

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARUSHA**

CRIMINAL APPEAL NO. 139 OF 2022

(Originating from District court Economic Case No. 8 of 2021)

BETWEEN

KASTULI BOAY@ DEEWASI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

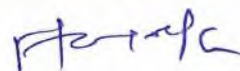
13/07/2023 & 24/07/2023

JUDGMENT

MWASEBA, J.

The appellant, Kastuli S/o Boay @Deewasi was arraigned before the District Court of Karatu at Karatu and charged with unlawful possession of Government Trophy, **C/s 86 (1) and (2) (b) of the Wildlife Conservation Act**, No. 5 of 2009 read together with paragraph 14 of the 1st schedule and **Sections 57 (1) and 60 (2) of the Economic and Organized Crime Control Act**, [Cap 200 R.E 2002] as amended by **Sections 16 (a) and 13 (b)** respectively of the written laws (Miscellaneous Amendments) Act No. 3 of 2016.

It was alleged that on or about 30th day of September, 2019 at Siay Juu, Kambi ya Simba area within Karatu District in Arusha Region, the appellant was found in possession of one Elephant Tusk which is

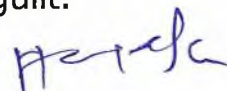


equivalent to one killed elephant valued at USD 15,000 which is equivalent to Tshs. 34,464,450/=, the property of the Government of the United Republic of Tanzania without permit from the Director of Wildlife. After full trial, the appellant was found guilty, convicted and sentenced to 20 years imprisonment.

Aggrieved, he has come before this court to challenge the whole decision having 13 grounds of appeal as depicted in the petition of appeal.

During the hearing of the appeal the appellant was represented by Mr. Samwel Welwel learned counsel while the respondent was represented by Ms. Amina Kiango learned State Attorney. The appeal was disposed of orally. However, I am not going to reproduce the whole submissions as I will be referring to it during my determination of the appeal.

I have gone through the record, submissions from both sides and the judgment. The conviction of the appellant is based merely on circumstantial evidence as none of the prosecution witnesses testified to have seen the appellant hiding the elephant tusks in the heap of cow manure at his compound. Thus, the Pertinent issue that calls for my determination is whether the circumstantial evidence adduced at the trial court pointed out irresistibly to the accused's guilt.



In his 1st and 2nd grounds of appeal, the appellant has strongly challenged his conviction based on the circumstantial evidence which did not meet the required principles/ conditions provided under the law. And that the case was not proved beyond a reasonable doubt. Submitting in support of these grounds, Mr. Welwel argued that all the prosecution witnesses testified that the elephant trophy was found in a heap of cow manure. That no body testified to have seen the appellant putting the said tusk in the said manure. He asserted that, they connected the appellant with the said elephant tusk because the manure was in the appellant's land in which the ownership was questionable.

Mr. Welwel clarified that the principles for relying on circumstantial evidence was well settled by the Court of Appeal in the case of the **Republic v. Kerstin Cameroon**, (2003) TLR No. 84. He averred further that, those principles were not met in the case at hand because any other person could have kept the government trophy in the said manure as the crime scene is not fenced. More to that, close to the said manure there is a path that any other person passing there may put the government trophy without the knowledge of the appellant. He winded up thatc, due to the said circumstantial evidence the case was not proved beyond reasonable doubt.



Responding to these grounds, Ms. Kiango abruptly stated that they support conviction and sentence imposed to the appellant. She further argued that, the prosecution evidence was direct and not relied on circumstantial evidence. She clarified that the evidence is clear that on 27/6/2019, PW2 was informed by their informer that there was a trophy in the appellant's premises. Then he started to investigate and talked to another informer. After being certain with the information, he notified his in charge at Mbulu about their intention to go and arrest the appellant. During arrest, she says, the game rangers put him under arrest in the presence of independent witness (PW6). The search was conducted in his house after the officers being inspected and found nothing in the house. They went out to proceed with inspection and found a heap of cow manure. The appellant denied to dig it when he was asked to do so then the police did it and found the elephant tusk hidden therein.

This rival submission prompted me to make clear the meaning of the term circumstantial evidence. The term has been defined by **Black's Law Dictionary, 8th edition** as the evidence based on inference and not on personal knowledge or observation. It is also termed as indirect evidence. The evidence in the case at hand is all about the appellant



being found in possession of the of a government trophy which is suspected to be hidden in a heap of cow manure at the appellant's compound. It was well stated by the trial magistrate in his judgment that the offence alleged to have been committed is based on merely circumstantial evidence as none of the prosecution witnesses testified to have found the appellant in possession of the said elephant tusks. I duly support his stance because the evidence is clear that no body among the prosecution witnesses saw the appellant hiding the said trophy in the said manure. More so, the appellant denied the allegations from the day he was arrested. It is settled that in case the prosecution relies their evidence on circumstantial, they are normally under obligation to eliminate any possibility of doubt for the court to rely on indirect evidence.

In the case of **Jimmy Runangaza v. Republic**, Criminal Appeal No. 159 'B' of 2017, Court of Appeal of Tanzania at Bukoba (unreported), at pages 9-10 the apex Court stated that;

*"In order for the circumstantial evidence to sustain a conviction, it must point irresistibly to the accused's guilt. (See **Simon Musoke Vs Republic**, (1958) EA 715). Sarkar on Evidence 15th Ed 2003 Report Vol. 1 page 63 also emphasized that on cases which rely on circumstantial*



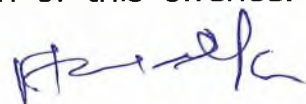
evidence, such evidence must satisfy the following three tests which are:

(1) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established.

(2) Those circumstances should be of definite tendency unerringly pointing towards the guilt of the accused; and

(3) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else”

Basing on the above laid down principles, I wish to re-evaluate the chain of circumstantial evidence on record and determine, if I can irresistibly conclude that it was the appellant, and nobody else, who put the said elephant tusk in the cow manure. It is the prosecution evidence that they went early in the morning to arrest the appellant who was sleeping in his house. They surrounded his house and after having independent witnesses they inspected the appellant's house and found nothing. They inspected at the appellant's compound and found the said elephant tusk being hidden in the cow manure. I agree with the learned counsel for the appellant that the said circumstantial evidence leaves a lot of doubt to implicate the appellant with the commission of this offence. This is



due to the fact that there is no dispute that the crime scene is not fenced. Further to that there is a path close to the crime scene of which any one can put the said trophy in the said manure.

The Court of Appeal has on several occasions restated that in a criminal case based purely on circumstantial evidence, that evidence must irresistibly point to the accused's guilt and exclude any other person:

Shaban Mpunzu @ Elisha Mpunzu v. R., Criminal Appeal No. 12 of 2002 (unreported). In the case at hand, the evidence does not tight the appellant conclusively. Any other person had a room to put the said trophy without the knowledge of the appellant. More so, none of the prosecution witnesses saw the appellant hiding the trophy in the said manure. Therefore, the factors stated above are not established, the conviction cannot be safely applied on circumstantial evidence. This is to say the 1st and the 2nd grounds of appeal have merit and they are enough to dispose of the whole appeal. Consequently, there is no need to determine the remaining grounds of appeal.

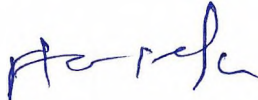
The above being said, I find this appeal with merit, and the same is hereby allowed. The appellant has to be released from custody forthwith unless otherwise lawfully held.



Ordered Accordingly.

DATED at **ARUSHA** this 24th day of August, 2023.




N.R. MWASEBA
JUDGE