

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
SUMBAWANGA DISTRICT REGISTRY
AT SUMBAWANGA
CRIMINAL APPEAL NO. 38 OF 2020

*(Originating from Katavi Resident Magistrates' Court in Economic Case
No. 28/2019)*

- 1. EMANUEL MATHIAS @ LUKONDA.....1ST APPELLANT**
2. MALILO LEONARD @ ULIZA.....2ND APPELLANT
3. EDWIN GABRIEL @ KABAKULI.....3RD APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Last Order: 18th May, 2022

Date of Judgment: 14th July, 2022

NDUNGURU, J

In the Resident Magistrates' Court of Katavi, the appellants were charged with two counts, **first** being unlawful possession of Government trophy contrary to section 86(1) and (2) (b) of the Wildlife Conservation Act No. 5 of 2009 read together with paragraph 14 of the First Schedule to and sections 57 (1) and 60 (2) of the Economic and Organized Crimes Control Act, [CAP. 200 R.E 2002] as amended by section 16 (a) and 13

(b) of the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016. **Second** count was unlawful dealing in trophies contrary to section 84 (1) of the Wildlife Conservation Act No. 5 of 2009 read together with paragraph 14 of the First Schedule to and sections 57 (1) and 60 (2) of the Economic and Organized Crimes Control Act [CAP. 200 R.E 2002] as amended by sections 16 (a) and 13 (b) of the Written Laws (Miscellaneous Amendment) Act, No. 3 of 2016.

It was alleged by the prosecution side that, on the 31st day of July, 2019 at Chambalendi village within Mlele District in Katavi Region, the appellants were found in an unlawful possession of three (3) elephant tusks and selling the same which were valued at USD 30,000 equivalent to TShs. 69,210,000/= only, the property of the Government of Tanzania without a permit from the Director of Wildlife, and Trophy Dealer's licence respectively.

As they were marched in court, they all pleaded not guilty but after a full trial, they were all convicted of the two counts and sentenced to serve a term of twenty (20) years imprisonment.

Aggrieved, the appellants have now appealed before this Court on the following grounds;

1. That, the trial Magistrate erred at law by admitting the Caution Statements which was procured contrary to the law and procedure governing the same.
2. That, the trial Court erred both at law and fact by convicting the second and third appellants basing solely on the caution statement which was not corroborated.
3. That, the trial Court erred at law and fact by not apprehending, taking into consideration and believing the outright and naked lies made by the prosecution side which intended to show that the 1st appellant conducted the business of selling trophies in the middle of the night.
4. That, the trial Court erred at law and fact by convicting the appellants on the case which was not proved beyond reasonable doubts.
5. That, the trial Court erred at law by convicting the appellants depending on the weakness of the defence evidence instead of depending on the strength of the prosecution case.

The mode opted in hearing of this appeal on the date scheduled for hearing was *viva voce*, whereas the appellants were representing themselves meaning they had no legal representation while the

respondent was represented by Mr. Simon Peres learned Senior State Attorney.

As they were invited to argue for the five (5) grounds of appeal they filed in their petition of appeal, the appellants all opted for this court to adopt their grounds of appeal as part of their submissions, and prayed for this court to find merit in their appeal and allow it, quash the decision of the trial court and set them free.

In reply, Mr. Peres submitted that having gone through the grounds of appeal, his side resists the appeal of the 1st and 3rd appellants and on the other hand support the appeal of the 2nd appellant.

Mr. Peres argued on the 1st ground of appeal that, the caution statement of 1st appellant was objected during trial and inquiry was conducted whereas the court was satisfied that it was recorded voluntarily, and thereafter it was admitted as Exhibit P6, in which the appellant had admitted that the trophy was found in his possession. He added that, the caution statement of the 3rd appellant was not objected and it too was admitted as Exhibit P5, whereas in it too the appellant had admitted the offence. He then prayed for this ground to be dismissed.

