IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 15 OF 2021

(Originating from Economic Case No. 07 of 2018, in the District court of Babati at Babati)

ANTONY PASCHAL @ RICHARD NJIGULA.....1ST APPELLANT

ALLY DASO @ TSERE.....2ND APPELLANT

TLUWAY GEOSI @RAMADHANI @GOSI @TSOKHO.....3RD APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

02/06/2021 & 27/08/2021

GWAE, J

The appellants were charged before the District Court of Babati at Babati (hereinafter "trial court") with an offence of Unlawful possession of Government trophy contrary to section 86 (1) (b) of the Wildlife Conservation Act, No. 05 of 2009 read together with paragraph 14 of the 1st schedule to and section 57 (1) and 60 (2) of the Economic and Organized Crime Control Act Cap 200 R.E 2002 as amended by sections 16 (a) and 13 (b) of the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016.

It was alleged by the prosecution that on the 18th November 2018 at Osterbay area within Babati District in Manyara Region the appellants were found in possession of three (3) pieces of elephant tusks weighing 5.8 kilograms valued at Tshs. 34, 500,795/= without permit from the Director of Wildlife.

The appellants patently denied the charge, a plea which required the prosecution to prove its case, the prosecution consequently lined up its six (6) witnesses and tendered seven (7) physical exhibits to wit; elephant tusks (PE2), a small bag and a sulphate bag collectively marked as (PE3) and five documentary exhibits namely: Chain of Custody Form (PEI), Certificate of Seizure (PE4), Certificate of Weight (PE5), Sketch Map (PE6) and Valuation Report (PE7).

The facts which led to the arraignment and finally conviction of the appellants were that; sometimes on 18/11/2018 PW1 was assigned by the OC-CID of Babati Police Station to make a follow up of the people who were suspected to be in possession of Government Trophies. PW2 was directed to go to Top in One Guest House in particular at Room 4. Upon his (PW2) arrival at the said Guest House, PW2 met the guest house attendant PW3 and informed her of his mission, whereupon the Guest House Manager, PW4 was

called and PW2 also called the OC-CID. Both headed to room number 4. After they had entered into that room, they found six people, the appellants were sitting on the bed while three others were sitting on the floor. The 1st appellant had a bag with him in black colour, he was ordered to open it and three pieces like elephant tusks were found in a white sulphate bag that was inside the said black bag. The 1st appellant identified the 2nd and 3rd appellants however he denied to have known the other three people who were sitting on the floor. The certificate of seizure was filled by the OC-CID one SSP Hamisi Fusi and the same was signed by both the appellants, the OC CID, D/C. Fadhili (PW2), Selina Cyril (PW3) and one Simion William (PW4). The appellants were subsequently taken to the police station, PE2 was then handed to police exhibits' keeper one CPL. Mondu (PW1) who kept.

On 19/11/2018, D/C. Donald (PW5) took PE2 to the Government Weigh Agency, the said elephant tusks weighed 5.8 kgs, the certificate of weight was received as exhibited (PE5). On the same date at around 12:00 PM, PW6, a valuer, took PE2 for valuation, after examination of the exhibit PE II, PW6 discovered that it was only one elephant tusk and for that matter one elephant was killed. Thereafter, a valuation report form was filled in and

the same was received as PE7. PE2 was then handed back to the exhibit keeper (PW1).

In their defence, the appellants denied the prosecution assertions. The 1st appellant alleged that on the material day he was at White Rose Hotel where he had a business transaction with one Mfaume. According to the 1st appellant he was dealing with mining business and on that day, he was selling minerals to the said Mfaume and in the course of doing the said business three people came introducing to him as police officers who instantly arrested him and the said Mfaume for doing Mining business without licence. They were taken to police station however the said Mfaume was released, the 1st appellant denied to have known the 2nd and 3rd appellants.

The 2nd appellant, on the other hand, had his own version that, on the material date he was arrested by PW2 at around 17:00 at Duru Village. The reason for the arrest being love affairs, PW2 was accusing him of marrying his wife.

