

IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MOROGORO DISTRICT REGISTRY

MOROGORO

CRIMINAL APPEAL NO 94 OF 2022

(Arising from Criminal Case number 69 of 2020, Morogoro District Court)

KULWA RAMADHANI NASSORO APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGEMENT

Date of last Order: 16/03/2023

Date of Judgement: 28/03/2023

MALATA, J

The appellant, Kulwa Ramadhani Nassoro was arraigned before the District Court of Morogoro for 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 2017].

It is alleged that, on 15th day of September 2020, the appellant was found at Shani Cinema Area, Morogoro Township within Morogoro District in Morogoro Region in possession of one elephant tusk and two pieces of elephant tusks being the property of the Government of the United Republic of Tanzania. The elephant tusks were identified as government trophy and valued by Tumaini Joseph Moga (PW5) on 16/09/2020. According to the trophy valuation certificate (Exhibit PE5), the elephant tusks was valued of USD 30,000 equivalent to Tanzania shilling sixty-nine million, six hundred and thirty thousand (TZS 69,630,000).

To prove the case, the prosecution side called a total of five witnesses A/ Insp Daniel Nyahiti (PW1), Hans Poper (PW2), E. 8949 D/Cpl Kwilinus (PW3), Moranya Baruti Moranya (PW4), Tumaini Joseph Moga (PW5) and tendered seven exhibits.

PW1 testified that he is the police officer working at Morogoro Central Police and that on 15/09/2020 he was at the police station with other police officers and wildlife rangers doing patrol all over the area of Morogoro. When they reached Shani Cinema Area at the old Dar es salaam road which is within Morogoro Municipal they saw two people.

Among them one was holding bag at his back, they seemed shocked after seeing the police officers, they stopped them but after seeing the police those people started to run and the police started to run after them. They managed to arrest one person who was holding the bag at his back, and that person is the appellant herein.

After the arrest they asked the appellant as to why he was running and he replied that he was shocked after seeing them, upon asked what is in the bag he replied that he was carrying the elephant tusks. They ordered him to open the bag, and the appellant opened the bag in front of many people who were gathered at that area after the arrest, and they saw a sulphate fasten by black rubber in it there was one complete elephant tusk and two pieces of elephant tusks, also there was clothes one trouser and mmasai cloth green in colour, one sweater, t shirt and one white vest.

Pw1 further testified that he filled the certificate of seizure by writing the things which were found with the appellant, he wrote the names of the witnesses who signed the certificate of seizure and the accused signed the certificate of seizure by using his thumb and he also signed the certificate of seizure, the appellant identified himself as Kulwa Ramadhani Nassoro (the appellant). PW1 identified one elephant tusk and two pieces of elephant tusks which were collectively admitted in court as PE2, the

bag which was admitted as exhibit PE3, the sulphate and the rubber band as exhibit PE4 and all clothes as exhibit PE5.

PW2 testified that he is "*bodaboda*" driver he parked his motorcycle near Shani Cinema Building. On 15/09/2020 he saw the police motor vehicle coming from the direction of Morogoro Municipal, the motor vehicle was parked where they park the motorcycles, he saw two persons but when the police motor vehicle parked one of them ran away and the police managed to arrest one person. The person arrested by the police was holding a brown bag with yellow belt at his back. The police ordered that person to open the bag, before the police asked him what was in the bag, he said that he was carrying elephant tusks.

PW2 further testified that the police ordered that person to open the bag, he opened the bag and took out the mmasai cloth green in colour, sweater blue in colour, black trouser, white vest thereafter he took white sulphate closed by black rubber band, he opened it and took three elephant tusks from the said sulphate, the police marked the elephant tusks and filled a form which he write his name and signed. PW2 identified the certificate of seizure (PE1), the elephant tusks (PE2), the bag (PE3), the sulphate and black rubber band (PE4) and the clothes (PE5).

PW3 testified that he is the police officer working at Morogoro Central Police as the exhibit keeper where he is keeping different kind of exhibits. He further stated that on 15/09/2020 in the morning hours he was at the police station where he was handed exhibit of case MOR/ IR/ 7101/ 2020 by A/ Insp. Daniel Nyahiti, the exhibit was a small brown bag and inside the bag there was a white sulphate bag where there was small elephant tusks and two pieces of elephant tusks, one mmasai cloth green in colour and black trouser, one t-shirt gray in colour, white singlend and a white sweater. PW3 labelled the elephant tusks with entry number ER. 390/2020 he also label the bag with the same entry number. On 16/09/2020 while in his office the investigator of the case one D/ Cpl Yusuph came along with the wildlife officer by the name of Tumaini Moga, the investigator of the case told him that the wildlife officer came to take valuation of the elephant tusks concerning case MOR/ IR/ 7101/ 2020, the exercise which was done at PW's office, he handed the tusks to the wildlife officer who weighed the tusks and fill his form, he thereafter returned the tusks for custody.

PW3 added that on 19/05/2021 he was informed that the exhibits is needed at the court for evidence and he brought the exhibits before the court, after hearing he was handed the exhibits for custody. On

22/06/2022 he brought the exhibit in court as there was a witness who came to adduce evidence

PW3 identified exhibits PE2, PE3 and PE4, and he identified the court exhibit register which was admitted as exhibit PE6.

PW4 testified that he is working as the wildlife officer, he stated that in the patrol conducted out of the game reserve they work together with police officers and street leaders during the search and. Further he stated that on 15/09/2020 at morning hours they arrange patrol with police officers, while in the motor vehicle along old Dar es salaam Road they reached the Shani Cinema area where they saw two people, after seeing the police they start to run, one was holding a bag, they managed to arrest the one with the bag, upon asking him why is running he replied that he is carrying elephant tusks. They ordered that person to open the bag, when he opened the bag he took out the clothes and a sulphate where there was elephant tusks, one complete and two pieces, and he said the elephant tusks belongs to him. the person introduced himself by the name of Kulwa Hassan Nassoro (the appellant). PW4 stated that he signed the certificate of seizure and the appellant signed by using his thumb. At the trial court PW4 identified PE2, PE3 and PE4 to be the exhibits seized while in possession of appellant on that day.

PW5 testified that he is the wildlife officer, that on 16/09/2020 while at his working station he was assigned to go to police Morogoro to identify and evaluate the value of government trophies. Upon reaching the police station he met afande Yusuf who sent him to the exhibit keeper afande Kwilinus, he was shown the brown bag, when he opened, he found white sulphate fasten with black bag, when he opened the sulphate, he saw the elephant tusks. He measured the height and weight of the tusks and found the three pieces weighs 1.85 kg, upon valuation he found out the tusks worthy 69,680,000. PW5 identified the valuation report which was tendered in court and admitted as exhibit PE7.

After the prosecution case the court was satisfied that prima facie case has been established against the appellant and the appellant was given a chance of defending his case. The appellant defended himself without witnesses and tendered two exhibits DE1 (a business plan) and DE2 (the letter from a company known as PASS)

In his defence, the appellant denied to have committed the offence. He deposed that he was arrested by police and wildlife officers at the area known as Shani Cinema, and that on that particular day he came from his Village to Morogoro to make follow up of his loan. He came with bus from the village and dropped at Kichangani where he boarded a Bajaj to town,

On the way they were stopped by the police officer upon reaching FFU area. After seeing that the time has gone, he asked the police officer to tell the Bajaj driver to return his money so that he can board another Bajaj. That is when the police told him that he is under arrest because he agreed to board the Bajaj with more than a number required by the law. He was sent to police station and on 11th November, he was brought before the court and charged with the above-mentioned offence.

After full trial, the trial court satisfied itself that the case against the appellant is proved beyond reasonable doubt and the appellant was convicted of offence as charged and then sentenced to serve custodial sentence of twenty years.

