IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 40 OF 2020

(Appeal from the decision of the Resident Magistrate Court of Dar es salaam at Kisutu in Economic Crime Case No. 31 of 2016 before Hon. M.S. Kasonde, **RM** dated 20/05/2019)

SOLOMON MAKURU MTENYA@KUHEMBE.....1ST APPELLANT

SIASI SHABAN ATHUMANI.....2ND APPELLANT

MUSSA ABDUL LIGAGABILE.....3RD APPELLANT

OMARY GASUSU SABO.....4TH APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

18th Oct, 2021 & 26th Nov, 2021.

E. E. KAKOLAKI J

The appellants in this appeal are aggrieved with both conviction and sentence imposed on them by the Resident Magistrate Court of Dar es salaam at Kisutu in Economic Crime Case No. 31 of 2016, in its judgment handed down on 20/05/2019. They have raised fifteen grounds of appeal

some of which they opted to combine and paraphrase during hearing of the appeal as I shall be soon narrating them while abandoning the 1st and 11th grounds of appeal. The appellants combined and argued together grounds No. 6th,8th and 12th as well as the 2nd and 3rd grounds and lastly the 10th, 13th and 14th grounds of appeal. Only the 4th, 5th, 7th and 9th grounds of appeal were argued separately. In the combined grounds No. 6th,8th and 12th which are herein termed as **first** ground, the appellants contend the trial court when convicting them erred to rely on incredible and unreliable prosecution evidence marred with contradictions and lies. On combined 2nd and 3rd grounds which were argued as the **second** ground of appeal, they assert the trial court erred to convict them while placing reliance on uncorroborated retracted cautioned statements that were illegally recorded and admitted in evidence without following the procedure. As to the combined 10th,13th and 14th grounds of appeal which are herein termed as **third** ground, they alleged the prosecution case was not proved beyond reasonable doubt. In the separate ground No. 4 they assail the trial magistrate's act of convicting the 4th appellant in all counts without considering that the evidence on record against him is in variance with the charge sheet. On the **fifth** ground the appellant are aggrieved with the trial court's decision to convict them relying

on seizure certificate (Exh. PE2), handing over or chain of custody document (Exh. PE 4 and Trophy Valuation Report (Exh.PE5) which were un-procedurally tendered as were not read aloud in court. They also lament in the additional ground herein termed as **sixth** ground that, the defence evidence which raised reasonable doubts was not considered by the court. In the **seventh** separate ground of appeal the 3rd appellant challenges court's decision of convicting him believing that he was part and parcel of the alleged trophies deal while the evidence does not implicate him at all as the elements of knowledge and control of the trophies were not established by the prosecution against him. In the separate ninth (9th) ground of appeal the appellants allege the trial magistrate erred to convict them relying on the evidence of exhibit PE.3, the exhibit which was tendered without laying foundation as well as exhibit PE. 8, which was tendered without establishing chain of custody and illegally admitted by the court without giving opportunity to the witness on dock to tender the same. Hearing of the appeal proceeded by way of written submission and both parties complied with the filing schedule orders as the appellants proceeded unrepresented while the respondent was represented by Ms. Elizabeth Mkunde, learned senior State Attorney.

Briefly before the trial court appellants stood charged with three different offences, the first count being **Leading Organised Crime**; Contrary to paragraph 4(1)(a) of the 1st schedule to, and Section 57(1) and 60(2) of the Economic and Organised Crime Control Act, [Cap. 200 R.E 2002]. Second count is of **Unlawful Dealing in Trophies**; Contrary to Section 80(1),(2) and part one of the 1st schedule to the Wildlife Conservation Act No. 5 of 2009 read together with paragraph 14(b) of the First Schedule to, and Section 57(1) and 60(2) of the Economic and Organised Crime Control Act, [Cap. 200 R.E 2002]. And the third count is **Unlawful Possession of Government Trophies**; Contrary to Section 86(1)(2)(c)(ii) and part one of the First Schedule to, and Section 57(1) and 60(2) of the Economic and Organised Crime Control Act, [Cap. 200 R.E 2019]. On the first count the prosecution contended that, the appellant jointly and together on 23/06/2016 at Kimara Stop Over area within Kinondoni District, Dar es salaam, intentionally organised, managed and supervised a criminal racket by buying, accepting, transporting and possessing Government trophies to wit; six (6) pieces of elephant tusks valued at USD 15,000, equivalent to Tanzanian Shillings Thirty Two Million Five Hundred Sixty Five Thousand [Tshs. 32,565,000/=, the property of United Republic of Tanzania without

