THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

SUMBAWANGA DISTRICT REGISTRY

AT SUMBAWANGA

CRIMINAL APPEAL NO. 109 OF 2021

(Original Economic Case No. 14 of 2019 of Katavi Resident Magistrate Court)

EMMANUEL SAID @ KACHEYEKELE..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

Date of Last Order: 109/08/2022
Date of Judgment: 20/10/2022

NDUNGURU, J

The appellant in this criminal appeal Emmanuel Said @ Kacheyekele was arraigned before the Katavi Resident Magistrate Court along with Samwel Juma for one count of unlawful possession of government trophy contrary to section 86 (1) and (2) (b) of the Wildlife Conservation Act No. 5 of 2009 read together with paragraph 14 (a) of the First Schedule and section 57 (2) and 60 of the Economic and Organised Crime Control Act, Cap 200 RE 2019 as amended by section 16 of the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016.

It was alleged that, on 27th day of November, 2018 at Inyonga – Tabora road within Mlele District in Katavi Region, Emmanuel Said @ Kacheyekele and Samwel Juma were found in unlawful possession of one elephant tusk weigh 2.7 kg valued at Tshs. 33,780,000/= the property of the United Republic of Tanzania without a valid license and permit to possess the same from Director of wildlife.

All the accused persons denied charge against them and to prove the allegation, prosecution called six (6) witnesses along with six exhibits while the appellant and his fellow defended themselves. Trial Court found the both accused persons had a case to answer during closure of prosecution case. After full trial, the Trial Court found only the appellant guilty of the offence and thereafter convicted him and consequently sentenced the appellant to serve a custodial sentence of twenty years.

Aggrieved by the conviction and sentence, appellant has preferred the present appeal based on three grounds of appeal, namely:

1. *That the Trial Court erred in law and facts where failed to discover that the offence was not proved beyond all reasonable doubt.*
2. *That the Trial Court erred at law and facts when failed to discover that he was never been found in possession of elephant tusk.*

3. *That the Trial Court erred at law and facts when failed to discover that he was found with one container of petrol. They forced him to admit to have been found with elephant tusk by threatening.*

When the appeal was called for hearing the appellant appeared in person unrepresented whereas the Republic was represented by Ms. Safi Kashindi, learned state attorney.

In support of his appeal, the appellant prayed the court to adopt his grounds of appeal and further he submitted that as regards the first ground that he was wrongly convicted because was not found in possession of the alleged trophy and his defence evidence was not considered.

Further, as regards the second ground he submitted that the case was not proved beyond reasonable ground. He submitted that in the typed judgment at page 5 the statement tendered by PW3 Vitus was not his. Thus, the case against him was not proved.

On the third ground the case against him was concocted. He submitted that PW1 and PW6 stated that they were informed that at Ipwaya village there are some people dealing with trophy but at that village there are village leaders, but no such leader was called to testify to

have found him in possession of the said trophy. He prayed his appeal be allowed.

On other hand, the republic through Ms Kashindi resisted the appeal by the appellant, thus prayed for the appeal be dismissed.

Ms Kashindi submitted that in proving the case the prosecution had six witnesses where witness PW1 and PW6 are the important and key witnesses in the case. These witnesses are the one who arrested the accused persons. That the witnesses testified to have found/arrested the accused person while in possession of the elephant tusk. That the accused were arrested along Inyonga-Tabora at the place where no people are living there. According to section 106 of the Wildlife Conservation Act, there was a difficult for obtaining independent witness. She referenced the case of **Emmanuel Lyatonga vs Republic**, Criminal Appeal No. 257 of 2019 (CAT). In this case, the Court has provided circumstances which calls for presence of independent witness while in this case there was no such a need.

Ms Kashindi argued that the witnesses tendered certificate of seizure which was admitted as Exhibit P1 which was read in court and duly signed by the appellant and further the tusk was tendered and admitted as exhibit P2. The witness also tendered chain of custody which was admitted by the court.

That the evidence of PW1 and PW6 was corroborated by the evidence of PW2, the witness who evaluated the value and tendered valuation report. That the valuation report was read and explained to the court.

As regards PW3, it is quite clear PW1 tendered the statement of the accused and extra judicial statement. It is the fact as submitted by the appellant that the said document was not read to him, yet still the court admitted as exhibit P5. She submitted that yet the extra judicial statement tendered and admitted, even upon after the appellant had objected. No inquiry was done nor the same was read having been admitted. Further, she contended that failure to read the said statement is fatal as per the case of **Edgar Kayumla vs DPP, Criminal Appeal** No. 498 of 2017 CAT and **Ramadhan Mboya Mahimbo vs Republic,** Criminal Appeal No. 320 of 2017, both unreported. She prayed for the statements ne expunged from record.

She submitted that apart from that, yet the evidence of PW1 and PW6 and that of PW2 is strong enough to prove the case as it did. Thus, she was in firm view that the case was proved beyond reasonable doubt. She prayed for the appeal be dismissed.

In rejoinder, the appellant insisted that the case against him was not proved. He prayed for the respondent's submission be disregarded and his appeal be allowed.

Having gone through the trial court's record and the submission of both sides, I have one issue to decide. Whether the case was proved beyond reasonable doubt by prosecution side.

