IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: JUMA, C.J., NDIKA, J.A., And MAKUNGU, J.A.)

CRIMINAL APPEAL NO. 69 OF 2020

GEORGE LAZARO OGUR ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

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

dated the 4th day of October, 2019
in
Economic Case No. 2 of 2019

.....

JUDGMENT OF THE COURT

21st & 23rd February, 2023

NDIKA, J.A.:

George Lazaro Ogur, the appellant, and another person, Makia Labia Samaja who is not a party to this appeal, were tried before the High Court of Tanzania, Corruption and Economic Crimes Division sitting at Arusha (Matupa, J.) with unlawful possession of government trophies. The charge was laid under section 86 (1) and (2) (b) 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

16 (a) and 13 (b) respectively of the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016 ("Act No. 3 of 2016"). While the appellant was convicted of the offence, the said Makia Labia Samaja was acquitted. Consequently, the trial court sentenced the appellant under section 86 (2) (a) of the WCA to fifteen years' imprisonment. Resenting the conviction and sentence, the appellant has now appealed.

The background to the appeal is as follows. The prosecution alleged that on 7th January, 2018 at Kisongo area in Arumeru District within Arusha Region, the appellant and the said Makia Labia Samaja were found possessing seven pieces of elephant tusks presumed to have been extracted 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 property of the Government of the United Republic of Tanzania without a permit from the Director of Wildlife.

Based on a tip from an informer, PW2 Inspector James Kilosa, a police officer from the Anti-Poaching Unit, Northern Zone at Arusha commonly known as *Kikosi Dhidi ya Ujangili* (KDU), arranged an undercover operation on 7th January, 2018 to entrap certain persons said to be offering for sale what was believed to be elephant tusks at an area in

Kisongo, Arusha. After communicating with the vendors, it was agreed that PW2 should meet them on that day around 16:00 hours. PW2 went along with Solomon Jeremiah, a Wildlife Officer stationed at KDU Arusha, to the agreed place known as A to Z, in a bushy spot in Kisongo, where he met the appellant who came riding on a motorcycle with the said Makia Labia Samaja, carrying a polythene bag containing what was believed to be elephant tusks. After a short conversation and upon being satisfied that what the duo were selling were real elephant tusks, PW2 and his colleague disclosed their identities and managed to arrest the appellant. In a scuffle that preceded the arrest, the said Makia Labia Samaja fled the scene but was lured back to Arusha on the following day whereupon he was arrested.

PW2 adduced further that the polythene bag contained seven pieces of elephant tusks, which they seized along with the appellant's motorcycle, Toyo make with registration number MC601ASS, and a Samsung cellphone. He filled out and signed a certificate of seizure (Exhibit P10) and then had it signed by Solomon Jeremiah and the appellant to evidence the capture of the tusks. One Sailep Mayinga (PW3), a passerby who coincidentally witnessed the confiscation, also signed the certificate as an independent eyewitness. Then, the appellant and the seized tusks were ferried to KDU

Arusha. PW2 handed over the tusks around 19:00 hours to PW1 Elidaima Akyoo, a wildlife conservator and storekeeper, as per a handing over certificate dated 7th January, 2018 (Exhibit P1).

The storekeeper (PW1) stored the tusks at KDU under lock and key but allowed PW4 Yassin Omari Beleko, a Wildlife Warden at KDU, to access them on 9th January, 2018 for assessment of their 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"). The handing over between PW1 and PW4 was attested by Exhibit P2. PW4 confirmed at the trial, based on his expertise in wildlife management, that the seized material was elephant tusks presumably extracted 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. He tendered in evidence a certificate of trophy valuation (Exhibit P11). After the assessment, PW4 returned the tusks to PW1 who kept them in the store until 20th September, 2019 when he took them to the trial court for tendering as exhibits. They were admitted as Exhibits P3 to P9.

