IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB- REGISTRY

AT ARUSHA

CRIMINAL APPEAL NO. 130 OF 2022

(Appeal against conviction and sentence of the Resident Magistrate's court of Arusha in Criminal Case No. 96 of 2019)

THOMAS SANJIRO KUTEYO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

20th April & 19th July 2023

KAMUZORA, J.

The Appellant herein was convicted and sentenced to serve 20 years imprisonment by the Resident Magistrates' Court of Arusha (the trial court) in Economic Case No. 96 of 2019. The brief fact of the case leading to the present appeal is that, before the trial court the Appellant and four others who are not part of the present appeal were jointly charged for the offence of unlawful possession of government trophy contrary to paragraph 14 of the 1st Schedule to and section 57 (1) and 60(2) of the Economic and Organised Crime Control Act, [Cap 200 R.E 2002] as amended by section 16(a) and 13(b) respectively of the

Written Laws (Miscellaneous Amendment) Act No. 3 of 2016. It was alleged that, on 10th day of November 2019 at Mbuyuni Village, in the District and Region of Arusha, the Appellant and 4 others were jointly and together found in unlawfully possession of two elephant tusks equal to one killed elephant valued at USD 15,000 equivalent to Tshs. 34,511,400/=, the property of the Government of the United republic of Tanzania without the permit from the Director of Wildlife. That, the Appellant and his fellow were arrested trying to sell the said trophies thus, they were apprehended and arraigned before the trial court. In his defence the Appellant generally denied the charge. The trial court after hearing the evidence from both the prosecution and defence, it was satisfied that the prosecution case was water tight only against the Appellant and convicted him for the offence. The Appellant was aggrieved thus, preferred an appeal to this court on the following grounds: -

1) *That, the learned trial magistrate erred in law and facts to convict the Appellant basing on actual or constructive knowledge while the same were not proved against the Appellant by the prosecution side.*
2) *That, the learned trial magistrate erred in law and facts by admitting a certificate of seizure while there was none*

compliance with the mandatory provision of section 38 (3) of the Criminal Procedure Act Cap 20 R.E 2002.

3) *That, the learned trial magistrate erred in law and facts for failure to recognize that the chain of custody recorded was broken and full of doubts, thus not reliable.*
4) *That, the learned trial magistrate erred in law and facts as she misdirected herself in convicting the Appellant without evidence of the independent witness who signed the certificate of seizure when the Appellant was arrested.*
5) *That, the learned trial Resident magistrate erred in law and facts as the whole proceedings were tainted with serious procedural irregularities which vitiate the mandatory provisions of sections 21(1), 25(1) of the Economic and Organised crime control Act, Cap 200 R.E 2022 and section 9(1) (3), section 38(1) of the Criminal Procedure Act Cap 20 R.E 2002.*
6) *That, the learned trial magistrate erred in law and facts to discredit all the Appellants witness and asserting that the Respondent witnesses were credible but failed to asses carefully the credibility of the prosecution witness.*
7) *That, the learned trial magistrate erred in law and facts by failure to consider the contradiction and inconstancies in prosecution evidence.*
8) *That, the learned trial magistrate erred in law and facts by disregarding the evidence in record.*
9) *That, the learned trial magistrate erred in law and facts to convict the Appellant while the prosecution side did not prove the case beyond reasonable doubt.*

10) That, the alleged sulphate bag was not tendered before the court of law as a very crucial exhibit to prove the case.

During hearing of appeal Mr. John Lairumbe learned advocate appeared for the Appellant while Ms. Riziki, learned State Attorney appeared for the Respondent, Republic. The Appellant's counsel abandoned ground 5 and arguing jointly grounds 6 and 8, grounds 7, 9 and 10, grounds 2 and 4 but ground 1 and ground 3 were argued separately.

Starting with grounds 7, 9 and 10 the Appellant's counsel submitted that the prosecution failed to prove the case beyond reasonable doubt. That, the sulphate bag was not tendered before the court as evidence and there existed contradictions and inconsistences in the evidence of PW2, PW3, PW4, PW5 and PW6. That, the trial court had the duty to address the said contradictions as per the decision in the case of **Mohamed Said Matula Vs. The Republic** [1995] TLR 3.

