THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MOROGORO DISTRICT REGISTRY

MOROGORO

CRIMINAL APPEAL NO. 108 OF 2022

(Arising from Economic case no. 89 of 2018 at Resident Magistrate Court Morogoro)

LUFINO GABRIEL MWAKAYELA ..... APPELANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGEMENT

Date of last order: 15/02/2023

Date of Judgement: 17/03/2023

MALATA, J

This appeal originates from the Resident Magistrate Court for Morogoro, where the appellant was charged and convicted 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 283] as amended by Written Laws (Miscellaneous Amendment) Act no 4 of 2016 read together with Paragraph 14 of the First Schedule to and

Sections 57(1) and 60(2) of the Economic and Organised Crime Control Act, [Cap. 200 R.E 2019] as amended by Written Laws (Miscellaneous Amendment) Act No. 3 of 2016.

The particulars of the offence according to the charge sheet is that Lufino Gabriel Mwakayela and Germanus Iddi Ngaliluwula, being the first and second accused persons respectively on the 19th July 2017 at Live Green Lodge, Sokoni area, Mlimba Village within Kilombero District in Morogoro Region were found in possession of Government Trophies, to wit, four (4) pieces of elephant tusks worth USD 15,000 equivalent to Tanzanian Shillings 33,586,500/= the property of the United Republic of Tanzania without a permit from the Director of Wildlife.

On 19th July 2017 at about 09.00 hours the appellant went to Live Green Lodge into the room baptised as Liverpool which was hired by one Kisiro Magesa Nsabo, he went in with the bag containing four pieces of elephant tusks to execute sale with Kisiro Magesa Nsabo who had set the trap against the appellant and decoyed to be the purchaser of the said elephant tusks.

Soon thereafter the police officers came into the room and conducted the search therein. The appellant was found in possession of four pieces of

elephant tusks without any permit. The appellant was arrested instantly, and a certificate of seizure was filled, signed by the appellant and witnesses in attendance during search and arrest.

To prove the case against the appellant, the prosecution paraded eleven witnesses and tendered six documentary exhibits and physical exhibits. Prosecution witnesses were PW1 Magnus Milinga, PW2 George Jidae, PW3 E9295 D/CPL Juma, PW4 Ass. Insp Lwambano, PW5 E.4345 CPL Sudi, PW6 G2342 DC Japhet, PW7 E8949 D/CPL Kwilinus, PW8 Zainabu Faraj Mdondogo, PW9 Vitus Mkanyipele, PW10 Kisiro Magesa Nsabo and PW11 Adam Joseph Katigiza.

Documentary and physical exhibits admitted in evidence are the certificate of seizure of elephant tusks Exhibit P1, four pieces of elephant tusks labelled LG1, LG2, LG3 and LG4 marked as Exhibit P2 collectively, Trophy valuation report as exhibit P3, the photocopy document of Court Exhibit register as exhibit P4 and the chain of custody record as exhibit P5.

Before dwelling on the merits of the appeal, it is resourceful to recount background facts of the case leading to this appeal as can be gleaned from the evidence adduced,

PW1 stated that, on 19/07/2015 at 08.00 hours he was on duty at Mlimba police station when he received information from a game officer by the name of Simon that there is a person who is selling elephant tusks. They agreed to set a trap in the Hotel, they set a trap at the hotel called Live Green Guest House accompanied by a police officer D/SGT Gilbert, PW8 and PW9. They succeeded to arrest the appellant at the Guest House in a room called Arsenal, in the room they found three men, one of them who sat on the chair in that room had a small sulphate bag with four pieces of elephant tusks in it and the two other persons were spies who were sent to accomplish the trap. The appellant confessed that the elephant tusks belonged to him, PW1 filled the certificate of seizure, and the same was signed by the appellant and witnesses who witnessed the search. The appellant was taken to the police station, at the police station the elephant tusks were labelled LG1, LG2, LG3 and LG4. Afterward, the appellant was taken to his home for search but nothing was recovered.

PW2 testified that, he is the Senior Game Officer at Swagaswaya Game Reserve, his duty being to make patrol, evaluation of Government trophies. He further stated that he got a call from a Police officer from Ifakara by the name of Japhet. He told him that there are elephant tusks which needed valuation. He went to Ifakara police station and found four

pieces of elephant tusks; from his experience the tusks were divided into two each to make four pieces. He further stated that, the value of the said elephant tusks was USD 15,000 which at that time was equivalent to TZS 33,586,500.

PW3 testified that he works at the Headquarters of investigation Department to combat poaching since 2014, his duty was to investigate crimes on poaching. On 19.07.2017 he was at Mlimba for special duty, he interviewed one of the arrested persons named Lufino Gabriel. He explained that, he prepared a room for the interview, chairs, table, papers and pen. He introduced himself to the accused and explained him his rights, the accused chose to give his statement while he was alone. He further stated that he interviewed the accused from 11.30 hours to 12.30 hours, he gave the accused the statement to read, he then signed the statement on each page.

Later on, 25.07.2017 at the afternoon he took the second accused cautious statement, PW3 introduced himself to the second accused with his name and force number. He informed the accused of his rights, the accused asked to give his statement in the presence of his relative named Ernest. He further stated that on 26.07.2017 the accused's relative came with a lawyer one Aziz Mahenge, the interview started from 14.27hours

to 16.52 hours, he read over the statement before the accused and his advocate and they both signed the statement. Both statements, of the first and second accused also were rejected by court after inquiry.

PW4, Ass. Insp. Lwambano stated that he is a police officer at the headquarters in Dar es salaam with thirteen (13) years of experience in investigating poaching cases and the like. He said that on 19.7.2017, together with CPL Korote, Sgt. Kombo and CPA Enoch, following information from people dealing with poaching acts, arrested the the appellant with four pieces of elephant's tusks. They interviewed him in detail and the accused made a confession. He also mentioned his co accused person whose firearm was used in committing the crime. PW4 further stated that the arrested accused person was Lufino (the appellant) the firearm was later on found in possession of the second accused person at his home on 25.9.2017. They took the gun from him so that the accused person would not continue to kill elephants. They (PW4 and others) asked the second accused if he owns the firearm and the second accused admitted and handed it over to PW4 and his fellows who also handed over the same to the police station at Mlimba. PW4 added that he filed the certificate used to seize the firearm from the second accused with registration number 2449 but he could not remember the licence number.