Further evidence came from Assistant Inspector Kaitila Machunde (PW5) who recalled having interviewed the said Makia Labia Samaja and

recorded his cautioned statement (Exhibit P12) on 8th January, 2018 between 12:30 and 14:00 hours at KDU Arusha. We should pause here to remark that the learned trial Judge later discounted the statement on the ground that it was recorded during the said accused person's extended incarceration contrary to the dictates of sections 50 and 51 of the Criminal Procedure Act ("the CPA") and section 106 (3) of the WCA.

Both the appellant and his co-accused interposed the defence of general denial. So far as the appellant is concerned, he, at first, refuted the prosecution's version that he was arrested in the evening of 7th January, 2018. It was his case that he was arrested in strange circumstances by certain wildlife officers on 8th January, 2018 around 19:00 hours while attending to customers at an eatery in Kisongo, which was his place of business. He claimed that initially the said officers alleged that he was being booked for causing environmental degradation by chopping off forests for production of charcoal and firewood. It seems that the charge was connected to a stockpile of charcoal and firewood at the eatery. He said the charcoal was for the eatery business purposes, not for retailing. He was then arrested and taken to KDU for interrogation. Later, he learnt

with shock that the initial charge had been changed to unlawful possession of government trophies, which he avowed to have not committed.

As hinted earlier, the trial court found the charge proven against the appellant but acquitted his co-accused of the offence. So far as the appellant is concerned, the trial court made three pertinent findings: first, the trial court acknowledged that there were apparent discrepancies between the testimonies of the two key persons who were at the scene (PW2 and PW3) on the timing of the events on the material day and whether the appellant's co-accused was also spotted at the scene. On the authority of this Court's decisions in **Jeremiah Shemweta v. Republic** [1985] T.L.R. 228 and **Amiri Mohamed v. Republic** [1994] T.L.R. 138, the trial court took the view that the disparities complained of were trifling; that they did not affect the cogency and reliability of the prosecution case placing the appellant at the scene in possession of the seized tusks.

Secondly, having reviewed the evidence on record in its totality, the trial court reasoned and concluded, as shown at page 242 of the record of appeal, that:

> *"In the present case, there is both oral and documentary paper trail to show that the first*

accused person [the appellant herein] was arrested at A to Z junction. He was arrested with the trophies and that they were documented right from the point of arrest, and also, there is oral evidence to that effect. I am satisfied that there is adequate evidence to establish the paper trail as well as the oral evidence .... I am satisfied that the parcel contained the elephant tusks."

Thirdly, while aware that in assessing the punishment to be awarded to the appellant under section 86 (2) (a), (b) and (c) of the WCA the trial court was enjoined by section 114 (1) and (3) of the WCA to compute the value of the trophy in accordance with the certificate of value of the trophies made under the Regulations, it found the certificate made by PW4 (Exhibit P11) worthless for being made contrary to the dictates of the Regulations. The court reasoned that the value ought to have been assessed as per rule 3 (2) and Item 87 of the First Schedule to the Regulations based on the state and weight of the tusks as opposed to Item 18 requiring computation upon the value of the entire animal killed. In the premises, the court held that the value of the trophies was not established for it to "convict" and sentence the appellant under section 86 (2) (b) and so, it resorted to convicting him of "the lesser offence" under section 86 (2)

(a) and sentencing him to fifteen years' imprisonment. The trial court predicated its approach on section 300 of the CPA allowing conviction for a minor offence where the substantive offence is not established.

The appellant initially challenged the conviction and sentence on eight grounds contained in the memorandum of appeal he lodged on 6th July, 2021. At the hearing of the appeal, the appellant's counsel, Mr. Asubuhi John Yoyo, predicated the appeal on four grounds, cited in a supplementary memorandum of appeal he lodged on 15th February, 2023 in substitution for the previous one, as follows:

1. *That, the learned High Court Judge grossly erred in law by failing to objectively evaluate the evidence and subjecting it to an objective scrutiny and, consequently, he convicted the appellant on a charge that was not proven to the standard required.*
2. *That, the learned High Court Judge grossly erred in law by pegging the appellant's conviction on Exhibit P10 which did not meet the threshold required by the law.*
3. *That, the learned High Court Judge grossly erred in law by convicting the appellant based on weak, incoherent, incredible, and unreliable evidence.*
4. *That, the learned High Court Judge grossly erred in law by ignoring the appellant's defence which raised reasonable doubt as*

to whether there was a common intention between the appellant and his co-accused jointly charged.

