IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO 68 OF 2021

(Arising from Serengeti District Court at Mugumu Economic Case No 113 of 2019 by I.E Ngaile - SRM)

MARO S/O MWITA @ GINAREGA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

24th May and 20th June, 2022
F. H. MAHIMBALI, J.:

The appellant in this case together with his two fellow accused persons were arraigned before the District Court of Serengeti charged with one offence of unlawful possession of government trophies contrary to section 86 (1) and (2) iii of the Wildlife Conservation Act, No. 5 of 2009 read together with paragraph 14 of the first schedule to and section 57(1) and 60 (2) of the Economic and Organized Crime Act [Cap 200, R.E 2019] as amended by Act No. 3 of 2016.

It was alleged by the prosecution that Maro Mwita Ginarenga @ Dume la Nyani, Kisuti Manzi Kazangá @ Amos and Nchama Nchama @

Kimore on the 9th day of September 2019 at Gusuhi Village within Serengeti District in Mara Region was found in unlawful possession of two pieces of Elephant Tusks weighing 7.15 kilograms valued of Tshs. 34, 125, 000/= the property of the United Republic of Tanzania. After the DPP had dully consented to the prosecution of the appellant and his fellow accused persons pursuant to section 26(2) of the Economic and Organized Crime Control Act, Cap 200 R.E 2019 read together with GN 284 of 2014 and upon conferring jurisdiction on a subordinate court to try economic and non-economic offences in terms of section 12 (3) of the Economic and Organized Crime Control Act, Cap 200 R.E 2019, the trial at the District Court of Serengeti began. The appellant and his fellow accused persons pleaded not guilty to the charge. This then compelled the prosecution to summon a total of nine witnesses.

The evidence from the prosecution side through their nine witnesses is to the effect on the 9th day of September 2019 at about 18.00hrs, PW1 who is the police officer and incharge of the Task Coordinated Group- Mara Region, received information from his informer that there were people involved in the business of selling elephant tusks at Gusuhi village, Serengeti District in Mara Region. The task force team that constituted PW2 and other police officers was then prepared and

organized themselves. That at about 23.00hrs, the PW1 (team leader), communicated with one of the sellers of the said trophies who introduced himself to be Maro Mwita Ginarega (the appellant) and they agreed on where the said sale transaction was to take place. At about 02.00hrs, at the signboard written *"Shule ya Msingi Gusuhi"* the appellant together with his fellow accused persons then brought two elephant tusks where they were spontaneously arrested by the task force. The said elephant tusks were then admitted as exhibit PE3. Police officers being at the scene called spectators including PW5 and PW6 who then witnessed all that was going on there including preliminary interrogation, search and seizure. The certificate of seizure was then admitted as exhibit PE1 at the trial. The appellant together with fellow accused persons were then taken to Mugumu police station where then PW3 and PW9 recorded cautioned statements of the accused persons which the same were dully admitted as exhibits PE5 and PE6 for the appellant and third accused respectively. PW4 – Game Warden who did trophy identification and valuation of the same who after being satisfied that the said exhibits PE exhibits were really elephant tusks as per their structures and identified features. He valued them being worth 34,125,000/= as being the value of the said elephant per market value by then. PW7 just testified how he measured the said elephant tusks

and weighed to be 3.55kg (PE8 exhibit). PW9 is a police store keeper who testified how he kept the said trophies (Exhibit PE3) from when he was handed over to when he produced them in court. All the transactions involving investigation and testimony in court, was well recorded by him as featuring in PE 9 exhibit.

On his defense, the appellant appears to have admitted that on the fateful date he was arrested being with his fellow accused persons and that he was arrested at school area where they met to discuss the sale of elephant tusks and that he was promised to get his commission. The 2nd and 3rd accused persons denied to have been in the deal of selling or carrying the said elephant tusks but only that they were on their way back from pombe club where they met their arrest by police in between (at the scene).

Upon hearing the case, the trial court convicted the appellant and the two accused persons to the charge and sentenced them each to a custodial sentence of 30 years. The appellant has preferred this appeal to this Court against both conviction and sentence meted out by the trial court. The second and third accused persons are not part to this appeal and the court record establishes nothing if they challenged the said appeal in any way. Perhaps, they are making tosses.

