IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

(DAR ES SALAAM REGISTRY)

CRIMINAL APPEAL NO. 184 OF 2017

(Originating from The District Court of Morogoro at Morogoro Criminal Case No 31 Of 2016 before: Hon. J.J Mkhoi– RM Dated 27th December, 2016)

ABEL ADRIANO----------1ST APPELLANT

ANAEL MKINDI----------2ND APPELLANT

ERICK WILLIAM KYARU----------3RD APPELLANT

VERSUS

THE REPUBLIC ---------- RESPONDENT

JUDGMENT

Last order date: 14th June, 2018
Judgment date: 29th June,2018

MLYAMBINA, J.

The appellants were on the first count charged with the offence of leading organized crime contrary to paragraph 41 (1) (a) of the first schedule read together with sections 57 (1) and 60 (2) of the Economic and Organized Crime Control Act, (Cap 200 R.E 2002). But they were all acquitted on the first count and convicted on the second count for the offence of unlawfully possession of Government trophies contrary to section 86 (1) (2) (ii) (3) (b) of the Wildlife Conservation Act, No.5 of 2009 read together with paragraph 14 (d) of the first Schedule and section

57 (1) and (2) of Economic and Organized Crime Control Act, (Cap 200 R.E 2002).

After hearing, the appellants were sentenced to 15 years imprisonment. Been dissatisfied with such decision of the Morogoro District Court, the appellants lodged this appeal on the following grounds: -

1. That, the learned trial Magistrate erred in law and fact by convicting the appellants on the flow of inconsistences and incredibility on the prosecution.
2. That, the learned trial Magistrate erred in law and misdirected himself to endorse conviction on the appellants based on the evidence of PW1, PW2 and PW3 as corroborative testimony of which the court neglected to focus at the legality and the scope of the possession of the alleged elephant tusks.
3. That, the learned trial Magistrate erred in law and fact when he accepted and admitted the evidence of Certificate of seizure without assuming that, the search which was conducted by PW1 was illegal.
4. That, the learned trial Magistrate erred in law and fact to believe that the appellants have been found with elephant tusks based on the evidence of certificate of seizure exhibit PE1 which was signed by the third appellant.

5. That, the learned trial Magistrate erred in law and misdirected himself to sustain conviction to the second and first appellant based on the evidence of Certificate of seizure in absence of their signature on that exhibit PE1. No any consent note delivered by the prosecution side to show that third appellants (DW3) have been given consent to sign the said document on behalf of second and first appellant.
6. That, the learned trial Magistrate erred in law and fact by not regarding the appellants defence in determining this case in favour of the prosecution who failed to prove their case beyond any reasonable doubts and the standard required by the statute of evidence Act, was observed in the admitting the facts contrary to title law.

WHEREFORE, the appellants prayed for this Hon. Court that; -

(i) The appeal be allowed.
(ii) Quash the conviction and set aside the sentence and
(iii) Leave the appellants at liberty
(iv) The appellants be present on the hearing date of the appeal.

Prior hearing of the appeal, the appellant lodged joint supplementary grounds of appeal which runs as follows; -

1. That, the judgment of the trial court was in contravention with the provisions of the law as the same never disclosed all specified number of offence and section of law to show under which the appellants were convicted in accordance with the law (Cap 20).
2. That, there was a failure of justice in that the seizing officers (PW1) of the elephant tusks (Exh.PE4) they did not file or take part in filling the Certificate of seizure to acknowledge the seizure or recovery of the allegedly trophies (Exh.PE4).
3. That, without prejudice to the afore grounds, the trial court seriously misdirected itself for acting on the un-procedural filed Certificate of seizure of elephant tusks (Exh.PE1) filed by PW2 who cannot become a seizing officer due to the fact that PW2 was handed the trophies in question while the same were already seized by PW1 team.
4. That, there was a failure of justice as the prosecution (PW6) shows the elephant tusk (Exh. PE4) were taken for identification on 13th of December, 2016 while the same elephant tusks were taken on 22nd of August, 2016 from the Court to the Police Station to wait the determination of the case.
5. That, the trial Magistrate erred in law and fact in convicting the appellants in the case where there was no positively

proof of chain of custody showing the handling of the trophies in question from PW1 who firstly seized them to anti robbery team (PW2's team). Yet PW1 who firstly seized the allegedly trophies (Exh.PE4) he took no part in the identification of the said elephant tusks in court to establish whether or not were the same he was firstly seized. This one renders the possibility of planting of the allegedly elephant tusks against the appellants.

