**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(ARUSHA DISTRICT REGISTRY)**

**AT ARUSHA**

**CONSOLDIDATED CRIMINAL APPEALS NO. 42 AND 54 OF 2022**

**(Originating from Arusha Resident Magistrate's Court at Arusha in Economic Case No. 22 of 2021)**

**THE DIRECTOR OF PUBLIC PROSECUTIONS.....APPELLANT/RESPONDENT**

**VERSUS**

**NAYAI S/O KIAPI SANING'O .....1ST RESPONDENT/1ST APPELLANT**

**JEREMIA S/O SIRAA SIMULEK .....2ND RESPONDENT/2ND RESPONDENT**

**JUDGMENT**

**22th December 2022 & 24th March 2023**

**GWAE, J.**

In the Resident Magistrate's Court of Arusha (trial court) through tried and convicted the respondents/appellant one Nayai Kiapi Saning'o and Jeremia Siraa Simulek via Economic Case No. 22 of 2021. The said respondents /appellants (convicts) were charged with the offence of being found in unlawfully possession of government trophy contrary to section 86 (1) and (2) (b) of the Wildlife Conservation Act, No. 5 of 2009 read together with paragraph 14 of the 1st schedule to, and Sections 57 (1)

and 60 (2) both of the Economic and Organized Crimes Control Act, (Chapter 200, R, 2002, EOCCA).

Through the particulars of the offence, the prosecution alleged that, , on 7th December 2016 at Kiwandani Village -Ganako Ward, Karatu District in Arusha Region the respondents/appellants (Respondents) were jointly and together found in unlawful possession of ten (10) pieces of elephants' tusks equivalent to five killed elephants. All valued at Tanzania one hundred sixty three million (Tshs. 163,000,000/=) only. The property of the United Republic of Tanzania without the permit from the Director of Wildlife.

After conclusion of the trial, the trial court rendered its judgment on 25th March 2022, convicted the respondents and while sentencing them, it adhered to a judicial precedent in **Tabu Fikwa v. Republic**, (1988) TLR 48. Eventually it ordered payment of a fine at the tune of Tanzania Shillings fifteen million (Tshs. 15,000,000/=) or serve twenty years in default thereof.

The substance of the prosecution evidence which led to the satisfaction of the trial court that, the respondents' guilty was proved to the hilt. It is as follows, that one ASP James a police officer (PW2) on the material date at 07:30 hrs was at Karatu Police station. He received

information that there were people at Ganako- Kiwandani hamlet who were with the elephant tusks in a certain house. PW2 proceeded to that house while in a company of one Edward Mlela and upon their arrival at that house they found four people. However, one managed to run away. Three persons were instantly arrested; the 1st convict and 2nd convict were each found in possession of a black bag whilst the third person known by name of Israel Saipi had nothing. The arresting officers put the convicts and the Israel Saipi under restraint.

PW2 phoned a hamlet chairperson of the area to come and witness the intended search. The village chairperson, Alexander Niima (PW3) responded to the PW2's call. The bag in possession of the 1st convict, Nayai was found with six pieces of elephant tusks whereas the 2nd convict Jeremiah was found to have contained four pieces of elephant tusk. The PW2 filled the search seizure certificate (PE5) which was signed by the convicts, the said Israel saipi, Alexander Niima who was by then hamlet chairperson (PW3) and PW2. In that search that was a weighing machine that was seized as well.

After seizure, there were handing over forms of the exhibits to the exhibits keeper (PW1) and from him to other officers involved in the investigation (PE1-PE3). The elephant tusks so seized were valuated and

certificated of valuation was tendered and received as PWE6 by PW4. The prosecution also produced the government tusks before the trial court and the same was admitted as PE5.

In his defence, the 1st convict admitted to have been arrested on 16th December 2016 on the material date however he stated to have been arrested at Chonomeloka hamlet while in a company of one Langai Katopi, DW3 and then his eyes were tied up with his sheet and taken to a room where he found three persons. He added that he knows how to read and write. He further testified that, police beat him on 17th December 2016. He then produced three exhibits namely; copies of academic certificates (DE1), medical chit (DE2) and a ruling of this court (**Mashaka, J** as she then was now JA).