Aggrieved thereto, by the conviction and sentence the appellant appealed to this court, thence the present appeal. The grounds advanced in the petition of appeal are that:

1. That the trial court erred in law and fact to convict the appellant while the charge and particulars of the offence was at variance;
2. That the trial court erred in law and in fact to convict the appellant relying on the improbable and confusing oral evidence of the valuer;
3. That the trial court erred in law and fact to find and hold that prosecution witnesses were credible and reliable as the appellant

confessed readily after being arrested at the scene without asking himself that if he confessed why his caution statement was not recorded and tendered in evidence to corroborate the issue;

4. That the court erred in law and fact to convict the appellant by disbelieving defence evidence while it raised reasonable doubt to the case,
5. The court erred in law and fact to convict the appellant while the prosecution was not proved to the standard required in criminal trials, that is beyond reasonable doubt.

When this matter was called on for hearing, the appellant appeared in person, unrepresented. On the other hand, the respondent was represented by Mr. Emmanuel Kahigi, learned State Attorney.

When the appellant was invited to submit on his appeal, he opted for the learned State Attorney to respond first to the grounds of appeal while reserving his right to re-join, if need be.

In reply, Mr. Kahigi informed the court that, they were resisting the appeal, he thus informed the court on consolidating grounds 1, 2 and 3 of appeal and arguing together while grounds 4 and 5 grounds to be argued separately.

In opposition of grounds 1, 2 and 3 of appeal the learned State Attorney submitted that, the appellant is challenging the variance between the charge sheet and the evidence on record. That while in the charge sheet it stated that, there was one complete elephant tusk and two pieces of elephant tusks. PW2 and PW5 testified that, there was three pieces of elephant tusks. PW3 stated there was small pieces of elephant tusks. He submitted that there is no variance, the evidence by PW2 stated three elephant tusks while PW3 talk of one complete elephant tusk and two pieces of elephant tusk. He submitted that, all in all the total elephant tusk were three, thus no variance. He further submitted that the issue is the number and not otherwise.

On the issue that the prosecution witnesses are not reliable and credible, Mr. Kahigi stated that, the allegation are unfounded, as PW1 and PW2 are independent witnesses and PW4 who is the one who conducted the valuation. To cement his submission, he cited the case of **Goodluck Kyando vs. Republic (2006) TLR 363** where the court held that, every witness is entitled to credence unless there are good and cogent reasons to hold otherwise. The learned state attorney submitted that credibility of a witnesses is observed by looking at the coherence and consistent of the testimony in relation to each other. In this case the witnesses were

coherent and consistent thus legally reliable. He further submitted that, the appellant did not account for allegation that they were not credible. As this fact was alleged by the appellant then he was duty bound to prove its existence to the satisfaction of the court.

As to the 4th and 5th grounds of appeal, Mr. Kahigi submitted that the Republic proved the case beyond reasonable doubt. The appellant was arrested red handed and the evidence was supported by PW2 who is an independent witness. He finally prayed to dismiss the appeal.

By way of rejoinder, the appellant submitted that there is contradiction in the prosecution evidence, as PW1 testified that there was one complete tusk and two pieces, in one bag while PW2 testified that he saw three pieces of elephant tusks, PW3 testified that there were three pieces while PW1 and in the charge sheet talk of one tusk and two pieces.

He further submitted that, PW5 informed the court that he conducted the valuation of three pieces. As such, he prayed to the court to quash the conviction, set aside sentence and set him free.

Having heard the submissions for and against, this court has gathered two key point for it to be addressed to prove if the case against the appellant was proved beyond reasonable doubt, first is the effect of failure to tender certificate of seizure and variance between the charge sheet

and the evidence adduced by key witnesses who witnessed the search. In determination of those issues this court being the first appellate court has the mandate to re appraise, re assess, and re analyse the evidence on record before it and arrive at its own conclusion on the matter and give reasons either way, See the case of **Siza Patrice vs. Republic**, Criminal Appeal no. 19 of 2010 where the Court of Appeal held that;

"We understand that it is a settled law that the first appeal is in the form of re hearing. The first appellate court has a duty to re-evaluate the entire evidence in an objective manner and arrive at its own findings of fact, if necessary."

