IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM

CRIMINAL APPEAL NO. 186 OF 2022

(Originating from the decision of the Resident Magistrate Court of Dar es Salaam at Kisutu in Criminal Case No. 49 of 2016)

ABSON SAMWEL CHAULA.....1st APPELLANT
SAID YASSIN CHEKELO.....2nd APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGEMENT

25th March & 16th June 2023

MKWIZU, J.

The appellants were arraigned at the Resident Magistrate of Dar es Salaam at Kisutu for the offence of Unlawful Possession of Government contrary to section 86(1) & (2) of the Wildlife and Conservation Act No. 5 of 2009 read together with paragraph 14(d) of the First Schedule to and Section 57(1) and 60(2) of the Economic and Organized Crime Control Act, (Cap 200 R.E. 2022)

It was alleged by the prosecution that on the 30th day of September 2016 at Jangwani area in Ilala District within Dar es Salaam Region, Abson s/o Samweli Chaula and Said Yassin Chekelo, the 1st and 2nd appellant were found in Possession of Government Trophies to wit, five pieces of elephant tusks valued at USD 75,000 which are equivalent to Tanzanian shillings one hundred and sixty-three million, six hundred and fifty thousand (163,650,000/=)the property of the United Republic of Tanzania without a permit from the Director of Wildlife.

Accused persons pleaded "not guilty". The prosecution brought seven (7) witnesses and tendered various exhibits in proving their case.

It is from the prosecution case that on 30/9/2016 a police officer Inspector Victor Francis Kashai (PW1) received information that there are people at Jangwani Mafuso area in Dar es Salaam who were about to transact in elephant Tusks. He prepared a team of people including a wildlife conservation officer by the name of Kiza Yusuph Baraga (PW3), DCPL Emmanuel Nahande (PW4), and others. According to PW1, PW3, and Pw4, the team went to the Jangwani area where at around 20. 30 hrs they saw two people carrying a sulfate bag and the informer identified them as the persons they were looking for. They arrested the appellants, and introduced themselves to them before the search and seizure exercise that was witnessed by an independent witness, Mohamed Said Ngeropera (PW2) where five pieces of elephant tusks were found in a Sulphate bag. PW1 informed the court that he signed the seizure certificate together with the 1st appellant Abson Charles Chaula and the independent witness, PW2. They took the accused persons and the elephant Tusks to Msimbazi Police where the case file was opened with registration No MS/IR / 5247/2016 and the elephant tusks were handled to the Wildlife authority for safe custody.

PW1 informed the court further upon interrogation, the 1st accused (now appellant) confessed the commission of the offense on 2/10/2016 naming his associates Leonard and Mwakyembe whom they succeeded to arrest in a trap that involved the 1st accused. He was later on 5/10/2016 assigned to search Leonard Tukio's house in the Msasani area where they found two small pieces suspected to be rhino horns which

were later identified to be Buffalo horns. That the search was witnessed by PW7, an independent witness. The seizure certificate was prepared and signed by the 3rd accused.

The trophies were taken to the ivory room, at Mpingo House Dar es Salaam. According to PW6, the exhibit keeper on 1/10/2016 at 00.000 received five elephant tusks, and on 3/10/2016 he received two buffalo horns and signed He signed the chain of custody records. He identified the five pieces of elephant tusks, two pieces of buffalo horns, and the chain of custody reports dated 01/10/2016 and 03/10/2016 respectively.

PW5 is Said Nyango Selemani a wildlife officer. His evidence was in respect of his participation in the preparation of the trophy valuation certification 7th day of October at Mpingo house. He identified five pieces of elephant tusks valued at USD 75,000 equivalent to Tshs 163,650,000/= and two buffalo horns worth 4,148,800/=. He in the end handled the valuation certificate to Assistant Inspector Victor Kishai

Both appellants denied the accusations levelled against them. The 1st Appellant said he was arrested on the 30th day of September 2016 about 19:00 hours to 20:00 hours, at Jangwani area on his way from Kigogo area to Kariakoo by the Police Officers and taken to Mpingo House, Keko Dare es salaam. He said at Mpingo, he was hung up, his legs tied with ropes, beaten for almost one and a half hours, such that he was unable to walk. He was later brought to the Court.