The 2nd convict also patently denied to have been found in unlawful possession of the government trophies. He further refuted to have been arrested at Kiwandani area as according to him he was arrested at Ilkupus area. He also testified that police tortured him while in a certain room. In support of his defence, he tendered adult education certificates (DE4), medical chit (DE5) as well as the proceedings this court (**Mashaka, JA)** delivered vide Economic Case of 2021.

Following the dissatisfaction with the imposed fine sentences by the trial court against the respondents, the Director of Public Prosecutions (appellant, "DPP") filed an appeal to the court registered as Criminal Appeal No. 42 of 2022 meanwhile the respondents/appellants (convict) subsequently filed their appeal, Criminal Appeal No. 54 of 2022. The court then consolidated the parties' respective appeals on 25th May 2022. The DPP's ground of appeal contained in her Petition of Appeal is;

1. That, the trial magistrate erred both in law and facts by delivering the sentence and ordering each convict to pay a fine of Tshs. 15,000,000/= in contravention to the Wildlife Conservation Act, No. 5 of 2009

Whereas both convicts correspondingly filed their joint and lengthy Petition of Appeal comprised of ten grounds of appeal namely;

1. That, the learned Resident Magistrate grossly misdirected her mind by convicting and sentencing the convicts by deciding that the case was proved beyond reasonable doubt despite of many unexplained and unsettled doubts raised
2. That, the learned Resident Magistrate erred in law and fact by convicting the convicts without considering that the prosecution failed to establish chain of custody as to whether the purported trophy were the same alleged to have been found in possession of the convicts

3. That, the learned Resident Magistrate erred in law and fact by admitting a certificate of seizure while there was non-compliance with mandatory provision of section 38 (3) of the Criminal Procedure Act, Cap 20 Revised Edition, 2019 (CPA)
4. That, the learned Resident Magistrate erred in law and fact in which the proceedings were tainted with serious procedural irregularities which violate the mandatory statutory provisions under 21 (1) of the Economic and Organised Crime Control Act (EOCCA) and section 38 (1) of CPA
5. That, the learned Resident Magistrate erred in law and fact
6. That, the learned Resident Magistrate erred in law and fact by failing to consider the contradictory and inconsistencies of evidence adduced by the prosecution witnesses
7. That, the learned Resident Magistrate erred in law and fact by ignoring the testimonies brought by the convicts
8. That, the learned Resident Magistrate erred in law and fact by wrongly failing to call the material witness
9. That, the learned Resident Magistrate failed to properly record the evidence given by the defence side
10. That, the learned Resident Magistrate failed to properly evaluate the evidence

In these appeals, Ms. **Alice Mtenga**, the learned state attorney represented the DPP whilst Mr. **John Kivuyo Lairumbe**, the learned

advocate represented both convicts. The court ordered the disposal of the parties' appeals by way of written submission. I shall consider the parties' submission duly filed in court when I shall be determining their respective grounds of appeal as presented and argued (DPP's ground of appeal and Convicts' grounds No.1, 2, 3, 4, 5 8, 9 and 10. However, I shall abstain from determining ground No. 6 as it was abandoned those not argued by the convicts' counsel.

> ***R**egarding the DPP's ground of appeal**, that, the trial magistrate erred both in law and facts by delivering the sentence and ordering each convict to pay a fine of Tshs. 15,000,000/= in contravention to the Wildlife Conservation Act, No. 5 of 2009.***

In this ground of the DPP's appeal, Ms. Mtenga argued that the sentence of fine imposed against the convicts was illegal on the ground that it contravenes section 60 (2) of EOCCA as amended by section 16 (a) and 13 (b) of the Written Laws (Miscellaneous Amendment) Act No. 3 of 2016. According to the learned state attorney for the DPP, the trial court was, upon its finding that the accused persons were guilty of the offence, mandatorily obliged to sentence the offenders to the term of not less than twenty (20) years imprisonment but not exceeding thirty (30) years' custodial sentence. She invited the court to refer to the decision of the Court of Appeal at Bukoba in **Paulo Andrea @ Mwemndambile and**

**another vs. Republic**, Criminal Appeal No. 613 of 2020 (unreported). She thus urged this court to invoke its powers provided by AJA to revise the sentence and set aside.

