IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
DODOMA DISTRICT REGISTRY
AT DODOMA
DC. CRIMINAL APPEAL NO. 13 OF 2023

(Arising from the Judgment of Singida Resident Magistrate's Court in Economic Case No. 7 of 2022)

JONAS NG'OLIDA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Last Order: 02nd August, 2023
Date of Judgment: 18th August 2023

MASABO, J:-

The appellant herein was arraigned before the Resident Magistrate's Court of Singida for two counts of economic offences. The first count was on unlawful possession of government trophies contrary to the provisions of sections 86(1) (2)(c)(iii), (3)(b) and 111(i) (a) of the Wildlife Conservation Act No. 5 of 2009 read together with paragraph 14(d) of the First Schedule to and sections 57 (1) and 60(2) both of the Economic and Organized Crime Control Act, Cap.200 R.E. 2002 and the second was on unlawful dealing in government trophies contrary to the provisions of sections 80(1), 84(1) and 111(1)(a) all of the Wildlife Conservation Act read together with Paragraph 14(b) of the First Schedule to and Sections 57(1) and 60(2) both of the Economic and Organized Crime Control Act.

The appeal has its origin in Economic Case No 8 of 2016 before Manyoni District Court where the appellant was charged with two counts, to wit, unlawful possession of government trophies contrary to the provisions of

sections 86(1) (2)(c)(iii), (3)(b) and 111(i) (a) of the Wildlife Conservation Act No. 5 of 2009 read together with paragraph 14(d) of the First Schedule to and sections 57 (1) and 60(2) both of the Economic and Organized Crime Control Act, Cap.200 R.E. 2002 and unlawful dealing in government trophies contrary to the provisions of sections 80(1), 84(1) and 111(1) (a) all of the Wildlife Conservation Act read together with Paragraph 14(b) of the First Schedule to and Sections 57(1) and 60(2) both of the Economic and Organized Crime Control Act. When called upon to plea, the appellant entered a plea of guilty to both counts. He was forthwith convicted on his own plea of guilty and was sentenced to serve a term of twenty years in prison in respect to the first count. On the second count, he was sentenced to serve fifteen years imprisonment. The two sentences were to run concurrently.

In spite of pleading guilty, the conviction and sentence aggrieved him. He appealed to this court vide Criminal Appeal No. 76 of 2016 in which he complained that his plea was equivocal. His appeal was dismissed after it was held that he was rightly convicted on his own unequivocal plea. Aggrieved further, he appealed to the apex court, the Court of Appeal of Tanzania, which held that the appellant's plea of guilty was equivocal and consequently quashed and set aside the proceedings, conviction and sentence while it subsequently ordered a retrial of the case. After the retrial, the appellant was convicted and sentenced to serve a concurrent sentence for 20 years imprisonment in respect of the first count and 20 years for the second count a, conviction and sentence which have aggrieved him further hence the present appeal.

As per the record, it was alleged by the respondent that, on 12th of February, 2016 at Ikolo Village, within Mkalama District in Singida Region, the appellant was found in unlawful possession and dealing on three elephant tusks weighing 9.8 kilograms valued at USD 30,000 which is equivalent to Tshs. 60,000,000/=, property of the United Republic of Tanzania without permit or licence. After the charge was read over to the appellant and after being invited to plea, he denied his involvement in all the counts. The case proceeded to full trial where the prosecution had three (3) witnesses whereas the appellant defended himself on oath as DW1.

According to Athuman Bahati (PW3) who was then working for KDU Manyoni, on 11th of February, 2016 he was tipped by an informer on persons dealing in elephant tusks. PW3 informed his superior and a task force comprising of comprising of PW3, Japhet Maro and Paulo Mwizarubi was formed in pursuit of the matter. With the aid of the informer, they set a trap pretending to be buyers of the government tusks. They met the appellant and after being introduced by the informer as buyers of the tusks, the appellant agreed to sell them the tusks at a price of Tshs. 100,000/= per each kilogram. Having agreed on the price, the appellant led them to Ikolo village where they found his fellow, one Gilamalamega Nefunya.

The appellant and his accomplice had sulphate bag which had three tusks which they were selling to PW3 and his colleagues. The appellant and his accomplice were arrested, the tusks and a motorcycle with registration number MC.248 AHE were impounded and a certificate of seizure was issued. Thereafter, the appellant and his accomplice were sent to Nduguti Police

station. While in police custody Gilamalamega Nefunya escaped, hence only appellant was arraigned in court. Apart from denying the charges, during the trial, the appellant alleged that the appellant alleged that the case was a mere fabrication against him. In the end, the court did not believe his story as it found the prosecution to have proved its case to the required standard. Hence, the conviction and sentence giving rise to the present appeal.

Disgruntled by the conviction and sentence, the appellant filed this petition of appeal having fifteen grounds which all of them are to the effect that the prosecution didn't prove the case beyond reasonable doubts. I shall summarise them as follows. **One**, the appellant did not plea guilty to the charge. **Two,** PW3's evidence was not corroborated by his informer or his colleagues who are Athuman Bahati and Japhet Maro. **Three,** the allegation that the accused person was taken to Nduguti police station was uncorroborated by a police officer from Nduguti. **Four,** there was no corroboration from Ikolo village authorities that the appellant was arrested in that village. The tusks were planted by policemen who brought the exhibit in their car at Mkalama police station. **Five,** PW1 did not state the date on which he received the tusks. He just stated that it was 22:00 hours. **Six**, the testimony of PW2, the valuer, was not credible as he was just a value hence unable to prove that the tusks were elephant tusks. Such proof could only have been given by a Government Chemist. **Seven,** there was no proof that he was found carrying the tusks on a motorcycle. **Eight,** the motor cycle was not tendered as exhibit in court. **Nine,** the appellant was convicted on weak evidence as the tusks were not found at his residence. **Ten,** the appellant was not afforded an opportunity for mitigation. And, **eleven,** the

conviction was based on weak evidence hence, should be quashed and set aside.

On the 2nd of August 2023 the appeal came for hearing. The appellant appeared in person and Mr. Kesanta, learned State Attorney appeared for the Respondent Republic. Invited to address the court in support of the appeal, the appellant informed the court that he trusts his ground of appeal as they sufficiently explain the appeal.

Resisting the appeal, the learned State Attorney consolidated ground number two to ten and ground number twelve and thirteen as they all suggest that the case was not proved. It was his submission that the case was proved in all the two counts, that is being found and dealing with government trophies. He argued that the appellant complaints that certain witnesses were not summoned is with no merit. According to section 143 of the Evidence Act, Cap. 6 R.E 2022, proof of the case does not require a specific number of witnesses. The fact that there ought to have been other witnesses apart from PW3 is immaterial as PW3 testified how he found the appellant in possession and dealing with the trophies. Therefore, there was no need for additional witnesses. He argued further that, there was no need to summon a police officer from Nduguti Police station and the local government leaders from Ikolo village as there was no evidence that the same were involved anyhow.

He proceeded that, the appellant's complaint that it was not certain whether the tusks were of an elephant is devoid of merit as the word tusks is

sufficiently describes the kind of trophies involved. On the valuation of the tusks, he argued that the complaint is irrelevant as PW2 demonstrated how he assessed the value. The tusks and certificate of value were admitted with no objection which shows that the appellant was found with them and his complaint in this appeal is merely an afterthought. On the 8th and 12th ground of appeal, he argued that, the argument that the appellant was not found with the tusks is with no merit as PW3 stated very well how the appellant was arrested and how his accomplice escaped. He contended further that it was the appellant who led PW3 to the place where the tusks were hidden with the view of selling them and had it not been the appellant, the tusks would not have been recovered. Thus, he cannot pretend to be innocent. On the ninth ground of appeal, he submitted and argued that there was no need for scientific proof of the same as the tusks are known.

On the tenth ground as regards the motorcycle with registration number MC 248 AHE make GSM which was not tendered in court, Mr. Kesanta submitted that, PW1 stated in his testimony that the motorcycle was sold after the case was decided on 2016 following the appellant's plea of guilty. He added that non-tendering of the same did not occasion injustice to the appellant. Submitting on the 11th ground of appeal, he argued that it has no merits as the appellant was given an opportunity to mitigate as shown at page 21 of the proceedings. Lastly, he submitted that the conviction and sentence were in good order as the case against the appellant was proved to the required standards. He therefore prayed that the conviction and sentence be upheld. By way of rejoinder, the appellant stated that PW3's evidence was not corroborated. He elaborated that at the scene there were four game rangers

who are listed in the second ground of appeal but they did not testify in court. On the third ground of appeal, he re-joined by stating that, when he was taken to police station, he found Gilamalamega who had been arrested with the tusks and when they were interrogated the same Gilamalamega, not him, did show the tusks.

