THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MOROGORO DISTRICT REGISTRY)

AT MOROGORO

CRIMINAL APPEAL NO. 49 OF 2022

(Originating from Economic Case No. 10 of 2020 the District Court of Morogoro)

OMARY SAID @ LUBAWA..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGEMENT

Hearing date on: 26/10/2022
Judgement date on: 09/11/2022

NGWEMBE, J.

The appellant Omary Said Lubawa is challenging both, his conviction and sentence meted by the trial District Court of Morogoro. The appellant was arraigned in court for the offence of Unlawful Possession of Government Trophies contrary to section 86 (1)(2)(b) and (3) of **the Wildlife Conservation Act, No. 5 of 2009 [Cap 2838]** read together with paragraph 14 of the First Schedule to, and section 57 (1) and 60 (2) of **the Economic and Organized Crimes Control Act [Cap 200 RE 2002].**

It was alleged in the particulars of the charge sheet that, on the 3rd day of December, 2017 at Mvuha Village within the district and region of Morogoro was found in possession of Government trophies to wit; two (2) elephant tusks weighing 10.3 kilograms worth USD. 15,000

equivalent to Tshs. 33,300,000/= the property of the United Republic of Tanzania without a permit or licence from the Director of Wildlife.

The evidence levelled by the respondent/Republic herein was to the effect that, the Wildlife Officers got information from an anonymous informer that, the appellant was in possession of elephant tusks and wanted to sell them. A trap was devised by the Wildlife Officers in collaboration with police officers at Mvuha Police Station. The officers disguised to be the customers willing to purchase those tusks and agreement was reached to sell at Tshs. 250,000/= per kilogram. He took the officers who pretended to be his customers near to the place he hid those elephant tusks. The customers asked him to get in their vehicle with the tusks for the business. Thus, they asked him as to whether he had any permit from the Director of Wildlife. He replied that he did not have. That is when they arrested him and seized those trophies.

He was taken to Mvuha Police and later to Morogoro Central Police where he was interrogated. The Republic claimed that, he confessed to have committed the offence and a cautioned statement was recorded. But he denied to have made any confession.

After full trial, the trial court convicted the appellant and sentenced him to serve twenty (20) years imprisonment. Immediately thereafter timely he issued notice of intention to appeal, and lastly actualized his intention by instituting his grounds of appeal clothed with ten (10) grievances to be referred in the course.

On the hearing of this appeal, the appellant was unrepresented, while the Republic was represented by Ms. Jamilah Mziray learned State Attorney. When the appellant was invited to address this court on his

grounds of appeal, unfortunate he just exhibited his belief that the grounds he has raised are sufficient for this court to do justice. Thus, he prayed this court to let him free.

In turn, the learned State Attorney forcefully addressed all grounds seriatim. The first ground is related to a complaint that, when the case was about to start, the charge was read over to him, but he was not allowed to plea thereto. Responding on this point, Ms. Mziray resisted this ground by submitting that, the appellant pleaded as per the law as per pages 4 and 5 of the proceedings.

The second ground is related to section 210 of **The Criminal Procedure Act** that was not complied with. The learned State Attorney discredited such complaint by referring to the testimonies of PW1. Conceding impliedly, she argued that, the requirement is optional and did not cause prejudice to the appellant. To strengthen her stance, she cited the decision in the case of **Emmanuel Mosha and others Vs. R, Criminal Appeal No. 188 of 2018.**

The appellant's third ground was related to the trial court's reliance to cautioned statement which was only for identification purpose and same was admitted in court as exhibit PE3 without first clearing it. Ms. Mziray pointed out that, exhibit PE3 was admitted after inquiry and thus, it was cleared for admission. She referred this court to page 17 of the proceeding.

Going further, the learned State Attorney took ground 4, 5 and 6 together and argued that, the gist of these grounds was that exhibit PE1, elephant tusks were not properly identified as there was contradiction amongst witnesses, while chain of custody was not established. In responding therein, she seriously contested this

lamentation by saying there was no contradiction. Referred to the testimonies of PW1, PW4, PW5 and PW6 were sufficient on the marks of the said exhibit registered as 426/2017 as marked by PW6. At Page 31, 37 and 39 of the proceeding, PW3's testimony established the chain of custody clearly.

The appellant's complaint in ground 7 is that exhibit PE4–seizure certificate was improperly admitted since PW1 was recalled without his opinion and when the said witness identified the exhibit, he was not allowed to comment. On this ground, Jamilah Mziray did not have much to argue, she briefly submitted that, the recalling of PW1 did not prejudice the appellant.

In respect of 8th ground, the appellant challenged the trial court for disregarding the evidence that, the elephant tusks (exhibit PE1) were planted to him. No independent witness was called, the wildlife officer's car was not searched. Also argued that, he was beaten, tortured and injured by the arresting officers. In turn the Republic responded that, the ground lacked merits, thus the trial court's judgement was based on analysis of the whole evidences adduced before it, which pointed to the appellant. Insisted that the judgement did not only rely on the witnesses of PW3 and exhibit PE1, but on the whole evidences adduced during trial.

On ground 9 and 10 the appellant attacks the trial court in convicting the appellant based on unreliable and contradictory evidences, which did not prove the offence beyond reasonable doubt. The State Attorney, opposed strongly those grounds. Insisted that the evidence was established that the appellant was found in unlawful possession of the elephant tusks. The offence was proved against the

appellant beyond reasonable doubt. Thus the appellant was properly convicted and sentenced in accordance to law. Finally, she prayed this appeal be dismissed forthwith and the decision of the trial court be upheld.

Having summarized all ten grounds of appeal, now the duty of this court is to determine the merit and demerits of this appeal. Being aware that, this is the first appellate court, therefore, it has a duty to re-evaluate the whole evidence adduced during trial and make its findings. The rule of placing the first appellate court to reevaluate the whole evidences of the trial court has been established long time ago and it has been followed in many precedents. Some of the old decisions on the duty of the first appellate courts are in the cases of **Salum Mhando Vs. R [1993] T.L.R. 170; Siza Patrice Vs. R, Criminal Appeal No. 19 of 2010; Bonifas Fidelis @ Abel Vs. R [2015] T.L.R. 156; and Alex Kapinga & 3Others Vs. R, Criminal Appeal No. 252 of 2005.** In **Siza Patrice,** it was *inter alia* held: -

> *"We understand that a first appeal is in the form of a rehearing. The first appellate court has a duty to revaluate the entire evidence in an objective manner and arrive at its own findings of fact if necessary"*

In so considering this appeal, I have opted to deal first with those grounds raising questions of law and at last deal with those challenging the evidence. It follows therefore that, grounds 1,2,3, & 7 are raising viable legal issues and the rest I will discuss them later on.

The first ground has risen two important legal issues which are related to the jurisdiction of the trial court and sections 2, 3 and 12 (3),

(4) and (5) of the **Economic Organized Crimes Control Act [Cap 200 RE 2002] now R.E 2022.**

An inclusive construction of the above is that, all economic offences are only triable by the Corruption and Economic Crimes Division of the High Court. Subordinate courts can only have jurisdiction to try economic offence cases when is conferred jurisdiction by the above High Court Division or when the Director of Public Prosecutions (DPP) or an authorised State Attorney, by a certificate under his hand so confers the subordinate court to try the case. It would follow therefore that, when a charge is placed before a subordinate court, such court will not have jurisdiction not even to take plea.

In respect to this appeal, the record is clear that the proceedings at the trial court were in respect of economic offence of unlawful possession of government trophy. What transpired on 30/01/2020 was that a charge was read over to the appellant, but plea was not taken for want of jurisdiction (see page 1 of the proceedings). After filing in court the DPP's certificate (consent), the charge was read over to the appellant/accused on 26/03/2020 as reproduced hereunder: -

> "***Senior State Attorney:*** *The matter is coming for PHg. I pray to tender certificate conferring jurisdiction and consent from Senior State Attorney I/C.*
>
> ***Accused:*** *No objection.*
>
> ***Court****: The consent and certificate conferring jurisdiction admitted.*
>
> *Sgd. A. Ringo*
>
> *26/03/2020.*

Court: *The charge read and explained to accused person who is asked to plea thereto.*

Accused*: It is not true."*

Taking from the above, this court finds that, the charge was properly read over to the accused and he pleaded in accordance to law. Therefore, the first ground lacks merits and the appellant has no reason to complain.

The second ground of appeal is related to section 210 (3) of **CPA** as was rightly recorded by the trial court in page 10. The spirit of the provision places a duty on the magistrate to inform the witness that he is entitled to have his evidence read to him. It reads: -

"The magistrate shall inform each witness that he is entitled to have his evidence read over to him and if a witness asks that his evidence be read over to him, the magistrate shall record any comments which the witness may make concerning his evidence."

The rationale of the provision is to protect the evidence in the court record by ensuring that, every testimony is properly recorded to prevent distortion. Same was observed in the case of **DPP Vs. Hans Aingaya Macha, Criminal Appeal No. 449 of 2016**.

There is no doubt that section 210 (3) of **CPA** was not followed. The current legal position is that the remedy for contravention of the procedural provisions, section 210 (3) inclusive, will depend on whether the contravention prejudiced any of the parties. This is what was held in the case of **Flano Alphonce Masalu @ Singu Vs. R, Criminal Appeal**

No. 366 of 2018, among other cases where the Court of Appeal resolved as quoted hereunder: -

> *"Admittedly, in **Mussa s/o Abdallah Mwiba** (supra), cited by Mr. Mtobesya, the Court held such an irregularity as fatal. However, in our earlier decision in **Jumanne Shaban Mrondo Vs. Republic,** Criminal Appeal No. 282 of 2010 (unreported), where we confronted an identical irregularity, we emphasized that in every procedural irregularity the crucial question is whether it has occasioned a miscarriage of justice. We, then, reasoned that:*
>
> *"**In Richard Mebolokini v, Republic [2000] T.L.R 90**, Rutakangwa, J. (as he then was) was faced with a similar complaint The learned judge observed that when the authenticity of the record is in issue, non-compliance with section 210 may prove fatal. We respectfully agree with that observation. But in the present case the authenticity of the record is not in issue, at least, the appellant has not so complained. In the circumstances of this case, we think that non - compliance with section 210 (3) of the CPA is curable under section 388 of the CPA"*

In this matter, authenticity of the record is not questioned, the presumption of sanctity of the court record is not rebutted and no prejudice has been occasioned to the appellant for not complying with the above section. It follows therefore that, the irregularity falls within the dimensions of curable defects under section 388 of the Act. Same provides: -

"Subject to the provisions of section 387, no finding sentence or order made or passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or in any inquiry or other proceedings under this Act; save that where on appeal or revision, the court is satisfied that such error, omission or irregularity has in fact occasioned a failure of justice, the court may order a retrial or make such other order as it may consider just and equitable."

On the above reasoning, the second ground, though staged on true facts, yet did not occasion any injustice to the appellant, accordingly this ground lacks merits same is dismissed.

The 3rd and 7th grounds of appeal are interrelated and will be delt with together. The appellant lamented bitterly on exhibit PE3 (cautioned statement) and PE4 (seizure certificate) that were improperly admitted during trial. Clarified that PE3 was not cleared prior to tendering in court and exhibit PE4 was identified by PW1 without availing the appellant to opine, and that chain of custody was not established.

Beginning with the general rule that, where an exhibit is admitted in contravention of the mandatory legal procedure, it will be expunged from the record. The rationale is to ensure that, suspects are not prejudiced in investigation and in the whole trial before the courts of law. This position was clearly emphasized by the Court of Appeal in the cases of **James @Shadrack Mkungilwa and another Vs. R [2012] T.L.R. 2392 [CA] and Steven Salvatory Vs. R, Criminal Appeal 275 of 2018, (CAT at Mtwara).**

The question is whether such rule is applicable in this appeal. This question is answered by perusing the trial court's records. The trial court's proceeding, correctly as the learned State Attorney so submitted, the testimony of PW2 F312 DCPL Kimea at pages 16 and 17, shows that the cautioned statement (exhibit P3) was recorded according to the dictates of law. The theory brought forward by the appellant in his defence, that he was just asked to sign a piece of paper he did not know its contents, is implausible, let alone the allegation of torture and involuntariness which was determined and correctly overruled by the trial court during trial.

