IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 68 OF 2020

(Arising from Babati District Court, Economic Case No. 2 of 2020)

ALAIS S/O LONDOBESI @ LAYENI .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

9th August & 27th September, 2021

MZUNA, J.:

Alaisi Londobesi @ Layeni, the appellant herein, is challenging the conviction and sentence of 20 years imprisonment imposed on him by the District Court of Babati (the trial court). He stood charged with the 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 1st schedule and Section 57 (1) and 60 (2) of the Economic and Organised Crime Control Act [Cap 200 R.E 2002] as amended by Section 16(a) and 13 (b) respectively of the written laws (Miscellaneous Amendment Act) No.3 Act 2016.

Particulars of the charge alleges that on 17 /12/2019 at Njoro Village within Kiteto District, in Manyara Region, the said appellant was found in possession of four Elephant Tusks equivalent to two killed elephants valued Tshs. 69,000,000/= the property of Tanzania Government without permit from the Director of Wildlife.

The facts in brief shows, the appellant was arrested after the Wildlife officers in collaboration with the Police set a trap after being notified that the appellant was looking for customers who could purchase the elephant tusks.

Then PW1 Alex Masunzu, the National Park Ranger, together with other staffs prepared a trap that aided in the apprehension of the accused whilst in possession of the said tusks and in attempt of selling them. The said Policeman acted as a customer. The communication was through a mobile phone. After the arrest at Njoro in the bush where there are farms, the motor cycle rider who carried him, ran away after noticing the arrest of the appellant. The appellant was taken to the Police station and thereafter the tusks were taken for weight measurement and valuation. The prosecution tendered three exhibits being, seizure certificate (exhibit P1), four elephant tusks and a sulphate bag (exhibit P2) and Trophy valuation certificate (Exhibit P3). The said exhibits were kept by PW2 Christopher Lazier and then handled to the exhibit keeper PW3 No. H. 58 71 Pc Godfrey.

In his defence the appellant denied to have been in possession of the said tusks but rather stated that he was kidnaped and later on being forced to sign, he signed by thumb print in various documents while being taken photos with the tusks.

The trial Magistrate acting on such evidence proceeded to convict the appellant and sentenced him as above shown. Aggrieved, he is challenging the conviction and sentence based on the following grounds: -

1. *That the trial court erred in law and in fact by not properly evaluating the evidence on record hence making a wrong decision.*
2. *That the trial court erred in law and in fact by admitting certificate of seizure that was tendered by an incompetent witness from the respondent.*
3. *That the trial court erred in law and in fact by holding that the credibility of certificate of seizure was not crucial in arriving at a just decision hence making a wrong decision.*
4. *That the trial court erred in law and in fact when it arrived at its decision without considering the key prosecution witness who had the evidential burden of proof hence misguiding itself.*
5. *That the trial court erred in law and in fact by holding that failure to tender chain of custody form did not jeopardize justice to the appellant.*
6. *That the trial court erred in law and in fact when it relied on evidence of certificate of seizure only to prove that the appellant was in possession of elephant tusks while disregarding the absence of the appellant's mobile phone and motor cycle.*

During hearing of this appeal which proceeded orally, the appellant was represented by Mr. E Sood, the learned advocate, while the respondent enjoyed the service of Ms Akisa Mhando, the learned State Attorney, who strongly opposed the appeal.

Reading the grounds of appeal, they raise matters of procedural defects as well as evaluation of the evidence. I propose to start with ground No. 2. The

main issue is whether the certificate of seizure was tendered by a person not otherwise authorised by law to do so?

Mr. Sood, argued that PW1 was not a proper person to tender the certificate of seizure. The learned counsel cited paragraph 2(b) of the Police General Order as well as the case of **R V. Daniel Ngalay L. Laizer & 2 Others,** Economic case No. 8/2020 High Court, (unreported) page 12, and stated that the only proper person to tender the said document was Insp Evarist who was the Police officer in charge of the investigation.

