IN THE HIGH COURT OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

CONSOLIDATED CRIMINAL APPEAL NOS. 91 AND 92 OF 2022

(Originated from Economic Case No. 3 of 2020 in the Resident Magistrate Court of Sumbawanga)

AMON NIKOLAUS@ NTILUKA ..... 1ST APPELLANT

CLEMENT SAMWEL @SALUM ..... 2ND APPELLANT

YONA MSOMA ..... 3RD APPELLANT

BARAKA SINDANI @SIMBEYE ..... 4TH APPELLANT

VERSUS

DPP.....RESPONDENT

JUDGMENT

27th July & 11th August, 2023

MRISHA, J.

Before me is a consolidated appeal resulted from Criminal Appeal No. 91 of 2022 by the 1st appellant, and Criminal Appeal No. 92 of 2022 by the 2nd,

3rd and 4th appellants respectively, following the order of this court issued on 20.12. 2022.

Initially the four were jointly charged, tried and convicted by the Resident Magistrate Court of Sumbawanga at Sumbawanga (the trial court) in Economic Case No. 03 of 2020 of the two counts namely Unlawful Dealing in Government Trophies contrary to section 80(1) and 84(1) of the Wildlife Conservation Act No. 5 of 2009 (the WCA) read together with Paragraph 14 of the first Schedule to and Section 57 (1), section 60(2) of the Economic and Organized Crimes Control Act, Cap 200 R.E. 2002(the EOCCA) which is now R.E. 2019).

The second count was Unlawful Possession of Government Trophies contrary to section 86(1) and (2) (c) (ii) of the WCA read together with Paragraph 14 of the EOCCA.

In addition to the above counts, the first appellant was also charged alone on the third count of Unauthorized Possession of Minerals contrary to section 18(1) and (4) of the Mining Act, Cap 123 read together with Paragraph 27 of the first Schedule to and section 57(1), 60(3) of the EOCCA. The particulars of the first count were that on diverse dates

between July, 2019 to 23rd January, 2020 at Chunya District in Mbeya Region and Safu Village within Kalambo District in Rukwa Region the 1st, 2nd, 3rd and 4th appellants did jointly and together dealing in Government trophies to wit purchasing and selling of twenty four (24) pieces of Elephant Tusks valued at a total of (USD) 60,000/= equivalent to Tanzania shillings One hundred and Thirty Nine million, One hundred and Forty thousand only (TZS 139,140,000/=) the properties of the Government of the United Republic of Tanzania without a trophy license from the Director of Wildlife Division.

In the second count the particulars where that on the 23rd day of January, 2020 at Safu Village within Kalambo District in Rukwa Region the 1st, 2nd, 3rd and 4th appellants were jointly and together found in unlawful possession of twenty four (24) pieces of Elephant Tusks valued at a total of (USD) 60,000/= equivalent to Tanzania shillings One hundred and Thirty Nine million, One hundred and Forty thousand only (TZS 139,140,000/=) the property of the Government of the United Republic of Tanzania.

As for the third count, it was alleged that on the 23rd day of January, 2020 at Safu Village within Kalambo District in Rukwa Region the 1st appellant was found in possession of minerals to wit; 79kg of Green Kyanite valued

at 393.95 USD which is equivalent to Tanzania Shillings Nine Hundred, Two thousand, Sixty-Nine shillings and Twenty-Four cents (TZS. 902,069.24/=) without a valid Mineral right, dealer's licence or brocker's licence.

As a result, each of them earned a sentence of 20 years in prison on the 1st count, and the trial court ordered the above sentences to run concurrently. However, the trial court found that the prosecution did not prove that offence of 3rd count for the 4th accused. It therefore acquitted him for not being guilty of that offence.

The appellants were not amused by the above sentences and decided to lodge their petitions of appeal seeking intervention of this first appellate court to allow their appeals, the convictions and sentences passed by the trial court so that they be set free.

As the present case is a consolidated criminal appeal case originating from Criminal Appeals No. 91 and No. 92 of 2022, and because all the appellants are petitioning against the same decision of the subordinate court which was delivered on 18.07.2022 as per the trial court records, I find it apposite to paraphrase their grounds of appeal in order to have a good

flow when I will be dealing with such grounds, one after another. The same can be paraphrased into the following grounds: -

1. *That the trial Court was biased as it based its decision to convict the appellant basing on the caution statement of the appellant which was not forming part of trial court records.*
2. *That the judgment of the trial Court was contradictory on the basis that it acquitted and convicted the appellant on the first count.*
3. *That the trial Court erred in law and fact by relying on the evidence of the principal witness PW3 who had his own interest to save in exonerating himself from the criminal liability having being found right-handed in possession of the alleged Government Trophies without proof that the said witness was acting for the appellant.*
4. *That the trial Court erred in law and fact for trying the matter in contravention with the principles of natural justice by admitting the exhibits without affording the Appellant right to be heard during admission of the prosecution exhibits mean while the said exhibits were affecting the appellant.*
5. *That the appellants were convicted basing on the objected exhibits which were improperly admitted as evidence against the appellant.*

6. *The trial Court erred in law and fact for convicting the appellant basing on what the trial Court considered to be weakness of the defence case.*
7. *That the trial Court erred in law and fact for convicting the Appellant on the offence which was not proved to standard required by the law as the prosecution evidence was contradictory and inconsistent.*
8. *That the trial Court erred in law and fact for failure to consider the weight of defence case which coherently established innocence of the appellant.*
9. *That the trial Court erred in law and fact for failure to analyze properly the evidence in court's record.*

When this appeal came for hearing, the appellants were represented by Learned Advocate Mathias Budodi, while the respondent Republic was represented by Simon Perez, Senior State Attorney. Addressing this court in respect of the appellants' grounds of appeal, the learned Advocate requested the court to adopt both Petition of Appeal Criminal Appeal No. 91 of 2022 and Criminal Appeal No. 92 of 2022 to be part of their submissions in chief. Submitted grounds of appeal based on the list of

petitions of appeal as shown in the Criminal Appeal No. 91 of 2022 which was mentioned herein above.

Starting with the first ground of appeal which is similar to ground three of the Petition of Appeal in DC Criminal Appeal No. 92 of 2022, the learned Advocate submitted that the trial court was based its decision to convict the appellants on the caution statement of the 4th accused which did not form part of the trial court's proceedings. He made reference to pages 114 to 118 of trial court proceedings and submitted that in those pages there is a ruling of the trial court dated on 04.11.2021 which clearly shows that the trial court rejected the cautioned statement of the 1st Appellant who was also 4th accused of the trial Court.

It was his further submission that despite the said ruling, the trial magistrate in his judgment at page 36 and 43 relied on the said cautioned statement to convict the appellants. He also said that is not an over sight because it is apparent at page 43 the first paragraph, that the trial magistrate confirmed he was aware that the said cautioned was not admitted, but he went on to believe that its contents were of essence as they showed a clear picture that all the appellants were dealing with Government Trophies.