The Appellant's counsel also submitted that PW5 failed to mention the KDU officer and the investigator of the case. That, the arresting officer did not mention the name of chairman of Mbuyuni Village who according to him was an important witness and the people who assisted them on the incident date. He added that the owner of exhibit P7 was not mentioned and the rider of the motorcycle with registration No. 917

make king lion was also not mentioned. To him all these inconsistencies renders the prosecution evidence weak not proving the case against the Appellant. He insisted that the accused cannot be convicted on weakness of his defence as the prosecution side are duty bound to prove their case beyond reasonable doubt. The referred the case of **John Makolobela Kulwa and Derrick Juma @ Juma @ Tanganyika Vs. Republic** [2003] TLR 296.

Submitting for ground 1 the counsel for the Appellant argued that, the trial court applied the evidence of PW4, PW5 and PW6 to conclude that the Appellant was found in possession of elephant tusks. He was of the view that the evidence of PW5 did not prove as to whom among five accused persons was found in possession of elephant tusks. Referring decisions in **Mosses Charles Deo Vs. Republic**, [1987] TLR 134 and **Paulo Andrew @ Mbwilande and Paulo John Vs. Republic,** Criminal Appeal No. 603 of 2020 (unreported), he maintained that such evidence did not prove case beyond reasonable doubt.

Submitting for grounds 2 and 4 the counsel for the Appellant argued that, the trial court failed to comply with section 38(3) of the CPA 2002. That, the important witness who prepared and signed the certificate of seizure was not paraded before the court and no

explanation for such failure. He added that, even the receipt was not issued when the property was seized. He referred this court to the case of **Samwel Kibundan Mgaya Vs. Republic,** Criminal Appeal No 180 of 2020 (Unreported) and section 38 (3) which requires issuance of receipt for search, presence of independent witness, receipt acknowledging seizure and signature of the searched person.

Submitting for ground 3 the counsel for the Appellant argued that the prosecution failed to prove the chain of custody by presenting evidence proving that the two elephant tusks tendered in court are the same found in possession of the Appellant. Pointing at the evidence of PW2 to PW6 he argued that the chain of custody was not proved either by documentation or by oral evidence. That, the prosecution witnesses failed to explain why the sulphate bag which contained elephant tusks was not tendered before the court. That, they even failed to state the type of package that was used to keep the elephant tusks after arresting the Appellant. That, the certificate of seizure for exhibit P8 and the handover certificate between PW2 and PW5 failed to list the item seized. That, they failed to explain the reason for failure to produce exhibit register thus, contravening PGO 229 (2) (b). That the evidence by prosecution witnesses contravened PGO 222 (8) (12) which requires

exhibits to be labelled. That, exhibit P8 was not labelled from the time of its seizure to when it was produced before the trial court. To cement on the issue of chain of custody he referred the cases of **Paulo Maduka and other Vs. Republic,** Criminal Appeal No 110 of 2017 CAT at Dodoma, **Agatha Sebastian Vs. Republic,** Criminal Appeal No 389 of 2020 (Unreported).

Arguing in support of grounds 6 and 8, the Counsel for the Appellant submitted that the trial court failed to analyse and consider evidence of both sides based on the applicable law. He argued that the issue of torture was raised by the defence side but was not considered as one of the doubts. That, the Appellant at the time of arrest had not known how to read and write or speak Swahili language. That, he even submitted a certificate for adult education indicating that he studied Swahili while in prison but the same was not considered by the trial court. Reference was again made to the case of **Raymond Nchimbi Aloyce and another Vs. Republic** [2006] TLR 419 and **Hussein Didi and another Vs. Republic,** 1986 TLR 166. Based on the above submission the Appellant prays for the appeal to succeed.

Responding to the Appellant's submission Ms. Riziki, learned State Attorney supported both the conviction and sentence imposed against

the Appellant. Starting with the 9th and 10th ground that the case was not proved beyond reasonable doubt as the sulphate bag was not tendered as exhibit, she submitted that the evidence of PW5 and PW1 proves that the Appellant and his fellows were found in possession of elephant tusks which were kept in the sulphate bag. That, since the Appellant and his fellows were charged for unlawful possession of elephant tusks it was important that the same be admitted and not the sulphate bag. In her view, by failure to tender sulphate bag it cannot be concluded that the case was not proved.