permit from the Director of wildlife. In the second count it was asserted on the same date and place, both appellants jointly and together bought, accepted and transported the above mentioned trophies with the value mentioned above in the particulars of the first count, without permit of the Director of wildlife, while in the third count, they were alleged to be found in unlawful possession of the same six (6) pieces of Government trophies without permit of the Director of Wildlife. The appellant's flatly denied the accusations the act which fuelled the prosecution side to parade eight (8) witnesses and exhibits in its urge to prove her case while the appellants (accused) fending themselves without calling witnesses save for the 3rd appellant who summoned only one witness to support his defence.

It was prosecution case in proving its case that, on the 23/06/2016 PW3, Insp. Mghamba (PW1) and other police officers acting under instruction of ASP Kaji whom they were in company of and having got information that one Juma Mbaguma who was a poaching network leader was at Mlimani City area, managed to set a trap and arrested him there at about 12.00 hours before they took him at his residence Segerea area for search. While the searching exercise was on Mbaguma received a call which was set on loud speaker and they heard conversation of that other person inviting Mbaguma

to collect his luggage (mzigo) at their meeting point as the same was ready, before the said Mbaguma disclosed to them that it elephant tusks. According to PW3 in company of PW1, Mbaguma and two others police officers acting under the order of ASP Kaji and in company accompany Mbaguma headed to the said meeting point at Kimara Stop Over and at about 9.00 pm they managed to arrest the 1st appellant, Solomoni Makuru Mtenya, after being identified to them by Mbaguma when appeared in response to his phone call informing him of his arrival at the meeting point. It is the said 1st appellant who disclosed where the luggage (mzigo) was kept and took them there, only to find a taxi cab with Reg. No. T540 DDS, make Toyota Fun Cargo (Exh. PE8) in control of the 3rd appellant one Mussa Abdul Ligagabile. On searching the said motor, vehicle six (6) pieces of elephant tusks (Exh. P3 collectively) were retrieved from the car boot kept in a sulphate bag and seized in the presence of independent witness Ngika Nzala (PW7) by issuing seizure certificate (Exh. PE2) and labelled them with marks K1 –K6. When the 1st and 3rd appellants were asked of the owner of the said luggage (mzigo), they mentioned the 2nd appellant who was at the nearest bar quenching his thirsty before he was arrested upon being identified to them by the 1st appellant. Both appellants and seized trophies were taken to

Kimara Police Station, case file opened and seized trophies each added mark of the case file No. KMR/IR/5846/2016 before PW3 handed the trophies to PW8, Wilfred Justin Olomi on the next day 24/06/2016, at the Ministry of Natural Resources and Tourism for storage and both signed the chain of custody document (Exh. PE4). The said trophies were valued by PW4, Daniel Gumbo, wildlife officer at USD. 15,000 equivalent to Tshs. 32,565,000/= as per valuation certificate (Exh.PE5). The 4th appellant was arrested on 14/07/2016 at his workplace Dar es salaam. Appellants were at different time interviewed and recorded their cautioned statements. These are for the 2nd appellant (Exh. PE1) tendered by PW2, F. 312 D/CPL Enock, 2nd and 4th appellant (Exh. P6 and PE7) tendered by PW5, E. 9295 D/Cpl Juma. In their defence save for the 3rd appellant who confessed to have been found in possession of the said trophies and gave a detailed account on how the 1st and 2nd appellants as owners of the luggage hired him as a taxi driver to carry the said luggage at Manzese area without his knowledge, the rest of the appellants denied of their involvement any how in the commission of the said offence. The 2nd appellant summoned DW5 his co-worker in taxi business to prove that his working station is at Kisutu area where he was picked by the 1st appellant before his arrest. The 1st appellant and 2nd

appellant allege to have been arrested as Kimara Baruti and Kimara mwisho areas respectively and not at Kimara Stop Over as claimed by the prosecution, while the 4th appellant said he was arrested at Simanjiro where he works at Tanganyika Safari Corporation Ltd and tendered his employment contract (Exh. DE1), to disprove the prosecution assertion that he was arrested at Dar es salaam office. The trial court did not believe their defence hence found the prosecution case was proved beyond reasonable doubt against them and proceeded to convict and sentence them to five (5), three (3) and twenty (20) years terms of imprisonment for the 1st,2nd and 3rd counts respectively. Sentence to run concurrently. It is from that decision and upon being dissatisfied with, the appellants are before this court protesting their innocence.

