IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)
AT ARUSHA

CRIMINAL APPEAL NO. 7 OF 2022
(Originating from the Resident Magistrates' Court of Arusha, Economic Case No. 77 of 2019)

JOSEPH PAULO BIIKA ..... APPELLANT

Versus

THE REPUBLIC ..... RESPONDENT

JUDGMENT

23rd May & 15th July 2022

Masara, J.

1.0 INTRODUCTION

In this Appeal, the Appellant, **Joseph Paulo Biika**, is challenging the conviction and sentence imposed on him by the Resident Magistrates' Court of Arusha (hereinafter "the trial court"). In that court, the Appellant stood charged of one count of Unlawful Possession of Government Trophy, contrary to sections 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) both of the Economic and Organized Crimes Control Act, Cap 200 [R.E 2002] (EOCCA) as amended by Sections 16(a) and (13) (b) respectively of the Written Laws (Miscellaneous Amendment) Act, No. 3 of 2016. The Appellant pleaded not guilty to the charge. After hearing the evidence, the trial magistrate was satisfied that

the charge against the Appellant was proved to the hilt. He was convicted and sentenced to serve 20 years imprisonment. The Appellant was aggrieved by both conviction and sentence. He has preferred this appeal on 14 grounds which in the course of his submission were condensed into to six grounds as hereunder:

a) *The 1st complaint faults jurisdiction of the trial court for trying the offence without Certificate to confer jurisdiction and consent by the DPP to try the offence in subordinate court as per sections 12(3), (4) and 26(1) (2) of the Economic and Organized Crimes Control Act, Cap. 200 [R.E 2002];*
b) *Second, the trial magistrate erred in law and fact for convicting and sentencing the Appellant based on a defective charge which was in variance with the evidence adduced;*
c) *Violation of section 38(3) of the Criminal Procedure Act, Cap. 20 [R.E 2019] since the Appellant was not issued with the receipt of the seized items, was the third complaint;*
d) *In the fourth complaint, the Appellant faults the prosecution for failure to call key witnesses such as the independent witness to testify;*
e) *The complaint in the fifth ground is that the cautioned statement was improperly relied on by the trial court because the inquiry conducted was in contravention of section 198(1) of the CPA; and*
f) *The complaint in the last ground faults the trial court for failure to consider the defence evidence.*

The Appellant, therefore, prays that the Court allows the appeal by quashing the conviction, setting aside the sentence imposed on him and letting him at liberty.

At the hearing of the appeal, the Appellant appeared in Court in person, unrepresented. The Respondent was represented by Ms Tusaje Samwel, learned State Attorney. The appeal was heard through filing of written submissions.

2.0 EVIDENCE AT THE TRIAL

It was the Prosecution's evidence that on 08/08/2019, at noon hrs, Inspector Joseph Jonas Labia **(PW1)** received information from an informer that there was a poacher who was transporting elephant tusks from Singida to Arusha for the purpose of selling them. That the said poacher had boarded Mtei Bus. Upon receiving the information, PW1 accompanied by the said informer headed to Kilombero area where Mtei Bus Station is located. At 12:30hrs, the bus arrived. While passengers were disembarking from the bus, the informer pointed the Appellant as the alleged poacher. PW1 arrested him. That the Appellant had a small bag, green and black in colour. PW1 in the presence of het bus conductor, Bakari Swalehe, searched the Appellant's bag thereby retrieving two elephant tusks (exhibit P1).

Thereafter, PW1 filled in a certificate of seizure (exhibit P2) which was also signed by the Appellant and Bakari Swalehe. PW1 took the Appellant to the police station and handed the elephant tusks to the exhibit keeper, Peter David Masela **(PW3)**, whereby he signed a handover form (exhibit P3). The Appellant was taken to the police lock up.

PW3 informed the trial court that after receiving the two elephant tusks from PW1 he registered the elephant tusks and labelled them No. 348/2019. He kept the elephant tusks in the exhibit room. That on 14/08/2019 he handed over the exhibits to one Michael Msokwa **(PW2)**, for valuation and identification purposes. PW2 valued the trophies at USD 15,000 equivalent to TZS 34,506,000/=. He then prepared the trophy valuation report (exhibit P4). After valuation and identification PW2 returned the exhibits to PW3.