On the argument based on contradictions in prosecution witnesses' testimonies, the learned State Attorney submitted that the contradictions were not pointed out. In her view, the evidence by PW2, and PW3 who were store keepers, PW4 and PW5 who were arresting officers and PW6 who was an independent witnesses were clear without contradiction and proved the case against the Appellant.

On the argument that PW5 did not mention the KDU officers and investigator of the case, Ms. Riziki submitted that KDU officer was known and he testified as PW4. That, PW5 also mentioned in his evidence during cross examination that he was the investigator of the case.

On the argument that PW5 did not mention the chairman of Mbuyuni she submitted that PW5 was not cross examined by the Appellant on the same meaning that he agreed to what PW5 testified. That, PW6 at page 64 also testified that during search, the chairman of Mbuyuni was present he was not cross examined to counter what he said.

On the argument that PW6 did not mention the owner of exhibit P7 which are the motorcycles learned State Attorney submitted that the evidence by PW6 is clear that when he reached at the scene, he found the Appellant and his fellows already under arrest thus could not know the person who was riding the motorcycle at the time of their arrest. She agreed that PW5 did not remember the person who was riding the motorcycle but, in her view, the issue on who was the owner of the motorcycle or who was riding the same at the time of arrest is not material. She insisted that the Appellant was charged for unlawful possession of elephant tusks and not motorcycle and that offence was proved against the Appellant.

On the first ground based on actual or contractive knowledge, Ms. Riziki submitted that the prosecution evidence proved that the Appellant was found carrying sulphate bag which contained elephant tusks. That,

such evidence proved that he was in actual possession of elephant tusks.

On the argument that those who signed the certificate were not called to testify in court she submitted that the certificate was signed by three witnesses who witnessed the search. That, there was no need for calling all witnesses because under section 143 of the TEA there is no specific number of witnesses to prove the case.

On the argument that PW5 did not issue receipt as per section 38 of the CPA she admitted that the receipt was not issued but insisted that since the Appellant signed certificate of seizure which indicated seized items, that certificate proved seizure. She was of the view that by failure to issue receipt it cannot be considered that the tusks were not seized. She referred the Court of Appeal decision in **Gitabeka Giyaya Vs. Republic**, Criminal Appeal No. 44 of 2020, where it was held that non-issuance of receipt under section 38 is curable under section 388 of the CPA.

On the 3rd ground based on chain of custody she submitted that there was no broken chain of custody as alleged by the Appellant. That, the evidence is clear that after PW5 had arrested the Appellant, he handled the exhibit to PW2, the exhibit keeper and they recorded the

hand over certificate, exhibit P5. That, PW1 while evaluating the trophy he received the exhibits from PW2 and they signed the handover certificate, exhibit P1. That, after valuation, PW1 handled back the exhibit to PW2 and they signed the handover certificate, exhibit P3. That, the exhibit keeper kept the exhibit until it was tendered in court thus, no broken chain of custody of exhibits. She added that even if there was broken chain, still there was no any defect as it was decided in several cases including the case of **Gitabeka Giyaya** (supra) where it was stated that elephant tusk is not among the items which can easily be changed.

On the 6th and 8th ground that the trial court did not consider defence evidence she submitted that the court considered defence evidence and acquitted four accused persons but convicted the Appellant. On the argument that the Appellant did not know Swahili language she submitted that at the time the case was heard, the Appellant had already learnt Swahili language during his stay in prison. That, he was even able to cross examine the witnesses and at no time the Appellant disclosed to the court that he did not understand Swahili language.

In rejoinder Mr. Lairumbe reiterated the submission in chief and added that since prosecution witnesses mentioned that elephant tusks were kept in sulphate bag, it was necessary exhibit. That, failure to tender the same raises doubt on prosecution evidence hence, the case was not proved beyond reasonable doubt. That, it was also necessary to establish the owner of the motorcycle allegedly found with the accused persons. He also maintained that the prosecution evidence did not prove if the Appellant was the one carrying the tusks. He insisted that there was contradiction in the evidence of PW2 and PW5 which was also pointed by the court at page 12 of the judgment.

