IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

CRIMINAL APPEAL NO. 95 OF 2021

(C/O Sumbawanga District Court Economic Crimes Case No. 06 of 2019)

(Maira Saanane Kasonde, SRM)

MOSHI JOHN @ SHABANI ..... 1st APPELLANT

REVOCATUS ALFRED ..... 2nd APPELLANT

FAUSTIN KALIKWENDA ..... 3rd APPELLANT

BATHOLOMEO CHOMA ..... 4th APPELLANT

OSCAR SAVEL @ MALAMBWA ..... 5th APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Date: 29/03 & 09/05/2022

NKWABI, J.:

In the trial court, ten accused persons were arraigned facing a charge which had two counts. The first one is unlawful possession of Government trophies contrary to section 86(1) and (2) (c)(ii) of the Wildlife Conservation Act No. 5 of 2009 as amended by section 59(a) and (b) of the Written Laws (Miscellaneous Amendments) (No. 2) Act No. 4 of 2016 read together with paragraph 14(d) (2) and (3) of the First schedule to and sections 57(1) and 60(2) and (3) of the Economic and Organized Crime Control, Act [CAP. 200 R.E. 2002 as amended by section 16(a) and 13(b) of the Written Laws

(Miscellaneous Amendments) Act No. 3 of 2016. The first count was preferred against the 1st, 5th, 6th and 7th accused persons. The trophies, (the elephant tusks) had the value of T.shs 34,575,000/=.

The 2nd count which was against all accused persons, was unlawful dealing in Government trophies contrary to section 80(1) and 84(1) of Act No. 5 of 2009 read together with paragraph 14 (d) of the First schedule to and sections 57 (1) and 60(2) and (3) of Cap. 200 R.E. 2002 as amended by Act No. 3 of 2016. It was alleged that the appellants and the accused persons who were acquitted had no requisite documentation to warrant their dealing in the trophies.

The prosecution entered a nolle prosequi and two accused persons (Everlina d/o Chalula @ Ventula, the 9th accused person and Peter s/o Mabula, the 10th accused person) were discharged hence eight accused persons stood trial to the end. At the end of the trial, three accused persons (4th, 6th and 8th accused persons) namely Linus s/o Thomas @ Kangómbe, Kulwa Onesphoro @ Samson @ Ezekia and Sharifu s/o Said @ Gadafi respectively were acquitted of the offences they stood charged as the trial court was

satisfied that the prosecution had failed to prove the charge beyond reasonable doubt. However, the appellants were convicted for the respective offences they were charged with.

The appellants are now challenging the convictions and sentences after they were seriously aggrieved by such convictions and sentences since they believe they are innocent. The respondent is resisting the appeal urging that the offences were proved beyond all reasonable doubt.

Eight complaints against the convictions and sentences were lodged in this court by the appellants. I reproduce them verbatim:

1. *That, the trial court erred in law point and fact by convicting and sentence the appellants relying on the prosecution witness without considering that the evidence adduced by prosecutions witness was the police officer and national park officer only without calling any independent witness to prove the allegation as required by law.*
2. *That, the trial court erred in both conviction and sentence for the appellants without calling ten cell leaders in order to make the*

court to satisfy if the appellants were found in possession of the said exhibit P.E. 9 as alleged the crown prosecution side.

3. *That, the trial magistrate court misdirected himself and did not properly address himself in considering the defense evidence and analyze the evidence of prosecution. My lord this is bad in law and can lead to injustice to the other party (appellants), please refer to the case of Hussein s/o Iddi and other v/s Rep (1986) TLS 166 cited in YASINI S/O MWAKAPALA v/s Rep criminal appeal No13 of 2012.*
4. *That, the trial total wrongly in law point and fact to convict the appellants relying on caution statement which tendered before the court as an exhibit without taking into consideration that the said caution statement P.E1, P.E.2 P.E.3 and P.E. 6 was wrongly admitted before the court since the said caution statement were recorded illegal.*
5. *That, the trial court erred in law point and fact by convicting and sentence the appellants relying on the exhibit P.E. 10 while misobserved that the said certificate of seizure were not signed by the appellants and independent witness or ten cell leaders in*

order to prove if the said government trophy (Exhibit P.E. 9) were handled to the appellants and ended drawn a nully conviction for the appellants.

6. *That, the trial magistrate court was erred in both conviction and sentence for the appellants by believing the evidence adduced PW3 who testified before the court that they found the 1st appellant and the other person named Oscar John but the prosecution failed to call the said Oscar s/o John as a witness who alleged to be at the time of arresting the 1st, 6th and 7th appellants the something which bring doubt in the eye of the law.*
7. *That, the trial court grossly in law point and fact by convicting and sentence the appellants basingly on the prosecution's evidence while it fail to not out that no chain of custody tendered before the court to show where the said government trophy (Exhibit P. E. 9) were stores after handled to the appellants.*
8. *That, the case was not proved to the required standard set by law in economic Cases.*

The above justifications of appeal prompted the appellants to pray this court allows their appeal, quashs the convictions and sets aside the sentences and finally sets them at liberty. The respondent, as stated above, resisted the appeal arguing that the grounds of appeal are meritless and ought to be dismissed just as the entire appeal ought to be dismissed as well. When the appeal was called upon for hearing, the appellants appeared in person, unrepresented, while the respondent was ably represented by Mr. Simon Peres, learned Senior State Attorney.

Advancing their appeal, the 1st Appellant argued that the charge sheet against them was not proved beyond reasonable doubt for the reason that there was no independent witness. He further maintained that the trial court did not consider their defence and they were not heard. He added the caution statements were recorded contrary to the law hence inadmissible.

The certificate of seizure was not signed by the Village Executive Officer or chairperson of street. The independent witness who only signed in the certificate of seizure was not called to testify without any reason. Further to

that the chain custody was not tendered in court. For those reasons he prayed this court to allow the appeal and release them. The other appellants supported the submissions of the first appellant.

In reply submission, Mr. Simon Peres, learned Senior State Attorney urged they proved the charge beyond reasonable doubt by use of evidence of PW1, PW2, PW3 and PW8 and PW9 with the exhibits P1, P2. Further P6, P7 and exhibit P8.

Mr. Peres added, the evidence of DW6 Kulwa was used to prove the evidence under section 33 (1) of the Evidence Act. They proved the charge against the appellants. Let the 8th ground be dismissed, he urged.

Turning to the 2nd ground of appeal, that is, that the evidence was of police officers. He submitted all witnesses who gave evidence are eligible to give evidence under section 127 of the Evidence Act. Further, there are other

witnesses other than police officers. The ground of appeal be dismissed, he implored upon me.

On the 3rd ground as to lack of Ten – cell leader which is in respect of the 1st Appellant, 3rd Appellant and 4th Appellant who were imprisoned for unlawful possession of government trophies, he argued the incidence happened on the way (road) and not at a home. It was between the sellers and purchaser, so it is difficult to get a local leader. It was an emergency matter. The ground of appeal is meritless, Mr. Peres maintained.

Mr. Peres further argued that, the record shows that all appellants entered their defence. The trial court did not consider the defence of every appellant. This court however, has power to consider the defence of the appellants and come to its own conclusion. That is as per **Jafari Musa V. DPP,** Criminal Appeal No. 234/2019 Court of Appeal of Tanzania (unreported) at Mbeya at page 11. The ground of appeal be dismissed, he stressed.

As to complaint about caution statements, the same is meritless as the caution statements were recorded in accordance with the law. The 1st, 4th appellant's caution statements were not objected their admission. That also befall the caution statement of the 3rd appellant. Even the caution statements of the rest were recorded and admitted in accordance with the law. Their complaint in this court is an afterthought. Let it be dismissed, he urged.

On the ground that there was no independent witness at the seizure of the trophies (exhibit P10), Mr. Peres submitted that the ground of appeal is in respect of 1st Appellant, and 4th Appellant. It was objected before the court. The court decided on its admissibility. Lack of independent witness was caused by the circumstance. The seizure was an emergency. This ground of appeal is lacking in merit he stated and referred me to the testimony of the 6th accused.

Coming to the issue of chain of custody, it was the view of Mr. Peres that it can be proved by way of testimony. It is true that in this case chain of custody was broken when the exhibit was taken from the police to court.

But PW9 who seized the exhibit explained where the exhibits were kept. The Elephant Tusks cannot be easily changed. He referred me to **Chacha Jeremia Murimi V. Republic,** Criminal Appeal No. 551/2015 Court of Appeal of Tanzania at Mwanza at page 23 – 25 (unreported). He prayed that this ground of appeal be found meritless, and it be dismissed.

