IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

APPELLATE JURISDICTION

ECONOMIC CRIMINAL APPEAL NO. 4 OF 2020

(Arising from Economic Case No. 4 of 2019 of Kigoma District Court Before G.E. Mariki, PRM)

JADILI S/O MUHUMBI.....1st APPELLANT

MASWANYA S/O JACKSON.....2nd APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

17th March, 2021 & 16th April, 2021

A. MATUMA, J.

Contrary to the provisions of section 86 (1) and (2) (b) of the Wildlife Conservation Act No. 5 of 2009 as amended by section 59 (a) and (b) of the Written Laws Miscellaneous Amendment Act No. 4 Act No. 2 of 2016 read together with paragraph 14 of the 1st Schedule to the Economic and Organized Crimes Control Act, Cap. 200 R.E. 2002, the appellants stood charged for unlawful possession of Government Trophies.

They were alleged to have been found in possession of two pieces of elephant tusks valued at **Tshs 35,265,000/=** on the 3rd day of April, 2019 at Mpeta Village within Uvinza District in Kigoma Region without permit from the Director of Wildlife.

After a full trial both appellants were found guilty of the offence, convicted and sentenced to serve a custodial sentence of twenty years in prison.

Aggrieved with such conviction and sentence, the appellants are now before me with a total number of eight (8) grounds of appeal all of which are challenging the prosecution case to have not been proved beyond reasonable doubts for there being contradictions among prosecution witnesses, unfair trial, improper identification, procedural irregularities on search and seizure, chain of custody, reliance on cautioned statement which was illegally obtained.

At the hearing of this appeal, the appellants appeared in persons while the Respondent/Republic had the service of Mr. Shabani Juma Masanja learned State Attorney.

The Appellants had common submissions in support of their joint appeal. They respectively submitted that PW1, PW2 and PW3 contradicted on whether they jointly found the appellants in possession of the trophies

or not. So, does PW7. They also complained to have been incarcerated into police lock up for 42 days before they could be arraigned in court hence unfair trial. The 1st appellant also complained about the admissibility of his cautioned statement which he stated to have been procured by torture and that even after his objection to its admissibility, the same was admitted in evidence arbitrarily.

The second appellant added that on his party he was merely named as a person who was communicating with the police as a linking person to the illegal business but no proof that they really had communicated with him. That no phone or any record was tendered in evidence to prove such allegation.

The learned State Attorney on his party maintained that the Prosecution case was proved beyond reasonable doubts. He disputed any contradiction in the prosecution case and that even if it appears that the three witnesses contradicted themselves as to whether PW3 was together with PW1 and PW2 at the time of arrest and seizure or he joined them when the appellants were already under arrest, then such contradiction is very minor which should not affect the prosecution case. The learned State Attorney Mr. Masanja cited the case of ***Silvanus***

Ansigali @ Mbilinyi versus Republic, Criminal Appeal No. 15 of 2020 to that effect.

The learned State Attorney further argued that there is nothing on record to show that the trial was unfair. He added that issues of identification are immaterial as the appellants were arrested on the locus in quo.

About chain of custody the learned State Attorney submitted that the same was not broken as the witnesses explained well on it. He added that the nature of the exhibit which was elephant tusks cannot easily be tempered with citing the case of ***Issa Hassan Uki v. Republic,*** Criminal Appeal No. 129 of 2017 (CAT).

About the cautioned Statement, the learned State Attorney argued that the same was properly admitted in evidence as there was an inquiry before its admission and that the same was taken within the prescribed time *(Refer the Rejoinder Submission).*

The learned State Attorney stood by the certificate of seizure as having been properly procured and filled. He finalized his submission by praying this appeal to be dismissed as the conviction of the appellants based on the strength of the prosecution case and not the weaknesses of the defence.

I will start with the evidence of PW3 Dalas Machiya and PW7 Chacha Marwa. PW3 being the Mtaa chairman of the locality within the crime scene testified that on the material date he was phoned by the police to join them at the crime scene (*alongside of the road at Kikwete Bridge*). On his arrival there he met the appellants already under arrest.

