IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: SEHEL, J.A., KIHWELO, J.A. And KHAMIS, J.A.)

CRIMINAL APPEAL NO. 151 OF 2021

SHABANI ALLY ATHUMAN..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Mashaka, J.)

dated the 13th day of November, 2020
in
Economic Case No. 02 of 2020

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JUDGMENT OF THE COURT

13th & 19th March, 2024

SEHEL, J.A.:

In the High Court of Tanzania, Corruption and Economic Crimes Division, Arusha Sub Registry (the trial court), the appellant was prosecuted and convicted of the offence of unlawful possession of government trophy contrary to section 86 (1) and 2 (b) of the Wildlife Conservation Act No. 5 of 2009 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 ("the EOCCA"). Upon conviction, he was sentenced to twenty (20) years imprisonment.

The facts that led to the appellant's conviction are such that: It was alleged that, on 30th October, 2017, at Lusaka Guest House situate at Kibaya Town within Kiteto District and Manyara Region, the appellant was found in unlawful possession of government trophy, to wit, one (1) piece of elephant tusk equivalent to one killed elephant valued at USD 15,000.00 which is equivalent to Tanzania Shillings thirty-four million three hundred sixty-five thousand (TZS. 34,365,000.00), the property of the Government of the United Republic of Tanzania without permit from the Director of Wildlife. After the Information was read to the appellant, he pleaded not guilty. Therefore, a full trial ensued.

To prove its case, the prosecution called a total of seven (7) witnesses and tendered five (5) exhibits whereas the appellant fended for himself. According to the evidence of the arresting police officer, one, Assistant Superintendent of Police (ASP), Meshack Lameck (PW2), on 30th October, 2017 he was on patrol with Police Constables (PC) Cleopa, Ginwe and Masoud. While on patrol, he received a tip from an informant that they saw a suspect at Lusaka Guest House carrying a sulphate bag.

PW2 went to Lusaka Guest House where he found the suspect seated in the restaurant drinking fizzy drink and a sulphate bag was under the table. Having observed the scenario, PW2 called a hotel receptionist, Stella Losi (PW3). They inquired from PW3 whether the appellant was the one who came with the sulphate bag. Having been assured it was him, PW2 introduced himself and the suspect did the same. The appellant introduced himself as Shabani Ally, the appellant herein. PW2 then asked him what was in the sulphate bag. The appellant replied that it was an elephant tusk. He opened the sulphate bag, in it there was a black bag which had a piece of an elephant tusk, exhibit P2. There and then, PW2 seized the trophy and filled in a certificate of seizure, exhibit P3, which was signed by him, PW3 and the appellant. He took the retrieved items and the appellant to Kibaya Police Station. At the police station, he prepared and filled in a chain of custody form, exhibit P1, and handed over the exhibit to a police officer with force number G. 4926 PC Sumaily (PW4), the exhibit keeper.

On that same date, PW4 labelled exhibit P2 with a letter "L" and case file number KIB/IR/1679/2017. On 31st October, 2017 he handed

over to Isaack Mushi (PW6), a game officer of Kiteto District in Manyara Region for examination and valuation.

According to the evidence of PW6, on 31st October, 2017, he went to Kibaya Police Station in order to examine and value the government trophy. At the police station, he met PW4 who handed him the sulphate bag. After he had opened the bag, he was able to identify the item by its colour, features and shape, that, it was a piece of elephant tusk with a hollow on one end. He further observed that the exhibit was marked with "L" and KB/IR/1679/2017. Thereafter, he weighed and found out that it was 2.36 kg and valued at TZS. 34,365,000.00 (USD 15,000). He recorded his findings in the trophy valuation certificate, exhibit P4 and then returned the exhibit to PW4.

On the same date, PW4 handed over exhibit P2 to Assistant Inspector Kaitira (PW5) who transported it to Anti-Poaching Unit in Arusha (KDU) for storage. PW5 arrived in Arusha on 31st October, 2017 and handed the exhibit to the exhibit keeper in Arusha, one James Kugusa (PW1) who stored it until it was tendered before the trial court on 30th October, 2020.

In his defence, the appellant (DW1) denied to have committed the charged offence. He recounted how he was arrested and said that, on 28th October, 2017, he was at Soya village in Chemba District in Dodoma Region. At around 07:30 hrs, he went to fetch water with his cart. On his way back, along a main road, his cart collided with a motor vehicle and passengers in that motor vehicle became angry. They took and drove him to an unknown place. He stayed there for three nights, and that, on 1st November, 2017, he was taken to Njiro KDU where he was beaten and forced to sign the certificate of seizure, exhibit P3 and the cautioned statement, exhibit P5. Later in the evening, he was taken to Arusha Central Police Station.

The trial court was of the view that the failure of the appellant to cross-examine PW2 and PW3 with regard to the date of arrest and the place of arrest at Lusaka Hotel/Guest House implied that he accepted the truth of such prosecution evidence. It therefore found credence on the prosecution evidence that the appellant was found in possession of a piece of the elephant tusk at Lusaka Guest House and Restaurant. In the end, the appellant was found guilty, convicted and sentenced as stated earlier.

On 13th June, 2022, the appellant lodged a memorandum of appeal comprised of the following grounds:

"1. *That, the trial Court erred in law and in fact for holding that the prosecution has proven their case beyond reasonable doubt despite clear variation between the charge/information and the evidence presented as to the place where the appellant is said to have been found in unlawful possession of government trophy.*

2. *That, the trial Court erred in law and in fact for holding that the omission by the Police to issue receipt of the seizure certificate was not fatal given the circumstance of the case.*

3. *That, the trial Court erred in law and in fact for holding the government trophy namely elephant tusk to have been found in possession of the appellant contrary to what was indicated in Exhibit P3 – Seizure Certificate.*

4. *That, the trial Court erred in law and in fact for disbelieving the appellant's version that Exhibit P3 and P5 were filled and signed at KDU on the basis of different in ink used in the thumbprint between the two exhibits.*

5. *That, the trial Court erred in law and in fact for holding that the prosecution was able to prove their case beyond all reasonable doubt.*
6. *That, the trial Court erred in law In sentencing the appellant to a full 20 years imprisonment without considering hence deducting the three years already spent by the appellant in remand".*

On 7th March, 2024, he filed a supplementary memorandum of appeal containing the following grounds:

"1. That, the chain of custody of the suspected Government trophy is broken and its integrity was not guaranteed.
2. *That, the trial Court erred in law and fact the search of the appellant was conducted without search warrant contrary to section 38 (1) and P.G.O. No. 226 (1) (a) (b) (c) and was unconstitutionally.*
3. *That, the trial Court erred in law and fact in not finding that, the charge was defective for not citing the mandatory provision of section 113 (2) of the Wildlife Conservation Act (WCA) regarding that the appellant was alleged found with Government trophy at Kiteto District –*

Manyara Region and the case was presided to Arusha Region.

4. *That, the trial Court erred in law and fact in not finding that there was serious violation of section 29 (1) of the EOCCA as there was delay in arraigning the appellant to the Court as required by section 32 (1) of the CPA.*
5. *That, the trial Court erred in law and fact by not noticing that the seizure certificate form does not indicate which provision of the law section relied on, hence illegally obtained the conviction.*
6. *That, the trial Court erred in law and fact to rely in trophy valuation certificate which was conducted by un authorized person contrary to section 86 (4) and 114 (1) (3) and (4) of the Wildlife Conservation Act (WCA).*
7. *That, the trial Court erred in law and fact in not finding that, the weight of the trophy seized was not well-established as the said trophy was not taken to the weighing management agency.*
8. *That, the trial Court erred in law and fact in not finding that the consent was neither stamped nor signed by the presiding Judge".*

At the hearing of the appeal, the appellant appeared in person unrepresented, whereas, the respondent/Republic was represented by Ms. Upendo Shemkole, learned Senior State Attorney assisted by Mses. Naomi Mollel and Tusaje Samwel, learned State Attorneys.

When given a chance to argue his appeal, the appellant preferred to let the respondent respond to his grounds of appeal while reserving his right to rejoin, if need would arise.

On the onset, the learned State Attorney made it clear that the respondent did not support the appeal. Thereafter, Ms. Mollel submitted on each and every ground of appeal with the exception of the second ground of the substantive memorandum of appeal which she combined with the second ground of the supplementary memorandum of appeal.

At the outset we wish to point out that, in determining this first appeal which is in the form of re-hearing, we shall be guided with the dictates of rule 36 (1) (a) of the Tanzania Court of Appeal Rules which enjoins the Court to re-evaluate the evidence and draw its own inference of fact or conclusions subject to the usual difference to the trial court's findings based on credibility of witnesses – see: the case of the **Director**

of Public Prosecutions v. Orestus Mbawala @ Bonge (Criminal Appeal No. 119 of 2019) [2020] TZCA 1728 (18 August, 2020; TANZLII). Further, in dealing with the fourteen grounds of appeal, we find it convenient to combine some of the grounds in order to avoid repetition.

Starting with the third ground of the supplementary memorandum of appeal, the appellant challenged the validity of the Information for failure to cite section 113 (2) of the WCA. Ms. Mollel did not find substance to this complaint. She argued that section 113 (2) of the WCA does not create an offence of unlawful possession for it to be cited in the Information. Rather, it provides for jurisdiction of the court. She contended that, in terms of section 132 the Criminal Procedure Act (the CPA), a charge/information is required to contain statement and particulars of the offence, and that, pursuant to section 135 of the CPA, the statement of the offence has to describe the offence and the section which creates such an offence. She pointed out that the Information which the appellant was charged with details in the statement of offence that the appellant was charged with an offence of unlawful possession of government trophy and it cited the sections creating that offence. She, therefore, urged us to dismiss this ground of appeal.

Having carefully heard the submission of Ms. Mollel and considered the Information, appearing at page 43 of the record of appeal, we agree with Ms. Mollel that the Information is in compliance with sections 132 and 135 of the CPA. We noted that the Information describes not only the specific offence which the appellant was charged with but also it gives such particulars as may be necessary for giving reasonable information as to the nature of the offence charged. In the statement of offence, the Information described the offence of unlawful possession of the government trophy and made reference to the section of the law creating the offence, that is, section 89 (1) (2) of the WCA. Further, it cited paragraph 14 of the 1st Schedule to and sections 57 and 60 (2) of the EOCCA which prescribe the unlawful possession of government trophy to be an economic offence. As rightly submitted by Ms. Mollel, section 113 (2) of the WCA does not create the offence of unlawful possession for it to be cited in the Information. Accordingly, we find this ground of appeal is meritless and we dismiss it.

Next is the complaint in the first ground of the memorandum of appeal. The appellant complained that the Information is at variance with the evidence. Ms. Mollel submitted in reply that the Information

against the appellant particularized that he was found in unlawful possession of exhibit P2 at Lusaka Guest House, and that, the evidence of PW2 was to effect that he arrested the appellant at Lusaka Guest House with a sulphate bag containing a piece of elephant tusk. It was therefore the submission of Ms. Mollel that the evidence of PW2 proved the allegation contained in the Information, thus, not at variance.

It was also the complaint of the appellant, on this ground, that there are inconsistencies in the prosecution witnesses on the place where the appellant was arrested. Ms. Mollel admitted that, while PW3 said that, on the incident date she was at Lusaka Restaurant and Guest House, PW2 said that he arrested the appellant at Lusaka Guest House. Further, a certificate of seizure, exhibit P3 details that the said piece of elephant tusk was retrieved at Lusaka Hotel. Nonetheless, Ms. Mollel argued that the trial court considered the inconsistencies, and, at the end, it ruled out by holding that the witnesses were referring to the same place, that is, Lusaka Guest House and Restaurant as it found that the difference was a matter of semantics. Therefore, Ms. Mollel urged us to uphold the findings of the trial court and dismiss this ground of appeal.

Connected to exhibit P3 is the complaint contained in the third ground in the memorandum of appeal that exhibit P3 contradicts with other pieces of the prosecution evidence on the item found in possession of the appellant. Ms. Mollel argued that the complaint is baseless. She pointed out that exhibit P3 shows that a piece of elephant tusk, exhibit P2 was retrieved from the appellant. She said that, the evidence is corroborated with the evidence of PW2 who searched the appellant in the presence of an independent witness, PW3. She further argued that, when exhibit P2 was tendered in evidence, the appellant did not raise any objection. Given that there was no objection and the appellant signed on exhibit P3, the learned State Attorney urged us to uphold the finding of the trial court that the appellant was found in possession of the elephant tusk as reflected in exhibit P3. When the Court invited Ms. Mollel to consider exhibit P3 with the evidence of PW6 and exhibit P4, she admitted that there is a discrepancy which, she said, it was minor.

Much as we agree that there are discrepancies here and there. In that, the evidence of PW2, PW3 and exhibit P3 differs on the description of the place where the appellant was arrested, and that, the evidence of PW6 and exhibit P4 vary with the evidence of PW2, PW3 and exhibit P3

on the size of the elephant tusk retrieved from the appellant. We find that such discrepancies immaterial as it is normal to have some discrepancies in the witnesses' accounts. However, it is trite law that minor contradictions, inconsistencies and discrepancies by any particular witness or among witnesses do not corrode the credibility of a party's case while material contradictions and discrepancies do – see: the case of **Dickson Elia Nsamba Shapwata & Another v. The Republic** Criminal Appeal No. 92 of 2007 [2008] TZCA 17 (30 May, 2008; TANZLII) and **Lusungu Duwe v. The Republic**, Criminal Appeal No 76 of 2014 [2014] TZCA 162 (6 June, 2014; TANZLII). Accordingly, we find that the pointed discrepancies are minor and do not go to the root of the matter that the appellant was found in unlawful possession of a piece of elephant tusk, exhibit P2, which was tendered and admitted in evidence without any objection from the appellant. The first and third grounds in the memorandum of appeal are similarly baseless and we dismiss them.

The appellant's fourth complaint in the memorandum of appeal is that the trial court wrongly rejected his defence that exhibits P3 and P5 were both filled in at KDU. Ms. Mollel submitted that the appellant's

argument is not supported by the evidence on record as each of these exhibits show that they were filled in at different places.

After having closely examined exhibits P3 and P5, we noted that exhibit P3 was filled in at KDU while exhibit P5 was filled in at Kiteto Police Station. In that respect, we are satisfied that the trial court rightly rejected the appellant's claim which is not supported by the evidence on record. The complaint is therefore unfounded and we dismiss it.

Responding to the fifth ground in the supplementary memorandum of appeal that, exhibit P3 is defective as it omitted to cite the section and the law under which it was made, the learned State Attorney briefly argued that the omission was not fatal since all relevant information are contained in the exhibit P3. Admittedly, exhibit P3 appearing at page 172 of the record does not refer to any section of the law under which it was made. Nonetheless, we are of the strong view that such an omission cannot invalidate the fact that the appellant was searched and a piece of elephant tusk, exhibit P2, was seized from him. Similarly, the omission does not affect the admission of exhibit P3. In the case of **Nyerere Nyague v. The Republic** (Criminal Appeal No. 67 of 2010) [2012] TZCA 103 (21 May, 2012; TANZLII) we held that:

> *"It is not therefore correct to take that every apparent contravention of the provisions of the CPA automatically leads to the exclusion of the evidence in question."*

Accordingly, this ground fails and we dismiss it.

The learned State Attorney combined the second ground in the memorandum with the second ground in the supplementary memorandum of appeal, and argued that, given the circumstances of the case, the appellant was arrested through emergency search conducted in terms of section 42 (1) of the CPA. Elaborating on her argument, she referred us to the evidence of PW2 who said that he received the information while on patrol and upon acting on such information, PW2 managed to find and arrest the appellant with the government trophy.

Further, the learned State Attorney admitted that a receipt was not issued after the search. Nonetheless, she argued that the appellant having signed the seizure certificate, exhibit P3 and since he did not disown his signature, that is sufficient evidence to prove acknowledgment of the search, which in any event, she argued, was witnessed by an independent witness, PW3. To reinforce her argument

that, by signing the seizure certificate, the appellant admitted having been found in possession of the government trophy, she referred us to the cases of **Ramadhan Idd Mchafu v. The Repulic** (Criminal Appeal No. 328 of 2019) [2022] TZCA 723 (11 November, 2022; TANZLII) and **Papaa Olesikaladai @ Lendemu & Another v. The Republic** (Criminal Appeal No. 47 of 2020) [2023] TZCA 51 (20 February, 2023; TANZLII).

On our part, we revisited the record of appeal and entirely agree with the learned State Attorney that the search was not conducted under section 38 of the CPA for PW2 to issue a receipt as required under section 38 (3) of the CPA. The evidence on record establishes that, on 30th October, 2017, PW2 was on patrol, he then received a tip that there was a suspect at Lusaka Guest House. Upon receipt of the information, he went to Lusaka Guest House and found the appellant sitting in the restaurant area having a glass of fizzy drink. He interrogated the appellant and discovered that he was in possession of the government trophy. There and then, he arrested him and seized from him the government trophy. Therefore, given the sequencey of events, it is obvious the appellant's search, arrest and seizure of exhibit P2 was done

under emergency circumstances, pursuant to section 42 of the CPA. Further, we are of the strong view that, by signing a certificate of seizure, the appellant admitted to be found in possession of the government trophy. Given that circumstance, we find that the omission to issue a receipt was not fatal. Accordingly, we dismiss these grounds of appeal.

We now move on to the sixth and seventh grounds contained in the supplementary memorandum of appeal that faulted the validity of the trophy valuation certificate, exhibit P4. The appellant complained that the valuation and measurement of exhibit P2 was done by an authorized person. Responding to the complaint, Ms. Mollel pointed out that the valuation was done by PW6 who was the "Principal Game Officer". Relying on the case of **Jamali Msombe & Another v. The Republic** (Criminal Appeal No. 28 of 2020) [2022] TZCA 165 (30 March, 2022; TANZLII), she argued that a principal game officer being among the persons whose main task is to protect wildlife, therefore, PW6 falls within the definition provided under section 3 of the WCA. She added that PW6 has adequate knowledge and expertise in wildlife to weigh and

value the trophy. Accordingly, she urged us to dismiss this ground of appeal.

Sections 86 (4) and 114 (3) of the WCA provide in clear terms that a trophy valuation certificate signed by the Director or wildlife officer from the rank of wildlife officer is *prima facie* evidence of the matters stated therein. A wildlife officer is defined under section 3 of the WCA as follows:

> *"a wildlife officer, wildlife warden and wildlife ranger* ***engaged for the purposes of enforcing the Act.***" [emphasis added].

In the case of **Jamali Msombe & Another v. The Republic** (supra), the Court considered the import of section 3 of the WCA and held that:

> *"It is our considered view, from the above discussion and the definition of who is game ranger, that a game warden, wildlife officer, wildlife ranger and a game ranger are same persons whose main task is to protect wildlife."*

In the present appeal, the designation of the person who assessed, valued, weighed and issued the trophy valuation certificate was a principal game officer. It is common ground that the main task of any game officer is to protect the wildlife and ensure proper implementation of the WCA. We are, therefore, satisfied that PW6 was a competent person to assess, value, weigh and issue the trophy valuation certificate. As such, the complaint that the trophy ought to have been weighed by the Weight and Measures Agency lacks merit. Consequently, we proceed to dismiss the sixth and seventh grounds of the supplementary memorandum of appeal.

In the eighth ground of the supplementary memorandum of appeal, the appellant complained that the consent was not acknowledged by the trial court as it lacked endorsement. Ms. Mollel replied that, the practice has been that, the consent is attached to the Information when it is filed in the High Court addressed to the Deputy Registrar. It was her submission that since the Information appearing at page 43 of the record of appeal was signed, endorsed and stamped by the Deputy Registrar of the High Court and signed, and that, behind that

Information there is a consent, Ms. Mollel beseeched us to find that the consent was also received by the court.

Having scrutinized the record of appeal, we observed that the Information and the consent were filed before the High Court through a letter dated 20th December, 2019. The said letter appears at pages 41 to 42 of the record of appeal. It partly reads as follows:

> *"Physical exhibits which is one piece of elephant tusk shall be produced during trial. Prosecution Attorney In-Charge consent to prosecute the accused person is also attached to this letter."*

The letter is signed and bears a rubber stamp of the Deputy Registrar of the High Court of Tanzania, Corruption and Economic Crimes Division acknowledging receipt of the Information and the consent. On the basis of the foregoing, we dismiss this ground of appeal.

In the first ground of the supplementary memorandum of appeal, the appellant complained that the chain of custody of the seized elephant tusk was not established. In responding to this ground of appeal, Ms. Mollel trailed through the chronological event of the elephant tusk from the moment it was seized to its tendering before the trial

court. She pointed out that the exhibit was seized by PW2 from the appellant in the presence of PW3. After seizure, PW2 took the exhibit to Kibaya Police Station and handed it over to a store keeper, PW4. On 31st October, 2017, PW4 handed the exhibit to PW6 for examination and valuation. The examination was done at Kibaya Police Station. PW6 returned it on the same day to PW4. On the same date, PW4 handed the exhibit to PW5 who transported it to Arusha. PW5 arrived in Arusha on the 31st October, 2017, and handed the exhibit to PW1 for safe keeping. PW1 stored the exhibit until it was tendered in evidence before the trial court on 30th October, 2020. She, thus, concluded that the exhibit seized from the appellant, later examined by PW6 and finally tendered in the trial court by PW1 was one and the same. Therefore, she urged the Court to dismiss the complaint.

It has been repeatedly stressed that in cases involving arrest, seizure, custody and later production in court of a seized item as exhibit, there must be a proper explanation of who and how the property was handled from where it was found and seized up to the point when it is tendered in court- see: **Paulo Maduka & 3 Others v. The Republic** (Criminal Appeal No. 110 of 2007) [2009] TZCA 69 (28 October, 2009;

TANZLII) and **Jibril Okash Ahmed v. The Republic** (Criminal Appeal No. 331 of 2017) [2021] TZCA 13 (11 February, 2021, TANZLII).

Our appraisal of the evidence on the record reveals that there is an oral account on the chronological events showing the collection of the elephant tusk at Lusaka Guest House by PW2, its custody and control at Kibaya Police Station by PW4, its onward transmission to KDU, Arusha Central Police Station by PW5 and its tendering before the trial court by PW1. Besides, the entire trail was documented in exhibit P1. Accordingly, we agree with Ms. Mollel that the chain of custody was intact from the moment the exhibit was seized from the appellant until it was tendered before the trial court. We thus find this ground of appeal has no merit. We dismiss it.

In the fourth ground of the supplementary record of appeal, the appellant complained that section 29 (1) of the EOCCA was not complied with as he was belatedly arraigned to the court. Ms. Mollel argued that the underlying factor to be considered is the reasonableness of the time taken to arraign the accused person. She supported her submission by referring us to the case of **Ramadhan Idd Mchafu v. The Republic**

(supra), where the Court considered the import of section 29 (1) of the EOCCA and stated that:

> *"... [section 29 (1) of the EOCCA] puts it as legal requirement in very clear and imperative terms that* ***an accused person must be produced in court within forty- eight hours of either his arrest or upon completion of investigation. Forty-eight hours are therefore gauged from the beginning of either of those occurrences.*** *It is therefore a matter to be determined based on the evidence availed to the court as to either the time when the arrest was effected or when the investigation was completed."* [Emphasis added].

The Court then concluded that:

> *"... consideration is on the reasonableness of the time taken to arraign an accused person in court from the date of his arrest. The position is therefore that in every situation it is important that an accused person should be charged within reasonable time ..."*

In the present appeal, the appellant was arrested on 30th October, 2017 and taken to court on 21st November, 2017, almost after a lapse of one month. Unfortunately, there is no evidence showing when the investigation was completed. Despite that, given the seriousness of the offence, we are satisfied that the time taken to arraign the appellant was reasonable. This ground of appeal also fails and we dismiss it.

The fifth ground in the memorandum of appeal is the general complaint to the effect that the prosecution failed to prove the offence of unlawful possession of the government trophy. Ms. Mollel submitted that the prosecution proved the case beyond reasonable doubt through seven prosecution witnesses and four exhibit tendered in evidence. She therefore urged us to dismiss the ground of appeal.

Undeniably, the evidence connecting the appellant with the offence comes from PW2 who effected the arrest, PW3 who witnessed the search, the seizure certificate, exhibit P3, signed by the appellant himself acknowledging that he was found with a piece of the elephant tusk, exhibit P2, PW6 who examined the trophy and established that it is a piece of the elephant tusk, and the trophy valuation certificate, exhibit P4 proving that the trophy is valued at TZS. 34, 365,000.00 (USD

15,000). In addition, the appellant himself did not dispute the tendering in evidence of exhibit P2. With that evidence in the record of appeal, we are satisfied that the offence was proven beyond reasonable doubt against the appellant. We therefore dismiss the fifth ground of appeal as it lacks merit.

Lastly, the appellant complained about the twenty (20) years imprisonment sentence imposed on him by the trial court. He argued that the trial court ought to have considered the time spent in custody when sentencing him. Ms. Mollel replied that the sentence is in accordance with section 60 (2) of the EOCCA. After the Court had adverted her to the provisions of section 172 (2) (c) of the CPA, she changed her stance and supported the ground of appeal.

In determining this ground of appeal, we preface our discussion by agreeing with the appellant that the trial court ought to have considered the time he spent in remand while awaiting his trial. This is the import of section 172 (2) (c) of the CPA which provides that:

> *"Where a person has been in remand custody for a period awaiting his trial, his sentence whether it is under the Minimum Sentences Act, or any*

other law, shall start to run when such sentence is imposed confirmed, as the case may be, and such sentence shall take into account the period the person spent in remand."

The above provision of the law was lucidly considered in the case of **Sano Sadiki & Another v. The Republic**, Criminal Appeal No. 623 of 2021) [2023] TZCA 17476 (9 August, 2023; TANZLII), where the Court said:

*"According to the above provision, three scenarios emerge; **one** custodial sentence begins to run when the sentence is imposed. **Two**, where a person has been remanded in custody for a period awaiting trial and or sentence, the time spent in remand has to be taken into account when considering sentence. **Three**, the principle set out in the provision applies regardless of whether the sentence is mandatory or discretional including those under the Minimum Sentences Act. We would add that the time spent in custody by such persons include the periods spent in detention by the police and at remand."*

In the present appeal, the trial court was mindful of the period which the appellant spent in remand but erroneously sentenced him to serve the full-term of twenty years imprisonment. To appreciate the trial court's consideration, we find it apt to reproduce the extract of the judgment hereunder:

> *"In this case at hand the accused person was arrested on 30th October, 2017, three years ago and spent all three years in remand,* ***this is one of the mitigating factors for this court to consider in imposing the sentence. In consideration to the mitigating factors, the accused person*** *being a first offender, is young, has a family of young children and dependent parents,* ***has spent three years in remand****; I hereby sentence the accused person Shabani Ally Athuman to serve twenty (20) years imprisonment."* [Emphasis added].

Obviously, the trial court was mindful of the time the appellant spent in remand. We believe that had it been aware of section 172 (2) (c) of the CPA, it would have deducted the three years period from the sentence of twenty years imprisonment. This being a first appeal which

is in the form of re-hearing, we proceed to deduct the three years from the sentence of twenty years imprisonment. Consequently, the appellant shall serve a custodial sentence of seventeen years from 13th November, 2020 when he was convicted and sentenced.

In the end, except for the sentence which we have reduced, we find that the appeal is devoid of merit. We accordingly dismiss it.

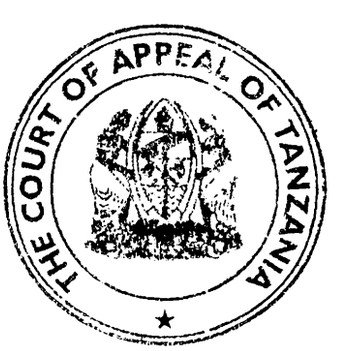
DATED at **ARUSHA** this 19th day of March, 2024.

B. M. A. SEHEL
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

A. S. KHAMIS
JUSTICE OF APPEAL

The Judgment delivered this 19th day of March, 2024 in the presence of the appellant appeared in person and Mr. Godfrey Nugu, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



A. S. CHUGULU
DEPUTY REGISTRAR
COURT OF APPEAL