Submitting on the last ground of appeal is in respect of failure to come to testify Oscar John, Mr. Peres argued that they did all they could to get him but they were unable. It took them about a year tracing him. However, he insisted that failure to bring him did not occasion injustice. Let this court see section 33 (1) of the Evidence Act. He prayed this appeal be dismissed as it is meritless.

In rejoinder, the 1st appellant disputed the submission of the respondent. He urged the court to find their grounds of appeal to have merits as per their submission in chief. The search warrant shows that his home was searched. The search (certificate of seizure) has grave irregularities, he added.

The 2nd appellant insisted that the respondent did not prove the case against him. No evidence touched him. He prayed the court to allow their appeal. On his side, the 3rd appellant maintained that he was just arrested. He did not do anything. He was just joined to the case for being merely mentioned. He also prayed his appeal be allowed.

It was the argument of the 4th appellant that their grounds of appeal have merits. He also stated that they objected the admission of the caution statements. He prayed their appeal be found to have merits. Then, the 5th appellant insisted that he was merely mentioned. He was arrested when he was at home, which was searched.

I will start considering the 1st and 2nd grounds of appeal in conjunction with the 8th ground of appeal as they relate. On them the appellants insisted that the certificate of seizure was not signed by the Village Executive Officer or chairperson of street. In addition, they contended that the independent witness who only signed in the certificate of seizure was not called to testify

without any reason. As such the case was not proved to the required standard.

Replying to the submissions, Mr. Peres argued that the ground that there was no independent witness at the seizure of the trophies (exhibit P10). The ground of appeal is in respect of 1st Appellant, and 4th Appellant. It was objected before the court. The court decided on its admissibility. Lack of independent witness was caused by the circumstance. The seizure was an emergency. This ground of appeal is lacking in merit because even the testimony of the 6th accused person (DW6) advanced their case.

I have carefully considered the arguments of both parties, with respect, I am not persuaded by Mr. Peres that that was an emergency search. If they were able to go with independent witnesses to homesteads of other accused persons, why not where they went and seized the government trophy while the place is within Sumbawanga Municipality? It is also on the record that the seizure of the alleged trophies was carried out in unfinished house of their choice. I am of the considered view that had the trial magistrate had in

mind and applied the authorities in **Chaali Kiama v. Republic [1979] LRT 54** where it was held:

> *"Discovery of the alleged bait money in the toilet by a police officer in the absence of a civilian called for the purpose of witnessing the search casts doubt as to whether the alleged bait money was not planted there."*

and **Janta Joseph Komba & Others v. Republic Criminal Appeal no. 95 of 2006** (C.A.T.) would have come to the conclusion that the alleged trophies were illegally seized. Worse, still, the alleged independent witness who is claimed to have signed to witness the seizure was not called to testify. The case of **Emmanuel Lyabonga V. Republic,** Criminal Appeal No. 257/2019 CAT (unreported) is distinguishable in the circumstances of this case, thus in my view, the respondent did not dare to cite. In the circumstances, the exhibit which is the alleged seized government trophies have to be expunged from the court record. With the expungement of the exhibit P 10, there is no any evidence that is sufficient to sustain conviction of the appellants.

I, therefore, agree with the appellants that in the circumstances that the absence of an independent witness where it is said that there were many people at the scene and the police decided to seize the government trophy at another location (unfinished house) leaves a lot to be desired. Actually, PW1 said the street chairperson witnessed the seizure. Failure to call him entitles the appellants to the benefit of doubt as this court has to accord an adverse inference in terms of **Aziz Abdalla v. Republic [1991] TLR 71** (CAT). The doubt created by the situation has to be resolved in favour of the appellants, see for instance **Republic v. Athuman Hatibu** [1986] TLR 396. The alleged seizure of the alleged government trophies contravened the law. The expungement of exhibit P 10 leaves the respondent's case bare and with respect the case has to go down swinging. The evidence of DW6 who was acquitted by the trial court cannot be the basis for conviction as it requires corroboration which is wanting here. It is trite law that evidence that needs corroboration cannot corroborate another evidence that needs corroboration itself, see **John Cherehani and Another v. Republic**, Criminal Appeal No. 189 of 1989 (Unreported) (CAT).