That the 1st appellant Jadili had in possession of a plastic bag (sandarusi) which he was ordered to open. When he opened it, this witness saw the elephant tusks.

Just like PW3, PW7 also was called by the police to witness the search in the plastic bag which was in possession of the appellants when he was on his way from fishing. By that time the two appellants were already under arrest.

From the evidence of the two witnesses supra, it is obvious that they were not present at the time of the arrest of the appellants and merely joined the police officers when the appellants were already under arrest. They could not thus precisely tell that it was the appellants who brought the ***"sandarusi"*** bag with elephant tusks thereat. They only witnessed the 1st appellant ordered to open such a bag in which the alleged elephant tusks were found. Their respective evidence in relation to the appellants being found in possession of the trophies is nothing but

hearsays which they received from police officers. Hearsays is inadmissible in evidence as clearly provided for, under section 62 (1) of the Evidence Act, Cap. 6 R.E. 2019 which requires oral evidence in all cases to be direct, that is to say if it refers to the fact which could be seen, then it be the evidence of a person who says he saw it. In the instant case PW3 and PW7 did not see the appellants arrested with the alleged tusks but saw the appellants already arrested and the alleged elephant tusks already restrained by police officers. I therefore expunge the evidence of the two witnesses for being bad in law as herein above explained.

I then turn to the cautioned statement of the first appellant Jadili Mahumbi.

When the statement was sought to be tendered, the 1st appellant objected among others on the ground of torture. The trial court conducted an Inquiry in which it ruled out that the contents of the statement cannot be said to be lies as averred by the 1st appellant but the truth which was voluntarily made. It thus admitted the statement as exhibit P4.

Since that was the decision of the court which the prosecution maintains as a good and just decision, the law requires the statement to be

considered as a whole and one cannot argue for the use of only certain parts of it in favour of the prosecution leaving or ignoring some parts of it against their favour. In fact, in criminal trials the benefit of doubts is always taken in favour of the accused/appellant and not in favour of the prosecution. Now back to the caution statement which the learned State Attorney and the prosecution generally relies as containing nothing but the truth, and since such truth is nothing but what was stated in it by the 1st appellant, then I find the statement to have been taken in contravention of section 50 (1)(a) of the CPA, Cap. 20 R.E. 2019. This is because in the statement, the 1st appellant stated to have been arrested at 20.00 hours on the night of 3/4/2019, and DC Abel the recording officer during inquiry confirmed that the 1st appellant told him;

'In the statement Jadili said that he was arrested at 20.00 hrs'.

If the statement is believed as a whole to have contained nothing but only the truth, then even the time under which the 1st appellant was arrested according to the statement itself, must be regarded as nothing but the truth.

If it is so regarded, then the recording of the statement at 02.15 hours on the 04/04/2019 was beyond the prescribed period of time under section 50 (1)(a) supra. In the circumstances, the statement becomes

liable to be expunged in terms of section 169 (1) of the CPA supra and as it was held in the case of ***Janta Joseph Komba and others versus The Republic,*** Criminal Appeal No. 95 of 2006.

And if, we have to take it that, the 1st appellant lied on the exact time of his arrest, then it should be suspicious that he might have been lied on some other contents of the statement. In fact, he testified to have stated lies in the statement due to torture.

Now since it is difficult to distinguish the truth and lies in the statement, the benefit thereof must be resolved in favour of the appellant. I therefore expunge the cautioned statement exhibit P4 from the evidence on record.