After considering the submissions above and the lower record which I have thoroughly scrutinized I will now proceed to determine the grounds of appeal and ultimately answer the main issue whether the prosecution proved its case to the required standards. In prelude, it is a trite law that, in criminal cases, the prosecution is duty bound to prove the charges against the accused person to the required standard which is, proof beyond reasonable doubt. The burden never shifts to the accused. All what the accused needs to do is raise some reasonable doubt on the prosecution case and he need not prove his innocence (see **Mohamed Haruna @ Mtupeni & Another v. Republic**, Criminal Appeal No. 25 of 2007, CAT (unreported) and **Mwita and Others v. Republic** [1977] TLR 54). Therefore, in this case, the prosecution was duty bound to prove without doubt that the appellant was found in possession and dealing in government trophies to wit, elephant tusks.

As stated earlier on, in discharging its burden, the prosecution called three witnesses. PW3 narrated the appellant's arrest and the seizure of the government trophies. He testified to have set a trap in collaboration with fellow workers at KDU Manyoni and in the course of the trap, they arrested the appellant and his accomplice in unlawful possession and dealing in three

elephant tusks on 12th February 2016 and seized the trophy and together with a motor cycle with registration number MC. 248 AHE make GSM. On 13th February 2016 the tusks together with motor cycle were handed over to PW1, an exhibit keeper, at KDU Manyoni. On 14th February 2016 PW1 handed over the tusks to PW2 for valuation purposes whereby the same were valued at Tshs. 60,000,000/=. After valuation the tusks were returned back to PW1 who stored them up to 12th May 2016 when the tusks were taken to Manyoni District Court. He testified further that, upon reaching at the court, he did not tender the tusks as exhibit as he found that the appellant has already entered a plea of guilty to the offences. It was PW1 evidence that, he marked the tusks as 315/2017/, 316/2017 and 317/2017 and on 25th August 2017 he surrendered the tusks to Ivory room in Dar es salaam where he handed them to one Wilfred Olomi who is the officer in charge of the Ivory room. Later on, on 13th July 2020, he was informed that the case has started afresh and because of that, he went to Dar es salaam to collect the tusks and he was handled the same by Wilfredy Olomi. He brought them back and tendered them in court on 22nd November 2022 whereby they were admitted as exhibits P1 with no objection from the appellant.

Back to the grounds of appeal, the first ground of appeal appears to have been misconceived as the appellant was not convicted on own plea of guilty. The suit proceeded to a full trial after which he was convicted and sentenced. In the second, third and fourth grounds of appeal, the appellant has complained that the witnesses who testified did not sufficiently implicate him. In particular, he has argued that, PW1's testimony that he arrested the

appellant being in possession and dealing in the elephant tusks ought to have ben corroborated by the his colleagues, Athumani Bahati and Japhet Maro, who joined him in the arresting mission. He has argued further that similarly wanting was PW3's testimony that after arresting the appellant and his accomplice they took them to Nduguti police station as this testimony was without any corroboration by a police officer from Nduguti and so was the testimony that they were arrested at Ikolo village as no leader from that village testified in court.

Mr. Kesanta has argued and I entirely agree with him that the law is well settled that, no particular number of witnesses is required to prove a fact in any particular case as all what matters is the quality as opposed to the quantity of evidence. A conviction can be entered based on the testimony of a single witness if that witness and her testimony are found credible. This is in line with section 143 of the Evidence Act, Cap. 6 RE 2022 which provides that:

> Subject to the provisions of any other written law, no particular number of witnesses shall in any case be required for the proof of any fact.

Applying this provision in of **Yohanis Msigwa vs. Republic** [1990] TLR 148, the court held that;

> As provided under section 143 of the evidence Act 1967, no particular number of witnesses is required for the proof of any fact. What is important is the witness's opportunity to see what he/she claimed to have seen and his/her credibility.

Cementing this position in **Richard Jared vs. Republic**, Criminal Appeal No. 23 of 2018 (unreported), the Court of Appeal held that;

> It is certain that under section 143 of the Evidence Act, no specific number of witnesses required to prove any particular case. As often stressed, what is important is for the prosecution to call witnesses who may prove their case beyond all reasonable doubts.