Responding to the DPP's grounds of appeal, the counsel for the offenders argued that, the trial court properly exercised its discretion in sentencing them. It is his opinion, the sentence for the offence levelled against the accused persons now convicts is discretional one which is exercisable by a sentencing court. He went on arguing that it was proper for the trial court to order payment of fine pursuant to section 60 (2) of EOCCA. He finally submitted that the issue of fine is best or practically left in the discretion of the trial judicial officer.

Now to the court's determination in this ground of appeal advanced by the DPP. It is more pertinent if provisions of the law cited in the charge relating to penalty are reproduced herein;

> *60 (2) Notwithstanding provision of a different penalty under any other law and subject to subsection (7), a person convicted of corruption or economic offence shall be liable to imprisonment for a term of not less than twenty years but not exceeding thirty years, or to both such imprisonment and any other penal measure provided for under this Act;*

*Provided that, where the law imposes penal measures greater than those provided by this Act, the Court shall impose such sentence."*

The above quoted provision of the law was correctly interpreted by the Court of Appeal of Tanzania in **Paulo Andrea @ Mwemndambile and another vs. Republic** (supra) cited by the DPP's learned counsel where the appellants were found guilty, convicted and sentenced to pay a fine of T7S. 683, 820,000/= each or serve the term of twenty (20) years' imprisonment, it was held;

*"It is clear from the above provision that, notwithstanding provision of a different penalty under any other law, the trial court is mandatorily required to impose a custodial term of not less than twenty years but not exceeding thirty years or to both that imprisonment and any other provided penal measure. Since the second appellant was convicted of an economic offence, we find that the sentence imposed by the learned trial Judge was illegal because there is no option of payment of fine."*

Basing on the clear provision of the law and judicial precedent cited above, it appears to me that, an accused person charged with an economic offence under EOCCA when found guilty shall be sentenced to imprisonment for the term of **not less** than twenty **(20)** years. However, the sentencing court shall not sentence such offender for the term of more

than thirty (30) years jail. As of now, only a departure from the mandatory sentence against a convict of an economic offence is entertainable under the plea bargaining procedure stipulated under provisions of section 194B of the Criminal Procedure Act, Cap 20, Revised Edition, 2019 as amended by Written Laws (Miscellaneous Amendments) Act No. 1 of 2022. The said amendment is o the effect that a conviction follows **a plea agreement**, the court shall impose the sentence provided for by the parties' agreement without regard to the sentence specified for the offence in respect of which the conviction has been entered.

Therefore, argument by the convicts' counsel that, the trial court had discretionary power under section 60 (2) of EOCCA to order either a payment of fine or custodial sentence and that, the function of sentencing be left to the sentencing court is, in law, baseless since the applicable law does not provide to that effect. To add, the provision is even restrictive to an application of any other law which provides any other sentence to an offender of an economic offence unless such piece of legislation provides a more severe sentence than provided in EOCCA.

Nevertheless, even if the convicts were charged with the offence of unlawful possession of the government trophies contrary to section 86 (2) (b) of the Wildlife Conservation Act, No. 5 of 2009 without applying

provision of EOCCA yet the imposed fine by the trial court is not in conformity with the wording of the applicable law. Section 86 (2) (b) of the Act provides.