2nd Appellant's defence was that he was arrested on the 28th day of September 2016 and brought to Magomeni police station where he stayed there for five (5) days. He was then shifted to Central Police Dar

es Salaam where he stayed again for two (2) weeks and on 18/10/2016 he was brought to Kisutu Resident Magistrate Court at Kisutu joined with other accused charged with the offence of unlawful possession of elephant tusks.

As intimated earlier, the appellants were acquitted in the first count but found guilty of the second count. In convicting them, the trial court relied on the evidence of PW1, PW2, PW3, and PW4 to the effect that, both 1st and second accused were found in Jangwani area with a sulfate bag containing the elephant's tasks at issue.

Appellants are aggrieved by both, the conviction and sentence they each filed in this Court six (6) grounds faulting the trial court for :-

1. Basing the conviction on a faulty search and seizure of the appellant conducted in contravention *c of section 38(1) & (3) of the Criminal Procedure Act, Cap 20 [R: E 2019*.
2. *The prosecution evidence is tainted with contradictions,*
3. *Failure to establish a chain of custody of the Government Trophies allegedly found with the appellant.*
4. *Failure by the trial court to evaluate the evidence.*
5. *failure by the trial, court to consider the defence*
6. *Failure by the prosecution to prove the offence to the required standards.*

When the appeal came for hearing on 20/2/2023, the appellants who were in person without legal representation asked the court to have it argued through written submissions The Republic/Respondent was represented by Mr. Laiton Muhesa, principal State Attorney. The prayer

was granted, and parties were given schedules upon which to file their respective written submissions.

The appellants filed a joint written submission in support of their grounds. In ground 1, the appellant challenges the use of exhibit P2(certificate of seizure) for being obtained in contravention of the law. They said, the alleged search was not an emergency search envisaged by the provisions of section 42(2) of the Criminal Procedure Act, Cap 20 [R: E 2019], because, the search team (PW1) and others had relevant information about the appellants deal earlier on that day from the informer but they mobilized themselves to go for the exercise and reached the scene at 08:00 pm of 30th day of September 2016 without a search warrant contrary to section 41 of the Criminal procedure Act, Cap 20 R: E 2019. They maintained that the search and seizure of Exhibit P.2 was illegal and ought to have not been received by the trial court.

Regarding contradictions in the prosecution case, the appellant said Pw1, PW2, PW3, and PW4 evidence is contradictory on who was carrying the sulfate bags at the time of arrest, who filled the seizure certificate(exhibit P.1), number of people who signed the seizure certificate, description of the five elephant tusks and the description of the elephant tusks and the type of sulfate bag alleged to have carried the elephant tusks. They contended that while the team leader PW1 says the sulfate bag was held by two people, The independent witness, PW2, on pages 135 and 138 of the proceedings said it is only the 1st appellant who carried the sulfate bag in which the five elephant tusks were found.

Submitting with respect to the signatories of the seizure certificate, the appellants said, while PW1 at page 107 of the proceedings identifies himself as the officer who prepared the seizure certificate which was signed by himself together with the 1st accused Abson Samwel Chaula(1st accused), and the independent witness, PW2; in his evidence at page 136 of the records the independent witness(PW2) says the seizure certificate was prepared by CPL Hussein while PW3, the wildlife officer who attended the same search and seizure exercise names Inspector Kashai as the officer who prepared the seizure certificate and that it was signed by four people namely PW1, the 1stand 2nd appellant and the independent witness(PW2).

They faulted the prosecution's evidence for describing the elephant tusks allegedly found at the scene differently. While PW1 identified the tusks with their IR number MS/IR/5247/2016 and RB No.MS/RB/7272/2 labelles he fixed on the trophies at the Msimbazi Center without any description as to their appearance and size, PW2 and PW3 described the tusks by appearance and size while PW4 said the trophies were short in size without more. They also faulted the chain of custody stating that there was improper handling of the exhibits from one place to another contrary to the directives of the PGO NO 229 paragraphs 15 and 31.

Explaining the variance of evidence as to the description of the colour of the sulfate bag found with the elephant tusks, the appellants said, while the rest of the prosecution witnesses described the sulphate bag as white in colour, PW4 described it as dirty sulfate bag. They, on the given contradiction, urged the court to find PW1, Pw2, PW3, and PW4 incredible witnesses.