To bolster his argument, the learned counsel referred the case of **Japan International Cooperation Agency v Kaki Complex Ltd** Civil Appeal No 107 of 2004 at page 15 paragraph 2. The Court of Appeal Tanzania held that: -

> *"The document in question somehow was not admitted in evidence. This was a substantial error during the trial which amounted to a miscarriage of justice!"*

He added that the rationale is that making reference to the rejected documents is irrelevant since the documents are not part of the proceedings. Henceforth, the trial court make finding on the extraneous matters which vitiates proceedings and judgment. He referred the case of **Frorence Mobili and 4 others v DPP,** Criminal Appeal No. 98 of 2019 sitting at Mbeya at page 20 last paragraphs and 21 last paragraphs**.** He therefore prayed to this court to nullify the entire proceedings of the trial court, quash the judgment together with convictions and set aside the sentences imposed on the appellants.

Turning to the second ground of Appeal, Mr. Budodi made reference to the proceedings and judgment regarding the contradiction on convictions and acquittal of the appellants at the same time. He submitted, for instance,

that at page 48 of the Judgment the second paragraph, the trial magistrate convicted all the appellants on the first count, on the third paragraph of the same page the trial magistrate stated that on the part of the 2nd and 3rd counts prosecution failed to prove the case beyond reasonable doubt.

He further argued that the first contradiction is on the first and second pages of the typed judgment which show that the appellants were charged with only two counts and not three counts. The second contradiction was on the third paragraph at page 48 in which the trial magistrate stated that for the second and third counts the prosecution side failed to prove beyond reasonable doubt, nevertheless the appellants were charged with two counts and not three counts. He wondered how the trial Magistrate convicted the appellants on the first and second counts except the 4th accused, still the trial magistrate convicted the appellants on the second count at the first place and acquitted the 4th appellant on the second count. He concluded by arguing that since the trial court found the appellants not guilty and acquitted then that court became functus officio; hence it could not decide contrary to what it ordered before.

Regarding the third ground which is also a first ground in the consolidated appeal, it was the learned counsel submission that the trial court erred in

law by relying on the evidence of PW3 who had his own interest to save when he exonerated himself from the criminal liability. Mr. Budodi referred to exhibit P5(a seizure certificate) which shows that the possessor of the Government Trophies is one Philemon Said Ntibasi who testified as PW3; that is shown at page 47 to 50 of the type proceedings.

Mr. Budodi added that PW3 was the one who was found with Government trophies, but for undisclosed reasons he was not among the accused persons, rather he become a principal prosecution witness. The Court of Appeal while dealing with the same circumstance in the case of **Abraham Saiguran v Republic, [1981]** TLR 265. In this case provide a principle that: -

> *"Evidence of person within interest of his own must be approached with care and should not be acted upon, unless corroborated with some other independent evidence"*

He also argued that the trial court believed the evidence PW3 without considering if there was other independent evidence. He went on submitting that in his evidence PW3 stated that he was informed by 1st

appellant to welcome his guests and take the trophies and he communicated with the 1st appellant through mobile phone and his phone was seized, but no evidence of audio devices was tendered before trial court.

Due to the above defects the learned counsel was of the view that the trial court committed a gross error in its finding. Moreover, the argued that the cautioned statement of a co-accused cannot be used to ground conviction in absence of corroboration; that position was stated in the case of **Damas Lucas and another v Republic,** Criminal Appeal No. 04 of 2021 High Court Kigoma (unreported) at page 7, thus:

> *"The evidence of co – accused needs corroboration to ground a conviction against the co – accused".*

He also referred this court to the case of **Rajabu Abdallah @Mselemu v Republic,** Criminal Appeal No. 134 of 2014, Court of Appeal Tanzania Iringa at page 4.

In regards to the search process, the learned advocate indicated that the same also contains irregularity which is contravened the provisions of section 38(2) of Criminal Procedure Act (CPA) arguing that the search was

conducted without search warrant. He submitted that there is no any nature of emergency which permitted search without warrant because the information was received on a work day. He referred the case of **Shabani Said Kindamba v Republic,** Criminal Appeal No.390 of 2019 Court of Appeal Tanzania Mtwara at page 15, to support his argument.

As for the fourth ground of appeal is similar to the second ground of appeal on consolidated appeal, Mr. Budodi argued that, the appellants were not given rights whether to admit or deny the admission of exhibits when was tendered this violated their constitutional right to be heard. The trial Magistrate Court provided an opportunity to the 4th appellant to object the cautioned statement while the rest were denied to object or admit the said statement.

He referred page 135 of trial proceedings, where PW10 tendered caution statement of 3rd accused who is the 4th appellant in this appeal, and argued that the trial court gave the 4th appellant a right to object only while the caution statement affected other appellants. The caution statement of 4th appellant was admitted as Exhibit P10.

Likewise, the counsel submitted that the admission of exhibits P9 and P11 that is cautioned statement of the 2nd and 3rd appellants respectively was considered when the trial court convicted the appellants, while the same were illegally admitted, he referred page 43 of the typed Judgment. To bolster his argument, he referred the case of **Geophrey Jonathan @ Kitomari v Republic,** Criminal Appeal No. 237 of 2017 Court of Appeal Tanzania Arusha at page 12.

> "*Wherever it is indented to introduce any document in evidence it should first be cleared for admission, and be actually admitted before it can be read out, otherwise it is difficult for the Court to be seen not have been influenced by the same".*

However, according to the learned counsel, the 4th accused raised a paramount important objection regarding his name, but when delivering its ruling the trial court admitted the document without it being tendered by the witness. Therefore, he argued that the exhibit was admitted illegally but it was formed basis of conviction. He argued further that the above said submission covers the fourth and fifth grounds on consolidated appeal.

In winding up with ground six of appeal which is also ground six of consolidated appeal, Mr. Budodi pointed out that the trial court based on the weakness of the evidence of the appellant to convict them. He referred page 48 to 49 of the Judgment which shows clearly. The trial court stated that the defence is *"weak and shoddy"* for the 1st appellant at page 48 and for the 2nd, 3rd and 4th Appellants the trial magistrate used the same word evidence *"weak and shoddy"*. The learned counsel fortified his position by relying on the cardinal principle that it is wrongly for the Court to convict the accused person based on the weakness of the defense as it was stated in the case of **Vicent Sonfo Mapunda V Republic** [1992] TLR 200.

Mr. Budodi merged grounds 7, 8, and 9 of the appeal; and submitted that the above submission covers those grounds of the appeal. Therefore, the ground 5 of the consolidated appeal was concluded by covering the 2nd, 3rd and 4th grounds of appeal.