The certificate of seizure was later rejected by the court for lacking a signature of an independent witness and the firearm licence was rejected as well because the certificate of seizure was rejected.

PW5, E4345 CPL Sudi testified that he is a police officer stationed at Kisaki and that on 21/7/2017 he was in charge of crimes at the central police. As in charge of the shift, he manages other officers at police station. He further stated that an officer with number G.2342 DC Japhet working at Mlimba came to his office with a bag marked MLB/112/507/2017 with exhibits in it. The bag was blue in colour and had four pieces of elephant's tusks labelled LG1, LG2, LG3 and LG4. He received and handed them over to the custodian one CPL Kwilinus.

PW6, G.2342 DC, Japhet stated that he is a police officer working under investigation department stationed at Ifakara with 12 years of experience. He stated that on 19.7.2017 while at Mlimba, he received a call asking him to go to Mlimba police station as there was a person arrested with elephant tusks and he was the one to take the exhibits to Ifakara. At Mlimba he met SP Mlinga who showed him four pieces of elephant tusks which were rolled in a sulphate and kept in a blue bag and they were labelled LG1, LG2, LG3 and LG4. He took the exhibits to Ifakara and stored them in a room of the head of investigation of district. PW6 further added

that while at Ifakara, he called George Gidei, a trophy officer to calculate the value of the exhibits and on 20/7/2017 in the afternoon Mr. Gidei went to see the exhibits and confirmed that the exhibits were actually elephant's tusks. On 21/7/2017 he was assigned to take the exhibits together with Lufino Gabriel (the appellant) to Morogoro Central Police station being accompanied with task force officers. At Morogoro central police station he handed over the accused and the exhibits to the officer on duty one E4345 CPL Sudi.

PW7, D/CPL, Kwilinus averred that he is a police officer at Morogoro central police with 25 years of working experience. His duties include protecting the citizens and their properties as well as to receive and keep exhibits. He said that in the morning of 22/7/2017, being around the police station, he was called by police officer number E4345 CPL Sudi who handed over to him four pieces of elephant's tusks which were kept in a blue bag and he signed a special form of chain of custody in the station's diary. The four pieces were marked with a black pen as LG1, LG2, LG3 and LG4 respectively. They were also marked with police case reference number MLB/IR/507/2017. He added that he registered the exhibits in the Court Exhibit Register through entry number 271 of 2017. A photocopied

document of Court Exhibit Register No. 2 of 2017 and a chain of custody form were admitted as exhibits P4 and P5 respectively.

PW8, Zainabu Faraj Mdondogo, affirmed and stated that she is employed at River Green guest house in Mlimba and her duties include cleaning, inspecting all rooms and receiving customers. She stated that she usually inspects a room before a new customer is allocated. On 19/07/2017 when she was at the River Green guest house around 0600 hours, a certain person hired a room named arsenal and they inspected it together before the customer was left alone. After 30 minutes two men went looking for the customer in the arsenal room and one (who was identified to be the appellant) was carrying a small blue bag. PW8 continued to narrate that after few minutes police officers arrived at the guest house and one of them introduced himself as the OCS of Mlimba police station and asked her to take him to arsenal room because there is a suspect. He called the street leader and when he arrived, they knocked together at the door and the customer opened it. They (PW8, one police officer and the street leader) all got inside the room and found three (3) people inside. The accused was holding a blue bag. The OCS asked about the bag and the accused said it was his. He was asked what was inside the bag and he answered that the bag contained elephant's tusks. After he opened it, four

pieces of elephant's tusks were found and everyone saw them. PW8, was given a paper to sign and they all went to the police station. At the police station, PW8 recorded her statement and added that she saw the OCS marking all the four pieces of elephant's tusks. She was released and went back to her office.

PW9, Vitus Mkanyipelele stated that he is a farmer, a hamlet leader and a justice of peace in Sokoni hamlet. He narrated that on 19/7/2017, at about 0900 hours, he received a call from the police officer Mr. Gilbert who requested him to go to River Green guest house. He rushed there and found Mr. Gilbert with other police officers who asked him to witness the search which is going to be conducted in a room named arsenal within that guest house. He narrated that the police officer knocked the door which was opened and three men were found inside. One of them had four elephant's tusks in the blue bag and he said that the bag belonged to him. The police officers asked what was inside the bag and the accused said that it contained elephant's tusks. The accused opened the bag and everyone saw four pieces of elephant's tusks. PW9 was given a search warrant and signed it. They all went to Mlimba police station to record their statements. He added that the police officer named Milinga marked the elephant's tusks by labelling them as LG1, LG2, LG3 and LG4.

PW10, Kisiro Magesa Nsabo, testified that he is a wildlife officer stationed in Dar es salaam with duties to protect the wildlife. He said that he was trained at Mweka College in Moshi and he has 22 years of working experience. On 15/07/2017 he received information from an informant concerning a person who wanted to sell elephant tusks. According to him he pretended to be interested in buying the said elephant tusks he communicated with that person and they agreed to meet at River Green Guest House. On fateful day they agreed to do the elephant tusks business, PW10 went to a guest house named River Green hotel and was given a room named arsenal but his name was not registered because he was told that customer names are usually registered from 10:00 hours. PW10 informed other wildlife officers and police officers from Morogoro to join him. He contended that the accused person came to him about 08:00 hours carrying four pieces of elephant's tusks in a small blue bag and was accompanied by their informer. While inside, one police officer, the two wildlife officers and the hamlet leader together with the guest house receptionist (PW8) asked the accused what he was carrying in the blue bag. The accused said that he was carrying elephant's tusks and he was asked to open the bag and upon opening it, everyone saw four pieces of elephant's tusks. Thereafter, a search warrant was prepared and was

signed by the receptionist and the accused person. They were all taken to Mlimba police station to record their statements.

