IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: LILA, J.A., GALEBA, J.A. And MGEYEKWA, J.A.)

CRIMINAL APPEAL NO. 431 OF 2020

METWII PUSINDAWA LASILASI ..... APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Arusha)
(Luvanda, J.)

dated the 28th day of February, 2020
in
Corruption Economic And Crimes No. 18 of 2019

.....

JUDGMENT OF THE COURT

9th & 23rd February, 2024

LILA, J.A.:

Metwii Pusindawa and Maoya Sindore Kumbuni, the 1st and 2nd appellants, respectively, together with two other persons namely Kerekuu Julius Sindila and Stephen Musonda Silungwe @ Mchungaji, were arraigned before the High Court of Tanzania sitting at Arusha to answer a charge comprising one count of unlawful possession of Government Trophies (twenty pieces of elephant tusks equivalent to five killed elephants) contrary to sections 86 (1), (2)(b) of the Wildlife Conservation Act No. 5 of 2009 read together with sections 57 (1) and 60 (2) of the Economic and

Organized Crime Control Act Cap 200 as amended by section 16 (a) and 13 (b) of the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016 (the EOCCA). They denied the charge and trial ensued. At the conclusion of the trial, only the appellants were convicted of the offence charged and each sentenced to pay TZS 329,100,000.00 or serve twenty years imprisonment. They did not pay the fine and are before the Court to challenge both convictions and sentences meted out against them.

The information alleged that; Metwii s/o Pusindawa Lasilasi, Maoya s/o Sindore Kumbuni, Kerekuu s/o Julius Sindila and Stephen s/o Musonda Silungwe @ Mchungaji on 10th day of February 2018 at Olkaria village within Monduli District in Arusha Region, were found in possession of government trophies to wit twenty (20) pieces of elephant tusks equivalent to five killed elephants each valued at USD 15,000 all total valued USD 75,000 (equivalent to TZS 168,900,000.00, the property of the Government of the United Republic of Tanzania without permit from the Director of Wildlife.

To prove the charge, six witnesses were summoned by the prosecution and the appellants were the sole defence witnesses. Briefly, the appellants' arrest and being arraigned in connection with the offence

was effectuated by Damas Paschal (PW3) and David Wilson Marwa (PW4), both Game Wardens, working at the Anti-Poaching Unit Mikocheni Dar- es Salaam. Acting on a tip they got from an undisclosed informer on 8/2/2018 that there were eight people selling government trophies, to wit elephant tusks, at Nanja Monduli in Arusha Region, the two pretended to be prospective buyers of elephant tusks. They left Dar es Salaam on 9/2/2018 aboard a Rav 4 motor vehicle and arrived at Arusha at about 23:00hrs as, according to the informer, the business was to be transacted at night it being an illegal business. Guided by the informer, they proceeded to Mtimmoja where they were told they would meet a certain person standing by the road who would lead them to where the tusks were. As told, they found such person who led them using a motorcycle rode by another person to a place called Olkaria located in wilderness of the savannah grasses where the luggage was kept. Upon arrival, another motorcycle arrived with two people carrying with them a sack in between them. PW3 and PW4 introduced themselves and the one who dropped from the motorcycle carrying a luggage introduced himself as Metwii and the one who led them from the road as Maoya, the appellants, and another person introduced himself as Mchungaji who vanished into thin air when

the appellants were put under arrest. The sack was opened and using flashlight from the motor vehicle, PW3 and PW4 identified twenty (20) pieces of elephant tusks which they loaded in the motor vehicle. As they had agreed to buy them by kilograms, a tree had to be found for hanging a weigh machine and Kerekuu and Mchungaji left to look for one while the appellants remained in the motor vehicle with PW3 and PW4 after the later had asked those responsible with tusks to remain in the motor vehicle. That trap having worked well, it was then when PW3 and PW4 introduced themselves as Game Wardens and arrested the appellants. PW3 filled a Certificate of Seizure (Exhibit P5) which was signed by both PW3 and PW4 as well as the appellants. That was on 10/2/2018 at night and they could not secure an independent witness due to the circumstances which obtained thereat. When asked if they had permit or license to possess the trophies, the appellants denied. Thereafter, they drove to Arusha at KDU office and handed the 20 pieces of elephant tusks in a khaki sack to the Exhibit Keeper one James Kugusa (PW1) after they (PW3, PW4 and the appellants) had signed a handover form issued by PW1. PW3 said the 1st appellant carried the sack while the 2nd appellant was the one who received them at the road side on the material date and led them to Olkaria.