6. That, the evidence of PW6 was wrongly acted upon as apart from a mere description of a Master of Degree of Wildlife he stated in Court, he did not go further to lay down qualification he had to enable him to identify and evaluate the elephant tusks and give him (PW6) option as demanded by the provisions of the Tanzania Evidence Act Cap 6 (R.E.2002).
7. That, the Cautioned Statement of the second appellant was wrongly relied and acted upon as the same was admitted in evidence without been disclosed (read over) in court.

WHEREFORE, the appellants prayed for this Hon. Court to allow the appeal, quash the conviction, set aside the sentence and set the appellant at liberty. Also, the appellants intended to rely on the case of **Tulubuzya Bituro v Republic (1982) TLR 264** in supporting the appeal on ground No.1 of the supplementary grounds.

During hearing of the appeal, the appellants been laymen, simply told the Court that they believe their grounds of appeal, supplementary grounds of appeal and the Court. The appellants asked the Court to rely on the grounds of appeal and supplementary grounds of appeal to quash the conviction, set aside the sentence and set the appellants at liberty.

In reply, the learned State Attorney one Elizabeth Mkunde having gone through the decision, proceedings and the grounds of appeal, supported the conviction. The State Attorney therefore objected the appeal.

The learned State Attorney started to advance her reply on the ground of inconsistences and credibility of the prosecution witnesses. The learned State Attorney objected on this ground for the following reasons. First, the appellants did not explain as to which evidential or witness's inconsistences. The learned State Attorney submitted that, after going through the proceedings they noted the witnesses had no much inconsistences to distort the basic evidence or remove their credibility. To buttress such point, the learned State Attorney referred this Court to the case of **Abdallah Said Mwingereza vs The Republic, Criminal Appeal No. 258 of 2013.** In this case, the Court discussed among others on

two things: 1. Credibility of witnesses 2. Inconsistences. The Court of Appeal at page 4 held: -

> *"the trial courts' finding as to credibility of witnesses is usually binding on an appeal courts unless there are circumstances on an appeal court on the record which call for a reassessment of their credibility..."*

The learned State Attorney was of submission that there are no basic reasons advanced to challenge the credibility of the prosecution witnesses. The State Attorney therefore prayed this Court be bound with the evidences of the prosecution witnesses. In the same case of **Abdallah** (*supra*) at page 7 the decision, the Court discussed the issue of inconsistence. The Attorney referred us to another case of **Dickson Elia Msamba Shapwata, Nelson Mohamed Mwazembe vs The Republic Criminal Appeal No. 92 of 2007 Court of Appeal of Tanzania (unreported),** at page 7 of this judgment the court discussed the issue of inconsistences of evidences which may go to the root of the case. That, it is normal for witnesses to be inconsistent.

It was the view of the learned State Attorney that the prosecution at the lower Court gave sufficient evidences of which were reliable. The learned State Attorney prayed for the Court

not to uphold the ground of inconsistence and lack of credibility of witnesses.

We agree with the appellant that credibility of a witness is a key factor in ascertaining truth of the case. If the case is fundamentally flawed by contradictions, then it means the case is not proved to the required standard. (**See Sprian Justine Tarimo (appellant) vs The Republic, Criminal Appeal No. 226 of 2007 Court of Appeal of Tanzania at Arusha (unreported).** In this case, the appellants have not established on shadow of doubts that the prosecution witnesses were incredible.

It has to be appreciated that all human being's memory is fallible. Therefore, shaking of a witness at a certain degree, especially in cross examination, is expected because the degree of confidences of a witness differs from one to another. It is the confidence of a witness in his recollection of facts of the case which makes such witness most accurate.

Needless the afore observation, as correctly submitted by the learned State Attorney, it is not every kind of inconsistences which may negate the decision of the Court. The Court has to take action on the inconsistences which fundamentally goes to the root of the case and which are likely to distort the basic evidence. In the case of **Mohamed Saidi Mulula Versus the**

Republic [1995] TLR 3 (CA), the Court of Appeal had these to observe:

> *"Where the testimony by witnesses contain inconsistencies and contradictions, the court has a duty to address the inconsistencies and try to resolve them where possible else the court has to decide whether the inconsistencies and contradictions are only minor, or whether they go to the root of the matter".*

The inconsistencies and contradictions are to be examined if such inconsistences and contradictions goes to the root of the case the benefit of doubts must be given to the accused person. In this case none of the alleged inconsistences has been established.

On the second ground of appeal, that is on chain of custody, the appellants did allege two things. First, there was no positively proof of chain of custody showing the handling of the trophies in question from PW1 who firstly seized them to anti robbery team (PW2's team). Second, PW1 who firstly seized the allegedly trophies (Exh.PE4) he took no part in the identification of the said elephant tusks in court to establish whether or not were the same he firstly seized. In view of the appellants, the said lack of

chain of custody renders the possibility of planting of the allegedly elephant tusks against the appellants.