He further submitted that the 2nd, 3rd and 4th appellants were convicted based on the fact that they were found at the house in which the alleged government trophies were found, but they were not in possession of the same, rather they were merely found at the scene of crime. To him that does not constitute an offence in law. To add more weight on that point,

the learned counsel cited the case of **Emmanuel Chigogi Vs. Republic,** Criminal Appeal No.355 of 2018 Court of Appeal Tanzania Dodoma at page 18 in which the Court of Appeal held that:

> *"Mere presence of the first appellant at the scene of crime was not sufficient to implicate him to the murder".*

Therefore, he prayed to the Court to acquit the 2nd, 3rd and 4th appellants because of the principle stated above.

Lastly, the learned Advocate for the Appellants submitted by showing/mentioning some procedural irregularities which he allegedly vitiated the trial court proceedings and attracted nullification of the same; among them are contravention of natural justice basing finding on extraneous matter and reliance on a non-admitted exhibit and on co - accused evidence all of which the remedy is to do trial denovo when the counts exceed.

Nevertheless, the defence counsel quickly argued that this is a fit case to order acquittal rather than denovo as it stated in the case of **Florence Mubiri** (supra) and the case of **Rajab Abdallah Mselemu** (supra).

More so, he contended that since there is illegality of the search warrant, that means the exhibit tendered cannot be a base of the case before the trial court because the center of the case was found in the search warrant. Therefore, he prayed to this Court to find that the case is not proved beyond reasonable doubt, quash conviction, set aside sentence and set free the appellants.

In replying about the grounds of appeal, the learned Senior State Attorney opposed the appeal and submitted that the appellants were convicted by the trial court basing on the evidence of PW1 and PW2 together with the exhibits admitted in court. However, Mr. Perez concurred with the submission of the learned Advocate that the exhibit referred by the trial Magistrate in his judgment at page 36 and 43 was not admitted.

Nevertheless, he denied the complaint that convictions of the appellants were based on the caution statement which was not admitted in court. He further argued those cautioned statements have shown clear picture that both accused persons were dealing with the unlawful Government Trophies.

In regards to the issue of extraneous matters, the learned Senior State Attorney submitted that the 4th accused (1st appellant) caution statement does not fall under extraneous matter; since the statement was rejected then the remedy is to expunge a piece of evidence available at pages 36 and 43 of the typed Judgment. However, the learned counsel submitted even if the same will be expunged from record, still the prosecution evidence will remain intact to convict the appellants. He was of the view that the mistake appearing in the trial court's judgment does no vitiate the whole judgment.

Turning to the complaint in ground two of the appeal, Mr. Perez contended that a charge sheet is the only document which shows a number of counts the appellants were charged with. He proceeded to submit that all the appellants were jointly charged in respect of the first and second counts, but on the third count the first appellant one Amon s/o Nikolaus @ Ntiluka, was charged alone. However, at page 2, paragraphs three of the typed judgment it shows that there are three counts in the charge sheet and the 4th accused was only charged with the 3rd count.

Regarding a complaint that the trial Court convicted the appellant and at the same time acquitted the appellants, the learned counsel submitted that

the language used by a trial Magistrate is clear; hence there is no contradiction, what is apparent is that the trial magistrate had his peculiar style of writing judgment.

Mr. Perez submitted that the trial magistrate convicted all appellants on 1st count, but the prosecution failed to convince the trial court for it to convict the 4th in respect of the second and third counts. The learned counsel fortified his position by referring the provisions of section 388 of the Criminal Procedure Act to cure any mistake occurred in the judgment.

Regarding third ground of appeal, the learned Senior State Attorney hesitated to say much that PW3 had interest of his own to serve because that issue was neither raised during the trial of the appellants nor were the prosecution witnesses cross examined on the same during trial. He went on arguing that the provisions of section 127 of the Evidence Act, Cap 6 [R.E 2022] guides the competence of a witness; hence according to him, PW3 was a competent witness because the trial court measured his evidence on credibility, reliability and acceptance before it accepted his evidence.

Mr. Perez also argued that the evidence which implicates the 1st appellant is cautioned statement of 1st, 2nd and 3rd accused persons which were

admitted as Exhibit P9, P10 and P11 corroborated by the evidence of PW3. He further argued that the 2nd, 3rd and 4th appellants were convicted based on their confessions and also corroborated by the evidence of PW1, PW2 and PW3, he invited this court to refer page 32 and 43 of court proceedings.

Regarding issue of search, Mr. Perez contended that the issue of search was not part of grounds of their appeal, but he argued shortly that PW1 and PW6 received information around 1800 hours; it was not easy for them to approach the Court and obtain a search warrant as it was an emergence. More so, the search was conducted in the presence of independence witness PW2 Village Executive Office and PW4 a resident of the said area.

While concurring with his fellow advocate on the principle that it is necessary to obtain search warrant from court when search conducted at night, the learned counsel argued that even if there is apparent contravention of the Criminal Procedure Act, it is not automatic exclusion of the evidence especially when the circumstance of a particular case fall under emergency situation. He fortified his stance by citing the case of

Matata Nassoro and another v Republic, Criminal Appeal No. 329 of 2019.

In replying about the fourth ground of appeal, the learned Senior State Attorney submitted that the cautioned statements of the accused persons were cleared for admission, admitted by the court and marked as Exhibits P9, P10 and P11 and their contents were read over before the Court. He continued submitting that clearness of the caution statement was only allowed to the maker, hence the maker is the one who can clear his statement.

He concurred with the principle of law stated in the case of **Geofrey Jonathan Kitowari v Republic** (supra); and added that the land mark case is the case of **Robson Mwanjisi v Republic**, 2003 TLR at page 218 which all provide an instructive procedure that before a document is admitted it must be cleared for admission.

He concluded on that ground by submitting that the procedure of admitting the caution statement of the third accused as appearing at page 136 and 137 of the court proceedings, was not violated; the objection was overruled and the said document was admitted as exhibit P10.

In winding up on ground six of the appeal, Mr. Perez argued that the trial Magistrate considered the defence of the appellants in the judgment. To fortify his stance, he referred this court to pages 47, 48 and 49 of the said judgment. The trial Magistrate weighed defence evidence and clearly stated that defence evidence was weak.

In addition, the learned Senior State Attorney argued that the word *"weak"* used in the judgment of the trial court should not be used to connote that the appellants were convicted due to weakness of their defences, rather it should be used to mean that, after evaluation of the prosecution evidence, the defence evidence could not to stand.

Mr. Perez proceeded to submit that as this court is the first leg of appeal, it has mandate to wear a shoe of the trial court in order to evaluate the defence to ascertain if it has merit and come up with its own conclusion. To bolster his argument, he referred the case of **Jafari Mussa v DPP**, Criminal appeal No. 234 of 2019 at page 11.

Finally, he concluded by submitting that the prosecution proved their case beyond reasonable doubt, and the trial court was justified to believe the prosecution witnesses, their testimonies and accept them. According to the

said counsel, this position was stated in the case of **Goodluck Kyando vs. Republic,** 2006 TLR 367.

He thus submitted that the evidence against the appellants is credible and water tight. He therefore, prayed to this court to dismiss the present appeal and upheld convictions and sentences imposed upon the appellants, indicating that the irregularity observed is minor and can be cured under section 388 Criminal Procedure Act, [Cap 20 R.E 2022].

In rejoinder, Mr. Budodi reiterated his previous stance by submitting that learned State Attorney conceded ground one of appeal by concurring with him that the trial Court made reference to an exhibit which was not part of the record and he neither disputed the position stated in the case of **Japanese International Cooperation Agency** (supra) nor distinguished the said case with the circumstance of the instant case. He argued that what was done by the trial magistrate is a substantial error which cannot be cured under section 388(1) of the Criminal Procedure Act.

Regarding issue of corroboration, he submitted that the caution statement is the statement of co-accused which need corroboration and further the evidence of PW3 is evidence of a person who have interest which needed

corroboration. In furtherance of his submission, he stated that the cautioned statements were improperly admitted and their legality is questionable.

I have considered all the rival submissions by the counsel for both parties together with the trial court's record. I have also paid much attention to the authorities as well as the provisions the law cited by said counsel. I think, the burning issue for consideration is whether the prosecution proved its case beyond reasonable doubt.

At the outset, I wish to point out that in order to win conviction, the prosecution must prove its case beyond any reasonable doubt as required of it under section 110 of the Evidence Act, Cap 6 R.E. 2022(the TEA), short of that the accused person will be entitled to the benefits of doubts left behind by the prosecution side.

Proof beyond reasonable doubt refers the cardinal principle which entails that in any criminal trial, the accused person must not be convicted merely because he has put forward a weak defence, but rather the evidence led by the prosecution incriminates him to the extent that there is no other hypothesis than the fact that the accused person committed the offence

with which he stands charged (See **Antony Kinanila & another v Republic**, Criminal Appeal No. 83 of 2021 (unreported).

This Court is the first appellate court and as it was held in a number of cases such as the case of **Kaimu Said v Republic**, Criminal Appeal No. 391 of 2019 CAT Mtwara (unreported), the Court held that:

> *"... a High Court being the first appellate Court has powers to step into the trial Court's shoes and reconsider the evidence of both sides and come up with its own findings of facts."*

As I perused the records of the trial court, I realized that the appellants' convictions were mainly based on the documentary exhibits and oral testimonies of the prosecution witness as will be described shortly. It appears that the testimonies of PW1, PW2, PW3, PW4 and PW6 justifiably testified to have been at the scene crime. However, the caution statement of the 1st appellant was discarded by the trial court for being tainted by vitiating factor particularly promises by the policemen.

Starting with the first ground of appeal, the learned Advocate has contended that the trial court based on the caution statement of the 1st appellant which was rejected to be admitted as exhibit and convicted the

appellants despite the fact that such document was not admitted. The learned counsel made reference to page 36 and 43 of the judgment and argued that what was done by the trial magistrate amounted to extraneous matter. He cited case law to support his contention.

In his reply to this ground of appeal Mr. Perez argued that what was done by the trial magistrate was something which was not supposed to be used in the course of composing his judgement but that did not amount to extraneous matter. Hence, in order to cure the said anomaly, the learned counsel submitted that the remedy there is to expunge a piece of evidence which indicated that the trial magistrate used the rejected evidence. He also said that even if there was such irregularity, the same is curable and can be cured by invoking the provisions of section 388(1) of the CPA.

In order to determine the merit or otherwise of this ground it is important to be guided by the principle stated in the case of **Ramdhani Shabani @Magurumbata and 3 others v Republic**, DC Criminal Appeal No. 81 of 2016 my learned sister Hon Mansoor, J held that:

"The caution statements being tainted by irregularities are hereby ***expunged from records****, and* ***cannot be relied by the either the prosecution or the trial court for conviction.****" [Emphasized]*

See also **Abuhi Omari Abdallah and 3 others v Republic**, Criminal Appeal No. 28 of 2010 and the case of **Makoye Samwel @ Kashinje and others v Republic,** Criminal Appeal No. 32 of 2014 (both unreported).

In the case at hand, it is glaring from the trial court's records that the caution statement of 1st appellant was rejected by the trial court after conducting an inquiry and declared that the said caution statement was made based on the promise which is contrary to section 27(3) of the Evidence Act, Cap 6 R.E. 2022. However, the trial Magistrate referred the said caution statement when he was composing his judgment at page 43 of the typed judgment. I find it necessary to quote the said part of the judgment to make the point clear, and I quote: -

"Basing on cautioned statement for the 1st, 2nd, 3rd accused person together with that of the fourth accused person though was rejected during the hearing of this case by the court basing on influential

aspect, but the contents and essence of those cautioned statements have a clear picture that both accused persons were dealing with unlawful Government trophies." [emphasis added]

The above quoted excerpt clearly demonstrates that the trial Magistrate referred the document which was not part of the proceedings when composing his judgment. In the circumstance, I am of the view that the consequence thereof is nothing, but to expunge the said rejected documentary exhibit which contains extraneous matters, as I hereby do. Having said the above, I find that ground number one of the appellants' petitions of appeal has merit.

The issue is whether after expunging the caution statement of the first appellant, the remaining prosecution evidence is sufficient to ground convictions against the appellants.

I have examined the records of the trial court and I have also considered all the documentary exhibits tendered by the prosecution side and admitted by the trial court save for the caution statement of the first appellant which I have already expunged earlier. It appears that apart from the said expunged documentary exhibit, there is another prosecution

evidence implicating the appellants herein in relation to the first and the second counts which they were jointly charged and arraigned before the trial court, save for the first appellant whom I have noted that he was acquitted by the trial court for want of proof by the prosecution side in respect of the second count.

The same is divided into two categories which are; first, the oral testimonies of PW1, PW2, PW3, PW4, PW5, PW6, PW7, PW8, PW9 and PW 10. The second category is based on the documentary exhibits which are the three mobile phones, government trophies which were 24 pieces of elephant tusks, the kyanite minerals and two motor cycles allegedly used by the appellants to transport those trophies from Chunya to Safi Village. Other exhibits are certificate of seizure/seizure certificate, chain of custody, trophy valuation report and three caution statements of the second, third and fourth appellants.

In their second ground of appeal, the appellants have alleged that the judgment of the trial Court was contradictory on the basis that it acquitted and convicted the appellant on the first count. The appellants' counsel while submitting on the above ground has indicated two contradictions in the typed judgment. According to him, the first contradiction is on the first

and second pages of the typed judgment which show that the appellants were charged with only two counts and not three counts.