Another witness for the Prosecution was D/Sgt Unuku Ibrahim Nderubu **(PW4)**, the investigative police officer. He testified that he recorded the caution statement of the Appellant on 08/08/2019 at 13:40hrs. That before interrogating the Appellant he was shown the elephant tusks, allegedly retrieved from the Appellant. PW4 recorded the Appellant's statement from 14:00hrs to 14:30hrs. He went on to say that the

Appellant admitted to have committed the offence and signed a statement to that effect. In the process of tendering the cautioned statement, the Appellant raised an objection on the grounds that he did not make the statement. The trial court conducted an inquiry which culminated to admitting the cautioned statement of the Appellant (exhibit P5).

In his sworn defence, the Appellant denied to have committed the offence he stood charged of. He informed the trial court that on the material date, he was travelling from Dodoma to TPC Moshi, where he was going to explore mason works. He boarded a bus known as Waefeso Express. His bus ticket was admitted as exhibit D1. When he arrived at Arusha at about 15:45hrs he took a coaster that was heading to Moshi. While in the coaster, his black briefcase was grabbed by a robber. The Appellant shouted but the robber escaped and disappeared with the briefcase. The Appellant went to the police station, where he found PW1 and three other police officers. He narrated the incident to the police officers. He was promised to regain possession of his briefcase upon payment of TZS 250,000/=. The Appellant was furious. He told them that the police officers are of no difference with the robbers. He was beaten, taken to the lockup and was forced to sign a statement. That he signed the alleged caution statement in order to avoid further pains from the beatings he

was receiving. That he was not taken to Court until on 26/08/2019 when he appeared before the trial court to face the charge against him.

3.0 WRITTEN SUBMISSIONS

Submitting in support of the first ground, the Appellant intimated that the trial court had no jurisdiction to try the offence against the Appellant because there was no consent issued by the Director of Public Prosecutions (DPP) as per of section 26(1) the EOCCA. Further, that the trial court was not issued with certificate to confer jurisdiction on it to try an economic case as per section 12(3)&(4) of the same Act. He insisted that since the trial court had no jurisdiction to try the case, the proceedings and decision of the trial court were a nullity. To support his contention, he cited Court of Appeal decision in **Jumanne Leonard Nagana @ Azori Leonard and Another vs Republic, Criminal Appeal No. 515 of 2019** (unreported).

Substantiating the second ground, the Appellant submitted that the charge sheet which was filed at the trial court on 26/08/2019 stated that the Appellant was arrested with the elephant tusks at Ngarenaro area. The same is reflected at the first page of the trial court judgment. According to the Appellant, PW1's testimony at page 15 of the typed

proceedings was that he went at the crime scene at Kilombero area where Mtei Bus Station is located. The Appellant maintained that since there was variance between the charge sheet and the evidence adduced, the prosecution ought to have sought amendment of the charge under section 234(1) of the CPA, which, in his view, was not done. It was the Appellant's further contention that since there was no amendment preferred by the Prosecution, the Appellant is entitled to an acquittal, lest there is a manifested miscarriage. To reinforce his argument, he referred to the decisions of the Court of Appeal in **Godfrey Simon & Another vs Republic, Criminal Appeal No. 296 of 2018** and **Michael Gabriel vs Republic, Criminal Appeal No. 390 of 2019** (both unreported).

On the third ground, the Appellant submitted that the Prosecution did not explain the reasons why PW1 conducted a search without a search warrant while the search was not an emergence one. This, in his view, contravened section 38(1) of the CPA. To support his argument, he sought reliance in the case of **Shaban Said Kindamba vs Republic, Criminal Appeal No. 390 of 2019** (unreported). In addition to that, the Appellant contended that there was no receipt issued to him after he was searched and items seized from him. That failure to issue receipt of the seized items contravenes section 38(3) of the CPA. He distinguished the receipts

referred from the certificate of seizure as held in the case of **Andrea Agustino @ Msigara vs Republic, Criminal Appeal No. 365 of 2018** (unreported).

Regarding the fourth ground, it was the Appellant's submission that the Prosecution ought to have summoned to testify in court one Bakari Swalehe, an independent witness, who allegedly signed exhibit P2. Since that witness was not called to testify, it was the Appellant's plea that the Court draws an adverse inference against the Prosecution; in that, had that witness been summoned, he would testify against the Prosecution. To bring his argument home, he cited and relied on the decision of the Court of Appeal in the case of **Paschal Mwinuka vs Republic, Criminal Appeal No. 258 of 2019** (unreported). Further, it was his submission that the driver of the bus as well as any of the passengers in the bus ought to have been summoned as witnesses so as to corroborate PW1's assertions.