PW11, Adam Joseph Katigiza, averred that he is a businessman and from 2017, he was engaged in selling rice at Mlimba area in Morogoro. He said that he knows the appellant for he was a neighbor to a person who used to sell rice to him. On 15/7/2017 he met the appellant person in Mlimba at Morogoro Region where he (the appellant) told him that he is selling elephant's tusks. PW11 told the accused that he will assist him to look for a client. After a few minutes, PW11 called a wildlife officer one Mr. Magesa to know the legality of such business. On 18/7/2017 PW11 and the appellant met with Mr. Magesa. They agreed to meet in the morning of the next day in order to conduct business. PW11 added that on 19/7/2017, him and the appellant met with Mr. Magesa (PW10) at River Green guest house. The accused had a blue bag. After arriving at the guest house with the accused the receptionist to take them to a room named Arsenal to After few minutes, the police officers, hamlet leader entered into the same room and the appellant was found with four pieces of elephant tusks in a blue bag.

That was the end of the prosecution case. The Court found out that the appellant and another accused person had a case to answer. They were

given the right to defend their case, generally they denied to have any involvement with the case.

DW1, Lufino Gabriel Mwakayela, stated that he is a farmer and a '*boda boda*' driver. He said that on 19/7/2017 at 08:30 hours he was at a stand when a certain client asked the appellant to take him to River Green guest house. DW1 took him there and the client asked him to wait outside. After waiting for approximately seven (7) minutes, the client asked him to get inside because someone wanted to negotiate with him so that he may take him somewhere. When he got inside, he met a person sitting on a bed carrying a small bag and the person asked the appellant to take him to Ngaramira. He said that while in the course of negotiating about fare, someone knocked at the door and since he was standing near it, he opened it. Six people entered inside and three of them were holding guns. DW1 further stated that the people asked what was inside the bag and the person who was carrying it replied that it contained clothes. One of them grabbed and opened the bag and found four elephant's tusks. They asked who the owner was but everybody stayed silent. DW1 told them that he was just a "*boda boda*" rider but they took his keys and arrested him. DW1 further explained that they were taken to Mlimba police station and later on the police asked him to take them to his home for a search.

They went together and the police also called his street leader named Paul Mwambope. Nothing was found after the search and he was taken back to Mlimba police station and subsequently to Ifakara police station where he stayed for two days. On 22/7/2017 he was taken to Morogoro central police and on 25/7/2017 he recorded a cautioned statement. On 27/7/2017 he was forced to sign two documents which he did not know by then but came to realize later on that the documents he signed were a search warant and a certificate of seizure. DW1 added that he does not know PW11, he had never communicated with PW10 and as a matter of fact he does not have a phone. He finished by saying that he knew DW2 after staying with him in custody.

DW2, Paulo Shariff Mwambope stated that he is a farmer and that on 19/7/2017 at 1000 hours the OCS of Mlimba police station called and told him that they wanted to search the house of DW1. He is a street leader and DW1 is his neighbor. A search was conducted in his presence but nothing was found at Dw1's house. He added that he stays alone at his home and he doesn't know PW11. That was the end of the appellant defence.

The second accused, German Idd Ngaliluwula testified as DW3. He narrated that he resides at Mlimba since 2016 with his wife and children.

On 24/7/2017 at 0140 hours when he was at his home, his door was knocked by people who introduced themselves as police officers. They arrested him. These policemen were Insp. Luambano and E9295 D/CPL Juma. They asked him to hand over to them all documents and his legally owned gun marked as IV 303 Rifle with Reg.NO.004343. They arrested and took him to Mllmba police station and at 0500 hours they took him to Ifakara police station and later on to Morogoro central police station. On 25/7/2017 they took him to a certain room for Interrogation and on 28/7/2017 a police officer by the name of Juma Koroto recorded his cautioned statement in the presence of his relative and advocate. DW3 added that he does not know the appellant, they met at the lock up and he did not give him his weapon. The gun was with him at home during the arrest.

After hearing the evidence and scrutinized the tendered exhibits, the trial Magistrate found the charges against the first appellant were proved beyond all reasonable doubts. He was convicted and sentenced to serve fifteen years imprisonment while the second accused was acquitted of all offences. Aggrieved by both conviction and sentence he preferred this appeal to protest conviction and sentence. Initially, the appeal was

preferred with twenty-two grounds of appeal which can be paraphrased to eight grounds of appeal as followed;

1. The trial magistrate erred in law and fact to convict and sentence the appellant while failed to observe that there was contradiction and inconsistencies evidence in the prosecution evidence.
2. The trial magistrate erred in law and fact to convict and sentence the appellant while the exhibit P2 were not labelled at scene of the crime.
3. The trial magistrate erred in law and fact to convict and sentence the appellant while the provision of section 231 of the CPA, Cap 20, R.E 2019 was not fully complied.
4. That, the trial magistrate erred in law and fact to convict and sentence the appellant while there was no confession by the appellant that the elephant tusks belonged to him.
5. That the learned trial magistrate erred in law and fact to convict and sentence the appellant by shifting the burden of proof to the appellant.
6. That, the learned trial magistrate erred in law and fact to convict and sentence the appellant while exhibit P2 was tendered by the

state attorney which is unprocedural contrary to the mandatory provision of the Criminal Procedure Act.

7. That the learned trial magistrate erred in law and fact to convict and sentence the appellant based on the evidence of incredible and unreliable witnesses.
8. That the trial learned magistrate erred in law and fact to convict and sentence the appellant on a case that was not proved beyond all the reasonable doubt.

Basing on the foregoing grounds of appeal, the appellant prayed that the appeal be allowed by quashing conviction and setting aside the sentence meted against him.

At the hearing of the appeal, the appellant appeared in person unrepresented, while the Respondent, Republic, was represented by Mr. Dustan William and Rose Makupa, learned State Attorneys.

The appellant had nothing to submit in support of his appeal, he just prayed the court to consider the grounds of appeal and allow it while reserving right of rejoinder after respondent's submission.

Ms. Rose Makupa strongly opposed the appeal.

Submitting on ground number 1 and 10 jointly on certificate of seizure against the evidence of PW1, PW1 on his petition of appeal stated that, the search was conducted at Mlikula hamlet while certificate of seizure depict that it was conducted at Mlimba B village at Mlimba town, at page 32 last paragraph of the proceedings PW1 testified that search was conducted at Mlimba, the statement which is in line with certificate of seizure. Further on the charge states that Government trophies were found at Mlimba Village while evidence of PW1 is to the effect that the trophies were found at Mlikula hamlet. She submitted that, there is no contradiction as Mlikula hamlet is within Mlimba B Village in Mlimba township, as such, this ground has no merit.

