THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MOROGORO DISTRICT REGISTRY)

AT MOROGORO

CRIMINAL APPEAL NO. 74 OF 2022

(Originating from Economic Crime Case No. 58 of 2017 the Resident Magistrate's Court of Morogoro)

ONATI NGULO KIKULILO..... 1ST APPELLANT

EMMANUEL ABDALLAH MSASA .....2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGEMENT

Hearing date on: 19/06/2023
Judgement date on: 19/07/2023

NGWEMBE, J.

The two appellants Onati Ngulo Kikulilo and his associate Emmanuel Abdallah Msasa were sentenced to serve twenty (20) years imprisonment after being convicted by the Resident Magistrate's Court of Morogoro (trial court) for an offence of Unlawful Possession of Government Trophies contrary to sections 86(1)(2)(b) and (3) of **the Wildlife Conservation Act, No. 5 of 2009 [Cap 283]** as amended, read together with paragraph 14 of the First Schedule to and section 57 (1) and 60 (2) of **the Economic Organized Crimes Control Act [Cap 200 RE 2002]** as amended.

The historical journey to twenty (20) years imprisonment commenced on 19th day of June, 2017 at Kidai area, within Kilosa district in Morogoro region, whereas the appellants were alleged to be found in

possession of Government Trophies to wit; two (2) elephant tusks and one piece of elephant tusk valued in total at USD 30,000 equivalent to Tanzanian Shillings Sixty-Seven Million One Hundred Seven Thousand Shillings (67,107,000/=) only, the property of the United Republic without permit or license from the Director of Wildlife. Both appellants denied the offence by entering plea of not guilty. Thus, subjected the Republic to call eight (8) prosecution witnesses and three (3) exhibits were admitted to establish and prove the offence alleged in the charge sheet.

The accused persons upon being found with a case to answer, they defended alone without any assistance from other persons or exhibits. The trial court in its judgment was satisfied that, the prosecution proved the case to the required standard as against both appellants. Thus, proceeded to convict them and sentenced them according to the dictates of law. However, the appellants seem to believe that they were and they are innocent, thus preferred this appeal before this house of justice. Notice of appeal was timeously filed followed with petition of appeal grounded with eleven (11) grievances as follows: -

1) That, the learned trial Magistrate erred in law and fact to convict and sentence the appellants when there was no arrest warrant issued to arrest appellants as per legal procedure;
2) That, the learned trial Magistrate erred in law and fact to convict and sentence the appellants when the search, seizure and arrest of the appellants did not involve any independent witness (es);
3) That, the learned trial Magistrate erred in law and fact to convict and sentence the appellants based on a certificate of seizure, which was prepared by TANAPA Officers who had no legal power

to prepare and fill the same outside the borders of the National Parks as per procedures of the law;

4) That, the learned trial Magistrate erred in law and fact to convict and sentence the appellants without considering that the arresting officers have no legal power to arrest outside the National Parks borders without involvement of Police Officers as they did to the appellants contrary to legal procedures;
5) That, the learned trial Magistrate erred in law and fact to convict and sentence the appellants when the chain of custody of exhibit was not established documentarily contrary to the procedure of the laws as:
    a) At Mikumi Police Station it is not explained how the alleged exhibits were kept; and
    b) Sulphate alleged to keep the tusks was neither brought nor marked with exhibit register number at court.
6) That, the learned trial Magistrate erred in law and fact to convict and sentence the appellants when the prosecution side failed to prove who exactly between 1st and 2nd appellant was holding the alleged sulphate bag contained the tusks;
7) That, the learned trial Magistrate erred in law and fact to convict and sentence the appellants when the prosecution side failed to prove the apprehension of the appellants in connection with the alleged offence they were charged with;
8) That, the learned trial Magistrate erred in law and fact to convict and sentence the appellants based on material contradiction between PW2, PW3, and PW7;
9) That, the learned trial Magistrate erred in law and fact to convict and sentence the appellants based on evidence of all prosecution witness (es) which was unsatisfactory, unreliable and incredible;

10) That, the learned trial Magistrate erred in law and fact to convict and sentence the appellants by failing to follow fully mandatory of section 312 (2) of Criminal Procedure Act, Cap 20 R.E.2002; and

11) That, the learned trial Magistrate erred in law and fact to convict and sentence the appellants when the prosecution case was never proved beyond all reasonable doubts against the appellants contrary to the procedure of laws.

