THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MOROGORO DISTRICT REGISTRY)

AT MOROGORO

CRIMINAL APPEAL NO. 106 OF 2022

(Originating from Economic Case No. 6 of 2019 the District Court of Ulanga at Mahenge)

HASSAN SALUMU @ CHIKOKO .....1ST APPELLANT

SUDI SALUMU .....2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGEMENT

Hearing date on: 15/03/2023
Judgement date on: 20/03/2023

NGWEMBE, J.

This is an appeal intended to challenge both, their conviction and sentence meted by the trial District Court of Ulanga at Mahenge. The appellants were arraigned in court for the offence of Unlawful Possession of Government Trophies to wit four (4) Elephant tusks 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].**

The particulars of the offence comprise an allegation that, on the 18th day of February, 2019 at Iputi Village within Ulanga District in Morogoro region the two appellants were found in possession of Government trophies to wit; four (4) elephant tusks worth USD. 30,000.00 equivalent to TZS. 69,900,000/= the property of the United

Republic of Tanzania without license or permit 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 appellants were in possession of elephant tusks at Iputi Village. Having such information at that night went to the respective village up to the village chairman and requested that chairman to take them to the houses of the appellants. At that midnight of around 2:00, the chairman knocked the door of the first appellant and made search in the whole house but found nothing illegal. Even to the 2nd appellant failed to find anything illegal. Later they interviewed them and admitted to have those trophies at the bricks oven where they found those four pieces of elephant tusks. Thus, the arraigned them in court and both were convicted and sentenced to twenty years imprisonment.

Having so convicted and sentenced, the appellants found their way to this court clothed with six grounds which I need not to recap them herein for good reasons to be disclosed later on.

On the hearing date of this appeal, the appellants were unrepresented, while the Republic was represented by learned State Attorney Edgar Bantulaki. When the two appellants were invited to address this court on their grounds of appeal, unfortunate they just exhibited their belief that the grounds they raised are sufficient for this court to do justice. The second appellant added that when the game wardens came to his house without the village chairman, he refused to open door at that midnight until they went with the village chairman. Even though, they failed to find anything illegal in his house. That the whole stories were cooked by those game wardens against him because

he was dealing with minerals. Rested by a prayer that the appeal be allowed.

Supporting this appeal, the learned State Attorney advanced different reasons for supporting this appeal. First, argued that exhibit P3 which were the elephant tusks were not properly identified if were the true tusks found with the appellants on 18/2/2019. The exhibit was tendered by PW4 while testifying that, exhibit P3 was labeled No. 1,2,3, & 4, but the testimony of an independent witness PW2 and PW3 did not explain at all those special marks in exhibit P3. More so, PW2 and PW3 did not even identify that exhibit P3. Thus, making it unknown if those tusks were the same found on the eventful date.

Another equally important point is the evidence of PW4 who seized exhibit P3 and handled over to Police station at Mahenge with handing over certificate admitted as exhibit P4. The recipient at Police was H 2554 D/C Samson, but that key witness was not called to testify during trial. Unfortunate even the contents of exhibit P4 does not disclose the labels of 1, 2, 3, & 4. Failure to call the store keeper from Police at Mahenge made the prosecution fail to properly identify exhibit P3.

Second ground advanced by the learned State Attorney was related to exhibit P1 which is a seizure certificate, such certificate was irregularly admitted in court for the contents of it was read over loudly in court prior to admission. In the case of **Robson Mwanjisi & others vs. R, (2003) T.L.R, 218**. Such irregularity would lead to expunging of the whole exhibit. Thereafter, the only remaining evidence is of PW1, PW2, & PW4.

Another area of concern was the availability of contradictions between PW1 and PW2 in respect to exhibit P3. Insisted that while PW1 testified that the appellants led the Game Wardens to the place where they hid those tusks, in the contrary PW2 testified that those elephant

tusks were hidden to Mzee Shole. Unfortunate, Mzee Shole was never called in court to testify his evidences.

Lastly, the learned State Attorney, insisted that it is no proof at all that the appellants had constructive knowledge on the presence of those elephant tusks. As such he rested by a prayer that this court may revisit the whole evidences testified during trial and find if at all the appellants were involved in anyway. Otherwise, the prosecutions case was not proved to the standard required.

Having summarized the arguments advanced by both parties, what remains is the duty of this court to determine merits 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 re-evaluate 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 traced 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,** the Court *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"*

It is evident that the search in the appellants houses did not yield fruits. The game warden together with an independent witness (PW2) never found anything illegal in the houses of the accused. Surprisingly, the Game warden left with the appellants to unknown places without being accompanied by the village leader who was an independent

witness at that midnight. Later went back to the house of that leader and called him to accompany them to the place where those tusks were hidden. At the brick oven they found those elephant tusks. Such tusks were not properly identified in court if were the ones found at that midnight.

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."

Such basic principle of evidence of identifying properties found with unique marks to differentiate with others is mandatory. The found elephant tusks were alleged to have had special marks of 1,2,3 & 4, as per PW4. However, those tusks were neither identified by any witness in court apart from PW4 who tendered it.

Failure of the prosecution to tender those properties in court and be identified by an independent witness, like PW2, PW1 and PW3 was fatal. Even those special marks were not identified in court to differentiate from other elephant tusks. Such failure to identify properly those tusks amounted into failure of prosecution to establish and prove accusations against the appellants.

Equally important is on procedures of tendering documentary evidences for court use. The procedures were clearly set forth in the case of **Robson Mwanjisi & others (Supra),** whereby briefly, the document must be properly identified in terms of its handwriting, name, signature and may be stamp if any, upon being properly identified, the witness may tender it in court. After being admitted as an exhibit, the contents of such document shall be read loudly in a language known to the accused person. For clarity the Court held as follows: -

"Whenever it is intended to introduce any document in evidence, it should first be cleared for admission, and be actually admitted, before it can be read out, otherwise it is difficult for the court to be seen not to have influenced by the same"

As a general rule, 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).**

In respect to this appeal exhibit P1 which is a seizure certificate, the prosecution asked to read the contents of it and in fact was allowed to read its contents before same was admitted as exhibit. Such irregularity is fatal; accordingly, I proceed to expunge exhibit P1 from the court record.

Having expunged exhibit P1 and the seized elephant tusks marked exhibit P3 for failure of proper identification by PW1, PW2 and PW3 who were eye witnesses on the said midnight when were seized, obvious what remains cannot constitute the offence preferred against the appellants.

It is settled law 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 including the cases of **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. Upon deep consideration of this appeal and after curious perusal to the trial court's proceedings and judgement, I am settled in my mind that, the prosecution failed to establish and prove the accusations against the appellants to the standard required by law. I fully subscribe to the

observations and submissions advanced by the learned State Attorney, this matter was unfortunately and processionary prosecuted at trial court. The essential elements of criminality of the appellants were not properly established and proved as required by law. As discussed above, this appeal has merits.

In totality and for the reasons so stated, I am certain that this appeal bears merits. I therefore, proceed to allow the appeal, quash the conviction and set aside the sentence meted by the trial court. Consequently, order an immediate release of the two appellants from prison, unless otherwise lawfully held.

Order accordingly.

Dated at Morogoro in chambers this 20th day of March, 2023

P. J. NGWEMBE

JUDGE

20/03/2023

Court: Judgment delivered in chambers this 20th day of March, 2023 in the presence of the appellant and Mr. Edgar Bantulaki & Vestina Masalu, State Attorneys for the respondent/Republic.

P. J. NGWEMBE

JUDGE

20/03/2023