The third ground of appeal is a complaint on the chain of custody (exhibit P.2) from the point of arrest to the store where it was kept for safe custody by PW6. The appellant's contention here is that the evidence given by the prosecution does not exhibit a proper unbroken chain of custody of the trophies to confirm that the said exhibit is the same found at the scene on the material time. They lamented further that the trophies were taken from the scene unlabelled to enable Pw2 to identify the same in court.

The fourth point is a complaint over the failure of the trial court to evaluate the evidence. The appellant was of the view that the trial court had applied double standards in assessing the evidence adduced against the 1st account and the second count. They contended that the evidence adduced in respect of the 2nd count contains similar contradictions to one that existed in the 1st count but the two were treated differently by acquitting the appellants in the 2nd count while convicting them on the 1st count with the evidence with similar mistakes. The attention of the court was drawn to the decision of **Maloda William V Republic**, Criminal Appeal No 256 of 2006(unreported) on this point.

The appellant's fourth point was on failure by the trial magistrates to consider their defence. Citing to the court the decision in **Hussein Idd And Another V Republic** (1986) TLR 166, the appellants said, in rejecting the 2nd appellant's alibi the trial court shifted the burden of proof to him faulting that approach claiming that the trial court duty was to assess the defence evidence and see if it has raised doubt on the prosecution case on not. The appellants maintained that the ignored

defence evidence casts reasonable doubt on the prosecution case which ought to have been used in their favor.

Criticizing the prosecution for failure to prove their case on their last ground, the appellants contended that the arresting team was not familiar with the appellants and relied on the information obtained from the informer who only knew 1st appellant. That PW2 and PW4's evidence indicates that the arrest of the appellant was effected in the dark and therefore the identification of the appellant was never watertight.

They challenged the failure by the prosecution to tender the appellant cautioned statements, late charging of them without plausible reasons, stating that all the above suggests a fabricated charge aimed at incriminating the appellants. They lastly urged the court to allow the appeal.

In rebuttal, the learned State Attorney submitted that the information received by the arresting officers was an emergency to the extent that they were required to immediately rush to the scene of the crime to apprehend the suspects before they could flee the site because any delay in getting to the crime scene could have caused the suspects to go unnoticed. He suggested that the search was under the circumstances, of emergency under section 42 (2) of the CPA.

Seemingly in the alternative, The learned State Attorney cited to the court the decision of **Peter Kabi and Others V R**, Criminal Appeal No. 5 of 2020 saying that the law under section 106(1) (c) of Wildlife Conservation Act No. 5 of 2009 allows an authorized officer, police officer inclusive to conduct a search without a warrant. He supported

the admission of the seizure certificate by the trial magistrate on the reason that it advances the public interest without unduly prejudicing the rights and freedom of the appellants.

The learned State Attorney admitted that there was a slight discrepancy as to who had the bag containing the elephant tusks at the time of the arrest, PW1 explicitly indicated that the bag was being carried by both the first and second accused while PW2 claimed that the first accused was the one carrying the bag. He was however of the view that that contradiction is minor, and it did not adversely affect the appellant's right. He relied on the decision of Evarist **Kachembeko and Others Vs Republic** [1978] TLR 70 *and* John **Gilikola Vs Republic**, Criminal Appeal No. 31 of 1999 (unreported)

He also maintained that the raised contradictions on the type of carrier bag, the number of people who signed the seizure certificate, the number of people who carried the sulfate bag and the description of the elephant's tusks were immaterial and did not prejudice the appellant. He contended that the key issue considered was whether the appellants were found in possession of the Government tusks or not. He prayed that the second ground be dismissed for lacking in merit.

Responding to the third ground of appeal, he said, the elephant tusks seized from the scene of the crime were immediately labeled after the accused, and the trophies were taken to Msimbazi Police Station and handed to the Wildlife Authority for safe custody with their mark. He said, the labeling is an investigative process, that needs to be followed in accordance with the PGO which is found at the Police station asserting

that since the seizure was conducted at night with only a vehicle light, and the Msimbazi police were a walking distance from the scene, the labelling of the tusks at the Msimbazi center was justified. The State Attorney went further to state that, PW2's duty was to witness the search, seizure of the tusks, and the arrest of appellants the duty that he perfectly performed and was able to identify both the seized Government trophies and the appellant in court. He suggested that the cited case **of DPP V Stephen Gerald Sipuka**. Criminal Appeal No 373 of 2019 is distinguishable for it was related to the seizure of Narcotic drugs which tends to change their original forms from time to time.

