IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF DODOMA

AT DODOMA

DC.CRIMINAL APPEAL NO.49 OF 2022

JOHN ABEL CHITINDE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from Judgment of Bahi District Court-Mwalilino, RM)

Dated 12th of April, 2022

In

Economic Case No. 03 of 2020

.....

JUDGMENT

9th&25thNovember, 2022

MDEMU, J.:

This appeal originates from the judgment of the District Court of Bahi, in Economic Case No.3 of 2020. In that trial Court, the Appellant herein was arraigned for unlawful possession of three pieces of elephant tusks valued at Tshs. 103, 759, 200/= contrary to the provisions of Section 86 (1) (2) (b) 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) both of the Economic and Organized Crime Control Act, Cap.200 R.E. 2019.

According to the prosecution case comprising of TNP.2389 Matutu Adam Sinde, Godson Christopher, Emmanuel Frank, H.8120 D/C John, H.9740 PC. Mohamed, Donisian Beda Makoi, WP 2265 SSgt. Mgeni PW1, PW2, PW3, PW4, PW5, PW6 and PW7 respectively, on 24th of April, 2020 the Appellant was found possessing such trophies following a trap organized upon information that the Appellant was trading in government trophies. On the fateful day, PW1, PW2, PW3 and one Zephania Elifadhiri under pretense to be customers had conversation with the Appellant and agreed to meet at Makulu in Bahi after request by prosecution witnesses to meet in Dodoma for the business transaction went futile. At night, the Appellant, dropped from a motorcycle, went to the prosecution witnesses as agreed. He had a white luggage which when opened, three elephant tusks were seized.

Along with the seized elephant tusks (P5), the prosecution also tendered in evidence certificate of seizure (P1), caution statement of the Appellant (P2), chain of custody document (P3), exhibit register (P4) and trophy valuation certificate (P6). In totality of this evidence, together with the evidence of the Appellant, the trial court found the accused person guilty thus convicted and sentenced him to twenty (20) years prison term. As said,

this was on 12th of April, 2022. The Appellant was aggrieved by this decision hence the instant appeal on the following nine grounds:

1. *That, your honour judge, the learned trial Magistrate erred in law when closed the prosecution's case not in compliance of the requirement of section 231(1) (a) (b) of the Criminal Procedure Act, Cap.20 R.E. 2019.*
2. *That, your honour Judge, the Appellant was convicted while the Prosecution side did not prove the case beyond reasonable doubts.*
3. *That, your honour Judge, the learned trial Magistrate erred in law and fact by convicting the Appellant when received evidence of Elephant tusk without known its weight and instead of received the evidence of the prosecution side that it was equivalent of the killed animal. The act done by the trial Magistrate was not within the law since the law is direct that not always necessary one who is found in possession of Government Trophy to be killer of a certain animal, weighing of the same is highly recommendable.*

4. *That, your honour Judge, apart from PW1, PW2, PW3, PW4, PW5, PW6 &PW7 who were the Police Officer and park Warden there are was no other independent witness who come before the Court to testify the evidence in support of prosecution case.*
5. *That, your honour Judge, the learned trial Magistrate erred in law and in fact by convicting the Appellant to twenty (20) years in jail while there was a failure by the Police Officer to comply with the mandatory provision of Section 38(3) of the Criminal Procedure Act, Cap. 20 R.E 2019.*
6. *That, your honour Judge, the learned trial Magistrate erred in law and in fact when convicted the Appellant without considering that the prosecution case did not establish the evidence of chain of custody from where it was alleged to be arrested until it was brought in Court as an exhibits.*
7. *That, your honour Judge, the learned trial Magistrate erred in law and misdirected herself in finding that the Appellant was found in possession of Government Trophy.*

8. *That, your honour Judge, the learned trial Magistrate had she carefully examined the evidence before she could have discovered that there was a very higher possibility for the Appellant to be implicated by the case.*
9. *That, your honour Judge, the learned trial Magistrate erred in law and in fact when admitted the statement basing on the procedural irregularities this is because the Appellant objected the said statement not to be tendered unfortunately the trial Magistrate admitted them without conducting a trial within a trial to ascertain if it was obtained voluntarily see on pg. 55 of the Court proceedings.*

On 9th of November, 2022 appears before me the Appellant unrepresented and Mr. Malogoi, Principal State Attorney and Ms. Kezirahabi, State Attorney for the Respondents arguing the appeal. The Appellant adopted his filed grounds of appeal to be his submissions and prayed to be released on that account for there is no offence he committed.

The Respondent resisted the appeal. Mr. Malogoi argued each ground of complaint seriatim. Beginning with the first ground of appeal, the learned Principal State Attorney could not perceive the basis of the complaint

because at page 79 of the proceedings, the trial magistrate found the Appellant to have a case to answer and addressed him of his right to prepare a defence. In his view, this is what is required under section 231 (1)(a) (b) of the Criminal Procedure Act, Cap.20 (the CPA).