In opposition Ms Mhando said, PW1 is a competent witness to tender Exhibit P1 in law as he has a knowledge on the same. He was present when it was issued and he even signed it thus he knew what was filled in the certificate of seizure and referred the case of **The DPP v Mirzai Pirbakhshi @ Hadji & 3 Others**, Criminal Appeal No. 493 of 2016 CAT at Dar es Salaam (unreported) page 7 and 8.

The question to ask is, who is the proper person to tender documentary evidence in court? In the case of **The Director of Public prosecution v Kristina Biskasevskaja,** Criminal Appeal No. 76 of 2016 CAT at Arusha (unreported) it was held that

> *"Since the envelope was addressed to the Government chemist and PW1, a Chemist in that office is the one who analysed the same, we buy the argument by the learned Senior State Attorney that PW1 was in the circumstance,* ***with full information and knowledge*** *of the envelope*

and therefore a competent witness than anyone else to tender in court the envelope and its contents." (Emphasis mine).

In the case of **The DPP v Mirzai Pirbakhshi @ Hadji & 3 Others**, (supra) it was held that:-

"The test of tendering the exhibit therefore is whether the witness had the knowledge and he possessed the thing in question at some point in time, albeit shortly. ***So, a possessor or a custodian or an actual owner or alike are legally capable of tendering the intended exhibits in question provided he has the knowledge of the thing in question."*** (Emphasis mine)

The above cited case laws if read in line with what was stated by PW1 at page 12 of the typed proceedings, he stated that:-

"I recollect inspector Evarist issued the seizure certificate in respect of the trophies and he signed. The suspect signed, myself and Selemani Kassim also signed. I remember suspect used thumb print to sign."

Also, reading from Exhibit P1 it shows that PW1 signed as the first witness and since he was amongst those who prepared a trap to catch the appellant then he had knowledge of the whole trap including the seizure certificate. That being the case, he is therefore a proper person to tender the said exhibit in court. The second ground of appeal lacks merit as well submitted by Ms Mhando, the learned State Attorney. It is bound to fail.

I revert to the third ground of appeal. The learned counsel challenged the judgment of the trial court mainly because issue of credibility of the seizure certificate was not crucial, for this Mr Sood stated that, the place where the item was seized had to be indicated and that the certificate had to be signed

by an independent witness as opposed to those three persons who signed, all being the policemen. Again he alleged on the issue of names that the name Seleman Maunda as a witness did not appear in the proceedings but rather Selemani Kassim. Mr Sood further stated that the arresting officer Inspector Evarist never signed Exhibit P1.

To cement his submissions, he cited the case of **Kassim Salum v. The Republic**, Criminal Appeal No. 186 of 2018 CAT (unreported) page 7, **David Athanas @ Makasi & Another v. The Republic,** Criminal appeal No. 168 of 2017 CAT (unreported) p 8.

Replying on this Ms Mhando stated that, on the issue of variation of names of Selemani Maunda and Selemani Kassim when the said exhibit was tendered in the trial court that issue was not raised and to raise it in the appellate stage, is an afterthought and the case of **Nyerere Nyague v. The Republic,** Criminal Appeal No. 67/2010, CAT at Arusha p 5 was cited. Responding on the issue that there was no independent witness, Ms Mhando stated that, it was curable under the ambit of the case of **Sophia Seif Kingazi v The Republic,** Criminal Appeal No. 273/2016 CAT at Arusha (unreported) p 34.

On the issue of the seizing officer (that is Insp Evarist) that he did not sign, she stated that that defect makes the document to be expunged and stated further that even if Exhibit P1 is expunged, still the prosecution evidence through PW1 proves the charge. She cited the case of **Charo Said Kimilu and**

Another v The Republic, Criminal Appeal No. 111 of 2015 CAT at Tanga (unreported) page 19 to emphasise the point that direct evidence comes from the testimony of a witness of fact who speaks the truth.

It is with no doubt that reading from Exhibit P1, the arresting officer one Insp Evarist did not sign that document. It is equally true that there is no other independent or civilian witness who witnessed the seizure of the four elephant tusks. All the same, the nature of the scene where the appellant was arrested at the bush and the fact that elephant tusks cannot change hands easily, makes this point worthless. It was held in the case of **Sophia Seif Kingazi v The Republic** (supra) at page 34 that absence of independent witness cannot invalidate a seizure though his presence is a desirable thing to do. So, the cited case of **R V. Daniel Ngalay L. Laizer & 2 Others** (supra) is distinguishable.

All the same, as well stated by the learned State Attorney that even if Exhibit P1 is expunged from the record, which I hereby do, still the evidence are sufficient to convict the appellant. The third ground of appeal equally fails.

This takes me to ground No. 4 on the need to call a witness one Insp Everist. In support of this Mr. Sood argued that failure to call a key witness an adverse inference should be drawn against the prosecution. Special attention was in respect of the arresting officer Insp Everist who was not called. The learned counsel relied on the case of **Aziz Abdallah v. R** [1991] TLR 71.

Ms. Mhando strongly opposed it and stated that the issue of credibility of witness was well assessed as PW1 did almost all what Insp Evarist did. It was

her view that if such witness was of any relevance in their case, the defence ought to have summoned him as their witness.

This court is alive on the fact that, "no particular number of witnesses shall in any case be required for the proof of any fact", (see section 143 of the Tanzania Evidence Act, Cap 6 RE 2002). The evidence of PW1 a Park Ranger, is self-satisfactory. He was involved from the first stage of arranging a trap for the arrest of the appellant until when the appellant was taken to Babati Police station and then handed over to PW4. PW4 said that the accused was brought to him by a wildlife officer from Njoro Kiteto. PW1 stated that (see page 12 of the typed proceedings):-

> *"The Trophies were in Sandarus (sulphate bag). We asked if he had any permit to own elephant tusks and he said he own no any permit, ... After the suspect was apprehended and we returned at Babati, Police arrived at 4:00hrs. The suspect was handed to Police and the exhibit was handed to exhibit keeper at Police the name I cannot recollect all the names bit one Afande Godfrey."*

Reading from the quoted paragraph, I tend to agree with the learned State Atorney Ms. Mhando that the remaining evidence still proves that the appellant was found in unlawful possession of 4 elephant tusks which was later on seen by PW2, PW3 and PW4 at different stages. Moreover, this court is alive of the principle that, every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing him. The trial court found and I entirely agree, that additional evidence of Insp Evarist could add nothing on the prosecution case apart from

reproducing what other witnesses said. The fourth ground of appeal is therefore bound to fail.

As for the fifth ground of appeal, the main issue is whether failure to tender chain of custody form weakened the prosecution case? Arguing in support of this ground, Mr. Sood submitted that from the proceeding there is no passing of chain of custody from various people starting from Insp Evarist then to Godfrey, Donald then Christopher Peter Laizer and thus he contended that there was a requirement to tender the form of chain of custody to show at what time it was handed. He argues that the chain of custody was broken.

Ms. Mhando however challenged this argument by stating that, the prosecution paraded witnesses from the arrest, seizure and then handling to PW3 the storekeeper. She submitted that the chain of custody was not broken. She is of the view that parading of witnesses is an alternative way instead of a chain of custody form or paper documentation. She made reference to the case of **Chacha Jeremiah Murimi & 3 Others v The Republic,** Criminal Appeal No. 551 of 2015 CAT at Mwanza (Unreported), and **Sophia Kingazi** (supra) p 32.

In answering this ground of appeal, this court is fully aware of the principle that what is important in determining whether chain of custody is intact is the existence of an assurance that there is no tempering with an exhibit at any given time. I am fortified to this view by the case of **Joseph Leonard**

Manyota V R Criminal Appeal No. 485 of 2015 CAT (unreported) where it was held that:

> *"It is not every time that when the chain of custody is broken, then the relevant item can not be produced and accepted by the court as evidence, regardless of its nature. We are certain that this can not be a case say, where the potential evidence is not in the danger of being destroyed or polluted and or in any way tempered with. Where the circumstance may reasonable show the absence of such danger, the court may safely receive such evidence despite the fact the chain of custody may have been broken, of course* ***this may depend on the prevailing circumstance in every particular case.****"* (Emphasis mine)

I find no possibility of change of hands or even tempering of Exhibit P2, four elephant tusks, which by its nature, cannot easily change hands. So, it is safe to say, the circumstance of the present case cannot suggest tempering of the exhibit. More so, the evidence of PW1, PW2, PW3, PW4 shows it was not possible for one to temper with the same and at no point had the number increased or decreased. Such parading of witnesses is an alternative way instead of chain of custody or paper documentation as it was so held in the case of **Chacha Jeremiah Murimi & 3 Others v The Republic** (supra).

The valuation report shows, various marks were being inserted upon every stage that the exhibit passed which cements the view that it was impossible for the said exhibit to be tempered with. Again all the prosecution witnesses who dealt with exhibit P2 recognised it at the trial and such chain of custody was not broken as the evidence by the prosecution side was a direct

evidence. Their evidence shows they saw it, kept it under exhibit room and others touched during valuation and measurement. Therefore, chain of custody was not broken. There was no further requirement for documentation or form showing how chain of custody moved from one person to the other. This ground of appeal also fails.

This takes me to the last issue relevant for the first and sixth grounds of appeal, issue of over reliance on the certificate of seizure while ignoring the absence of mobile phone and motor cycle and the argument that there was no proper evaluation of evidence.

Mr. Sood on this ground made reference to the case of **Pascal Yoya @ Maganga V. The Republic,** Criminal Appeal No. 248 of 2017 CAT(Unreported) p 16 and stated that the case was not proved beyond reasonable doubt as required by the law since the record revels that the appellant was arrested after a trap was set. That the appellant had a phone which was used during the conversation leading to the set of a trap and that both phones used in communication being that of the appellant and of Insp Evarist were not tendered in court as exhibits. The same applies to the motor cycle alleged to have been used by the appellant during the arrest. Failure to tender it according to the learned counsel, shows there was no proper evaluation of evidence.

Ms Mhando contested all the raised issues and argued that the trial Magistrate evaluated all the evidence including chain of custody was not broken, the evidence of PW1 and the issue of certificate of seizure was

considered. That, even the issue of mobile phone and submissions were all considered. She insisted that there was no misdirection as alleged.

Ms. Mhando further stated that, there was a direct evidence of PW 1 who proved the offence because it was direct evidence who made communication with the appellant leading to the appellant appearing at the scene holding four elephant tusks and the issue of phone number as well as motor vehicle not being identified was due to the fact that it was night and it was not easy to identify the description.

In answering this issue, I have this to say. The evidence of PW1 was a direct evidence as he witnessed the whole scenario. The advantage of a direct evidence is that a witness to the fact to be proved, speaks the truth from what he saw and or done. What matters is whether he is entitled to belief or credence. The trial court believed the prosecution evidence and found that the defence failed to cast doubt on such evidence. The point at issue was on unlawful possession of government trophy, four elephant tusks. The issues of mobile phone and or motor cycle presence or its absence does not touch the core substance of the case. That is also what PW1 said when he was cros examined by the defence counsel. He said the main aim was for the person in possession of trophies not phone numbers.

It was held in the case of **Saganda Saganda Kasanzu v R** Criminal Appeal No. 53 of 2019 TZ CA (unreported) that issue of proof *"beyond reasonable doubt depends on the totality of the evidence adduced before the*

trial court". Issue of Selemani Maunda and Selemani Kassim being one and same person was not raised at the trial court. It is not correct to raise it now, the case in point is that of **Nyerere Nyague v. The Republic** (supra).

Other defects like absence of the arresting officer Insp Evarest, or even tendering of chain of custody form, phone numbers and the motor cycle as well as another independent witness, still the case based on the analyzed evidence above, was proved beyond reasonable doubt. I find and hold that there was proper evaluation of evidence. The findings of the trial court cannot be faulted.

That said and done, this appeal lacks merit. The appellant shall continue to serve the sentence imposed on him.

Appeal dismissed.

M. G. MZUNA,

JUDGE.

27th September, 2021