Before the trial court, appellants were unrepresented, same as in this appeal, they had no service of an advocate. On the side of the Republic, Ms. Mary Lundu learned Senior State Attorney entered appearance. Therefore, hearing of the appeal was made on 19/06/2023.

The first appellant when invited to address this court, he just insisted that, he was arrested near his home carrying vegetables and tomato, with nothing in his possession connected to the offence. He knows nothing about the charge that faced him. He is a senior citizen of 65 years old, never committed such offence. The second appellant supported the submission by his fellow and added that, he himself denies to have committed such offence, praying this court to consider their grounds of appeal and release them. It can be noted that the appellants did not address the grounds specifically due to the fact that they were not represented by legally trained brain, possibly had no experience to address any court of law. Thus, generally and briefly denied involvement to the offence alleged to have committed.

In turn, the learned Senior State Attorney was much fair, in her turn she addressed all grounds of appeal and expressly exhibited that, she strongly opposed the appeal.

First, she took grounds 1, 2, 3 & 4 jointly which raised the issue of arrest warrant, independent witness and that Wildlife Officers had no arresting powers outside the National Park. She submitted that the

appellants were arrested by PW2 on 19/06/2017 at Kidai village after PW2 pretended to be a purchaser of the elephant tusks as per page 70 of the proceedings. Explained further that, PW2 and PW3 went to the appointed place where they had agreed with the appellants. The appellants went to the bush and came back with two elephant tusks and a piece, that is when they were arrested. Argued that the certificate of seizure was filled in and admitted in court as exhibit P3 as per page 72 of the proceedings.

Went further to submit that, the officers were authorized to arrest under section 106 (1)(b) of **Wildlife Conservation Act** even without warrant of arrest. Added that, the circumstance of arresting the appellants did not warrant an independent witness. She cited the prominent case of **Emmanuel Lyabonga Vs. R, Criminal Appeal 257 of 2019** and concluded that those grounds have no merits.

She also addressed ground five regarding the chain of custody, that same was established. Submitted that PW2 explained how they arrested the appellants in possession of the elephant tusks and on the same day they were arrested. Exhibit register was admitted in court showing clearly how were the exhibits registered and duly marked as MKI/IR/362/17. She proceeded to cite the case **Gitabeka Giyaya Vs. R, Criminal Appeal No. 40 of 2020.**

On grounds 6 and 7, the learned State Attorney argued that the accused were arrested at the scene of crime citing page 74 of the proceedings. Extending to ground 8, the learned Senior State Attorney argued that PW7 received the exhibits from PW2 and that there was no contradiction on the prosecution evidence.

In arguing grounds 9 and 11 jointly submitted that, the prosecution proved the offence beyond reasonable doubt. Referred this court to page 10 of the judgment. Maintained that the prosecution

witnesses were credible and reliable. Thus, section 312 of CPA was complied with, appellants were properly convicted, the sentence of 20 years was proper in law. Hence prayed this court to dismiss the appeal for lack of merits.

Having paid regard to the submissions of both sides, at this juncture this court is going to determine whether or not the appeal has merits. In all cases of first appeal like this one at hand, this court has never ceased to follow the established principles relevant to first appellate court. Likewise, in this case, the court is mindful of its duty of re-evaluating the evidence as stated in the case of **Goodluck Kyando Vs. R, [2006] T.L.R. 363, Bonifas Fidelis @ Abel Vs. R, [2015] T.L.R. 156** and **DPP Vs. Stephen Gerald Sipuka (Criminal Appeal No. 373 of 2019) [2021] TZCA 330.** In the last case, our apex court reiterated the principle in a relatively comprehensive way when it observed: -

