IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: WAMBALI, J.A., KEREFU, J.A. And MAIGE, J.A.)

CRIMINAL APPEAL NO. 397 OF 2021

HAMISI HASSANI JUMANNE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Dar es Salaam)

(Mbagwa, J.)

dated the 2nd day of July, 2021
in
Criminal Appeal No. 256 of 2020

JUDGMENT OF THE COURT

17th February & 1st March, 2023

KEREFU, J.A.:

In the Resident Magistrate's Court of Kibaha, the appellant, Hamisi Hassani Jumanne was charged with and convicted on two counts. The first count was on unlawful possession of government trophies contrary to section 86 (1), (2) (c) (iii) and (3) (b) of the Wildlife Conservation Act No. 5 of 2009 (now Cap. 283 R.E. 2022) (the WCA) as amended by Written Laws (Miscellaneous Amendments) Act No. 2 of 2016 read together with paragraph 14 of the First Schedule to and sections 57 (1) of the Economic and Organized Crime Control Act [Cap. 200 R.E. 2002] (the EOCCA) as

amended by the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016. The second count was on unlawful dealing in government trophies contrary to sections 80 (1) and 84 (1) of the WCA read together with paragraph 14 of the First Schedule to and sections 57 (1) and 60 (1) and (2) of the EOCCA.

On both counts, it was alleged that on 1st December, 2017 at Chalinze Kimange, Stand Area within Bagamoyo District in Coast Region, the appellant was found in unlawful possession of and dealing with government trophies, *to wit,* two (2) elephant tusks valued at USD 15,000 equivalent to TZS. 33,645,000.00, the property of the United Republic of Tanzania without permit from the Director of Wildlife.

The appellant pleaded not guilty to the charge. However, after a full trial, he was found guilty, convicted and sentenced to twenty years imprisonment for the first count and for the second count, he was ordered to pay fine at the tune of TZS. 67,290,000.00 or to serve four years imprisonment in default. The sentences were ordered to run concurrently.

In essence, the substance of the prosecution case, as obtained from the record of appeal is to the effect that, on 1st December, 2017, while PF 19781 Ass. Insp. Aliko Mwakalindile (PW1) together with other police officers were at Chalinze Kimange, Stand Area following a tip from an

informer on the elephant tusks' business which was to take place at that area. It was the testimony of PW1 that at 12:50 hours, while there posed like a buyer, he managed to arrest the appellant who was holding a small black bag which he was informed that it had elephant tusks inside. PW1 stated further that having arrested him, he put him inside the police motor vehicle and he called independent witnesses namely, Kulwa Raphael Ngweta (PW2), the Kimange Ward Executive Officer and Hussein Idd Machoka to witness the search. PW1 testified further that, having searched the appellant's bag, in the presence of the said independent witnesses, two elephant tusks were found tied in a nylon paper covered with a piece of sulphate bag. PW1 stated that, they seized the two elephant tusks, prepared a certificate of seizure which was signed by the appellant, PW2 and himself as a maker. PW1 stated further that, he then marked the elephant tusks as K1, K2 and the case file No. CHA/IR/2691/2017. The two elephant tusks, the nylon bag, piece of sulphate bag and the black bag were all admitted in evidence collectively as exhibit P1 and the certificate of seizure as exhibit P2, respectively.

Subsequently, the appellant together with the two seized elephant tusks (exhibit P1) were taken to Chalinze Police Station where exhibit P1 was handed over to the exhibit keeper No. D.7742 SGT Hassan (PW3) via

handing over form (exhibit P3). In his testimony, PW2 supported the narration made by PW1 and added that, during the search, he asked the appellant about the elephant tusks and the appellant admitted that they belonged to him.

In his testimony, PW3 confirmed to have received exhibit P1 on 1st December, 2017 and stored it in the exhibit room. Then, on 3rd December, 2017, he handed over exhibit P1 to Mrekwa Salmon Foka (PW6), a Wildlife Officer who acknowledged by signing exhibit P3. PW6 testified further that he identified the tusks that they were from an elephant and valuated them at USD 1500 and returned exhibit P1 to PW3. He then prepared a valuation certificate which was admitted in evidence as exhibit P5. Thereafter, On 4th December, 2017, again, through signing of exhibit P3, PW3 handed over exhibit P1 to PW1 who took it to Dar es Salaam and then later, tendered it in court.