In so far as the fifth ground is concerned, the Appellant faults the trial court for mishandling the inquiry and for relying on a retracted caution statement. That during hearing of the inquiry, the name of the witness who testified for the Prosecution was not recorded nor was that witness sworn or affirmed contrary to the requirements of section 198(1) of the

CPA. To support the argument that evidence taken without oath or affirmation renders that evidence invalid, he subscribed to the decisions of the Court of Appeal in **Amos Seleman vs Republic, Criminal Appeal No. 267 of 2015** and **Peter Ephraim @Wasambo vs Republic, Criminal Appeal No. 386 of 2018** (both unreported). The Appellant prayed that exhibit P5 be expunged from the court records as there was no proper inquiry leading to its admission.

Expounding on the last ground of appeal, the Appellant faulted the trial magistrate for failure to consider the defence evidence, which, in his view, raised serious doubts on the Prosecution evidence. He intimated that he raised a defence of *alibi*, which was supported by a bus ticket (exhibit D1), but the same was not accorded requisite weight. He challenged the way he was arrested, tortured and forced to sign exhibit P5, as well as the corrupt inducements from the police officers. He was therefore of the view that had the trial magistrate taken into account his defence, she would not have reached the decision she did. In the totality of his submissions, the Appellant urged the Court to allow the appeal and set him free as he is innocent.

On her part, the learned State Attorney, in response to the first ground, submitted that consent of the DPP in accordance with section 26(2) or

certificate conferring jurisdiction on a subordinate court to try economic case in respect of section 12(3) and (4) of the EOCCA, may either be issued by the DPP or officers subordinate to the DPP, including State Attorney In charge dully authorized by the DPP. She also made reference to G.N No. 284 of 2014 which gives powers to the Prosecution Attorney In-charge to issue consent for the prosecution of economic offences specified under part III of the Wildlife Conservation Act. According to Ms Tusaje, the consent of the DPP and certificate conferring jurisdiction on the trial court to prosecute the case, were issued by Prosecution Attorney In charge on 24/06/2020.

In response to the second ground, Ms Tusaje contended that there was no variance between the charge sheet and the evidence adduced because the charge sheet filed at the trial court on 24/06/2020 shows that the offence was committed at Kilombero area and not Ngarenaro as purported by the Appellant. She was in agreement with the Appellant that at the first page of the judgment of the trial magistrate it is indicated that the offence was committed at Ngarenaro. In her view, that was inadvertent because at page 3 of the same judgment, while analysing the evidence of PW1, the trial magistrate indicated that the offence was committed at Kilombero

area. It was the learned State Attorney's view that such discrepancy does not go to the root of the matter and cannot be a basis for the acquittal.

Contesting the third ground, Ms Tusaje, while conceding that the Appellant was not issued with receipt of the seized items as per section 38(3) of the CPA, she submitted that the omission did not vitiate the Prosecution case or prejudice the Appellant, as the Appellant signed the certificate of seizure, indicating that he knew exactly what was seized during the search. Ms Tusaje cited decisions of the Court of Appeal in **Jumanne Mpini @ Kambilolo and Another vs Republic, Criminal Appeal No. 195 of 2020** and **The DPP vs Freeman Aikael Mbowe, Criminal Appeal No. 420 of 2018** (both unreported) to the effect that failure to issue receipt as per section 38(3) of the CPA does not vitiate the prosecution case.

On searching the Appellant without a search warrant, the learned State Attorney submitted that section 38(1) of the CPA makes search warrant mandatory where a police officer intends to enter into a building, vessel, carriage, box, receptacle or a place. In the circumstances of the case under consideration, she argued, it was the Appellant's bag which was searched and it was searched while he was outside the bus. That search warrant was not a mandatory requirement in those circumstances.

On the fourth ground, it was Ms Tusaje's submission that failure to summon Bakari Swalehe did not water down watertight evidence from the Prosecution witnesses, which evidence sufficiently proved the charge against the Appellant. It was her further argument that the bus driver or any passenger in the bus were not material witnesses for the Prosecution since search was not conducted inside the bus. She placed reliance on section 143 of the Evidence Act, Cap. 6 [R.E 2019] which requires no particular number of witnesses to prove a fact. To further reinforce her contention, she referred the Court to Court of Appeal decisions in **Halfan Ndubashe vs Republic, Criminal Appeal No. 273 of 2016** and **Hamis Mohamed vs Republic, Criminal Appeal No. 297 of 2011** (both unreported).