> *"We wish to restate the salutary principles of law that, **one**, a first appeal is in the form of a re-hearing and as such, this being the first appellate court, it is duty bound to re- evaluate the entire evidence on record by reading it together and subjecting it to a critical scrutiny and if warranted arrive at its own conclusions of fact (see D.R. Pandya v. Republic (1957) EA 336 and Iddi Shaban @ Amasi v. Republic, Criminal Appeal No. 2006 (unreported)). **Two,** the credibility of a witness is the monopoly of the trial court, but only in so far as the demeanour is concerned. On the part of the first appellate court, the credibility of a witness can be determined in other ways namely, when assessing the coherence of the testimony of that witness and when the testimony is considered in relation to the evidence of other witnesses, including that of*

the accused person (see - Shaban Daudi v. Republic, Criminal Appeal No. 28 of 2001 (unreported))."

In this appeal, I have noted that although the 11 grounds of appeal are in a way intertwined, they are divided in three classes; there are grounds which raise points of law regarding the procedure (see grounds 1, 2, 3, 4 and 10); Ground 5 is on both law and fact, while grounds 6, 7, 8, 9 and 11 are on facts, specifically on whether the offence was proved beyond reasonable doubt.

Therefore, in determining this appeal, I will deal with the first four grounds which raises the question of law together with ground 5 on chain of custody, then revert to those in respect of facts. But ground 10, though is on question of law will be the last. It is because that ground is questioning the procedure of conviction, which usually is the last stages of judgment writing.

The first cluster of grounds 1, 2, 3, 4 and 5, bear an argument that search, seizure and arrest was illegal because it was made by TANAPA officers outside the National Park without involving police and without arrest warrant. Also, certificate of seizure was prepared by TANAPA officers, while they are not authorized by law to do so. Another illegality is related to undertakings made in absence of an independent witness. The chain of custody of the elephant tusks was not established, since no explanation was given on how the exhibits were kept and that the sack which was alleged to keep those tusks was not brought to court nor was it marked in exhibit register.

The appellants for being unrepresented, pointed no law to justify those challenges, but in the petition of appeal they listed the case of **Iluminatus Mkoka Vs. R [2003] T.L.R 245** and **Paulo Maduka Vs. R,** where in total it was held *inter alia* that, when exhibits are seized from the accused, there must be a clear account of their custody and

that courts should remain alive to the importance of proper custody of exhibits and proof of whose custody the exhibits were kept.

Ms. Lundu maintained that, search, seizure and arrest were proper. That the Wildlife Officers are authorized to conduct search, seizure and arrest even without any assistance of the police officer under section 106 of the **Wildlife Conservation Act** and that under the circumstance which the appellants were arrested, an independent witness would not conveniently be secured as was held in the case of **Emmanuel Lyabonga (supra)**.

Having referred to all the cases cited by the appellants, I accept their argument and I hope Ms. Lundu, learned Senior State Attorney is not disputing the position of law in those precedents referred by the appellants on the rule concerning chain of custody. There are other authorities like **Maliki H. Suleiman Vs. SMZ [2005] T.L.R 236** and **Gitabeka Giyaya's** case cited by the learned State Attorney. The basis and rationale of the rule is as was stated in **Paulo Maduka and 4 Others Vs. R, Criminal Appeal No. 100 of 2007** that: -

> *"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 guilty. The chain of custody requires that from the moment the evidence is collected, its very transfer from one person to another must be documented and that it be provable that nobody else could have accessed it."*

However, the statement that officers working in the National Park are not authorized to conduct search, seizure and arrest outside the park, is a strange complain. This court finds this argument to be jocular and clowning, that is why the person who prepared their petition of

appeal did not cite any law to that effect. Had it been the position of the law, this court would ask what if the Wildlife officers in the wild, found the perpetrators in the act. Then, do they mean that in case perpetrators escape, the officers should not cross the boundaries?