That the second contradiction was on the third paragraph at page 48 in which the trial magistrate stated that for the second and third counts the prosecution side failed to prove beyond reasonable doubt, nevertheless the appellants were charged with two counts and not three counts. He wondered how the trial Magistrate convicted the appellants on the first and second counts except the 4th accused, still the trial magistrate convicted the appellants on the second count at the first place and acquitted the 4th appellant on the second count. On his side, the respondent's counsel was of the view that there was no such contradiction pointing that the trial magistrate had his own peculiar way of composing a judgment. He has also pointed out that the charge sheet is very clear as it stipulates three counts two of which shows the appellants were jointly charged and one which is the third count shows it is one the first appellant who was charged on that count.

Regarding the first alleged contradiction, I do not see if there was such contradiction. This is because the trial magistrate clearly indicated that the prosecution side had sufficiently proved its case regarding the first count

and the second counts and convicted the 2nd, 3rd and 4th appellants accordingly, but refrained from convicting the first appellant in respect of the second and third count for want of proof by the prosecution side. This is justified at page 50 of the typed judgement in which the trial magistrate stated, thus:

> *"...therefore, I find the prosecution side proved the case to the standard required by law on the first count which encompasses both accused persons. Likewise, on the second count which include first, second and third accused persons, the prosecution side proved its case beyond reasonable colors of doubt, but failed to prove the case beyond reasonable doubt on second count to the fourth accused person, as exhausted much above. I therefore, found the first, second third and fourth accused person guilty of the offence charged particularly the first count, and second count to the three accused persons particularly first, second and third accused persons." [the underline is mine]*

The only defect which in my view is curable, is the act of the trial magistrate to use the word *"both"* to refer to accused persons (the appellants). I am of the considered view that the use of that word was not

proper because both' is normally used when one refers to two persons, or two things. The correct word ought to be the word *"all"* if the trial magistrate intended to make reference all the four accused persons who are now the appellants.

That apart, at page 42 of the typed judgment, the trial magistrate stated the following: -

> *"...Consequently, I proceed to acquit the fourth accused person on **the third count** as for the foregoing observed reasons above based on insufficient evidence from the prosecution side."[emphasis added]*

The above fortifies this court observation that the counts of which the appellants herein stood charged before the trial court were three in that on the first and second counts, the said appellants were jointly charged for the offences of **Unlawfull dealing with Government Trophies** and **Unlawful Possession of Government Trophies** respectively, but the first appellant was charged alone on the third count with an offence of **Unauthorized Possession of Minerals**. So, I am certain that there were no such contradictions. Thus, due to the above reasons, the second ground of appeal fails.

In their third ground of appeal, the appellants have complained that the trial Court erred in law and fact by relying on the evidence of the principal witness PW3 who had his own interest to save in exonerating himself from the criminal liability having being found right-handed in possession of the alleged Government Trophies without proof that the said witness was acting for the appellant.

Section 142 of the Evidence Act, CAP 6 R.E. 2022(the TEA) provides that:

"142. An accomplice shall be a competent witness against an accused person; and conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice".

The TEA does not specifically provide a definition of the term, "Accomplice", but through other aids one can simply understand what the term exactly means. For example, the Blacks' Law Dictionary, 4th Edition, St. Paul, Minn. West Publishing Co. 1968 at page 32, "Accomplice" has been defined thus:

> *"A person who **knowingly, voluntarily,** and **with common intent with the principal offender** unites in the commission of a crime."*

From the above definition it is quite clear that for a witness to be qualified as an accomplice he or she must have knowledge about the plan to commit an offence, again he must have volunteered to participate in its commission and the last condition is that he or she must have a common intention with the principal offender and unite in the commission of a crime.

In the case at hand, PW3 whose evidence appears to have been corroborated by the prosecution witnesses particularly PW1, PW2, PW4, PW5 and PW6 testified that he was instructed by the first appellant to host the second, third and fourth appellants, allow them to slept in the house rented by him, pick their three luggage and kept them until the first appellant comes.

There is nowhere such witness said that he participated with either of the said appellants to commit the offences the subject of this appeal. Also, there is nowhere in the trial court records it shows that the said witness confessed to PW2 and PW6 who are members of law enforcement agents that he formulated a common intention with the appellants to commit such offences. Therefore, due to the above reasons, I am of the firm view that PW3 was not an accomplice rather he was a normal witness just like the

rest of the prosecution witnesses. Therefore, the third ground of appeal has no merit.

As for the fourth ground of appeal in which the appellants seem to fault the trial court for denying them a right to be heard during admission of the prosecution exhibits while the same affected each of them, I should start by saying that as a matter of law, there are three stages which a trial court has to observe before a document is admitted in evidence it should first be cleared for admission, secondly, it should be admitted in evidence and thirdly, it should be read out in court.(See **Robinson Mwanjisi and 3 Others vs Republic**(Criminal Appeal No. 154 of 1994[2001] TZCA 28(*at Tanzlii*).

The reason behind reading the contents of the admitted document is to enable to accused person know the contents of the same and be prepare his defence. This was emphasized in the case of **John Mghandi @ Ndovo v. The Republic**, Criminal Appeal No. 352 of 2018 (unreported), in which the Court of Appeal stated that:

> "*...whenever a documentary exhibit is introduced and admitted into evidence, it is imperative upon a presiding officer to read and explain*

its contents ***so that the accused is kept posted on its details to enable him/her give a focused defence".***

In the case at hand, the appellants seem to complain that they were not given a right to be heard when their fellows caution statement was sought to be tendered as exhibits before the trial court. I do see if their complaints have legs to stand because what I know, as indicated from the authorities I have cited above, the one who has a right to comment on the document sought to be tendered as exhibit is the maker of the statement. What the rest of the appellant could do was to listen to the contents read by the prosecution witness which I believe they did because they were present in court.

For instance, when exhibit P10 which is the caution statement of the fourth appellant was admitted in court, it was that appellant who had a right to comment on it whether he had an objection or not; the rest of the appellants who are the first, second and third appellant were supposed to hear its contents and prepare their defence if they thought the same affected them. However, none of them, leaving alone the first appellant whose caution statement was not admitted, said anything in their defences. Thus, from what I have said above, I find that the exhibits

tendered by before the trial court were properly admitted and the appellants were not denied a right to be heard. Hence, I hold that the fourth ground of appeal has no merit.

Next is the fifth ground in which the appellants through their learned advocate have alleged that the appellants were convicted basing on the objected exhibits which were improperly admitted as evidence against the appellant. Talking about that complaint the appellants' counsel has faulted the trial court for relying on the evidence of PW1 and PW6 who conducted search at the scene of crime without a search warrant contrary to section 38(2) of the CPA; he cited the case of **Shaban Said Kindamba** (supra) to support his position.