The 3rd appellant's defence version went as follows; he was arrested on 18/11/2021 Riroda local market where he went to sell his cow (a bull). At

around 13:00 he went for lunch where he also took two beers, he got into an argument with the waitress as he alleged that the bill which he was to pay was exaggerated. After such misunderstanding the waitress called police officers one of them being PW2 who arrested him and took him to the Police Station.

After a full trial, the trial court was fully satisfied that, the prosecution evidence had proved the guilt of the appellants. It convicted and sentenced them to twenty (20) years imprisonment which is the minimum statutory sentence. Aggrieved, the appellants have preferred this appeal to the court. In the petition of appeal the appellants have raised eight (8) grounds of appeal which can be conveniently paraphrased as follows:

1. The Trial Magistrate did not evaluate the evidence on record properly.
2. That the prosecution failed to prove its case beyond reasonable doubt.
3. That the trial court's decision was founded from the weak defense of the appellants.
4. That, there was no enough proof (test) that the alleged elephant tusks were really elephants' tusks as alleged by the prosecution.
5. That, the trial court did not consider the defence of the appellants.

6. That, the trial court did not consider the defence of alibi which was raised by the appellants.
7. That, the trial court failed to grant the prayer of the appellant's counsel to recall witness PW3 for further cross examination.
8. That, the trial court errored in denying the 3rd appellant right to legal representation at the time PW6 was testifying.

At the hearing, the appellants appeared in person, unrepresented whereas the respondent Republic had the services of Mr. Ahmed Hatibu, learned State Attorney. The appeal was orally argued. I shall consider the parties' arguments in the course of determining the appellants' grounds of appeal.

The 1st ground for my consideration is, whether the trial magistrate failed to evaluate the evidence on record.

The appellants alleged that the prosecution evidence was not consistent especially in the number of the suspects found in the alleged room number 4. The 1st appellant in his submission argued that the prosecution witnesses in their testimonies testified to have found six people in the room to which the appellants were arrested, however it was only three of them who were brought to court. Mr. Hatibu, on the other hand admitted that it is true that the prosecution witnesses testified to have found six people in

room no. 4, nevertheless he was of the view that it was the 1st appellant who was found with the bag containing Government trophies.

It is the duty of the trial court to evaluate the evidence of each witness as well as his credibility and make a finding on the contested facts in issue. See the decision in the case of **Stanslaus Rugaba Kasusura and Another vs. Phares Kabuye** [1982] TLR 338. However, this being the first appellate court is entitled to re-evaluate the entire evidence on record by reading it together and subjecting it to a critical scrutiny and if warranted, arrive at its own decision.

A carefully reading of the proceedings shows that prosecution witnesses in particular PW 2, PW3, PW4 testified that when they entered into room no. 4, they found six people however the 1st appellant who was sitting with the rest of the appellants on the bed was found with a bag which contained the suspected Government trophies. The prosecution witnesses further testified that it was the 1st appellant who mentioned the 2nd and 3rd appellants by their names however, when he was asked about the other three persons who were sitting on the floor, he alleged that they were not known to him. In his analysis of the evidence, the trial Magistrate analyzed well this particular evidence at page 5,6 and 7 of the typed judgment in

which he added that even the certificate of seizure was signed by the three appellants after the 1st appellant had identified the 2nd and 3rd appellant to be his partners.

Furthermore, the question whether it was the 1st appellant who mentioned his co-appellants leaving out the other three persons was not an issue at the trial court and even the 1st appellant never contested it in either cross examination nor in his defence. The act of the 1st appellant raising such an issue at this state is more of an afterthought as it has been a well-known principle of the law that in appeals the courts are bound to determine on issues which were only dealt with at the trial court. This covers also the complaint by the 1st appellant that they were not brought to court promptly as they were arrested on 18/11/2018 and were arraigned in court on 05/12/2018, again this was not raised by the appellants during trial and accordingly cannot be brought up on appeal.

On further evaluation of the trial court's evidence, I have considered the complaint that the certificate of seizure was certainly filled by the OC CID, Hamisi Fusi, however it was PW2 who produced it in court as correctly contended by the appellant. Mr. Hatibu did not dispute this appellant's contention however he argued that PW2 was also a fit person to tender it as

he was present when the same was filled, I do agree with the position taken by the learned counsel for the Republic because a person who is competent to tender an exhibit is a witness to whom the document was in his possession, custody or authored it or had knowledge of its existence. (**Jacob Mayani vs. The Republic,** Criminal Appeal No. 558 of 2016 (Un reported). According to the evidence on record, it was the OC-CID, Fusi who filled the certificate of seizure in the presence of PW2 who also signed as a witness. It follows therefore, in the circumstances, PW2 must have had knowledge of the existence of the exhibit PE4 and therefore was a competent person to tender it.

In furtherance of the above ground, the appellants also complained that exhibit PE1, a chain of custody form was not read out in court after its admission. This irregularity should not detain me much as it is apparent from the records particularly at page 48 of the typed proceedings that PE1 after its admission was not read out in court. It is settled law that, whenever it is intended to introduce any document in evidence, it should be admitted before it can be read out. Failure to read out documentary exhibits is fatal as it denies an accused person an opportunity of knowing or understanding contents of such exhibit because each party to a trial be it criminal or civil,

must in principle, be availed with an opportunity to have knowledge of and comment on all evidence adduced or observations made with a view of influencing the trial court's decision or be able to cross-examine a witness who tenders it (See **Shaban Hussein @ Makora & Another vs. The Republic,** Criminal Appeal No. 287 of 2019 Unreported). In the final event, PE1 is accordingly discarded from the record.

On the 4th ground, appellants' complaint that there was no enough proof from the prosecution that, PE2 were really the elephant tusks.

Mr. Hatibu on the other hand submitted that PW6 properly identified the elephant tusks due to her skills and experience. I have gone through the evidence of PW6 who introduced herself as a Wildlife Officer, according to her evidence one among her duties were to make valuation, on 18/11/2018 she was informed that there were suspected Government trophies and she was required to examine and make valuation. After examination of three pieces of trophy, she discovered that it was only one elephant's tusks which amounted into one killed elephant valued at Tshs. 34, 500, 795/= she then filled in a valuation report which was admitted without objection save for the objection raised by the 1st appellant on the absence of his name and his

signature on the said exhibit. To this end this court is satisfied that PW6 was a proper person for identification and valuation (see section 86 of the Wildlife Conservation Act) and properly identified the elephant tusks contrary to what the appellants alleged.

Coming to 5th and 6th the appellants are complaining on the failure of the trial court to consider their defence in particular on the defence of alibi.

Mr. Hatibu in responding to this complaint submitted that, the trial court **did** consider the defence of alibi raised by the appellants. To answer this issue, I had to revisit the trial court judgment, this legal issue was raised as a second issue by the trial Magistrate when composing his judgment to wit; whether the defence of alibi was properly and correctly pleaded by all accuseds.

In his consideration of whether the said defence was properly raised the trial Magistrate cited the case of **Mwita Mhere and Ibrahim Mhere, v. Republic** [2005] TLR 107 which provided three things to be considered by the court under the provisions of section 194 (6) of the Criminal Procedure Act Cap 20 R.E 2019 where the defence of alibi is raised after the prosecution

has closed its case and no prior notice of such defence was issued. The Magistrate went further to state that the defence was not properly pleaded by the appellants as what they taxed to show was that they were not at the place (White Rose Hotel) the prosecution alleged to have arrested them and they did not bring any evidence to show that they were arrested at different places as alleged by them. It was further observed by the trial Magistrate that given the circumstance of the defence case where all admitted to have been arrested by PW2 and on the same date (18/11/2018) taking into account the places (distance) from which the appellants alleged to have been arrested by PW2 it was quite impossible for the same police officer to arrest the three appellants from three different places at a time. Therefore, to him the defence of alibi was a mere escape of goat from the criminal liability.

Having explained above, I am of the same position as correctly argued by Mr. Hatibu that, the appellants' defence was considered. The issue of the defence of alibi is well settled. **First**, that, the law requires a person who intends to rely on the defence of alibi to give notice of that intention before commencement of hearing of the case Section 194 (4) of the Criminal Procedure Act, Cap 20 and secondly, that, if the said notice cannot be given at that early stage, such an accused person is under obligation, then, to

furnish the prosecution with the particulars of the alibi at any time before the prosecution closes its case S.194 (5) Cap 20. Should the accused person opt to raise such defence later than what is required under subsections (4) and (5) above, as was the case herein, the court may, in its discretion, accord no weight of any kind to the defence Section 194 (6) Cap 20.

In our case, the trial magistrate considered this defence and came to the conclusion not to accord any weight to the defence of alibi. I subscribe to the trial court's conclusions on this defence as there were no evidence to prove that the appellants on 18/11/2018 were in some other places other than at Top in one guest house and the fact that all appellants agreed to have been arrested by PW2 on the same date and time. These grounds of APPEA are therefore dismissed.

In the 7th ground, the appellants are complaining on the failure of the trial court to grant the appellant's counsel prayer to recall PW3 for further cross-examination.

I have perused the records at page 74 of the typed proceedings Mr. Raymond the counsel for the appellants made a prayer for PW3 to be recalled for further cross examination the respondent on the other hand raised a

concern that the said PW 3 was no where to be found as she no longer worked in the said guest house that she was previously working and therefore it would take time to relocate her. In its ruling the trial Magistrate rejected the appellant's counsel prayer on the reason that it will take time for the prosecution to find the said witness whom they no longer know her whereabout. Sincerely, I do not see if the denial of this prayer in any way prejudiced the interests of the appellants, in fact the appellants were present at the time the said witness was testifying and they also exercised their rights to cross examination, and also, the appellants did not dispute the fact that the said PW3 was nowhere to be seen as alleged by the persecution. Thus, no miscarriage of justice was occasioned.

On the last complaint, the 3rd appellant complained that he was denied his right to legal representation during the time PW6 was testifying.

Mr. Hatibu, on this complaint, argued that the records reveal that the right of legal representation was abused by the 3rd appellant's counsel and not by the trial court. Perhaps let the trial court's records speak for themselves. On the 09th June 2018 Mr. Raymond Joachim Kim, the learned advocate informed the trial court that he was duly engaged to represent the

appellants at that time PW1 PW2 PW3 & PW4 had already testified. On 22/09/2020 Mr. Masanja appeared holding brief of Mr. Kim stating that he was at the High Court of Dodoma but there was no proof of the same, the respondent alleged that they came with a very important witness who was coming from very far and that she had a very small baby in which it would be unfair to adjourn the matter.

In his ruling the trial Magistrate ordered for the hearing to proceed since there was no proof that the said advocate was at the High Court of Dodoma. I fully agree with the trial Magistrate, the appellant's counsel was present on one but last adjournment, his adjournment was not backed up by any proof establishing that, he was really attending a case at High Court Dodoma on that particular date. Nevertheless, the appellants were present when the said witness was testifying, and in any way, I don't see if there was any miscarriage of justice that was occasioned taking into account the nature of evidence adduced by the said PW6.

It is a cardinal principle that, the burden of proving charges against an accused person beyond reasonable doubt lies on the shoulders of the prosecution, for the reasons stated above this court is satisfied that the prosecution case to the required standard. The court's holding which

negatively answers the appellants' **ground 2 and 3** above. More so, the trial Magistrate properly analyzed the evidence adduced before him and he finally arrived at an appropriate conclusion. Thus, there is no justification to interfere with his decision.

In view of the aforesaid, I find the appeal to be devoid of merit. It is hereby dismissed.

It is ordered.

M.R. GWAE
JUDGE
27/08/2021

Court: Right of appeal fully explained

M.R. GWAE
JUDGE
27/08/2021