Responding to the fifth ground, Ms Tusaje fully subscribed to the Appellant's submission that PW4 was not sworn or affirmed before adducing his evidence in the Inquiry made so as to admit the caution statement. That such omission contravenes section 198(1) of the CPA. She was in agreement that the omission was fatal and conceded that exhibit P5 ought to be expunged from the record. She, however, stated that even if exhibit P5 was to be expunged from the court record, the oral testimony of PW4 sufficiently proved that the Appellant confessed.

Reacting to the last ground, the learned State Attorney did not agree with the Appellant. She stressed that the Appellant's defence was considered as reflected at pages 7 to 10 of the typed judgment. In the alternative, she urged the Court to step into the shoes of the trial court, in case it considers that the defence evidence was not considered, to re-valuate the same. To support her contention, she invited the Court to be guided by the Court of Appeal decision in the case of **Athuman Mussa vs Republic, Criminal Appeal No. 4 of 2020** (unreported). Ms Tusaje urged the Court to dismiss the appeal because the prosecution evidence proved the case against the Appellant to the required standards.

In rejoinder submission, the Appellant reiterated his position on all the grounds. He did not agree with Ms Tusaje regarding jurisdiction of the trial court contending that in the court record, the proceedings of 24/06/2020 do not show where the Prosecution sought to tender the DPP's consent or certificate. Further, that even if the said consent and certificate were filed on 24/06/2020, the preliminary hearing was conducted on 10/06/2020, prior to issuance of such consent and certificate, would be illegal as it was done by a court without requisite jurisdiction.

Regarding variance between the charge and evidence, the Appellant insisted that there was no amendment of the charge as no amendment is reflected in the court records. Regarding Ms Tusaje's response to the third ground, the Appellant urged the Court to disregard the decision in **Jumanne Mpini @Kambilolo & Another** (supra) cited by the learned State Attorney as it was not appended in her submissions. He insisted that the case of **DPP vs Freeman Aikael Mbowe** (supra) is distinguishable as it deals with section 38(2) while his complaint was particularly on non-compliance with section 38(3). He also did not agree that the evidence of PW4 regarding his confession can be sustained in the absence of the exhibit P5.

I have arduously considered the grounds of appeal and the submissions by the Appellant and the learned State Attorney. I will determine the appeal based on the grounds as presented in the written submissions.

In the first ground, the Appellant faults the trial court for trying Economic Case No. 77 of 2019 without the consent and certificate of the DPP conferring jurisdiction on the trial court to try the offence. I should point apriori that consent of the DPP must be given before trial of an economic offence as per section 26(1) and (2) of the EOCCA commences. Similar to that, a subordinate court has no jurisdiction to try any economic offence

unless and until it is issued with a certificate of the DPP conferring jurisdiction upon such court to try the offence as per section 12(3) of the EOCCA. The essence of the certificate conferring jurisdiction is due to the fact that section 3(1) of the EOCCA vests jurisdiction on economic cases to the High Court, Corruption and Economic Crimes Division. Therefore, for a subordinate court to try any economic offence, it must be issued with a certificate by the DPP, conferring such jurisdiction on it. The case of **Jumanne Leonard Nagana @Azori Leonard & Another vs Republic** (supra), cited to me by the Appellant, is instructive in this respect:

Ms Tusaje pointed out that the record of the trial court reveals that both consent of the DPP and the Certificate conferring jurisdiction on the trial court were issued on 24/06/2020. I have perused the trial court records, While there seems to be variance of the date which the said consent and certificate were issued, I agree with her that the trial court was vested with jurisdiction to try the case. The record shows that on 10/06/2020, prior to conducting preliminary hearing, Prosecution sought to substitute the charge. The prayer was granted by the trial court. The charge was substituted and read over to the Appellant, who pleaded not guilty. It was followed by a preliminary hearing. I also noted from the record that the

charge sheet which was filed on 10/06/2020, was accompanied by "Consent of the Prosecution Attorney In-charge" and "Certificate of Order for Trial of an Economic Offence in the Resident Magistrates' Court of Arusha", dated 10/06/2020. The documents were signed by Innocent Eliawony Njau, Prosecution Attorney In-charge.

The record further reveals that on 24/06/2020, the Prosecution sought to amend the charge and the trial court granted the prayer. The amended charge was also accompanied by Consent of the prosecution and certificate conferring jurisdiction on the trial court, which was also signed by Innocent Eliawony Njau, Prosecution Attorney In-charge. I therefore do not agree with the Appellant's contention that the preliminary hearing was conducted by the trial court without jurisdiction. While it is true that there was no reflection in the proceedings of the trial court of a prayer for filing consent and certificate conferring jurisdiction, such omission would not per se be a ground for vitiation of the proceedings as what the law mandatorily requires is presence of consent and certificate issued by the DPP or an authorized officer conferring jurisdiction. While it has been a practice for the trial court to record the presence of such documents, the law does not make such recording mandatory. I therefore dismiss this ground of appeal for lack of merits.

The second ground relates to variance between the charge sheet and the evidence adduced regarding the place where the Appellant was allegedly arrested with the trophies. The Appellant argues that the charge ought to have been amended as per section 234(1) of the CPA to reflect the correct place. While his expose of the legal requirements is correct, the circumstances of the case at hand do not back him up. It is true that the first charge sheet filed on 26/08/2019, indicated that the Appellant was found in unlawful possession of the government trophy at Ngarenaro area within the City and Region of Arusha. However, as pointed out earlier, the charge was substituted on 24/06/2020. The substituted charge of 24/06/2020 stated that the Appellant was found in possession of the government trophy at Kilombero area, within Arusha City and Region. On the date the charge was substituted hearing had not commenced. Hearing of Prosecution evidence commenced on 23/07/2020. On that day PW1 testified to have arrested the Appellant at Kilombero area, where Mtei bus station is located. Therefore, this ground is devoid of merits.

It is true that the judgment made reflected that the place of Arrest was at Ngarenaro area. However, as correctly pointed out by the learned State Attorney, such record must have been inadvertent. The trial magistrate might have relied on original charge. This appear to be correct because

while analysing the evidence of PW1, at page 2 of the typed judgment, she specifically stated: *"He went at the scene of crime at Kilombero area where there is Mtei bus station."*

On the third ground, the Appellant faults the decision of the trial court on the basis that there was no search warrant and no receipt was issued after seizing items from the Appellant. He contends that such omission contravenes Section 38(1) and 3 of the CPA. For clarity, section 38(1) and (3) of the CPA subject of the contention provide as follows:

> *"(1) If a police officer in charge of a police station is satisfied that there is reasonable ground for suspecting that there is in any building, vessel, carriage, box, receptacle or place:-*
> *(a) anything with respect to which an offence has been committed;*
> *(b) anything in respect of which there are reasonable grounds to believe that it will afford evidence as to the commission of an offence;*
> *(c) anything in respect of which there are reasonable grounds to believe that it is intended to be used for the purpose of committing an offence, and the officer is satisfied that any delay would result in the removal or destruction of that thing or would endanger life or property, he may search or issue a written authority to any police officer under him to search the building, vessel, carriage, box, receptacle or place as the case may be.*
> *(2) N/A*
> *(3) Where anything is seized in pursuance of the powers conferred by subsection (1) the officer seizing the thing shall issue a receipt*

acknowledging the seizure of that thing, being the signature of the owner or occupier of the premises or his near relative or other person for the time being in possession or control of the premises, and the signature of witnesses to the search, if any..."

In my view section 38(1) of the CPA is self-explanatory. A search warrant becomes mandatory where the said search is conducted in a building, vessel, carriage, box, receptacle or place, where an offence is committed or circumstances enlisted under paragraphs (b) and (c) of section 38(1). In the circumstances of the case under consideration, the search was conducted outside the bus, after the Appellant had disembarked. The search was only conducted in the Appellant's bag; therefore, I agree with the submission by the learned State Attorney that search warrant was not a mandatory requirement as envisaged under section 38(1) of the CPA.

Failure to issue a receipt of the seized items in respect of section 38(3) of the CPA is another complaint by the Appellant. The learned State Attorney admitted that there was no receipt issued but that its absence does not vitiate the Prosecution evidence. With due respect, facts surrounding the case under consideration warranted issuance of a receipt, as the law prescribes. This is due to the fact that the only witness who testified to have arrested, searched and seized the elephant tusks from the Appellant is PW1. The cited case of **Jumanne Mpini @Kambilolo and Another**

vs Republic (supra) is distinguishable from circumstances obtaining in this Appeal. In that case PW1, PW2, PW3 and PW4 testified in court how they witnessed seizure of the firearm from the 2nd Appellant's residence. The certificate of seizure was signed by PW1 in the presence of PW2, PW3 and PW4. All those witnesses in court.

Things are not the same in this Appeal. As stated above, it is only PW1 who testified in the trial court. PW2, PW3 and PW4 who testified for the Prosecution, only testified on how the trophies were stored, valued and the statement of the Appellant. None of the said witnesses witnessed the search and seizure. This makes issuance of receipt mandatory as per section 38(3) of the CPA. In this respect, I seek inspiration from the Court of Appeal decision in **Gaudence Mpepo vs Republic, Criminal Appeal No. 67 of 2018** (unreported), where it was held:

> *"It is thus clear that, had the officers issued the receipt, the doubt concerning independent witness would have been cleared because the appellant and witnesses would have signed it. See for instance, the case of Paulo Maduka & Four Others (supra)."*

Guided by the above cited authority, it is this Court's finding that failure to issue a receipt by PW1 acknowledging seizure of the elephant tusks from the Appellant was fatal. Had the receipt been issued, it would have corroborated PW1's evidence that the Appellant was arrested in

possession of the elephant tusks. I therefore sustain this ground of appeal in part as it has merits.

The fourth ground in this Appeal is on failure by the Prosecution to call key witnesses. Exhibit P2, certificate of seizure indicates that the search was conducted in the presence of Bakari Salehe Setumba who, according to PW1, was the bus conductor. According to PW1's testimony, the Appellant was arrested at Mtei bus station immediately after disembarking from a bus. This suggests that there were many people at the scene. Exhibit P2 tendered at the trial shows that it can be witnessed by more than one person as it has a space to accommodate more than one witness.

As pointed out above, apart from PW1, the rest of the Prosecution witnesses testified on how the elephant tusks were taken to the police station by PW1, how they were stored, valued and how the Appellant's caution statement was recorded. Therefore, the only eye witness to the incident was PW1 who, unfortunately, was the sole arresting and searching officer. The said Bakari Salehe Setumba was a key witness who ought to have been summoned to explain how the exhibit P1 was seized from the Appellant. No explanation was given by the Prosecution why such a key person was not summoned to testify. I do agree with the assertions made by the Appellant that failure to summon such a crucial

witness required an adverse inference against the Prosecution by the trial court. The Court of Appeal in the case of **Samwel Japhet Kahaya vs Republic, Criminal Appeal No. 40 of 2017** (unreported), while faced with a scenario where an independent witness who witnessed and signed a search report was not summoned to testify in court, had this to say:

> *"Be that as it may, the failure of the prosecution to summon some of the important witnesses would have prompted the trial court to draw adverse inference since if a party to the case opts not to summon a very important witness he does so at his detriment and the prosecution cannot take refuge under section 143 of the Evidence Act."*

Guided by the above authority, it is this Court's position that failure by the prosecution to summon key witnesses, such as the independent witness who witnessed arrest, search and seizure of the elephant tusks from the Appellant, diminished the value of the Prosecution evidence. The fourth ground of Appeal is accordingly upheld.

The learned State Attorney, on the fifth ground, conceded that the inquiry was conducted in contravention of the law as the prosecution witness who testified was not sworn or affirmed. She urged the Court to expunge exhibit P5 from the court records. She is correct. The record is clear that when PW4 was testifying on 15/10/2020, he sought to tender the cautioned statement of the Appellant as an exhibit. The Appellant

objected, stating that it did not belong to him. The State Attorney in conduct of the case prayed for an inquiry to be conducted. The case went through several adjournments until 11/12/2020 when the purported inquiry was conducted. The record shows that the particulars, including the names of the witness who testified for the Prosecution in the inquiry, were not recorded. Further, as submitted by both parties, that witness was neither sworn nor affirmed prior to testifying. That was in contravention of the mandatory requirements of section 198(1) of the CPA which provides:

> *"(1) Every witness in a criminal cause or matter shall, subject to the provisions of any other written law to the contrary, be examined upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declarations Act."*

The record is also silent as to whether the Appellant was asked to give evidence or call any witness to substantiate his claims about the statement. Incidentally, after the purported inquiry, the trial magistrate was satisfied that the statement was voluntarily made. The statement was then admitted as exhibit P5. As pointed out above, the statement was admitted in contravention of the law. As already stated, the Appellant did not testify in the inquiry, which renders admission of the cautioned statement of the Appellant fatal. I thus sustain the prayer made by both

parties herein. Exhibit P5 is thus expunged from the Court record. Contrary to what was stated by Ms Tusaje, once Exhibit P5 is expunged from the record, the evidence of PW5 regarding the confession by the Appellant wanes away. This is more so considering that PW4 does not appear to be neutral in this case. He cannot be an investigator of the case and record the statement at the same time. Further, his admission that he was shown the exhibit allegedly retrieved from the Appellant before he interrogated and recorded the Appellant's cautioned statement makes his version of the evidence rather suspect. Ground five is sustained.

This brings me to the last ground of appeal, which hinges on failure to consider the defence evidence. Ms Tusaje argued to the contrary and urged the Court, in the alternative, to step into the shoes of the trial court and re-evaluate the defence evidence. It is on record that the Appellant raised a defence of *alibi* by tendering a ticket of a bus known as Waefeso Express, which showed that he was traveling from Dodoma to Arusha on the material date. He also made a prolonged explanation leading to his arrest. He was of the view that his account of explanation raised doubts on the Prosecution case.

According to the prosecution evidence, PW1 was at the police station on the material date, he received information from an informer that there

was a poacher who was traveling from Singida to Arusha. According to his evidence, PW1 headed to Kilombero, where there is Mtei Bus Station, with the informer. The Appellant arrived in Mtei Bus, whereby PW1 apprehended him instantly. As earlier stated, the evidence of PW1 was not corroborated by any other witness. While the procedure for relying on the defence of *alibi* appear not to have been complied with by the Appellant, his version regarding how he was arrested must be gauged on the same scale as that of PW1. It is his words against those of PW1.

I must encapsulate that the Prosecution evidence left some holes in a number of areas. Their evidence was self-contradictory in some aspects. For example, PW1 testified that when he handed over exhibit P1 to the exhibit keeper, the Appellant was in the police lockup. PW3, the exhibit keeper, on the contrary, stated that at the time of handling over the exhibit the Appellant was also present. There is also contradiction regarding the time the exhibits were handed to PW3. PW1 stated that he handed over the exhibits (tusks) to PW3 at 14:00hrs, while PW3 testified that he received the exhibits from PW1 at 13:30hrs. Similarly, PW4, the investigator of the case, stated that he started to record the Appellant's statement at 14:00 to 14:30hrs but that he had been shown the exhibit earlier on. The above shows that there were contradictions among the

prosecution witnesses, which cannot be explained. In this respect I subscribe to the holding in the case of **Mohamed Said Matula vs Republic [1995] TLR 3**, in which the Court held *inter alia* that:

> *"Where the testimonies 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."*

In the case at hand, the contradictions were not addressed. That apart, the evidence of PW1 fall short of corroboration from any other witness, taking into consideration the seriousness of the offence the Appellant faced. One wonders why a police officer of the rank that PW1 possess did not ask other police officers to accompany him to the bus station or inform and probably get an officer from the KDU office Arusha, considering that KDU is the one with expertise regarding trophies and poaching. Furthermore, there was no receipt issued to the Appellant in respect of the seized items, as per the dictates of the law. In addition to that, key witnesses did not testify, with no explanation given. Going by the defence of the Appellant, it raised serious doubts on the Prosecution's case. It may as well be true, as the Appellant stated, that the case was fabricated against him after he failed to give a bribe. The Appellant complained that

he was held at police lock up for 18 days before he was taken to court. This complaint is confirmed by the date that the case was taken to Arusha Resident Magistrate's Court. Why did it take that long to arraign the Appellant in Court considering that he was allegedly arrested with the trophies? All the above factors sufficiently establishes that the charge against the Appellant was not proved to the hilt.

In view of the above, I am of the considered view that the case against the Appellant was not proved beyond reasonable doubt. The appeal is accordingly allowed. I consequently quash the conviction by the trial court and set aside the sentence. I order that the Appellant be released from prison custody forthwith unless he is held there for some other lawful cause.

It is so ordered.

Y. B. Masara
JUDGE

15th July 2022