THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MOROGORO DISTRICT REGISTRY)

AT MOROGORO

CRIMINAL APPEAL CASE NO. 08 of 2022

(Arising from Economic Case No. 19 of 2020 in the Resident Magistrate's Court of Morogoro)

FIDELIS MOHAMED KIKUNGWE..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Last order on: 28/07/2022

Judgment date on: 16/08/2022

NGWEMBE, J.

The appellant was aggrieved with conviction and sentence of forty (40) years imprisonment running concurrently meted by the trial court founded in two counts namely being found with unlawful possession of Government prophies and unlawful possession of fire arms. Two accused persons were arraigned in court, charged accordingly, but at the end the 2nd accused was not found liable save the appellant.

The genesis of this appeal traces back to the 2nd July 2014 at Kisiwani area, Kidai village within the district of Kilosa in Morogoro,

whereby Fidelis Mohamed Kikungwe being the first accused and his co-accused one Kelvine Soma Sadiki @ Mavula (2nd accused) were arraigned before the Resident Magistrate's Court of Morogoro, facing three counts (3rd count for the 1st accused only). The counts preferred against the accused persons were; ***First***, Unlawful Killing of Specified Animals contrary to section 47 (a) of **The Wildlife Conservation Act No. 5 of 2009 (now Cap. 283 R.E 2022)**. It was alleged that the appellant along with Kelvine Soma Sadiki @ Mavula, on the date and places above referred killed two elephants valued at Tsh. 49,500,000/- (Forty-Nine Million Five Hundred Thousand Shillings), without permission or authority. ***Second*** count was unlawful possession of government trophies contrary to section 86 (1) (2) (b) and (3) of the **Wildlife Conservation Act No. 5 of 2009** read together with paragraph 14 (d) of the First Schedule and section 57 (1) and 60 (2) of **The Economic and Organized Crime Control Act, [Cap 200 RE 2002], (now RE 2022)**. In this count it was alleged that the accused persons on or about 26th July 2014 at the same place were found in possession of government trophies to wit, 4 elephant tusks valued at Tanzanian Shillings 49,500,000/= (Forty-Nine Million Five Hundred Thousand) without a permit or authority.

Third count was unlawful possession of firearm contrary to section 4 (1) (2) and 34 (1) (2) of **The Arms and Ammunition Act [Cap 223 RE 2002]**. It was alleged that on or about 26th July, 2014 at the place referred above the appellant was found in possession of firearm make Rifle 375 without permit or authority.

When the charge was read over to the accused persons, they pleaded not guilty to all three counts. In turn the prosecution lined up 8

(eight) witnesses, 7 physical and documentary exhibits. Consequently, the accused persons also defended themselves. Due to the nature of the grounds of appeal paraded by the appellant, I find important to summarize both evidences adduced during trial herein prior to considering those grounds of appeal.

According to the trial court's records, PW1 – Mganga Petro Ngosha, then an OCS at Mikumi Police Station, testified that the appellant was brought to the station being charged with killing animals illegally. After interrogation by D/CPL Emmanuel on 26/07/2014 he volunteered to show the elephant tusks, an axe and gun that were used in the commission of the offence. He led them to Kidai village, in a bush nearby his house where he did hide the tusks, a gun and an axe and retrieved them. Seizure certificate was dully filled. The Village chairman Mr. Deo as an independent witness signed in the certificate. The certificate was admitted as exhibit P1. Elephant tusks admitted as Exhibit P2, a gun Make Rifle 375/285 NP 19 registered TZCAR43818 as Exhibit P3 and an axe as P4.

The evidence of PW1 was supported by PW2, E1180 D/SGT Emmanuel who testified as police working at Mikumi Police Station, testified that he interrogated the appellant who volunteered true information on the commission of the offence. He led PW2, PW1 and other police officers to one Mohamed's homestead (who was not around) where they found a motorcycle No. T.147 CQV Fekon. The appellant confessed same was used to transport the appellant and his companion, tusks, gun and food.

The motorcycle was taken along with the accused to the police station, where his statement was recorded. In the statement he

admitted to have taken part in killing two elephants and removed the tusks. He volunteered to lead police officers to the place he did hid those tusks, gun and an axe. After signing the statement, in company of PW1, Sgt Haji and PC Kombo the appellant led them to Kidai where those materials were found. They took along the Village Chairman Mr. Deo and the appellant's brother one Hamis Kikungwe as independent witnesses. Similar to what PW1 testified, the appellant led them to the bush and he retrieved the elephant tusks. A seizure certificate was dully filled in, the appellant, his brother, the independent witness Mr. Deo, PW1 and PW2 himself signed it. They took the items to the police station along with the appellant. At the station, they recorded an additional statement, extending from the previous statement. The appellant and PW2 signed. The said statement was tendered and admitted as exhibit P5. He also managed to identify exhibit P1, P2, P3 and P4 properly as well as the appellant.