No. G.4057 SGT Issa (PW5), the investigation officer testified that he was involved in the investigation of the incident and interviewed the appellant who confessed to have been found in possession of the said trophies. The appellant's cautioned statement was admitted in evidence as exhibit P4.

In his defence, the appellant denied to have committed the offence. In particular, he contended that on 1st December, 2017 while at Kwamduma Village, he was approached by PW1 who asked to be escorted to a witchdoctor one Msukuma. A moment later, PW1 also asked to be taken to the main road to withdraw some cash. Upon reaching there, the appellant saw a motor vehicle with police officers who arrested and put him in the motor vehicle. He asked them to call an independent witness to witness the search exercise. That, later he was brought to Chalinze Police Station where he was tortured to admit the offence. He asserted that he informed the police that the owner of exhibit P1 is Mzee Mwalonde who is also a witchdoctor and he wandered why the police failed to arrest him.

After a full trial, the trial court accepted the version of the prosecution's case and the appellant was found guilty, convicted and sentenced as indicated above. The appellant's appeal to the High Court was unsuccessful. Aggrieved, the appellant has preferred the present appeal. In the memorandum of appeal, he raised nine grounds which can be conveniently paraphrased as follows: **one**, that the search and seizure of exhibit P1 was illegal for want of warrant of arrest and search order; **two**, PW1 was uncredible and unreliable witness and his evidence was not corroborated; **three,** the testimonies of PW1, PW3 and PW6 were tainted

with contradictions and inconsistencies on how exhibit P1 was labelled, thus unreliable; **four**, PW1, PW3 and PW5 were uncredible and unreliable witnesses as their evidence was tainted with contradictions on the time between the appellant's arrest and recording of his cautioned statement; **five,** the evidence of PW2 was unreliable on the seized items as he found the appellant already arrested; **six**, exhibits P1, P2, P3, P4 and P5 were unprocedurally admitted in evidence; **seven,** the prosecution case was poorly investigated and badly prosecuted; **eight,** the appellant's defence was not considered; and **nineth**, the prosecution case was not proved beyond reasonable doubt.

At the hearing of the appeal, the appellant entered appearance in person whereas the respondent Republic was represented by Ms. Rehema Mgimba, learned Senior State Attorney.

When given an opportunity to argue his appeal, the appellant adopted the grounds of appeal and his written submission lodged in Court on 28th November, 2022 to form part of his oral submission. It is noteworthy that in his written submission, the appellant did not specifically submit on the third and fourth grounds as he indicated that they are self-explanatory.

On the adversary side, Ms. Mgimba after having stated categorically that the respondent Republic is opposing the appeal, she intimated that she will respond to the grounds of appeal as argued by the appellant in his written submission. We shall therefore determine the grounds of appeal, in the same manner as indicated above and the related grounds will be determined conjointly.

However, before doing so, it is crucial to state that, this being a second appeal, under normal circumstances, we would not interfere with concurrent findings of the lower courts if there were no mis-directions or non-directions on evidence. Where there are mis-directions or non-directions on the evidence, the Court is entitled to interfere and look at the evidence with a view of making its own findings. See for example **Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] T.L.R. 149, **Salum Mhando v. Republic** [1993] T.L.R. 170 and **Mussa Mwaikunda v. The Republic** [2006] T.L.R. 387. We shall be guided by the above principle in disposing this appeal.

The appellant's complaint under the first ground is to the effect that his arrest and search was conducted contrary to the Police General Orders (the PGO) and the Criminal Procedure Act [Cap. 20 R.E. 2019] (the CPA). He further contended that, the search was not conducted as an emergency

measure, as having received a tip from an informer on the alleged elephant tusks' business, PW1 had ample time to prepare warrant of arrest and search within the dictates of the law. It was his argument that, since that was not done and he was searched without search warrant then the said search was illegal. He thus urged us to find that exhibit P1 was illegally obtained and disregard it.

In response to this ground, Ms. Mgimba challenged the appellant's complaint to have no basis. She argued that, since the appellant was charged with economic offences governed by the WCA and the EOCCA, the search was conducted in terms of section 106 (1) (c) of the WCA, which permits search to be conducted even without search warrant. She insisted that, PW1, being an investigator in the office of the Director of Criminal Investigation in Dar es Salaam then, he had powers to arrest and conduct search on the appellant without search warrant. She thus urged us to find that the first ground of appeal is with no merit.