The learned State Attorney was of reply that, PW1 was the arresting officer, PW2 made search and seizure and he is the one who tendered Certificate of Seizure, elephant tusks and the motor vehicle. PW3 was the independent witness who witnessed search and seizure.

It was further replied by the learned State Attorney that all the three witnesses are of important evidences which proved the offence of possessing government trophies by the appellant.

The learned State Attorney went further to argue that, in proving possession of Government trophies, the evidence showed that the appellants were found possessing the Government trophies contrary to the law. To support the argument, the learned State Attorney referred us to the decision in the case of **Simon Ndikulyaka vs The Republic, Criminal Appeal No. 231 of 2014 Court of Appeal of Tanzania** which discussed the issue of possession at page 6 when refereeing to the case of **Mosses Charles Deo vs the Republic (1987) TLR 134** and held; -

> *"for a person to have possession actual or constructive of goods, it must be proved either that he was aware of their presence and that he exercised control over them..."*

It was the argument of the learned State Attorney that witnesses in this case proved that elephant tusks were in the Motor vehicle of the appellants. PW1 stopped their car which was at high speed, the demeanor of the appellants caused PW1 to search them.

I have also noted in rejoinder, the first appellant conceded that they were arrested on overspeed but they objected of been found in illegal possession of Government trophies. The first appellant stated that they were arrested at Maseyu but there is no connection on how PW2 was handled with the Government trophies. That, at Mikese there is a Police Station, Kinguluwira and Msamvu there are Police Stations, all of these stations were jumped up to Central station.

The second appellant in rejoinder was of submission that the independent witness (PW3) never identified elephant trophies (exh.PE4). PW3 identified exhibit PE1 only of which is the arrest warrant.

The third appellant rejoined that, PW1 told the Court that he searched the Motor vehicle while there were other Police officers. But the later were not brought. That, there were two independent witnesses but only one who was brought to adduce evidence. That, PW1 arrested the appellants and took them to anti robbery. There were no reasons as to why the appellants

were not taken to Mikese Police Station which is big like Central Police Station.

I had time to go through the proceedings of the trial Court and the submissions of the parties but with the sharp eye on the grounds of appeal. I noted the evidence of PW1 who the arresting officer was, PW2 who made search and seizure and who tendered Certificate of Seizure, elephant tusks and the motor vehicle, PW3 who was the independent witness and who witnessed search and seizure were water tight. Indeed, the chain of custody of the elephant tusks cannot be easily doubted because of their possessory nature of such trophies. Similar findings were reached by the Court of Appeal of Tanzania in the case of **Joseph Leonard Nanyota vs the Republic, Criminal Appeal no 485 of 2015 (unreported)** where it was held; -

> *"the elephant tusks in the case at hand were such that they could not change hands easily and therefore could not easily be tempered with..."*

I'm of further findings that the point of not been taken to Mikese Police Station, Kinguluwira or Msamvu Police Stations cannot be a hard and fast justification that the appellants were not in possession of the government trophies. The arresting officer had a right of taking the accused to a Police Station within the Region

of which could easily facilitate administration of justice to the accused.

On the third, fourth and fifth grounds of appeal as well as supplementing grounds 2 and 3 which talks of seizure of the Government trophies, the learned State Attorney was of submission that, the appellants objects on the Certificate of seizure. The appellants contend that search was done without following the law. The appellants also allege that the prosecution never gave an opportunity to the one of appellants to sign the Certificate of Seizure on behalf.

In view of the learned State Attorney, PW1 in his evidence stated that he stopped the appellants at the Maseyu area, Mikese Morogoro where the appellants were at high speed with the motor vehicle Land Cruiser DFP 3468. After stopping and interrogating them, the evidence shows that they were terrified which led Police to make further interrogation. The appellants were found with elephant tusks.

The learned State Attorney maintained that, since it was on the road, the Police went with the appellants at Central Police Station where seizure was done. Thus, it was not safe to do search while on the road. The learned State Attorney submitted that, PW2 stated that he is the one who did search in the car at Central Police. Thus, the prosecution brought one independent witness.

After search, the Certificate of Seizure was filed and the third appellant signed it. But the appellants alleged that the third appellant never signed on behalf.

It was the submission that the seizure was legally proper. The Court never misdirected itself on that point. Section 38 of the Criminal Procedure Act Cap 20 (R.E.2002) gives directives on the search and seizure.