This being the first appeal, the court has the power to do what the trial court failed to do, if satisfied otherwise.

Ordinarily, under section 234 (1) of the Criminal Procedure Act, the trial court is empowered to make an order to alter the charge at any trial stage once it appears that the charge is defective, either in substance or in form. The purpose is to make the evidence tally with the charge sheet. Failure of which renders the charge sheet defective.

In the case at hand, it is true that there are inconsistencies as to what is stated in the charge and the evidence adduced in court with regards to the elephant tusks,

PW1 testified that

"When we open the said bag, we saw the elephant tusk one complete and two pieces."

PW2 testified that

"He opened and took three elephant tusks from the said elephant."

PW4 testified that

".... he showed us the elephant tusks one complete and two pieces."

The charge sheet depicts that;

PARTICULARS OF THE OFFENCE.

*Kulwa Ramadhani Nassoro on 15 September 2020, at Shani Cinema area, Morogoro Township, within Morogoro District in Morogoro Region was found in possession of Government trophies to wit; **one (1) elephant tusk and two (2) pieces of elephant tusks.....***

That's the extract of the charge sheet and witnesses who were present during the search and seizure of the elephant tusks. The issue to be determined in this circumstance is whether failure of the

prosecution to amend the charge sheet has cause injustice on the part of the applicant. PW1, PW2 and PW3 were all present during the arrest of the appellant, they saw what was in the bag, it was elephant tusks. Following that evidence there is no doubt that the appellant was arrested in possession of those elephant tusks, difference in description by the witnesses in the case can't water down the prosecution case because there are eye witnesses who saw the appellant from the time of arrest, that being the case the prosecution failure to amend the charge sheet is not fatal due to the following reasons, first, there are eye witnesses saw the appellant while taking out the tusks from his bag, second, the evidence of the eye witnesses linked the appellant to the commission of the charged offence on 15/09/2020, and third, description of the tusks differ from the witness due to nature of the exhibit, not everyone is familiar with elephant tusks to understand the difference between a piece of elephant tusk and complete elephant tusk. The important issue is the appellant was arrested in possession of government trophies and there are people who can testify to prove the possession.

On the other hand, PW1 testified that, they arrested the appellant and seized the elephant tusk, they filled the certificate of seizure with

the elephant tusks and certificate was as well signed by independent witnesses. He also testified that, there was certificate of seizure which was tendered in court as Exhibit PE1. This court has gone through all the handwritten and typed proceeding nowhere stated or recorded that, the said certificate was tendered. One, could expect that, may be the same was admitted during preliminary hearing stage and before the commencement of trial. This court has gone all the handwritten and typed trial court proceedings and noted no such document ever been tendered and admitted by court as exhibit PE1. Further, there is no such certificate in the court file.

Additionally, when the facts were read over and explained to the appellant, during preliminary hearing there was no document tendered and admitted by the court, Certificate of seizure inclusive.

That being the case, there is no certificate of seizure which was tendered. As such, the evidence by PW1, PW2 and PW3 are with no supporting evidence in particular the certificate of seizure which details nothing but the properties in question alleged to have been found with appellant. The importance of certificate of seizure in establishing the relevant chain of custody was emphasised in the case of **Daud s/o Chacha @ Marwa**

vs. The Republic, High Court of Tanzania at Mwanza, Criminal Appeal no. 100 of 2014 (unreported)

*I have also discovered as correctly submitted by the learned state attorney that the prosecution act **of not tendering certificate of seizure raise a serious doubt to be apprehended as I do.** This is so for obvious reasons that the police officers were merely in patrol duty, it was important for them to have recorded what the seized from the appellant.*