Having closely considered the parties' submissions and examined the charge sheet found at pages 1 and 2 of the record of appeal, we find the appellant's complaint under this ground unfounded. We shall demonstrate. As argued by Ms. Mgimba, the offences the appellant was charged with are governed by the WCA and the EOCCA. Pursuant to section 106 (1) of the

WCA, a search in respect of such offences is allowed to be conducted even without search warrant. For clarity, the said section provides that:

"106. -(1) Without prejudice to any other law, where any authorized officer has reasonable grounds to believe that any person has committed or is about to commit an offence under this Act he may –

(a) require any such person to produce for his inspection any animal, game meat, trophy or weapon in his possession or any iicence\permit either issued to him or required to be kept by him under the provisions of this Act or the Arms and Ammunitions Act;

(b) enter and search without any warrant any land, building, tent, vehicle, aircraft or vessel in the occupation or use of such person, open and search any baggage or other thing in his possession: Provided that no dwelling house shall be entered into without a warrant except in the presence of at least one independent witness; and

(c) seize any animal, livestock, game meat, trophy, weapon, licence, permit or other written authority, vehicle, vessel or aircraft in the possession or control of any person and, unless he is satisfied that such person will appear and answer any charge which may be preferred against him, arrest and detain."

In terms of the above section, any authorized officer is allowed to conduct search without warrant but in the case of a dwelling house in the

presence of at least one independent witness is mandatory as per the proviso. In the instant appeal, there is no dispute that the search was conducted by PW1 who was a police officer in the office of the Director of Criminal Investigation in Dar es Salaam thus fall within the category of "authorized officers", as defined by section 3 of the WCA, vested with powers of inspection, search, seizure and arrest under that section. Moreover, since the said search exercise was witnessed by PW2, an independent witness, we have no hesitation to agree with the learned Senior State Attorney that the operation was properly conducted.

Although, we have also noted that the said search was not an emergence one, as according to PW1 they were tipped by an informer on the intended illegal business but it is also on record that the said informer did not specifically reveal the name of the suspect nor the specific venue where the said business is going to take place to enable PW1 to prepare an arrest order and/or search warrant as claimed by the appellant. However, since under the cited above section PW1 had powers to conduct search without warrant, we find the first ground devoid of merit.

On the sixth ground, the appellant contended that exhibits P2, P3, P4 and P5 were unprocedurally admitted in evidence as their contents were

not read over after admission in evidence contrary to the requirement of the law. As such, the appellant prayed for the said exhibits be expunged.

In response, Ms. Mgimba challenged the appellant's complaint on exhibit P4 by referring us to page 111 of the record of appeal and argued that the said exhibit had already been expunged by the first appellate court. She however, readily conceded that exhibits P2, P3 and P5 were unprocedurally admitted in evidence as their contents were not read out after their admission in evidence. She thus also urged us to expunge them. Nonetheless, she was confident that, even if the said exhibits are expunged, it would not affect the strength of the prosecution's case because their contents were adequately explained by oral accounts of PW1 and PW6. She therefore urged us to find that there is still sufficient evidence to sustain the appellant's conviction.

After having perused the record of appeal, we agree with Ms. Mgimba that the appellant's complaint on exhibit P4 has no basis, because as reflected at page 111 of the record of appeal, the said exhibit was expunged by the first appellate court. Likewise, we even find the appellant's complaint in the fourth ground of appeal to have no basis as the said complaint was on the contradictions between the evidence of PW1, PW3 and PW5 in relation with the time he was arrested to the time

of recording exhibit P4. Now, having intimated above that exhibit P4 had been already discounted by the first appellant court, we find the appellant's complaint under the fourth ground unfounded.

As for exhibits P2, P3 and P5, we agree with both parties that the same were unprocedurally admitted in evidence as, indeed, the record of appeal bears it out at pages 47, 48 and 58 that their contents were not read out after admission in evidence. We thus outrightly discount them.