Speaking on the chain of custody challenged by the appellant in this case, the State Attorney said, it is not necessary to establish the chain of custody with a paper trail as established in the case of **Chacha Jeremiah Mrimi And others V R,** criminal Appeal No 551 of 2015. He invited the court to find this ground devoid of merit.

Submitting against the fourth ground of appeal, the State Attorney stated that the trial court found the evidence in support of the 2nd count so contradictory to establish the offence but the same court was convinced that the evidence adduced in support of the 1st count was sufficient enough to establish the offence therein. To him, the circumstances of the arrest and seizure of the elephant tusks are different from that of the arrest and seizure of the buffalo horns and the 3rd accused.

On whether the defence was considered or not, the learned State Attorney admitted that the duty to prove the case lies on the prosecution. To him, the trial court weighed the credibility of the alibi defence just like any other evidence when determining whether the prosecution has met that burden and the court was satisfied that the appellants were at the scene thus the argument that alibi defence was not considered is worthless.

Lastly, the State Attorney said, the prosecution case was proved beyond reasonable doubt. That the evidence by PW1, PW2, and PW3 was not strongly challenged by the defence. He said the investigation information is always obtained from the whistle-blowers through whom the appellants were identified by the police officers at the scene. He at the end prayed for the dismissal of the appeal.

I have seriously considered the grounds of appeal and the party's submissions. In their first grounds, the appellants fault the seizure certificate for contravening the provisions section 38(1) and (3) of the CPA calling for an assessment of evidence to see if the procedures relating to the Search and seizure were followed or not.

Fortunately, the law on this aspect is well set under sections 38 to 40 of the CPA, read together with items 2, 17, and 18 of the Police General Order 226. Section 38 of the CPA:

> *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* ***place-***

(a) anything with respect to which an offence has been committed;

(b) anything in respect of which there are reasonable ggrounds to believe that it will afford evidence as to the commission of an offence.

(c) anything in respect of which there are reasonable grounds to believe that it is intended to be used to commit an offence, and the officer is satisfied that any delay would result in the removal or destruction of 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 police officer concerned shall, as soon as practicable, report the issue of the authority, the grounds on which it was issued, and the result of any search made under it to a magistrate.

(*3).* ***Where anything is seized in pursuance of the powers conferred by subsection (1) the officer seizing the thing shall issue a receipt acknowledging the seizure of that thing, being the signature of the owner or occupier of the premises or his near relative or other person for the time being in possession or control of the premises, and the signature of witnesses to the search, if any."***

And Police General Order No. 226:

"Item 17 (b) The services of a local leader or two independent witnesses who should be present throughout the search; should

be obtained. This is to ensure that he or they may be in a position to give supporting evidence if anything incriminating is found and to refute allegations that the search was roughly carried out and the property damaged."

"Item 18: On completion of the search; a search report will be made out at the scene, giving details of all articles seized, a copy of which shall be handed to the occupier."

According to the above provisions, the following are some of the main points regarding search and seizure:

i. A police officer in charge of a police station may conduct search and seizure or can issue a written authority to any police officer under him to search any building, vessel, carriage, box, receptacle, or place where there is reasonable ground for suspecting that there is anything related to an offence or intended to be used for committing an offence except on an emergency search conducted under section 42 of the CPA.

ii. A search must be witnessed by a local leader of the area or two independent witnesses.

iii. A person executing a search warrant must prepare a list of all things seized to be signed by the owner or occupier of the premises or his near relative or another person for the time being in possession or control of the premises, and the signature of witnesses to the search, if any -

See for instance the decision in **Maluqus Chiboni @ Silvester Chiboni and Another v. Republic**, Criminal Appeal No. 8 of 2011.