> *"(2) A person who contravenes any of the provisions of this section commits an offence and shall be liable on conviction*
>
> *(a) Where the trophy, which is the subject matter of the charge or any part of such trophy is part of animal specified in Part 1 of the First Schedule to this Act the value of the trophy does not exceed one hundred thousand shillings, to impoundment for a term of not less than five years but not exceeding fifteen years or to a fine twice the value of the trophy or both*
>
> *(b) Where the trophy which is the subject matter of the charge or any part of such trophy is part of an animal specified in Part I of the First Schedule to this Act, and* ***the value of the trophy exceeds one hundred thousand shillings, to a fine of a sum not less than ten times the value of the trophy or imprisonment for a term of not less than twenty years but not exceeding thirty years or to both (****emphasis mine.")*

According to the evidence on record including the information and valuation report (PE6), the value of the government trophies is Tshs. 163, 575,000/= that means, if the trial court was mandated to impose a fine, it ought to be ten times the value of the trophy involved (163, 575,000/=x

10=1,635,750,000/=) for both respondents. More so, the trial court did not specify on whether the imposed fine of Tshs. 15,000,000/= was payable by both convicts or each convict since it ordered that, the accused person to pay Tshs. 15,000,000/= or serve 20 years imprisonment. That was improper. For clarity parts of its sentence is reproduced herein under;

> *"Following such decision this court therefore sentence (sic) the accused person to pay fine of Tshs. Fifteen million (Tshs.15, 000,000/= or to serve twenty (20) years imprisonment."*

If the provisions of the EOCCA were not applicable which is not the case in this particular criminal matter, the trial court was hitherto duty bound to indicate that, the fine of Tshs. 15, 000,000/= was to be paid by both or each offender. In event of default to pay the imposed fine, it would be ordered that each of the offenders to serve the term of twenty (20) years imprisonment.

Having deliberated on the DPP's ground of appeal as herein above, the DPP's appeal is allowed. The imposed fine sentence by the trial court is therefore found illegal, the same is quashed and set aside by applying provision of Criminal Procedure Act (supra) and not AJA wrongly argued by DPP's counsel. I am of that view since the Appellate Jurisdiction Act,

Cap 141, Revised Edition, 2002 is not applicable in this court when dealing with criminal appeals emanating from subordinate courts.

**In the 1st, 8th, 9th and 10th grounds on the complained trial court's evaluation of evidence and weight attached thereto**

Collectively and jointly arguing the 1st, 7th, 8th, 9th and 10th grounds of appeal, the learned counsel for the convicts stated that the charge against his clients was not proved to the required standards. He went on to state that an accused person can only be convicted on the strength of the prosecution case and not based on weakness of his defence. He cited the case of **John Makolobela and Derick Juma @ Tanganyika vs. Republic** (2002) TLR 296 where this court held and I quote;

> *"A person is not guilty of a criminal offence because his defence is not believed; rather, a person is found guilty and convicted of a criminal offence because of the strength of the prosecution evidence against him which establishes his guilt beyond reasonable doubt."*

According to the convicts' counsel, in this case the prosecution leaves a lot to be desired due to the following reasons,

**Firstly**, that DDP's former charge through Economic Case No. 1 of 2021 and the one before the trial court through Economic Case No. 22 of 2021, the prosecution side failed to explain when and where as well as

how certificate of seizure with two suspects and the one tendered before the trial court with three suspects were procured. He added that, the prosecution side entered nolle prosequi in order to fill the gaps learnt in Economic Case No. 1 of 2021. The respondents' counsel further argued that, the evidence adduced in the former trial and the latter trial are contradictory. He embraced his argument by citing section 91 (1) of the CPA a case in law in **Evarist Kachembeho and others vs. Republic** (1978) LRT. 12 where it was held that if a witness had previously made a statement contradictory to his statement at the trial, his statement should viewed with great suspicion and there should be satisfactory explanation for the change of the story.