Nevertheless, we equally agree with Ms. Mgimba that, even after discounting the said exhibits, the available oral accounts of PW1, PW2 and PW6 is quite sufficient to establish on how the appellant was arrested, searched and found with exhibit P1 which was confirmed to be elephant tusks. For instance, at page 45 of the record of appeal, PW1 clearly explained on how they arrested the appellant, searched and found him with exhibit P1. PW2, an independent witness also at page 49 of the same record testified on how he witnessed the search exercise, found the two elephant tusks (exhibit P1) retrieved from the appellant's bag, who admitted to be his and all signed the certificate of seizure. Likewise, PW6 at page 58 of the record of appeal testified on how he received exhibit P1, identified it to be elephant tusks, valuated them and found that they are worth 15,000 USD which is equivalent to TZS. 33,645,000.00. We therefore

only allow the sixth ground of appeal to the extent that exhibits P2, P3 and P5 are discounted as explained above.

The appellant's complaint on the eighth ground hinges on the failure by the lower courts to consider his defence evidence. He contended that, both lower courts did not objectively evaluate and/or analyze his defence evidence and no reasons were assigned for such omission. It was his argument that the said omission had occasioned miscarriage of justice on his part. To buttress his proposition, he cited the cases of **Hussein Idd and Another v. Republic** [1986] T.L.R. 166 and **Mkaima Mabagala v. Republic,** Criminal Appeal No. 267 of 2006 (unreported).

Responding to this ground, Ms. Mgimba was very brief and to the point that both lower courts sufficiently considered the appellant's defence and rejected it for being incapable of weakening the prosecution case. To clarify her argument, she referred us to pages 85, 110 and 111 of the record of appeal. She thus distinguished the two cases above relied upon by the appellant by arguing that facts in those cases are not relevant to the circumstances of the current appeal. She thus urged us to dismiss the eighth ground for lack of merit.

Having perused the record of appeal, we agree with Ms. Mgimba that the appellant's complaint under this ground is not supported by the record,

as it is vivid at pages 85, 110 and 111 of the record of appeal that both lower courts adequately considered and weighed the appellant's defence against the prosecution case but rejected it. For sake of clarity, we excerpt the relevant part of the first appellate court's reasoning and finding on the appellant's defence at page 110 to 111 of the record of appeal thus:

> *"I agree with Mauya's submission that the trial court considered the appellant's defence and found it too weak to raise reasonable doubt. The trial court said, 'The accused did not dispute to be at Kwamduma area and to have seen PW1 the arresting officer, what he states in contest to the averments is that PW1 was looking for a witchdoctor and he, the accused was arrested in the process of directing PW1 to the witchdoctor.' I have taken this being the strong portion of the defence case against the entire evidence by the prosecution. Finally, what I have found is that, the averments for not at all give doubt to the facts constituting the offence."*

Having reviewed the above finding and reasoning, we agree with the learned Senior State Attorney that the appellant's complaint under the eighth ground of appeal is baseless. We equally agree with Ms. Mgimba's submission that the cases of **Hussein Idd and Another** and **Mkaima Mabagala** (supra) cited by the appellant are distinguishable and not applicable in this appeal because in those two cases, the appellants'

defences of *alibi* were completely not considered which is not the case herein. We thus dismiss the eighth ground of appeal for lack of merit.

Back to the remaining grounds. We have observed that, the appellant's main complaint in the second, third, fifth, seventh and nineth grounds, is to the effect that the prosecution case was poorly investigated and thus not proved to the required standard due to uncredible witnesses whose testimonies were tainted with contradictions and inconsistencies on how he was arrested, searched and labelling of exhibit P1.

Specifically, the appellant argued that although, in his testimony PW1 testified that at the scene of crime he was with other police officers, none of them was summoned to testify before the trial court to shed more lights on what transpired at the scene. He argued further that PW1 did not even produce his photograph(s) at the scene of crime to substantiate his allegations on the said illegal business. He wondered that, even after he revealed to PW1 that, the owner of exhibit P1 was one Mzee Mwalonde, the said Mwalonde was not traced and brought to court as either an accused person or a witness. He equally wondered as why both lower courts did not draw adverse inference on the prosecution side for such failure. To bolster his proposition, he cited **Aziz Abdallah v. Republic**

[1991] T.L.R. 71 and **Boniface Fundakira Tarimo v. Republic,** Criminal Appeal No. 350 of 2008 (unreported).