Sequel to this, is the legal duty for a party to summon all material witnesses to the case the failure of which might attract an inference adverse to the respective party. Dealing with these twin principles, the Court of Appeal in Pascal **Mwinuka vs Republic** (Criminal Appeal 258 of 2019) [2021] TZCA 174 stated as follows:

> At this juncture, while we agree with Ms. Mpagama that in terms of section 143 of the Evidence Act, Cap 6 R. E. 2019, a party is not compelled to parade a certain number of witnesses to support his case as also rightly observed by the Court in **Separatus Theonest @ Alex v. The Republic**, Criminal Appeal No. 135 of 2003 (unreported), we **however hold the firm view that this is not always the position in every case. Equally important, it is settled that depending on the circumstances of the case, failure to summon an important witness at the trial entitles the court to draw adverse inference to the respective party's case.** It is in this regard that in Aziz Abdallah v. The Republic (1991) TLR 91 it was stated that:-
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> > **"Where a witness who is in a better position to explain some missing links in a party's case is not called without any sufficient reason being shown by the party, an adverse inference may be drawn against that party,**

even if such inference is only a, permissible one". [the emphasis is mine].

The appellant has implicitly invited this court to draw an adverse inference against the prosecution for failure to summon all the persons who participated in the arrest, Ikolo village leaders and a police officer from Nduguti police station who would have corroborated the story as to his arrest at Ikolo village and his detainment at Nduguti police station. However, having scrutinized the record, I decline this invitation as there is no missing link in the prosecution's case which would have necessitated the summoning of the person listed by the appellant. As argued by Mr. Kesanta, the narration by PW3 on how he arrested the appellant and seized the tusks was clear and the trial court which was best placed to asses the credibility of a witness found him and his evidence credible. It is settled law that, every witness is entitled to credence and his evidence must be believed unless that reasons for not believing him (see **Goodluck Kyando vs. Republic** [2006] TLR 363). As the appellant has not told us why PW3's should not be believed, I find no reason for disbelieving him. Accordingly, the 2nd, 3rd and 4th grounds of appeal fail.

On the fifth ground of appeal, the appellant has challenged the credibility of PW1's evidence. He has argued that it should not be believed as he did not disclose the date on which the tusks were handled over to him. He just stated that it was 22:00 hours. This argument is serious wanting and devoid of any merit. As it appears in page 4 and 5 of the proceedings, PW1 told the court that he received phone a call from his superior, Kened Sanga, on 13/2/2016 at night instructing him to go to receive exhibits whereby he went to the

office and arrived there at 22:00 hours. This account was also corroborated by PW3 who stated that after arresting the appellant and spending the night at Nduguti, on 13/2/2016, they went back to Manyoni and arrived at KDU office as 22:00 hours. Further corroboration is found in Exhibit P3 which was admitted uncontested as it shows that the tusks were received at KDU on 13/2/2016. Thus, it is not correct that the date was not disclosed. This ground of appeal is without merit.

The sixth ground of appeal is challenging the testimony of PW2, the valuer. The appellant has argued that this witness was not a credible person to tell whether the tusks were of an elephant or something else as he has no such expertise. I have respectfully considered this argument. However, much as it may appear attractive and logic to have a scientific report, there is no legal requirement that such an ascertainment should only be scientific or that it come from a government chemist. Other evidence, such as in this case, the ascertainment done by PW2, who is an expert in wildlife science with a bachelor on wildlife science obtained from the University of Dar es Salaam and vast experience in wildlife, is also acceptable. At page 9, PW2 narrated the following three signs by which he identified the tusks as elephant tusks, namely: one, the Schreger's line which are only found in the tusks, pulp cavity and weight. He explained that, elephant tusks are heavier compared to other tusks. As this evidence was not anyhow contradicted, it has remained intact and this court has no justification to disbelieve it or to fault the trial court for believing it.

In arriving at this conclusion, I stand guided by the decision of the Court of Appeal in **Anania Clavery Betela vs Republic** (Criminal Appeal 355 of 2017) [2020] TZCA 245 (22 May 2020) when dealing with an analogous issue. The Court instructively held that:

> Coming to the complaint in the fourth ground of appeal, we respectfully agree with the learned State Attorney that PW2, as a Wildlife Officer, was duly authorized to examine and assess the value of the seized tusks. We hasten to observe that the competence of this witness to examine the tusks was not contested at the trial nor was he cross examined on it by the appellant. That apart, we note that the designation "Wildlife Officer" is defined under section 3 of the WCA to mean:
>
> > "a wildlife officer, wildlife warden and wildlife ranger engaged for the purposes of enforcing this Act"
>
> For the purpose of enforcement and court proceedings, section 86 (4) of the WCA empowers wildlife officers, among others, to examine any trophy and issue a certificate of value thereof:
>
> > "(4) In any proceedings for an offence under this section, a certificate signed by the Director or wildlife officers from the rank of wildlife officer, stating the value of any trophy involved in the proceedings shall be admissible in evidence and shall be prima facie evidence of the matters stated therein including the fact that the signature thereon is that of the person holding the office specified therein." [Emphasis added]
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> We think the above provision tells it all. **It expressly empowers any wildlife officer, aside from the Director of Wildlife, to examine a trophy and issue a certificate stating the value thereof and other relevant facts.**

Such certificate would, then, constitute, on its face, proof of the facts stated therein.