PW3 Mr. Madaraka Kisunguda Makeremo a Game Ranger at Udzungwa National Park, by then, testified that, on 22/07/2014 with his fellow game rangers, Hamis Mabula, Hemana Ng'ola, Omary Mnapi and Juma Mwita, were at Mang'ula Udzungwa National Park. He received information from the incharge one Prisca that she received information from the Village Chairman of Kidai that, there were two elephants killed not yet to rot. They went to the village in 23/07/2014 and found the village chairman also other people who led them to where the dead elephants were lying and tusks removed by using a sharp object. An informant told them that Fidelis Mohamed Kikungwe and his fellow went missing, hiding at Ruaha. Thus, reported to Mikumi Police Station on 24/07/2014, the case was opened and search was mounted. On

25/07/2014 at midnight they arrested the appellant handed him to the police station.

PW5, E9295 D/CPL Juma Koroto, the exhibit keeper at Mikumi Police Station and PW4 A/Insp Barnabas Malya an exhibit keeper at Morogoro Central Police Station, gave their testimonies which in total were to the effect that, exhibits P2, P3 and P4 upon receipt at Mikumi Police Station were properly registered by PW5 and then sent to Morogoro Central Police Station where PW4 received the same. They testified the movement of the exhibits and registers for the same, from the day they were received at Mikumi Police Station, when brought to Morogoro Central Police Station to the date they were tendered in court.

PW4 identified exhibits P2, P3 and P4 also tendered exhibits register as exhibit P6. PW5 identified the exhibits and P6. PW5 further stated that, on 19/09/2014 he took exhibit P3 (rifle) from the Central Police to the Ballistic expert in Dar es Salaam. The expert showed that the correct number of the gun was 79211. Also, the elephant tusks (P2) were evaluated by a park Warden before the same being taken to Central Police.

Another witness, PW6 Vitalis Peter Uruka, Assistant Commissioner and Head of Kibosi National Park testified that, on 28/07/2014 he was called to Mikumi Police Station for evaluation of government trophies. PW5 showed the trophies. By his expertise, he identified the trophies as elephant tusks valued at USD 30,000 which then was equivalent to TZS. 49,500,000/=. He duly filled evaluation form. The same was tendered as exhibit P7. He identified properly exhibit P6 (exhibit register) and P2 (elephant tusks). Then the tusks were given to PW6 back to the National Park for safe custody.

PW7, Deo Ngasakwa, a member of Malolo "B" village council gave his evidence that on 21/07/2014, the villagers informed him that they heard a gunshot near the village at Ruaha river, on the Udzungwa National Park side. They reported at the Village Executive Office, later to Ruaha Mbuyuni Police Station in Iringa. On 22/07/2014, the Park Staff arrived at the village, with PW3 and some villagers went to the place, on the other side of the river. They found two elephants dead and their tusks removed. This place was about one kilometer from the village.

On 26/07/2012, OCS Mikumi Police Station along with TANAPA officials accompanied with the appellant Mr. Fidelis Kikungwe (the appellant) volunteered to show the elephant tusks. He asked the appellant if he really had the said tusks and instrument used to commit the offence, he admitted. The appellant led them to the bush where he retrieved and showed four elephant tusks, an axe and a gun hidden down the bush.

The OCS (PW3) took out 'a piece of paper' (seizure certificate – P1) which they filled and signed accordingly. The witness identified P1 accordingly by his name and signature. He also described and identified exhibit P2, P3 and P4. Added that, it was about 40 meters from the appellant's home to the place he hid the said exhibits.

The last prosecution witness, PW8 (TNP 5016, Angomwile Mwakila) testified that on 11/08/2014 he was ordered by Vitalis Uruka (PW6) to go to Morogoro Central Police Station to pick the exhibits. He took them and kept in safe custody at the park. On 16/02/2021 the tusks (P2) were taken to court as exhibits. He described P3 properly and identified them.

At the end of prosecution case, the accused persons were found to have a case to answer, hence were invited to defend as follows:- the appellant testified that he was just arrested and beaten heavily by police officers unknown to him. Forced him to sign a cautioned statement he did not write. They took him to the bush and asked him to look for the gun, axe and elephant tusks. He glanced at the bush and found the said things. But he was not involved in any commission of the offence. He proceeded to discredit and criticize the prosecution evidence.

The second accused narrated about his arrest, detention and trial and that he was joined in a case that he did not know. He was not involved in any commission of the offence.

In a nutshell, those were the testimonies of both parties during trial. At the end, the trial court found the 2nd accused not guilty but the appellant was found guilty on two counts, hence sentenced to statutory sentence of 20 years in each count but same to run concurrently.