On the 2nd ground of complaint, the learned Principal State Attorney argued that, the case was proved beyond reasonable doubt and that in the course of analysis of evidence, the learned trial Resident Magistrate considered both the prosecution and defence case before arriving at the conviction and sentence which, in his view, both were proper.

He submitted in the 3rd ground of appeal that the weight of the government trophies was determined as per page 13 of the judgment. According to him, in exhibit P5 (the trophies) found in possession of the Appellant, PW6 properly identified the trophies by describing the weight, size and colour and that it was up to the Appellant, in terms of section 86 (1) of the Wildlife Conservation Act, Cap.283 R.E. 2019, to establish lawful possession through production of a license.

Regarding want of independent witnesses complained in the 4th ground of appeal, the learned Principal State Attorney conceded but was of the view

that, such witnesses are from different government departments and had different roles prayed in the entire transaction. He added that the Appellant have not stated how he was prejudiced and presence of any likelihood for the witnesses to be biased.

Submitting in the 5th ground of appeal, Mr. Malogoi stated that, Section 38(3) of the CPA which is on search in buildings, vessels etc. is irrelevant in the instance case and has nothing to do with the arrest of the Appellant. In his observation, exhibit P1 (certificate of seizure) was the relevant document in the circumstances because the Appellant was not searched at his premises.

The learned Principal State Attorney submitted in the 6th ground of appeal that, the chain of custody principle was properly observed. Exhibit P3 as tendered by PW5 and acknowledged at page 6 of the judgment, indicates compliance of the chain of custody. He adopted his reply in ground 3 of the appeal to be ground 7 and further submitted in ground 8 of the appeal to have supported the conviction and sentence because the evidence was overwhelming for the incarceration of the Appellant as submitted by him, Mr. Malogoi added.

It was his submissions in the last ground of appeal on illegality in the admission of the caution statement that, it is baseless because the said caution statement as per page 13 of the judgment was never deployed by the trial Magistrate as the basis of conviction. On that note, he urged me to dismiss the appeal for want of merits. The Appellant rejoined briefly that, there are documents in the file which are not correct and it was unsafe to be base conviction on them. That was all from the parties.

Going by the contents of both the prosecution and defence cases as contained in the record of the trial court, it is not disputed that the Appellant was arrested on the 23rd of April, 2020. As per the preliminary hearing record of undisputed facts, the Appellant was arrested by TANAPA officers and referred to Chamwino Police Station. Later, he was taken to Bahi Police Station by Cpl. Pilimo of Chamwino Police Station. Equally, in the record, exhibit P5 which are three pieces of elephant tusks had their way in Court through the evidence of PW5 H.9740 DC Mohamed.

The area of controversy therefore is where the Appellant was arrested and if at all he was arrested in possession of the said three elephant tusks. This one is a question of evidence and since is a criminal case, the burden is thus on the prosecution to prove beyond reasonable doubt. See **Charles**

Ndabahagati & Yusuph Issa vs. Tofilo John [2008] T.L.R. 106. In the instant appeal it has to be proved that the Appellant was arrested in possession of three elephant tusks without licence.

From the outset, I am in all fours with the Learned Principal State Attorney that the 1st and 5th grounds of appeal are baseless. At page 79 of the proceedings, the trial magistrate made a ruling that the Appellant have a case to answer. In principle, that is the dictates of section 231 (1)(a) (b) of the CPA). As seen in the record, the Appellant then defended himself and also did close his case. The section was not violated. Regarding noncompliance of section 38 (3) of the CPA complained in the 5th ground of appeal, the circumstances of this case do not permit application of the section. The prosecution case is such that, the Appellant was arrested after laying a trap and not in his premises as to require issuance of a search warrant.

The remaining grounds of appeal will be resolved as one. As alluded above, the answer to two questions on where and circumstances regarding arrest of the Appellant and whether he was arrested in possession of the seized three elephant tusks. In the prosecution case, there was prior information from an informer that the Appellant was dealing or trading as

the case may be, in government trophies. PW1, PW2 and PW3 are the three testified officers who laid the trap and ultimately arrested the Appellant. The arrest, according to these witnesses, was in the forest of Chali Makulu Village in Bahi District. At the scene, the Appellant was dropped by a motorcycle.

Smart queries; why did the five arresting officers did not impound a motorcycle? Was the Appellant arrested at Chali Makulu Village? If was arrested at that village, next is whether Chali Makulu village and Makulu Village contained in the charge is one and the same village. What was the reason for taking the Appellant to Chamwino Police Station and not Bahi Police Station? Which police station between Chamwino and Bahi is near to Makulu or Chali Makulu Villages?

Resolving those queries partly resolves what is complained in ground 4 of the appeal on want of independent witnesses. As said, there was prior intelligence information that the Appellant was in possession of government trophies and was looking for a customer. In my considered view, a trap in the circumstances of this case would have involved planted civilian customers if not in the course of arresting, to involve even local leaders of the local area. This kind of investigation would have greatly marked a difference to arresting a person in the normal duties of patrol by park

wardens. I am saying so because the Appellant in his evidence stated to have been arrested at home. It was the duty of the prosecution to establish that the Appellant was not arrested at home. In it therefore, the need to have independent witnesses was unavoidable undertaking. In the case of **Betrod Wilbert Kigodi vs. Republic [2008] T.L.R.79** on independent witnesses, it was observed that:

(i) There is no law which prevents a court from relying on evidence of police officers only ***but peculiar circumstances of a particular case may necessitate independent evidence****. (emphasis supplied)*

In the instant case, there are peculiar circumstances, as said, for requirement of independent witnesses, **one**, there was prior information that the Appellant was looking for customers to sell elephant tusks, **two**, not known which village between Makulu Village or Chali Makulu Village the Appellant was arrested. **Three**, the evidence of the Appellant which has not been contradicted is such that, near the place he was arrested there was a Village Office. At page 81 of the proceedings regarding these assertions the Appellant stated that:

I asked their name, one informed me with the name of Hamisi. The other did not mention his name. they were using motor cycle transport, ahead there is the office of VEO but they refused.....

Four, reasons for not arresting the person who ferried the Appellant to where PW1, PW2 and PW3 were have no explanation. It be remembered that as those witnesses laid a trap, meant they were well prepared. **Last** is the reason for taking the Appellant to Chamwino first and then Bahi.

The other point to consider is in respect of variance between the charge and the evidence. As alluded earlier on, the Appellant was arrested at Chalu Makulu Village. This is the evidence of PW1, PW2 and PW3. The charge in the particulars of offence laid at the door of the Appellant shows that the offence was committed at Makulu Village. It has not been proved by way of evidence that Makulu Village and Chalu Makulu Village is one and the same village. Consequence on variance between the evidence and the charge is one that the prosecution case was not proved beyond reasonable doubt. See **Thabit Bakari vs. the Republic, Criminal Appeal No. 73 of 2019** (unreported).

Another question to ask is where valuation of the trophies were performed? In the evidence of PW6 who made the valuation states to have done it at Kondoa. At page 70 of the proceedings, PW6 on this testified that:

> *On 5/6/2020, I received summons from OC CID Bahi that he will send investigator to come at Kondoa, she came Afande Mgeni handled to me with three elephant tusks in order to identify and evaluate it.*

This evidence contradicts that of WP.2265 D/C Mgeni (PW7) who stated to have sent the trophies for evaluation to Manyoni without naming the person who made the valuation. She testified on this at page 77 of the proceedings that:

> *Also, I brought the government trophy to Manyoni for identification and valuation.*

Whereas PW6 testified to have been given three elephant tusks by PW7 for valuation at Kondoa, PW7 testified to have send to unknown person for valuation at Manyoni. Certificate of Valuation itself (P6) bearing no police file number indicates that valuation was done on 11th of June, 2020 at Bahi Police Station. What a contradiction. Exhibit P6 also contain no weight of

the trophies such that complaint of the Appellant in ground three on want of weight cannot be casually dismissed certainly for one reason, how did the officer made the valuation determined the value, if at all there was any trophy ever valued.

Of interest perhaps is the chain of custody exhibit P3 documenting chronological events and movement of the seized three pieces of elephant tusks. The Appellant did not object to its being tendered in evidence. That notwithstanding, the said exhibit is not related to this case. It is in respect of case titled as CHAM/IR/260/2020. According to the evidence of PW7, the file she was investigating is BAHI/1R/232/2020. At page 76 of the proceedings, PW7 testified as hereunder on this point:

> *I received file with number Bahi/IR/232/2020 the offence was unlawful possession of government trophy, the Accused was John Abel*

From the foregoing evidence, exhibit P3 has nothing to do with the offence the Appellant is charged. If at all PW1, PW2 and PW3 arrested the Appellant in possession of three elephant tusks, then the elephant tusks tendered as exhibit P5 in line with defects in exhibit P6 (Certificate of

Valuation) it was not the trophies documented in exhibit P3, the chain of custody.

In all, the prosecution case rests on unsolved contradictions which, had the trial court directed to its duty of retrieving and determining to what extent such contradictions go to the root of the matter, would not have concluded on the guilty of the Appellant. See **Mohamed Said Matula vs. Republic [1995] T.L.R.3.** I am saying so because contradictions on place of arrest, what was seized, where valuation of the trophies were done, charge and evidence encompassing variance and the like, in my view, went to the root of the case. That said, the appeal is hereby allowed. Conviction and sentence met by the trial court is accordingly quashed and set aside. The Appellant be released from custody unless held lawful for some other causes. It is so ordered.

Gerson J. Mdemu

JUDGE

25/11/2022

DATED at **DODOMA** this 25th day of November, 2022

Gerson J. Mdemu

JUDGE

25/11/2022