In the circumstances, it is very unsafe to uphold convictions based on the alleged caution statements of the appellants. With the greatest respect to the trial learned Senior Resident Magistrate, it would appear to me that he had not seen three case laws in respect of caution statements. Had he seen such authorities, without doubt, he would have not heavily relied on the caution statements to ground conviction on the appellants. These are, **Paulo Maduka & 4 others v Republic,** Criminal Appeal No. 110 of 2007, (CAT) (unreported) where it was stated:

> *"However, such claims of accused persons having made confessions should not be treated casually by courts of justice. The prosecution should always prove that there was a confession made and the same was made freely and voluntarily.* ***The confession should have been free from the blemishes of compulsion, inducements, promises or even self-hallucinations."*** (Emphasis supplied).

The 2nd case law is **Mohamed Katindi & Another v R. [1986] TLR 134** (HC) Lugakingira, J. where he held:

> *"It is the obligation of a defence counsel, both in duty to his client and as an Officer of the court, to indicate in cross-examination*

the theme of his client's defence so as to give the prosecution an opportunity to deal with that theme. For to withhold the position of the defence and thereby take the prosecution and the court by surprise, does to my mind, portray a poor appreciation of the meaning and purpose of any trial.

I think it can still be said that although it is undesirable to permit a party to canvass a point not raised in cross-examination, the court should not thereby be precluded from disbelieving a witness on a particular point merely because he was not cross-examined on that point. This proposition appears to accord with the realities of our own environment where, in Magistrate's courts most accused persons do not have access to professional representation nor do they have the skill to conduct their cases. Not infrequently cases come up where there has been no cross-examination, at all, or, there has been poor and irrelevant cross-examination, but then the accused comes up with a defence which could possibly be true. Injustice could therefore be occasioned if the court were to believe a prosecution witness on

a particular matter merely because he had not been cross-examined on that matter."

The last case law is **William Shimba v. Republic,** Criminal Appeal No. 10 of 1998 (Unreported) (CAT) (MWANZA) in which it was decided:

"The instances of brutal treatment of suspects by the police are not unknown in this country and therefore, where the prosecution intends to tender in evidence a confession statement which an accused person retracts or repudiates it must satisfy the court that the statement was obtained lawfully."

It is also alarming that PW2 Ernest recorded caution statements of Moshi John (the 1st appellant) on 05/02/2019 at 07:10 hrs, the exhibit P E1, then recorded the statement of Batholomeo Choma (the 4th appellant) on 05/02/2019 at 08:30 hrs, which is exhibit PE 2 and finally that of Sharifu Said (the 8th accused person who was acquitted) exhibit PE 3 on 10/02/2019. In the circumstances, PW2 was not eligible to record the subsequent caution statements which are exhibit P2 and P3 because he would be recording what

he has already known from recording exhibit PE1. As such exhibit PE 2 and PE3 have to be expunged from the record so there is nothing in evidence to support the conviction of the 4th appellant. He has to be acquitted. Luck enough, the 8th accused person was acquitted by the trial court. The caution statement exhibit PE 4 of 6th accused Kulwa Onesphoro cannot be used to ground conviction because it did not support even his own conviction.

As to the caution statements of the 1st appellant (Moshi John), Exhibit P1 its voluntariness was challenged in cross-examination, of the 2nd appellant (Revocatus Alfred) exhibit PE 6 (repudiated/claimed not to have made a statement), and that of the 5th appellant (Oscar Saver) exhibit P.5 which its voluntariness was challenged during cross-examination (threatened). Such confessions needed corroboration to ground conviction. There is nothing on the record to corroborate them.

Turning to the caution statement of the 3rd appellant (Faustine Kalikwenda) PE 7 in which he stated *(niliokota meno ya tembo mawili hifadhi ya Katavi*), the 3rd appellant who testified as DW5 said in his defence that:

"The next day on of the police officer took me to a certain office and ordered me to sign a written document I refused. Until that time the Police officers did not reveal the offence I was suspect to have committed."

The record shows that 3rd appellant was not cross-examined by the respondent on his claim that *until he was told to sign a document he had not been informed of the offence he was suspected to have committed.* In the circumstances the prosecution/respondent is deemed to admit that fact and that fact invalidates the alleged caution statement of the 3rd appellant. It does not even require corroboration as there is nothing to be corroborated.

In the premises and for the reasons I have endeavoured to explain above, the appeal is allowed. I quash the convictions of the appellants and set aside the respective sentences. The appellants are to be set free from prison unless they are held therein for another lawful cause. It is so ordered.

DATED at **SUMBAWANGA** this 9th day of May, 2022

THE HIGH COURT OF TANZANIA
UHURU NA UMOJA

J. F. NKWABI
JUDGE