PW1 received 20 pieces of Government trophies (exhibit P2) which were in a sack on 10/2/2018 from PW3 at 07.00hrs and both signed a handover form (exhibit P1) and labelled the sack Eco. No. 17/2018, the names of the appellants and Mtimmoja as the place they were seized and also each piece was numbered from one to twenty. on 12/2/2018, a Game Warden named Novatus Hillary Haule (PW2) approached requesting to see 20 pieces of elephant tusks for valuation purposes and after that he returned them to PW1 after filling a handing over certificate (Exhibit P2).

When he was cross-examined by Mr. Majura, learned advocate for the 1st appellant, he said he did not know the number of proceedings and that 20 pieces belonged to Economic Case No. 17/2018 by that time and when cross-examined by Mr. Mgalula, learned advocate for the 2nd appellant, he said he got the Economic Case Number from the prosecutor and that he received exhibit P3 from Olkaria Village.

Mr. Novatus Hillary Haule (PW2), a Game Warden stationed at Northern Zone Arusha, with five (5) years' experience, told the trial court that in identifying kinds of animals, he looks at the size of the animal, teeth, skin and hoof as some are split and others are not. That on 12/2/2018, he was tasked by his In-charge to identify the trophies and

went to PW1 who, after filling a hand over form, was issued with 20 pieces which he identified as of elephant tusks which, after joining them, they formed nine elephant tusks coming from five elephants as each one has two tusks. He said according to Valuation Rules every part of an animal is equal to a value of a whole animal and as each elephant is valued at USD 15,000, then the value of five elephants amounted to USD 75,000 which was equivalent to TZS 168,900,000.00 at an exchange rate of TZS 2,252 applicable then as per the Bank of Tanzania website. He then filled a Trophy Valuation Certificate (Exhibit P4).

Jonas Laki Fungo (PW5) an Inspector of Police, accompanied with two Game Wardens participated in tracing and arresting Kerekuu Julius Sindila at Nokanoka Village at a local brew hut and was transported to Arusha KDU. Haji Shaibu Msosa (PW6), a Game Warden, too, assisted by Cpl Michael, a policeman, in the company of an informer, was the one who arrested Mchungaji at his residence at Karatu and sent him to Karatu Police station. After being shown his statement he recorded at the police station and on being cross-examined by Mr. Mgalula, he said in his statement he recorded a case of the 4th accused (Mchungaji) as IR/21/2018 and

Economic Case No. 15/2018. He further said, in exhibit P4, the police file is IR/20/2018 but said he did not know why it was recorded so.

Two different versions were given by the appellants in their sworn defences. They refuted the accusation of being found in unlawful possession of twenty (20) pieces of elephant tusks (exhibit P3). They denied being at Olkaria village where the 20 pieces of elephant tusks were seized. Both denied any involvement in Government trophy business. In particular, the 1st appellant's defence amounted to an alibi alleging that he was arrested at his residence at Olkaria Village on 8/2/2018 by police who first inquired him as to who owned the house and he answered them positively and since he had no keys to open it, one of the policemen broke the padlock, they entered and searched but nothing was recovered. He further said, the police forced him to produce a gun he had but he maintained his position that he had no gun and was taken to KDU Arusha where he was kicked, hit with fists and club as well as holding him by the chest. He denied being charged in Economic Case No. 17/2018 but in Economic Case No. 15/2018 as well as signing the certificate of seizure and knowing either of his fellow accused with whom he was jointly charged.