It should however be noted that this is an economic case where appellants stand charged and convicted on among other laws, the Wildlife Conservation Act, No 5 of 2009. In that Act, section 106 (1) (a)(b)(c) search and arrest powers mandated are vested in authorized officers, police officers, and wildlife officials. The section provided:

> *"106. -(1) Without prejudice to any other law, where any* ***authorized 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 license, 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, license, 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"

And the "**authorized officer**" is defined in section 3 of the same Act to include the Director of Wildlife, ***a wildlife officer***, a wildlife warden, a wildlife ranger, or a ***police officer***.

I have read the records. It is evident that the search team had members from the police force and the Wildlife officers including inspector Francis Kashai(PW1) and Wildlife officers Kiza Baraka, Fopa Mtekwa, Abel Manyanza, and Masemba Meanatindigwe). In terms of section 3 and 106 (1) of the Wildlife Conservation Act, these individuals are authorized officers who require no further search warrant to search, seize and arrest. Thus, the search and seizure conducted on the appellants in Jangwani area was properly done under section 106 (1) (c) of the Wildlife Conservation Act.

Again, it is on the records that the appellant's search was conducted in the presence of an independent witness. It is in the prosecution case that having arrested the accused with a sulfate bag, the police called one civilian/ public Member (PW2) to witness the search. They then opened the sulfate bag and found inside it five pieces of elephant tusks. They filled out a seizure certificate which was signed by the 1st accused person, PW1, and an independent witness (Pw2). This evidence was confirmed by the said independent witness, Mohamed Said Ngeropera(PW2). I do not find merit on the first ground of appeal.

The appellant's third point which I propose to determine before determining the 2nd ground is on the chain of custody of the Government Trophies allegedly found with the appellant. It is a settle led principle that to establish the integrity of the items found with the appellant, proof of the chain of custody is mandatory. The position held by the Apex Court of the Land in several cases is that without a proper explanation of the custody of those exhibits, there would be no cogent evidence to prove the authenticity of such evidence. See for instance **Onesmo Mlwilo vs Republic**, Criminal Appeal No. 213 of 2010 (unreported), **Paulo Maduka and Others vs Republic**, Criminal Appeal No. 110 of 2007, and **Hassan Barie and Meshaki Abel Ezekiel vs Republic**, Criminal Appeal No. 297 (all unreported) and **Illuminatus Mkoka vs Republic** [2003] TLR 245 in the latter case the court held:

> *"… given those missing links in the instant case, we are of the considered opinion that the improper or absence of a proper account of the chain of custody of Exhibits P3 and P4 leaves open the possibility for those exhibits being concocted or planted in the house of the appellant".*

In the instant case, the appellant complain that the chain of custody was broken. The trophies (exhibit P.2.) were seized from the appellants on 30/10/2016 at Jangwani Mafuso area in the presence of Pw2, as an independent witness. A certificate of seizure was prepared and signed by the accused, PW1, and the independent witness. The exhibits were taken to Msimbazi Police station, where the case filed was opened and the exhibits were marked with the RB and IR numbers

MS/RB/7272/2016 and MS/IR/5247/2016, they measured the tusks, and taken to the Ivory room at Mpingo House by PW3 accompanied by Pw1 and other police officers namely DCPL Selemani Mwakasenga, Mlekwa Simoni Fokas, Abel Manyaza, and Masamba Tindiagwe. At Mpingo house the evidence shows that the exhibit P2 was handed to the exhibit keeper by the name of Wilfred Olomi (PW6) who signed in the chain of custody. The tusks were 7/10/2016 handed to PW5, Saidi Nyanzo the government valuer for valuation, and after the valuation, Pw6 kept the exhibits before he later handed it to PW1 for tendering in court. I do not see any cracked point in the chain of custody suggesting any tempering that would have raised doubt on the integrity of the trophies found with the appellants on the material date. I am thus convinced that the chain of custody was intact as rightly found by the trial court.

On failure by the trial court to consider defence. It is the law under section 235 that in composing a decision, a trial magistrate is obligated to consider the evidence of both sides as presented to it to arrive at a finding of guilty or not and the analysis and evaluation of the evidence as well as the findings should be apparent in the record. Insisting on this requirement, the Court of Appeal decision in **Kaimu Said V The Republic**, criminal Appeal No 391 of 2019, on page7 held:

> *"… it is clear to us that in composing the judgment (decision) a trial magistrate is obligated to consider the evidence of both sides as presented to it to arrive at a finding of guilty or not. The analysis and evaluation of the evidence as well as the findings should be apparent in the record. In the event a trial court fails to perform its duty under the law to consider the defence evidence, a High Court, being the first appellate court*

has the power to step into the trial court's shoes and reconsider the evidence of both sides and come up with its finding of fact.

I have evaluated the evidence. Page 17 of the trial court's decision contains an analysis of the evidence of both sides the prosecution and the defence with an express satisfaction with the prosecution evidence**.** This ground is thus dismissed for lacking in merit**.**

The second, fourth, and sixth grounds of appeal are intertwined and therefore will be determined together. On these grounds, the trial court's decision is being challenged for relying on weak and contradictory evidence by the prosecution impeaching the trial court for failure to evaluate the same properly.

Seating as a first appellate court, this court will be guided by the legal position expressed by the Court of Appeal in **Siza Patrice vs, Republic**, Criminal Appeal No. 19 of 2010 (unreported) where it categorically stated that: -

"We understand that it is settled law that a first appeal is in the form of a rehearing, as such, the first appellate court must re-evaluate the entire evidence in an objective manner and arrive at its finding of fact, if necessary."

The re-evaluation process will go along with the consideration of the burden of proof in criminal cases that is shouldered on the prosecution. As I understand the law, the prosecution in any criminal case bears the duty to establish not only the commission of the offence but also that it

is the accused persons/ appellants in this case that are responsible for the said offence.

With respect to the 1st count, six witnesses were paraded by the prosecution. PW1, PW3, and PW4 are Police and wildlife officers who participated in the arrest and seizure of the appellant and exhibit P2 at the Jangwani Mafuso area in the presence of PW2, an independent witness on 20/9/2016. According to their evidence, the accused were identified to them by an informer, they apprehended the appellant with a sulfate bag, and they involved an independent witness (PW2), in searching the appellants at the scene where they found them with five elephant tusks. The search warrant (exhibit P1) was filled and signed by the 1st accused, PW1, and an independent witness (PW2). They took the accused to Msimbazi Police where they marked and labeled the trophies with the IR and RB numbers and took them to Mpingo house where the same were handled to PW6 a storekeeper at Mpingo house who confirmed before the court to have received on the material date five elephant trophies from the arresting team including PW3 and PW1. PW5 is the government value that performed a valuation of the trophies ta the Mpingo house.

The appellants' point of contention is that the evidence of those witnesses is contradictory and therefore weak to ground their conviction. The prosecution case is said to contain contradictions in the number of people who carried the sulfate bag during the arrest, the type of sulfate bag, the officer who prepared the seizure certificate, the number of people who signed the seizure certificate, and the description of the elephant's tusks (exhibit P2).

I have evaluated the evidence.PW1 evidence is to the effect that the sulfate bag was carried by the two accused in court. This piece of evidence is also supported by PW2 on page 135 of the trial courts proceedings where he was recorded to have said:

> *"The 1st and 2nd accused were found in possession of the elephant tusks in packing area of Lorries along Morogoro road and Jangwani area… we had approached the area when the accused persons (1st and 2nd accused) were arrested*
>
> *.. The first accused person carrying the seized sulfate bag and he was accompanied by the 2nd accused."*

This evidence tallies that of Pw1 on the number of people who carried the sulfate bag on which the elephant tusks were found. There is no contradiction at all on the colour of the sulfate bag as contented by the appellant. PW2 said it was while in color while PW4 describes it as a dirty sulfate bag. The evidence by Pw4 that the sulfate bag was dirt did not eliminate the fact that the bag had its original colour.