Furthermore, the appellant also challenged the evidence of PW2 to be unreliable because he found him already arrested and did not witness where exhibit P1 was retrieved. To support his argument, he cited the case of **Shabani Said Kindamba v. Republic,** Criminal Appeal No. 390 of 2019 (unreported). In addition, the appellant contended that PW1, PW3 and PW6 were uncredible and unreliable witnesses as their evidence was tainted with contradictions on how exhibit P1 was labelled. That, while PW1 testified that he labelled exhibit P1 with marks K1 and K2 together with case file No. CHA/IR/2691/2017, PW3, the custodian of exhibits at Chalinze Police Station, testified that he received exhibit P1 from PW1 which was labelled with only the file case number and PW6, in his testimony, he only mentioned marks K1 and K2. Based on his submission, the appellant concluded that the prosecution case was not proved to the required standard and urged us to allow the appeal and set him at liberty.

On the credibility of PW1, Ms. Mgimba argued that, PW1 was credible and reliable witness as he clearly narrated on how they received a tip from an informer on the intended illegal business of elephant tusks, went to Chalinze Kimange, posed like buyers finally, how they managed to arrest

the appellant with his small black bag that had elephant tusks inside. She added that, the evidence of PW1 was corroborated by PW2, PW3 and PW6. Specifically, Ms. Mgimba referred us to page 49 of the record of appeal, where PW2, an independent witness, testified that when they found two elephant tusks in the appellant's bag, he interrogated him on the tusks and the appellant admitted that they belonged to him. It was her argument that, since from the record of appeal, the appellant did not cross examine PW2 on that aspect, he in effect accepted the evidence of PW2. She thus distinguished the case of **Shabani Said Kindamba** (supra) relied upon by the appellant that is not applicable in the circumstances of this appeal as in that case the search did not comply with the mandatory provisions of the WCA as it was conducted illegally which is not the case herein.

As for the alleged contradictions in the evidence of PW1, PW2 and PW3 on the labelling of exhibit P1, Ms. Mgimba argued that there is no any contradiction as all witnesses referred to the marks and the case file number already mentioned by PW1. That, in his testimony, PW1 stated that he labelled exhibit P1 with three marks, K1, K2 and the case file number, whereas PW3, the custodian, testified that he received exhibit P1 which was marked with the case file number and PW6 mentioned only the two marks.

On the failure by the prosecution to summon the police officers who were alleged to be at the scene and one Mzee Mwalonde mentioned by the appellant to be the owner of the exhibit P1 as material witnesses, Ms. Mgimba argued that the burden of proof in criminal cases lies squarely on the prosecution shoulders and the standard has always been proof beyond reasonable doubt. She further cited section 143 of the Evidence Act [Cap. 6 R.E. 2019] (the Evidence Act) and argued that, the said law does not require a specific number of witnesses to prove a fact, what is required is the quality of evidence and credibility of witnesses. She thus insisted that, in the instant appeal, the prosecution case was proved beyond reasonable doubt through the evidence of PW1, PW2, PW3 and PW6 who clearly narrated all the stages followed and properly established the chain of custody and sufficiently proved that the appellant was found in possession of the trophies. That, having established its case against the appellant, the prosecution found it unnecessary to summon other witnesses. She thus also urged us to find that the second, third, fourth, seventh and nineth grounds are devoid of merit. In conclusion and on the strength of her submission, she urged us to find the appellant's appeal unmerited and dismiss it in its entirety.

In a brief rejoinder, the appellant did not have much to say other than urging us to allow the appeal and set him at liberty.

Having carefully considered the submissions by the parties on the credibility of PW1, PW2, PW3 and PW6 and to answer the question as whether the prosecution case was proved to the required standard, we find it apposite to revisit the relevant evidence of PW1, PW2, PW3 and PW6. In his testimony found at page 45 of the record of appeal, PW1 testified that:

> *"I recall on 01/12/2017 concerning this case, I was at Chalinze Coast Region where I was making a foliow up on the information, we got from the informer on the elephant tusks. I was with a team of police officers whom were about three police officers. The informer directed us to the scene of crime where there was a business of the elephant tusks. At about 12:50pm, while we were at Kimange Bus Stand, I succeeded to arrest the accused person. He had a small black bag of which we were told that therein were the elephant's tusks. We pretended as buyers hence he came directly to the motor vehicle with the informer and after arrest we put him in our motor vehicle. He got in with his bag. Immediately, after the arrest, I called independent witnesses... I ordered him to open a bag in the presence of the WEO and a secondary school teacher. Inside the bag we saw two elephant tusks and he admitted that it was elephant tusks. They were in the nylon paper and it was covered with the piece of sulphate*

bag. Thereafter, I prepared a seizure certificate and the accused as well as the witnesses signed therein. Hence from there, I also signed it as a maker. I also put a mark of K1 and K2 to show that they were seized at Kimange...I also put the mark of the registration number of the case CHA/IR/2691/2017."