I also expunge exhibit P1 the certificate of seizure for having been executed-by under the order of a wrong person. Both the order of search and the certificate of seizure thereof were executed under the provisions of section 35 of the Police Force and Auxiliary Services Act, Cap. 322 R.E. 2002 and section 38 (1) of the Criminal Procedure Act, Cap. 20 R.E. 2002. Under such provisions only **the Police Officer Incharge of a Police Station** can search and seize exhibits or only him can **order** any other officer subordinate to him to conduct search

and seizure. The provisions of such two different laws are very clear and with identical words;

'(1) If ***a Police Officer Incharge of a Police Station*** *is satisfied that there is reasonable ground for suspecting that there is in any building, vessel, carriage, box, receptacle or place;*

a. anything with respect to which an offence has been committed;

b. anything in respect of which there are reasonable ground to believe that it will afford evidence as to the commission of an offence;

c. Anything in respect of which there are reasonable grounds to believe that it is intended to be used for the purpose of committing an offence;

and the ***officer*** *is satisfied that any delay would result in the removal or destruction of that thing or would endanger life or property, he may search or* ***issue a written authority*** *to any* ***police officer under him*** *to search the building, vessel, carriage, box, receptacle or place as the case may be'.*

In the circumstances of the law, it is not for every officer of the Police Force to search or order search. Only the Officer Incharge of the Police

Station or under his written authority any other officer under him. The Officer Incharge of the Police Station is commonly known as OCS. In the instant case it was the Officer Commanding Criminal Investigation in the District (OC/CID) who ordered search on the so alleged; *'I have other duties to perform at the office'.*

I reiterate what I previously held in the case of ***Rose John versus Republic, (DC) Economic Appeal No. 1 of 2020,*** High Court at Kigoma, that; so long as the powers to search and seizure or to authorize any other to exercise such powers under a written authority are vested to OCS, no any other officer of the police force can assume them (such powers).

In the above-named case of Rose John, I made it clear which I reiterate here that the herein above provision does not necessarily mean that OC/CID, Regional Police Commander (RPC), Commissioners of Police or any other Police Officer of certain ranks cannot search or order search. This is because the Officer Incharge of a Police Station (OCS) has been defined under section 2 of the Police Force and Auxiliary Services Act supra to be the Police Officer in Command of the Police Station (OCS) himself and that includes an officer superior in rank of an Officer Incharge of a Police Station. The law is again clear

that when the OCS or the officer superior in rank to him are unavailable, then any other officer next in rank can perform the duties that would otherwise be performed by the OCS or by an officer superior in rank to him.

Therefore, all what matters is the presence of evidence to the satisfaction of the court that the officer who conducted or ordered search was either the OCS himself or an officer superior in rank to the OCS, or was an officer next in rank to OCS but when it was the officer next in rank to OCS, such further evidence that the OCS himself by whatever reason to be on record was absent from the station.

Under the record at hand, there is no evidence that the OC/CID who ordered search was superior in rank to OCS nor there is evidence that he or she was next in rank, neither that the OCS was not available at the time. Even the Order/Warrant itself exhibit P1 has clear words that;

> *'To be completed when* ***the officer in charge of the Police Station*** *requires a subordinate to carry out the search'.*

Then the place where the signature is to be affixed on the order, the words are again very clear;

> ***'Signature of Officer Incharge of Police Station'.***

As the search and seizure in this case was illegally initiated, the same was unlawful and renders exhibit P4 unlawful hence I expunge the same.

Having expunged the evidence of PW3, PW7, exhibit P1 and P4, the question is now; is the available remaining evidence sufficient to sustain the conviction of the appellants or either of them? That takes me to the other complaints in the grounds of appeal.

About improper identification, I agree with the learned State Attorney Mr. Shabani Juma Masanja that in the circumstances of this case issues of identification was immaterial. This is because the appellants were arrested on the locus in quo and never at any time escaped or parted from the hands of Police Officers who arrested them. The potential issue would only be as shall be soon herein below determined; whether the appellants were really found in possession of the alleged tusks as a mere presence at the crime scene does not constitute one a party to an offence or establish common intention as it was held in the case of ***Damiano Petro and Jackson Abraham v. R,*** *[1980] TLR 260.* The claims on improper identification are thus dismissed.

On the chain of custody, I again purchase the arguments of the learned State Attorney that the same was not broken.