The main issue at the trial court was whether the accused persons were found in unlawful possession of the government trophies to wit; two pieces of elephant tusks. The reasons as to why the appellant and the co-accused persons were convicted by the trial court can be gathered from page 6 to 9 of the typed judgment. The reasons are: firstly, the existence of incriminating evidence contained into the cautioned statement of the appellant (PE5 exhibit). On this, the trial magistrate relied the case of **Pascal Kitigwa V. Republic** [1994] TLR 65 that incriminating evidence from the co-accused suffices conviction. Secondly, none existence of reasonable doubt by defense. On this he reasoned that the accused persons' defense fell short of any imminent doubt. He sought reliance of his stance in the case of **Joseph Marwa V. Republic** (HC -searchable in tanzlii) that accused story need not be believed but only to raise a reasonable doubt to the prosecution. Thirdly, failure to cross examine the prosecution's witnesses as per the principle laid down in the case of **Nyerere Nyague V. Republic,** Criminal Appeal No. 67 of 2010.

In challenging the said decision, the appellant has preferred this appeal armed up with a total of four grounds of appeal, namely: -

1. That, the trial magistrate erred in law and fact to

convict and sentence the appellant without giving him a chance to call his independent witness who was there during this at the trial magistrate.

2. *That the trial magistrate erred in law and fact to convict and sentence the appellant by admitting wrong exhibits which were tendered by the prosecution side.*
3. *That the trial magistrate erred in law and fact to convict and sentence the appellant by admitting wrong evidence from PW1, PW2, PW3, PW4, PW5, PW6, PW7, PW8 and PW9.*
4. *That the trial magistrate erred in law and fact to convict and sentence the appellant because there was no Village Executive Officer from Gusuhi village who was at the scene.*

Basing on the above grounds of appeal, the appellant is challenging the decision of the trial court on its findings which led to the conviction and sentence which is now the subject of this appeal.

The appellant had a self-representation whereas the respondent was dully represented by Mr. Frank Nchanilla, learned state attorney who resisted the appeal. The appellant on his part, had nothing more to add but just prayed that his grounds of appeal be adopted to form part of his submission and bowed the Court to allow his appeal.

In resisting the appeal, Mr. Nchanila had this to submit. With the

first ground of appeal, the appellant's grief is this, he was not given on opportunity to call his witness. The trial court's proceedings at page 69 (of the typed proceedings), the appellant is recorded to have stated that he had no any witness to call. He repeated so on page 79 when he closed his case. Thus, in digest to this, this ground of appeal is merely an afterthought.

In the second ground of appeal that the tendered exhibits were wrongly admitted, he countered it as not established. While revisiting the trial court's proceedings, there are a total of 9 exhibits. As per law exhibits are not sent to Justice of peace. In reading the prosecution's case, your find that there was certificate of seizure in which it was dully signed by all accused persons including this appellant. The wrongness of these admitted exhibits has not been established by the appellant. All the exhibits tendered by PW1, connect the appellant. All these didn't need any sending them to Justice of peace for them to be valid. Equally exhibit PE9 as tendered by PW9 is chain custody. The same is not stored or sent to Justice of peace for it to be valid. In his considered view, he submitted that all these exhibits before their admission, were introduced, identified and then dully admitted by the trial court. He then wondered how the appellant can now complain that they were wrongly

admitted.

Responding to the third ground of appeal which concerns admission of wrong evidence of PW1 –PW9, he too countered this ground as well. Making reference to the proceedings of the trial court, it is clear how PW1 (team leader) played an active role in the arrest of the appellant. Equally PW2 – PW3 were in companion with PW1. PW4 is the wildlife officer. He is an expert officer. He testified as qualified person and how he identified the said elephant tusks and valued the same. PW5 is the neighbour to the scene. He witnessed the seizing of the said trophies. PW6 testified as Ag. Village Executive Officer (VEO) of Busuhi village. He testified how he witnessed the search and seizure. PW8 is the store keeper. He kept all the exhibits safely and keenly. PW9 also testified how the chain of custody remained intact. As all these witnesses testified under oath, they were credible and trustworthy witnesses. He considered this ground of appeal as misplaced and unfounded.

Lastly, on the absence of VEO at the search exercise, he replied that if search is done at non-residential area, then requirement of local rulers is not mandatory. However, as per facts of this case there are two independent witnesses (PW5 and PW6) who witnessed the said search.

With all this, this ground of appeal equally fails.

With his submission, he prayed that this appeal be dismissed for want of any merit.

I have critically gone through the trial court's record, assessed the evidence, proceedings and the submissions for and against the appeal. The important question here is whether the appeal is meritorious in view of the submissions made, evidence received and the proceedings of the case.

