THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 147 OF 2022

(Originating from the District Court of Chunya at Chunya Criminal Case No. 15 of 2021)

MANGE SENGEREMA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Date of last order: 06/03/2023

Date of judgment: 30/03/2023

NGUNYALE, J.

The appellant MANGE SENGEREMA stood charged before the District Court of Chunya at Chunya with the offence of Unlawful Possession of Government Trophy contrary to section 86 (1), (2) (c) (iii) of the Wild Life Conservation Act No. 5 of 2009 as amended, 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 R. E 2019. It was alleged by the prosecution that the appellant was charged that on 7th day of August, 2021 at Isangawana village within the District of Chunya in Mbeya Region was found in possession of a Government Trophy to wit; one piece of

elephant tusk valued at USD 10,000.00 which is equivalent to Tanzanian Shillings Twenty Three Million one Hundred and Eighty Five Thousand (Tshs 23,185,000) only, the property of the Government of the United Republic of Tanzania without permit.

Upon a plea of not guilty the case went to full trial and at the end on the 4th day of July 2022 the court was satisfied that the prosecution had proved the charge against the appellant beyond reasonable doubt. He was convicted as charged and sentenced to pay fine in the tune of 69,555,000/= or to serve 20 years imprisonment in default. Conviction and sentence was followed by an ancillary order of confiscating and forfeiture of the elephant tusk.

Aggrieved by conviction and sentence he preferred the present appeal basing on nine grounds of appeal challenging the decision of the trial court.

In order to understand the genesis of this appeal and to appreciate the end results I will prefer to state briefly the facts basing on the evidence as narrated before the trial court. PW1 Lazaro Anthon Kwimanija (34) testified before the trial court that on 7th day of August 2021 at around 00:00 hours as Acting Executive Officer was involved by Game Ranger from Rungwa Conservation area to participate in the search exercise at

the home of the appellant. It was alleged that the appellant was being suspected of possession of government trophy unlawful. In the course of search, they recovered one elephant tusk hidden at his banana plant. Thereafter the certificate of seizure was filled and they all signed to enable seizure of the trophy which was wrapped with a piece of cloth. PW2 Samwel Pere Mollel (40) testified that he is a Wildlife Officer based at Rungwa Game Reserve. On 6th August 2021 he was at Rungwa where he received information from one informer that one person who is residing at Isangawana village is in unlawful possession of government trophy. Their boss directed him and other rangers to go to the place/scene. At the very village he shared the information with the Village Executive Officer and hamlet chairman. Three rangers went direct to the house of the appellant for providing security. Later, they also went to the home of the appellant. Morning hours on 7/08/2021 the appellant open the door of his house and they told him that they suspected that he had government trophy. He denied. Denial made them to conduct search. Search enabled them to recover one piece of elephant trophy which was hidden outside near his house under the banana plant. They filled the certificate of seizure which was signed by the appellant and other officials including the village leaders VEO and hamlet chairman. Next day the appellant was taken to police station for further action and institution of

the case. The witness tendered the elephant tusk which was admitted and marked Exhibit No. PE1 and the certificate of seizure Exhibit No. PE2.

PW3 Simphrose Amandus Kavishe (40) a Wildlife Officer based at Chunya testified that on 8th August 2021 at 16:00 hours he received the elephant tusk for custody at their office. Next day she conducted valuation and prepared trophy valuation certificate. The trophy valuation certificate was admitted and marked Exhibit No. PE3. The register used to fill the details of the elephant tusk was admitted and marked Exhibit No. PE4.

The testimony of PW1, PW2 and PW3 marked the end of the prosecution case, upon weighing such evidence the trial Magistrate was satisfied that prima facie case had been established against the appellant. The appellant was availed an opportunity to defend himself upon oath, he testified as DW1 Mange Sengerema (54). I his testimony, he said that on the midnight of 6th August 2021 he heard people knocking his house. They introduced themselves as Game Rangers from Rungwa Game Reserve. They commanded him to open the door but he never opened till morning at 06:00 hours. They asked him if he owned government trophies; he replied no. They searched his house but they found nothing. Later one of the Game Officers called them near a banana plant. At that plant is where they found what they alleged to be elephant trophy. He denied to be

found with elephant trophy and he complained that search was done without warrant.

The above framework of the prosecution evidence made the trial court to end up with the verdict stated above. The appellant preferred the present appeal premised in nine grounds of complaint to challenge the decision of the trial court. The complaints are comprehensively paraphrased as follows in order to make sense.

One, the three prosecution witnesses failed to prove the charge beyond reasonable doubt, **two**, the appellant was not found with exhibit PE1 inside his house, **three**, the said trophy exhibit PE1 was found outside far from the houses of the appellant, **four**, the alleged informer was not called to testify on how he saw the appellant with that trophy and how he communicated with PW2 on how he knew the way the trophy was hidden. **Five**, that the case is fabricated the said informer is the one who hidden the trophy, **six,** the hamlet chairman was not called to testify about true distance from the house of the appellant to the place where the said trophy was found, **seven**, no investigator tendered sketch map of the scene of crime to prove the area where the trophy was found, **eight**, there was no conclusive evidence of DNA conducted to prove if the said cloth used to wrap the trophy was of the appellant or their informer, **nine**,

the defence of the appellant was not considered by the trial court since the trial court enhanced the fine against the law.

The appellant prosecuted the appeal in person. Mr. Rodgard Eliaman learned State Attorney represented the respondent Republic. The appellant did not address the court on the grounds of appeal but asked it to consider and weigh them to allow his appeal. In order to smoothly dispose this appeal, I will straight forward determine the grounds of appeal as follows;

The appellant in the 1st, 2nd and 3rd grounds of appeal his complaints are based on evidence that whether it was proved beyond reasonable doubt that he was found in possession of elephant trophy Exhibit No. PE1. Submitting against these grounds Mr. Eliamani submitted that the offence was proved beyond all reasonable doubt by the prosecution. PW1 testified as a leader who attended search at the appellant's home. Search enabled recovery of elephant trophy at the banana plant outside his home. Even the appellant in his defence he said that the trophy was found around his premises. He prayed the court to dismiss those grounds of appeal for want of merit.

The centre of the complaint in these grounds of appeal is about elephant trophy Exhibit No. PE1 which was recovered through search exercise

conducted on 6th August 2021. Prudence attracts the court to determine the issue whether search as conducted at the house of the appellant was legal?

The parties were invited to address the court as to whether the search was legal or otherwise on 28th day of March 2023. The appellant insisted that search was illegal because local leaders were not involved and they searched without search warrant. In their part the respondents insisted that search was legal because it was done in compliance with section 106 (1) (a)(b)(c) of the Wildlife Conservation Act. The independent witness PW1 was involved during search in compliance with section 106 (1)b of the same Act.

Search is governed by section 38 (1) and (3) and section 40 of the Criminal Procedure Act, the guiding question is whether search contravened those provision of the CPA as read together with the Police General Orders (GPO)? I am aware also that the Wildlife Conservation Act Cap 283 R. E 2022 under section 106 (1) (a)(b)(c) gives power of search and arrest to the wildlife officials. In the present case this Wildlife Conservation Act is the proper law governing search and seizure. PW2 and PW3 were proper persons with authority to conduct search at the house of the appellant. the law in detail provides; -

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 Wildlife 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****; and*

(c) seize any animal, livestock, game meat, trophy, weapon, licence, permit or other written authority, vehicle, vessel or aircraft in the possession or control of any person and, unless he is satisfied that such person will appear and answer any charge which may be preferred against him, arrest and detain him

The evidence on record is to the effect that on 6th day of August 2021 PW2 a Wildlife Officer while at his work place Rungwa received information from a secret informant that there is a person unlawful possessing a government trophy. The informant told him that the suspect is at Isangawana Village. He then informed his boss who instructed some

game rangers to escort him to the place of incident. They went to the scene accompanied with the VEO of the area who testified as PW1. According to the evidence; PW2 was in charge of the search exercised conducted at the house of the appellant. The three rangers went straight to the house of the appellant for security purpose and later PW2 and the VEO PW1 went there for search exercise at around 00:00 hours. The fact that PW2 a Wildlife Officer was in charge of search the question is whether he had power to conduct search and seizure. The provision above gives power to the wildlife officer to conduct search and arrest. Therefore PW2 and PW3 had power to lead or to conduct search and PW1 the local leader of the area was relevant witness of search who is recognized by section 106 (1) (b) which legalise search which is done in presence of one independent witness. The last issue is whether those Wildlife Officials or Game Rangers have power to conduct search outside their premises. For example in this case those officials their working station is Rungwa Conservation Area, did they had power to move outside their premises and to go to Isangawana Village to conduct search. In view of the above provision, I think they had such power because the law is silent about the jurisdiction on powers of search and arrest. But prudent would have moved them to involve the police officer of the area in conducting search

because Section 38 gives wider and exclusive powers of search to the Tanzania Police Force. The very provision provides; -

> *"38. -(1) Where a police officer in charge of a police station is satisfied that there is reasonable ground for suspecting that there is in any building vessel carriage, box, receptacle or piece-*
>
> *(a) anything with respect to which an offence has been committed;*
>
> *(b) anything in respect o f which there are reasonable grounds to believe that it w ill afford evidence as to the commission o f an offence;*
>
> *(c) anything in respect o f which there are reasonable grounds to believe that it is intended to be used for the purpose o f committing an offence,*
>
> *and the officer is satisfied that any delay would result in the removal or destruction o f that thing or would endanger life or property,* ***he may search or issue a written authority to any police officer under him to search the building, vessel, carriage box, receptacle or place as the case may be****.*
>
> *(2) Where an authority referred to in subsection (1) is issued, the poiice officer concerned shall, as soon as practicable, report the issue o f the authority, the grounds on which it was issued and the result o f any search made under it to a magistrate.*
>
> *(3) Where anything is seized in pursuance o f the powers conferred by subsection (1) the officer seizing the thing shall issue a receipt acknowledging the seizure o f that thing, [bearing] the signature o f the owner or occupier o f the premises or his near relative or other person for the time being in possession or control o f the premises, and the signature o f witnesses to the search."[Emphasis added]*

The search by the wildlife officials outside the Game Reserve without involving the police officers might result to chaos between the two

coercive organs though they acted within the law. A search outside the reserve without the involvement of the police can create a clash between police and Game Rangers as police are responsible for protecting citizens and their properties having jurisdiction in every district. Considering the two laws in totality I think that; according to the Wildlife Conservation Act the search conducted was legal. The remaining issue to be answered is whether the appellant was in possession of the recovered elephant trophy.

The 4th ground of appeal that, the alleged informer was not called to testify on how he saw the appellant with that trophy and the 5th ground, that the case is fabricated because the said informer is the one who hidden the trophy are interrelated. The two will be determined sufficiently together. The learned State Attorney submitted that the grounds about the informer have no merit because section 143 of Evidence Act does not require specific number of witnesses to prove a certain fact but what was required was to prove that the appellant was found with government trophy. He submitted that the prosecution managed to prove that he was found with trophy. He cited the case of **Halfan Ndumbashe v. R**, Criminal Appeal No. 493 of 2017 Court of Appeal of Tanzania at Tabora reiterated that there is no specific number of witnesses to prove a certain

fact. The witnesses who testified and exhibits tendered were enough to prove the fact that the appellant was found with the trophy.

I subscribe to the submission of the learned State Attorney that the prosecution has discretion on selection of witnesses who are relevant to prove facts at issue guided by section 143 of the Evidence Act. They were not bound to call a specific witness like the informer whom the appellant complains about, but it remains for the court to analyse the evidence availed and weigh credibility of the witnesses paraded. In the case of **YOHANNIS MSIGWA vs R**, [1990] TLR 148 at page 148 where it held as hereunder: -

> *"As provided under section 143 o f the Evidence Act 1967, no particular number of witnesses is required for proof of any fact. What is important is the witness's opportunity to see what he/she claimed to have seen, and his/her credibility."*

Therefore, the prosecution had exclusive right to choose witnesses who are necessary and relevant to prove their case. The complaint that this is a fabricated case because the informer is the one who hidden the trophy has no relevancy now, but it may be relevant later after being weighed with other evidence in this judgment. Having been said and done, the 4th and 5th grounds of appeal are worth of being dismissed.

The 6th and 7th grounds of appeal will be determined together for good reason that both are about the scene of crime where the alleged trophy

was recovered. The 6th ground is about the complaint that the hamlet chairman was not called as a witness to prove the distance from the house of the appellant to the place where the trophy was found and the 7th ground is about the investigator of the case and sketch map. That the investigator of the case was not called as a witness and the sketch map was not tendered. The learned State Attorney opted to argue together the 6th and 7th grounds of appeal where he submitted that there is no specific number of witnesses needed to prove a certain fact but what is important is reliability and credibility of witnesses paraded. There was no essence of calling an investigator of the case, after all there was no dispute about the distance from the house of the appellant to the place where the trophy was recovered. The banana tree where the trophy was found was the property of the appellant. Thus, the hamlet chairman and the investigator of the case were not material witnesses to be called to testify during trial. I think these grounds should not detain the court because it has already been ruled that there is no specific number of witnessed need to be called to prove a certain fact but what matters is credibility of witnesses. It remains the exclusive right of the prosecution to set a prosecution plan especially on selection of witnesses.