In the absence of the certificate of seizure, what is its effect to that evidence?, **one**, the court is in the position to ascertain in really the appellant was arrested with the items in question, **two**, who was present and signed the certificate of seizure, **three**, where was it found, **four**, how many tusks were retrieved therefrom, **five**, did the appellant found with it and signed the certificate of seizure, what identifying peculiar marks was it given to it. The court has been denied to have link between the elephant tusks with the evidence on record and charge sheet. How will this court with all eyes and mind be certain that, tendered elephant tusks are the ones retrieved from the scene of crime in the absence of certificate of seizure? This question was so difficult to the court decide in the absence of certificate of seizure without being given cogent reasons for its

absence. To prove that, the appellant was found with such elephant tusks is fundamental and is done through a certificate of seizure as couched by the provision of section 86 (1) The Wildlife Conservation Act which provides that;

*"Subject to the provisions of this Act, a person **shall not be in possession of, or buy, sell or otherwise deal in any Government trophy.**"*

It is with no iota of doubt that, the key element to be proved by the prosecution side as per the above provision are; **unlawful possession, buying, selling, or otherwise.** There is no proof of whatsoever unlawful possession, buying, selling or otherwise. Where should this court rely on in believing the story in the absence of what the law required to be done for the offence unlawful possession to be established.

I am pleased with PW1's testimony who stated that in order to prove that the said properties owned by the appellant is through the certificate of seizure.

In this case, the starting point in connecting the accused persons with the offence charged is the evidence establishing that the elephant tusks were found in the bag which was under control of the accused

person, and the only evidence to establish that, is a Certificate of Seizure showing what was seized in the said bag on that day.

Failure of the prosecution to tender the certificate of seizure in this scenario create serious doubt against the prosecution case because that was the material evidence which could have connected the appellant with the offence charged.

As such, this court is of the opinion that, failure to have a certificate of seizure as required by law is fatal and rendered the evidence on the issue to be so weak to rely upon.

It is trite law that, evidence improperly adduced or not adduced at all should not be relied on by the court to base its decision. This proposition was stated in the case of **Shemsa Khalifa and Two others Vs. Suleiman Hamed Abdallah**, Civil Appeal No. 82 of 2012, (CAT-unreported) where the Court had this to say

"...we think our main task is to examine whether it was proper for the trial court and other subsequent courts in appeals to rely upon, in their judgments, the said document which was not tendered and admitted in court.

We out-rightly are of the considered opinion that, it was improper and substantial error for the High

Court and all other courts below in this case to have relied on a document which was neither tendered nor admitted in court as exhibit. We hold that this led to a grave miscarriage of justice."

The trial court magistrate erred to rely on the evidence which was not dully admitted in court in this case it is fatal and it goes to the root of the matter, because the certificate of seizure is the material evidence which could have connected the appellant with the offence charged considering the fact that the appellant doesn't dispute to have been arrested, he disputed to be found in possession of the elephant tusks and other things said to be found in the bag. Further, the law demands for proof of unlawful possession, buying, selling or otherwise which neither of them were proven.

The testimonies by PW1, PW2 and PW4 made reliance certificate of seizure to prove that the things seized belongs to the appellant, while the certificate of seizure they are referring to was not part of evidence. For those reasons there is no other evidence proving that the things seized belonged to the appellant.

All said and done, I find satisfied that this is good case for this court to interfere with the trial court's decision based on the afore said reasons pinpointed here in above. This turn this court to conclusion that, the prosecution side failed to prove the case against the appellant to the standard required by the law, that is to say, beyond reasonable doubt.

Consequently, I hereby quash the conviction, set aside the sentence imposed to the appellant, as such I order for immediate release of **KULWA RAMADHANI NASSORO**, the appellant herein from the custody unless he is lawful held for other reasons.

IT IS SO ORDERED.

DATED at **MOROGORO** this 28th March, 2023



G. P. MALATA

JUDGE

28/03/2023