To the contrary, I would accept the learned State Attorney's submission and reasoning. This court has deeply considered section 106 (1)(2)(3)(4) and (5) of **The Wildlife Conservation Act** on Power of search, seizure and arrest. I will paraphrase them hereunder without quoting the whole provision, they include: -

1) To conduct inspection of any meat, game or trophy,
2) Enter and search with or without warrant, any land, premise, baggage or anything in possession of any person,
3) Seize anything connected to the suspicion,
4) To stop and detain any person who he sees or suspects of doing any act which requires permit, in order for that person to produce the permit or let his vehicle, vessel or aircraft be searched,
5) Placing in custody a person detained or things seized,
6) To require any person stopped or detained to produce his personal particulars and of the permit or licence and address.

But who is an authorized officer? This question is important, considering that, the appellants believe that PW2 and PW3 who are both park rangers, were not authorized to search, seize and arrest. However, the answer to that question is in provided in section 3 of the Act. The phrase authorized officer is given comprehensively as I quote hereunder: -

> ""*Authorized officer" means the Director of Wildlife, a wildlife officer, wildlife warden, wildlife ranger or police officer, and includes the following-*

(a) an employee of the Forest and Beekeeping Division of, or above the rank of forest ranger;

(b) an employee of the national parks of, or above the rank of park ranger;

(c) an employee of the Ngorongoro Conservation Area of, or above the rank of ranger;

(d) an employee of the Fisheries Division of, or above the rank of fisheries assistant;

(e) an employee in a Wildlife Management Area of a designation of a village game scout;

(f) an employee of the Marine Parks and Reserve of, or above the rank of marine parks ranger;

(g) an employee of Tanzania Wildlife Management Authority of or above the rank of conservation ranger;

(h) an employee of the Antiquities Division of, or above the rank of conservator of antiquities; and

(i) any other public officer or any person, who shall be appointed in writing by the Director;"

The provision is crystal clear, a park ranger is among the officers authorized to conduct search, seizure and arrest among other powers conferred under section 106 of **The Wildlife Conservation Act.** I think the above suffices to dismiss the contention that the officers were not authorized to conduct search, seizure and arrest. Even the circumstance under which the appellants were arrested was emergence in nature and the officers were acting on the informer's report, while being not aware of the identity of the appellants. The circumstance would not be convenient to have arrest warrant. The nature of the offence under part B of first Schedule of the CPA, is permissible to arrest without warrant

under the circumstances. Likewise, under section 106 (6) of **The Wildlife Conservation Act**, can be arrested without warrant.

Now I turn to the issue of independent witness during search and seizure. Generally, it is a good practice to have an independent witness whenever there is a need to search and seize anything connected with criminal complaints, it will also safeguard against planting of cases as we have observed from time to time. It is known that under section 38 (3) of **Criminal Procedure Act,** the witness to search and seizure is provided though not mandatory, if the search and seizure was witnessed, then that witness must sign in the seizure certificate. However, a literal construction of section 106 of the Act is that search and seizure can be conducted without warrant or in absence of independent witness in case of emergency. However, under section 106 (1)(b) provides that, no dwelling house shall be entered into without a warrant except in the presence of at least one independent witness.

This means with a warrant, a dwelling house can be entered and searched without having an independent witness. But where there is no search warrant, a dwelling house can be entered and searched only in presence of at least one independent witness.

In this appeal, PW2 and PW3 testified that, the trap was staged in the bushes between Kidai A and Kidai B Village some 100 kilometers from Mikumi National Park. The appellants were arrested at the forest, not in the dwelling house. This is well explained by PW2 and PW3 that they were working on information given by an informer. They would not find an independent witness because in case they involve any other person, the information would leak and abort the plan. Under the circumstance, rightly as the learned State Attorney submitted, it was inconvenient to secure an independent witness without aborting the trap.

Regarding the complaint that chain of custody was not proved, I have considered both arguments. PW2 and PW3 established that, the appellants were arrested around 22:00 hours in the bush alongside the road. A certificate of seizure was prepared by PW2 right there (exhibit P3). These two witnesses and the appellants signed in the said certificate (exhibit P3). They explained how they marked the two elephant tusks (exhibit P2) and a piece as KD1, KD2 and KD3 respectively. Those exhibits were tendered by PW1, exhibit P3 was tendered by PW2 and properly identified by other witnesses.