Submitting on ground number 2 in respect of the name of the accused as it appears on certificate of seizure and charge sheet. She submitted that, the charge sheet indicates that the name of the accused to be Lufino Gabriel Mwakayela while in the certificate of seizure is written Lufino @ Mwakayela. At page 31 PW1 testified that the accused introduced by the name of Lufino Mwakayela, PW1 testified that the first accused is known as Lufino @ Mwakayela, the certificate of seizure was signed by the appellant and at no point in time he ever denied his name even during

the testimony, to bring the same at the appeal is mere afterthought, thence ask the court to ignore the allegations for want of merits.

As to ground number 3 of appeal, the learned state attorney submitted that the appellant alleged that, there was no evidence that the lodge really exist. However, PW8 testified that it exists as she used to work there, PW4 also proved that he was present when the appellant was arrested at the said hotel. The issue of not calling the owner, non-issuance of the business licence and TRA document of the business to prove its existence is not fatal since PW4 and PW8 proved its existence. Concerning the contradiction of where the lodge is found whether at Mlikula hamlet or Mlimba B village. PW1, PW8 and PW9 proved where the lodge is situated that is Mlimba Village. PW1 testified that there is Mlimba A and Mlimba B village separated by road, but both are within Mlimba township. She thus concluded that, the ground lacked merits.

In support of grounds number 4 and 5 of appeal which were conjoined and argued together, these grounds are in respect of which room the appellant was found is it at Arsenal or Liverpool. Ms Makupa stated that the fact read over by the Republic indicates that the appellant was found in a room known as Liverpool while the testimony of all the prosecution witnesses are to the effect that the appellant was arrested at a room

called Arsenal. Ms. Makupa stated that it is true there is such contradiction however the same is not fatal and it does not go to the root of the matter and affect justice on the part of the appellant, reasons thereto being, the appellant was found redhanded with the exhibits, he signed the certificate of seizure, arrested and sent to Mlimba police station, the nature of exhibit it is not likely to be tempered with, thus the different in room is not fatal.

Submitting in ground number 6 that there was no lodge book tendered in court to prove that the appellant was the guest rented the room in the fateful date, it was learned state attorney submission that PW8 at page 94, stated that the normal procedure is to register guests at 10.00 a.m. However, failure to tender guest book from the lodge is not fatal as there was no evidence of alibi or otherwise.

As to ground number 7, there is no confession that the appellant was found with four pieces of elephant tusks and he is the owner of the bag, at page 31. Ms. Makupa submitted that, the oral evidence is sufficient to prove certain facts as the appellant was found red-handed.

As to grounds number 8, 9 and 14 of appeal were argued jointly, these grounds are in respect of labelling of trophies, bag and sulphate. The appellant complaint is that they were not labelled at the crime scene. Ms.

Makupa admitted that, it is true that they were all not labelled at the time of seizure, but immediately after arriving at police they were all labelled before an independent witness. She stated further that, labelling of the seized properties has to be at the time of seizure. However, in the circumstances failure to do so was not fatal as it was done on arrival at the police station in the presence of the appellant.

On grounds number 11, 12, 13 and 18 of appeal which were argued together, the appellant complaint is that, there was no document of proving handing over of the pieces from PW5 to PW6. Ms. Makupa agreed that there was no handing over document between PW5 and PW6 on the four elephant tusks, however PW6 testified at page 81, that he received the tusks from PW1, there after it was handed over to PW5 and thereafter to PW7. There is no likelihood of the same being tempered, to cement his submission he cited the case of **Jackson Paul vs. Republic**, Criminal Appeal no 615 of 2020 at page 11. Ms Makupa admitted that, there was no document proving chain of custody, however chain of custody was orally proved through PW1, PW5 and PW6. She referred to the case of **Gitabena Giyaya vs. Republic**, Criminal Appeal no. 44 of 2022 at page 17, that the oral evidence suffice.

Submitting on ground no 15, that the trial court did not comply with Section 231 of the Criminal Procedure Act (C.P.A), Ms. Makupa stated that at page 112 – 113 of the proceedings the appellant was given right and entered a reply to it, thus this ground has no merit.

On ground number 16, the appellant complaint is that the burden of proof was shifted on his part, Ms Makupa submitted that, it was the prosecution who bear the burden of proof, and that is what happened in this case as per section 110 of the Evidence Act, this ground therefore has no merit.

The appellant on ground number 17 stated that the exhibit P2 was tendered by the state attorney, the courts records show that it was tendered by PW1, on page 9 paragraph 2, thus this ground has no merit.

Another grievance of the appellant is on ground no 19, failure of the trial court to evaluate and consider evidence of both sides, replying to the complaint the learned state attorney stated that at page 18 of the judgement depict how the evidence of both sides were considered to reach the verdict as such the allegation is unfounded and with no merits.

On ground number 21 the appellant stated that the trial court erred in convicting and sentencing him based on incredible evidence of the prosecution, Ms. Makupa submitting on that ground stated that credibility

of evidence is measured by evidence which is uncontradictory, she further stated that in the prosecution evidence there was some minor discrepancies which did not affect or cause injustice to the appellant, she glued her submission by citing the case of **Matata Nassoro vs. Republic**, Criminal Appeal no. 329 0f 2019, CAT at page 20 of the judgement about minor discrepancies and how it should be treated. Ground number 20 and 22 were argued together, the appellant stated that the prosecution did not prove their case beyond reasonable doubt, the learned state attorney submitted that the evidence adduced by prosecution proved the case hence the conviction of the appellant at the trial court met the standard of proof in criminal cases.

By way of rejoinder the appellant prayed for the court to consider the grounds of appeal and set him free. The appellant insisted that, given the observed contradictions, it is clear that, the prosecution's evidence are not worthy. He further submitted that, the prosecution side failed to prove the case beyond reasonable doubt. In total the evidence did not prove the case against the appellant.

Having heard the submission for and against the appeal, this court has gathered the following issues for determination;

1. Whether there were contradictions in the prosecution's evidence and what are its effect to the verdict
2. Whether there was irregular chain of custody of the seized elephants' tusks and what are its effect
3. Whether the case was proven against the appellant beyond reasonable doubt

Before embarking to the main discussion, this court find indebted to highlight one of the key principles to this court when sitting as first appellate court. This is the first appeal, and this being the first appellate it is in the form of re-hearing, in which the court has the duty to re-evaluate the evidence of the trial court and satisfy itself if it correctly evaluated the evidence and law applicable, thus arriving to the right verdict.

The above legal position is gathered from the case of **Hassan Mzee Mfaume v. Republic** [1981] T.L.R. 167 where the Court held that,

> *"A judge on first appeal should re-appraise the evidence because an appeal is in effect a rehearing the case; Where the first appellate court falls to re-evaluate the evidence and consider material issues involved. In a subsequent appeal, the court may re-evaluate the*

evidence in order to avoid delays or may remit the case back to the first appellate court"

Having thoroughly gone through the evidence both oral and documentary adduced by both parties, I find it pertinent to discuss the issues for determination in this case.

Submitting in support of the first ground of appeal regarding **contradiction of evidence**, the appellant complained that there is **contradiction as to the place where search and certificate of seizure was made,** the search warrant shows that, the search was made at Mlimba B, and PW1 stated that the search was made at Kitongoji cha Mlikula. Clearly there are contradictions as to where the search warrant and the certificate of seizure was made. However, there is no doubt that the two documents were made, and the appellant signed the certificate of seizure. Additionally, as stated herein above in the analysis of evidence, it is clear that Mlikula is a name of hamlet within Mlimba B village within Mlimba township. The difference is so minimal as Mlikula hamlet is within Mlimba B village of which even the appellant does not oppose the same, as such, the contradiction in the area of where the statements were made is immaterial in these circumstances as it does not go to the root of the case. All in all, it is in the same Village.

Another grievance by the appellant is about **contradictions of names** as they appeared in the certificate of seizure exhibit P1 is Lufino @ Mwakayela while in the charge sheet the name is Lufino Gabriel Mwakayela. As it is shown from the documents the names bear some differences, it is disputed by the appellant that the name of the person found in possession of the elephant tusks is different from the name of the person charged in this court. In examining the accused names, despite the fact that he has been referred to different names, the name MWAKAYELA, has often appeared in both Prosecution and Defence testimonies particularly in the charge sheet and when he introduced himself before the court in these proceedings. It is clear that, all the names touch the name of the appellant Lufino @ Mwakayela, Lufino Mwakayela, and Lufino Gabriel Mwakayela, are names used interchangeably and the appellant signed in all document stating those names, the same had never been refuted by the the appellant at any stage. Raising the same at this stage surely, it is a mere afterthought, thus this ground fails.

As on which room was the appellant when arrested with elephant tusks between arsenal and Liverpool room. It is not in dispute the room called arsenal and Liverpool are there in the lodge mentioning arsenal in place

of Liverpool and vice versa does not water down the evidence, what matter much is the issue at hand whether the appellant was found in possession of the trophies at which place and the evidence in support thereto.

Also, the issue of failure to tender documents of existence of the lodge is not of importance to prove as the prosecution called witness who among others testified to be the worker of the said lodge where the appellant was arrested.

It is not in dispute that the fact read to the appellant during trial shows that the appellant was found in Liverpool, the evidence adduced by all prosecution witnesses shows the appellant was found in the room Arsenal. The learned state attorney was of the view that there is contradiction however the same does not go to the root of the matter. The discrepancy by the appellant is about the room where the he was found. PW1, PW8 and PW10 tell the story to the effect that the appellant was found in the room. Being it Arsenal or Liverpool, or if the name of the appellant was registered in the log book or otherwise it doesn't change the fact that the appellant was arrested at Live Green Lodge with in possession of elephant tusk.

In the determining this point, I am guided by the principles established in the case **Deus Josias Kilala v Republic,** Criminal Appeal No. 191 of 2018 (unreported) where the court of appeal stated that;

> *"Court observed that regularly in all trials, normal contradictions or discrepancies occur in the testimonies of witnesses due to normal errors of observation; or errors in memory due to lapse of time or due to mental disposition."*

The Court did not end there but went further explaining on material contradiction or discrepancy which any court of sound mind would consider by elaborating as follows:

> *"... material contradiction or discrepancy is that which is not normal and not expected of a normal person and that courts have to determine the category to which a contradiction, discrepancy or inconsistency could be characterized"*

It is correct at this point to say that contradictions and inconsistencies in evidence by the witnesses are inevitable due to different observation and how people perceive things, lapse of time from the day of the incidence to the day the witness adduced evidence, however there are contradictions which go to the root of the matter (material contradiction)

and affect the prosecution case by creating doubts. In the case of **Said Ally Ismail vs. Republic**, Criminal Appeal no. 249 of 2008 for instance, the court observed that;

> *"It is not every discrepancy in the prosecution case that will cause the prosecution case to flop. It is only where the gist of the evidence is contradictory then the prosecution case will be dismantled."*

The question which comes at this juncture and which we are enjoined to answer is whether the contradictions in evidence in the case at hand were so material as to go to the root of the matter and thus affect the prosecution case?

It is true that, through court proceedings there are contradictions and inconsistencies in the prosecution evidence, however the said evidence had inconsistencies as compared to the witnesses' statements did not go to the root of the case to prejudice the accused persons or cause the prosecution case to flop, refer the case of **Said Ally Ismail Vs. Republic (supra).**

The contradiction and inconsistencies found are minor which did not go to the root of the matter as it is evident that the testimony of PW1, PW8 and

PW9 who were present at the scene of the crime is credible on account of being coherent and consistent. For that reason, this ground of appeal also lacks merit.

The appellant another grievance is that there was no confession statement. According to the prosecution evidence the appellant was arrested in the Lodge by the name Live Green, PW8 who used to work at the lodge and PW9 who was present during the arrest testified that the appellant was arrested at Live Green Lodge. PW8 and PW9 evidence was direct, and in this fact, I share the view of the learned state attorney that even in the absence of the testimony of the owner of the lodge or documentary evidence to prove existence of the lodge is not fatal as the evidence by PW8 and PW9 were sufficient to prove that the appellant was arrested in possession of Government trophies.

Further appellant complaint is that he was convicted and sentenced while there is no evidence of confession by the appellant that elephant tusks belong to him. On this ground it is the evidence of PW1 who was present during the arrest of the appellant that, the appellant was found in possession of elephant tusks, and he confessed before PW1 and other witnesses that he is the owner of the bag and four pieces of elephant tusks found in the bag. Despite the absence of confession statement by

the appellant there are witnesses who were present during the appellant arrest, they saw the appellant and hear when he confessed that the elephant tusks belongs to him.

It is known that an eye witness is the crucial whose evidence being oral is direct as it provided under section 62 of the Evidence Act which provides

62.-(1) Oral evidence must, in all cases whatever, be direct; that is to say-

(a) if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

(b) if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;

In view of the appellant's defence, the trial court was entitled to decide the issue on the basis of credibility, in my opinion the trial court rightly believed the credibility of the prosecution witness. It should be understood that, for the evidence to found incredible there must be credible issues raised by the defence side to discredit it, other simple suspicion, slip or shortfalls of whatever kind if it do not go to the substantive justice to deny the party's right, however, strong they are, cannot vitiate and discredit the

available evidence but only if they are strong and affect the substantive justice or deny one's right.

Otherwise, contradictions are there to stay as the exercise is done by human being with; **one**, difference capacities in storing facts in their brain, **two**, different perception, **three**, ability, **four**, level of education, **five**, circumstances under which the act was done, **six**, time spend, **seven**, was it daylight or night, **eight**, proximity, **nine**, is the evidence touches or relevant to the fact in issue and other related circumstances.

All the raised contradictions do not in my view touch, the heart of the fact in issue. Any doubt raised by the appellant must be satisfied that, they are relevant to fact in issue for it to worthy consideration, not every doubt is material to the defence side. The doubts therefore raised by the appellant are not fatal and it do not touch the fact in issue and affect the substantive justice on the appellant's side thus untenable in law. This ground also lacks merit.

Another appellant's complaint in this appeal is that, the exhibit was not labelled after seizure, it was the learned state attorney submission that the trophies, bag and the sulphate bag were not labelled at the crime

scene. Clearly stating, the aim of labelling exhibits is to make sure that they are clearly identified so that they can't be mixed with other exhibits.

In the case at hand PW1 explained before the court that the exhibits in question (elephant tusks) were wrapped in a sulphate bag and put in the bag. Thus, the same could be clearly identified throughout the process. However immediately after arriving at the police they were all labelled before an independent witness.

It is my opinion that failure to label the exhibit like drug, in powder form is different from failure to label an exhibit like an elephant tusk which was packed in a bag. Hence not any failure to label an exhibit, even in the circumstances where the exhibits can be identified due to its nature render the evidence far-fetched. The fact that, ***one***, elephant tusks were retrieved from the appellant, ***two***, labelled just on arrival at the police, ***three***, it was put in specific bag belonged to the appellant, **four**, the appellant did not contest that, the bag and the tusks are not the ones gathered at the scene of crime.

On the other hand, the trial court records show that, the appellant did not cross examine the prosecution witnesses on the issue of labelling of exhibits and did not object the admission of the exhibits tendered by

prosecution witnesses. It is a settled law that failure to cross examine the witness leaves his/ her evidence unchallenged, the position was reiterated in the case of **Goodluck Kyando vs. Republic**, Criminal Appeal no. 118 of 2003. That being the position there is no reason to doubt the credence of the evidence adduced before the trial court.

This shows that the exhibits were properly handled from the time of seizure to the time of disposal, and that is why the appellant had no doubts of the valuation report tendered in court. This ground also lacks merit. It is in the opinion of this court that, such concern cannot withstand and is a really an afterthought.

Further, the appellant raised another complaint with regards to the chain of custody of exhibit P2. The appellant's complaint is that; ***first***, there was no document to prove that exhibit P2 was handled to PW5 from PW6, ***second***, there was no document tendered in trial court to prove that there was handover of exhibit P2 between PW6 and PW1 ***third***, it was not well explained why exhibit was kept in two different police station (Mlimba and Ifakara) and lastly the appellant was convicted and sentenced without considering that the proper chain of custody was not established.

To start with, I am indebted to have the rationale behind having a chain of custody; ***first***, to ensure that the item seized at the scene of crime is and has remain the same to the date of tendering in court despite changing hands or being restored at a different stores or places, ***two***, prevent the seized properties from being tempered in any way, ***three***, to ensure genuineness, to have differentiating identity with other items, ***four***, to provide relationship between the charges and items retrieved from the scene of crime.

It is a settled law that in cases involving arrest, seizure, **custody** and later production in court of the seized property as exhibit, **there must be proper explanation** of who and how the property was handled from where it was found and seized up to the point when it is tendered in court. That is intended to ensure authenticity of such evidence, the rationale behind is stated in the case of **Paulo Maduka and three others vs. Republic**, Criminal Appeal no. 110 of 2017.

> *"By a 'chain of custody', we have in mind the chronological documentation and/or paper trail, showing the seizure, custody, control, transfer, analysis and disposition of evidence be it physical or electronic. The idea behind recording the chain of custody, is to establish that the alleged evidence is in fact related*

to the alleged crime – rather than, for instance, having been planted fraudulently to make someone appear guilty...the chain of custody requires that from the moment the evidence is collected, it's very transfer from one person to another must be documented and that it be provable that nobody else could have accessed it"

This court revisited the evidence on record and it is clear that, after seizure of the tusks, the valuation report and the appellant was taken to Morogoro Central Police station, on 21/07/2017 PW5 while at his place of work at The Central Police received a blue bag from PW6, within that bag there was four pieces of elephant tusks labelled LG1, LG2, LG3 and LG4. Afterward he handled the same to exhibit custody under custodian of the one CPL Kwilinus (PW7).

The learned state attorney agreed that there was no handling document between PW5 and PW6, however there is oral evidence of PW6 that he received the tusk from PW1 and stored them in the safe of the Head of Investigation at Kilombero District later on 21/07/2017 the exhibit was handed over to PW5 at Central Police Station, on 22/07/2017 the exhibit was handed over to PW7 who is the Custodian of exhibits at Morogoro Central Police Station.

The scope of the principle of chain of custody was narrowed down so that it couldn't apply strictly to exhibits which can't be easily tempered with. The position was re-instated in the case of **Issa Hassan Uki vs. Republic**, Criminal Appeal no. 129 of 2017 (unreported) where the court had this to say about the principle of chain of custody;

> *We are of considered view that elephant tusks cannot change hands easily and therefore not easy to temper with. In cases relating to chain of custody, it is important to distinguish items which change easily in which the principle stated in* ***Paulo Maduka*** *and followed in* ***Makoye Samwel @ Kashinje and Kashindye Bundala*** *would apply. In cases relating to items which cannot change hands easily and therefore not easy to temper with, the principle laid down in the above cases can be relaxed.*

Therefore, the fact that there was no documentary proof with regards to the issue of chain of custody just as stated in the case of **Issa Hassan Uki,** that elephant tusks are the items that couldn't be easily tempered with, the doctrine of proper chain of custody couldn't apply as strictly as in **Paulo Madukas case.** It is my considered view that chain of custody

was established through oral evidence, and the appellant did not raise any concern during trial.

Further, the appellant did not object or denounce the ownership and explained why he was in the said room. This ground of appeal is with no merit.

As to ground 15, that there was no compliance with the mandatory provision of Section 231 of the Criminal Procedure Act, Cap 20, R.E (C.P.A). Basically, Section 231 of the CPA requires a trial court to inform an accused person of his rights before making his defence. It provides that:

> *231.-(1) At the close of the evidence in support of the charge, if it appears to the court that a case is made against the accused person sufficiently to require him to make a defence either in relation to the offence with which he is charge or in relation to any other offence of which, under the provisions of sections 300 to 309 of this Act, he is liable to be convicted the court shall again explain the substance of the charge to the accused and inform him of his right-*

(a) to give evidence whether or not on oath or affirmation, on his own behalf;

(b) to call witness in his defence, and shall then ask the accused person or his advocate if it is intended to exercise any of the above rights and shall record the answer; and the court shall then call on the accused person to enter on his defence save where the accused person does not wish to exercise any of those rights.

The relevancy of section 231 of the CPA has been put more clearly in the case of **Juma Limbu @ Tembo vs. Republic**, Criminal Appeal no.188 of 2006, where it was stated as follows: -

"To avoid a miscarriage of justice in conducting trials, it is important for the trial court to be diligent and to ensure without fail, that an accused person is made aware of all his rights at every stage of the proceedings"

In the instant case, the record shows that the trial magistrate did comply with the mandatory provisions of section 231 of the CPA as a whole, where the accused rights were stipulated. What transpired after the close of prosecution side is as hereby reproduced;

Court: *The accused person has been addressed as per section 231 as regards to his rights.*

Sgd: Hon. E. Mrema – RM

11/12/2020

1st Accused: *I will testify under* ***oath****. I intend to call* ***two*** *witnesses including me. I don't have any exhibit to tender.*

Sgd: Hon. E. Mrema – RM

11/12/2020

As pointed out earlier, the appellant was made aware of his rights pursuant to section 231 of the CPA. In the circumstances of this case, there was no omission that occasioned miscarriage of justice at the trial. This ground of appeal has no merit.

In addition, the appellant contention that the prosecution shifted the burden of proof to his part. It is settled point of law that the burden of proof in Criminal cases lies on the Prosecution side.

I wish to recapitulate the principle of burden of proof in criminal case. It is a trite Law and elementary that he who alleges has a burden of proof as per section 110 of the Evidence Act, Cap 6 R. E. 2022. In criminal cases

therefore the burden of proof is on the prosecution and the standard of proof is beyond reasonable doubt.

This requirement have been emphasized in a number of decisions of this court and Court of Appeal. In the case of **Joseph John Makune v. Republic** [1986] TLR 44, it was observed:

> *"The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case. The duty is not cast on the accused to prove his innocence."*

To be able to discharge this duty, the prosecution evidence in its totality, must be sufficient cogent and credible. Conviction of the appellant was largely dependent on the evidence of PW1, PW8 and PW9 who were present during the arrest. This was the evidence of witnesses who were at scene of crime, and evidence of each of them and other prosecution witnesses made a corroboration hence the conclusion that the appellant is guilty.

Another complaint is that exhibit P2 was tendered by the public prosecutor and not the respective witnesses. I have thoroughly perused the record of appeal and noted that the public prosecutor prayed to tender the exhibit after the respective witness had identified them and indicated

that he wanted it to be tendered as an exhibit before the court and Prosecutor as matter of procedure is the one praying to the court to admit it and be part of evidence if the other part has no objection. The exhibit was tendered by witness but as but of procedure, it is the prosecutor who inform the court.

The procedure for tendering of exhibit P2 is hereby reproduced for readymade reference;

> ***Witness**: This is the bag which carried the elephant tusks. This is the sulphate bag and these are the four pieces of elephant tusks. This is LG1 up to LG4. This is the case number which described.* ***I pray to tender the four pieces of elephant as exhibit.***
>
> ***Pros**: We pray to tender the four pieces of elephant tusks labelled LG1. LG2, LG3 and LG4 with the case number MLB/ IR/ 507/ 2017.*
>
> ***Counsel**: The defence counsel had shown the exhibit.*

Consequently, I find this complaint baseless and accordingly dismiss this ground of appeal.

The appellant further challenged the credibility of prosecution witnesses that the case was not proved based on the evidence of incredible witnesses. It should be noted that there are no specific rules in determining the credibility of the witness. In the case of **Goodluck Kyando vs. Republic** [2006] TLR 363 it was stated that

> *"Every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness."*

It was the learned state attorney submission that credibility of the witness is measured by evidence which is contradictory or demeanour of the witness.

When determining the issue of credibility of a witness the Court of Appeal of Tanzania in the case of **Nyakuboga Boniface vs. Republic**, Criminal Appeal No.434 of 2016 (unreported) the court said that;

> *"There are no rules of thumb in determining the credibility, truthfulness or reliability of a witness. It all depends on how the demeanour of the witness, has been assessed by the Judge/ magistrate, and the assessment which is made to the evidence which he/ she gives in court"*

Based on the above observation, the credibility of a witness is determined by assessing the demeanor of a witness in relation to the evidence he gives in court. The issue of assessment of demeanour of a witness is entirely in the ambit of the trial magistrate since he is only who had an opportunity of seeing the witness when he/ she testifies. Therefore, this court being an appellate court is not in a position to determine the credibility of the witnesses but to determine whether the re-evaluate and reassess the evidence and how it was sufficient to amount to conviction. As appellate court, it can gather credibility of witness through looking at the coherent and consistence of the evidence adduced by the witnesses including contradictions in the vital issues evidence.