**Secondly**, the prosecution failed to call his key witness, case investigator, one Edward Shema and Andrew Sebastian. These were not called for testimonial purposes. He bolstered his decision in **Baya Lusana vs. Republic,** Criminal Appeal No. 593 of 2017 (unreported) where the Court of Appeal held

> *"It is the investigator who would have shed light as to what precipitated the appellant's arrest while the appellant was charged with attempted murder the evidence on record shows that he was arrested for stealing cattle but on interrogation he confessed to have assaulted."*

**Thirdly,** that, the evidence adduced by especially PW2 and PW3 is so contradictory in the following aspect, on whether the house was searched, whether the house was searched in the presence of the owner and whether the search was conducted in the presence of the relatives. In view of the prosecution evidence, Mr. John was of the opinion that, there are doubts that have to be apprehended in favour of the accused persons now respondents

In her response, the learned counsel for the DPP argued that once a nolle prosequi is entered under section 91 (1) of CPA does not bar the prosecution from instituting a subsequent charge against those who were discharged. She also argued the prosecution is taken into surprise since it has no records of the former case, Economic Case No. 1 of 2021. Embracing her argument, the counsel stated, that what is to be dealt with by this court and the court below is the latter economic case (Economic Case No. 22 of 2021).

On the complaint of failure to call material witnesses, the counsel submitted that no particular number of witnesses is required in order to prove a case. She invited the court to refer to section 143 of the Tanzania Evidence Act, Cap 6 Revised Edition, 2002. She further argued that the owner of the house is the one who ran away hence it was not easy to

have his presence during search or summon him as a witness for the prosecution since he was a suspect as well.

Court's determination on the certificate of seizure (PE5) produced during trial by the Resident Magistrate's court of Arusha it is the same which was rejected by this court **(Mashaka, J now JA)** on the ground that, the document (certificate of seizure-PE5) is not the document that appeared in the committal proceedings. Thus, vitiating Rule 8 (2) and 9 (3) of GN. No. 267 of 2016.

The DPP's counsel strongly resisted the arguments advanced by the respondents' advocate as far as reliability or authenticity of the certificate of seizure (PE5) by stating that the same does not form the proceedings in this particular case. I am not buying the argument of the DPP's learned state attorney for obvious reasons,

**Firstly**, that, the proceedings (DE6) and ruling (DE3) of the court vide Economic Case No. 1 of 2021 were tended and admitted by the trial court. Therefore, they formed part of the trial court proceedings especially documents for consideration or otherwise

**Secondly**, since the ruling and proceedings and ruling in respect of the former case withdrawn by the prosecution under section 91 (1) of CPA does not mean they became useless for future use in law after discharge

of the respondents taking into account that the decision of this court binds the lower court

**Thirdly**, that, the trial court in the latter case ought to have taken a judicial notice taking into consideration the respondent calling upon had troubled not only to call upon the trial court to take the judicial notice but also tendered the same. In **Ernest Kinyanjui Kimani v Muiru Gikanga and another** (1965] 1 EA 735, Court of Appeal of Kenya at Nairobi at page 743 held and I quote;

> *"No evidence of any fact of which the court will take judicial notice need be given by the party alleging its existence; but the judge, upon being called upon to take judicial notice thereof, may, if he is unacquainted with such fact, refer to any person or to any document or book of reference for his satisfaction in relation thereto, or may refuse to take judicial notice thereof unless and until the party calling upon him to take such notice produces any such document or book of reference."*

In our instant case, the learned Resident Magistrate must have not been acquainted with the ruling of the court in Economic Case No. 1 of 2021. But the respondents who alleged its existence intending to establish doubts to the search together with oral evidence adduced by PW2 and

PW3, did tender the same as per sections 58 and section 59 (3) of Tanzania Evidence Act, Cap 6 R.E. 2019.

**Fourthly**, that, during trial by RM's Court, the 2nd respondent collectively tendered the proceedings and the ruling of the court (DE6) on 11th day of November 2021 without any objection from the prosecution. Thus, argument that, such records are not within DPP's reach is found an afterthought.