Therefore, in the present case the testimony of PW2 considered conjointly with trophy valuation certificate which was admitted as exhibit P7 sufficed as proof that the tusks were of elephants and had the value indicated in the certificate.

In the seventh and eighth grounds of appeal, the appellant has argued that there was no proof that he was found carrying the tusks on a motorcycle and on top of that, the motor cycle was not tendered as exhibit in court. Section 86(1) of the Wildlife Management Act, provides that:

> 86.-(1) Subject to the provisions of this Act, **a person shall not be in possession of**, or buy, sell or otherwise deal in any Government trophy.

The word possession is however not defined under this Act. To unravel the question before me, I will seek assistance from section 5 of the Penal Code, Cap 16 RE 2022. Under this provision the word possession is defined broadly as:

> "possession" "be in possession of" or "have in possession" includes-
> (a) **not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person,** or having anything in any place (whether belonging to, or occupied by oneself or not) for the use or benefit of oneself or of any other person;
> (b) **if there are two or more persons and any one or more of them with the knowledge and consent of the rest has**

or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them [Emphasis added].

From this provision, it is crystal clear that being in possession of something does not necessarily mean having the actual possession of the thing in question. Where, as in the present case, there are more than one person and only one of them is in actual possession of the thing, such other persons who are not in actual possession may be deemed to be in possession if they had knowledge and consented that it be under the custody or possession of that other person. Therefore, a person may be convicted of possession even where he has no physical/actual possession of the thing.

The immediate question to be determined here is whether the evidence on record established that the appellant had control of the elephant tusks or had knowledge and consented that they be under the custody of Gilamalamega who remains at large. Looking at the record, and particularly the testimony of PW3, I find it to have been credibly established that the appellant herein had the necessary knowledge and consented to have the trophies in the custody of Gilamalamega who was his accomplice. As per the PW3 testimony, the appellant was the one who not only negotiated the price but he took them to Ikolo where they found Gilamalamega in custody of the trophies which were on a sulphate bag. After they arrived at the scene, and upon PW3 and his colleagues being introduced to Gilamalamega as buyers, he drew the three tusks from the sulphate bag ready for sale to PW3 and his colleagues. Thus, as correctly argued by Mr. Kesanta, had it not been the appellant, the trophies would not have been impounded which shows that,

the appellant had all the knowledge and consented to have the trophies in the custody of Gilamalamega. Thus, he can not hide under the narrow interpretation of the term possession which is not supported by law.

As for the motorcycle, there is no dispute that when he met PW3 and his colleagues, the appellant was riding a motorcycle with Registration No. MC 248 AHE, and with that he led them to the scene. Thus, there was a direct linkage between it and the sale of the trophies at it was used to ferry the appellant to the buyers and used the same motorcycle to lead the buyers to the scene. The evidence on record show that, the motor cycle was seized from him and that after his conviction in on own plea of guilty, it was sold. Exhibit P8, the certificate of seizure shows it was seized and exhibit P2, an exchequer receipt with 19878484, which was admitted uncontested, shows it was sold to one Saban Mayeye. Thus, the failure to produce the motorcycle in court was with explanation. This ground of appeal fails.

The appellant's further complaint is that he was not afforded an opportunity for mitigation. Much as mitigation is a right available to every offender, in the present case, the appellant's complaint is without merit as the record demonstrate that he was accorded the opportunity to mitigate and while excising such right he told the court as follows:

> "I pray the court to consider the time I spent in jail. Second, I have a family depending on me."

In the foregoing, his complaint attracts no weight.

Lastly, based on what I have demonstrated above, I am convinced that this appeal is without merit as the prosecution credibly proved their case to the

required that the accused was found in possessing and was selling the elephant tusks an act which amounted to dealing in Government trophies, an offence facing him under the first and second count, respectively.

Accordingly, this appeal is found with no merit and is dismissed and the conviction and sentence passed by the trial court are upheld.

DATED at **DODOMA** this 18th day of August, 2023

J. L. Masabo

JUDGE