IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO 42 OF 2022

(Arising from Serengeti District Court of Serengeti at Mugumu Economic Case No 113 of 2019)

KISUTI S/O MANZI @ KAZANG'A ..... 1ST APPELLANT

NCHAMA S/O NCHAMA @ KIMORE ..... 2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

22ND September, and 22nd September, 2022

F. H. MAHIMBALI, J.:

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

It was alleged by the prosecution that Maro Mwita Ginarenga @

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

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

task force team that constituted PW2 and other police officers was then prepared and organized themselves. That at about 23.00hrs, the PW1 (team leader), communicated with one of the sellers of the said trophies who introduced himself to be Maro Mwita Ginarega (the appellant) and they agreed on where the said sale transaction was to take place. At about 02.00hrs, at the signboard written *"Shule ya Msingi Gusuhi"* the appellants then brought two elephant tusks where they were spontaneously arrested by the task force team. The said elephant tusks were admitted as exhibit PE3. Police officers being at the scene called spectators including PW5 and PW6 who then witnessed all that was going on there including preliminary interrogation, search and seizure. The certificate of seizure was then admitted as exhibit PE1 at the trial. The appellants were then taken to Mugumu police station where then PW3 and PW9 recorded cautioned statements of the accused persons which the same were dully admitted as exhibits PE5 and PE6 for the 2nd appellant and another accused person (not party to this appeal) PW4 – Game Warden who did trophy identification and valuation of the same who after being satisfied that the said exhibits PE 3 exhibits were really elephant tusks as per their structures and identified features. He valued them being worth 34,125,000/= as being the value of the said elephant per market value by then.

PW7 just testified how he measured the said elephant tusks and weighed to be 3.55kg (PE8 exhibit). PW9 is a police store keeper who testified how he kept the said trophies (Exhibit PE3) from when he was handed over to when he produced them in court. All the transactions involving investigation and testimony in court, was well recorded by him as featuring in PE 9 exhibit.

On their defense, appellants denied to have been in the deal of selling or carrying the said elephant tusks but only that they were on their way back from pombe club where they met their arrest by police in between (at the scene).

Upon hearing the case, the trial court convicted the appellants and to the charge and sentenced them each to a custodial sentence of 30 years. The appellants have preferred this appeal to this Court against both conviction and sentence meted out by the trial court. The other person (Maro s/o Mwita @ Ginarega not party to this appeal) was acquitted by this court in Criminal Appeal No 68 of 2021.

The main issue at the trial court was whether the appellants were found in unlawful possession of the government trophies to wit; two pieces of elephant tusks. The reasons as to why the appellants were convicted by the trial court can be gathered from page 6 to 9 of the

typed judgment. The reasons are: firstly, the existence of incriminating evidence contained into the cautioned statement of the appellants (PE5 and PE6 exhibits). On this, the trial magistrate relied the case of **Pascal Kitigwa V. Republic** [1994] TLR 65 that incriminating evidence from the co-accused suffices conviction. Secondly, none existence of reasonable doubt by defense. On this he reasoned that the accused persons' defense fell short of any imminent doubt. He sought reliance of his stance in the case of **Joseph Marwa V. Republic** (HC -searchable in tanzlii) that accused story need not be believed but only to raise a reasonable doubt to the prosecution. Thirdly, failure to cross examine the prosecution's witnesses as per the principle laid down in the case of **Nyerere Nyague V. Republic,** Criminal Appeal No. 67 of 2010.

In challenging the said decision, the appellants have preferred this appeal armed up with a total of six grounds of appeal, namely: -

1. *That, as per lacking proper documentation regarding taking and handing over the recovered exhibits, equally the chain of seizure and custody of the same was broken thus affect the purported doctrine of recent possession.*

2. *That, the trial court erred in law and fact to convict and sentence the appellants by admitting and relied on all exhibits enacted by prosecution witnesses to facilitate*

conviction and sentence against the appellants and PW4 who claimed to conduct the alleged trophy no description for disclosing his qualification as an expert of trophies valuation, no doubt to believe that prosecution side by using chain of custody and game warden their witnesses fabricated the case at hand.

3. *That, the trial court misdirected to convict and sentence the appellant by relying on shack and weak evidence of prosecution witnesses which was obviously incredible nature which lead him to make injustice judgment toward the appellant.*
4. *That, the trial Magistrate erred in law and fact to try the case at hand without consent from Director of Public Prosecution and certificate conferring jurisdiction to subordinate court to try economic offence since this case fall under economic offence, so appellants was wrongly convicted and sentenced under the eye of the law.*
5. *That, the prosecution case was not corroborated as a matter of practice and precedent to warrant conviction but the trial court relied on the weakness of first accused defense and ignored the appellants strong defense.*
6. *That, the case was not proved beyond all reasonable doubts.*

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

The appellants had a self-representation whereas the respondent was dully represented by Mr. Frank Nchanilla, learned state attorney

who supported the appeal. The appellants on their part, had nothing more to add but just prayed that upon concession by the respondent, they be set free, that their conviction be quashed and sentence set aside.

As to why Mr. Nchanila supported this appeal, he simply stated that in consideration to the former decision of this court in Criminal Appeal No 68 of 2021 in which I had allowed the appeal, there will be the same findings of the court. He thus, prayed that this appeal be marked as conceded.

As per concession by the Republic, the appeal is allowed because of the fact of improper admission of cautioned statement incriminating the appellants.

As the arrest of the appellants was done on the 9th September 2019. However, the recording of the cautioned statements was done on the 11th September 2019, two days later. As to why the said cautioned statements were recorded two days later, the evidence in record is silent on that. Since such statements are recorded within four hours after the arrest of the suspects, it is unlawful to record the same beyond the stipulated time as provided by the law. Section 50(1) of the CPA is very clear on the time frame to which the accused person is to be

interrogated which is four (4) hours from the time when the accused was taken under restraint. See **Raymond John and Another V. Republic**, Criminal Appeal No. 47 of 2015, **DPP Vs James Msumule @ Jembe** and 4 others, Criminal Appeal No.397 of 2018, Court of Appeal of Tanzania (unreported) at page 11 and **Yusuph Masalu @Jiduvi & 3 Others Vs Republic**, Criminal Appeal No.163 of 2017, Court of Appeal of Tanzania at Mwanza (unreported) at page 14,15 and 16. As what is the effect of a wrongly admitted exhibit, is to expunge the same from the court record as I hereby do.

Bearing in mind that the only incriminating evidence has been expunged from the record, what remains intact is nothing but just pieces or skeleton of evidence by the prosecution. Considering the testimony of PW1, that upon receiving intelligent information from his informer, he organised his team for the said trap. He plotted himself as purchaser of the said elephant tusks, and then called the appellant for the said deal. That was done and eventually the appellants were arrested. The arrest of the appellants is not disputed; however, the point of consideration is whether there was any that prior communication preceding their arrest linking them with the charge. I find none in the record. That PW1 had a prior communication with any

appellants has not been made out. There is no proof of that communication done. Since, exhibits PE5 and PE6 have been expunged, then there is nothing intact incriminating evidence in the case file to hold the appellants with the charge.

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

This court orders the immediate release of the appellants from custody unless he is lawfully held for another course.

It is so ordered.

DATED at MUSOMA this 22nd day of September, 2022.

F.H. Mahimbali

Judge

Court: Judgment delivered 22nd day of September, 2022 in the presence of both appellant, Mr. Frank Nchanila, state attorney for the respondent and Mr. Gidion Mugoa, RMA.

Right to appeal to any aggrieved party is explained.

F.H. Mahimbali

Judge