In this judgment I have chosen to deal with all grounds one after another as submitted on by the parties as this court being the first appellate court is entitled to re-evaluate the evidence adduced during the trial and come up with its own findings. See the cases of **Peters V. Sunday Post Ltd.** (1958) E.A. 424 and **Demaay Daat Vs. Republic**, Criminal Appeal No. 80 of 1994 (CAT-unreported). To start with what I have referred herein above as the first ground of appeal, it is the appellant's submission that, the prosecution

witnesses gave testimonies with full of lies and that the law is clear on the danger of believing the witness who lies on material facts. They argued, PW1 and PW3 gave contradictory statements on where, the time and how the 1st and 2nd appellants were arrested as the 1st and 2nd appellants testified were arrested at Kimara Mwisho and the 3rd appellant at Kimara Baruti while the prosecution witnesses testified it was at Kimara stop over. References were made to several accounts of their evidence and the statement made by PW3 as the complaint which was attached to the submission. Another contradiction raised was regarding to the where and when the elephant tusks were seized as they contend PW1 when recalled for cross examination said it was at Kimara Mwisho between 05.00 and 6.00 pm. Lastly was on the marks put on the two elephant tusks out of six seized which bear different marks to the ones identified by the independent witness (PW7) thus broken chain of custody. They therefore argued the contradictions fatally affected the credibility of witnesses and therefore the trial magistrate ought not to have relied on them.

In her response Ms. Mkunde submitted there was no contradiction in the prosecution witnesses' evidence. On the place and how the appellants were arrested she argued the available evidence of PW1 and PW3 is clear it is the

1st appellant who was arrested first at Kimara Stop over under assistance of Juma Mbaguma as the meeting point between the two, followed by the 3rd appellant and his taxi cab after being lead by 1st appellant and later on the 2nd appellant at the nearest bar at the same area, thus no material contradictions as alleged. As regard to the alleged difference of marks on the two elephant tusks she said there was no contradiction as the witnesses PW3 and PW7 identified the marks K1-K6 and PFC No. KMR/IR/5846/2016 marked by PW1 which were marked in their presence save for extra marks which they did not know and which she said were properly identified by exhibit keeper PW8. And added that even if the difference of marks is considered as contradiction the same does not go into the root of the case, thus could not affect credibility of the witnesses as well as the chain of custody of the exhibit as the same was proved orally by PW1, PW3 and PW8 exhibit keeper. In rejoinder the appellant reiterated their earlier submission. And had nothing material to add.

I have closely followed both parties' arguments as well as revisiting the evidence referred by the parties. Indeed my close and deep eye of the challenged evidence has failed to unveil the claimed contradictions. As to the time, place and how the 1st, 2nd and 3rd appellants were arrest the record is

very clear as submitted by Ms. Mkunde that as PW1 and PW3 persistently testified the arrest was done at Kimara Stop Over at 9.00 pm and not Kimara Mwisho and Kimara Baruti as alleged by the appellants. It is true the 3rd appellant stated was arrested at Kimara Baruti when cross examined during his defence. However, on further cross examination she clarified that, what he knows is that he was arrested at Kimara area as was not sure whether it was kimara mwisho or not for not being conversant with the two areas. As to the reference to the complainant's statement (PW3), the appellants' act of introducing evidence from the document attached to the submission to contradict the prosecution evidence in my firm view does not find support of the law. It is the law, submission being summary of arguments and not evidence, when an annexure is made to the submissions save for excepts, extracts of judicial decisions or textbooks, it is instructive that, the same should be expunged from the said submission and totally disregarded. See the case of **Tanzania Union of Industrial and Commercial Workers (TUICO) at Mbeya Cement Company Ltd Versus Mbeya Cement Company Ltd and National Insurance Corporation (T) Ltd** [2005] TLR 41. Since in this case the statement of PW3 which was not tendered in court as evidence has been introduced to contradict his evidence by annexing it to

the submission I expunge it from the submission hence pay no any regard to it. As regard to the alleged difference on marks labelled in the two disputed elephant tusks I find there is no contradiction as PW7 managed to identify the two marks of K1-K6 and PFC No. KMR/IR/5846/2016 marked by PW1. His failure to identify the marks which was not put on his presence but which were well identified by PW8, the exhibit keeper, does not amount to contradiction of the evidence as the same might have been added later on in his absence. It could be a contradiction if he had failed totally to identify the first two marks which he saw before. Since there was no prosecution evidence materially contracted by the evidence of any other witness or witnesses as alleged by appellants which could have been affected credibility of prosecution witnesses as it was rightly stated in the case of **Yanga Omary Yanga Vs. R**, Criminal Appeal No. 132 of 2021 (CAT-unreported), I find the complaint is without merit. And with regard to the issue of chain of custody I hold, failure of PW7 to identify extra mark in the two elephant tusks which were properly identified by PW8 could not in any way affect the chain of custody since he did not deny to have known them at all save that he noted additional marks of GWK 5356 and GWK 5355 which he did not see before. It is on record as rightly submitted by Ms. Mkunde chain of custody

was established orally by PW1, PW3, PW5 and PW8 who told the court on how they handed each other the said exh. PE 3 before it was tendered in court, therefore no proof of the appellants' assertion that chain of custody was broken. Further to that, I hold there is no way chain of custody could have been broken as claimed by the appellant, as elephant tusks are not among the items which can easily change hands and therefore be easily tempered with or swapped hence affected by doctrine of chain of custody in absence of its proof by paper trail. See the case of **Mwinyi Jamal Kitambala @ Igonza and 4 Others Vs. R**, Criminal Appeal No. 348 of 2021 where the Court of Appeal when faced with similar scenario to this said *"Elephant tusks constitute an item that cannot change hands easily and thus cannot be easily altered, swapped or tempered"*. There is no merit in this complaint hence no substance on the entire first ground of appeal as combined.

Next for consideration is the second ground of appeal combining grounds No. 2 and 3, where the appellants are complaining of the trial court's reliance on uncorroborated evidence of exhibits PE1, PE6 and PE7 (cautioned statements of 2nd, 3rd and 4th appellant) which were retracted and admitted without conducting inquiry, to convict them, as the evidence of PW1, PW3,

PW5, PW7 and PW8, already contradicted above could not have corroborated the said statements. They said the cautioned statements also were recorded under both sections 57 and 58 of the CPA, thus rendered defective and unreliable. They relied on the case of **Muhidin Mohamed Lila @ Emolo and 3 Others Vs. R**, Criminal Appeal No. 443 of 2015 (CAT-unreported), where it was held retracted or repudiated confession evidence cannot be acted upon to base conviction unless the same is corroborated by independent evidence. On the procedure of admission of the statement during inquiry the court was referred to case of **Seleman Abdallah and 2 Others Vs. R**, Criminal Appeal No. 384 of 2008 (CAT-unreported) and further submitted, no inquiry was conducted before admission of those cautioned statements to establish their voluntariness and truthfulness. In response Ms. Mkunde argued, the statements were legally obtained and properly tendered and admitted in court as Exh. PE1 was tendered by PW2 and rightly admitted after inquiry was conducted to establish its voluntariness and the objection raised overruled. As for Exh. PE6 and PE7, she intimated, inquiry was not conducted after the court had overruled the objection raised by the appellant not based on voluntariness of their authors when procuring them, thus there was no requirement of conducting inquiry.

As regard to fatality of the said cautioned statements (Exh. PE1, PE6 and PE7) for being recorded under section 57 and 58 of the CPA, while admitting them to be recorded under the two different sections she countered, the same were properly admitted hence not prejudicial to the appellants. She reinforced her stance by referring the court to the case of **Francis Paul Vs. R**, Criminal Appeal No. 251 of 2017 (CAT-unreported). In their rejoinder submission appellants stated, the respondent has failed to reply to their submission that the three statements were un-procedurally recorded and therefore urged this court to find their ground meritorious. It is not true that, the respondent failed to reply to the appellants' submission on fatality of the exhibits PE1, PE6 and PE7 allegedly recorded and tendered un-procedurally in court. I agree with Ms. Mkunde that, exhibit PW1 was legally procured and admitted in court after inquiry was conducted and objection overruled hence the contention that no inquiry was conducted is unfounded and I dismiss it. As regard to exhibits PE6 and PE7 as rightly submitted by Ms. Mkunde, the submission which I embrace, there was no need of conducting inquiry for an objection not based on the voluntariness or truthfulness of the statement. Since in this case the objection was raised without citation of the infracted law and since it was not based on claims of torture or promises to

the 3rd and 4th appellants when recording their statements I hold, the case of **Seleman Abdallah** (supra) is inapplicable under the circumstances of this case and it was proper for the trial court to admit them without conducting inquiry after satisfying itself that the raised objection lacked merits. As regard to the complaint of recording the said statements under the provisions of section 57 and 58 of the CPA, this court is of the profound view that, the irregularity is not fatal as the statements were not taken in question and answers form and further the omission did not prejudice the appellants in anyway thus inconsequential. Similar stance to this was taken by the Court of Appeal in the case of **Francis Paul** (supra) when faced with similar predicament and the Court had this to say:

> *"All the same, as indicated above the appellant's statement was recorded in terms of sections 57 and 58 of the CPA. The irregularity is therefore not fatal. That said,* ***the fact that the appellant's statements in the present case was not taken in the question and answer form is therefore inconsequential and did not prejudice the appellant****." (Emphasis added)*

That said and done, this ground also lacks merit and I dismiss it too.

I now jump to the original fifth ground of appeal before I revert back to third and fourth grounds as renamed herein above. The ground attacks the

legality and reliability of the certificate of seizure (Exh. PE2), Chain of custody document (Exh. PE4 and trophy valuation Report (Exh. PE5) admitted in court without being read out loudly as per the requirement of the law, the omission which Ms. Mkude concedes while arguing their contents are covered by oral evidence. I agree with the appellants that such omission if fatal. The Court of Appeal in the case of **Anania Clavery Betela Vs. R**, Criminal Appeal No. 355 of 2017 (CAT-unreported) deliberating on similar issue to the present one where the document tendered in the lower court was not rea aloud held thus:

> *"Indeed, the record of proceedings bears out that none of the said* ***exhibit was read out at the trial after admission****. It is settled that such* ***an omission is fatal*** *as it violates* ***the fair trial right of an accused person to know the content of the evidence tendered and admitted against him****. See* ***Robson Mwanjisi & Three Others Vs. R*** *[2003] TLR 218 at 226,* ***Issa Hassan Uki Vs. R****, Criminal Appeal No. 129 of 2017 and* ***Rashid Amir Jabar & Another Vs. R****, Criminal Appeal No. 204 of 2008 (CAT-unreported)." (Emphasis added).*

In this matter since the said three exhibit were not read out in court aloud after their admission the omission which is fatal, I uphold the ground of appeal and proceed to expunge them from the record.

Back to the third and sixth grounds of appeal as renamed which include the combined grounds No. 10th,13th and 14th grounds of appeal, it is the appellants complaint that, their defences were not considered and therefore prosecution case was not proved beyond reasonable doubt, as generally the case was poorly investigated and prosecuted. They argued first, regarding the 1st appellant, the statement of one Mbaguma, material or prime suspect connecting him to the offence, who is also proved by PW3 and DW1 to have died under torture, ought to have been tendered in court or tender the mobile phone printouts exhibiting their communication but none of them was tendered. Secondly, there was no evidence to prove that the 1st and 2nd appellants witnessed exh. PE3 retrieved from exh.PE8 as they did not sign the seizure certificate, since the 3rd appellant disclaimed possession of the said trophies (exh.PE3) which was found in his taxi cab throwing the ball to them. They added, PW1 also failed to identify exh.PE2 and PE3 hence his evidence with regard to the said exhibits was not reliable. And further that, the container (big red box) where exh. PE3, is alleged to have been packed before retrieval from the boot of exh.PE8 was not tendered in evidence. Thirdly, as for the 4th appellant they contended, his defence of alibi was not considered at all since the Korogwe Police Detention Register was produced

in court to prove disprove prosecution's evidence that he was not arrested at Dar es salaam on 04/07/2016 as alleged by PW5 but rather at Manyara, since he denied being implicated by the repudiated/retracted cautioned statement of the 2nd appellant (exh.PE1). In response Ms. Mkunde argued, it was not imperative for prosecution to tender statement of Mbaguma as other witnesses sufficiently addressed part of his evidence which pointed irresistibly to the guilty of the appellants. As regard to the complaint of failure of the 1st and 2nd appellants to sign the seizure certificate she argued the same is baseless since the trial court at pages No. 15,16 and 17 of the typed judgment gave a detailed analysis of evidence on the said appellants on how and why they were treated to have been in possession of the alleged trophies. On the failure of PW1 to identify exh. PE2 and PE3, she countered the omission did not affect prosecution case as the exhibits were well identified by PW3 the arresting officer as well as exhibit keeper PW8. And with regard to the defence of Alibi by the 4th appellant she told the court, though he failed to issue Notice of Alibi before closure of prosecution case to avail them with opportunity to disprove it, still the court considered and it was found not to have proved and shaken prosecution case. This court was therefore invited to dismiss the grounds of appeal. In rejoinder the

appellants while reiterating their earlier submission added failure of PW1 and PW7 to identify exhibit PE2,PE3 and PE8 respectively dented their credibility and reliance of their evidence concerning the said exhibits as there was no proof that are the same exhibits they dealt with before. The prayers of finding the ground meritorious was reiterated.

Having examined the evidence on record with regard to submissions made by both parties I find the appellants' complaints are lacking in merits. To start with the contention that none tendering of one Mbaguma's statement affected the prosecution case, the appellants cited no law to convince this case that the omission affected the prosecution case. The law is very clear under section 143 of Evidence Act, [Cap. 6 R.E 2019] that there is no required number of witness to prove a certain fact and prosecution is at liberty to choose its witnesses in as long as the case is proved beyond reasonable doubt. No one can choose for them the material witness to call. See also the case of **Ally Mkombozi vs. R.**, Criminal Appeal No. 7 OF 2007 and **Rashid Issa Vs. R**, Criminal Appeal No. 210 of 2010 (Both CAT-unreported). I therefore endorse Ms. Mkunde's submission that, since there was other witnesses (PW1 and PW3) proving that Mbaguma (deceased) is the one who informed them as police officers that, the 1st appellant was

involved in the deal of trophies and that the two were going to meet at Kimara Stop Over, the information which when worked on turned out to be true leading to his (1st appellant) arrest and later on the 2nd and 3rd appellants arrest under his aid at Kimara Stop Over, I hold prosecution was not compelled to tender his statement, therefore the omission was not fatal and did not affect the prosecution case. I say so as determination of case does not base on a single piece of evidence but rather totality of the available evidence in the case. See the case of **Ahmad Omari Vs. R**, Criminal appeal No. 145 of 2005 (CAT-unreported). As to the claim of lack of proof of possession of the alleged trophies (Exh. PE3) by the 1st and 2nd appellants for want of their signature in the certificate of seizure, the submission is also devoid of merit and deserves dismissal as the issue of possession by all appellants was well addressed by the trial court at pages No. 15,16 and 17 of the typed judgment as I shall soon demonstrate. The learned trial magistrate lucidly analysed and applied the principles of actual and constructive possession when observed at page 16 and 17 of his typed judgment, how the 1st and 2nd appellants were considered to have been in possession of the said exh. PE3, despite of the same being found in actual possession of the 3rd appellant. As per his analysis and conclusion I find

possession by the 1st and 2nd appellant was constructive one. Constructive possession by its nature is likely to be circumstantial, therefore proof of unlawful possession of contraband is mostly done through circumstantial evidence and not direct evidence, although circumstantial evidence can be just competent as direct evidence. The Court of Appeal in the case of **Yanga Omari Yanga** (supra) while citing the article titled; **That Aint Mine: Taking Possession of Your Constructive Possession case** authored by H. Lee Harrel, Deputy Commonwealth's Attorney Wythe Court Virginia Vol. 6 Number 1/July 2011 on proof of circumstantial evidence observed though has to prove the case beyond reasonable doubt, it must pass two conditions:

1. *That, defendant was aware of the presence and character of the contraband.*
2. *That the contraband was subject to defendant's dominion and control.*

Now the question which might be raised is how someone establishes accused's knowledge of presence of the alleged contraband in possession of the third party. The answer to the question is obtained from the case of **Moses Charles Deo Vs. R**, [1987] T.L.R 134, when the Court of Appeal deliberated on the manner of establishing knowledge on the part of the accused, and had this to say:

"…for the person to be found to have had possession, actual or constructive, of goods ***it must be proved either that he was aware of their presence and that he exercised control over them****, or* ***that the goods came albeit in his presence, at invitation and arrangement****." (Emphasis supplied)*

Applying the above principles to the facts of this case it is learnt from PW1 and PW3's evidence that it is Mbaguma who informed them that the 1st appellant had trophies/luggage (mzigo) for sale to him and that the two were planning to conclude the deal at their meet point Kimara Stop Over area. The two witnesses in company of Mbaguma having reached that area managed to arrest the 1st appellant who took them to where the 3rd appellant had parked for recovery of the said trophies (exh. PE3) which had been kept in the taxi cab boot, Reg. No. T540 DDS, make Toyota Fun Cargo (Exh. PE8), which was under actual control of the 3rd appellant, who also signed the seizure certificate (Exh.PE2). The evidence on arrest and retrieval of the said exh.PE3 from exh.PE8 is corroborated by testimony of the 3rd appellant who mentioned the 1st and 2nd appellant to be the owners of the said exh.PE3 as the persons who hired him to carry them from Manzese area the fact that lead to arrest of the 2nd appellant at the closest bar within the same area. It is trite law the court will be entitled to take into account accused's defence

evidence that further carries prosecution case in deciding the question of his guilty as it was well adumbrated by the Court of Appeal in the case of **Mohamed Haruna @ Mtupeni Vs. R**, Criminal Appeal No. 259 of 2007 (CAT-unreported). In that case the Court had this to say:

> *"…if the accused person in the course of his defence gives evidence which carries the prosecution case further, the court will be entitled to take in account such evidence of the accused in deciding on the question of his guilty."*

In this case the mere fact that, the 1st and 2nd appellants did not sign the seizure certificate does not exonerate them from liability as owners of the contraband as being the persons who hired the 3rd appellant and packed them in the said taxi cab at Manzese area as per the 3rd appellant's account, I hold that is a proof they were aware of their presence in the said taxi cab and exercised control over them. I say so since it is unlikely that they would have risked leaving them (exh.PE3) in a motor vehicle which they have no control of as the 3rd appellant when arrested was found awaiting for them, and it is the 1st appellant who led PW1 and PW3 to the said taxi cab (exh.P8), thus a proof that they were in constructive possession of exh. PE3. As to the 3rd appellant he was found in actual possession of the said exh. PE3 hence cannot disclaim possession on mere assertion that it belonged to the 1st and

2nd appellants as there is no proof that he had no knowledge of what was contained in the said luggage retrieved from his car. The above evidence notwithstanding there is confession statements of the 2nd and 3rd appellants, giving detailed accounts on how were they involved in the commission of the offences they stood charged and convicted with and implicated the 1st appellant. I am therefore satisfied there is no misapprehension of the evidence to enjoin this court interfere with the finding of the trial court as trial magistrate correctly found the case against the 1st, 2nd and 3rd appellants was proved beyond reasonable doubt. I would have had a different view had the appellant successfully established to this court that there was misapprehension of evidence in such a manner that led into trial court's conclusions basing on incorrect premises. See the cases of **Rashid Issa** (supra), **Salum. Bugu Vs. Mariam Kibwana,** Civil Appeal No. 29 of 1992 and **Juma Kilimo Vs.R.** Criminal Appeal No. 70 of 2012 (both CAT-unreported) As regard to the 4th appellant, the only evidence implicating him is his own confession statement (exh.PE7) and confession statement of the 2nd appellant (exh. PE1) incriminating him to be his co-accused in stealing the said trophies from his employer Tanganyika Wildlife Safari Ltd. Now the issue for determination before me is whether the two confessions are legally

sufficient to warrant conviction of the 4th appellant? What is gleaned from exh. PE7, the 4th appellant statement is that, he confessed to have stolen elephant tusks which were sliced into six (6) pieces. However, it is not clear as to where, when and to whom the same were sent to so as to prove to this court beyond specs of doubt that, are the ones alleged to have been illegally dealt it and found unlawfully possessed by all appellants. Secondly, in the said statement he claims to have stolen or dealt in the said trophies between 2-4/06/2016 the fact which is at variance with particulars of the date of commission of the offence described in the charge sheet which is 23/06/2016. Guilty of the accused person may be proved by evidence adduced in court or by his confession. It is trite law that, the desire of any court must always be to ensure so far as possible that punishment is imposed to those who are in fact guilty. The duty of the court to clear the innocent must be equal or superior in importance to its duty to convict and punish the guilty. See the case of **Samson Kitundu Vs. R**, Criminal Appeal No. 195 of 2004 (CAT-unreported) when borrowed wisdom from the case of **S [an infant] vs Manchester City Recorder and Others** (1969) 3 All E.R. 1230. In this case since the date indicated in the 4th appellant's cautioned statement is at variance with the one in the charge sheet it cannot safely be

concluded did that he confessed to the commission of the offences he was charged with and therefore dealt with and/or constructively possessed the said exh. PE3 for having full knowledge of their presence in possession of the 1st, 2nd and 3nd appellant. With such insufficient evidence I can firmly conclude that the case against him was not proved beyond reasonable doubt. That being the position I need not consider the 4th ground from the original grounds of appeal touching him as the third and sixth grounds of appeal as renamed herein above suffice to dispose of the appeal against him.

I now move to the seventh separate ground of appeal where the 3rd appellant claims was wrongly convicted since the evidence does not implicate him at all as the elements of knowledge and control of the trophies were not established by the prosecution against him. I think this ground need not detain me as I dealt with it in extensor when determining the third and sixth grounds of appeal as renamed and found that he was found in actual possession which finding is corroborated by his true account on the dealings with trophies together with the 1st appellant as detailed in his cautioned statement. I therefore make a finding that, the prosecution successfully established he had knowledge and was in control of the said trophies when

left in his car by the 1st and 2nd appellant before he was arrested. I say so because if the said trophies were packed in the boot of his car by the 1st and 2nd appellant they must have been so packed with his full knowledge and approval as the owner of the taxi cab. In the case of **Yanga Omari Yanga** (supra) on determination of the issue as to whether the drug substances were stored in the cupboard of the appellant's house with his full knowledge and approval or not, the Court of Appeal made reference to the case of **Songlei Vs. DPP and DPP Vs. Xiao Shaodan, Chen Jianlin and Hu Liang**, Consolidated Appeal No. 16A and 16 of 2017(CAT-unreported) where it was held:

> *"It is our considered view that, Song Lei was a person in charge and control of his motor vehicle regardless of having authorised Zhang Peng to drive it when the latter was travelling to Malawi from Tanzania. Also,* ***our view is that, even the horns were packed in the secret chamber be it by Zhang Peng or the unnamed Hotel Manager, this must have been with the knowledge and approval of Song Lei the owner to the motor vehicle in question****. It is highly unlikely that, Zhang Peng and the hotel manager would have risked leaving the valuable Rhino horns in the motor vehicle which they had no control over." (Emphasis supplied)*

In this matter like in the above cited case the 3rd appellant was in charge of the motor vehicle (exh.PE8) and therefore had knowledge and control of the said trophies in his motor vehicle since he could not have waited that long with it before he was arrested, had he not been part and parcel of the deal. Logic demands if he was so innocent and genuine enough after dropping the passengers/customers (1st and 2nd appellant) he would have demanded for his charges and leave the place as it is not stated that Kimara stop over was not the final destination. This ground has to fail too.

Next for consideration is the last original ground of appeal No. 9 on the assertion of irregularities in tendering of exhibits PE3 and PE8. On exh. PE3 they said was tendered without laying foundation since the exhibit was collected from another person. As to exh. PE 8 they submitted, there is no plausible explanation as to where the exhibit was kept before its tendering in court something which dented the chain of custody. I think also this ground need not detain me much as exh. PE3, the six (6) elephant tusks were tendered and received without appellants' objection nor were there cross examination question of the complained fact. It is surprising to find them questioning the tendering procedure at this stage which act I hold is an afterthought hence disregarded. As to exh. PE8, the taxi cab, an omission

by the prosecution to explain as to where was it kept before its tendering court, I hold did not dent the chain of custody as the same is one of the items incapable of being easily exchange hands hence not easily altered, swapped or tempered'. See the case of **Mwinyi Jamal Kitambala @ Igonza** (supra). The ground also lacks merit. As the question of sentence was not raised by either party in this appeal I find it prudent to not comment on.

All that said and done I find the appeal by the 1st, 2nd and 3rd appellants is wanting in merits and the same is hereby dismissed in its entirety save one for the 4th appellant which is allowed. The conviction against the 4th appellant is quashed and sentence meted on him is set aside. This has the effect of ordering 4th appellant's immediate release from prison forthwith unless otherwise lawfully held, which order I hereby issue.

It is so ordered.

DATED at DAR ES SALAAM this 26th day of November, 2021.

E.E. KAKOLAKI

JUDGE

Delivered at Dar es Salaam in chambers this 26th day of November, 2021 in the presence of the appellants in person, Mr. Adolf Kisima and Dhamiri Masinde learned State Attorneys for the respondent and Ms. Asha Livanga, court clerk.

Right of appeal explained.

E.E. KAKOLAKI

JUDGE

26/11/2021