Commencing with the grounds of appeal submitted by the parties, I have the following consideration. With the first ground of appeal, the appellant's grief is this, he was not given on opportunity to call his witness. I agree with Mr. Frank Nchanila learned state attorney for the respondent that what is reflected in the trial court's proceedings at page 69 (of the typed proceedings), where the appellant is recorded to have stated that he had no any witness to call, the grief is baseless and a mere after thought.

The second grief by the appellant was this that the prosecution's tendered exhibits were wrongly admitted. Though the statement was so general, Mr. Nchanilla was firm to respond that the grief is misplaced. As

to why it is misplaced, he argued that in his considered view, all these exhibits before their admission, were introduced, identified and then dully admitted by the trial court. He then wondered how the appellant can now complain that they were wrongly admitted. I partly agree with him that all the exhibits were introduced, identified and then dully admitted by the trial court. However, that alone is not sufficient on the rightfulness of the admitted exhibits. I have no doubt with the rest of the exhibits, but in consideration of the admitted exhibits PE5 and PE6, which are incriminating cautioned statements, I wonder if they were rightly admitted. I say so because, the arrest of the appellant and his co-accused persons was done on the 9th September 2019. However, their recording was done on the 11th September 2019, two days later. As to why the said cautioned statements were recorded two days later, the evidence in record is silent on that. Since such statements are recorded within four hours after the arrest of the suspects, it is unlawful to record the same beyond the stipulated time as provided by the law. Section 50(1) of the CPA is very clear on the time frame to which the accused person is to be interrogated which is four (4) hours from the time when the accused was taken under restraint. See **Raymond John and Another V. Republic**, Criminal Appeal No. 47 of 2015, **DPP Vs James Msumule @ Jembe** and 4 others, Criminal Appeal No.397 of 2018,

Court of Appeal of Tanzania (unreported) at page 11 and **Yusuph Masalu @Jiduvi & 3 Others Vs Republic**, Criminal Appeal No.163 of 2017, Court of Appeal of Tanzania at Mwanza (unreported) at page 14,15 and 16. As what is the effect of a wrongly admitted exhibit, is to expunge the same from the court record as I hereby do.

The next ground of appeal is closely connected with the ground number two. Whereas ground number two concerns admitting wrong exhibits, ground number three concerns admitting wrong witnesses. Though the wrongness of these witnesses could not be established, conversely it can be argued that whereas exhibits PE5 and PE6 were wrongly admitted, equally then what was stated by PW3 and PW9 in respect of the admission of exhibits PE5 and PE6 is questionable as per their witnesses being expunged. As there were no plausible explanations as to why they recorded them beyond four hours after they had arrived at Mugumu police station. In the case of **Ayub Mfaume Kiboko and Another V. Republic**, Criminal Appeal No. 694 of 2020, the Court of Appeal insisted no court of justice should act on such an illegally obtained evidence without ensuring that the requirements of section 169 (1) and (2) of the CPA are complied with.

With the fourth ground of appeal that there was no VEO who

witnessed the said search, the respondent's counsel has countered this ground of appeal that it was not sound ground as it is not a requirement of law for police search when done in non-residential areas to be witnessed by local leaders for the said search to be lawful. I partly agree with him. However, in the circumstances of this case, there are a lot desired to be considered. I will explain to it shortly.

Having considered all this extensively, the vital question now is whether the prosecution case is well proved beyond reasonable doubt as per law. the law is, the accused story need not be believed. And that the accused person should not be convicted on the weakness of his defense, but on the strength of the prosecution case. Has the prosecution case established any such strength in the circumstances of this case for the appellant's guilty? Bearing in mind that the only incriminating evidence has been expunged from the record, what remains intact is nothing but just pieces or skeleton of evidence by the prosecution. Considering the testimony of PW1, that upon receiving intelligent information from his informer, he organised his team for the said trap. He plotted himself as purchaser of the said elephant tusks, and then called the appellant for the said deal. That was done and eventually the appellant and his co-accused persons were arrested. The arrest of the appellant and his co-

accused persons is not disputed; however, the point of consideration is whether there was any that prior communication preceding their arrest. I find none in the record. That PW1 had a prior communication with the appellant or any of the co-accused person has not been made out. There is no proof of that communication done, via what telephone numbers. Since, exhibits PE5 and PE6 have been expunged, then there is nothing intact incriminating evidence in the case file to hold the appellant with the charge.

That said, appeal is allowed, conviction quashed and sentence meted out is set aside.

This court orders the immediate release of the appellant from custody unless he is lawfully held.

It is so ordered.

DATED at MUSOMA this 20th day of June, 2022.

THE HIGH COURT OF TANZANIA
MUSOMA

F.H. Mahimbali

Judge

CamScanner