The 8th ground of appeal the appellant complained that there was no conclusive evidence of DNA conducted to prove if the said cloth used to wrap the trophy was of the appellant or their informer. On this ground of appeal the appellant submitted that DNA is not a legal requirement in evidence in Tanzania, he prayed the court to dismiss the ground of appeal for lack of merit. Having considered the circumstance of this case, it is true that there is no direct link between the appellant and the trophy Exhibit No. P1. The trophy was found outside the house of the appellant and there is no direct link that the appellant is the one who took the trophy and kept there to the banana plant. Forensic evidence would have assisted to fill such evidential gap to prove such link as suggested by the appellant, but in Tanzania as accurately submitted by the State Attorney forensic evidence through DNA test is not a legal requirement. The case of **Cristopher Kandidius @ Albino vs. R**, Criminal Appeal No. 394 of 2015 Court of Appeal of Tanzania at Dar es Salaam (unreported) is a good example that DNA test is an optional move in Tanzania. In the very case the Court observed; -]

> *"Unfortunately, despite the enactment of the Human DNA Regulation Act, 2009 [ACT No. 8 of 2009] criminal investigation and prosecution in Tanzania still shies away from comprehensive use of the DNA evidence to fill evidential gaps to solve crimes especially where there is lack of direct evidence."*

In considering the evidence of PW1, PW2 and PW3 all testified that the alleged trophy was found outside the house of the appellant on the banana plant. There is no direct evidence proving the connection or link between the appellant and the trophy. The prosecution relied on the circumstantial evidence that the fact that the trophy was found outside the house of the appellant they belong to the appellant. The follow up questions might be why the appellant and not his wife or his children or passer-by's or the informant? The trial Magistrate relied on the case of **Charles Mbaabu Mburi v Republic** (2018) eKLR that the appellant was in control of the premises with the exclusion of all others. I think it was not proved that he was in control of the premises with exclusion of all others as doubted in the following up questions raised above. These evidential gaps raise doubts to the prosecution case as far as possession of elephant trophy is concerned. The prosecution side could have filled such gaps by other form of evidence or DNA test as complained by the appellant. Those are the doubts which shake the prosecution case. In criminal justice doubts raised against the prosecution case are resolved in favour of the accused or the appellant.

In the last ground of appeal that the defence of the appellant was not considered by the trial court, the respondents' attorney urged the court

to dismiss it for want of merit. He submitted that the judgment of the trial court is very clear that the defence case was considered in the final verdict. The defence of the appellant was that he was not in possession of the elephant trophy and the search was illegal because it was done without search warrant. It was not in dispute in the proceedings and judgment that the elephant trophy was found in the premises of the appellant. The only doubt was whether the appellant was responsible with hiding the said trophy under the banana plant. In its judgment the trial court ruled that the appellant was the actual or special owner of the premises where the government trophy was found basing on the certificate of seizure. The learned Magistrate was of the firm view that, the fact that he was a special owner who was in control of the premises he was in possession of the trophy. He ruled that possession of elephant trophy against the appellant had been proved. The specific extract in the judgment of the trial court reads I quote; -

> *"There is no doubt, and it was never dispute by DW1 that, the premise or the farm to where the piece of elephant tusk was found belonged to any other person other than accused. The* ***certificate of seizure*** *exhibit PE2 of the item found allegedly in possession of the accused person lends credence to my mind that* ***possession has been proved****" emphasis added.*

It has been ruled out under the 8th ground of appeal that the evidence that the appellant was in possession of the said trophy is subject to a

number of evidential gaps which ought to be filled by the prosecution. Thus, conviction cannot be grounded under such gaps. This is because the appellant was not the only person with an opportunity to keep such trophy. In my view I think the analysis of evidence as done by the trial Magistrate went short. In case he could have conducted thorough his analysis he would have end up establishing doubts to the prosecution case as already ruled. It is a rule of law that the prosecution case ought to be proved beyond all reasonable doubt the standard required in criminal cases. In the present case the prosecution could not prove beyond reasonable doubt, it went short. The circumstantial evidence that the appellant was in possession of the trophy was not irresistible. Circumstantial evidence should irresistibly lead to the inference that the appellant and nobody else had kept the trophy to a place it was recovered. Had the trial Magistrate analysed properly the evidence of both sides, I think with respect, he would have come to the conclusion that the evidence was insufficient to link the appellant with the alleged trophy because it cannot be stated conclusively that it was the appellant who had hidden the trophy.

Considering what had been said, I am of the settled view that the offence was not proved beyond reasonable doubt due to evidential gaps

established. The good practice is that, the evidential gaps are resolved in favour of the appellant. The conviction is hereby quashed and sentence set aside, the appellant is removed from custody unless lawful held with another lawful cause. Order accordingly.

Dated at Mbeya this 30th day of March 2023.

D. P. Ngunyale
Judge

Delivered this 30th March 2023 in presence of the appellant in person and the respondent represented by Ms. Agness Ndanzi.

D. P. Ngunyale
Judge