**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF SONGEA**

**AT SONGEA**

**CONSOLIDATED DC. CRIMINAL APPEAL NO. 04 AND 05 OF 2021**

***(Originating from Economic Case No. 05 of 2019 of the District Court of Songea at Songea)***

**ISSA MUSSA MILANZI @ KANTIPULA ..... 1ST APPELLANT**

**FIDELIS MANGALA @ SAID ..... 2ND APPELLANT**

**VERSUS**

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

**JUDGMENT**

**Date of Last Order: 02/06/2021**
**Date of Judgment: 16/6/2021**

**BEFORE: S.C MOSHI, J.:**

The appellants were arraigned before the District Court of Songea at Songea for the offence of unlawful possession of Government Trophy contrary to section 86(1) and (2) (b) of the Wildlife Conservation Act No. 5 of 2009 read together with paragraph 14 of the first schedule to sections 57 (1) and 60(2) of the Economic and Organized Crimes control Act Cap. 200 R.E 2002 as amended by section 16 of the written laws (Miscellaneous Amendments) Act No. 3 of 2016. It was alleged that on

11th day of July 2019 at Nambendo village within Songea District in Ruvuma Region the appellants and one Maulid Jafari were found in unlawful possession of Government trophy to wit two elephant tusks valued at T.shs. 34,505,550/= the property of the United Republic of Tanzania without a valid permit from Director of wildlife. After a full trial, the appellants were found guilty and were convicted accordingly. Consequently, the appellants were sentenced to 20 years imprisonment. Aggrieved by the conviction and sentence they have appealed to this court. The appellants filed two separate appeals namely Dc criminal appeal number 4 of 2021 and 05 of 2021, the court consolidated them as they both originate from Economic case No. 5 of 2019. The first appellant's grounds of appeal are: -

1. *That, the trial Magistrate erred in law and fact by convicting and sentencing the appellant basing on the sequence of custody in respect of exhibit PIII (elephant tusks) without considering that the chain of custody was not properly accounted for.*

2. *That, the trial Magistrate erred in law by admitting exhibit PI, PII, PIII, and PIV in evidence and used the same to convict and sentence the appellant without considering the same were tendered and admitted contrary to the law.*

3. *That, the trial magistrate erred in law by convicting and sentencing the appellant without considering there is material inconsistencies and contradictions on testimonies of PW1 and PW5 on identification of Exhibit PIII (elephant tusks.)*

4. *That, trial magistrate erred in law and in fact by convicting and sentencing the appellant contrary to the law.*

5. *That, the trial magistrate erred in law and in fact by convicting and sentencing the appellant without considering that the prosecutions had failed to prove the case on the required standard.*

The second appellant's grounds of appeal were as follows: -

1. *That, the trial magistrate erred in law and fact to convict me while the prosecution was not corroborated PW1 stated that both tusks were labeled with Songea IR/25/12/2019 while PW2 stated that they were labeled with SO/IR/2521/2019. Hence a doubt has been raised on the matter of the chain of custody.*

2. *That, the trial magistrate erred in law and fact to convict me basing on the evidence of PW4 while his evidence was weak and doubt full. Your Hon. Judge, PW4 during his testimony before trial court, he neither*

*mentioned any specific mark or appearance of those elephant tusks (i.e exhibit P) nor identified the same so as to prove that he same was been valued by him on the material date and very interesting, he (PW4) stated that he was called to do evaluation on 11/7/2017 while the case at hand was 2019. See page 50 of the proceeding.*

3. *That the trial Magistrate erred in law and fact to convict me basing on the evidence of PW2 while his evidence was contradicted and doubtful. PW1 said that he was familiar with 2nd accused since 11/7/2019 then he said that he arrested 2nd accused on 5/07/2019 and later on he said that he arrested him on 10/07/2019 then he arrested him on 10/07/2019 but very surprisingly he came to say that he had got information about 2nd accused on 24/08/2019 see page 32-34 of the proceedings.*

4. *That, always the burden of proving the charge beyond all reasonable doubt lies on the prosecution side and at this juncture the prosecution side failed to prove the charge against me beyond all reasonable doubt.*

At the hearing of the appeal the appellants were unrepresented, whereas the Republic was represented by Ms. Tulibake Juntwa Senior state Attorney.