It was further stated that, the elephant tusks along with seizure certificate as well as the appellants were then taken to Mikumi Police station that same night, reaching at the station at around 01:00 hours. They then handed over the exhibits to a police officer known as Cpl. Justine. This is PW7 who testified that, on 19/06/2017 at night at Mikumi Police Station, TANAPA officers brought the appellants with two elephant tasks and a piece of elephant tusk marked MK1/IR/362/2017. That he received those exhibits and kept at the OCS' office as the exhibit keeper was not present at that night. The exhibits were marked as KD1, KD2 and KD3 he also marked them as MK1/IR/362/17. That on 20/06/2017 he sent those exhibits and the appellants to Morogoro Central Police Station where he handed over and signed in Exhibit register as 226/2017 (exhibit P1). PW5 who was the exhibit keeper confirmed to have received those exhibits and registered them as 226/2017 and he also signed. Next day PW4 identified them and verified that they were actually elephant tusks in a sulphate sack. Weighed and valued them accordingly as per the certificate (exhibit P4). PW1 and PW6 testified to the effect that, those tusks remained under police custody up to 19/04/2020 evening hours, when the same were handed by PW1 over to PW6, both witnesses signed in exhibit register (exhibit P1), then were

kept them at TAWA offices until when they were tendered in court by PW1.

From this coherent explanation of the witnesses, this court is satisfied that the chain of custody was never broken. The prosecution sufficiently established on how exhibit P2 was handled from the day of seizure to the day of tendering it before the trial court. The complaint on chain of custody is therefore not justified. Even the complaint that a sulphate sack in which they kept the elephant tusks was not tendered did not affect the prosecution case nor did it prejudice any party.

Having analyzed as above, and on the strength of the evidence along with the proceedings, I find no merit in ground 1, 2, 3, 4 and 5. Those grounds are thus, dismissed altogether.

I will now address grounds 6, 7, 8, 9 and 11. Taken together those grounds raises the question whether the offence against the appellants was proved beyond reasonable doubt. The appellants in their petition of appeal and before this court were firm that the offence against them was not proved beyond reasonable doubt and thus, the trial court erred to convict and sentence them. The submissions presented by Ms. Lundu are also considered, she argued that, the offence against the appellants was proved, witnesses were credible and no serious contradiction was featured in the prosecution's case.

In dealing with the issue whether the offence was proved against the appellants, I will be guided by some principles which will be exhibited in the course.

The appellants claim that the charge was not proved as the evidence against them was unreliable and contradictory, while the Republic strongly contented that, the offence was proved beyond reasonable doubt, thus, the appellants were properly convicted and the sentence was proper.

This court is mindful of the trite law that, in criminal trials the prosecution is bound to prove the offence beyond reasonable doubt. This is what sections 3 (2)(a), 110 and 112 **of the Evidence Act, Cap 6 RE 2002 (now R.E 2022)** provide. In the case of **Jonas Nkize Vs. R, [1992] T.L.R 213,** having considered also **Mancini Vs. DPP [1941] 3 All ER 272** and the popular **Woolmington Vs. DPP [1935] A.C. 462; [1935] UKHL 1** this court, held that: -

> *"The general rule in criminal prosecution, the onus of proving the charge against the accused, beyond reasonable doubt lies on the prosecution, is part of our law, and forgetting or ignoring it is unforgivable, and is a peril not worth taking"*

Likewise in **D.P.P Vs. Ngusa Keleja @ Mtangi & Another [2020] 2 T.L.R. 204 [CA],** the court observed thus: -

> *"We now pose to restate the basic principle of law that the burden of proof in criminal cases lies squarely on the prosecution shoulders, the standard of which is beyond reasonable doubt - See Woolmington v. DPP (1935) AC 462 and Mohamed Said Matula v. Republic [1995] T.L.R. 3. An accused has no duty of proving his innocence, and in making a defence, an accused is merely required to raise a reasonable doubt. We must add here that even, the accused person can only be convicted on the strength of the prosecution case and not on the basis of weakness of his defence"*