It was the submission of the learned State Attorney that, the search seizure was legal. It is not each person must sign the search and Seizure Certificate. Thus, in signing Seizure during search, it was the motor vehicle which was searched, one person (third appellant) signed to prove if the car was searched. Also, there were two independent witnesses (PW3 and PW2) the one who did seizure.

The learned State Attorney submitted that, there was no dispute that all the three appellants were found in one car, even in their defence never objected on that point and that one of them signed the Certificate of Seizure. To back up this point, the learned State Attorney refereed this Court at page 45 the 1-3rd appellants refused admission of Seizure Certificate. The Court followed all the procedure in admission of Certificate of Seizure by hearing both sides arguments. That, it was after hearing both sides the Court gave a decision.

The State Attorney further refereed this Court to the decision of the Court of Appeal in the case of **Ally Mohamed Mwaya vs the Republic Criminal Appeal No.214 of 2011, the Court of Appeal of Tanzania (unreported)** discussed on admission of exhibits at page 8. It was the position of the learned State Attorney that in this matter, all the legal procedures of admitting Certificate of Seizure were followed.

In the cited case of **Ally Mohamed Mwaya**, one of the principles stated in tendering of an exhibit is that;

> "*wherever an object is intended to be tendered as an exhibit, it should first be cleared for tendering, inter alia, asking the accused whether he has any objection. If an objection is raised, the Court to look into it and make a finding whether to admit or otherwise." (see page 8 of the typed decision).*

In this case, advocate Evodius for the accused (herein appellants) did raise an objection on tendering of the Certificate of Seizure before the trial Court. After hearing of the objection, the court overruled the same as it observed; -

> "*...this court is of the strong view that, the two witnesses who were called to witness the search are enough as required by good practice of the law: PW2 told the court that, they called the two witnesses apart from the police;*

they are enough. The first accused person signed among the other accused person on their believe and it was not disputed that he didn't sign that only makes the court to believe that the accused persons were free on that search...." (see page 47 of the typed proceedings)

It is clear therefore that the legal procedure of tendering the Certificate of Seizure was complied with. The trial Court gave an opportunity to the accused to object or concede with the tendering of it, the accused objected but their objection had no merits. Even on this appeal there are no any genuine grounds advanced by the appellants to expunge the Certificate of Seizure.

The learned State Attorney was of proper submission that there is no legal requirement of seeking consent of one accused from other accused to sign Certificate of Seizure. In that regard, I find this point to lack weight.

On the ground that the court did not consider the defence case before reaching its decision, the learned State Attorney objected on this ground. Page 13, 14 and 15 of the judgment reveals that the Court considered the defence evidences and got satisfied. To buttress such position, the learned State Attorney refereed us to the case of **Issa Saidi vs the Republic Criminal Appeal No. 10 of 2014(unreported), the Court of Appeal of Tanzania held at page 6 para 2** that; -

"we are satisfied that the appellant defence was considered but was rejected. The fact that his defence was rejected, does not mean that the same was not considered..."

I had time to go through the entire decision and find out whether the evidence of the defence case was considered. As properly argued by the learned State Attorney, the records do not leave any doubt that the trial Court analysed the entire evidences from both sides. For clarity, I will just quote part of the analysis at page 14 and 15 of the decision.

"in fact the evidence of PW1, PW2 and PW3 is sufficient, satisfactory and strong enough to prove that these three accused persons were found in possession of the government trophies that is elephant tusks pieces 51....their defence is that, they know nothing about the elephant tusks also the plate number of DFP is all a lie by saying that he has no money for fine that wouldn't made the police to do so...."

The other ground is that the judgment of the Court does not show the law upon which the appellants were convicted. The learned State Attorney objected on that point. At page 21 of the decision, the court found the 1st, 2nd and 3rd accused guilty and were convicted on the second count. At page 2 of the decision,

it shows that the appellants were charged and convicte unlawful possession of Government trophies.

The learned State Attorney was of arguments that, even if this Court find that the appellants were not properly convicted, the proper remedy is to return the file for conviction.

I have perused the copy of judgment in particular page 2 and page 21, I noted true the appellants were found guilty and convicted of the second charged offence which was unlawfully possession of Government trophies contrary to section 86 (1) (2) (ii) (3) (b) of the Wildlife Conservation Act, No.5 of 2009 and read together with paragraph 14 (d) of the first seizure and section 57 (1) and (2) of Economic and Organized Crime Control Act, (Cap 200 R.E 2002).

On the 4th and 5th grounds of appeal, it is about chain of custody. The respondent objected these grounds. That, PW1 and PW2 explained how the chain of custody of the elephant tusks and the motor vehicle. PW2 tendered Seizure Certificate, handing over (Exh.PE2) elephant tusks (Exh.PE4) and Motor vehicle (PE6).