However, the respondent's counsel took a different view that since search was conducted in an emergency situation at midnight, there was not necessity of obtaining a search warrant from the court. Admittedly, section 38(2) of CPA is very clear about the requirement of obtaining search warrant from the court before an authorized police officer wants to conduct search a premises or a vessel in which he suspects an offence has been committed or is intended to be committed.

However, I think that the circumstances in **Shaban Said Kindamba** (supra) were different to the ones in the case at hand. In that case there was no emergence situation which could necessitate the police officer to conduct search without warrant which exception is provided under section 42(1) of the CPA and because of that the Court of Appeal resolved that the search was illegally conducted.

In the instant case, there was an emergency situation, as rightly pointed out by the respondent's counsel. This is because the trial court's reveals that at 1800 hours PW1 was tipped by PW6 through a mobile phone about the appellants' illegal business of transporting government trophies which were elephant tusks from Chunya to Safu Village, Kalambo District, in Rukwa region and that the said appellants were moving to that village in order to do business with their fellow who is the first appellant. In the circumstance, it is obvious that search warrant not inevitable as rightly argued by the respondent's counsel. Therefore, due to the above reasons I find that the fifth ground of appeal too has no legs to stand.

In their sixth ground of appeal the appellants have complained that the trial court erred in law and fact for convicting the appellants based on what it considered to be weakness of the defence case. He took refuge on the

principle stated in **Vicent Sonfo Mapunda V Republic**(supra) that it is wrong for a court to convict the accused basing on the weakness of defence case. To the contrary, the respondent's counsel has insisted that the trial court properly considered evidence of both sides before arriving to its findings against the appellants. He has referred this court to pages 47, 48 and 49 and concluded that the word *"weak"* used in the judgment of the trial court should not be used to connote that the appellants were convicted due to weakness of their defences, rather it should be used to mean that, after evaluation from both sides, the defence evidence could not supersede that of the prosecution side.

Having heard the rival submissions of the counsel for both parties and gone through the court record particularly on the pages referred to by the respondent's counsel, I am certain that the appellants' complaint is unfounded as it is obvious that the trial magistrate properly considered both parties' evidence; the defence evidence inclusive, and came to a conclusive finding that the defence evidence was weak compared to the one adduced by the prosecution side. In my view, the trial magistrate could have been in a wrong path had he confined himself to the prosecution evidence, but that is not what he did, and I commend him for being fair to

both parties by properly considering their evidence before determining the case before him. Thus, due to the reasons which I have given hereinabove, I find that the ground number is unmerited.

Coming to ground number seven which I find to be similar to ground number 8 of the appellants' petition of appeal, it is their complaint that the trial court erred in law and fact for convicting the appellants on the offences which were not proved to the standard required by the law.

As indicated above, the appellants were charged and arraigned before the trial court which after hearing and considered evidence from both sides, convicted and sentenced them for committing the offence of unlawful dealing with Government trophies and for being found in unlawful possession of the Government trophies.

Arguing in support of the above ground, the counsel for the appellants submitted that the 2nd, 3rd and 4th appellants were convicted based on the fact that they were found at the house in which the alleged government trophies were found, but they were not in possession of the same, rather they were merely found at the scene of crime. To him, that does not constitute an offence in law as mere presence of the accused at the scene

of crime is not sufficient to implicate him to the offence he stands charged. Conversely, the respondent's counsel stressed that the offences the appellants were charged with and convicted accordingly, were sufficiently proved basing on the oral evidence of the prosecution witnesses as well as the documentary exhibits.

Admittedly, it is not in dispute that the alleged Government trophies were not found in the room the second, third and fourth appellants slept on the material day, but were found in the room PW3 had slept. However, the appellants through their advocate have not denied the very crucial fact that the said trophies were actually found in the same premises the three of them slept.

Also, it is not in dispute that when the said Government trophies were uncovered by PW1 and PW6 through the aid of PW3 and in presence of PW2, PW4 and PW5 who were independent witnesses, the first appellant was not found in that house. However, I have noted that there is a piece of evidence adduced by PW3 which reveals that the second, third and fourth appellants approached him on the material day after being directed by the first appellant and that it was that appellant who instructed PW3 his then employee, to host the second, third and fourth appellants together with

their luggage in the house he had rented from PW4 and keep the luggage brought by the said appellants which contained 24 pieces of elephant tusks.

That evidence was corroborated not only by PW1, PW2, PW4 and PW6, but also it was corroborated by the second, third and fourth appellants through their caution statements which were admitted by the trial court as exhibits P9, P10 and P11.

For example, in his statement before PW9 the second appellant stated the following: -

> *"Tarehe 20.01.2020 asubuhi tulianza safari ya Kwenda Kijiji cha Safu na tulikuwa tumebeba yale meno ya tembo kwenye pikipiki walizokuwa wakiendesha Yona na Baraka.Na katika safari hiyo tulipitia njia ya nchi Jirani ya Zambia ili tusionekane kwa urahisi na wenyeji hadi tukaja kutokea Kijiji cha Jirani cha Zambia tukavuka kuingina Kijijini Safu.Basi tulifika hapo kwenye nyumba ya mwalimu ndipo Yona akampigia simu mwalimu ambaye tulikubaliana kununua meno hayo kwa shilingi elfu 80,000/= kwa kilo; Yona akampa simu ndugu yake mwalimu aliyejitambulisha kwa jina la Philemon ambaye*

aliongea na mwalimu kumuelekeza cha kufanya na baada ya hapo Philemoni alitupokea mizigo tuliyokuwanayo kwenye pikipiki ambayo ni meno ya tembo..."

Also, according to the exhibit P10 which is the caution statement of the third appellant which was recorded by PW10, he stated as follows: -

"Yona Msoma alikuwa na pikipiki yake aina ya Qing Qi tulisafiri wote tukiwa tumeongozana hadi Kijiji cha Ulumi, baada ya kufika Stand ya Ulumi Yona Msoma alimwita shimeji yake kwa jina la Clemence Samwel @ Salum na kuniambia hapa tumekuja kubeba meno ya tembo ambayo amekujanayo shimeji yangu Clemence Samwel ametokanayo Buhu huko Chunya na meno haya tunatakiwa kuyapeleka kwa mwalimu Ntiluka Amoni Kijiji cha Safu.Tukiwa wote watatu Kijiji cha Ulumi niliona mabegi mawili na na kifurushi cha mfuko wa sulphate.Yona alibeba mabegi mawili kwenye pikipiki yake na mimi nilimbeba Clemence Samwel pamoja na kifurushi kile cha sulphate, Yona Musoma aliongoza msafara tulipita Kijiji kuelekea Zambia na Kwenda hadi Kijiji cha Kalekwa nchini Zambia na Kwenda Kijiji cha Safu.

