IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

CRIMINAL APPEAL NO. 102 OF 2021

(Originating from the Court of Resident Magistrate of Mbeya, at Mbeya, in Economic Case No. 5 of 2017)

ISSA BROWN SAMSON.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last Order: 25.02.2022

Date of Judgment: 20.05.2022

Ebrahim, J.

The appellant, Issa Brown Samson filed the instant appeal challenging the conviction and sentence of the Court of Resident Magistrate of Mbeya in Economic Case No. 5 of 2017.

The appellant was charged and convicted for two counts of unlawful possession of government trophy contrary to **section 86 (1) (2) (c)(iii) of the Wildlife Conservation Act, No. 5 of 2009 as amended by section 59 of the Written Laws (Miscellaneous Amendments) (No. 2) Act 2016 read together with paragraph 14 of**

the first schedule and section 57(1) of the Economic and Organised Crime Control Act, Cap. 200 R.E 2002. He was sentenced to serve a term of seventeen years imprisonment.

It was alleged that on 8th March 2017 at Lupa area within Chunya District and Region of Mbeya, the appellant was found in possession of Government trophy to wit nine (9) pieces of elephant tasks valued at USD 45,000.00 equivalent to Tshs. 100,350,000/= and two tails of giraffe valued at USD 30,000.00 equivalent to Tshs. 66,900,000/= the property of the United Republic of Tanzania without a permit. The appellant pleaded not guilty.

The prosecution lined up four (4) witnesses and tendered five (5) exhibits to wit; exhibit P1 (Warrant of Commitment on a Sentence of Imprisonment), exhibit P2 (trophy certification value), exhibit P3 (seizure note), exhibit P4 (9 pieces of elephant tusks, two Giraffe's tails, Digital scale, sulphate bag and polythene bag), and exhibit P5 (motor bike).

The evidence by the prosecution was to the effect that the appellant and other two person (not subject of this appeal) were trapped and arrested at Mnadani area in Chunya found in

possession of the said government trophies. The trophies were wrapped into polythene bag and a sulphate then tied up on a motor bike, make Boxer. That the trophies were seized in the presence of the independent witnesses, PW3 being one of them. That they were taken to Lupa police station, later on they were transferred to Chunya police station and finally they were charged before the trial Court.

The appellant gave unsworn testimony. He testified that he was arrested by TANAPA rangers, he was taken to Lupa police station where he was interrogated on the weapon he used in poaching. That he admitted to had seen one. He escorted the police to Mahviga village where the weapon was searched and found. When he was cross-examined by his co-accused and the prosecutor, the appellant admitted that he was the one who was in possession of the trophies. However, he said that they were owned by another person by the name of Elly.

The trial Court was satisfied that the prosecution proved the case to the hilt. Thus, convicted and sentenced the appellant as afore said. Aggrieved by the conviction and sentence, he filed the present appeal. The appellant raised ten (10) grounds of

appeal. Due to the language used and the nature the grounds of appeal were framed, they can be conveniently re-framed and condensed into four as follows:

1. That the trial court erred in law and fact when it convicted the appellant while the prosecution did not prove the charge beyond reasonable doubt.
2. That the trial court erred in law and fact when it failed to consider the appellant's evidence.
3. That the trial court erred when it admitted exhibit P4 and P5 while there was a broken chain of custody.
4. That the trial court erred in law and fact when it admitted exhibit P1 without according the appellant the right to object it.

When the appeal was called on for hearing, the appellant appeared in person and unrepresented, whereas Ms. Rosemary Mgeni appeared for the respondent/Republic. The appellant offered the right to begin to the State Attorney while reserving his right to re-join.

Ms. Mgeni did not protest the appeal. She supported the appeal in its entirety on two grounds. **One**, that the trophy

valuation report (exhibit P2) was prepared by a Game Warden contrary to **section 114 (1) of the Wildlife Conservation Act, Cap. 283 R.E 2019.** She contended that **subsection (3) of section 114** mandatorily requires the court to render judgment according to certificate of evaluation signed by a Director or Wildlife officer of the rank of Wildlife Officer. That Wildlife Officer includes Wildlife Warden and/or Wildlife Ranger. It was her argument that, in the case at hand the certificate was prepared by unqualified person as the result it is as good as no valuation report was tendered.

Two, Ms. Mgeni argued that chain of custody regarding exhibit P4 was not maintained. She contended that the evidence did not disclose who was the custodian of the government trophies which the appellant was arrested with. That the prosecution was supposed to call a custodian of the exhibit as a witness. Ms. Mgeni gave an example that PW1 said he received the exhibit from PC-Simon, but he (PC-Simon) was not called to testify.

In his rejoinder, the appellant joined hands with the State Attorney's submissions. He urged this court to also consider his grounds of appeal.

I have considered the grounds of appeal and the submissions by the learned State Attorney. I will determine the appeal according to the law even though the same is supported by the learned State Attorney. I will do so due to my understanding of the trite principle of law that, courts in this land, are enjoined to decide matters before them according to law and justice. This spirit is underscored under Article 107B of the Constitution of the United Republic of Tanzania, 1977, Cap. 2 R. E. 2002. It was also cemented in the case of **John Magendo v. N.E.Govani** (1973) LRT. 60. Courts are not thus, obliged to decide matters according to the consensus of the parties before them.

Starting with the compliant on the 4th ground of appeal as improvised above; the appellant complained that the trial court erred when it admitted exhibit P1 without affording him the right to object it. The record shows that "exhibit P1" is a Warrant of Commitment on a Sentence of Imprisonment. It was received as exhibit during preliminary hearing. The exhibit was received in evidence after the appellant admitted that he escaped from lawful custody and he was arrested, charged in the District Court

of Chunya where he was sentenced to serve 2 years imprisonment or pay fine at the tune of Tshs. 500,000/=.

It is true that the record does not show if the appellant was accorded the right to object it. However, as I have hinted before, the appellant admitted the fact that he was convicted and sentenced for the offence of escaping from lawful custody. The exhibit thus, was tendered to substantiate the admission made by the appellant. Raising a complaint at this stage is an afterthought. The same was observed in the case of **Abdallah Rasid Namkoka vs Republic**, Criminal Appeal No. 206 of 2016 CAT at Mtwara (unreported). In that case the appellant raised a complaint about his confession at the appeal stage. He complained that extra-judicial and cautioned statements were admitted whilst he repudiated them. The Court of Appeal dismissed the complaint on the ground that the appellant did not object the production of the same and they were admitted during the preliminary hearing.

Nevertheless, even where this court would have decided that the admission of exhibit P1 was in contradiction with the law, the same would have not been found fatal. This is because, exhibit P1 was not among the evidence which the trial court relied

upon in convicting the appellant. Thus, the appellant was not in any way prejudiced. The ground of appeal is therefore dismissed.

As to the 3rd ground of appeal the appellant and the learned State Attorney for the respondent are at one that the chain of custody was not maintained. The learned State Attorney did not tell the Court if the irregularity vitiated the proceedings or if it prejudiced the appellant.

The question to be resolved is whether or not the chain of custody was observed. Depending on the answer to that question, it would follow the issue as to whether or not the irregularity vitiated the proceedings.

In addressing this issue, it is my view that I should firstly look at what does the chain of custody entails.

In the case of **Paulo Maduka and 4 others vs Republic,** Criminal Appeal no. 110 0f 2007 CAT, and **Julius Matama @ Babu Mzee Mzima vs Republic,** Criminal Appeal No. 137 of 2015 CAT (both unreported) Chain of Custody was described to mean the sequence of activities connected with collection, custody, transfer, examination and disposition of evidence used in legal

proceedings or a chronological documentation and /or a paper trail, showing the seizure, custody, control, transfer, analysis, and disposition of evidence be it physical or electronic.

The intention of adhering to the chain of custody procedure is to avoid the use of evidence that could be the subject of tempering, substitution or contamination; see **Avyalimana Azaria and 2 Others vs Republic,** Criminal Appeal No. 539 of 2015 CAT, at Bukoba. This therefore means that, strictness in observing the chain of custody is put more on the evidence which can easily be subject of tempering, substitution or contamination.

The above view is in line with the position underscored by the CAT in numerous decisions such as **Issa Hassan Uki vs Republic**, Criminal Appeal No. 129 of 2017; and **Vuyo Jack vs Director of Public Prosecutions**, Criminal Appeal No. 334 of 2016 (both unreported) it was observed that:

> *"The chain of custody principle should not be treated as a straitjacket but one that must be relaxed when dealing with items which cannot be easily altered, swapped or tampered with"*

In the case at hand, exhibit PE4 and PE5 involved nine pieces of elephant tusks, two giraffe tails, digital scale, sulphate bag and polythene bag on one hand and the motorbike on the other. It was the evidence by PW2, PW3 and PW4 that the exhibits were recovered from the possession of the appellant. It was also testified that the said elephant tusks and giraffe tails were wrapped into polythene bag and put together with the digital scale in a sulphate bag then tied at the back of the motorbike.

They were seized in the presence of the independent witnesses i.e PW3. Then a seizure note (exhibit P3) was filled and signed by PW2, PW3, the appellant and his co-accused. All of the exhibits i.e P3, P4, and P5 were admitted unobjected by the appellant and his co-accused.

The evidence further tells that the pieces of elephant tusks were taken to Chunya police station where they were marked with a case number. Indeed, there is no evidence after the exhibits being marked as to who was the custodian until when they were tendered in court.

The answer to the question observation, depends the circumstance of each case. On my part, I will be guided with the

findings made in the case of **Joseph Leonard Manyota v. Republic**, Criminal Appeal No. 485 of 2015 (unreported) where the CAT observed that:

> *"It is not every time that when the chain of custody is broken, then the relevant item cannot be produced and accepted by the court as evidence, regardless of its nature. We are certain that this cannot be the case say* ***where the potential evidence is not in the danger of being destroyed, polluted, and/or in any way tampered with. Where the circumstances may reasonably show the absence of such dangers, the court can safely receive such evidence despite the fact that the chain of custody may have been broken.*** *Of course, this will depend on the prevailing circumstances in every particular case."* (bold emphasis added).

The nine pieces of elephant tusk, two giraffe tails and a motorbike, in the circumstances of this case, do not appear to have been swapped, altered or tampered with. I therefore firmly find that they were properly received as evidence notwithstanding the fact that the court was not told who was a custodian. More so, there was no objection as to they admission-

or cross-examination to challenge chain of custody. My findings, lead to the collapse of the appellant's complaint as well as the support furnished by the learned State Attorney. Resultantly, I dismiss it.

Regarding the complaint that the trial court did not consider the appellant's evidence. The complaint is want of merit. This is because, I have gone through the impugned judgment and observed that the trial court considered defence evidence but it found it not to be casting any doubt in the evidence adduced by the prosecution. For easy reference, I quote the pertinent part at page 10 of the judgement.

> "..for the 1st accused person he did not dispute that the allegations that he was dealing with and found with government trophies. Also he did not dispute that he was the one who helped police to find the muzzle gun which was used to kill animals. The 1st accused person when being cross examined by the 2nd accused he replied that; it was all of us whom found with elephant tusks, we were arrested together, although you were not involved in this tusks but it was me, it was me who hired you to carry me for a ride"

This compliant by the appellant therefore, lacks merit.

Last but not least it was the complaint that the prosecution did not prove the case at the required standard. It is the principle of law that the burden of proof in criminal cases rests squarely on the shoulders of the prosecution side unless the law otherwise directs; and that the accused has no duty of proving his innocence - See **Armand Guehi v. Republic**, Criminal Appeal No. 242 of 2010, CAT (unreported).

I am also mindful of the fact that this being the first appellate court, it is dutybound to reconsider and evaluate the evidence on record and come to its own conclusions bearing in mind that it never saw the witnesses as they testified; see **Maramo Slaa Hofu and Others vs Republic**, Criminal Appeal No. 146 of 2011 CAT at Arusha, (unreported).

Having gone through the prosecution evidence and considering the entire proceedings, it is apparent that; PW2, PW3 and PW4 were eye witnesses. According to the evidence PW2 (game ranger), received a tip from his informer that there are persons searching for a customer to sell government trophies.

PW2 and his fellow game rangers (Hamza Midiano and Edwin Kwacha) decided to use a private motor vehicle Noah Make so that they could not be identified. They went to Lupa police station, informed the Officer Commanding Station (OCS) who came later to testify as PW4. PW4 and another police officer joined the team. PW2 set a trap which later the appellant thinking that he had got lucky of the prospective customer, together with his fellow boarded the PW2's motor vehicle for negotiation of the price. Later on, the appellant called his fellow to bring the luggage at Mnadani.

It was the story that after five minutes that fellow of the appellant arrived with a motorbike, make Boxer make without a plate number with a luggage tied behind it. Then in the process of untying the luggage PW4 and other police officers who were hiding, merged and arrested the appellant and his fellow. PW3, a motor cyclist and others thinking that the appellant have been invaded reached at the scene only to be told that the invader are police officers and game rangers. PW3 was among the witnesses who observed the elephant tusks and giraffe tails being

recovered from the appellant and his fellow. PW3 also signed a seizure note.

The appellant's defence was to the effect that he was arrested at Mnadani area. That he was taken to Lupa police station and later was transferred to Chunya police station where he was interrogated regarding the weapon he used in poaching. Further, he admitted to have seen one and he accompanied the police to Mahviga village to show the said weapon which was searched and found.

When he was cross examined by his co-accused, he admitted that they were found with elephant tusks but the appellant exonerated his co-accused by telling the trial court that they were not involved. Again, when the appellant was cross-examined by the prosecution counsel, he admitted to have been arrested with elephant tusks, but he told the court that they were owned by a person named Elly.

All of the above narrated evidence is clear as broad day light that the prosecution evidence was watertight. It is also apparent from the record that the appellant did not object the tendering of any exhibit. He did not even at all cross-examine

PW2. All these circumstances are the indication that the appellant was satisfied that the prosecution witnesses testified nothing but the truth. This is so because, it is a settled law that failure to cross-examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness evidence. See the holding in the cases of **Damiani Ruhele v. Republic,** Criminal Appeal No. 501 of 2007 CAT (unreported) **Bomu Mohamed vs Hamisi Amiri**, Civil Appeal No. 99 of 2018 CAT at Tanga.

Notwithstanding the principle that the accused is not dutybound to prove his innocence, it is my view that the appellant's evidence in this case corroborated the prosecution case. It is not a new phenomenon for the accused/appellant to do so. In the case of **Felix Lucas Kisinyila v. Republic,** Criminal Appeal No. 129 of 2002, CAT (unreported) it was found the appellant's evidence corroborating the prosecution case. Again, the appellant's complaint is dismissed.

Before I pen off, I am obliged to discuss though in brief the concerned raised by the learned State Attorney that, the judgment entered based on the Trophy Valuation Certificate prepared by unqualified person is fatal. Her contention based on

section 114 of the Wildlife Conservation Act. I hastily resolve that; the learned State Attorney misconceived the law. This is because, trophy valuation certificate as per (1) of section 114 of WCA is for the purpose of assessing the punishment to be awarded. It reads:

> *"114 (1) In any proceedings under this Act, the Court in assessing the punishment to be awarded shall calculate the value of a trophy or of animal in accordance with the certificate of value of trophies as prescribed by Minister in the regulations."*

Nevertheless, it is true that the law i.e **section 114 (3) of Wildlife Conservation Act** requires the certificate to be prepared by either the Director of Wildlife or any wildlife officer.

The designation "Wildlife Officer" is defined under section 3 of the **Wildlife Conservation Act** to mean *"a wildlife officer, Wildlife warden and Wildlife ranger engaged of the purpose of enforcing the Act"*

Thus, it is true as rightly observed by the learned State Attorney that exhibit P2 was certified by PW1 who introduced himself when testifying to be a Game Warden I. Due to the dictate of the law above, Game Warden grade 1 does not fall within the scope and

purview of "Wildlife officer." The position has also been stated by the CAT in the cases of **Petro Kilo Kinangai vs. Republic,** Criminal Appeal No. 565 of 2017, **Emmanuel Lyabonga vs. Republic**, Criminal Appeal No. 257 of 2019 (both unreported).

In the above cases the CAT discounted the respective certificates concerned after ruling out that the same had no evidential value. Being so guided, I here by hold the same for exhibit P2 and discount it.

Having discounted exhibit P2, the question for determination is whether there was any other valuation to be based on in assessing the sentence to the appellant. In his testimony, PW1 told the trial Court that he is a diploma holder in wildlife conservation, and was employed in 2010. He further explained how he recognised nine pieces to be elephant tusks and two giraffe tails. He also testified that the pieces of elephant tusks involved the killing of three elephants and two tails involved killing of two giraffes. The value of an animal is USD 15,000/= each. It my view that PW1 had sufficient knowledge and experience to enable him know the value of the elephant and the giraffe. Therefore, the

value of the trophy was orally proved and the trial court was properly acted on in sentencing the appellant.

In the circumstances, the appellant's appeal lacks merit. It is hereby dismissed.

Ordered according.

R.A. Ebrahim

JUDGE.

Mbeya

20.05.2022

Date: 20.05.2022.

Coram: Hon. P.A. Scout, Ag -DR.

Appellant: Present.

For the Republic: Ms. Hanarose – State Attorney.

B/C: Gaudensia.

Ms. Hanarose – State Attorney:

Your honour, the case is coming on for judgment. We are ready to proceed.

Appellant: I am ready too.

Court: Judgement is delivered in the presence of Ms. Hanarose State Attorney, Appellant and C/C in Chamber Court on 20/05/2022.

Sgd: A.P. Scout

Ag-Deputy Registrar

20/05/2022

Court: Right of Appeal explained.

A.P. Scout

Ag-Deputy Registrar

20/05/2022

DEPUTY REGISTRAR
HIGH COURT OF TANZANIA
MBEYA