The Appellant also pointed out that the witness who witnessed the seizure one Moran Mollel and Inspector Frank who filled the certificate of seizure were important witnesses to testify but they were not called as witnesses. He also added that since the State Attorney conceded that receipt was not issued as per section 38 of the CAP, failure to issue receipt was fatal. He insisted that the Appellant did not know Swahili language at the time of arrest and they were forced to sign the same certificate of seizure. He was of the view that the cited case by State Attorney is distinguishable.

I have clearly considered the grounds of appeal and the submissions by the counsel for the parties for and against the appeal as well as the trial court's record. I will take a different approach in addressing this appeal by deliberating on matters which are in contention. From record and submissions, there are five pertinent issues that needs court determination; **1)** whether the elephant tusks were seized on the date of alleged incident, **2)** whether there was clear chain of custody of seized exhibits, **3)** whether there were contradictions and inconsistencies in prosecution evidence, **4)** whether the defence evidence was considered and **5)** whether the offence of unlawful possession of government trophies was proved beyond reasonable doubt against the Appellant.

Starting with the first issue on whether elephant tusks were seized on the date of incident, there is no doubt that two witnesses; PW4 and PW5 testified to have been involved in the seizure of exhibits which are elephant tusks. They also tendered certificate of seizure, exhibit P8 in need to prove that the tusks and two motorcycles were seized on the material date of incident. I therefore find this issue to be answered in affirmative.

The second issue is whether there was clear chain of custody of seized exhibits. The Appellant challenged the prosecution evidence for being contradictory on the seizure and handling of seized exhibits. He also raised an issue that he was forced to sign the certificate of seizure as he did not know how to read and write. The advocate for the Appellant while rejoining did not challenge the documentation regarding the chain of custody but insisted that oral testimony was contradictory thus not proving proper handling of exhibits from the time of arrest to the time the same was tendered in court. He pointed out the following inconsistencies as regard to chain of custody; that, the sulphate bag was not listed in the certificate of seizure and handover certificate and was not tendered in court and that, they failed to tender exhibit register and that, the evidence by PW2 and PW5 contradicted each other. He was of the view that the whole process of exhibits handling contravened PGO 229.

I have made a thorough perusal of evidence and exhibits and realised that there is no clear chain of custody for the alleged exhibits. The evidence on chain of custody was captured by the learned State Attorney in her submission but for purpose of eliminating doubt I will also recap the evidence from record. The testimony by Frank Mapunda

(PW5) at page 56 to 57 of the proceedings is contradictory in the sense that at first, he mentioned that after they have arrested the accused persons and seized exhibits, he handled the accused persons and exhibits to Coplo Essau at the police station. He however changed the story and said that he handled the exhibits to James Kugusa (PW2) through handing over certificate. He did not state the place he handled the exhibits to PW2, but PW2 who works with Aunt Poaching Unit, in his testimony at page 24 of the proceedings, testified that the handover took place at their offices. That was also supported by handover certificate indicating that the handover was at KDU offices. There is no explanation as to how the exhibits after being handled to Coplo Esau came again to be in the hands of PW2 and PW5.

I do not agree with the trial court's reasoning that such contradiction did not affect the case since there was successful handover. The handover cannot be regarded successful if there are doubts over the whole handover process.

In this case, since the person to whom the exhibit was handled and the place to where the same was handled are questionable, it cannot be said that there was successful handover of exhibits. Had the trial court considered this contradictory it would have reached to a conclusion that

there was broken chain of custody. I however do not agree with Appellant's argument that the chain of custody was broken. The contention that the sulphate bag to which the exhibit was kept was not tendered or listed in the certificate of seizure or handover certificate in my view, is immaterial. What was relevant for assessing in this matter was elephant tusks which is the subject matter of the offence and motorcycle which is an instrument used to facilitate the commission of the offence. In my view, failure to tender the sulphate bag or list it in the certificate of seizure or handover form did not affect the chain of custody of elephant tusks. But based on the contradiction on handling the exhibits, I find merit in this issue.

The third issue is whether there were contradictions and inconsistencies in prosecution evidence. The following are contradictions and inconsistencies pointed out by the counsel for the Appellant; that, the certificate of seizure was illegally prepared, PW5 failed to mention the name of KDU officer and the chairman who witnessed search, that, the prosecution side failed to call important witnesses including village chairman and that, they failed to prove the owners of motorcycles seized. In my view, the above alleged inconsistencies do not go to the root of the case.

On the certificate of seizure, the Appellant alleged that he was forced to sign certificate of seizure while he was illiterate. The facts reveals that the Appellant studied Swahili while in prison and completed adult education on 13th June, 2021. Hearing of this case started by May 2021 meaning that, at the time when the hearing started, the Appellant had already studied Swahili hence, able to follow the proceedings. Since no evidence to the contrary, this court is convinced to believe that whether he signed the certificate of seizure, nothing proves that the arresting officers made him understand what he was signing. But that in itself cannot vitiate the case if there is water tight evidence proving search and seizure of exhibits from the Appellant.

On the issue of naming and calling witnesses, I see no defect on the failure to name the KDU officer or the chairman. I also agree with the counsel for the Respondent that the prosecution side knows its case and they are liberty to call those witness they think will prove the elements of the offence. In fact, there is no specific number of witnesses required to prove a case. While the Appellant's insisted on the importance of evidence by village chairman, he did not state if there was any fact left unexplained because of his absence. The prosecution evidence reveals that the chairman and PW6 signed as independent

witnesses meaning, they had similar evidence on what they witnessed. Since PW6 testified on that fact, nothing could have forced the prosecution to call two independent witnesses. Similarly, the fact that PW5 did not mention KDU officer does not make his evidence unreliable only for that reason unless other inconsistencies are pointed out which could make court to doubt his story.

On the argument that the ownership of motorcycle was not proved, I agree that there was laxity by the prosecution in investigating on the ownership of the said motorcycles. But for purpose of convenience the issue of ownership of motorcycle will be addressed while assessing evidence in response to the fifth issue on whether the offence was proved beyond reasonable doubt.

The fourth issue is whether the defence evidence was considered by the trial court. Going through the trial court judgment, I am satisfied that the defence evidence was considered. At page 13 of the trial court judgment the evidence for the Appellant who was the first accused was well considered and the trial court reasoned why it was not accorded weight. This argument is therefore baseless.

The fifth issue is whether the offence of unlawful possession of government trophies was proved beyond reasonable doubt against the

Appellant. This takes this court to re-assessment of evidence to see if the same proved the case against the Appellant.

From the evidence on record, only PW4 and PW5 were at the scene at the time of arrest. They were the ones who set the trap and witnessed the whole process of arrest, search and seizure. PW6 witnessed the search and seizure as he found the Appellant and his fellow already under arrest. Now the issue is whether the evidence by PW4, PW5 and PW6 proves that the Appellant was found in unlawful possession of government trophies.

In his testimony PW4 gave a general account that all five accused persons were arrested while in possession of elephant tusks and two motorcycles. He did not in his evidence in chief mention the role of each accused at the time they arrested them; who was riding the motorcycles, who was carrying the elephant tusks and how they related all five accused persons with possession of the trophies. When he was cross examined, he admitted that he did not remember the person who was riding the motorcycle but mentioned that the Appellant was the one carrying sulphate bag with elephant tusks. If that was the case, anyone would raise a question, why the same was not disclosed during evidence in chief and came up during cross examination. In considering that PW4

was at the scene and witnessed everything that took place, it was expected for him to give a clear account reflecting the true picture of the scene of crime and not to raise questions to the audience that was not at the scene.

Similarly, PW5 while identifying exhibit P4 testified that elephant tusks were seized from the accused persons but he never mentioned in particular to whom among the five accused persons the same was seized from. It was during cross examination when PW5 stated that the trophies were in possession of the Appellant herein.

From his evidence the Appellant denied the offence in general meaning he even denied all tendered exhibits, including the motorcycles allegedly seized from them. PW5 who claimed to be the investigator of the case did not investigate on the motorcycles to see how the same were connected with the accused persons and for purpose of this appeal, the Appellant. All the above accounted facts create doubts in prosecution evidence and basically, they have to be decided in favour of the Appellant. Having said so, I see no reason to labour much in discussing procedural irregularities based on contravention of section 38 of the CPA.

In the upshot, I find merit in this appeal and allow the same. The trial court's judgment, conviction and sentence imposed against the Appellant is hereby quashed and set aside. The Appellant shall be released immediately from prison unless lawfully held for any other valid cause.

DATED at **ARUSHA** this 19th July 2023.

D.C. KAMUZORA

JUDGE