IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

CRIMINAL APPEAL NO. 7 OF 2020
(Arising from Criminal case No. 118/2017 of the District Court of Bariadi at Bariadi)

MALOBA SAMSON ....1st APPLELLANT

MIYAGA WILLIAM.....2nd APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUGEMENT

Date of the last Order: 1st July, 2020
Date of the Ruling: 28th August, 2020

MKWIZU, J.:

Distressed by the conviction and sentencing of 20 years imprisonment by the Bariadi District Court in Criminal Case No. 118 of 2017 delivered on 5th December, 2019, the appellants **Maloba Samson** and **Miyaga William** appealed to this court on 5 grounds of appeal which can be summarized as following:

1. *Trial Magistrate failed to evaluate the prosecution's evidence*

2. *Conviction was grounded on a weak evidence of prosecutions witnesses without any independent witnesses.*
3. *Prosecution failed to establish the case beyond reasonable doubt*

It was alleged by the prosecution that, on 24/10/2016 , 1st appellant was charged with an offence of unlawful possession of Government Trophy C/S 86 (1) (2) (b) of the Wildlife Conversation Act No. 5 of 2009 read together with paragraph 14 of the first schedule to section 57 (1) and 60 and (3) of Cap 200 RE 2002. The second accused was alleged to have failed to report the possession of Government Trophies C/S 87 (1) and (2) Wild Conservation Act No. 05 of 2009 read together with paragraph 14 of the 1st schedule to section 57 (1) and 60 (2) and (3) of the economic and organized Control Act Cap 200.

The records reveal that, initially appellants were charged in criminal case No 72 of 2016 which was dismissed on 12/12/2016 for want of prosecution. They were re-arrested again on a similar accusation a day after on 13/12/2016 and brought to the court with another Criminal Case no. 118 of 2016. The Prosecution side paraded four (4) witnesses who

testified to the effect that on the material date and time they arrested the accused persons at KG Guest house, where 1st appellant was found with unlawful possession of one Government trophy to wit Elephant tusks which was measured to 0.5kg. The appellants' statements were recorded, seizure certificate prepared and properly signed, then appellants were taken to the police station and later to court to answer the charge. Appellants disassociated completely with the offence, they said the case was a frame up accusations against them.

After a full trial, the court found that, the prosecution has proved the case beyond reasonable doubt, it convicted both appellants and sentenced them to 20 years imprisonment. Appellants were aggrieved, hence this appeal.

The Appeal was heard in the absence of the appellants who opted to have their appeal so determined. By the order of the court dated 15/5/2020, the respondent/Republic under the services of Ms. Mapunda learned State Attorney, filed written submissions.

Generally, Ms. Mapunda supported the appeal. Her reasons were that **One,** the 2nd appellant had objected to the tendering of the seizure certificated alleging to have not signed the same. Trial court did not do any enquiry to clear the said doubt.

Secondly, that the appellants were not given chance to cross examine PW1 who was a key witness to the case. Ms. Mapunda elaborated that after PW1 had given his evidence in court, 1st appellant prayed for an adjournment as he had a stomach pain. PW1 was ordered to appear on the set date for cross examination. However, the proceedings do not tell as to whether PW1 turned up or not.

Thirdly that, PW2 had testified to the effect that they searched the appellant's room at the alleged guest house before they found the said government trophy in the 1st appellant's pocket but nothing was mentioned as to the room Number of the guest house and who exactly occupied that room as per the registration book of the guest house.

Fourthly, Ms. Mapunda noted that PW3 tendered in court the statement of the witness whose where about was unknown without clearing it for admission and contrary to section 34B (2) of evidence Act Cap 6 R:E 2002. She cited the case of **Omary Mohamed China and 3 others V. Republic** Criminal Appeal No. 230 of 2004.

Fifth that, there are inconsistencies between the evidence of PW4 who tendered valuation report and PW2 which go to the root of the matter. Ms. Mapunda prayed that the Appellants' conviction and sentence be quashed and they be set free.

I have careful considered the submissions of Ms. Mapunda in support of the grounds of appeal. Indeed, the above are true interpretations of the trial court's records. PW1 was a key witness for the prosecution in this matter, his testimony specify that he is the first person to receive information relating to the commission of the offence facing the appellant, he is the one who organized his fellow and went ahead to the scene where appellants were arrested and the alleged trophy collected. However, as rightly stated by the learned State Attorney, he was not availed to the

appellants for cross examinations. As the records would show at page 19 and 20 of the proceedings, on 28/8/2018 after PW1 had testified in chief, 1st appellant prayed for another time for cross examination on the ground that he had a stomach ache. Trial court adjourned the matter to 11/9/2018 for cross examination and PW1 was warned to appear. This witness never showed up. Instead, on 19/11/2018 PW2 gave his evidence and other witnesses followed. This was a gross error on the part of the trial magistrate. Appellants had a right unless waived by them, to cross examine a witness in court more so PW1 who participated on the arrest and seizure of the exhibits connecting the appellant with the offence facing them. The importance of cross examination is provided for under section 155 of the Evidence Act, Cap. 6 R.E. 2019 which provides:

> *"155. When a witness is cross-examined, he may, in additional to the questions herein before referred to, be asked any question which tend-*
>
> *(a)* ***to test his veracity;***
>
> *(b) to discover who he is and what is his position in life; or*
>
> *(c)* ***to shake his credit,*** *by injuring his character;*
>
> *although the answer to such questions might tend to*

directly or indirectly to incriminate him, or might-expose or tend directly to expose him to a penalty or forfeiture "(Emphasis added)"

Appellants had the right to cross examine prosecutions witnesses so as to test the veracity of their evidence, the trial court denied itself and the parties the opportunity to ascertain the truth of the testimony which is one of its primary function.

Another issue of concern is on how the Statement of Getrude Masuduli who is said to have witnessed the arrest of the appellant entered into the records. At page 27 of the records, prosecution informed the court that they have failed to get their intended witness Getrude Masuduli and therefore they prayed to tender her statement under section 34 B (1) (2) (b) (c) (e) and (f) of the Evidence Act. The section provides: -

"*In any criminal proceedings where direct oral evidence of a relevant fact would be admissible, a written statement by any person who is, or may be, a witness shall subject to the following provisions of this section, be admissible in evidence as proof of the relevant fact*

contained in it in lieu of direct oral evidence. 18 (2) A written statement may only be admissible under this section-

(a) where the maker is not called as a witness, if he is dead or unfit by reason of bodily or mental condition to attend as a witness, or if he is outside Tanzania and it is not reasonably practicable to call him as a witness, or all reasonable steps have been taken to procure his attendance but he cannot be found or he cannot attend because he is not identifiable or by operation of any law he cannot attend;

(b) if the statement is, or purports to be signed by the person who made it;

(c) if it contains declaration by the person making it to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that if it were tendered in evidence, he would be liable to prosecution for perjury if he willfully stated in it anything which he knew to be false or did not believe to be true;

(d) if, before the hearing at which the statement is to be tendered in evidence, a copy of the statement is served, by or on behalf of the party proposing to tender it, on each of the other parties to the proceedings,

(e) if none of the other parties, within ten days from the service of the copy of the statement, serves a notice on the party proposing or objecting to the statement being so tendered in evidence;

(f) if, where the statement is made by a person who cannot read it, it is read to him before he signs it and it is accompanied by a declaration by the person who read it to the effect that it was so read".

My close examination of the records reveals that, the statement intended by the prosecution was not tendered in evidence. Prosecution served the appellants with a 10 days' notice plus the said statement as required by the provision quoted above. They also prayed for leave to tender the statement of Getrude Masudili as exhibit. The prayer was opposed to by the appellants. The trial court at page 30 and 31 of the proceedings

overruled the objection and ordered the person who recorded the said statement to be summoned. The recording officer appeared as PW3. She gave her evidence under oath at page 34 of the records. She identified herself as a person recorded the statement of Getrude Masuduli and that witness had told him that she witnessed the arrest of the appellants.PW3 thereafter readout the statement made by Getrudi Masuduli. That was the end of the story, the statement was not tendered as exhibit. Nevertheless, page 4 of its decision, trial court used the said statement to ground appellant's conviction. Trial magistrate was convinced after she had gone through the contents of the statement of Getrude Masuduli that it corroborated the evidence of PW1 and PW2.This was an error. Given the circumstances explained above, PW3's evidence had no evidential value for it failed to bring into the court's records what was intended by the prosecution that is, the statement of Gertrude Masuduli. This being the case, trial magistrate wrongly believed on the contents of the statements which was not made part of the court's records.

Another issue is on the inconsistencies of the prosecution's evidence. I will only go to the evidence intended to connect the appellants with the

charge. On how appellants were arrested, PW1 said, their informer told them that the appellants are at KG Guest house. On how they arrested the appellants, here is the story:

> *"We saw two people who entered to the bar, they found us sitting on the chairs when they entered we put them under arrest we began to search them so as to see if they had dangerous weapons we searched Maloba where we found elephant tusk at his right pocket. It was inside black plastick bag.....we searched the second person where we found him with nothing..."*

On the same scenario, at page 23 of the proceedings PW2 said:

> *"At around 12.00 noon we managed to arrest Maloba Magambo and Maijan William they were at KG Lodge. They hired a room there. When we entered to the said lodge, we met one of them coming to the room. We took them back to the room. We called hotel attendants to witness the search. We searched the the accused's we saw one piece of elephant at his right pocket of Malobas trouser."*

PW1 testified that appellants were arrested outside the said guest house at the bar, while PW4 gave a different story. The two witnesses being an eye witness, could not have a different version of the story on how they arrested the appellants at the scene. The contradiction pointed above raises doubt on their credibility and therefore fatal.

Another anomaly is on the way exhibit PE2, the elephant tusk was handled from the scene of crime to the police and later to court. PW1's evidence on this aspect goes thus:

> *"We arraign the two accused here to police I can recall the said piece of elephant tusk as we recorded case number of 2016, we measured its weight and recorded it. It was roundish elephant tusk which was cut and it had a hole on it..."*

Showing exhibit P2 to the court, PW1 gave the following explanation:

> *"This is the elephant tusk of which I was referring. This is the hole in the center this is the IR Number 1827/2016 weighting 0.5 kg Bariadi. IR 1827/2016 is the number of the case registered at police...."*

Describing the same Elephant tusk which he evaluated, at page 47 of the records PW4 said:

> *"The said piece was of elephant tusk form morphological structure by seeing it. Elephant tusk has three layers named enamo (tip)bentad (middle side) and cavit (opening when the tusk is dry)'".*

One would ask, is the elephant tusk described by PW1 the same with the evaluation report by PW4?. This question is hard to answer with the evidence on the records. PW1 and PW4, the prosecution witnesses who worked directly on the same exhibit assigned different descriptions on the said tusk.PW1 said it was roundish in shape with a hole at the center, marked IR 1827/2016 whereas PW3 said it had three layers.

In addition to the above, the prosecution evidence lacked clarity on the chain of custody of the seized elephant tusk. At page 4 of the trial court's judgement, trial magistrate had noted this anomaly, she concluded that, the omission to call a witness who received the elephant tusk is not fatal. I

hold a different view. The tusk was seized on 24/6/2016, the prosecution's evidence do not tell as to whom it was handled at the police station. It was not explained as to where the exhibit was kept from 24/6/2016 when it was retrieved from the appellants to 26/10/2016 when PW4 was called to do the necessary evaluation.PW4 also did not disclose who exactly handled him the said exhibit. On how PW4 got the tusk, here is his evidence:

> *"It was on 26/10/2016 when I was at work Bariadi around 10.000 am I received a call from DC Godfrey. He told me to go to police Bariadi so as to identify and evaluate trophies. When I reached at police I was shown the said trophies. I identified a piece of elephant tusk I measured it and noted that it had 0.5 kg I evaluated it".*

PW4 did not testify on how he found the said tusk at the police, there was no mention of the marks that were inserted by PW1 on the said exhibit This, in my view brings more confusion as to whether the tusk that was evaluated by PW4 is the same object/tusk found with the appellants on the material date. As if that is not enough, the record is silent on where PW4 took the tusk to after he had completed the valuation assignment. The

exhibit remained on undisclosed place until 28/8/2018 when PW1 resurfaced with it for tendering in court as exhibit. Again, on this date no explanation was given on where PW1 got the said tusk.

The chain of custody of the alleged tusk is so broken such that it is doubtful as to whether the elephant tusk that was found with the appellants on 24/6/2016 is the same elephant tusk that was evaluated by PW4 on 26/10/2016 and the same that was tendered in court on 28/8/2018 by PW1.Definitely, the integrity and the evidentiary value of the seized tusk is questionable .Exhibit P2 is therefore expunged from the records for the reasons stated above. Consequently, the records is empty, the remaining evidence is insufficient to ground appellant's conviction as far as the offence of unlawful possession of the government trophy is concerned. Suffices to say, the appellants appeal has merit, trial court failed to properly evaluate the evidence before it hence arriving into a wrong decision.

On the basis of the above, I allow the appeal, quash the conviction and set aside the sentence imposed against the appellants. Appellants are to be released forthwith from custody unless held for other lawful cause.

DATED at **SHINYANGA** this 28th day of August, 2020.

E.Y. MKWIZU
JUDGE
28/8/2020

COURT: Right of appeal explained.

THE HIGH COURT OF TANZANIA

E.Y.MKWIZU
JUDGE
28/08/2020