The main complaint by the appellant is that the case/ offence was not proved beyond reasonable doubt. In an effort to prove the case at the trial court the prosecution side paraded six witnesses and eight exhibits. As regards certificate of seizure and seizure of the elephant tusk, PW1 and PW6 a game warden and a game ranger respectively in their testimonies at the trial court testified that after being informed through informer on 27/11/2018 at Inyonga -Tabora road they arrested the appellant along with his fellow while in possession of the elephant tusk wrapped in a sulphate bag. PW1 testified further that they seized the said trophy and filed certificate of seizure. PW1 also tendered in court certificate of seizure, elephant tusk and chain of custody as exhibits P1, P2 and P3 respectively.

However, in the course of tendering exhibits P1 and P2 by PW1 for admission, the appellant and his fellow accused appeared to have put an objection to its admission. Having raised an objection, the trial court went

on admitting the same without conducting an inquiry according to the laid down procedure and practice of the law.

In the case **of Rashid and Another vs Republic** [1969] E. A 138, where the Eastern African Court of Appeal had observed that:

> *"The correct procedure when a statement is challenged is for the prosecution to call its witnesses and then for the accused to give or make a statement from the dock and call his witnesses if any."*

It was improper and a fatal irregularity for the trial court's failure to conduct an inquiry before admission of the certificate of seizure and the elephant tusk. The certificate of seizure and the elephant tusk improperly admitted the same do hereby expunged from the record.

PW2 a game warden testified that on 28th day of November 2018 while in his office came police officer with a sulphate bag containing trophy. He examined the trophy and identified to be of elephant tusk, it was long and thick. He tendered a valuation report which was admitted in court as exhibit P4. He also identified elephant tusk and a chain of custody tendered by PW1.

PW3 a Police Officer testified that on 27th day of November 2018 testified that while in the office was assigned to interrogate one Emmanuel

Said Kacheyekele. He said to have recorded the statement of the accused person who admitted the offence. He tendered the cautioned statement. Looking at page 17 of the typed record of proceedings, when clearing the appellant's cautioned statement for admission, the appellant objected to the admission on the ground that the witness wrote what he did not tell him. This means the appellant retracted his confession, however the trial court admitted without conducting an inquiry, thus it cannot be said the cautioned statement was procured voluntarily. Under the circumstance, the trial magistrate ought to have conducted an inquiry to satisfy himself that the statement was made voluntary or not. Again, in the case of **Daniel Matiku vs Republic**, Criminal Appeal No. 450 of 2016, unreported, the Court of Appeal in its previous decision in **Twaha Ali & 5 Others vs Republic**, Criminal Appeal No. 78 of 2004, unreported the Court held:

> *"If that objection is made after the trial has informed the accused of his right to say something in connection with the alleged confession, the trial court must stop everything and proceed to conduct an inquiry (or trial within trial) into the voluntariness or not of the alleged confession. Such inquiry should be conducted before the confession is admitted in evidence.....Omission to conduct an*

inquiry in case an objection is raised is fundamental and incurable irregularity because if the confession stands out to be crucial or corroborative evidence, an accused would be convicted on evidence whose source is doubtful or suspicious."

Also, the above cautioned statement of the first accused was not read out in court as the practice of the law which is irregularity. The irregularity was also conceded by the learned state attorney for the republic for being fatal as per the cases she cited to me of **Edgar Kayumba vs DPP** and **Ramadhan Mboya Mahimbo vs Republic** [supra].

The same irregularity happened to PW4 when testified to have recorded extra judicial statements of the appellant and his fellow accused (exhibit P6 and P7 respectively) when in the course of clearing appellant and his fellow accused's statements for admission, the appellant and his fellow accused objected to the admission on the ground that they never recorded any statement. That means the appellant and his fellow accused person repudiated their confession statement recorded before justice of peace PW4. Under the circumstance, again the trial magistrate ought to have conducted an inquiry to satisfy himself that statements were actually made by them or not.

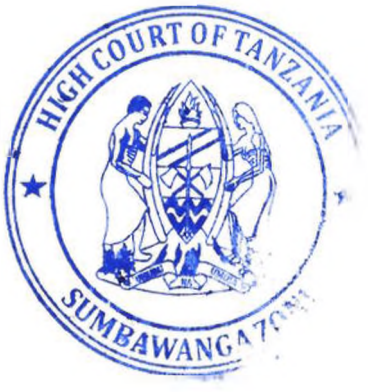
The same irregularity done by the trial court when PW5 who recorded cautioned statement of the 2nd accused one Samwel Juma, co-accused of the appellant. When clearing the cautioned statement of the Samwel juma for admission the accused objected to the admission on the ground that the statement was not the one he recorded. The witness did not read to him. Thus, the accused retracted his confession. Therefore, as discussed above, the proper procedure was for the trial magistrate to conduct an inquiry to satisfy himself that the statement was made by the accused.

So having expunged exhibit P1 (certificate of seizure), P2 (elephant tusk), P5 (cautioned statement of the appellant), P6 (extra judicial statement of the appellant), P7 (extra judicial statement of the appellant's co-accused) and P8 (cautioned statement of the appellant's co-accused) what remaining is exhibit P3 (chain of custody) and P4 (Trophy valuation report) which I find cannot suffice to prove the case beyond reasonable doubt.

In the premise, I am satisfied that the prosecution has not sufficiently discharged the burden of proof. The charge against the appellant was not proved beyond reasonable doubt. The conviction and sentence meted out against the appellant are hereby quashed and set aside. The appellant be

set at liberty unless otherwise lawfully held in connection with any other criminal offence.

It is so ordered.



D. B. NDUNGURU

JUDGE

20.10.2022