This is because the prosecution witnesses explained thoroughly on how the exhibits were handled throughout. PW1 D/CPL Edward who seized the trophies explained that having seized the trophies he took them to CRO and handled them to PC Samson who was CRO on duty after he had labeled them with a mark; Ref.IR/89/2019, A, B & C. He then during trial collected the same exhibits and tendered them in evidence as exhibit P2 collectively and without any objection. PC Samson came as PW5 and testified at page 33 of the proceedings on how he received the exhibits with its labeled marks, how he kept them until the next morning when he handled them to the exhibit keeper one DC Ephraim. PC Samson identified in court exhibit P2 collectively as the very exhibits he received that day and later handled them to exhibit keeper. Then came DC Eprahim as PW6 at page 34 who explained how he received the exhibits, registered them in the exhibit register. How he handled them to DC Advent on the 10/04/2019 for the wildlife officer to make identification and valuation and how the exhibits were returned to him the very same day whereas he kept them until on 15/07/2020 when he gave them to D/CPL Edward for tendering them in evidence on trial. DC Advent also came as PW8 and testified on how he received the exhibits from the exhibit keeper, took them to the Wildlife Officer for identification and valuation, and how he took them back to the exhibit keeper. The Wildlife

Officer Imelida Mbarouk was not left out. She came as PW4 and testified on how she received the exhibits, identified and valued it and then handled it back to DC Advent. Also, in the case of **Issa Hassan Uki** supra, the Court of Appeal considered that elephant tusks as exhibits are such that they cannot change hands easily nor can easily be tempered with and thus can be received in evidence even when the chain of custody is broken provided that there is no evidence on record on a danger that they might have been tempered with.

In that respect therefore, I dismiss the complaints relating to chain of custody.

The last question for determination is thus, is there sufficient evidence on record to the satisfaction of the court that the appellants or either of them was positively found in possession of exhibit P2 collectively? The evidence relating to the arrest of the appellants have been given by PW1 and PW2. It is only these two witnesses who can positively state whether the appellants were in possession of the trophies or not at the time of arrest as it was them who arrested the appellants.

PW1 D/CPL Edward testified that they arrested the appellants out of four people who arrived at their mission (*kwenye mtego wao*) whereas the 1st appellant was holding a plastic bag (sandarusi) in which the elephant

tusks were found. That in the course of arrest there was a passerby PW7 Chacha Mwita whom they invited to witness the search. PW2 Ahazi Philipo Sanga had also positive evidence that it was that 1st appellant who had the tusks but was in a company of three others.

With that evidence, it was the 1st appellant who was positively found in possession of the elephant tusks in the '***sandarusi***' and it is him who was ordered to open it.

The 2nd appellant was associated to the crime on two allegations;

One, that he was the one tracing customers for the purchase of the tusks from the 1st appellant and **two**, that at the time of arrest he was in a company of the 1st appellant.

I find the evidence against the 2nd appellant Maswanya Jackson insufficient to warrant his conviction. This is because there is no positive evidence on record that indeed he was tracing customers for the tusks. All what is on record as per PW2 is that such information was availed to the Anti-Poaching Unit by their informer. Through the information of their informer, they sent a Game Officer to the village to make follow up of such information. The said game officer who was not named reported back that it was Jadili Mahumbi (the 1st appellant) who possessed the trophies and his middlemen who were tracing customers were Maswanya

(the 2nd appellant) and one Marko. Unfortunately, neither the alleged game officer nor the informer was brought as witnesses to accord the 2nd appellant with an opportunity to hear them on how he was tracing customers and subsequently for him to cross examine them. Even when the 2nd appellant through his advocate Mr. Sadiki Aliki cross examined PW2 why didn't they bring the informer, PW2 replied;

> *'I was contacting our informer and I am not supposed to mention him.*
>
> *I don't agree that we must bring the informer to testify as the aim was to arrest Jadili which we succeeded'.*

But the law is very clear that no one can be held liable for information received from undisclosed persons commonly known as informers. Every piece of evidence to be used against an accused person must be received on record in accordance to the law and the accused person be accorded opportunity to cross examine the author of such evidence.

In the case of **Kigecha Njunga versus Republic** [1965] 1 E.A. 773 (HCK) at page 774 the Court of East Africa had a useful decision relating to informers. It held;

> *'Informers play a useful part no doubt in the detection and prevention of crime, and if they become known as informers to that class of society among whom they work their*

usefulness will diminish and their very lives may be in danger. But if the prosecution desires the court to hear the details of the information an informer has given to the police, clearly the informer must be called as a witness'.

In the circumstances, it was wrong for the trial court to believe that the 2nd appellant was the 1st appellant's middleman tracing for customers of the tusks basing on information of an informer who was not called to positively point out the 2nd appellant as a person he referred in his information and explain thorough how did he became aware of such information.

I also had opportunity to rule out of the rule and potentiality of information allegedly received from Police informers in the case of **Republic vs Idrisa Hamis and Another** Criminal Session Case No. 34 of 2020, High Court at Kigoma. In that case at page 16 I stated;

'Before I wind up, I would like to remind investigators of their duty. They are called investigators because their role is to investigate offences and collect all potential evidence to prove or disprove the allegations registered before the police station. ***They should not relax on the information obtained on the so-called informers without verifying them by collecting independent evidence through the information obtained'.***

I went on cautioning them very clear that;

'Courts of law will never convict a suspect on allegations that police informer named him even if it is stated that such informer saw the accused committing the offence in the broad day light and that they are familiar to each other. In the circumstances the informer would be necessitated to turn into a witness and be physically available in the witness dock to be subjected to cross examination by the accused person or his advocate. And for the court to assess his or her credibility and reliability'

I still stand by the herein above observations as far as the question of informers is concerned. In the instant matter, no positive evidence that the 2nd appellant was really a middleman as no body gave evidence to have directly contacted him for the stated illegal business.

Even PW2 who alleged to have been communicating with the accused did not state to have directly contacted/communicated with the 2nd appellant. Instead, he insisted that at all times he was communicating with his informer,

'Upon our arrival at Mawasiliano sub village, I phoned our informer that we had arrived'

I thus find that the 2nd appellant remains with only one incriminating fact that he was arrested along with the 1st appellant who at the time had in possession of the tusks.

It is my firm finding that being arrested together at the locus in quo in itself is not sufficient evidence to convict as that might entail convicting the person on his mere presence on the crime scene. There must be evidence as to common intention between the offenders for the execution of the alleged offence. Going by the guidelines in ***Godfrey James Ihuya and others versus R, [1980] TLR 197,*** I find that common intention has not been established between the appellants.

But again, the arrest of the accused persons now the appellants, was done in the dead dark night to the extent that the arresting officers used torch light to search in the sandarusi. The arrest was on the passing road, not in a house, tent or vessel. Thereat, some other people were also passing including PW7. With the darkness, the prosecution witness could not testify as to whether they had opportunity to see the two appellants walking together as one group under a common move. Therefore, the meeting of the 2nd appellant and the 1st one at the locus of arrest might be a coincidence, the possibilities of which cannot be ignored. This is because had PW7 also arrived at that area on the exact time with the appellants he might have been arrested as well. Thank God, he arrived there some minutes or very soon after the arrest of the appellants. The doubts as to

whether the 2nd appellant was a companion to the 1st appellant are not overruled particularly in the absence of the 1st appellant's cautioned statement and his positive evidence on defence that he was alone at the time of his arrest. Such doubts are hereby resolved in favour of the 2nd appellant.

With the herein above analysis the 2nd Appellant cannot even be held liable under the principle of **constructive possession** under section 5 of the Penal Code, Cap. 16 of the Laws Revised Edition of 2019 and or 2002 as the case may be. I therefore find the 2nd appellant Maswanya Jackson not guilty of the offence charged and wrongly convicted. I allow his appeal, quash his conviction and set aside the sentence of twenty years meted on him. I order his immediate release from custody unless held for some other lawful cause.

As about the 1st appellant, I hold the view that the evidence is enough to warrant his conviction. First of all, the two arresting officers PW1and PW2 positively testified that it is him who was holding the sandarusi within which the elephant tusks were found. They consistently stated that it was the 1st appellant who had in possession of such bag/sandarusi and it is whom they ordered to open upon which the tusks were found. The 1st appellant called me to discredit these

witnesses as they testified that at the time of his arrest they were in a company of PW3 the street chairman but he contradicted them as herein above stated earlier that he only joined them when the arrest was over.

The principle is that every witness is entitled to credence and have his evidence accepted unless there is good and cogent evidence to disbelieve the witness. See ***Goodluck Kyando versus Republic,*** *[2006] TLR 363.*

It is true that PW1 and PW2 purported in evidence to have been in a company of PW3 the street chairman at the time of the arrest of the appellants but PW3 on his side denied such fact, let us see their versions;

PW1;

> *'While on the way we notified Kitongoji chairman that we wanted to meet him to assist us. We went to Mawasiliano sub village* ***in the company of the said chairman****...on arrival Mr. Ahazi dropped...after sometime there arrived people holding a plastic bag (mfuko wa sandarusi)'*

PW2;

*'**We met the sub village chairman on the way before arrival at the scene.** What I know is that we picked the chairman on our way to Mpeta (the scene)'.*

But PW3;

> *'I found two people under arrest...**I found both accused already under arrest'.***

That is what the 1st appellant called contradictions. I agree with him that they were contradictions but the same did not go to the root of the matter which is the arrest itself and being found in possession of the trophy. In fact, what PW1 and PW2 did, was to add some lies on the truth the addition of which was not necessary. In my view they wanted to purport that they had a free agent in the arrest and search of the appellants. I find the mischief curable as all other material evidence to my satisfaction that the elephant tusks were really seized from the 1st appellant are intact. I would have ruled otherwise had the other evidence on the material aspects shaken.

Even though I call upon witnesses particularly police officers to stop adding some false facts/evidence on the truth as they might endanger prosecution cases which would have otherwise stand in the absence of such additions.

Let me now end the matter by explaining why I have decided to believe PW1 and PW2 that they found the 1st appellant in possession of the trophies in the absence of any certificate of seizure. In law where there is strong evidence to the satisfaction of the court that an accused person was really found in possession of the trophy or exhibit, the court may convict even in the absence of the certificate of seizure. In the case of **Mandela Masikini @ Kasalama versus The Republic**, Criminal Appeal No. 471 of 2015 for instance, the Court of Appeal at Mwanza sustained the conviction of the appellant who was found in possession of a lion skin without there being a certificate of seizure. It held;

> *'We are settled in our mind that lack of certificate of seizure does not or cannot in anyway shake the strong evidence of PW1, PW2 and PW4 that the appellant was found in unlawfully possession of government trophy, to wit, a lion skin'.*

In the like manner, I believe the evidence of PW1 and PW2 in relation to the fact that the 1st appellant was in fact found in possession of the trophies to wit, elephant tusks. I accordingly dismiss his complaints that he was not found in possession as such.

Having so observed, I partly allow this appeal in respect of the 1st appellant to the extent herein above stated and partly dismiss it. In the

final analysis the conviction of the 1st appellant is sustained. The sentence is as well legal and accordingly sustained. Serve for the grounds which I have allowed herein, the 1st appellant's appeal against the conviction and sentence is dismissed. The right of further appeal to the Court of Appeal of Tanzania subject to the guiding laws and rules thereat is explained to whoever aggrieved with this judgment.

It is so ordered.

A. Matuma

Judge

16/04/2021

Court: Judgment delivered in chambers in the presence of Appellants in person and Mr. Shaban J. Masanja Learned State Attorney for the Respondent.

Sgd: A. Matuma

Judge

16/04/2021