Submitting on the 2nd ground, Mr. Peres argued that the 2nd appellant was convicted basing on the caution statement of his co-accused, that there was no any evidence touching the 2nd appellant. Mr. Peres continued that, in the absence of corroboration, the court contravened Section 33 of TEA, that in the record there is no any evidence supporting the caution statement. However, he submitted that for the 3rd appellant, he was implicated by the caution statement of the 1st appellant and his own caution statement where he admitted the offence.

Mr. Peres argued further that, on the 3rd ground PW10 was an independent witness. That he was taken by the arresting officers to the scene where the trap was made. In that course, he added, the witness saw the 1st appellant being arrested, he knew him and he signed in the seizure certificate. The witness is the WEO and justice of peace, that he is entitled to credence as stated in **Peter Kyando vs Republic (19) TLR**. Mr. Peres therefore finds devoid in merit as far as the 3rd ground is concerned.

The learned Senior State Attorney furtherly submitted that, on the 4th ground as regards the 1st appellant, the case was proved beyond reasonable doubt. He said, the 1st appellant was arrested red handed, as

witnessed by PW10, seizure certificate was signed by the appellant and never objected it neither he never cross examined the said exhibit. Mr. Peres added that, in his caution statement, the 1st appellant admitted (referred this court to Exhibit P6), and that his side is convinced that the case against the 1st appellant was proved beyond reasonable doubt.

He however concluded on 4th ground that, as far as the 3rd appellant is concerned, he was firstly named by the 1st appellant in his caution statement and thereafter he himself admitted the offence in his caution statement, therefore the case against him too was proved beyond doubts.

Lastly on the 5th ground, Mr. Peres submitted that the ground is devoid as in the judgement the trial Magistrate had considered their defence but the court convicted them on the bases of the strength of the prosecution case. He believes that this ground too is devoid of merit.

Nevertheless, Mr. Peres winded up by addressing for the 2nd appellant that his appeal be allowed but resist the 1st and 3rd appellants' appeal.

In rejoinder, the 1st and 3rd appellants had nothing to add to their submission in chief, as for the 2nd appellant he concurred with what was submitted by the learned Senior State Attorney, Mr. Peres.

As the respondent supported the appeal of the 2nd appellant as the case against him was not proved beyond reasonable doubts, this court did not hesitate to quash the conviction and set aside the sentence imposed on him and ordered an immediate release from the prison, unless he was held for any other lawful cause. To that effect, this matter remained with only two appellants, the 1st and 3rd appellants.

I have gone through the submissions from both camps, plus considered the grounds of appeal as filed by the appellants, whereas all five grounds entirely suggests that the appellants were convicted of charges which were not proved beyond the required standard by the law. In that case, the main issue for determination is **whether the prosecution side did prove their case against the appellants beyond reasonable doubts.**

To start with, I find it best to outline that this court is the first appellate court and as it was held in a number of authorities such as the case of **Kaimu Said vs Republic Criminal Appeal No. 391 of 2019 CAT Mtwara** (unreported) that; -

".....a High Court, being the first appellate court has powers to step into the trial court's shoes and reconsider the evidence of both sides and come up with its own finding of facts."

As I perused the records of the trial court, I realised that the appellants' conviction was mainly based on the testimonies of PW1, PW10 and PW11 for the 1st appellant plus his caution statement which was admitted as Exhibit P6 and Seizure Certificate which was admitted as Exhibit P1. On the other hand, only the caution statement of the 1st appellant where the 2nd appellant was mentioned by the 1st appellant as one of the owners of the said trophies and his own caution statement (admitted as Exhibit P5) were considered enough in convicting him for the offence he was charged with.

Starting with the prosecution side's evidence, PW1 testified that on the 30/07/2019 at around 23:15 hours, he was assigned by his senior known as Inspector Komba to join TANAPA rangers and mission out to arrest culprits who were trading on government trophies at Chamalend village, whereas the information was tipped to the park rangers by an informer. PW1 told the trial court that, in obeying the order, as they reached the village of the incident, they were joined by the Village Executive Officer (VEO) and a neighbour to the scene, while the park ranger pretended to be the buyer of the trophies.