Baada ya kufika Safu mwalimu Ntiluka Amon alipiga simu kwa Yona Musoma na kuelekeza meno hayo ya tembo tushushe kwa Philemon Said @Ntubasiga na mzigo huo ulipelekwa na Philemon Said akauingiza ndani kwake na baada ya hapo mwalimu Ntiluka alipiga simu tusiondokė eneo hilo yeye yuko njiani.Philemoni aliingiza mzigo ndani sisi akatupa chumba cha uani tukalala, wakati huo pikipiki zetu mbili zilichukuliwa na Philemoni akaenda kuzitunza kwa Jirani.Saa sita usiku askari walifika hapo tulipolala wakiwa na viongozi wa Kijiji wakatukamata na kutufanyia upekuzi..."

Again, when making his statement before PW11, the fourth appellant was recorded to have stated the following: -

"*Tarehe 20.01.2020 majira ya asubuhi tuliondoka nyumbani kwangu Kijiji cha Mnamba tukielekea Kijiji cha Safu kupelekea ule mzigo wa meno ya tembo kwa mwalimu Amon Ntiluka kwa kutumia usafiri wa pikipiki mbili ambapo pikipiki moja ilikuwa ni ile ya mdogo wake Baraka Sindani na nyingine aina ya Qing QWQI niliazima kwa baba Mesi kwani niliamuahidi kuwa nitampatia pesa nikirudi kwani Clement Samwel aliahidi kuwa atatupatia pesa kiasi cha shilingi milioni moja 1,000,000/= baada ya biashara kufanyika, tulipitia njia ya nchi Jirani*

ya Zambia kwani ndio mkato, tulifika Kijiji cha Safu jioni ambapo tulipokelewa na mdogo wake mwalimu aitwaye Philemoni Said @ Ntibansiga na mizigo yote tuliyokuwanayo alipokea na kuiingiza ndani, pia pikipiki tulizokuwanazo ndugu Philemoni alikwenda kuhifadhi kwa Jirani yake."

It is quite clear that the above confessions by the second, third and fourth appellant not only reveals how they participated in the commission of the two offences they were jointly charged, but also, they have implicated the fourth appellant as the master minder of the commission of such economic offences.

There are several ways a trial court can use to know if the what is contained in the accused's confession is true or not. The Court of Appeal in **Michael Mgowole and Another vs Republic,** Criminal Appeal No. 205 of 2017(unreported) outlined them as follows: -

*"**First**... N/A,*

***Second,** if the confession contains a detailed, elaborate relevant and thorough account of the crime in question, that no other person would have known such details, but the maker,*

***Third**, since it is part of the prosecution case, it must be coherent and consistent with the testimony of other prosecution witnesses, especially with regard to the central story (and not every detail) and the chronology of events,*

*And, **lastly**, the facts narrated in the confession; must be plausible".*

Reverting back to the present appeal, it does not need one to use a microscope in order to see how the above quoted parts of the confessions by the second, third and fourth appellant contain a detailed, elaborate relevant and thorough account of the crimes in question, that no other person would have known such details, but the maker who are the said appellants.

Also, it is obvious that apart from being be plausible, as part of the prosecution case, the said confessions which were admitted by the trial court as exhibits P9, P10 and P11 respectively, are coherent and consistent with the testimony of other prosecution witnesses including PW1, PW2, PW3 and the rest of the prosecution witnesses, especially with regard to the central story about their involvement in commission of the two offences they stood charged, and the chronology of events. Hence, I am satisfied

that what is contained in such appellants' confessions is nothing, but the truth.

That apart, in the case of **Moses Charles Deo vs Republic** [1987] TLR 134 which was also cited in the cases of **Simon Ndikulyaka vs Republic**, Criminal Appeal No. 231 of 2014(unreported) and **Mwinyi Jamal Kitalamba @ Igonza and 4 Others vs The Republic**, Criminal Appeal No. 348 of 2018 (unreported), the Court of Appeal held that: -

> *"...for a person to be found to have possession, actual or constructive of goods, it must be proved* ***either that he was aware of their presence and that he exercised control over them****, or* ***that the goods came, albeit in his absence, at his invitation and arrangement****. But it is also true that mere possession denotes knowledge and control." [Emphasis added]*

Guided by the above principle, I am of the considered opinion that the above established principle suits the circumstances of the case at hand, and I am inclined to apply it accordingly. First of all, it is evident that the second, third and fourth appellants who were hosted by PW3 under the instructions of the first appellant, were aware of the presence of the

alleged Government trophies particularly the 24 pieces of government trophies, in the premises they had slept on the material day and they had control over them just as indicated in their caution statements above which were well corroborated by the evidence of PW3.

Secondly, it is evident that despite his absence at the scene of crime when his fellow appellants were found in constructive possession of the Government trophies to wit 24 pieces of elephant tusks, the first appellant too was in constructive possession of the said Government trophies, save for the minerals of which the prosecution evidence failed to prove his possession, as rightly found by the trial magistrate. This is because according to the evidence of PW3 which was also corroborated by that of PW1, PW2, PW4, PW6 and the caution statements of the second, third and fourth accused persons, he is the one who invited his fellow appellants and arranged for their reception through his employee who is PW3.

All that justifies that even though the first appellant was absent at the scene of crime, yet he had knowledge about the presence of the said 24 pieces of elephant tusks and had arranged for their storage. Hence, I find the argument by the appellants counsel that mere presence of the second,

third and fourth appellants at the scene of crime falls short of constituting the alleged offences, unfounded.

Before I pen off, I wish to point out that apart from the above evidence which I have found to be sufficient in proving the charged offences against the appellants herein, I have also taken into consideration other pieces of evidence which were also considered by the trial court in its judgment. The same include the two mobile phones used for communication between the appellants, two motor cycles used by the appellants to transport the alleged Government trophies and the twenty-four pieces of elephant tusks.

Others were the Trophy Valuation Certificate (the TVC), the Chain of custody and the Seizure certificate. These were admitted by the trial court as Exhibits. Taking for example the TVC (Exhibit P8), it clearly describes the trophies as being 24 (twenty-four) pieces of elephant tusks, equal to four elephants and their value is 60,000/= USD equivalent to 139,140,000/= which value tallies with the one indicated in the charge sheet.

As for the Chain of custody (Exhibit P2), I have noted that it clearly shows the paper trail of the seized exhibits from one person to another until their

production before the trial court, which tells that there was no possibility of tempering with such exhibits.

Thus, due to the reasons which I have given herein above, I do not see any reason to fault the findings of the trial magistrate who rightly held that the case against the appellants in respect of the first count, and second count in respect of the 2nd ,3rd and 4th appellants, was proved beyond any reasonable doubts.