As to what proof beyond reasonable doubt means, we have reference from the English decision of **Miller Vs. Minister of Pensions (1947)2 All ER 372** Lord Denning stated: -

> *"It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean*

proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable," the case is proved beyond reasonable doubt, but nothing short of that will suffice"

Same position was restated in our jurisdiction, in many cases including; **Magendo Paul & Another Vs. R, [1993] T.L.R. 220, Samson Matiga Vs. R, Criminal Appeal No. 205 of 2007**, **Yusuf Abdallah Ally Vs. R, Criminal Appeal No. 300 of 2009** and **Daimu Daimu Rashid @ Double D Vs. R, Criminal Appeal No. 5 of 2018.**

Extracting from section 86 (1) reading together with section 85 of **the Wildlife Conservation Act**, the offence of unlawful possession of government trophies is proved if two facts are established; *first* possession of a trophy; *second* failure to produce a licence or permit.

This court has considered the evidence from both sides as laid before the trial court. I will visit the said evidence in brief before resolving the issue.

The prosecution's evidence was to the effect that, Officers of Mikumi National Park got from the informer that some persons at Kidai village are in possession of elephant tusks, seeking for a buyer. An arrangement was made on 19/06/2017 for follow up. Three Park rangers were in the plan; Timotheo Ezra (PW2) pretending to be the potential buyer; Donald Vicent Chiunje (PW3) as a driver of a civilian vehicle make Toyota Noah used to reach the scene and communicating with the informer. These two witnesses did not appear in uniform, but their fellow

Park Ranger one Oscar Mbunda was in official uniform, armed and hid behind the vehicle.

They went to the sellers following the informer's instructions, that they would meet them along the road and that they will give a signal by switching on the torch light. Things went as instructed, they eventually met two persons whom were properly identified as the two appellants; Onati Ngulo Kikulilo and Emmanuel Abdallah Msasa. Having discussed with the buyer, the appellants told the officers to wait for them there and went into the bush to take the said tusks, which they brought in a blue sulphate sack. The appellants opened the sack, the officers saw the tusks. Oscar came forward and they arrested the appellants right there. When asked them the appellants introduced themselves as Onati Ngulo Kikulilo and Emmanuel Abdallah Msasa respectively. PW2 prepared a certificate of seizure which was admitted at the trial court as Exhibit P3. The elephant tusks were tendered and admitted as exhibit P2, while the register was admitted as exhibit P1.

Exhibit P3 was made by Timotheo in front of Donald Chiunje and Oscar Mbunda on 19/06/2017 at 22:10 hours. Two elephant tusks and one piece of elephant tusks were seized from them. Both appellants signed, the three officers as well signed. Those elephant tusks were valued by PW4 one Joseph Chengula Bunango, a wildlife Officer as per exhibit P4. The chain of custody of exhibit P2 was established as addressed.

The defence of the appellants was a denial that they did not know each other. That they were not arrested at the bush being in possession of elephant tusks, but arrested in different places; Ruaha Mbuyuni and Kidai respectively. They both questioned why did the officers not secure an independent witness if at all what they claim was true. They denied to have signed any certificate of seizure and further challenged that the

prosecution evidence had contradictions on the date the appellants were taken to Morogoro Central Police as PW7 said they were sent on 20/06/2017 while PW2 and PW3 said it was 21/06/2017.

The said contradiction was properly addressed by the trial court and found the same to be nothing serious. When this court examined the proceedings, found that even the appellants themselves stated that they were arrested on 19/06/2017 and on 20/06/2017 taken to Morogoro Central Police. I do not think that there is any contradiction deserving any further discussion, considering that minor inconsistencies are immaterial. There is no dispute that the appellants were taken to Central Police Morogoro.