The first appellant had nothing to add to the grounds of appeal.

The second appellant submitted on the first ground of appeal that, PW2, PW3, PW4 and PW5 were not shown and did not identify exhibit P 3 before the court so that they could prove the charge facing him.

On the second ground he stated that, the subordinate court magistrate erred in law and fact in convicting him since the certificate of seizure by the prosecution does not contain his name and it doesn't contain his signature.

Submitting on the third ground, he argued that the trial court magistrate erred in law and fact to convict him as PW1 said that the second appellant was indicated by Shamei Omary Maliwata, he again said that he was pointed out by Shamei Omary he wanted to know which one of the two versions is tre.

In reply Ms. Tulibake Juntwa opposed the appeal. She started with the first appellant's grounds of appeal. On the first ground she submitted that, the proceeding shows that there was a chain of custody and admission of exhibit P.III was proper. The prosecutions' witnesses did explain well how exhibit P.III was kept and later brought to court.

There is a testimony of PW1 who said that he found the tusks on 11/7/2019 at Nambengo village. The second appellant led them to the first appellant who led them where the tusks were found. Thereafter, he took them to police station at Songea and handed them to D/CPL Musa. At the police station they were marked as IR 25/ 21/2019. The evidence which was supported by evidence of PW1.

She submitted further that there is evidence of PW5, the police exhibit keeper who said that, on 11/7/2019 he received the tusks from a policeman called Musa and kept them at police exhibit room/store up to 24/11/2020 when he handed them to PW1 who was to produce them in court as exhibit. The prosecution produced a chain of custody record (exhibit P.II) which was dully read out in court; hence it was properly admitted. The chain of custody was never broken. To cement this argument, she cited the case of **Issa Hassan Uki V. R, Cr. Appeal No. 129/2017** (Unreported), Court of Appeal at Mtwara at page 12.

On the second ground, she said that exhibit P.I was certificate of seizure, P. II chain of custody, P.III Elephant tusks and P.IV is evaluation report. Exhibit P. I, P.II and P.III were tendered by PWI. She said that the procedures were followed; nowhere in the proceeding indicate that the procedures were floated. She said that at page 35 of typed proceedings, when the witness was tendering a certificate of

seizure, he explained how he filled it and how he can identify it. He then tendered it. After admission he read the contents of the document. In respect of exhibit P.II, at page 36, she said that, the witness explained how he filled it and that he could identify it, he tendered it, it was admitted and read out in court. As regards exhibit P. III elephant tusks, the witness identified them, explained how he identified them, where they were from and he tendered them in court. On exhibit P.IV, she said that evaluation report was tendered by PW4 who stated how he had prepared it and how he could identify it, it was tendered and admitted in court. It was also read out in court.

Regarding the third ground, that evidence of PW1 and PW5 differed relating to the identification of the elephant tusks. She said that, she did not see any variation between these two witnesses' testimonies. PW1 said that there were two tusks; they were in a bag which was tied with a rubber, one tusk was bruised and the other had cuts and were of the same size. Same explanations were given by PW5 who said *"yamekatwa"* the other said *"kuchongwa".* She said that semantically it is the same thing explained differently.

On fourth and fifth ground pertaining to proof of the case on the required standard. She said that, these grounds have no merit. The evidence is very clear. It establishes that 2nd accused led the police; he

said that he had taken the tusks to the 1st accused. He led police to the first accused; the 1st accused led the police to the place where the tusks were kept, the evidence which was supported by defence witnesses; though defence evidence can't be used to convict an accused but it supported prosecution's evidence. She argued also that the sentence is in accordance with the law that is 20 years imprisonment.

In respect of the second appellant's petition of appeal on 1st ground where he complained of the labeling of the elephant tusks. She said that at page 40 of typed proceedings PW1 said it was IR 25/21/2019 at page 44 PW2's version is not complete. She was of the view that it is a typing error. However, in the judgment, the record was kept right, at page 4 of the judgment the magistrate indicated that it was IR 25/21/2019. He said that the error was clerical or typing which do not go the root of the case. She said that this argument also relates to 3rd ground of appeal, which is about dates. That the date indicated by PW1 were inconsistent. The correct date is shown in the judgment; that is on 05/07/2019 PW1 was informed that 2nd appellant was in possession of tusks and that on 11/7/2019 they apprehended 2nd accused who led them to the first accused. Even the 2nd witness (PW2) indicated that on 10/7/2019 he was told about going to follow up the

elephant tusks and that they went to Nandembo village to recover the elephant tusks on 11/7/2019.

In respect of the second ground, she said that, it is argued that PW4 didn't describe the tusks with specific marks and that he did not identify them. She was of the view that this ground also has no merits. *Firstly,* the witness was not an arresting officer. *Secondly,* he was an expert who prepared a report on identification and evaluation. It was not his duty to describe with specific marks. He is only an expert who makes valuation of many tusks, he even did not know where the tusks were kept. That is why there are other witnesses who explained how the tusks got to the expert. Regarding the date which the valuation was conducted she said that it is true that at page 50 of typed proceeding it is shown that PW4 said it was 11/7/2017. She said that this is only typographical error as at page 7 of the judgment it is shown that he identified the tusks on 11/7/2019 not 2017. She added that PW2, PW3, PW4 and PW5 were not shown elephant tusks (P.III) so that they can confirm if they were the same elephant tusks. She said that, this ground is not meritious, as all witnesses explained the same chain as explained by PW1. They all said that the tusks ended up in PW1's hands. Despite the fact that he didn't sign a certificate of seizure, he still was in possession; he had knowledge and it passed through him; thus,

possession doesn't necessarily has to be actual. He is the person who led the police to first accused. Regarding names of Shamei Omary, she said that, the names were not relevant, because PW1 said that they arrested Shamei Omary with a gun which Shamei Omary said it was used to kill elephant by 2nd accused who led them to 1st accused (page 32).

The issue to be determined is whether the appeal has merits. Starting with grounds of appeal in Dc Criminal appeal number 04 of 2021, in his first ground, the appellant's complaint is on chain of custody of the elephant tusks subject of the present charge. In establishing a chain of custody of exhibit of two elephant's tusks it was necessary to afford a reasonable assurance that the exhibit tendered at the trial court was the same as the one seized from the appellant's farm. See the case of **David Athanas @Athanas and Another vs. R,** Criminal Appeal No. 168 of 2017, Court of Appeal sitting at Dodoma (Unreported). The principle of chain of custody requires that from the moment a piece of evidence is seized or collected, its handling, custody or transfer must be documented up to the time of its production in court as exhibit. This is intended to avoid or prevent acts which would lead to tempering with exhibit in the process. See the case of **Paulo Maduka and four others**

**vs. R,** Criminal Appeal No. 110 of 2007, Court of Appeal sitting at Dodoma.

Prosecution's evidence shows that the tusks, exhibit P.III were found on 11/7/2019 at Nambendo village where the second appellant led PW1 and other witnesses to the first appellant who led them where the tusks were found. Thereafter PW1 took the elephant tusks to Police station at Songea and handed them to PW5 on 11/7/2019. Looking at the chain of custody record which was tendered and admitted as exhibit PII and other exhibits I have noticed that the same were not endorsed by the trial court. The immediate issue is whether such irregularity is fatal to render the exhibits liable to be expunged from the record. With the principle of overriding objective, I ignore the irregularity because it does not affect the merits of the case. This was the position in the case of **Ashraf Akber Khan vs Ravji Govind Varsan,** Civil Appeal No. 05 of 2017, Court of Appeal No. 05 of 2017 (Unreported).

However, the chain of custody record does not show what happened to the trophies exhibit P. III from 11/07/2019 up to 23/11/2020, it doesn't show the person who kept it and it does not show the place where it was kept. The testimony of Pw1 shows that he handed the exhibit P. III to D. Cpl Musa for custody however this witness was not called to prove that exhibit P. III was handed to him

for admission and be actually admitted before it can be read out. See the cases of **Robinson Mwanjisi and 3 Others vs. The Republic** [2003] T.L.R 218 and the case of **Sylivester Fulgence and Another,** Criminal Appeal No. 597/2016, Court of Appeal sitting at Tabora (Unreported). Furthermore, the trial court is required not only to inform the accused persons of their right to say anything in connection with the intended documentary evidence but also the duty to record faithfully what an accused person says in response. This was said in the case of **Twaha Ali and 5 Others vs. The Republic,** Criminal Appeal No. 78 of 2004, Court of Appeal, (Unreported).

Once a document has been cleared for admission and admitted in evidence, it must be read out in court in order to enable the accused persons know and appreciate the contents and substance of that documentary evidence. Failure to do so occasions a serious error amounting to miscarriage of justice. I have passed through the trial court record to see whether the above procedures were followed by the trial Magistrate in respect to the above documents. I subscribe to the submission made by Ms. Juntwa Senior State Attorney that the procedures were followed. Hence this ground has no merits.

On the third ground about inconsistencies and contradictions on testimonies of PW1 and PW5 on identification of Exhibit PIII. Ms. Juntwa

admitted that there are such contradictions but she urged the court to look at the hand written proceedings as the contradictions appeared to be typing errors. I looked at the hand written proceeding, indeed the error was typographical one as PW1 identified exhibit PIII by saying it was written IR/25/12/2019, PW2 stated that it was IR/25/12/2019 and PW5 stated that it was SO/IR/2521/2019.

On part of the grounds of appeal advanced by the second appellant, the first and second ground has been deliberated when discussing the first and third ground of appeal of the first appellant. On the third ground that PW1 and PW5 differed about identification of elephant tusks, his complaint was similar to first appellant's argument hence, similarly these grounds have no merits.

The other complaint raised by the second appellants is that the certificate of seizure does not bear his signature. This is a new fact he didn't state it in his ground of appeal. However, the issue of search warrants and seizure are governed by Section 38 of the Criminal Procedure Act, Cap. 20 R.E 2019. They are intended to guide for recovery of things directly relating to commission of offence connected with the suspect. It is true that the certificate of seizure does not bear the second appellant's signature. Section 38 (3) of the Criminal Procedure Act Cap. 20 R.E 2019 lists persons whose signature are

required, they include, the owner or occupier of the premise or his relative or other person for the time being in possession or control of the premises and the signature of witnesses to the search. Therefore, second appellant's signature and names don't appear in the certificate of seizure as he was none of the above persons.

The other complaint was that, he was mentioned by a person called Shame Omary and again was pointed out by Shamei Omary he was asking which one of the two version is trustworthy. I perused through the hand written proceeding, it is my view that the variation was due to typographical errors.

Concerning the sentence; the minimum sentence for the offence is twenty (20) years imprisonment. However I find that the trial court erred to impose the sentence whilst the offence was not proved on the required standard as shown hereinabove.

That said, I find the appeal has merit for prosecution's failure to establish a chain of custody of the trophies. Which is first ground of appeal for both appellant's in their petitions of appeal. Whereof, I find that the case was not proved beyond a reasonable doubt.

Before penning off, I would like to point out that it is apparent that the trial magistrate did not make time to proof read the proceedings, had he read through the record, the parties wouldn't have raised

unnecessary complaints basing on typographical errors. I remind the trial magistrates to do this important part of their duty to avoid questioning of proceedings' authenticity.

That said and done, I allow the appeal and quash the conviction of the appellants and set aside the sentences. I order their immediate release from prison unless held there in for some other lawful causes.

It is so ordered.

Right of appeal is explained.


**S. C. MOSHI**

**JUDGE**

**16/06/2021**