However, being dissatisfied with the conviction and sentence on both counts, the appellant has preferred this appeal armed with thirteen (13) grievances. Since all grounds of appeal are not related, I am forced to reproduce them hereunder as they are: -

1) That the learned trial resident magistrate erred in law and fact by holding that the prosecution proved their case against the appellant beyond reasonable doubt as charged;
2) That the learned trial resident magistrate erred in law and fact by convicting the appellant based on an unjustified uncorroborated prosecution evidence;

3) That, the trial resident magistrate erred in law and fact by convicting the appellant relying on exhibit P5 (caution statement) which was obtained illegally, that is contrary to section 50 (1) and 51(1) of the **Criminal Procedure Act;**
4) That, the trial resident magistrate erred in law and fact by convicting the appellant relying on exhibit P1 (certificate of seizure) without considering the objection raised by the appellant that he did not sign the same and the expert of finger print was not called to solve this huge doubt contrary to the procedure of law;
5) That, the trial resident magistrate erred in law and fact by convicting the appellant based on contradictory evidence of PW1, PW2, PW4, PW5, PW6, PW7, PW8 concerning the marks used for labelling in exhibit P2, P3 and P4 the act that shaking their credibility and reliability;
6) That, the learned trial resident magistrate erred in law and fact when did not appraise objectively the credibility of the prosecution evidence before relying on it as basis of conviction;
7) That, the learned trial resident magistrate erred in law and fact by convicting the appellant based on exhibit P2, which was admitted by the court without any prayer from any prosecution witness contrary to **Tanzania Evidence Act, Cap 6 RE 2019;**
8) That the learned trial resident magistrate erred in law and fact by convicting the appellant based on exhibit P2, P3 and P4 while the prosecution is silent due to storage of the same from 26th July 2014 the date alleged the appellant showed the same before PW1 and other witnesses) to 31st July 2014 (the date that custodian (PW4) agreed to receive exhibit);

9) That, the trial court erred in law and fact by convicting the appellant in a case that gave many chances to the prosecution side to fill up their gaps after ordered retrial before Hon. George M. Masaju, J, on 6th July 2018;

10) That the learned trial resident magistrate erred in law and fact by convicting the appellant without considering the defence case of the appellant contrary to the procedure of law;

11) That, the trial court erred in law and fact by convicting the appellant without considering the following: -

    (a) That the appellant was the first offender.

    (b) That the appellant should have been given a minimum sentence according to the law.

    (c) That the appellant had been convicted and has served a part of sentence faced into him.

    (d) That the appellant was never enjoyed bail since he was arrested in 2014 up to now even after his conviction, the court did not consider all period served in jail as a remanded and as prisoner as well.

12) That the trial resident magistrate erred in law and fact by convicting the appellant based on PW7 (suburb chairman) who failed to identify exhibit P2, P3 and P4 properly, hence identification differed from other prosecution witnesses; and

13) That the learned trial resident magistrate erred in law and fact by convicting the appellant based on evidence of PW7 (suburb chairman) who stated that, the suspicion of the appellant came from the villagers' vote. The court had a duty to observe that there was no malicious intent against the appellant.

The hearing of this appeal was conducted through Virtual Court (Video Conferencing), while the appellant was in Morogoro Prison unrepresented, and the Republic was represented by Ms. Jamila Mziray, learned State Attorney. As expected, when cases of this nature, the appellant is not represented, usually they turn to have nothing useful to assist the court in determining their grounds of appeal. The appellant followed the same trend, he just prayed this court to consider his grounds of appeal and let him free.

In turn the learned State Attorney, Ms. Mziray, argued thoroughly on all grounds of appeal. She argued jointly grounds 1 and 2, then went along with the remaining grounds seriatim. She submitted that; the respondent proved the offences beyond reasonable doubt. In substantiating her argument, she skimmed the evidences adduced during trial court. PW1, PW2, PW6 and PW7 together with exhibits P1 (cautioned statement) and P5 (Extrajudicial Statement). Generally, the evidence was to the effect that the appellant confessed to have killed two elephants and his voluntary confession led to discovery of the gun and four elephant tusks, which were hidden in the bush near his house. PW8 proved that the appellant was found with the government trophies.

Justified her argument by referring this court to the case of **Waiki Amiri Vs. R, Criminal Appeal No. 230 of 2006** where the court ruled that it is not the number of witnesses, but their credibility and reliability in proving the issue in court.

She discredited ground three as an afterthought because the whole procedure was followed and the cautioned statement was admitted after the accused/appellant had no objection.

Regarding the fourth ground, Ms. Mziray briefly argued that, PW1 and PW7 proved that the exhibits were seized from the appellant. The seizure certificate was properly tendered in court and the appellant signed the same. On ground five the learned State Attorney argued that there was no conflicting evidence on the major issues. Identification of the elephant tusks and firearm was watertight and properly made. On the sixth ground, the learned State Attorney submitted that the trial court recorded the evidence properly and analysed it well. Complaint on exhibit P4 lacks merit as page 23 of the proceedings show the exhibit was properly admitted.

Ms. Mziray went on to argue on ground 8 which disputed the chain of custody saying it was intact and was proved beyond reasonable doubt. She referred this court to page 23 and 45 of the proceedings. Disputed ground 9 by arguing shortly that, it is not merited. On ground 10, it was Mziray's view that the appellant's defence was properly considered as the trial court analysed both parties' evidence squarely. To justify her argument, she referred this court to the case of **Zakaria Vs. R, Criminal Appeal 55 of 2019.**

On ground 11, she submitted that the law is clear, all mitigating factors were considered by the trial court before final verdict of the court. Therefore, twenty (20) years imprisonment was the minimum sentence. Advanced to ground 12 which she briefly argued that it lacks merits. Referred to the testimony of PW7 and convincingly stated that this ground lacks merits same be dismissed.

On ground 13, she argued that, the same lacks merits because the appellant led the law enforcers to the place where he did hide the trophies and firearm voluntarily.

Finally, the learned State Attorney made a humble prayer that the whole appeal lacks merit. Thus, prayed same be dismissed and this court uphold the trial court's judgement and sentence.

I have paid serious consideration to the appellant's grounds of appeal also the arguments of the learned State Attorney in line with the evidence on record. The trial court's proceedings and judgement speaks louder, thus I am entrusted to reevaluate both the evidences adduced during trial as well as the considered opinion of the trial court prior to arriving into the conclusion of this appeal.

This being the first appellate court there are two intertwined legal principles that binds the first appellate court to adhere; ***first*** - the duty of treating the evidence recorded by the trial court as whole and reevaluate it. ***Second*** – in exercise of the above, the appellate court should not lightly interfere with the trial court's finding on credibility of witnesses, unless the evidence reveals fundamental factors of a vitiating nature.

This position of law was pronounced and reiterated in various cases of the Court of Appeal and of this court. The case of **Shaban Amiri Vs. R, Criminal Appeal No. 18 of 2007; Prince Charles Junior Vs. R, Criminal Appeal No. 250 of 2014** and this court in **Pia Joseph Vs. R, [1984] T.L.R 161,** more comprehensively expounded as follows: -

"The law as regards the role of an appellate court in matters of credibility is settled beyond peradventure. The trial court which has seen and heard the witnesses, thereby being privileged to observe their manner and demeanour, is certainly in a better position to assess their credibility than an appellate court which has not had these advantages. It has therefore been consistently held that an appellate court will not lightly interfere in the trial court's finding on credibility unless the evidence reveals fundamental factors of a vitiating nature to which the trial court did not address itself or address itself properly. As a rule of practice, therefore, a first appeal assumes the character of a retrial and as stated in The Glannibanta (1876), 1 P.D. 283, an appellate court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses, and should make due allowances in this respect"

On strength of these precedents, this court will endeavour to reevaluate the evidence of both, the prosecution and the defence case as presented before the trial court and make its findings to see if there will be any merit on the grounds of appeal.

Due to the nature of the grounds, it befits to determine the grounds in the following clusters; First cluster covers grounds 3, 4, 5, 7, 8, 9 and 12, which are mixture of evidence and procedured rules and they are more on the procedural rules where the appellant is challenging the conviction. Second Cluster comprises ground 1, 2, 6, 10 and 13 which raises the question of evidence and proof of the offence as

required by law. The last cluster, constitutes only ground 11, which challenges the validity or propriety of the sentence awarded to the appellant by the trial court.

Considering the first cluster, on ground three, the appellant contended that the court relied on exhibit P5 (caution statement) which was obtained illegally contrary to section 50 (1) and 51 (1) of the **Criminal Procedure Act (supra).** The said provisions generally provide for 4 hours within which to interrogate the accused and powers of the magistrate to extend such time upon application. The appellant has not shown how the said caution statement contravened sections 50 and 51 of the CPA. Exhibit P5 itself shows that the interview took place from 10:00 to 13:45 hours and PW2 stated that the interview took around four hours to complete.

I have keenly visited pages 29 and 30 of the proceedings, the appellant did not have any objection when PW2 prayed to tender the said caution statement, since there was no objection, the caution statement was eventually admitted, marked exhibit P5. This being the case, I rule that there was no contravention of procedural rules in recording the caution statement (P5).

Above all, exhibit P5 was well detailed with specific information which, if the appellant did not volunteer, there would be no discoveries. It suggests what the appellant stated to Police Officer was only truth because all what he stated was verified when they went to the place, he led them. Apart from his admission, all witnesses corroborated what the appellant stated in exhibit P5.

Referring to the previous decisions of similar nature, in the case of **Ibrahim Yusuph Calist @ Bonge and 3 Others Vs. R, Criminal Appeal No. 204 of 2011** and in the case of **Michael Mgowole and another Vs. R, Criminal Appeal No. 205 of 2017** the court held: -

> *"There are several ways in which a court can determine whether or not what is contained in a statement is true.* ***First****, if the confession leads to the discovery of some other incriminating evidence. (See PETER MFALAMAGOHA Vs. R, Criminal Appeal No. 11 of 1979 (unreported).* ***Second****, if the confession contains a detailed, elaborate relevant and thorough account of the crime in question, that no other person would have known such details but the maker (See WILLIAM MWAKATOBE Vs. R, Criminal Appeal No. 65 of 1995 (unreported).* ***Third****, since it is part of the prosecution case, it must be coherent and consistent with the testimony of other prosecution witnesses, and evidence generally. (SHABAN DAUDI Vs. R, Criminal Appeal No. 28 of 2001 (unreported) - especially with regard to the central story (and not in every detail) and the chronology of events. And,* ***lastly****, the facts narrated in the confession; must be plausible"*

The above precedents fall squirely on exhibit P5 whereby the appellant admitted to have killed two elephants and that they used a machete and axe to remove the tusks. That on 26/07/2014 near his homestead he retrieved exhibits P2, P3 and P4. He clearly stated that he did hide those items after committing the offence. Therefore, this court lacks sufficient reason to uphold this ground of appeal.

In respect to ground four, the appellant contended that the learned trial resident magistrate relied on exhibit P1 (certificate of seizure) without considering the objection raised by the appellant that he did not sign the same and the expert of finger print was not called to solve the doubt.

The objection that the appellant raised was just a denial that he did not sign it. When the court overruled the objection, allowed the appellant to cross examine because denial of the signature would not render exhibit inadmissible. When the appellant cross examined PW1, the witness explained sufficiently on P1. I have studied exhibit P1, though without expertise, it strongly suggests that the person who signed in exhibit P1 and exhibit P5 (cautioned statement) was the same. Also, before the trial court, PW1, PW2 and PW7 who is a member of the Malolo "B" Village council, an independent witness, witnessed him signing exhibit P1. In the circumstances, I am satisfied, there would be no need of expert witness to give opinion on the finger print on exhibit 1 (seizure certificate). A complaint in ground four is thus unfounded.

Ground five raised an issue of contradiction regarding the marking of exhibit P2, P3 and P4. I have examined the testimonies of all prosecution witnesses and found that PW1, PW2, PW4, PW5, PW6, PW7, PW8 had similar in substance though had minor differences on identification of exhibits P2, P3 and P4. Some of the witnesses stated the labelling of three exhibits referenced to No. MIK/IR/326/2014, also referred as "MIK/IR/326/2014" while others referred as "MKI/IR/326/2014".

The other minor difference is found on extra information on exhibit P3 by PW5 a ballistic expert who stated that, after examination, a gun's correct number was discovered to be 79211.

There is a principle relevant in the law of evidence regarding contradiction a that where there are contradictions or inconsistencies in the witnesses' testimonies, the court is bound to analyse and make a finding as to whether they are material or minor ones. The Court of Appeal in **Mohamed Said Matula Vs. R, [1995] TLR. 3** among other things, held: -

> *"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"*

Taking into consideration that the offence took place in year 2014 and the trial was conducted in year 2021, with lapse of time, some slip of memories in specific and minor details is common. In the case of **John Gilikola Vs. R, Criminal Appeal No. 31 of 1999 (unreported)** and followed in the case of **Alex Ndendya Vs. R, Criminal Appeal No. 207 of 2018 (CAT, Iringa),** it was ruled that due to the frailty of human memory the discrepancies on details may be overlooked. In **John Gilikola**'s case, the court observed the following: -

> *"The discrepancies were on details and they may have been occasioned by the relatively long passage of time between the*

two statements and the giving of evidence in court and also by the frailty of human memory. Like the trial judge, we do not, with respect, consider the discrepancies in the two statements and the evidence of the witness material so as to affect the credibility and reliability of PW4."

In this case, although the trial court did not address it expressly, the said contradictions were very minor, perhaps the trial magistrate did not find any need to address the same in a specified approach. But as above discussed, the discrepancies were trivial. The ground is therefore lacking merits.

The appellant's complaint in ground 7 is related to the trial resident magistrate erred in law and in fact in convicting the appellant based on exhibit P2, which was admitted by the court without any prayer from any prosecution witness contrary to the **Evidence Act, (Cap 6 R.E 2019)** however, no specific section was mentioned. Perusing the trial court's proceedings indicates that, the witness made a prayer to tender three exhibits and the same were admitted without objection from the appellant. I will quote the relevant part of the original proceedings which is page 23 as follows: -

"Mr. Malema State Attorney

Your honour, I pray to show PW1 some properties for identification.

Court: *Prayer granted, PW1 was able to identify four elephant tusks, one gun make Rifle and an axe.*

PW1 Continues:

I pray to tender four elephant tusks, one gun make Rifle and one axe as exhibit.

1st Accused: No objection

2nd Accused: No objection

Court: *Four elephant tusks admitted and marked exhibit P2, one gun make Rifle admitted and marked Exhibit P3 and one axe admitted and marked exhibit P4."*

The appellant's contention cannot be accepted by this court because it may impurify the good principle of sanctity of court record. Generally, proceedings of the court are taken as true reflection of what transpired in trial. It has been so held in the case of **Paulo Osinya Vs. R, [1959] EA. 353** in the recent case of **Alex Ndendya Vs. R, (supra)** where the Court of Appeal held *inter alia*: -

"It is settled law in this jurisdiction that a court record is always presumed to accurately represent what actually transpired in court. This is what is referred to in legal parlance as the sanctity of the court record"

The above, being the true record of the trial court, I hold a strong view that the ground was based on non-existing facts or misconception of facts. This court cannot have any remedy than to find this ground unmerited.

Now facing ground 8 where the appellant complained that the court based on exhibit P2, P3 and P4 whose chain of custody was not established. The respondent held a firm stance that the chain of custody was established. The correct position of law as it stands today, chain of custody of the exhibit must be established to cover the whole journey from the original source to when it is tendered in court. This was the Court of Appeal's decision in the case of **The Director of Public Prosecutions Vs. Mussa Hatibu Sembe, Criminal Appeal No. 130 of 2021** where also the case of **Paulo Maduka and Four Others Vs. R, Criminal Appeal No. 110 of 2007** was referred along with other authorities, the Court held: -

> *"It is trite law that, chain of custody is established where there is proper documentation of the chronology of events in the handling of exhibit from seizure, control, transfer until tendering in court at the trial"*

The rationale behind the rule was well enunciated in the famous case of **Paul Maduka**. The rule is aimed at eliminating the possibilities of the evidence having been fraudulently devised to make someone guilty. Developing from the rationale, to establish whether the chain of custody was intact or not and the effect or prejudice if any, must depend on the nature of the case, nature of exhibits in question and other relevant circumstances.

The case before the trial court was based, among others, exhibits that were retrieved from the hiding place by the appellant himself. The exhibits were four elephant tusks, a gun and an axe said to have been used in killing the elephants and removal of the tusks. I have considered the nature of exhibits and also the testimonies of PW1, PW2, PW3 and

PW7 who were present when the appellant showed the place, he did hide those items. Clearly, PW4, PW5 and PW8 testified very well on the chain of custody, which to my analysis was intact in respect of all exhibits P2, P3 and P4. It is on those reasons I find this ground likewise lacks merits.

The appellant's grievance in ground 12 was that PW7 failed to identify exhibit P2, P3 and P4. But this ground is contrary to what was recorded by the trial court. At page 56 of the trial court's proceedings PW7 being examined in chief by Mr. Malema, learned State Attorney, he stated: -

> *"When I see elephant tusks, I will identify by its size, two are big and two are small. Have No. MIK/IR/326/2014. At the end each tusk there are pieces of bones and being hinted by a sharp object when uprooted. The axe is locally made having a wooden handle tied with black elastic the gun is made from wood and having ironed pointer. It has a back belt"*

After being shown PW7 said:-

> *"Your honour, these are four elephant tusks, they are written MIK/IR/326/2014, they have bones remains, two are small and two are big. This is a locally made gun has black belt, wooden bottom and iron made pointer. This is an axe; it has a wooden handle No. MIK/IR/326/2014. It is wrapped with black elastic"*

The above, in my considered opinion was a sufficient identification by the witness. The trial court must have seen beyond what this court can perceive, what is written is what exactly transpired, this court would

reach to the same finding that the witness had identified the exhibits properly. The complaint is otherwise baseless and unfounded.

The 9th ground by the appellant brings forward a grievance that *trial de novo* orders in the previous case gave chances to the prosecution side to fill up their gaps. The learned State Attorney did not want to pay any more attention to this ground, instead she shortly discredited as unmerited. Although he did not cite any of the said previous cases, my effort to comprehend this ground infers the appellant's suggestion that there was a previous trial which was nullified on appeal and a trial *de novo* was ordered. He seems to hold a stance that the trial *de novo* helped the prosecution to improve their case against him. The trial court therefore, should not have convicted him.

This court is aware that where *trial de novo* is ordered, it means there was nothing in place concerning the impugned decision. **The Black's Law Dictionary**, gives interpretation of trial *de novo* as: -

> *"A new trial on the entire case – that is on both questions of fact and issues of law – conducted as if there had been no trial in the first instance"*

In determining this ground, it is significant to point out the rule governing trial *de novo*. In the case of **Fate Hali Manji Vs. R, [1966] 1. EA 343** it was held: -

> *"In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill gaps in its*

evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it."

The above was also followed in the case of **Enock Lwenge Vs. R, Criminal Appeal No. 592 of 2017, CAT at Mwanza**. The Court observed as follows: -

"We are alive to the fact that parties adduce their evidence afresh during retrial and therefore, in our view, they cannot be precluded from leading evidence which did not feature at the original trial"

Considering deeply on the above precedents, obvious this ground is misconceived or misplaced. This court before Judge Masaju ordered retrial after going through the tests set forth herein above. Even if that order was improperly procured, this court has no jurisdiction to scrutinise anything on that order. Obvious when *trial de novo* is ordered on appeal or revision, the subordinate court so sitting at retrial is presumed to have no memory of the past. Therefore, if the appellant was aggrieved by the retrial order, he had the right to appeal against that decision and not to wait on appeal and raise it after retrial has already been concluded.

If the appellant did not appeal in that other case, I have pondered a great deal, what did he expect the trial court to do, when a trial *de*

novo order was properly issued by the superior court and unchallenged? I am sure it was bound to retry the case as per the appellate court's order. I therefore, satisfied that, this ground is not merited.

I have carefully and repeatedly reviewed the evidences adduced by the prosecution witnesses and that of the defence side. Dealing with grounds 1 and 2, otherwise, I have failed to see any unjustified or uncorroborated evidence as the appellant contends. From any point of view, the whole evidences gives, remained unchallenged. That, two elephants were killed and tusks therein were removed. The appellant was suspected and while on the run, he was arrested. When interrogated he admitted to have killed the two elephants using a rifle and by an axe and a machete, he removed the tusks. He led the investigators to the place he hid the tusks, a gun and an axe used to remove the tusks.

More so, the testimonies of PW1 and PW2 were corroborated by other prosecution witnesses that the appellant admitted to have killed the elephants and remove their tusks, that he used a gun and an axe and that the tusks, a gun and the axe were hidden in a bush near to his house. PW1, PW2, PW3 and PW7 were present when the appellant showed the place, he hid the said items. PW4, PW5 and PW8 testified very well on the chain of custody, which to my analysis was intact in respect of all exhibits P2, P3 and P4.

Unless the appellant perceives the concept of corroboration in a very distinct sense, which will be strange in law, corroboration does not mean similarity of the story and diction. Two witnesses may narrate on the same matter in different languages, that does not mean they are not

corroborating each other. This court is at liberty of being persuaded by other jurisdictions jurisprudence, herein I am interested with the former English philosopher and a judge **Patrick Devlin** (*The Criminal Prosecution in England (1960))* also referred in **The Black's Law Dictionary**, 8th Edition at page 1633, where he said: -

> *"Every witness is an editor; he tells you not everything he saw and heard, for that would be impossible, but what he saw and heard and found significant and what he finds significant depends on his preconceptions"*

I have no slight doubt, the prosecution evidences were corroborated leaving no contradictions, that the appellant was the brain behind the whole saga. Treating the testimonies of the witnesses as above, a justifiable conclusion is that there was no material contradiction and almost each witness testimony moved in unison to the charge that was laid against the appellant.

Revisiting the trial court's proceedings and judgment, I find the trial resident magistrate performed his duties professionally and composed an acceptable judgement by considering and analysing the evidences of both parties properly. Therefore, the appellant's complaint on credibility of the prosecution evidence as per ground 10 of the appeal is unmerited.

The complaint on ground 13 pegged on the claim that the appellant was singled out by villagers' vote is an afterthought. What I have gathered from PW7 suggests that informers (who must have deserved anonymity) tipped the investigators on the perpetrators and their whereabout. The prosecution's case was not based on suspicion,

but on the evidence harvested after mounting serious investigation. The evidence that was laid before the trial court was properly analyzed at length in the preceding grounds. It is difficult to adopt the appellant's thinking that he was convicted on a mere suspicion. This ground likewise is termed as baseless.

On the issue of sentence as per ground 11, the appellant complained that the learned trial resident magistrate erred in law and fact by convicting and sentencing the appellant without considering his mitigation that he was the first offender and has served part of his sentence, and that he never enjoyed bail since he was arrested in 2014 and thus should have been given a minimum sentence according to the law.

This court considered the principle of legality in criminal law which goes by two latin maxim *nullum crimen sine lege* and *nulla poena sine lege.* The first literally means there is no crime without a law, and the latter means there is no punishment without law.

To date even in our jurisdiction, the two maxims have remained our cornerstone to Criminal Justice. A person will be convicted, if among other things, what he did or omitted to do is clearly and expressly declared by the law to be an offence *(nullum crimen sine lege).* Even where he is convicted by such offence, he will be punished only by the sentence and by the manner prescribed by the law *(nulla poena sine lege).* All courts are obliged to, and they actually do, follow this principle. Anything done outside the square will be quashed by the superior court. In our case the second limb of the principle *Nulla poena sine lege* is more relevant. By following this principle, when a party seeks to

challenge the legality of a sentence, it is expected to point out some factors which were not considered in the mitigation or aggravation, or the law that was contravened.

Moreover, the purpose of penology (punishment) is to change the wrongdoer and rehabilitate him/her from committing similar offence in the society. On the other side, penology is intended to deter others of similar thinking from committing similar or related offences in the society

Having laid down those basic principles in criminology and penology, the question remains, how do they apply in this appeal? Unfortunately, the appellant did not point any fault on this ground. However, to address properly in this ground, pages 18 & 19 of the trial court's judgement is considered extenso. Likewise, I will consider some basic sections of law related to the offence preferred against the appellant. To begin with, section 34 (1) (2) of **The Arms and Ammunition Act [Cap 223, RE 2002]** provides: -

> *"34.-(1) Any person who contravenes any provision of this Act, or any regulation, notice, or order made under it, or the conditions of any licence or permit, commits an offence under this Act.*
>
> *(2) Any person who commits an offence under this Act shall upon conviction except where any other penalty is provided,* ***be liable to imprisonment and any other penal measure provided for under the Economic and Organized Crimes Control Act.****"*

The Economic and Organized Crimes Control Act, Cap 200 RE 2019 (Now RE 2022) under section 60 (2) provides for a minimum sentence as follows: -

> **Section 60 (2).** *"Notwithstanding provision of a different penalty under any other law and subject to subsection (7),* ***a person convicted of corruption or economic offence shall be liable to imprisonment for a term of not less than twenty years but not exceeding thirty years, or to both such imprisonment and any other penal measure provided for under this Act;*** *Provided that, where the law imposes penal measures greater than those provided by this Act, the Court shall impose such sentence."*

Under **the Wildlife Conservation Act, No. 05 of 2009** section 86 (1), 2 (b) and (3) read together with paragraph 14 of the First Schedule to **The Economic and Organised Crimes Control Act, [Cap 200 RE 2019],** the sentence of not less than 20 years imprisonment is provided. The mitigation offered by the accused before the trial court was considered by the trial court as quote: -

> *"Your honour I have no any other thing to state. I know the court is a place to make justice. I have been in prison for a long time, my family is suffering. I pray the court to impose a lenient sentence on me. That is all"*

Regarding his remaining in custody, I have observed that he just failed to meet the bail conditions. He was given bail conditions as seen at page 13 of the proceeding. The reason for remaining in custody was his failure to meet bail conditions, which to my view were legal and

reasonable. The trial court in its judgment, observed properly the procedure and stated that it has considered the mitigating factors put forward by the appellant, thus sentenced him to minimum sentence of twenty (20) years imprisonment.

Noted that, the law prescribes minimum punishment for the offence preferred against the appellant is twenty (20) years. The court cannot refuse to apply the law as it is, if it is unfair or irrational, or unjust it is the duty of the Parliament to amend it, but this court cannot refuse to apply it. Since the Parliament preferred a minimum sentence of twenty years, the court of law has no mandate or duty to depart from applying it. Unfortunate that is the principles of separation of powers enshrined in our Constitution.

This being the case, the sentences that the trial magistrate awarded to the appellant, being a first-time offender was the minimum sentence prescribed by law. The trial court had no legal mandate to award less than the minimum punishment prescribed by law. Accordingly, the sentence was legal and proper, unfortunate this ground must fail same is dismissed forthwith.

However, although the appellant never clarified his complaint as above alluded, I have observed two errors on the whole trial. **First:** the charge on the second count did not include a penal provision. The trial courts proceeded with hearing, convicted the appellant and sentenced him accordingly.

Second: Having admitted three real exhibits (objects) four elephant tusks, one gun and one axe, as exhibit P2, P3 and P4 respectively, the court did not make any order for disposition.

Fortunately, both errors are curable at this stage. Sections 132 and 135 of **the Criminal Procedure Act, Cap 20 R.E 2019 (now R.E 2022)** have been considered along with the recent decision of the Court of Appeal in the case of **Abdul Mohamed Namwanga @ Madodo Vs. R, Criminal Appeal No. 257 OF 2020, CAT, Mtwara,** where among other things, the Court referred its previous decisions and held: -

> *"We are prepared to conclude that the irregularities over non-citations and citations of inapplicable provisions in the statement of the offence are curable under section 388 of the CPA"*

Section 60 (3) of **The Economic and Organised Crimes Control Act (supra)** provides for confiscation and forfeiture of proceeds of crime and instrumentalities of crime. Also, section 366 (1) (a) (b) (c) of **The Criminal Procedure Act** empowers this court to reverse, rectify orders or make consequential orders in appeal. Being the first appellate court, I make orders on the exhibits as follows: -

Exhibit P2 (elephant tusks – proceeds of crime), exhibit P3 and P4 (a gun and an axe – instrumentalities) be confiscated for the government of the United Republic of Tanzania. The relevant Authorities are ordered to keep them in safe custody for Government use.

Save for the minor but important variations that I have made, for reasons aforesaid, in totality this appeal lacks merits same is dismissed forthwith. Convictions and sentences in respect of the appellant remains intact and are hereby upheld. Case file be remitted back to the trial court for compliance of an order so issued.

I accordingly Order.

DATED at MOROGORO in Chambers this 16th August, 2022.

P. J. NGWEMBE

JUDGE

16/08/2022

Court: Judgment Delivered at Morogoro in Chambers on this 16th day of August, 2022 in the presence of the appellant through Video Conferencing and Edgar Bantulaki learned State Attorney for the Republic.

Right to appeal to the Court of Appeal explained.

THE HIGH COURT OF TANZANIA

P. J. NGWEMBE

JUDGE

16/08/2022