There is no ground upon which to impeach credibility of the prosecution witnesses. It follows, the rule that finding of trial court on credibility binds the appellate court unless there are material factors suggesting that the trial court erred in such finding. The case of **Antonio Dias Caideira Vs. Frederick Augustus Gray (1936) 1 ALL ER 540** is persuasive, where it was ruled by the House of Lords that: -

> *"The appeal is in the nature of a re-hearing, and the Court of Appeal must re-hear the case, reconsidering the materials which were before the judge. The presumption is that the trial judge is right on the facts, and unless the judge is satisfactorily made out to have been wrong, his decision will not be disturbed. Where questions as to credibility of witnesses arise, the appellate court is at a great disadvantage, in that it neither sees nor hears them, and unless it can be shown that the judge has failed to use or has palpably misused his advantage, the appellate court will not take the responsibility of reversing his conclusions. The Judicial Committee applied these principles in the present case"*

That principle was also followed by the Court of Appeal in our jurisdiction in its decisions in countless cases, including the following **Omari Ahmed Vs. R, [1983] T.L.R 52 (CA), Augustino Kaganya, Athanas Nyamoga and William Mwanyenje Vs. R, [1994] T.L.R 16 (CA)** and **Bakiri Said Mahuru Vs. R, (Criminal Appeal No. 107 of 2012) [2012] TZCA 148.** The key point maintained is in the case of **Omari Ahmed** that: -

> *"The trial court's finding as to credibility of witnesses is usually binding on an appeal court unless there are circumstances on an appeal court on the record which call for a reassessment of their credibility."*

The trial court had a determined opinion that, the prosecution witnesses were credible and trustworthy which has been strongly supported by the learned State Attorney. But the appellants have complained that the evidence was incomplete and witnesses were incredible. This court having followed the whole evidence recorded by trial court, is also of the same view as the trial court. The witnesses were credible, the evidence was coherent and all the exhibits were corroborative to the charge.

An overall consideration of the evidence, I find that the prosecution unshakeably established; *first* – the appellants were found in possession of the elephant tusks; *second* – the appellants did not have any valid licence or permit for possessing or dealing with the tusks in whatsoever manner; *third* – the said appellants being in possession of the elephant tusks, intended to sell them to PW2 a park ranger; *four* – the appellants were arrested at the scene of crime while in possession of those tusks; *fifth* - the chain of custody of those tusks followed the laid down legal procedures; *sixth* - the appellants failed to shack the prosecution evidences. Conclusively the appellants were properly convicted.

There is also another complaint by the appellants that it was not proved as to who between them was holding the sulphate sack containing the elephant tusks. The respondent was of the view that both appellants were in common intention.

In considering this issue, I understand that generally, a mere presence of a person at the scene of crime when the offence is being committed does not necessarily constitute common intention to the offence committed. In the cases of **Moses Charles Deo Vs. R, [1987] T.L.R. 134, Emmanuel Mwaluko Kanyusi & 4 Others Vs. R, Consolidated Criminal Appeals No. 110 of 2019 and 553 of 2020 (unreported)** and **Paulo Andrea @ Mbwilande and another Vs. R, (Criminal Appeal No. 613 of 2020) [2022] TZCA 473** where the Court of Appeal maintained that mere presence of the person at the premises or place where the trophy or any property related to the offence was retrieved does not mean possession or common intention in the offence. It was observed however that, mere possession denotes actual control of the property. In **Emmanuel Mwaluko Kanyusi** the Court held as follows: -

> *"We agree ... that the evidence points at the fourth appellant and convicts him on the count of possession of government trophy. Mere presence of the other appellants when the game warden retrieved two elephant tusks from the fourth appellant's land does not make them to be in possession."*

However, where the evidence show that the person's presence meant being part of the undertaking even when he himself would have not acted or appeared to be passive to the commission, the person will be connected to the offence. What is needed is the evidence which show oneness of the offenders in any part of the transaction constituting the offence. That is what in law is termed as common intention. Common

intention is stated under section 23 of **The Penal Code** in very clear terms, it provides that: -

> *"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."*

The Court of Appeal in the case of **George Lazaro Ogur Vs. R, (Criminal Appeal No. 69 of 2020) [2023] TZCA 49** made a simple interpretation of the section, which the appellants in this case may easily understand. It held: -