However, there are other ways through which credibility of a witness may be determined. In the case of **Nyakuboga Boniface vs. Republic** (supra) the court further stated that;

> *"Besides observing the appearance of the witness, in resolving as to whether the witness is trustworthy and telling the truth, the trial Judge/magistrate, is enjoined to correlate the demeanour of the witness, and the statements he/she makes during his/her testimony in court. If they are not consistent, then the credibility of the witness, becomes questionable."*

In view of the foregoing therefore, it is in the monopoly of the trial court in assessing the credibility of a witness is limited to the extent of the demeanor only. But there are other ways in which the credibility of the witness can also be assessed as the Court held in **Shabani Daud Vs. Republic,** Criminal Appeal no. 28 of 2001 that;

> *"The credibility of a witness can also be determined in other two ways that is, one, by assessing the coherence of the testimony of the witness, and two, when the testimony of the witness is considered in relation to the evidence of other witnesses"*

Now, coming back to the present case being led by the above cited authorities, this court can determine the credibility of by assessing coherence and consistence in their testimony and by considering their testimonies in relation to the evidence of other witnesses. Based on the evidence of PW1, PW2, PW3, PW5, PW6, PW7, PW8, PW8, PW9, PW10 and PW11, having carefully assessed the evidence of the witnesses on record. I am satisfied that, their evidence was credible and it proved the offence beyond reasonable doubt. However, this court observed some contradiction here and there but the same were minor and did not prejudice the appellant in any way as it did not touch the root of the matter as analyzed here above.

As to the last ground of appeal, that the trial court didn't prove the case beyond reasonable doubt, it is a cardinal principle that in criminal cases the duty to prove the case lies to the prosecution side.

In the case of **Christian Kaale and Rwekiza Bernard vs. Republic** [1992] TLR 302, the court held that

> *"An accused ought to be convicted on the strength of the prosecution case"*

The prosecution side therefore have the duty to adduce evidence to prove that it is the accused person who is guilty of the offence charged, and the standard of proof has to be beyond reasonable doubt.

In the upshot, I am settled that, the cumulative evidence of the prosecution proved the case beyond a reasonable doubt against the appellant as he was charged for unlawful possession of Government trophies to wit four Elephant tusks.

Based on the analysis of evidence of a trial court, I find that this appeal has no merit. I therefore upheld the conviction imposed to the appellant.

However, there is one more aspect of critical significance which I need to address in relation to the sentence imposed to the appellant by the trial

Court. It is on record that, upon being convicted the appellant was sentenced to serve fifteen (15) years imprisonment under section 60(2) of the Economic and Organised Crime Control Act.

The sentencing section for this kind of offences is section 60(2) of the Economic and Organised Crime Control Act, which provides that;

> *"(2) Notwithstanding provision of a different penalty under any other law and subject to subsection (7), a person convicted of corruption or economic offence shall be liable to imprisonment for a* ***term of not less than twenty years but not exceeding thirty years,*** *or to both such imprisonment and any other penal measure provided for under this Act;"*

The trial magistrate therefore, erred to impose the sentence which is below the statutory sentence for this kind of offence because, it imposed the sentence below the mandatory statutorily given.

It is a trite law that, an appellate court will only alter sentence imposed by the trial court, if it is evident that the said trial court has acted on a wrong principle, overlooked some material facts, or if the sentence imposed is manifestly excessive or below in the circumstances of the case. See the case of **Yusuph Abdalla Ally vs. Republic,** Criminal Appeal no 300 of 2019 (unreported), where the Court of Appeal quoted with approval the principle enunciated in **Dingwal vs. Republic** (1966)

Seychelles Law Report, 205 and quoted with approval in its earlier decision in the case of **Robert Aron vs. Republic**, Criminal Appeal no. 68 of 2008 (unreported). It was stated that;

> *".....on this subject which have shown that an appellate court may alter sentence imposed by trial court where;*
>
> *1. The sentence is manifestly excessive.*
>
> *2. **The sentence is manifestly inadequate**.*
>
> *3. The sentence is based upon a wrong principle of sentencing/law.*
>
> *4. A trial court overlooked a material factor.*
>
> *5. The sentence is based on irrelevant factors.*
>
> *6. The sentence is plainly illegal.*
>
> *7. The sentence does not take into consideration the long period an appellant spent in remand or police custody awaiting trial*

In view of the above authorities, I am satisfied that the sentence of fifteen years' imprisonment was erroneously imposed. The appropriate sentence is imprisonment of a term **not less than twenty years and not exceeding thirty years.**

I therefore set aside the sentence imposed by the trial court of fifteen years' imprisonment and subject to the powers vested in this court under section 373 (1) (a) of the Criminal Procedure Act I hereby enhance the sentence passed by Trial Magistrate against Lufino Gabriel Mwakayela to twenty years' imprisonment in terms of section 60 (2) (a) of the Economic and Organised Crime Control Act

All said and done, I hold that, this appeal is with no merits as I hereby dismiss it.

It is so ordered.

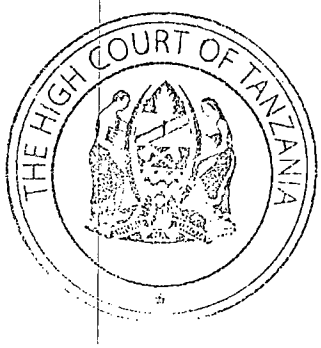
DATED at **MOROGORO** this 17th March 2023.

G. P. MALATA

JUDGE

17/03/2023

Court: Judgement delivered this 17th March 2023 in chambers, in the presence of the appellant and in absence of the Respondent.

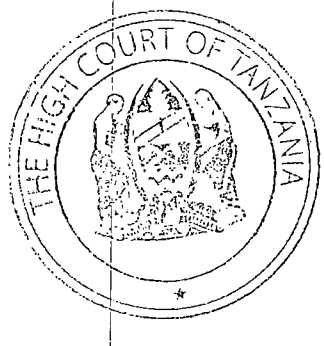


G. P. MALATA

JUDGE

17/03/2023

Right of appeal explained to the parties.



G. P. MALATA

JUDGE

17/03/2023