On his part, the 2nd appellant linked his arrest with the debt he owed one Lomanyaki Mollel whom he had sold a farm at Komande Kilindi District but was yet to pay the full amount as he owed him TZS 800,000.00 after he had paid TZS 1,200,000.00 out of the agreed amount of TZS 2,000,000.00. As to what led to his arrest, he narrated that Mr. Mollel called him on 4/2/2018 informing him that he was ready to pay the balance hence he should go to Arusha. Those being good news to him, he, on 5/2/2018, early in the morning left to Arusha and met Mr. Mollel together with two other persons he did not know and boarded a motor vehicle belonging to Mr. Mollel. After a short ride, the three robbed him, arrested him and took him to police station and case No. 15/2018 opened. He denied being found in possession of trophies and he associated his arrest with Mr. Mollel's deliberate mission to avoid paying the money he owed him.

The trial court raised two issues to guide it in the determination of case: **first**, whether the twenty pieces of elephant tusks were seized from the accused persons and **second**; whether the chain of custody was properly maintained. Answering the first issue, the learned trial judge was convinced that the appellants fell into a trap set by PW3 and PW4 to

identify owners of the trophies by asking those concerned with the trophies to board the car and others to look for a tree to weigh the trophies and they arrested the appellants who remained in the motor vehicle. He found such evidence not shaken or discredited by way of cross-examination and ruled out that the appellants' respective defences fell short of negating the fact that they were arrested in the motor vehicle by P3 and PW4, Game Wardens who posed as potential buyers of the trophies. In respect of chain of custody, he held that the certificate of seizure and exhibits P1, P2 and P5 exhibited the chronological record of events on how exhibit P3 was handled from the time of its seizure to the time it was produced in Court. Regarding the different case numbers on the sack, he held that labelling Economic Case No 17/2018 and Economic Case No. 15/2018 on the sack which contained the trophies was inconsequential as those were not the only labels in the trophies as there were other marks such as place of seizure which showed to be Mtimmoja, name of suspects and serial numbers from 1 to 20 on the tusks which explained away the doubts. Further to that, he was of the view that more assurance was lent by PW3 and PW4 who identified the pieces of elephant tusks which were in the sack as being the ones they seized on the material date. He was, at the

end, satisfied that the appellants were found in possession of the trophies and convicted them. The findings aggrieved the appellants.

Before us, the appellants are faulting the trial court's findings upon a seven (7) point memorandum of appeal. They run thus: -

> *"1. That, the learned trial Judge erred in law and fact when he failed to see the glaring inconsistencies and contradictions in the prosecution's case.*
>
> *2. That, the learned trial Judge erred in law and fact when he failed to scrutinize the evidence of PW1 and Exhibit P3 as a result arrived at an erroneous decision.*
> *3. That, the learned trial Judge erred in law and fact to convict and sentence the appellants relying on the evidence of PW3 and PW4 as there was no independent witness according to the directives of the law.*
>
> *4. That, the trial Judge erred in law and fact for convicting and sentencing the appellants while their identification at the scene of the crime was accompanied with full of doubts and with unfavorable conditions, hence the standard required under identification was not properly proved by the prosecution side.*
> *5. That, the learned trial Judge erred in law and fact in convicting the appellant without proper evaluation of the evidence and exhibits admitted in the course of hearing.*

6. *That, the learned trial Judge erred in law and fact by failure to evaluate the evidence tendered by the defence which raised reasonable doubt.*
7. *That, the learned trial Judge erred in law and fact when he held that the prosecution has proved the case beyond a reasonable doubt."*

Subsequently, learned counsel Mr. John Melchiory Shirima who represented the appellants, lodged a supplementary memorandum of appeal comprising four grounds. The grounds read thus: -

"1. That, there was a material variance between the charge sheet and evidence on record, i.e. irregularity in the proceedings as the appellants pleaded to the charge at the subordinate court which was however not their trial court.

2. *That, the trial court erred in law and in fact by convicting and sentencing the Appellants by relying on exhibit P3 which was not among the exhibits listed during committal.*

3. *That, the trial Court erred in law and in fact by failure to address his mind on the evidence adduced by PW1 who testified that on 10/02/2018 he labelled exhibit P3 with Economic Case No. 17/2018 while the appellants or the case were not yet taken to Court.*

4. That, the trial Court erred in law and in fact when it deals with the prosecution evidence on its own and arrives at the conclusion that it was true and credible without considering the defence evidence."