> *"As provided by section 23 of the Penal Code, common intention only arises as a necessary ingredient of an offence when a criminal act is done by several persons in furtherance of their common intention. In such a case, each of such persons would be liable for the act in the same manner and as if the act were done by him alone"*

Likewise, in the case of **Issa Mustapha Gora & Another vs Republic (Criminal Appeal No. 330 of 2019) [2022] TZCA 638 (19 October 2022)** it was further ruled that: -

> *"In establishing common intention, it is crucial therefore that cogent evidence must be led to show that there was meeting of the mind of two or more persons in pursuing a common plan to commit an offence"*

In this case at hand, strong evidence established that, both appellants were together when they met the officers. Together the appellants stood alongside the road in the bush during the night around 22:00 hours. They all were conversant with the signal language as

instructed by the informer and participated in arranging about the sale. Together they went to the bush and together they came out with the elephant tusks. I do not think under the circumstance, anything extra was needed to prove the appellants' common intention.

It even defeats common sense to imagine that the two appellants were strange to each other, yet were standing together at night hours in the bush alongside the road. They were moving together in all the undertaking. Questioning as to who between the two held the sack or why the sulphate sack was not tendered in court, will be dealing with trivial matters contrary to the doctrine against trifles to the effect that the law does not concern itself with trifles. There is a Latin maxim; *de minimis non curat lex,* or as put by other authors in the simple language that *the eagle does not catch flies.* Consideration should be done to the fact that the case took about five years from arrest and seizure to when it was actually tried in court.

It is this court's verdict that the prosecution managed to prove the offence against the appellants beyond reasonable doubt. I believe if the appellants had any licence or permit from the Director of Wildlife, they would not hesitate to produce the same. And of course, it would be their duty to prove the fact under section 114 of **The Evidence Act.**

The last issue of whether the conviction was made in compliance of section 312 of **The Criminal Procedure Act,** will not press this court any further. Section 312 (2) provides: -

> *"In the case of conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted and the punishment to which he is sentenced."*

I have failed to see why the appellants lamented that their conviction contravened the above section. They did not explain the

contravention at any extent. But this court having visited the conviction of the trial court, holds a view that the conviction was compliant to section 312 (2) of the CPA. The trial court convicted the appellants at page 12 of the judgment in the following mode: -

> *"Consequently, I find them guilty and I convict them of the offence of unlawful possession of government trophies contrary to section 86 (1)(2) and (3) of The Wildlife Conservation Act No. 5 of 2019 read together with paragraph 14 of the First Schedule to and section 57 and 60 of the Economic and Organised Crime Control Act Cap 200 of the Revised Edition 2002"*

In my view, the trial magistrate complied with the law, which fact sufficiently justify this court to find ground 10 of the appeal as misplaced. Therefore, I dismiss ground 6, 7, 8, 9, 10 and 11 of the appeal. Even the sentence was correct, 20 years imprisonment sentence is the minimum as per sections above cited.

Having found no material upon which to depart from the trial court's analysis and findings, this court is of the position that the appeal has no merit. The same is dismissed entirely. Judgment, sentence and any order made by the trial court shall remain undisturbed.

Accordingly ordered.

Dated at Morogoro this 19th day of July, 2023

THE HIGH COURT OF TANZANIA

P. J. NGWEMBE

JUDGE

19/07/2023

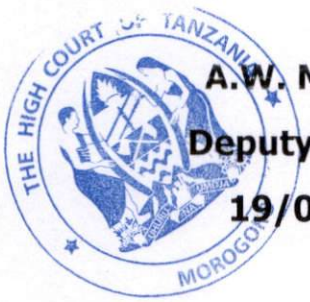
Court: Judgment delivered at Morogoro in chambers this 19th day of July, 2023 in the presence of both appellants and Mr. Josbeth Kitale and Ms. Elida Mtisi, State Attorneys for the Republic/Respondent.

A.W. Mmbando

Deputy Registrar

19/07/2023

Court: Appeal rights explained accordingly.



A.W. Mmbando

Deputy Registrar

19/07/2023