Ms. Tarsila Asenga, learned Senior State Attorney, who was accompanied by Mr. Charles Kagirwa and Ms. Jackline Linus, learned State Attorneys, stoutly opposed the appeal on behalf of the respondent.

We begin with the first ground of appeal. Mr. Yoyo's essential submission on this ground was that the charged offence was unproved primarily because the prosecution failed to establish the value of the trophies (Exhibits P3 to P9). He supported the trial court's view that PW4's evidence as unveiled in Exhibit P10 was worthless because the computation of the value contravened rule 3 (2) and Item 87 of the First Schedule to the Regulations. Furthermore, he faulted the trial court for "convicting" the appellant of the "lesser offence" under section 86 (2) (a) of the WCA, contending that the alleged lesser offence was equally unproved, if not inexistent. Section 300 of the CPA, he added, was inapplicable in the case. To bolster his submission, he cited **Emmanuel Lyabonga v. Republic**, Criminal Appeal No. 257 of 2019 (unreported) on proper valuation of government trophies. Further reference was made to **Kulwa Nassoro Mohamed v. Republic**, Criminal Appeal No. 183 of 2018 (unreported) on the application of section 300 of the CPA.

Ms. Asenga resolutely disagreed with her learned friend. She argued that the absence of proof of the value of the trophies was inconsequential to both the conviction and eventual sentence. Elaborating, she submitted that apart from the valuation not being an ingredient of the offence charged, the penalty to be imposed on the offender would not be levied under section 86 (2) of the WCA based on the value of the trophies involved but under section 60 (2) of the EOCCA following the amendments introduced by Act No. 3 of 2016. She added that, in any event, the charged offence was sufficiently proved as it was established in the evidence that the appellant was found possessing the trophies and that he failed to prove in terms of section 100 (3) of the WCA that he had the requisite permit for such possession.

To resolve the issue at hand, we wish to observe, at the forefront, that the gravamen of the offence the appellant faced is possession of government trophy as defined by sections 3 and 85 of the WCA without the permit of the Director of Wildlife. Once it is established by the prosecution that the accused was found in possession of a substance that is a government trophy contrary to section 86 (1) of the WCA, the burden would lie in terms of section 100 (3) (a), (c) and (d) of the WCA on the

accused to establish whether the said possession was lawful or that he assumed the possession in order to comply with the requirements of sections 85 and 86 or that the trophy is not a government trophy. It is, therefore, too plain for argument that the value of a trophy involved in any case is not an ingredient of the offence of unlawful possession of government trophy.

Certainly, the value of the trophy involved, computed pursuant to sections 86 (3) and (4) and 114 of the WCA, remains a statutory factor for determining the punishment to be imposed as prescribed by section 86 (2) (a), (b) and (c) of the WCA once an accused is convicted of unlawful possession of government trophy. However, as the Court stated in **the Director of Public Prosecutions v. Papaa s/o Olesikadai @ Lendemu & Anor**, Criminal Appeal No. 48 of 2020; and **Hamisi Juma @ Seleman @ Isaya v. Republic**, Criminal Appeal No. 63 of 2020 (both unreported), the punishment under the aforesaid section 86 (2) (a), (b) and (c) of the WCA would not apply as the law now stands. This is because following the amendments made by Act No. 3 of 2016 making the offence of unlawful possession of government trophy an economic offence triable under the EOCCA, the penalty to be imposed for that offence is provided

under section 60 (2) of the EOCCA, which is the overriding punishment provision for corruption or economic offences – see again **Papaa s/o Olesikadai** (*supra*) and **Hamisi Juma** (*supra*). See also **Anna Moises Chissano v. Republic**, Criminal Appeal No. 273 of 2019 (unreported).

At this point, we are satisfied, at first, that the learned trial Judge's holding that the value of the trophies was unproven following his discounting of PW4's evidence on that aspect had no bearing on the impugned conviction. Secondly, we agree with Mr. Yoyo that the learned Judge slipped into error in pegging the conviction upon what he called "lesser offence" under section 86 (2) (a) as opposed to section 86 (2) (b) of the WCA. As rightly argued by Mr. Yoyo, both paragraphs (a) and (b) of section 86 (2) constitute punishment provisions, not provisions creating the charged offence. The impugned conviction, therefore, should have rested under section 86 (1) of the WCA. At any rate, the said error was innocuous; it is not decisive on the outcome of this appeal as it does not vitiate the conviction. On that basis, the first ground of appeal fails.

As mentioned earlier, the complaint in the second ground of appeal faults the trial court for acting on the certificate of seizure (Exhibit P10) as the basis of the conviction. On this ground, Mr. Yoyo criticized the trial

court for treating Exhibit P10, shown at page 221 of the record of appeal, as conclusive proof that the appellant was found with the tusks. He argued, in the first place, that the certificate was illegal for contravening section 38 of the CPA, as it purported to evidence results of a search mounted without any search order or search warrant. Relying on **Stephen s/o Jonas & Another v. Republic**, Criminal Appeal No. 337 of 2018 (unreported), he determinedly argued that there were no justifying circumstances that would have made the search and seizure an emergency one fitting within the scheme of section 42 of the CPA. PW2 and his colleague, he said, had ample time since the morning of the fateful day to seek and obtain a requisite search order or warrant but went to the scene in disregard of the dictates of the law. On that basis, he urged us to discount the certificate.

Conversely, Ms. Asenga countered that the certificate was not treated by the trial court on its own as conclusive proof of the seizure as claimed by her learned friend. She said that the trial court considered the certificate along with the evidence of PW2 and PW3. On the legality of the search, she submitted that it was carried out as an emergency search in terms of section 42 of the CPA because the suspects, who were targeted to be

traced and arrested, were in a movement. The learned Senior State Attorney added that the veracity and reliability of the certificate was beyond reproach primarily because it was duly signed at the scene by the appellant himself as well as the independent witness (PW3).

We are aware that section 38 (1) of the CPA empowers any officer in charge of a police station to search or give written authority to any police officer under him to search any building, vessel, carriage, box, receptacle, or place if he is satisfied that there is reasonable ground for suspecting that in the said building, vessel, carriage, box, receptacle, or place there is anything with respect to which an offence has been or is about to be committed. On the other hand, section 42 (1) (a) of the same law allows any police officer to search any person suspected by him to be carrying anything concerned with an offence.

In the instant case, PW2 adduced that the search and seizure were effected under the aforesaid section 42. Indeed, it is true that the exercise did not involve any search of a building, vessel, carriage, box, receptacle, or place for it to fall under section 38. We uphold Ms. Asenga's submission that the search fitted neatly under section 42 because it involved entrapment of suspects who were in a movement such that no search

order or written authority would be ideal in the circumstances. Certainly, PW2 clearly averred how the undercover buy-and-bust operation was executed. The appellant and his colleague revealed the tusks after PW2 and his colleague had offered to buy them. Moreover, the fact that the certificate was signed by the appellant and PW3 as an independent witness gives credence to its veracity and reliability. Overall, we are satisfied that the trial court did not rely on the certificate on its own as conclusive proof of the seizure of the tusks; it considered it along with the testimonies of PW2 and PW3. The second ground of appeal is equally bereft of merit.

We now turn to ground 3 whose essence is the contention that the impugned conviction lay on weak, incoherent, incredible, and unreliable evidence.

Addressing us on the above ground, Mr. Yoyo argued that the prosecution case was mainly built on the testimonies of PW2 and PW3 as well as the certificate of seizure (Exhibit P10) but that it was so weak, contradictory, and unreliable. He elaborated that the prosecution's claim that PW2 received information from an informer was unsubstantiated and that the absence of proof of the alleged phone communication between PW2 and the appellant on the arrangement to meet later at the scene at

16:00 hours was fatal to the prosecution case. Furthermore, he argued that the testimonies of PW2 and PW3 were contradictory as to what happened at the scene of the crime.

Beginning with PW2's testimony, the learned counsel said PW2 indicated at the trial that he and his colleague were first to arrive at the scene. Referring to PW3's testimony, however, he argued that the witness initially claimed in his evidence in chief to have seen a scuffle at the scene involving four persons and that one of them fled the scene. PW3 adduced further that he was subsequently called by PW2 and his colleague to witness at the scene the seizure of what looked like elephant tusks after the duo had introduced themselves as police officer and wildlife officer respectively. The learned counsel, then, claimed that PW3's version changed in cross-examination when he said that it was the rider and his passenger on the motorcycle that arrived at the scene first and that the two officers (PW2 and his colleague) came later and arrested the appellant.

Replying, Ms. Asenga submitted that in terms of section 143 of the Evidence Act the prosecution's case hung on the quality of its evidence but not the number of witnesses produced at the trial. She said that calling the informer as a witness or production of the cellphone communication record

was unnecessary and immaterial. As regards the alleged disparities between the testimonies of PW2 and PW3, she urged us to find them insignificant.

In resolving the issues at hand, we wish to stress the evidence on record that the appellant was arrested at the scene of the crime in a buy-and-bust operation. If the testimonies of PW2 and PW3 are to be believed, the appellant was entrapped and caught at the scene *in flagrante delicto*. On this basis, the testimony of the informer, who was most probably not at the scene at the time of the arrest and seizure, was immaterial. Similarly, we wonder what difference the cellphone communication record would have made in the circumstances of this case.

As regards the disparities between the testimonies of PW2 and PW3 alluded to by Mr. Yoyo, we would, at first, acknowledge that they exist. In fact, the learned trial Judge acknowledged them too in his judgment at pages 233 and 234 of the record of appeal. It should be observed, however, that contradictions by any witness or among witnesses cannot be avoided in any case: see, for example, **Dickson Elia Nsamba Shapwata v. Republic**, Criminal Appeal No. 92 of 2007 (unreported). In **Evarist**

Kachembeho & Others v. Republic [1978] LRT n.70, the High Court rightly held, that:

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

In the circumstances, the critical issue in any case is whether the disparities complained of affected the cogency and reliability of the prosecution case.

It is unmistakable from the record that the learned trial Judge was alive to the above standpoint and that, having scrutinized the issue, he took the view that the disparities complained of were trifling. Having reviewed the evidence, we uphold the learned Judge's finding. It is in the evidence that the two witnesses observed the events at the scene of the crime from different vantage positions. They testified on 20th and 23rd September, 2019, which was almost twenty months after the incident. Given these circumstances, their accounts could not be similar especially in minute details. As we held in **Masanja Mazambi v. Republic** [1991] T.L.R. 200, such minor disparities or variations are, if anything, a healthy sign that the witnesses had not rehearsed the evidence before testifying.

Despite the discrepancies, their testimonies in totality were to the effect that the appellant was at the scene of the crime at the material time in possession of the seized tusks. We are, therefore, satisfied that the disparities did not affect the cogency and reliability of the prosecution case on that aspect. Accordingly, we find the third ground unwarranted.

The grievance in the fourth of appeal that the appellant's defence was not duly considered now comes for consideration.