As rightly held by my learned sister that, the certificate of seizure that was to be tendered by PW3 in the former case now PW2 did not tally with the copy supplied to the defence and in other committal proceedings, briefs (dock briefs). Since DE5 rejected by the court presiding the former case bears three names of suspects namely; those of respondents herein and that of the said **Israel Saipi** whereas the copies to the committal proceedings available have two suspects (respondents only).

More so, DE5 indicates that, the search conducted on the 7th December 2016 was witnessed by PW3, Alexander Niima and Edward Shema whilst the copies attached to the briefs of committal proceedings the name of Edward Shema is not indicated. In my firm view this serious irregularities going to the authenticity of the certificate of seizure (DE5) as well as the testimonies given by PW2 & PW3.

How can it be possible for the searching officer including Inspector of Police Force as he then was at the material date and during trial, an Assistant Superintendent of Police (ASP) to prepare and fill two certificates of seizure with different contents aforementioned? This anomaly raises serious and fatal irregularity. Equally, the evidence adduced by PW2 and PW3 in relation to the ones who were arrested and searched and found in unlawful possession of the said government trophies also raise doubts to the prosecution evidence.

The differences observed in DE5 and copies to the committal proceedings briefs lead to inevitable apprehension of serious doubts as the prosecution evidence. Similarly, the evidence of PW2 and PW3 in regard with the one who was arrested together with the respondents is contradictory as PW2 testified that, he was accompanied with one Edward Mlela (See Page 18) while PE5 indicates that, it was **Edward Shema** (See 26 of the typed proceedings). These are two different names, there is also contradiction on a number of bag searched, were they three or two taking into account PW2 told the trial court that there were three bags but on the other hand he testified that one Israel Saipi carried nothing (See page 18 and 19 of the typed proceedings).

Moreover the testimony of PW3 before Mashaka, J (JA) was to the effect that the house as searched but nothing was impounded (See page

54- "I searched the house") whilst PW3, Alexander testified before the subordinate court that, he did not enter the house where the respondents and another were arrested. Different versions or testimonies during trial before the court and subordinate court also raise doubts to as to the credibility of the prosecution witnesses (See **Mohamed Hemed Kakopa vs.** (1967) HCD 341

I am also of the view that since there were contradictions as to a number of suspects in the certificate of seizure (PE5) and that, in the copies of the briefs followed by the ruling of the court, the investigator of the case was therefore a material witness. His or evidence was very vital to clarify as to what led the investigation to have two different forms regarding search and seizure of the government trophies allegedly found in unlawful possession of the respondents. I am saying so simply because the investigator was a vital witness since he was the one who collected pieces of evidence before he sent the file to the office of National Prosecutions at Arusha for further actions or investigative directives as well the custodian of the filed.

Therefore, failure to call the investigator of the case and failure to have satisfactory explanation leave a lot to be desired. This position has been consistently stressed in various judicial decision for instance in **Aziz**

**Abdallah vs. Republic** (1991) TLR 71 where the Court of Appeal instructively stated;

> *"The general and well known rules is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution."*

Having determined the respondents' grounds of appeal No. 1, 8 , 9, and 9 in favour of the respondents. Therefore, I do not see any reason to proceed determining other grounds of appeal since DE5 is not worthy for forming basis of conviction together with oral evidence adduced by PW2 and PW3 together with contradiction of evidence given by the prosecution side.

That said and done, the DPP's respondents' appeal is allowed to the that the imposed sentence was in contravention with mandatory statutory sentence provided for under section 60 (2) of the EOCCA. Equally, the respondent's appeal is laudable and I proceed to allow it. The trial court's convictions are quashed and sentences meted out to the appellant are hereby set aside. The respondents/appellants shall be realised from prison forthwith unless held therein for any other lawful cause. The trial court's

ancillary orders in respect of the trophies and weighing machine remain undisturbed since the respondents did not claim ownership of the same.

It is so ordered

**DATED** at **ARUSHA** this 24th March, 2023

**MOHAMED R. GWAE**

**JUDGE**