However, in the course of composing this judgment I observed that apart from finding the first appellant not guilty and acquitted him in respect of the third count the particulars of which allegedly implicated that appellant to have been in unauthorized possession of minerals to wit; 79 kg Green Kyanite valued at 393.95 USD equivalent to Tanzania Shillings 902,069.24/=, the trial magistrate ordered the said minerals to be confiscated to the Government of Tanzania. Moreso, as I was going through the typed trial court judgment, particularly at page 48, it came to my mind that the first appellant was acquitted in respect of the third count. In that part the trial magistrate wrote that:

"On part of second and ***third counts,*** *this court found that the prosecution side failed to prove the case beyond reasonable doubt thus,* ***I hereby acquit the fourth accused person under section 135(1) of the Criminal Procedure Act*** *[Cap 20 R.E. 2019]"*

The above bolded part clearly indicates that the trial court did not convict the first appellant who was by then the fourth accused person. This necessitated this court to call upon the counsel for the parties to address it particularly on whether the trial court's order of confiscating such minerals was lawful.

In addressing the court Mr. Budodi had it that the trial court committed a gross error when it ordered the confiscation of minerals weighing 79 kilograms without there being a conviction against the first appellant. He was of the view that what was done by the trial magistrate was a contravention of section 351(1) of the CPA.As for the way forward, the learned counsel submitted that trial court ought to invoke the provisions of section 353(1) of the CPA and make an order of returning the minerals to the first appellant upon disposal of the proceedings.

However, he quickly changed his position and submitted that the right position is for the court to make an order allowing a person who appears to be entitled to possess the said minerals to claim it in court, and if there could be no such claim within twelve (12) months, then the trial court could make an order that the same be sold, destroyed or otherwise disposed of so that the proceeds of sale thereof could be paid to the General Revenue.

On the adversary side, Mr. David Mwakibolwa, learned State Attorned who partly assisted Mr. Perez, was of the view that the trial court of right to make an order of confiscating the said minerals which according to the typed court proceedings were admitted as Exhibit P7 due to the fact that the first appellant and his co appellants did not claim ownership over them, nor did the first appellant tendered a certificate as proof of ownership of the same during trial.

It was Mr. Mwakibolwa's further submission that the first appellant did not raise any objection when such minerals were tendered before the trial court as exhibit and he even did not claim ownership of such minerals when adducing his evidence during defence hearing.

Having so argued, the learned counsel submitted that section 351(1) of the CPA, read together with section 9 of the Proceeds of Crimes Act, Cap 256 R.E. 2022 do not provide for an automatic right; the claimant of the property must file an application before the court within twelve (12) months. He also referred section 351(2) of CPA and submitted that the trial court ought to have made an order that the said minerals be confiscated immediately after expiration of six months from the date of delivering its judgment.

Having heard the learned minds' submission on the issue raised by this court *suo motu*, I am now in a good position to determine it accordingly. It appears to me that the counsel for the parties have parted ways on the propriety of the confiscation of minerals by the trial court. However, while I appreciate their well submission, I would, with all due respect, differ with the position the counsel for the respondent has invited me to take, and instead I will opt for the one taken by the appellants' counsel. I will give my reasons shortly.

Section 351(1) of the CPA which has been cited by counsel for the parties in their respectful submissions, provide that:

"... (1) ***Where a person is convicted of an offence and the court which passes sentence is satisfied that any property which was in his possession or under his control*** *at the time of his apprehension-*

(a) ***has been used for the purpose of committing or facilitating the commission of any offence;*** *or*

(b) ***was intended by him to be used for that purpose, that property shall be liable to forfeiture and confiscation and any property so forfeited*** *under this section shall be disposed of as the court may direct"*

From the above provisions and bolded parts, it does not need much thought to know that section 351 is applicable when an accused person has been convicted of an offence and the trial court is satisfied that there is a property under his possession or control which was used and/or intended to be used by him for the purpose of committing or facilitating the commission of any offence. In other words, forfeiture order which is normally applied interchangeably as confiscation order, is made if the person charged is convicted of the offence charged and the property found

in his possession has been used or is intended to be used for the purpose of committing or facilitating the commission of the offence. (See **Director of Public Prosecutions vs Kilo Kidang'ai and 2 Others**, Criminal Appeal No. 340 of 2017, CAT (unreported).

In the present appeal the trial court's record clearly reveals that the order of confiscating the minerals weighing 79 kilograms was made without the trial court having convicted the first appellant on the charged offence of unauthorized possession of such minerals. In the circumstance, the trial magistrate had no power to made such order due to want of conviction which is supposed to be linked with the order of confiscation, as per the provisions of section 351, CPA.

The above takes me to the provisions of law cited by Mr. Budodi.According him, the proper provisions of the law to be applied by the trial court ought to be section 353(1) of CPA.In supporting his position, the learned counsel submitted that such provision is applicable in the case at hand because the trial court did not convict the first appellant and basing on that, a proper way was for the trial court to make an order that the allegedly minerals be sold or otherwise disposed of and let the proceeds of its sale be paid to the

general revenue of the Republic. For an ease of reference, I find it apt to reproduce the above provision as hereunder: -

> *"...353-(1) Where anything which has been tendered or put in evidence in any proceedings before any court has not been claimed by any person who appears to the court to be entitled thereto within a period of twelve months after the final disposal of the proceedings or if any appeal is entered in respect thereof, the thing may be sold, destroyed or otherwise disposed of in such manner as the court may by order direct and the proceeds of its sale shall be paid into the general revenue of the Republic."*

From the foregoing provision it is obvious that the same applies where anything has been tendered or put in evidence in any criminal proceedings before the court, but has not been claimed by any person who appears to the court to be entitled thereto within a period of twelve months.

I am of the settled view that the above provision is applicable given the circumstances of the case at hand, as rightly submitted by Mr. Budodi.I say so because first, it is evident that the said minerals were tendered by PW7

before the trial court and admitted as exhibit P7 and secondly, the first appellant did not claim ownership over such minerals.

Therefore, due to those reasons, the above raised issue is answered negatively that the order of confiscating the minerals weighing 79 kilograms made by the trial court was not lawful. Having said the above, I do not see if there is any pressing reason to continue dealing with the last ground of appeal since all that I have discussed above suffice to dispose of the present appeal.

In fine, I hold that owing to the foregoing reasons the present consolidated appeal has no merit. Consequently, I dismiss it on its entirety and I uphold the trial court's decision, sustain both the convictions, sentences and orders imposed upon the first, second, third and fourth appellants herein, save for the trial court's order confiscating the minerals weighing 79 kilograms, which according to the foregoing reasons, I hereby revise accordingly.

In lieu thereof, I order that the said minerals be under Police custody pending the filing of an application before the trial court by any interested person, and in the event no such application is lodged within the period of

twelve months from the date of this judgment, then such minerals should be disposed of by way of public auction through the nearby Government Mineral Market and the proceeds of its sale be paid into the general revenue of the Republic.

It is so ordered.

A.A. MRISHA
JUDGE
11.08.2023

DATED at **SUMBAWANGA** this 11th Day of August, 2023.

A.A. MRISHA
JUDGE
11.08.2023