The prosecution evidence is specific that the seizure certificate was prepared by PW1, Inspector Victor Kashai. The seizure certificate (exhibit P1) was signed by PW1, Inspector Kashai as the officer who executed the search, PW2, Mohamed Ngauseoro, an dependent witness, and the 1st accused Abson Samwel Chaula (1st accused). PW1's evidence on page 107 was recorded thus:

> *"I am the one who filled the certificate of seizure. I signed therein together with Abson Samwel Chaula, (first accused) and an independent witness who I forgot his name.."*

This position was maintained by all the prosecution witnesses. The prosecution evidence was also elaborative on why the 2nd accused did not sign the seizure certificate. According to Pw1, the signature spaces in the seizure certificate give no room for more than one suspect to sign the certificate, which is why, the 2nd accused did not sign. I find this explanation plausible. Though Pw2 indeed mentioned CPL Husein, as the officer who filled exhibit P1, that evidence did not at all erode the truth of the matter. I say so because even in his evidence Pw2 admitted to having forgotten the officer who prepared the exhibit and that his mention of CPL Hussein was just a guess telling the court that he could have identify him if he appears before the court. This in my view was nothing but a human error caused by a lapse of time. I am on this fortified by the decision in **Evarist Kachembeko and Others Vs**

(Supra), the court held**:**

> *human reconciliation is not infallible. A witness is not expected to be right in minute details when retelling his story".*

And in a similar situation in **John Gilikola Vs Republic**, (supra) the court said:

> *"Due to the frailty of human memory and if the contradiction or discrepancies in issue are on details the court may overlook such contraction or discrepancies".*

I find a contradiction in the identity of the officer who prepared exhibit P1 and the number of persons who signed the same minor not affecting the integrity of the prosecution's evidence.

The evidence in the description of the elephant tusks allegedly found at the scene is also intact without major errors despite of different styles used in describing the same. PW1 identified the tusks by their IR number MS/IR/5247/2016 and RB No.MS/RB/7272/2016 the labels he fixed on the trophies at Msimbazi Center. PW2, the independent witness described them by their physical appearance and so the PW3 and PW4. There is nothing in the prosecution evidence suggesting that the trophies described by Pw1 are distinct from the ones described by the rest of the prosecution witnesses. This certainty is also strengthened by the strong prosecution evidence about the chain of custody analysed in the third ground of appeal.

The court is of the firm view that the prosecution evidence is reliable and contradictions if any are not central and fatal enough to destroy the credible prosecution evidence. I am supported by the decision in the celebrated case of **Mohamed Said Matula v. R** [1995] T.L.R. 3, where the Court Held:

> *" Where the testimonies by witnesses contain inconsistencies and contradictions, the court has a duty to address the inconsistencies and try to resolve them where possible; else the court has to decide whether the inconsistencies and contradictions are only minor, or whether they go to the root of thematter"*

And **Chrizant John vs R**, Cr Appeal No 313 of 2015, where the Court insisted that:-

"Contradictions by any particular witness or among witnesses cannot be escaped or avoided in any particular case, however in any considering nature the number and impact of contradictions it must always be remembered that witnesses do not make a blow-by-blow mental recording of an incidence as such contradiction should be evaluated without placing them in their proper context in an endeavour to determine their gravity meaning whether or not they go to the root of the matter rather than corrode the credibility of a parties case"

I have as well examined the circumstance concerning the appellant's arrest and identity. It is a fact not in dispute that the appellants were arrested at night at around 8.30 pm in the Jangwani area. It is however in the prosecution evidence that the appellants were introduced to the arresting team by an informer who was familiar with the appellants. And that after their arrest, search, and seizure, the appellants were straight taken to Msimbazi police for further investigation steps. I on the above evidence find the identity of the accused intact.

In his defence, DW1(1st appellant) admitted to having been arrested in the Jangwani area on 30/9/2016 at around 20.00 with other people. When asked if he had any grudges with PW1 and Pw2, 1st appellant was honest enough to say that he had none. The question that one would ask is why the police should incriminate the appellants for the offense they have never engaged into the extent of manufacturing all the exhibits, the seizure certificate, trophies, and witnesses, including PW2, a public member who appeared as an independent witness. The 2nd

accused defence was also unable to dismantle the credible evidence by the prosecution.

In fine, from what I have discussed herein above, the court is satisfied that the prosecution case was proved beyond reasonable doubt against the appellants. I thus, find the appeal unmeritorious and hereby dismiss it in its entirety.

Dated at **DAR ES SALAAM** this **16th JUNE** 2023

E.Y. MKWIZU

JUDGE

16/6/2023

Court: Right of appeal explained

E.Y. MKWIZU

JUDGE

16/6/2023