PW1 continued to testify that, at around 01:00 hours as it was already the 31st of July, 2019, they saw three people coming towards

where they had their car parked along the Majimoto-Mambasi road. He added, one of the three people had a sulphate bag, and they were all told to board the car, they did so. However, he proceeded in the process of arresting them, two of them managed to escape but the one who did not manage to escape was the 1st appellant, and when they searched the sulphate bag, they found three elephant tusks and he then issued a certificate of seizure which was signed by the 1st appellant and the witnesses present at the scene, who were the VEO (PW10), the park ranger (PW11) and another person who was not summoned as a witness during the trial.

PW10 in his testimony, told the trial court that on the fateful date, he was awakened by police officers at around 01:00 hours who were accompanied by TANAPA rangers, they wanted him to accompany them to an arrest of culprits who were selling elephant tusks. He testified as they arrived at the area of the scene he saw three people, whereas one of them had a sulphate bag, and the latter was told to board the car. He added, in the process of arresting them, two of the three culprits escaped to an unknown destination, and the only one who was apprehended was the one with the sulphate bag, who he later introduced himself as Emanuel Mathias Lukanda (1st appellant), who he

knew him as Mathias Malando. PW10 said, he also witnessed the police officers inspecting the sulphate bag as they found three tusks of elephant, and a document being prepared whereas he signed it.

PW11 testified that, on the 30/07/2019 as he was at their offices at Stalike village, they received a tip that at Mabambasi area there was a person selling elephant tusks. PW11 testified before the trial court as if he was not alone, therefore, they went to Majimoto Police station and requested assistance of police officers for reinforcement and they were given PW1. He added that, they went together up to Chamalend, and searched for the VEO where it was around 01:00 hours, as they found the VEO, together they went to the area of the scene and parked their vehicle along Majimoto-Mabambasi road.

PW11 continued, as he pretended to be the buyer, he was the one communicating with the seller, in a short while they saw three people approaching them, and one of them had a sulphate bag. He testified further that, they told the one with the sulphate bag to board the car for the business to take off, thereafter they prepared to arrest them but in the process two of the three escaped and the one with the sulphate bag was caught. PW11 said, they then inspected the sulphate bag and recovered three elephant tusks, and they asked the culprit if he had a

permit but he denied having a permit. The culprit as identified was the 1st appellant, and therefore PW1 filled a certificate of seizure and confiscated the trophies, PW11 concluded.

In the 1st appellant's caution statement, he said that he got the trophies from his friend known as Jisena Idete, who was not arrested. He added, through his business of being a milk monger, he made friends easily, among them was Jisena Idete, Malilo Leonard and Kabakuli. However, it was Jisena Idete who told him, if he wants to have a better life, dealing in animal trophies would make him rich in a short term. 1st appellant continued that, Jisena Idete named the 2nd appellant and the 3rd appellant as his compatriots who poach wild animals by using a gun and sell them to wealthy individuals in Mpanda. But as he was caught in 2017, he has lost all the contacts of his buyers, and therefore he wanted the 1st appellant to hide the said trophies for he is new in business, and let him look for buyers.

1st appellant in his caution statement said, he did not communicate with Jisena Idete for about two weeks. He then was contacted by Jisena Idete that he has got a buyer from Majimoto and that he will come to the 1st appellant to get the trophies. Jisena Idete did tell the 1st

appellant that he should not be worried or scared even if the buyer comes in the night.

1st appellant said, on the 30/07/2019 he was ready to sell the trophies, Jisena Idete called him and said the buyer has reached at the bridge of Mabambasi-Majimoto road so he should go meet him. And so, he did. As he reached the place, he saw three people, and he was asked if he was the one sent by Jisena Idete and he replied indeed. Thereafter, he went to Kavuu river (where he had hide the trophies), with one of the three people, who turned out to be a broker, they weighed the trophies and got the total weight to be 10 Kilograms.

The 1st appellant and the broker went back to the area where the car was, and he was told to board the car. Inside the car, the driver told him to show him the trophies and he did so, and he was asked the price by the driver and he answered him that they are sold at Tshs. 1,200,000/= . 1st appellant concluded that, the driver told him he his getting the money but instead took out a gun and told him that he was under arrest, as he attempted to escape, he was caught by other police officers who were hiding in the bushes. But he insisted that, the trophies were not his, but rather they belonged to Jisena Idete, Malilo Leonard

and Edwin Gabriel as they are the poachers. He was therefore taken to Majimoto police station.

In the 3rd appellant's caution statement, he agreed that Malilo Leonard, Emmanuel Mathias @ Lukanda and Jisena Lukuvi were his friends and that they usually meet at a liquor pub. While there, they exchange ideas of their daily activities, whereas one day Jisena Lukuvi and Malilo Leonard were bragging that they are good wild animals' poachers, while himself (3rd appellant) and the 1st appellant were good in storing and selling the trophies whether it was meat or trophies.

He added, one day as they were drinking liquor at their common pub, Jisena Lukuvi told them that he had three elephant tusks and they should find a buyer. He said, it was on the 31/07/2019 at around 18:00 hours they met at Jisena Lukuvi's place, and he handed the trophies to the 1st appellant as the latter had claimed that he got a buyer. 3rd appellant proceeded that; they together went away, but before reaching the buyer they had agreed that the 1st appellant would go alone so that the buyer won't be worried as they went three of them. Therefore, they let him go alone, and reminded him about the price that is TShs. 120,000/= per one kilogram. The 3rd appellant concluded that, he was caught on the 02/08/2019 at night concerning the said trophies.

Considering the defence evidence, on 31/07/2017 during the midnight 1st appellant, was asleep at his home place. He was then woken up by the sounds of his cows who had jumped off the cowshed. He then went after them and found them grazing in his neighbours 'shamba'. He woke up his neighbour to resolve the damage, and they agreed to deal with it the following day. As he was returning with his cattle herd, he saw a car in a high speed which stopped where he was, then asked where he was from by the people in the car as they arrested him, and he narrated the entire incidence to them.

As the arresting officers required 1st appellant to go back to the owner of the farm which was damaged by the cows, he left his cattle herd behind as he came back the herd had disappeared. 1st appellant then started to follow the trails and realised the herd had gone into the reserved forest. Therefore, he was arrested for grazing in the restricted area, whereby he was taken to the police station at Majimoto where he was remanded. In the following day, he was charged with the offence of unlawful possession of Government Trophy, and as he was in custody other two suspects were brought in remand. On 02/07/2019, they were taken to Mpanda Police Station and on the 30th August, 2019, they taken to court.

The 3rd appellant testified that, on 02/08/2019 police officers arrived at his place and arrested him and they told him that they are suspicious of his home. He added, the village chairman was present and they entered his house together and began the search but they did not retrieve anything illegal. Thereafter they went to where the car was parked, and as they reached the place, he saw another suspect being under arrest, 3rd appellant could not recognise him because it was dark.

3rd appellant proceeded to testify that, they were then taken to Usevya Police Station whereby in the morning at around 08:00 hours he was interrogated where he denied to know the 1st and 2nd appellants. Thereafter, the 3rd appellant concluded that, they were taken Majimoto Police Station and later on taken to Mpanda police station where they stayed for a month and then matched to court for the offence of unlawful possession of government trophy.

Considering the outlined trial court records, it is undisputed that the key witnesses who led to the conviction of the 1st appellant were PW1, PW10 and PW11. When reading between the lines, one would notice that the testimonies are contradictory.

However, it is the principle of the law that, where there are inconsistencies, the Court's duty is to consider them and determine

whether they are minor and do not affect the prosecution case or that they go to the root of the matter. That was said by the Court of Appeal in the case of **Mohamed Said Matula Vs. Republic [1995] TLR. 3** as hereunder:

"Where the testimony by witnesses contain inconsistencies and contradictions, the court has a duty to address the inconsistencies and try to resolve them where possible, else the court has to decide whether the inconsistencies and contradictions are only minor or whether they go to the root of the matter"

It is my firm decision that the contradictions in the testimonies of the witnesses I regard to be key, were too minor and did not affect the root of the case. All the three witnesses did testify that it was the 1st appellant who arrived at the area of the incident, and that it was the 1st appellant who had a sulphate bag which was searched after being arrested by the arresting officers and that three elephant tusks were found being in his possession without having a permit. These witnesses also testified that; it was the 1st appellant who was attempting to sell the tusks to the park ranger (PW11) who pretended to be the buyer. As it stands, the contradictions are too minor to dismantle the prosecution evidence.

The reality of the incidence, is supported by the caution statement of the 1st appellant himself. He stated that he was engaged in the business of selling trophies by his friend known as Jisena Idete. It was his friend who gave him the trophies so that he would hide them while they search for a buyer, and as the buyer was found; 1st appellant was contacted to complete the transaction with the buyer. He stated that, at the material date, he succeeded to meet the buyer who turned out to be a police officer who took out a gun instead of money and arrested him. Nevertheless, during the trial, the 1st appellant did not deny the admission of the seizure certificate which proves that indeed he was found in possession of the said elephant tusks.

As for the 3rd appellant, his conviction was based on his caution statement and that he was mentioned by the 1st appellant. Nevertheless, the 3rd appellants' caution statement was taken contrary to Section 50 and 51 of the CPA which set out specific periods within which interviews of suspects can be taken. It is trite that, statements taken without following procedure are inadmissible in evidence. There are plenty of authorities in support of this truth. See, **Zakayo Shungwa Mwashilingi, Rai Shungwa Mwashilingi and Abel Mwamwezi v. Republic, Criminal Appeal No. 78 of 2007, CAT** (unreported),

Salim Petro Ngalamba v. Republic, Criminal Appeal No.85 of 2004, CAT (unreported), Emmanuel Malalya v. Republic, Criminal Appeal No.212 of 2004, CAT (unreported) and Prosper B. Kileo, Huruma John v. The Republic, Criminal Appeal No. 150 of 2011, CAT (unreported) to mention a few.

The 3rd appellant was arrested on the 02nd of August, 2019 at around 03:00 hours, but his statement was taken at 10:30 hours, some seven (7) hours after being arrested. As he was taken to Majimoto Police Station, his statement could have been taken at the particular place before being taken to Mpanda Police station where they arrived at around 08:30 hours.

In Janta Joseph Komba and Three Others v R Criminal Appeal No. 95 of 2006 (unreported) it was observed that;

"The obtaining of the statement of the appellant while still in custody outside the time provided under the law for investigative custody, contravened the provisions of the law. Section 169 of the Criminal Procedure Act provides for exclusion of evidence illegally obtained."

Therefore, the 3rd appellant's caution statement deserves to be expunged from evidence. With it being absent from evidence, there is

no any other cogent evidence that would grant the conviction of the 3rd appellant.

In my considered facts, it is my firm holding that the charges against the 1st appellant were proved to the required standards before the trial court. Unfortunately, the charge was not proved against the 3rd appellant.

Therefore, I uphold the decision of the trial court against the 1st appellant and proceed to quash the 3rd appellant's conviction in respect of the two counts he was charged at the trial court. The earlier imposed sentence is set aside. I order immediate release of the 3rd appellant from custody unless he is held therein for other lawful causes.




D. B. NDUNGURU

JUDGE

14.07.2022