I have closely examined the contents of exhibit PE3, I am satisfied that same would not have come from nobody, but the appellant himself. The statement would not be given by the police officers as the appellant alleges. Apart from the details being much specific and personal, the account of events is coherent with the testimonies of PW1 and PW3 who had correspondence with the accused and eventually arrested him, also PW2 who recorded his statement.

Regarding exhibit PE4, which was tendered by PW1 after being recalled. I have considered the appellant's grievance that PW1 was recalled without him giving an opinion and when the said witness identified and tendered exhibit PE4 he was not allowed to comment. The record is to the contrary, I quote relevant part at page 27: -

> ***"Witness:*** *I identified the certificate of seizure on my signature and the fingerprint of the accused person and his signature. I pray the court to produce in court as exhibit.*
> ***Accused:*** *I pray the certificate of seizure not admitted in court because my relative were not called to witness the*

seizure. Also, the Ward Executive Officer was not called to witness. When I was signing the certificate of seizure"

What followed, the respondent replied and the accused was invited for rejoinder, then the court overruled the objection and admitted the certificate (PE4) while complying with all other subsequent procedures at page 27 and 28. The above forms a strong justification for this court to dismiss ground 3 and 7 altogether.

I will now move to grounds 4, 5, 6 and 8 whose baseline is to the effect that, the elephant tusks (exhibit PE1) were not properly identified. The appellant claimed that, the chain of custody was not established. Exhibit PE1 were planted on him, no independent witness and the wildlife officers' vehicle was not searched.

Regarding independent witness and chain of custody, the law requires, where practicable, an independent witness be called to witness search and seizure of exhibits as per section 38 (1) and (3) of **CPA.** When the exhibits are seized from the accused, there must be a clear account of their custody, this is what in law is termed as Chain of Custody. This position was emphasized in the case of **Paulo Maduka and 3 Others Vs. R, Criminal Appeal, No. 110 of 2007,** among others. The rationale is to take guard against all the possibilities of implicating innocent persons to criminal charges. However, chain of custody will not be tested against the higher standard of perfection, instead circumstance of the case should be regarded.

In the case of **Director of Public Prosecutions Vs. Stephen Gerald Sipuka, Criminal Appeal 373 of 2019,** the Court of Appeal held: -

"It is settled law that, though the chain of custody can be proved by way of trail of documentation, this is not the only prerequisite in dealing with exhibits. There are other factors to be considered depending on prevailing circumstances in each particular case. In cases where the relevant exhibit can neither change hands easily nor be easily compromised then principles as laid down in the case of Paulo Maduka (supra) can be relaxed. In all circumstances, the underlying rationale for ascertaining a chain of custody, is to show to a reasonable possibility that the item that is finally exhibited in court and relied on as evidence, has not been tampered with along the way to the court."

In our case there is ample evidence that the appellant entered in the PW3's vehicle while he was carrying the luggage with elephant tusks. This was in fulfilment of the business as the Wildlife Officers had disguised as his customer who needed to buy those tusks. Arrest was made there in the car, at Mvuha, in the forest where it would not be easy to have an independent witness.

The evidence indicates that, after arrest, the appellant was taken to Morogoro Central Police Station along with the elephant tusks seized under the certificate (PE 4) on 03/12/2017, and were handed over to PW5 E. 471 Sgt Hamad, Police Officer of Matombo on the same day evening. Thereafter, PW5 handed the tusks to PW6 (CPL Kwilinus) exhibit keeper at Morogoro Central Police on 04/12/2017 at 08:00 AM. Entries were made in exhibit PE6 (Exhibit Register) as 426/2017 for two elephant tusks in a sulphate sack whose ID was 293/2017. PW6 called PW4 Joseph Bunanyo, a Wildlife Officer to the Station, who evaluated

the tusks in exhibit PE 5. On 18/11/2019, the same was taken to court by PC Lifa and admitted as exhibit PE1.

Considering the circumstance surrounding the whole process, I am satisfied that, from the time of arrest and seizure of the tusks, the chain of custody was clear and intact up to the day of tendering them in court. I understand that there was no independent witness, arrest was made in the car at Mvuha, in the forest where it would not be easy to have an independent witness.

I also went through the provisions of section 106 of The Wildlife **Conservation Act, (now Cap 283 RE 2022)** and found that a requirement of independent witness in search and seizure is not an absolute rule, its applicability though strict, is subjective. This is what the section 106 (1) provides: -

> **Section 106 (1)** *"Without prejudice to any other law, where any authorised officer has reasonable grounds to believe that any person has committed or is about to commit an offence under this Act, he may-*
> *(a) require any such person to produce for his inspection any animal, game meat, trophy or weapon in his possession or any licence, permit or other document issued to him or required to be kept by him under the provisions of this Act or the Firearms and Ammunition Control Act;*
> *(b) enter and search without warrant any land, building, tent, vehicle, aircraft or vessel in the occupation or use of such person, open* ***and search any baggage or other thing in his possession: -***

Provided that, no dwelling house shall be entered into without a warrant except in the presence of at least one independent witness;"

In the same spirit, the Court of Appeal in the case of **Emmanuel Lyabonga Vs. R, Criminal Appeal 257 of 2019,** which also involved seizure of government trophy in absence of independent witness, considering circumstances of arrest, search and seizure ruled *inter alia*: -

"Moreover, since the appellant's polythene bag was searched and seized in a remote bushland at Kitandililo, not at his dwelling house, in circumstances that no independent witness could be found, we are in agreement with the learned State Attorney that the operation was properly conducted"

In this appeal, the testimonies of PW1 and PW3 indicates that a trap was staged near Mvuha Secondary School, and the appellant was trapped and finally was arrested at the forest more than 3 Kilometers from the school compound. I am satisfied that under such circumstance, where the officers were communicating with the informer and the informer was communicating with the appellant who intended to strike a deal on those ivory. Obvious it was very difficult to secure an independent witness without aborting the trap. But in a full examination of the process, the appellant was not prejudiced in any way. In totality these grounds (4, 5, 6 and 8) equally lacks merits same must follow the same trend.

Considering grounds 9 & 10 jointly, the appellant alleges that the charge was not proved as the evidence against him was unreliable and contradictory. In turn the learned State Attorney stood firm to oppose that allegations and strongly submitted that the offence against the

appellant was established and proved beyond reasonable doubt. Thus the appellant was properly convicted and sentenced according to law.

Considering more specific, the issue for this court to determine is whether the offence against the appellant was proved to the standard required by law? In answering this question, this court has in mind the relevant legal principles governing criminal justice in our jurisdiction. I will start with the rule of proof in criminal trials. It is settled that; the prosecution is bound to prove the offence beyond reasonable doubt. This is what entails under sections 3 (2)(a), 110 and 112 **of the Evidence Act, Cap 6 R.E 2019 (now R.E 2022).**

The same spirit had been expounded in a number of decisions by this court and the Court of Appeal. **Mohamed Katindi and another Vs. R, [1986] TLR. 134** (HC); **Tino s/o John Mahundi Vs. R, Criminal Appeal No. 21 of 2020, (HCT–Mtwara), Nathaniel Alphonce Mapunda and Another Vs. R, [2006] T.L.R. 395;** and **William Ntumbi Vs. Director of Public Prosecutions, Criminal Appeal No. 320 of 2019** these are few cases among many.

Having deeply considered the testimonies and exhibits of both sides at the trial court, I find the following were established and proved beyond reasonable doubt: - first, the appellant had the elephant tusks in his possession and of course in company of his colleague who are at large; second the appellant intended to sale the said tusks and in the course the Wildlife Officers, in disguise of potential buyers came in contact with the appellant, agreeing the price of TShs. 250,000/- per Kilogram; in the course of effecting that illegal business, which was to be concluded in the Wildlife Officers' vehicle, wherein the appellant brought those tusks, alas he was arrested by the disguised potential

buyers; the appellant confessed to have been found in possession of the elephant tusks and that he did not have permit from the respective authorities; and all other procedures were followed up to the appellant being charged with the offence.

I have considered the appellant's theory at the trial court, that he was just arrested when he was going to Mvuha from Lukulunge Village and the contention of contradictions of the prosecution evidence. I have revisited the whole evidences and generally, there was no contradiction in the testimonies of the prosecution save for one on identification of the elephant tusks at Mvuha Police and Morogoro Central Police respectively. PW5 stated that the elephant tusks were marked MAT/IR/193/2017, but all other witnesses and the exhibit register referred to as MAT/IR/293/2017 left no doubt. This is the contradiction on which the appellant stood persistently.

Regarding contradictions, the law is settled that, courts should analyse and resolve them as to whether the said contradiction goes to the root of the case or otherwise. This is the duty of the court in its analysis of the evidence, even when no one raises the same. In the old case of **Mohamed Said Matula Vs. R, [1995] T.L.R. 3,** the Court of Appeal ruled on the duty of the trial judge that: -

> *"He had a duty to consider the inconsistencies and contradictions and try to resolve them if he could. Else he had to decide whether the inconsistencies and contradictions were only minor or whether they were such as did go to the root of the matter"*

This has remained an unshakable principle of law followed by our courts. Some of the cases are **Said Ally Ismail Vs. R, Criminal**

Appeal No. 241 of 2008; Shukuru Tunugu Vs. R, Criminal Appeal No. 243 of 2015.

The rule is further developed that where a trial court did not address the contradictions, it is upon the first appellate court to address and resolve them in exercise of its duty as the first appellate court. In re-evaluate the evidence, those contradictions should be resolved. This was so held and demonstrated in the case of **Mapambano Michael Mayanga Vs. R, Criminal Appeal 268 of 2015.**

In this appeal, the trial court did not address the contradictions pointed out by the appellant and this being the first appellate court I have analysed those contradictions albeit in brief as above.

Having examined those contradictions along with the legal principles as above, I find that, the complained contradictions are minor and much attributed to loss of memory in minor details due to lapse of time. The arrest and seizure were made in year 2017, while the matter was tried in 2020, the lapse of three years might have contributed to human forgetfulness of those details. It is known, naturally and in law that with lapse of time, witnesses may lose perfection in minor details. Such trivial variances should not be treated with significance.

It is a rule also, in resolving contradictions, evidence must be treated as whole. Same was detailed decided in the case of **Dickson Elia Nsamba Shapwata and another Vs. R, Criminal Appeal 92 of 2007, (CAT–Mbeya)** when they held: -

> *"In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements"*

As alluded earlier, not all contradictions will favour the accused, but the effect of the said contradiction to the gist of the case will be a decisive determinant. (See **Said Ally Ismail Vs. R** (supra)), where the Court of Appeal observed *inter alia:* -

> *"Yes, we agree with Ms. Mushi that these are contradictions within the case for the prosecution. However, it is not every discrepancy in the prosecution's witnesses that will cause the prosecution's case to flop. It is only where the gist of the evidence is contradictory then the prosecution's case will be dismantled"*

This court is therefore of the settled view that, such contradiction of citing the identification of exhibit P1 as MAT/IR/193/2017 instead of MAT/IR/293/2017, was immaterial, provided that the evidence available taken as whole gives proof beyond reasonable doubt. As such the appellant would not benefit from those complaints on contradictions. In the case of **Magendo Paul & Another Vs. R, [1993] T.L.R. 220**, the Court of Appeal warned that: -

> *"As it was held by Lord Denning in Miller v Minister of Pensions: the law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour ... the case is proved beyond reasonable doubt"*

In this appeal, there was enough evidence against the appellant, including his confession, which makes him the truest depiction of what transpired on the fateful day. Therefore, this court proceed to dismiss grounds 9 and 10 altogether, for lack of merits.

Having so found that all ten grounds of appeal raised by the appellant lacks significant value to change the position arrived by the trial, obvious the whole appeal lacks merit. The conviction and sentence of the trial court are upheld. Consequently, I proceed to dismiss this appeal forthwith.

Order accordingly.

Dated at Morogoro in chambers this 9th day of November, 2022

P. J. NGWEMBE

JUDGE

09/11/2022

Court: Judgment delivered in chambers this 9th day of November, 2022 in the presence of the appellant and Ms. Jamila Mziray State Attorney for the respondent Republic.

THE HIGH COURT OF TANZANIA

P. J. NGWEMBE

JUDGE

09/11/2022