Submitting on the above complaint, Mr. Yoyo referred us to the appellant's testimony at pages 99 to 101 of the record of appeal and contended that the appellant denied having been arrested at A to Z area in Kisongo on 7th January, 2018. The appellant, he said, was arrested at his eatery on 9th January, 2018. The learned counsel contended that this piece of evidence was not analysed along with the evidence by the appellants' co-accused who, apart from denying liability, adduced that he was arrested in Singida on 7th January, 2018. Mr. Yoyo insisted that the prosecution failed to establish whether the two persons had a common intention to pursue a criminal venture.

Ms. Asenga responded that the appellant's defence was essentially an *alibi*, but it was raised rather belatedly during his testimony, without any prior notice. She added that there was no need for proof of common intention between the appellant and his co-accused who was acquitted. It was her further submission, based on the evidence of PW2 and PW3, that it was unassailable that the appellant was arrested at the scene with the tusks.

We have reviewed the evidence on record in its totality as well as its analysis by the learned trial Judge while mindful of the contending submissions by the learned counsel. With respect, we do not agree with Mr. Yoyo's submission. It is apparent from the impugned judgment that the learned trial Judge rightly observed that the appellant raised the defence of general denial as opposed to *alibi* as he did not state where he was on 7th January, 2018, the fateful day. The learned Judge rightly assessed the appellant's claim and rejected it, in view of the evidence of PW2 and PW3 as well as the certificate of seizure (Exhibit P10) placing him at the scene of the crime on the fateful day. We have stated time and time again that the defence of general denial is inherently self-serving and very weak. In the instant case, it was rightly rejected by the trial court as it dissipated

once the court believed PW2 and PW3's evidence, which was supported by the certificate of seizure (Exhibit P10). Moreover, the alleged absence of proof of common intention between the appellant and his co-accused is beside the point. The appellant was prosecuted and convicted of a criminal act that he directly committed. As provided by section 23 of the Penal Code, common intention only arises as a necessary ingredient of an offence when a criminal act is done by several persons in furtherance of their common intention. In such a case, each of such persons would be liable for the act in the same manner and as if the act were done by him alone. That said, we find the ground at hand similarly without any merit.

Based on the foregoing discussion, we find no difficulty to conclude, as we must, that the prosecution sufficiently established that the appellant was arrested on the fateful day at the scene of the crime in possession of what PW4 later confirmed to be seven pieces of elephant tusks (Exhibits P3 to P9). The tusks were undisputedly government trophies. Moreover, the appellant failed to discharge the burden on him, in terms of section 100 (3) (a), (c) and (d) of the WCA, whether he had a requisite permit for such possession or otherwise that the said possession was lawful. Accordingly, we uphold his conviction under section 86 (1) of the WCA.

Finally, we round off with the propriety of the sentence imposed on the appellant. The learned counsel for both sides acknowledged that the trial court should have sentenced the appellant under section 60 (2) of the EOCCA as section 86 (2) of the WCA was inapplicable. We agree with them. The said section 60 (2) provides 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."* [Emphasis added]

As we stated recently in **Papaa s/o Olesikadai** (*supra*) and **Hamisi Juma** (*supra*), section 60 (2) above is the overriding penalty provision for any corruption or economic offence, the charged offence in the instant case being one such economic offence – see also **Anna Moises Chissano**

(*supra*). Given this position, the appellant, 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. Invoking our revisional jurisdiction under section 4 (2) of the Appellate Jurisdiction Act, we set aside the illegal sentence of fifteen years imprisonment imposed on him and substitute for it the sentence of twenty years imprisonment.

In the final analysis, we dismiss the appeal in its entirety.

DATED at **ARUSHA** this 23rd day of February, 2023

I. H. JUMA
CHIEF JUSTICE

G. A. M. NDIKA
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Judgment delivered this 23rd day of February, 2023 in the presence of Mr. Asubuhi Yoyo, learned counsel for the appellant also in presence of the appellant and Ms. Jacqueline Linus, learned 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