Then, at page 49 of the same record, PW2, an independent witness to the search exercise testified that:

"...I went up to the bus stand where I found police officers and other people. I saw the accused who carried a black bag and he was under arrest. From there the accused opened his bag and I saw the plastic bag and piece of elephant tusks...I asked the accused about his personal particulars and he said he was from kwamduma and ***he admitted to me that the elephant's tusks belong to him and there was a form which we signed. I saw PW1 marking the elephant tusks as K1 and K2****." [Emphasis added].*

Furthermore, PW3, the custodian at page 52 of the record of appeal, testified that he received exhibit P1 which was marked with the case file No. CHA/IR/2691/2017 and PW6 at page 58 of the same record, testified that the elephant tusks he examined, identified and valuated were marked K1 and K2.

From the above excerpt of the testimonies of the four prosecution witnesses, it is our settled view that the appellant's conviction was firmly grounded. It is in evidence that PW1 had communications on the phone with the informer on the illegal elephant tusks business hence PW1 and his team went to the scene and posed as buyers to buy the said trophies. While there, the appellant and the said informer showed up and directly went to the motor vehicle to negotiate the business, where the appellant was outrightly arrested. From this conduct at the scene, it is inferable that through the informer the appellant had prior communications with PW1 over the proposed dealing. Furthermore, PW2, an independent witness who witnessed the search exercise clearly testified that when they found two elephant tusks in the appellant's bag and interrogated him, the appellant admitted that they did belong to him. It is on record, and as rightly submitted by Ms. Mgimba that during the trial, the appellant did not cross examine PW2 on that aspect and he never disputed his oral confession. It is trite law that, a party who fails to cross examine a witness on a certain matter is deemed to have accepted it and will be estopped from asking the court to disbelieve what the witness said, as silence is tantamount to accepting its truth. We find support in our previous decisions in **Cyprian Athanas Kibogoyo v. Republic,** Criminal Appeal

No. 88 of 1992 and **Hassan Mohamed Ngoya v. Republic,** Criminal Appeal No. 134 of 2012 (both unreported). It is also undisputed that PW6, the wildlife officer and valuer, verified exhibit P1 and vouched that it was elephant tusks. It is therefore our considered view that PW1, PW2, PW3 and PW6 were credible witnesses and their evidence sufficiently established that the appellant was found in possession of the elephant tusks. It is also on record that, in convicting the appellant, the trial court at page 84 of the record of appeal relied mainly on the evidence of PW1, PW2, PW3 and PW6 who clearly narrated all the stages followed and properly established the chain of custody of exhibit P1.

On the failure by the prosecution to summon the police officers who were alleged to be at the scene and Mzee Mwandole who was mentioned by the appellant to be the owner of exhibit P1, we wish to state that, as correctly argued by Ms. Mgimba, the burden of proof in criminal cases lies on the prosecution shoulders and the standard is proof beyond reasonable doubt. Therefore, the prosecution was at liberty to bring only those witnesses who could advance their case regardless of the number – see section 143 of the Evidence Act. What is required is the quality of evidence and the credibility of the witnesses. This position has been emphasized in several decisions of this Court. See for instance, the cases of **Yohanis**

Msigwa v. Republic [1990] T.L.R. 148, **Hassan Juma Kanenyera v. Republic** [1992] T.L.R. 100 and **Mwita Kigumbe Mwita & Another v. Republic**, Criminal Appeal No. 63 of 2015 (unreported). In the latter case, the Court stated that:

> *"In each case, the court looks for quality, not quantity of the evidence placed before it. The best test for the quality of any evidence is its credibility. It was for the prosecution to determine which witness should prove whatever fact it wanted."*

Being guided by the above authorities, we agree with Ms. Mgimba that the appellant's complaint on this aspect is meritless.

On the alleged contradictions and inconsistencies in the evidence of PW1, PW2 and PW3 on the labelling of exhibit P1, having revisited the evidence of these witnesses on this aspect, we agree with the submission of Ms. Mgimba that there is no any contradiction as in their testimonies PW2, PW3 and PW6 all referred to the marks and the case file number already mentioned by PW1. In any case, and even if we assume that such contradictions do exist, we still do not, with respect, consider them to be material to the extent of affecting the credibility and reliability of PW1, PW2, PW3 and PW6. It has been the position of this Court that contradictions by witness or between witnesses is something which cannot

be avoided in any particular case - see **Dickson Elia Nsamba Shapwata and Another v. Republic,** Criminal Appeal No. 92 of 2007 and **Marmo Slaa @ Hofu & 3 Others v. Republic,** Criminal Appeal No. 246 of 2011 (both unreported). The same position was also taken in the case of **Issa Hassan Uki v. Republic,** Criminal Appeal No. 129 of 2017 (unreported) while citing with approval the High Court's decision in **Evarist Kachembeho and Others v. Republic** [1978] L.R.T 70 where it was observed, rightly so, that:

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

In the same case of **Issa Hassan Uki** (supra), the Court also referred to the case of **John Gilikola v. Republic,** Criminal Appeal No. 31 of 1999 (unreported) where it was stated that due to frailty of human memory and if the contradictions or discrepancies in issues are on details, the Court may overlook such contradictions and discrepancies. Therefore, in the light of the above position of the law, we find the inconsistencies and discrepancies complained of did not corrode the evidence of prosecution witnesses. In totality and upon a careful re-appraisal of the evidence on record, we are satisfied that both lower courts adequately

evaluated the evidence on record and arrived at a fair conclusion. It is therefore, our settled view that there is no fault in the factual findings of the two courts below on these grounds for this Court to interfere. We are satisfied that, the evidence taken as a whole establishes that the prosecution's case against the appellant was proved beyond reasonable doubt. In the event, we equally find the second, third, fifth, seventh and nineth grounds of appeal to have no merit.

At the closure of parties' submission, and being aware of section 60 (2) of EOCCA as amended by sections 16 (a) and 13 (b) of the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016, we invited the parties to address us on the propriety or otherwise of the sentence imposed on the appellant in respect of the second count, that is, to pay fine at the tune of TZS 67,290,000.00 or to serve four years imprisonment term in default. Both parties did not have much to say and they left it upon us to decide the appropriate sentence in accordance with the law.

It is on record that the appellant was charged with economic offences governed and regulated by the EOCCA and WCA. Section 60 (2) of the EOCCA as amended provides that:

> *"Notwithstanding provisions of a different penalty under any other law and subject to subsection (3), 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 that 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."

In addition, sub-section (7) of section 60 of the EOCCA provides for factors to be considered in assessing the sentence where mitigation is among them unless circumstances of the case do not allow. It is our considered view that, since the said amendments came into force on 8th July, 2016 and the offence was committed on diverse dates between November to December, 2017 after the coming into force of the amending section, it was an oversight on the part of the trial court to have not complied with the letter of section 60 (2) of the EOCCA as amended, as being a first offender, the prosecution had no previous criminal record on him.

In the circumstances, we invoke our revisional powers bestowed on the Court under section 4 (2) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2019] to set aside the sentence imposed on the appellant in respect of the second count and replace it with one of twenty years in prison without

any option of fine to run concurrently with the other sentence imposed on him in respect to the first count.

In the upshot, save for the adjusted sentence, the appeal stands dismissed.

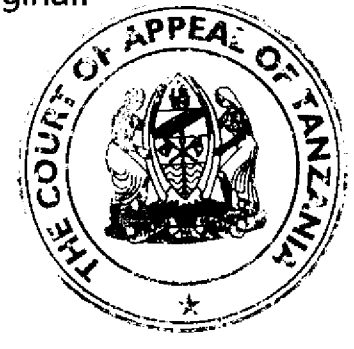
DATED at **DAR ES SALAAM** this 28th day of February, 2023.

F. L. K. WAMBALI
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 1st day of March, 2023 in the presence of Appellant via Video Link and Mr. Nassoro Katuga, learned Senior State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



S.P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL