THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

IRINGA DSTRICT REGISTRY

AT IRINGA

CONSOLIDATED DC. ECONOMIC APPEALS NOS. 12, 20, 21 OF 2022

(Originating from Economic Case No. 02 of 2018, in the Court of Resident Magistrate of Iringa, at Iringa).

1. RASHID MBEDULE.....1ST APPELLANT

2. PAUL JOHN LIHO.....2ND APPELLANT

3. KENETH JONAS MGWAMA.....3RD APPELLANT

VERSUS;

THE REPUBLIC..... RESPONDENT

JUDGMENT

25th July & 21st September, 2022.

UTAMWA, J:

In this first appeal, the three appellants, RASHID MBEDULE, PAUL JOHN LIHO and KENETH JONAS MGWAMA (Henceforth the first, second and third appellant respectively) challenged the Judgement of the Court of

Resident Magistrate of Iringa, at Iringa (The trial court) dated 15/9/2020 in Economic Case No. 2 of 2019. The three appellants filed distinct petitions of appeal. The appeal by the first, second and third appellant were registered as appeal No. 12 of 2022, No. 20 of 2022 and No. 21 of 2022 correspondingly. The three appeals were consolidated by this court for purposes of a smooth hearing since they all arose from the same original case, i.e. Economic Case No. No. 2 of 2022 before the trial court, hence this single judgment.

Before the trial court, the three appellants stood charged with the offence of Unlawful possession of government trophy contrary to sections 86(1) and 2(b) of the Wildlife Conversation Act, Act No. 5 of 2009 read together with Paragraph 14 of the First Schedule and Sections 57(1), 60(1) and (2) of the Economic and Organized Crimes Control Act, Cap. 200 RE. 2002 as amended by sections 16(a) and 13(b) of the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016. It was alleged in the charge sheet that, on the 14th day of December 2017, at Madibila area within the District of Mufindi and region of Iringa, the appellants were found in possession of two pieces of elephant tusks valued at Tanzanian Shillings (Tshs.) 33,656,400/= being the property of the Government of the United Republic of Tanzania without any permit or licence.

The appellants pleaded not guilty to the charge hence a full trial ensued. At the end of the trial they were all found guilty of the charged offence, convicted and each was sentenced to pay a fine of Tshs. 112,188,000/= or to serve in prison for seventeen (17) years in default of

paying the fine. They were discontented by both the conviction and sentence, hence the present appeal.

In their respective petitions of appeal, the first and second appellant had six grounds of appeal whereas the third appellant had five grounds of appeal. The totality of their respective grounds of appeal, which said grounds were couched in a layman's language and which were more or less similar, can be understood as follows:

1. That, the learned trial Magistrate erred in law and facts in holding that contradictions of evidence from the prosecution side between PW.1 and PW.6 were minor.

2. That, the trial court wrongly received and admitted the certificate of seizure as exhibit thought the same had not been signed by an independent witness.

3. That, the trial court wrongly gave weight to cautioned statements which had been wrongly recorded at police station and which were read in court before being duly admitted in evidence.

4. That, the learned trial Magistrate (the successor magistrate) erred in law in taking over the case from his predecessor without properly addressing the appellants on their rights as required by the law.

5. That, the learned trial magistrate misdirected himself in holding that the appellants' cautioned statements were recorded out of time prescribed by the law.

6. That, the prosecution side failed totally to prove the case against all the appellants beyond reasonable doubt.

The appellants therefore, urged this court to allow their respective appeals, quash the conviction, set aside the sentences and set them at liberty.

During the oral hearing of the consolidated appeals, the appellants appeared in person and unrepresented. On the other side, the respondent Republic was represented by Ms. Jackline Nungu, learned State Attorney.

The appellants adopted their grounds of appeal as they appear in their corresponding petitions of appeal and they had nothing of substance to add.

On her part, the learned State Attorney for the respondent also supported the appellants' appeal on the following grounds: that, the prosecution did not prove its case beyond reasonable doubts. This was because, the search of all the appellants' places did not follow the procedure required by the law, to wit; Section 38(3) of the Criminal Procedure Act, Cap. 20 RE. 2019 (The CPA). The provisions of law guide that, in conducting a search in a house at night (as it was in the present case) there has to be a search warrant and an independent witness (if possible) who has to sign the certificate of seizure. Nonetheless, such requirements of the law were not followed in the case at hand. This was so irrespective of the fact that the search was not an emergency search falling under section 40 of the CPA which would be exempted from the requirement at issue.

The learned State Attorney further argued that, the importance of complying with search procedures was underscored by the Court of Appeal of Tanzania (The CAT) in the case of **Samweli Kibundali Mgaya v. The Republic, Criminal Appeal No. 180 of 2020, CAT, at Musoma, [2022] TZCA 342.** The certificate of seizure in the present matter was therefore, valueless for offending the legal requirements highlighted above.

It was a further argument by the learned State Attorney that, the appellants' cautioned statements were not properly received in evidence due to the following reasons: the first and second appellants' statements were read in court before they were admitted in evidenced as evidenced at page 48 of the typed proceedings of the trial court. This was contrary to the law as decided by the CAT in the case **Robinson Wanjisi & 3 Others v. Republic (2003) TLR 218**. In that case, the CAT held that an exhibit must firstly be identified, admitted and then read in court. Failure to follow this procedure makes an exhibit liable to be expunged from the record. The two statements (exhibit P. 3 and P. 4) thus, have to be expunged from the records.

The learned State Attorney also faulted the prosecution's case as the identification of the government trophies at issue (The two elephant tusks) was not proper. This is because, PW.1 (Edwin Mbeku) who was among the arresting officer did not clearly state in his evidence the marks which he had put in the tusks so as to help him in identifying them properly. Again, PW.2 (Davi Msovele) who evaluated the elephant tusks did not also identify them in court as required by the law. During the trial, he only said that

there were only two tusks. Moreover, PW.5 (Hamisi), the Village Executive Officer did not identify the said elephant tusks as required by the law though he testified that he had seen the first appellant holding the tusks. Furthermore, the PW.6 (Manyama) who was also an arresting officer did not identify the elephant tusks in court.

Additionally, the learned State Attorney contended that, the chain of custody of the elephant tusks (as exhibits) was broken. This is because, PW.1 (one Edwin) testified that, he took the tusks to Ipogolo Wildlife Anti-poaching Centre. The PW.3 (one Manyama) also testified that the tusks were taken to the Anti-poaching Centre at Ipogolo to one Constantine Lubawa who was the exhibit keeper. On the other hand, the PW.2 (one David) testified that, he took the same elephant tusks from the police station for his evaluation. However, the said Constantine did not testify in court. PW.2 did not also testify as from whom he took the elephant tusks. The law provides that every witness who handles an exhibit must testify in court.

It was also the contention by the learned State Attorney that, there were serious contradictions between the evidence of PW.1 and that of PW.6. These two witnesses were the arresting officers who said they arrested the appellants. However, their testimonies did not tally in relation to the arrest. The PW.1 for example, said, the appellants were arrested and then searched (at their respective homes) and found with the tusks. Nonetheless, the PW.6 testified that, the appellants were arrested in the

bushes possessing the elephant tusks. The contradiction was thus, fatal and raised doubt in the prosecution case.

In conclusion therefore, the learned State Attorney prayed for this court to allow the appeal.

The appellants had nothing to add as rejoinder to the submissions made by the learned State Attorney for the respondent Republic. They only prayed for the court to acquit them.

I have considered the grounds of appeal, submissions, the law and the record. In my settled view, the fact that the present appeal is not objected, is not the reason why this court should not test its merits. That fact is also not the sole ground for this court to allow the appeal. These views are based on the understanding that, it is a firm and trite judicial principle that, courts of law in this land are enjoined to decide matters before them in accordance with the law and the Constitution of the United Republic of Tanzania, 1977, Cap. 2 RE. 2002 (henceforth the Constitution). This is indeed, the very spirit underscored under article 107B of the Constitution. It was also underlined in the case of **John Magendo v. N. E. Govan (1973) LRT n. 60**. Furthermore, the CAT emphasized it in the case of **Tryphone Elias @ Ryphone Elias and another v. Majaliwa Daudi Mayaya, Civil Appeal No. 186 of 2017, CAT at Mwanza**, (unreported Ruling). In that precedent, the CAT held, *inter alia*, that, the duty of courts is to apply and interpret the laws of the country. It added that, superior courts have the additional duty of ensuring proper

application of the laws by the courts below. I will therefore, test the merits of the appeal despite the fact that the respondent supports it.

In determining the appeal, I opt to firstly consider the ground of appeal listed earlier as number six. This is because, according to the anatomy of the petitions of appeals lodged by the appellants, this seems to be the major ground of appeal. The rest were merely supporting it. In essence, under the sixth ground of appeal, the three appellants are challenging the conviction against them on the ground that, the prosecution had not proved the case against all of them beyond reasonable doubts. *The major issue is therefore, whether the prosecution proved the case beyond reasonable doubts against all the appellants, or any of them, before the trial court.* The law is well settled that the prosecution bears the burden of proving the case against an accused and the required standard of proof is beyond reasonable doubts; See section 3(2)(a) of the Evidence Act, Cap. 6 RE 2022 and the case of **Hemed v. Republic [1987] TLR 117.**

In my settled view, the circumstances of the case at hand call for a negative answer to the issue posed above. This view is based on the following grounds: in the first place, as correctly contended by the learned State Attorney for the respondent Republic, the search of the appellants violated Section 38(3) of the CPA. These provisions basically provide that, when anything is seized from a suspect upon a search, there should be *inter alia*, a signature of a witness to the search, if any. The record shows that, the appellants were searched at their respective houses at night. This

is evident from the PW.6's testimony who said that, they (PW.6 and his colleagues) arrived at Madibila area at 21 hours and they seized the elephant tusks from the appellants. The certificate of seizure was then signed by all the three appellants. PW.6 nonetheless, did not testify as to why there was no any independent witness during the search. He did not also testify if they had a search warrant (written authority) as required by the law, i.e. section 38(1) of the CPA. As correctly submitted by the learned State Attorney, the importance of complying with search and seizure procedure was underscored in the **Samwel Kibundali case** (supra) where the CAT underlined that, there must be a search warrant, the owner of the premises or his near relative must be present, there must also be an independent witness who is required to sign to verify his presence and lastly there must be issuance of a receipt acknowledging seizure of the property.

In the present case however, the record does not show if the search-officers had any search warrant or search order authorizing them to conduct it as hinted before. No evidence was also adduced to show that it was a kind of search which was exempted from the requirements shown above. The search was thus, illegal as rightly contended by the learned State Attorney for the respondent. The contravened procedures created doubt on whether the search was really conducted as alleged by the prosecution witnesses as correctly argued by the learned State Attorney.

Another reason contributing to the negative answer to the issue posed above is the irregularity in tendering the cautioned statements of the

appellants during the trial as rightly pointed out by the learned State Attorney for the respondent Republic. The record reveals that, the PW.3 who recorded the cautioned statement of the first and third appellants prayed to read the statement before it was admitted in evidence and he did so. As correctly submitted by the learned State Attorney, the law provides that, whenever it is intended to introduce any document in evidence, it should firstly be cleared for admission and be actually admitted, before it can be read out; see the **Robinson Mwanjis case** (supra). Due to the above reasoning, the 1st and 3rd appellants' cautioned statements were wrongly received in evidence hence cannot be relied upon for a conviction. The non-compliance explained above vitiates the said cautioned statement hence liable to be expunged, and I accordingly expunge them from the record.

The learned State Attorney for the respondent also faulted the prosecution evidence before the trial court on the ground that, the PW.1, PW.2, PW.5 and PW.6 did not identify the elephant tusks and the chain of custody was broken. It is settled principle that in cases involving exhibits there has to be an unbroken chain of custody and there has to be a chronological documentation and/or paper trail showing the seizure, custody, control, transfer, analysis and disposition of evidence.

The CAT has in various cases underscored the importance of maintaining the chain of custody. In the case of **Paulo Maduka and Others v. Republic, Criminal Appeal No. 110 of 2007, CAT at Dodoma** (unreported) for example, the CAT held that, the idea behind

recording the chain of custody is to establish that the alleged evidence is in fact related to the alleged crime rather than, for instance having been planted fraudulently to make someone guilty. The CAT added that, the chain of custody requires that, from the moment the evidence is collected, it's very transfer from one person to another must be documented and that it be provable that nobody else could have accessed it. The significance for maintaining the chain of custody of exhibits was also echoed in the cases of **Anania Clavery Betela v. Republic, Criminal Appeal No. 355 of 2017, CAT at Dar es Salaam** (unreported) and **Mussa Hassan Barie and Albert Peter @John v Republic, Criminal Appeal No. 292 of 2011, CAT at Arusha** (unreported).

In the instant appeal, the prosecution witnesses have not shown a chronological handling of the elephant tusks from seizure to exhibition as evidence in court. PW.1 for instance, testified that he apprehended the appellants, but he only mentioned that he took the tusks to KDU and that he kept marks on the said tusks. He did not however, explain the marks that helped him identify the tusks. As to the PW.2, the officer who evaluated the tusks also told the court that the police came with the elephant tusks for him to evaluate. PW.6 who was also among the officers who arrested the appellants testified that, upon arresting the appellants, the said elephant tusks were taken to Iringa Central Police and handled to one Constantine Lubwa. The above evidence does not provide for a chronological sequence of how the tusks were handled. Moreover, there is contradiction between the evidence of PW.1 and that of PW.6 on where the tusks were taken after they were seized from the appellants. PW.1

testified that, they were taken to KDU. On the other hand however, PW.6 testified that, upon seizing the tusks they were taken to Iringa Central Police to one Constantine Lubuwa. I thus, agree with the learned State Attorney that, the chain of custody for the tasks was broken and it cannot be guaranteed that the tusks tendered in court were actually related to the crime under discussion.

Owing to the above findings, I answer the issue posed above negatively that, the prosecution did not prove the case against all the appellants before the trial court beyond reasonable doubts. I consequently uphold the common ground of appeal which challenged the prosecution for not proving the case against all the appellants beyond reasonable doubts.

Due to the findings I have just made above, I find no need for testing the rest of the grounds of appeal since the ground discussed above alone, as the major ground of appeal as hinted previously, is capable of disposing of the entire appeal. Otherwise discussing other grounds of appeal will be tantamount to performing an academic exercise which is not the core objective of the adjudication process.

I accordingly allow the appeal, quash the conviction, and set aside the sentences imposed against all the appellants, Rashid Mbedule, Paul John Liho and Keneth Jonas Mgwama. I further order for their immediate release from the prison, unless held for any other legally justified cause. It is so ordered.

JHK UTAMWA
JUDGE
12/9/2022.

21/09/2022.

CORAM; JHK. Utamwa, J.

Appellants: present all 3 (By virtual court while in Iringa prison).

Respondent: Ms. Hope Masembo, State Attorney (present physically).

BC; Gloria, M.

Court; Judgment delivered in the presence of all the 3 appellants (by virtual court while in Iringa prison) and Ms. Hope Masembo, learned State Attorney for the respondent, this 21st September, 2022.

JHK UTAMWA
JUDGE
21/09/2022.