The learned State Attorney went on to submit that the evidences of PW2 proved how his exhibits were tendered without been tempered with. Also, it was proved that the exhibits were found with the appellants. To buttress this point, the learned State

Attorney refereed us to the case of **Issa Hassan Uki vs The Republic, Criminal Appeal No. 129 of 2017** which gave directive on providing chain of custody. At page 13 of that judgment the Court while referring to its another case of **Joseph Leonard Nanyota vs the Republic, Criminal Appeal no 485 of 2015 (unreported)** and held; -

> *"the elephant tusks in the case at hand were such that they could not change hands easily and therefore could not easily be tempered with..."*

The learned State Attorney submitted that Chain of Custody was proved, elephant tusks could not be tempered with and the witnesses did prove that exhibits were not tempered with till were tendered in the Court.

I need not say much here, unlike other materials like drugs, elephant tusks do not change easily. The prosecution side did establish beyond any shadow of doubt that the appellants were in possession of the elephant tusks(PE4) and they were using the motor vehicle(PE6). The Seizure Certificate was tendered to that effect. In my humble view, the chain of custody was proved.

On the sixth ground, the appellant alleged that PW6 who tendered valuation report did not give further qualification apart from saying he holds Master's Degree in Wildlife. The learned State Attorney in reply was of submission that PW6 is the Wildlife

Officer who have powers under Section 114 and 86 (4) of the Wildlife Conservation Act, 2009 of giving trophies Valuation certificate or Report. Thus, the law gives him authority to identify the value of the Government trophies and his evidence is acceptable under that law.

It was therefore the submission of the learned State Attorney that exhibit PE6 was tendered legally and during tendering of the same all the appellants never objected as per page 79 of the proceedings. That, the appellants were also given a right to cross examine of which they exercised it. In view of the learned State Attorney, it was therefore an afterthought.

As rightly pointed out by the learned State Attorney, the Wildlife officer is empowered by the law to make valuation of Government trophies. Section 114 and 86 (4) of the Wildlife Conservation Act, 2009 mandates the Wildlife officer of giving trophies Valuation certificate or Report. So, the description whether the Wildlife officer possesses Master's degree or PhD is of no any value. The important thing is that he/she must be the Wildlife officer and the accused must be given opportunity to cross examine him/her. In this case such procedure was adhered to and as per the record, there was no any objection in tendering of the Valuation report (**see page 79 of the typed proceedings**).

As far as the 7th supplementary ground of appeal is concerned on Caution Statement of the second appellant, the learned State Attorney conceded that it was admitted without been read. As such, it was illegally admitted. For that reason, the remedy, as viewed by the learned State Attorney, is to be expunged. To support such argument, the learned State Attorney, referred us to the case of **Ally Mohamed Mwaya** (*supra*) the Court of Appeal of Tanzania expunged the exhibits which was not properly admitted but it sustained evidences based on other oral evidences.

As conceded by the learned State Attorney, there is nowhere in the record to prove that the Caution Statement was ever read before the accused prior admission before the court as an exhibit. That was an error on part of the trial Court in admitting the caution statement prior been read over to the accused. In the case of **William Lengai (Appellant) v Republic Criminal Appeal No. 203 of 2007 Court of Appeal of Tanzania at Dodoma (Msoffe J.A, Rutakangwa J.A and Bwana J.A)** held *inter alia* that: -

> *"The way the cautioned statement was recorded neither shows that the appellant was given an opportunity to agree to be recorded, nor was it read over to him after the recording. All these irregularities in respect of the cautioned*

statement should have led the two courts "a quo rely on it, let alone to admit in evidence....in absence of the said statement, the prosecution case did not have a strong legal leg to stand on, leading to the conviction of the appellant."

Unlike in this case, the prosecution evidence in absence of the caution statement is sufficient enough to convict the appellants as demonstrated herein above. Been guided by the Court of Appeal in **Ally Mohamed Mwaya** (*supra*), the caution statement in this case is expunged.

In the end result, taking into consideration of the afore observation and findings, I'm satisfied that the appellants were legally convicted basing on evidences adduced in the Courts which proved that the appellants were found in illegal possession of Government trophies. The appeal is therefore dismissed for lack of merits. The conviction and sentence are sustained.

Y. J. Mlyambina

Judge

29/06/2018

Dated and delivered this 29th day of June, 2018 in the presence of the appellant in person and learned State Attorney Adolf Ulaya for the respondent.

Y. J. Mlyambina

Judge

29/06/2018