Learned counsel Mr. John Melchiory Shirima represented the appellants who were also present in Court, in arguing the appeal and the respondent Republic had Ms. Riziki Mahanyu, learned Senior State Attorney, Ms. Tusaje Samwel and Ms. Eunice Makala, both learned State Attorneys to represent it. They resisted the appeal.

Upon taking the floor, Mr. Shirima dropped ground 2 of the supplementary memorandum of appeal and in the course of hearing, he dropped grounds 3 and 4 of the substantive memorandum of appeal. As for the manner of arguing the remaining grounds of appeal, he clustered grounds 1, 2, 5 and 7 of the substantive memorandum of appeal with ground 3 of the supplementary memorandum as forming one group to be argued jointly, grounds 3 and 4 of the substantive memorandum of appeal as another group but later dropped them, ground 6 of substantive memorandum of appeal and ground 4 of the supplementary memorandum to be argued jointly whereas ground 1 of the supplementary memorandum of appeal was to be argued separately.

Mr. Shirima first addressed us on grounds 1, 2, 5 and 7 of the substantive memorandum of appeal jointly with ground 3 of the supplementary memorandum. In these complaints, his attack was first directed to the contradictions which allegedly existed in the manner the container containing exhibit P3 was labelled. We are compelled to call it a container as there is another allegation to be discussed later that there was contradiction as to what exactly it was. He contended that PW1 who said he received 20 pieces of elephant tusks and labelled it as Economic Case No. 17 of 2018 while PW2 who valued the trophies said that there was no such mark when he was doing the evaluation. It was his further argument that such references did not feature in exhibits P1, P2, P4 and P5. To make things worse, he said the register showing exhibits stored by PW1 was not tendered. On this basis, it was his view that the contents in the container labelled Economic Case No. 17 of 2018 were of another case as the appellants were facing Economic Case No. 15 of 2018.

The kind of container in which the 20 pieces of elephant tusks (Exhibit P3) were kept was also taken issue by Mr. Shirima arguing that PW1 said it was sisal sack (page 55), PW4 said it was khaki sack (page 84) and PW3 called it either a sack or a bag. He faulted the learned trial judge

for treating these discrepancies as minor and inconsequential. In his view, they raised doubt on the credence of exhibit P3.

Connected with above grounds is failure by the prosecution to call an independent witness to prove that the 2nd appellant attempted to escape and was arrested by motorcyclists famously known as *"bodaboda"* boys after a short but hot pursuit.

Responding against these complaints, Ms. Samwel was firm that the inconsistences are minor not going to the root of the case. She conceded that exhibit P3 was labelled Economic Case No. 17 of 2018 but agreed with the learned trial judge who resolved the inconsistence as minor citing the case of **Mohamed Said Matula v. R** [1995] T.L.R. 3 to support his argument. Explaining further, she said according to PW2 that was not the only label or mark in exhibit P3 and to distinguish it from other exhibits in the store, the names of the accused and place of seizure was shown in exhibit P3. In the circumstances, she concluded that the inconsistence was not material.

We, indeed, agree with the learned trial judge and the learned State Attorney that the inconsistence is not material. The learned trial judge

rightly considered it and properly resolved it. We would add that if anything, the doubts were explained away by PW1 who, at page 55 of the record of appeal, explained how he labelled the container containing exhibit P3 after receiving it from Damas Paschal (PW3) thus: -

> *"On 10/2/2018 at 7.00 hours while at office proceeding with my duties, came Game Warden on Damas Paschal with two suspects and exhibits. Upon arrival, ... Mr. Damas prepared form for handing over showing his name as handing over officer, my name (receiving officer) James Kugusa, date and place of handing over as KDU Arusha, 20 elephant tusks, name of two suspects, then he signed and I counter signed, both suspects also appended their thumb prints to show that what was handed over to me was what was seized from them. In the handing over there were two suspects Metwi Kusindaga and Maoya Sindole. After handing over (receiving) those exhibits I labelled date of seizure, weight I measured and labelled. I labelled a container which is a sack of sisal, date of seizure that sack, place of seizure at Mtimmoja, name of suspect Metwi Kusindaga and another. Thereafter I procured Economic No. which I recorded in that sack which is Eco. No. 17/2018. Thereafter labelling*

those exhibits I preserved those exhibits at exhibit room KDU Arusha."

As if the above was not enough, PW1 maintained in court that he labelled Eco. No. 17/2018 and the same was admitted in court without any objection. No challenge on the contents of exhibit P3 cropped up during cross-examination which meant that there was no doubt on what was contained in it. That said, the issue that the appellants were facing Eco No. 15/2018 has no relevance here. The fact remained that what PW1 received from PW3 and labelled it remained the same from the time he received it until its production in court during trial.

Was the container a sisal sack, khaki sack or bag, to us this is not material at all. It is true that witnesses referred to the container in the manner Mr. Shirima explained. Our reading of the record shows that the witnesses used such terms interchangeably when referring to the container in which the 20 pieces of elephant tusks were kept. But, of essence, they all meant the container containing 20 pieces of elephant tusks. Here too, no challenge came from the appellants' counsel that it was not the same container seized on 9/2/2018 containing exhibit P3. So, reference to the container as being a sisal sack, khaki sack or bag was a minor discrepancy

not going to the root of the case hence did not prejudice the appellants. The general rule is that contradictions by any particular witness or among witnesses cannot be escaped or avoided in any particular case and are health as they show that the witnesses were not rehearsed before testifying [See **Dikson Elia Nsamba Shapwata & another v. Republic,** Criminal Appeal No. 92 of 2007, (unreported)]. In this case the Court acknowledged presence of normal contradictions and discrepancies that they are bound to occur in the testimonies of the witnesses due to normal errors of observation and expression and even time lapse. The clear chain of oral evidence by PW1, PW2, PW3 and PW4 on the manner exhibit P3 was handled linked the appellants with possession of exhibit P3. We have therefore failed to see how the mere labelling Eco. No 17/2018 prejudiced the appellants. These grounds have no merits and we dismiss them.

Next in line, was Mr. Shirima's contention that the defence evidence was not considered by the learned judge as complained in grounds 6 of the substantive memorandum of appeal and ground 4 of the supplementary memorandum of appeal. The substance of this complaint, according to Mr. Shirima was that the appellants denied being arrested on the dates shown in the charge and alleged being arrested on diverse dates. He was then

surprised why the prosecution refrained to produce the appellants' cautioned statements they alleged to be part of their intended exhibits during committal proceedings reflected at page 52 of the record of appeal. That failure, according to Mr. Shirima, was deliberate so as to hide the facts contained in them particularly on where and when the appellants were arrested. He beseeched us to find that the hidden cautioned statement would have revealed adverse facts to the prosecution which would have supported the defence case. He sought refuge on the case of **Hussein Idd and Others v. R** [1986] T.L.R. 166.

In another angle, Mr. Shirima faulted the learned trial judge for dismissing the appellants' defence evidences arbitrarily. His contention was primarily that, in the learned trial judge's judgment found at page 148 of the record, no reasons were assigned for holding that the defence evidence "*cannot negate a fact that they were arrested at a scene (Nanja) while dealing with elephant tusks...*" To do justice to the appellants, he sought indulgence of the Court, this being a first appeal, to step into the shoes of the trial judge and evaluate the defence evidence afresh optimistic of receiving a finding favourable to the appellants. The Case of **R v. Juma Mohamed** [1986] T.L.R. 231 was referred in cementing his contention.

Mr. Shirima's contentions could not find purchase to Ms. Samwel. She firmly resisted such assertions. Beginning with cautioned statements not being produced as evidence as suggested during committal proceedings, she agreed that there was such indication but they found it unnecessary to produce them and neither of the prosecution witnesses testified in court to the effect that the appellants' cautioned statements were ever recorded. Otherwise, she had no qualms with the Court taking over the duty of the High Court and considering the defence evidence and come up with own finding.

For the first limb in Mr. Shirima's complaint, the issue calling for our determination is, in a wider sense, whether the prosecution is bound to produce as evidence everything they would have shown or indicated during committal proceedings to be their intended evidence during the trial. In a way, this question calls us to reflect on the purpose of committal proceedings. It is common knowledge that all offences triable by the High Court have to go through committal proceedings before subordinate court in terms of sections 28 to 30 of EOCCA which are identical to sections 244 and 246 of the Criminal Procedure Act (the CPA) and during the inquiry period which is termed as pre-committal period, an accused is not

permitted to plead to the charge. His trial begins when a proper charge (information) is filed by the Director of Public Prosecutions (the DPP) before the High Court before which proceedings commences after an accused is committed to the High Court and an information is filed thereat. That means, committal proceedings are not trial proceedings. (See **The Republic v. Dodoli Kapufi and Another**, Criminal Revision No. 1 of 2008 C/F No. 2 of 2008 (unreported). It is for this reason that a magistrate presiding over such proceedings is, under section 29(3) of the EOCCA which is in *pari materia* to section 245(3) of the CPA, imperatively required to address an accused in these words: -

> *"This is not your trial. If it is so decided, you will be tried later in the High Court, and the evidence against you will then be adduced. You will then be able to make your defence and call witnesses on your behalf."*

Committal proceedings, therefore, are proceedings purposely conducted to commit an accused person for trial by the High Court. We are wide awake that the presiding magistrate is, under section 246 of the CPA which is applicable in economic cases in terms of section 28 of the CPA, obligated to *"explain or cause to be read to*

the accused person the information brought against him as well as the statements or documents containing the substance of the evidence of witnesses whom the ***DPP intends to call*** *at the trial."*

A liberal construction would have it that all the statements of witnesses and documents of which their contents are made known to the accused during committal proceeding are but the DPP's indication of what he would rely on during trial. There is no law which compels the DPP to call all witnesses whose statements were read or produce all exhibits revealed during committal proceedings. Instead, to ensure there is fair trial, the DPP is barred from producing during trial witnesses and documents which were not exposed during committal proceedings save with notice to the trial court stating the substance of such evidence under section 289 of the CPA. The appellant's complaint is therefore baseless and it fails.

Turning to the second limb, we have examined the record and satisfied ourselves that the complaint that the defence evidence was not considered and/or disregarded without assigning reasons, arises from the learned trial judge's order at page 148 of the record. The record bears out that the complained order was just a conclusion of

the learned trial judge's discussion of the prosecution evidence in which he was of the finding that the appellants were arrested in the car at the place the business of selling and buying the trophies was held. Comprehensively considered, his conclusion was that the appellants were arrested while in possession of exhibit P3. Upon a finding that the prosecution evidence placed the appellants at the scene of crime, that is red handed, he reasoned that no defence evidence could displace that fact. We think, in view of his holding above that the prosecution evidence linked the appellants with the possession of exhibit P3, he was right to hold as he did and he cannot be faulted for using the words "*the defence evidence could not negate...*" We are fortified in that position by our recent decision in **Watson Daniel Mwakasege v. Republic**, Criminal Appeal No. 666 of 2020 (unreported) in which, upon a tip that a truck driven by the appellant was carrying bhangi, police officers tracked it and the driver and arrested him. A search in it found five bags full of bhangi. The appellant, in that case raised several complaints on appeal including contradictions and worse still he disowned the truck. The Court declined to accept his defence in a

situation termed as *"buy- bust operation"* for a reason that the appellant was caught red handed citing the holding in the persuasive decision of **People of Philippines v. Garry de la Cruz** (G, R. No. 185717 of June 8 : 2011) in which the Supreme Court held: -

> *"a buy – bust operation is "a form of entrapment, in which the violater is caught in flagrante delicto and the police officers conducting the operation are not only authorized but duty-bound to apprehend the violator and to search him for anything that may have been part of or used in the commission of the crime."*

At home, in the case of **Thadeo John Bilunda and Another v. Republic**, Criminal Appeal No. 68 of 2020 (unreported), the appellants' defence was rejected on account of being found red handed in possession of a bag containing two pieces of elephant tusks after they fell into a trap set by the prosecution witnesses as is the case herein.

The above scenarios present situations which are closely identical to what happened in this case. PW3 and PW4, for the

purpose of performing their official duty of protecting wild animals, pretended to be buyers of government trophies from Dar es Salaam and managed to apprehend the appellants in possession of 20 pieces of elephant tusks. Like in two cases above, we cannot therefore afford to let the appellants who were found red handed having the pieces of tusks to evade the arm of justice on flimsy reasons. We have read the cases of **R v. Juma Mohamed** and **Hussein Idd and Others v. R** (supra) cited to us by Mr. Shirima and find them of no assistance here. We accordingly dismiss the complaints in the two grounds.

Mr. Shirima's last card was his complaint in ground 1 of appeal that the contents in the charge were not in harmony with the evidence on record. His main focus was on the alleged variance between the charge and evidence in respect of the place where the appellants were arrested. We shall link this complaint with the prosecution failure to secure independent person to witness seizure of exhibit P3. While referring to page 83 of the record where Mr. Shirima said PW4 claimed to be "Nanja Olkaria", he said the charge showed "Olkaria Village" only. He argued that the two places are

different and the discrepancy was not resolved by the prosecution. He was adamant that the discrepancy prejudiced his clients but was unable to tell us how the discrepancy prejudiced the appellants. Ms. Samwel disagreed with the contention, submitting that as the charge indicated Olkaria then there is no issue because Nanja is part of Olkaria. We need not cite an authority to bail us out for us to hold that the alleged discrepancy is so trivial that any reasonable person would not be moved to agree that it in any way worked injustice to the appellants. The learned State Attorney, rightly in our view, argued that as the particulars of the charge (information in this case) indicated "at Olkaria Village" it was sufficient information of the place the offence was committed and where the appellants were arrested. The place being at wilderness of savannah grasses and at night as was fully explained by PW3 and PW4, we agree with the learned State Attorney that it was not possible to secure an independent person to witness the arrest and seizure of exhibit P3 from the appellants. We dismiss these complaints too.

In the end, we are satisfied that the appellants were arrested red handed in possession of exhibit P3 and there was clear chronological

documentation and/or paper trail showing the seizure, custody, control, transfer, analysis, and disposition of the tusks. The testimonial accounts of PW1, PW2, PW3, and PW4 sufficiently explained the handling of the tusks from their seizure to exhibition at the trial. As the Court held in **Issa Hassan Uki v. Republic,** Criminal Appeal No. 129 of 2019, elephant tusks constitute an item that cannot change hands easily and thus it cannot be easily altered, swapped or tampered with, there was possibility of being interfered. Such is position we stance we pronounced in the case of **Song Lei v. Director of Public Prosecutions**, Consolidated Criminal Appeals No. 16A of 2016 and 16 of 2017 (unreported) where, relying on our earlier decision in **Vuyo Jack v. Director of Public Prosecutions**, Criminal Appeal No. 334 of 2016 (unreported), we held, as regards rhinoceros' horns, that: -

> *"In our considered view, since rhino horns are items which cannot easily change hands and in the absence of any evidence that Exhibit P. 13 was mishandled or handled by any other unidentified person; we are satisfied that it was at all time, from seizure to its tendering at the trial under the control and supervision of PW5 and the chain of custody was not broken."*

From the above proposition, in our decided view, there is no substance in this appeal.

In the final analysis, we hold that the appeal is without merit. We dismiss it in its entirety.

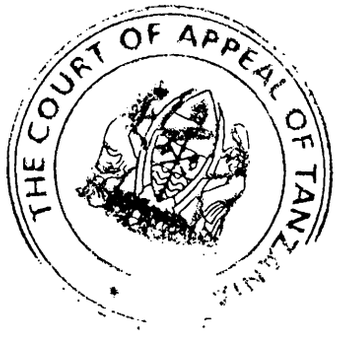
DATED at **ARUSHA** this 23rd day of February, 2024.

S. A. LILA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

The Judgment delivered this 23rd day of February, 2024 in the presence of Mr. Hendry Simon Katunzi holding brief for Mr. John Melchiory Shirima, learned counsel for the Applicants, and Ms. Neema Mbwana, learned State Attorneyfor the Respondent/Republic, is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL