. The same evidence was also adduced by PW4 at page 64 of the record of appeal when he stated: -

> *"After seizure, we took the accused to Mto wa Mbu Police Station while waiting for our vehicle from Arusha. After our vehicle arrived around 23:00 hours, we drove to Arusha, KDU. After arrival, the accused was taken to Central Police Arusha."*

This evidence, harmonizes, is consistent and corroborates that of PW3, such that to that point we do not find any inconsistence. However, during cross-examination, PW4 stated: -

"From Mto wa Mbu we headed to Arusha Central Police."

That is to say, part of the evidence of PW4 (the first quotation above) as to where the appellant was taken from Mto wa Mbu, is not contradictory to what PW3 stated, but the second part (the second quotation) is not in conformity with the evidence of PW3.

As for PW5, his evidence was that on 29th November, 2017, he was assigned to go to KDU Arusha to record the appellant's cautioned statement, which he did. That was the main theme of his evidence, otherwise he did not testify as to the first destination where the appellant, from Mto wa Mbu, was taken. Thus, a complaint targeting his evidence as being contradictory with any other evidence on where the appellant was first taken from Mto wa Mbu, has no merit.

The law on contradictory evidence as developed by this Court, is that not every discrepancy of any magnitude, even the minor, has ability to corrode proceedings and collapse a party's case. In the case of **Dickson Elia Nsamba Shapwata and Another v. R,** Criminal Appeal No. 92 of 2007 (unreported), we observed as follows:-

"Normal discrepancies in evidence are those which are due to normal errors of observation; normal errors of memory due to lapse of time,

due to mental disposition such as shock and horror at the time of the occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a case, material discrepancies do."

Simply put, minor inconsistencies within the evidence of one witness or between the evidence of two or more witnesses, which do not shake a party's case, cannot adversely affect the decision reached by relying on such evidence. Only major and serious discrepancies going to the very root of the case with ability to shake its core foundation, are the only contradictions that law regards as material and consequential to a party's case.

With that principle in mind, we will briefly examine what was the case before the trial court, and what was the inconsistence about. The case before the trial court was that of unlawful possession of Government trophy and unlawful dealing in the trophy. The inconsistence however,

was about the first destination of the appellant when he was transferred from Mto wa Mbu to Arusha City following his arrest.

In our view, the issue of where the appellant was taken first after his arrest, was not a relevant fact or matter to the prosecution case. It was miscellaneous and ancillary. The issue had nothing to do with unlawful possession of the government trophy or unlawful dealing in the trophy that the appellant was found with. In other words, the place at which the appellant was taken first between KDU and Arusha Central Police Station is irrelevant and inconsequential to the case that was facing him. Thus, it is our firm position that, the inconsistence in the evidence of PW3 and PW4 was minor and immaterial to the case of the prosecution.

Finally on this ground, we acknowledged that, at page 85 of the record of appeal, in the ruling of the trial within trial, the learned trial Judge made a finding that there was a material contradiction between the evidence of PW3 and PW5 in respect of time at which the appellant was interviewed and a cautioned statement taken. Nonetheless, the contradiction detected was remedied by declaring the cautioned statement of the appellant as inadmissible. We wish to add that, the said contradiction had nothing to do with possession and dealing in the

Government trophy which was the case facing the appellant. In the event, the second ground of appeal has no merit and it is hereby dismissed.

In the third ground of appeal, the appellant complains that the prosecution did not call material witnesses. In support of this ground, Mr. Shirima submitted that, PW3 at page 61 of the record of appeal, testified that the arresting team consisted of five men in the vehicle including Joseph Masele, the driver and two other game officers. Mr. Shirima's strongest argument was that the driver and the two wildlife officers were to be called to give evidence, allegedly because they were material witnesses. To back his point, he relied on the case of **Paschal Mwinuka v. R**, Criminal Appeal No. 258 of 2019 (unreported), where this Court relying on another decision in the case of **Aziz Abdallah v. R** [1991] T.L.R. 91, held that, where a witness who is in a better position to explain some missing links in a party's case is not called without any sufficient reason being shown by the party, an adverse inference may be drawn against that party. Based on that, he implored us to allow the ground of appeal.

In reply, Ms. Mbwana contended that, the witnesses that the prosecution called to prove the case were sufficient, and calling any more witness could not have added any value to the prosecution case. She also

wondered how could the appellant's side demand more witnesses without disclosing those witnesses' identities. She concluded her submissions by referring us to section 143 of the Evidence Act, which provides that there is no minimum or maximum number of witnesses that a party is obligated to call.

We have thoroughly considered the above ground of appeal and the respective submissions of counsel. In disposing it, the issue for our resolution is whether there were material witnesses who were in a better position to explain certain significant aspects in the case, which were not explained because of the material witnesses' absence.

At this point, we wish to firmly state that under the law, generally the mandate and prerogative to choose which witnesses to call for establishing a party's case and which ones to leave out, is entirely and exclusively resident in the domain of that party. It is also not necessary for a party, to call a large number of witnesses for purposes of proving a fact which may be proved by one credible witness or fewer witnesses. What matters in law is the weight and credibility of the evidence and not the number of witnesses who adduced it. We must also observe that, a material witness is not a witness who would come to narrate a similar story as other witnesses who have already testified. A material witness,

as was held in the case of **Aziz Abdallah,** is a witness who is in a better position to explain a particular aspect or point in a party's case, which without such witness, the point would not be adduced as part of the evidence. In this case, we think, PW2, PW3 and PW4 were the witnesses whose evidence was essential for establishing the offences of unlawful possession and unlawful dealing in the Government trophy, the subject matter of the case at the trial.

Thus, the issue whether there were material witnesses who were in a better position to explain how the appellant committed the offences, and were not called by the prosecution, is answered in the negative; that there were no such witnesses who were not called to give evidence. That means the third ground of appeal has no merit, and we dismiss it.

We will then move to the fourth ground of appeal. The appellant's dissatisfaction in that ground is that, the evidence of James Anthony Kugusa (PW1), was not supposed to be considered because it raised reasonable doubts. In supporting that ground of appeal, Mr. Shirima submitted that, based on what he had submitted supporting the second ground of appeal, the prosecution failed to prove the case against the appellant at the trial. He complained about failure by the prosecution to tender the torch and the telephone gadgets which PW3 and PW4 used to

identify the Government trophy at the scene of crime. He insisted, those items were, by law supposed to be tendered.

In reply to that ground, Ms. Mbwana submitted that the case against the appellant was proved beyond reasonable doubt. She narrated how PW3 and PW4 arrested the appellant with the Government trophy and the entire process from seizure of the trophy, the documentation accompanying it up to tendering of the evidence by the prosecution witnesses. She submitted that the appellant's own evidence proved that he was arrested with the trophy and added that, on allegation the trophy did not belong to the appellant lacked sufficient proof. All in all, she concluded, the prosecution proved the case to the hilt.

As regards this ground of appeal, the issue for resolution is whether the evidence of PW1 was not supposed to be taken into account by the trial court because it raised reasonable doubts. According to the record of appeal, PW1 was the exhibits' custodian at Anti-Pouching Unit in Arusha. As per his evidence contained at page 47 to 51 of the record of appeal, his major role in the case was to explain to the trial court how he received the exhibits from PW3 and PW4 upon their return from Engaruka and Mto wa Mbu with the appellant. He testified that around 02:00 hours on 29th November, 2017, upon arrival from Engaruka, the team leader PW3

handed over to him one piece of the seized elephant tusk and they both filled in a handover form and signed it. He tendered that handover form in court, and it was admitted as exhibit P1. This witness also tendered exhibit P2, the elephant tusk, the subject matter of the trial. Mr. Arnold Ojare, learned advocate for the appellant neither objected to tendering these exhibits, nor did he question their authenticity. Indeed, exhibit P2 was the elephant tusk that the appellant admitted to be arrested with at the scene of crime.

At the hearing before us, we did not hear Mr. Shirima challenging any aspect of this witness' evidence, and indeed we do not find any issue with the evidence of PW1. In our view, had that evidence been problematic, the learned counsel for the appellant would have been emphatic on that aspect, as he was with the evidence of other witnesses in other grounds of appeal. That said, we find no valid arguments to support this ground of appeal. In the circumstances, the issue on whether the evidence of PW1 created reasonable doubts, is answered in the negative. In conclusion, we hold that the fourth ground of appeal has no merit and for that reason, we dismiss it.

By way of conclusion, we wish to affirm that, in view of the evidence that was tendered at the trial, we have no doubt in our mind that the case

against the appellant on both counts, was proved beyond reasonable doubt.

Before getting to the very end of this judgment, we wish to make one observation. This is in relation to the period of time that the appellant spent in custody awaiting his trial and before his conviction and commitment to prison. According to the record of appeal, the appellant was arrested on 28th November, 2017, but convicted and committed to prison on 23rd July, 2020, being about two years and seven months difference. At the hearing we asked counsel for the parties to address us on whether the trial court was supposed to consider and waive the period from the date of arrest to the date of sentencing, in view of the provisions of section 172 (2) (c) of the CPA.

Ms. Mbwana submitted that, at the time of sentencing the appellant, the trial court ought to have considered the period spent by the appellant in custody and deduct it from the years he was sentenced to prison. The same position was shared by Mr. Shirima.

Indeed, we agree with learned counsel on their shared position. Section 172 (2) (c) of the CPA provides that:-

> *"Where a person has been in remand custody for a period awaiting trial, his sentence whether it is*

under the Minimum Sentences Act, or any other law, shall start to run when such sentence is imposed or confirmed as the case may be, and such sentence shall take into account the period that the person has spent in remand."

Thus, in terms of the above provision, at the time of sentencing the appellant, the trial court ought to have considered the period that the appellant stayed in custody and deduct it from the sentence imposed. In the case of **Sano Sadiki** (supra), this Court held that section 172 (2) (c) of the CPA is applicable even where the sentence imposed is under the Minimum Sentences Act.

As there was an error in the decision of the High Court on the aspect of sentencing, we invoke this Court's revisionary powers under section 4 (2) of the Appellate Jurisdiction Act, and reverse the sentence imposed on the appellant by deducting two (2) years, seven (7) months and twenty-five (25) days being the period between 28th November, 2017, and 23rd July, 2020, from the mandatory sentence of twenty (20) years that was imposed by the High Court. Accordingly, the appellant shall now serve a sentence of seventeen (17) years, four (4) months and five (5) days in each count, counting from 23rd July, 2020, subject to relevant laws applicable in computing custodial duration, when a warrant committing

him to prison was issued by the High Court. The terms of imprisonment shall run concurrently.

In the final analysis, except for the issue of sentencing in respect of which we have already made appropriate orders and directions, this appeal has no merit, and the same is hereby dismissed.

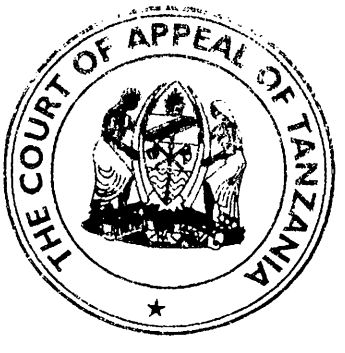
DATED at **ARUSHA** this 29th day of August, 2023.

M. A. KWARIKO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

A. S. KHAMIS
JUSTICE OF APPEAL

The judgment delivered this 30th day of August, 2023 in the presence of John Shirima, learned advocate for the appellant and Tusaje Samwel, learned State Attorney for the respondent Republic, is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL