**IN THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**(DISTRICT REGISTRY OF MBEYA)**

**AT MBEYA**

**CRIMINAL APPEAL NO. 75 OF 2019**

*(Appeal from the decision of the District Court of Mbarali at Rujewa in Economic Case No. 03 of 2017)*

**JOSEPH S/O NGADUPA.....1ST APPELLANT**

**SUPARINO S/O GEORGE @ SHILUNGA.....2ND APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**JUDGEMENT**

*Date of Hearing : 13/07/2020*
*Date of Judgement: 01/09/2020*

**MONGELLA, J.**

The appellants were arraigned before the District court of Mbarali at Rujewa on two counts to wit: first, unlawful possession of government trophy contrary to section 86 (1) and (2) (c) (iii) of the Wildlife Conservation Act No. 5 of 2009 as amended by section 59 of the Written Laws (Miscellaneous Amendments) Act No. 2 of 2016, read together with paragraph 14 of the First Schedule and section 57 (1) of the Economic and Organised Crime Control Act, Cap 200 R.E. 2002 as amended by section 125 of the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016. The second count was dealing in Government trophies contrary to

section 80 (1) and 84 (i) of the Wildlife Conservation Act No. 5 of 2009, read together with paragraph 14 of the First Schedule and section 57 (1) of the Economic and Organised Crime Control Act, Cap 200 R.E. 2002 as amended by section 16 of the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016. They were ultimately convicted of the two counts and sentenced each to serve 20 years imprisonment for the first count and 5 years for the second count, the sentence to run concurrently. In addition, they were ordered to pay a fine of T.shs. 33,600,000/-.

Aggrieved by the decision they preferred this appeal on seven grounds of appeal. Since the appellants, who were unrepresented, did not make any submission in chief, but prayed for their grounds of appeal to be adopted as their submission and to first hear the respondent's counsel, I shall state the grounds as I summarise the submission of respondent.

On the first ground, the appellants claim that the trial Magistrate erred in law and fact by convicting the appellants relying on the evidence of PW1, PW2, PW3, PW4, PW6 and exhibit PE5 (certificate of seizure), without taking into consideration that both appellants were not arrested within the area of the Tanzania National Parks, specifically within the Ruaha National Park in Iringa region. In addition, they argue that exhibit PE5 was not read out in court by PW6 who tendered it. Citing the case of ***Mohamed Said Matula v. Republic*** [1996] TLR 3 in which it was held that "*the document which was not read over was sufficient to cast doubt in prosecution*," They prayed for exhibit PE5 to be expunged from the record.

In reply to this ground of appeal, Ms. Sara Anesius, learned State Attorney, who represented the respondent, had this to argue. Referring to page 24 to 29 of the typed proceedings, she submitted that PW6 who was the National Park ranger testified on how he arrested the appellants. She conceded that though the exhibit was not objected, it was not read over after being cleared for admission. She however, argued that no rights of the accused were prejudiced because PW6 who arrested them was the one who tendered the exhibit and his evidence capitalized on the contents of the exhibit. She referred the court to the case of ***Chrizant John v. Republic***, Criminal Appeal No. 313 of 2015 (CAT at Bukoba, unreported) in which the Court ruled that since the witness who filed the exhibit is the one who testified in court, there was no prejudice to the appellant. She prayed for the ground to be dismissed for lack of merit.

On the second ground, the 1st appellant argued that the trial Magistrate erred in law and fact in convicting the 1st appellant by relying on the evidence of PW7, the police officer and exhibit PE6, the caution statement which was taken contrary to the law. They argued that, although exhibit PE6 was not objected by the 1st appellant during the hearing because he is a layman, PW7 did not comply with section 54 (1) of the Criminal Procedure Act, Cap 20 R.E. 2002. They argued so saying that the 1st appellant was not given any right by PW7 while recording the said exhibit at police station. They contended that non-compliance with section 54 (1) of the Criminal Procedure Act by PW7 renders the whole evidence bad in law and should not have been acted upon. They added that the 1st appellant was also not taken to the justice of peace for an extra judicial statement to be recorded to corroborate exhibit PE6.

Replying to this ground, Ms. Anesius argued that the caution statement, exhibit PE6, when tendered by PW7, the 1st appellant did not object. She argued that he was given the right to object, but did not use it, therefore the ground lacks merit. With regard to the extra judicial statement, Ms. Anesius argued that it is not a mandatory requirement under the law that the accused be taken to the justice of peace for an extra judicial statement to be recorded. She added that this is only done when the accused himself wishes to.

With regards to the third ground, the appellants submitted that the trial court grossly erred in law and facts by convicting them by merely believing the evidence of PW1, PW2, PW3, PW4, and PW6 who stated that both appellants were found in possession of Government trophies being 2 elephant tusks. They contended that there was no any leader of the said locality who was involved at the time they were being arrested with the said exhibit (exhibit PE2). They added that PW4 did not see them being arrested.

On this ground, Ms. Anesius argued that it is not necessary that a local leader be present during the arrest. She said that PW1, PW2, PW3 and PW4 were present and witnessed the appellants being arrested with the elephant tusks.

Coming to ground four, the 2nd appellant contended that the trial Magistrate erred in law and fact in convicting the 2nd appellant relying on the evidence of PW5, the police officer and exhibit PE4, the caution statement. They argued that exhibit PE4 was admitted contrary to the law

because the 2nd appellant was tortured by PW5 during interrogation. The 2nd appellant added that PW5 did not give him his right of being with a friend, relative or an advocate during the recording of the caution statement. He referred the court to the case of ***Republic. Hassan Jumanne*** [1983] TLR No. 932 and that of ***Ishembe Shija v. Republic***, Criminal Appeal No. 3 of 1985 whereby it was held that a confession made involuntarily to a police officer cannot alone be the basis of conviction. He also contended that PW5 failed to take him to the justice of peace for an extra judicial statement to be recorded to corroborate the caution statement.

Ms. Anesius replied to this ground by submitting that, as seen at page 22 to 24 of the proceedings, PW5 tendered the exhibit/ the caution statement and the 2nd appellant did not object to its admission. She thus was of the view that the claim that the 2nd appellant was tortured is of no weight at this appellate stage.

Regarding the fifth ground, the 2nd appellant claimed that the trial Magistrate grossly erred in law and fact in convicting him by believing that he was mentioned by his co-accused, the 1st appellant, without considering the strength of the prosecution case. He referred the court to the case of ***Selemani Rashid v. Republic*** [1981] TLR 252, that of ***GOPA v. Republic*** [1993] 20 EACA 318 and that of ***Ezera v. Republic*** (1962) EA 309 and argued that in all these cases the court was of the view that the confession by the co-accused can only be used as lending assurance to the other evidence against the co-accused and that it cannot be used as a base for prosecution case.

Ms. Anesius challenged the contention by the 2nd appellant that he was convicted basing on the evidence of the co-accused. She argued that the said contention has no truth because the 2nd appellant was not convicted basing on the evidence of the 1st appellant. She argued that the record shows that the 2nd appellant was at the crime scene and was the one carrying the bag with the trophy. She said that this is in accordance with the testimony of PW2 and PW3 who eye witnessed him holding the exhibit. She as well referred to the caution statement in which the 2nd appellant confessed to the crime.

On the sixth ground, the appellants claimed that the trial Magistrate erred in law and fact in convicting and sentencing them to serve 20 years imprisonment for the first count and five years imprisonment for the second count and to pay a fine of T.shs. 33,600,000/- without taking into consideration that the prosecution case was not proved against them beyond all reasonable doubt as required under the law.

Replying on this ground, Ms. Anesius argued that the prosecution mounted 7 witnesses and 5 exhibits. She added that in accordance with the testimonies of these witnesses and the exhibits tendered the case was proved beyond reasonable doubt. She further contended that the appellants did not cross examine some of the prosecution witnesses, something which shows that they agreed to what the witnesses stated and thus the case been proven beyond reasonable doubt.

On the last ground, the appellants claimed that their defence evidence was not considered by the trial court in reaching its verdict. Replying to

this ground, Ms. Anesius referred the court to page 11 of the trial court judgment. She argued that, as seen on this page the trial court summarised the defence evidence and considered it including the fact that the 1st appellant confessed to the offence even in his defence. She added that the trial court considered the 2nd appellant's evidence that he was on his way and got arrested when he came near a motor vehicle, make Noah. That the trial court considered this evidence and found it had no weight as there were eye witnesses who testified that the 2nd appellant had carried the elephant tusks and that he confessed in his caution statement.

The 2nd appellant rejoined on Ms. Anesius' submission. He still maintained that the non-reading of exhibit PE5 was fatal and the same should be expunged from the record. He also challenged the admission of his caution statement arguing that he objected to its admission on the ground that he was not taken to the justice of peace, but the trial court proceeded to admit the same. He further challenged the evidence of PW4 arguing that it was highly relied upon by the trial court in convicting him. He insisted that PW4's evidence is not true as he did not see him while being arrested. He as well challenged the evidence of PW2, PW3 and PW6 saying that it is not to be relied upon because the trial Magistrate while recording it in his judgment stated that these witnesses testified that he was arrested at the compound of his house while he was arrested in a farm.

After considering the grounds of appeal and arguments by both parties, I also took trouble to thoroughly read the record of the trial court. My observation is as follows:

On the first ground, I find the argument that the appellants were not arrested in the park to be irrelevant and devoid of merits. The evidence adduced by the prosecution witnesses clearly shows that the appellants were arrested in a farm after agreeing with PW6, a park ranger to go to the said farm to complete the deal. The appellants also claims that exhibit PE5, seizure certificate should be expunged as it was not read out after being cleared for admission. The general position of the law is to the effect that an exhibit has to be read out in court after being cleared for admission. See: ***Lack Kilingani v. Republic***, Criminal Appeal No. 402 of 2015 (unreported); ***Sumni Amma Awenda v. Republic***, Criminal Appeal No. 393 of 2013 (unreported); ***Robinson Mwanjisi & Others v. Republic*** [2003] TLR 218, just to mention a few. However, an exception lies in circumstances whereby the witness's testimony capitalizes on the exhibit. This was provided in the case of ***Chrizant John v. Republic*** (supra), cited by Ms. Anesius, in which the CAT ruled that if the evidence of the witness capitalizes on the exhibit then the accused is not prejudiced. Specifically the Court held:

> *"In the circumstances of the instant case however, we rush to agree with Mr. Ngole that since the Republic called PW4 Florence Kayungi, the doctor who conducted deceased's autopsy, and because the evidence of that witness capitalized on exhibit P1 and he explained in detail the deceased's cause of death, also as his advocate was given chance to cross-examine her, it cannot be accepted*

*that the appellant was denied opportunity to know the contents of exhibit P1."*

I have gone through exhibit PE5 and the testimony of PW6, a park ranger who arrested the appellants and seized the elephant tusks. In this exercise, I found that PW6, as the arresting officer who also filled in the certificate of seizure gave evidence that capitalized on the contents of exhibit PE5. In my view therefore, the appellants were not prejudiced as they understood what charges were being laid against them, the contents of exhibit PE5 and they even got the chance to cross examine PW6 on his testimony. This ground is therefore dismissed.

Regarding the second and fourth grounds, I wish first to reproduce the provisions of section 54 (1) of the Criminal Procedure Act under which the contention by the appellants lies. It provides:

*"Subject to subsection (2), a police officer shall, upon request by a person who is under restraint cause reasonable facilities to be provided to enable the person communicate with a lawyer, relative or friend of his choice."*

The testimony of PW7, a police officer who administered the caution statement, as seen at page 32 of the typed proceedings, is to the effect that the 1st appellant was informed of all his rights including that of having a lawyer, a friend, or relative of his choice in the course of administering the caution statement and he opted to proceed on his own. With regards to the 2nd appellant, the testimony of PW4, as seen at page 22 to 23 of the typed proceedings, shows that he was also informed of all his rights as

required under section 54 (1) of the Criminal Procedure Act. Thereafter his caution statement was taken. As argued by Ms. Anesius, both appellants did not object to the admission of the caution statement, exhibit PE6 and PE4 respectively. The appellants have argued that they did not object due to being laymen. I do not subscribe to their defence because it does not take a legal mind to accept facts that are untrue in a court of law. If PW5 and PW7 had not spoken the truth about informing and giving them their rights as they testified then the appellants ought to have objected to that and the trial court would have taken necessary steps. These grounds are dismissed as well.

I shall collectively deliberate on the 3rd, 5th, 6th and 7th grounds of appeal because they all touch on the prosecution evidence in connection to the offence charged. In these grounds the appellants argued that no local leader was involved during their arrest; the 2nd appellant claims he was convicted basing on the evidence of the co-accused, the 1st appellant; they both claim that the case was not proved beyond reasonable doubt; and that the defence evidence was not considered.

Regarding the claim that no local leader was present, I agree with Ms. Anesius that there is no legal requirement that a local leader must be present during arrest of a suspect. I thus find the argument baseless taking into account that they were not arrested at their homes but in a farm. Regarding the argument that the 2nd appellant was convicted basing on the evidence of a co-accused, I also find the argument devoid of merit. As much as the 1st appellant testified to have committed the offence with the 2nd appellant, there is sufficient independent evidence on record

proving the liability of the 2nd appellant. PW2 and PW6 explained how they met the appellants even before their arrest and how they planned for their arrest. They testified that after being informed of the 1st appellant being in possession of the trophy they contacted him pretending to be prospective buyers. The 1st appellant took them to a place where the 2nd appellant emerged with a bag carrying the two elephant tusks. The appellants were then arrested at the scene with the elephant tusks. In this event there were also other witnesses being PW3, a park ranger also involved in arresting the appellants, and PW4, a villager who witnessed the appellants being arrested with the two elephant tusks.

In my settled view this piece of evidence carries more weight in the conviction of the 2nd appellant than the fact that he was mentioned to be involved in the offence by the 1st appellant. The 2nd appellant challenged the evidence of PW4 as being unreliable. In my view however, even if PW4's testimony is expunged, the testimony of PW2, PW3 and PW6 suffices to prove the offence. It is trite law that the trial court is better placed at assessing the credibility of the witnesses than the appellate court. In that regard, the appellate court is limited in interfering with the findings of the trial court on assessment of credibility of witnesses, unless where there are compelling reasons to do so. These are such as where there are serious mis-directions, non-directions, mis-apprehensions, or miscarriage of justice. See: ***Bakari Abdallah Masudi v. The Republic***, Criminal Appeal No. 126 of 2017 (unreported); ***Ally Mpalagana v. Republic***, Criminal Appeal No. 213 of 2016 (unreported); ***Jaffari Mfaume Kawawa v. Republic*** [1981] TLR 149; ***Mussa Mwaikunda v. Republic***, Criminal Appeal No. 174 of 2006 (unreported) and ***Michael Alias v.***

***Republic***, Criminal Appeal No. 243 of 2009 (unreported). In the case at hand I do not see such mis-directions, non-directions, mis-apprehensions or miscarriage of justice to warrant interference on the findings of the trial court.

In addition, the record, as seen at page 35 of the typed proceedings, indicates that the 1st appellant confessed to the commission of the offence even during his defence. The law is settled to the effect that there is no better evidence in proving commission of an offence than the accused's own confession. See: ***Jacob Asegelile Kakune v. DPP***, Criminal Appeal No. 178 of 2017 (CAT, unreported); ***Ibrahimu Ibrahimu Dawa v. Republic***, Criminal Appeal No. 260 of 2016 (CAT, unreported); and ***Mohamed Haruna Mtupeni & Another v. Republic***, Criminal Appeal No. 259 of 2007 (CAT, unreported). Therefore, considering the evidence adduced by the prosecution witnesses and the fact that the 1st appellant confessed in his caution statement as well as during defence case, I find that the prosecution proved the case beyond reasonable doubt.

On the last issue that the defence evidence of the 2nd appellant was not considered, I have gone through the trial court judgment and I agree with the appellants that the defence evidence was not considered. At page 11 and 16 to be specific, the trial Magistrate appears to summarise the defence evidence, but he did not go further to evaluate the same. After the summarizing the defence evidence, he concluded that the prosecution witnesses have proved the liability of the 2nd appellant. However, this being the first appellate court, it has the power to evaluate and consider the defence evidence as I hereby do. See: ***Prince Charles***

***Junior v. Republic***, Criminal Appeal No. 250 of 2014 (CAT at Mbeya, unreported). The 2nd appellant basically put up a defence that he was not found in possession of the government trophy, but was arrested while he was on his way. I am not convinced with this defence taking into account that the 2nd appellant confessed in committing the offence in his caution statement. The argument he brought up in this appeal that he objected to the caution statement being admitted is found to be an afterthought as it is not supported by the records of the trial court.

Having observed as hereinabove, I find the case against the appellants was proved beyond reasonable doubt. I therefore uphold the conviction and sentence of the trial court. The appeal is dismissed.

Dated at Mbeya on this 01st day of September 2020

**L. M. MONGELLA**
**JUDGE**

**Court:** Judgment delivered at Mbeya through video conference on this 01st day of September 2020 in the presence of the appellants, appearing in person and Ms. Xaveria Makombe, learned State Attorney for the respondent.

**L. M. MONGELLA**
**JUDGE**