THE UNITED REPUBLIC OF TANZANIA

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF MTWARA

AT MTWARA

CRIMINAL APPEAL NO. 7 OF 2023

(Originating from Economic Case No. 4 of 2021 in the District Court of Kilwa, at Masoko.)

SELEMANI ABDALLAH KIPANDE ---------- APPELLANT

VERSUS

THE REPUBLIC ---------- RESPONDENT

JUDGMENT

Date of last Order: 07.08.2023
Date of Judgment: 13.09.2023

Ebrahim, J.

The appellant, Selemani Abdallah Kipande filed the instant appeal challenging the conviction and sentence of the District Court of Kilwa in Economic Case No. 4 of 2021. The appellant was charged and convicted for two counts of unlawful possession of government trophy contrary to **Section 86 (1) and (2) (c) (iii) of the Wildlife**

Conservation Act, No. 5 of 2009 as amended by Written Laws (Miscellaneous Amendments) (No. 2) Act 2016 read together with paragraph 14 of the first Schedule and Section 57(1) and 60 (2) of the Economic and Organized Crime Control Act [Cap. 200 R.E 2019]. After full trial, the 3rd and 4th accused were acquitted but the 2nd accused absconded bail. The Appellant was convicted of both counts and sentenced on the first count to pay fine of TZS. 346,504,500/= (Three hundred forty-six million and five hundred and four thousand five hundred shillings) in default to serve 20 years in prison. On the second count, he was ordered to pay fine of TZS. 34, 650,450/= (Thirty-four million six hundred fifty thousand four hundred and fifty shillings) in default to serve 10 years in prison.

The two (2) elephant tusks and four (4) hippopotamus teeth were confiscated as per **Section 111 of the Wildlife Conservation Act No. 5 of 2009** and Motorcycle No. T. 176 CHN SUNLG was returned to the 3rd accused as per **Section 357 of the Criminal Procedure Act [Cap. 20 R.E. 2022].**

Brief facts of this appeal are to the effect that: on 28th May, 2021 at Kiranjeranje within Kilwa District in Lindi Region, the appellant and his

co-accused were found in possession of Government trophy to wit two (2) pieces of elephant tusks valued at USD 15,000 equivalent to TZS. 34,650,450/= and four (4) hippopotamus teeth valued at USD 1,500 equivalent to TZS. 3,465,045/= the property of the United Republic of Tanzania without a permit. The appellant pleaded not guilty. The prosecution lined up eight (8) witnesses and tendered ten (10) exhibits to wit; exhibit PE1 collectively (Two Elephant tusks marked as KR1, KR2), exhibit PE2 (Four hippopotamus teeth marked as KR3, KR4, KR5, KR6), exhibit PE3 collectively (Three sulphate bags 2 white sulphate bags and 1 green sulphate bag), exhibit PE4 collectively (Rubber ropes), exhibit PE5 (Body of motorcycle no MC 176CHNSUNLA), exhibit PE6 (Engine no SLI57FM11990550 and its accessions), exhibit PE7 (Certificate of seizure), exhibit PE8 (Certificate of seizure to seize motorcycle MC 176 CHN), exhibit PE9 (Caution statement of 1st accused), and exhibit PE10 (Trophy valuation certificate). The evidence by the prosecution was to the effect that the appellant and another person (not subject of this appeal) were trapped and arrested at petrol station Kiranjeranje area in Kilwa, found in possession of the above listed government trophies. The trophies were wrapped into sulphate bags. The trophies

were seized in the presence of the independent witnesses; PW7 being one of them. They were taken to Kilwa Masoko and finally they were charged before the trial Court.

The Appellant denied the allegation and on 27th May, 2021 at around 22:00hrs a relative of the 4th accused called him to go to 4th accused's home. On reaching there he found two people who wanted to go to Kiranjeranje at that night. He disagreed to take them until the next day. He testified that on the next day the 4th accused gave fueled his motor cycle to go to the 3rd accused premises then they went to Makangaga where the motorcycle knocked. He called the 4th accused who advised him to find another motorcycle. Further to that he was told that the 2nd accused will cover the expenses to repair his motorcycle. Later on, 2nd accused joined them accompanied with four people. He took his luggage and put it in the vehicle. After few minutes the 2nd accused was arrested and later the Appellant and the motorcycle driver were also arrested. Thereafter other police officers emerged with sulphate bags pieces which contained elephant tusks. They were and

photographed the Ward Councilor was called and they filled some papers and then sent to police Kilwa Masoko.

The trial Court was satisfied that the prosecution proved the case to the hilt. Thus, convicted and sentenced the appellant as afore said. Disgruntled by the impugned decision of the trial court, the Appellant filed a petition of appeal against the conviction and sentence on the grounds outlined below;

1. That, the appellant pleaded not guilty to the offence charged, because he did not commit the alleged offence in question as it was fabricated on him by the prosecution side;
2. That, the trial court erred in law and fact in convicting and sentencing the appellant based on an improper seizure certificate;
3. That, the trial court erred in law and fact in convicting and sentencing the appellant without considering that the Prosecution failed to establish chain of custody as to whether the purported trophy was the same alleged to have found in possession of the appellant;
4. That, the trial court erred in law and fact in convicting and

sentencing the appellant depending on the evidence of PW1, PW4, PW5, PW6, PW7 and PW8 which were so unreliable and contradictory and who by the testimonies they were accomplices and had based on hearsay (sic);

5. That, the trial court erred in law and fact in convicting and sentencing the appellant because the whole proceedings were marred by procedure irregularities which amounts to dismissal of the matter in total; and
6. That, the trial court erred in law and fact in convicting and sentencing the appellant because the prosecution fabricated evidence to convict the appellant, that is why the prosecution failed even to tender as evidence the instruments used to exhume buried trophies.

Basing on the grounds of appeal, the Appellant prays that the appeal be allowed by quashing the conviction and setting aside the sentence and order an immediately release.

When the appeal was called on for hearing, the appellant appeared in person, unrepresented; whereas Mr. Edson Mwapili and Mr. Melkion, learned State Attorneys appeared for the Respondent/Republic.

When invited to argue the appeal, the Appellant prayed to adopt the petition of appeal as part of his submission. He submitted further that he did not commit the offence. He said he is a motorcycle driver and the people whom he carried were the ones who had the government trophies which he did not know.

Resisting this appeal, the learned State Attorney responded to the 1st, 4th, and 6th grounds of appeal together on whether prosecution proved the case beyond reasonable doubt. He supported the conviction and sentence and argued that the prosecution proved that the Appellant was among the perpetrators found in possession of government trophies. Eight witnesses were called and 10 exhibits were tendered as per page 33-56 of the typed proceedings. He said the testimonies of all witnesses were credible, reliable and had no contradictions. Expounding his submission, Mr. Mwapili argued that PW2 received information from the informer that there were two people looking for buyers of two elephant's tusks and four hippopotamus tusks which made the police to pose as clients and managed to arrest the Appellant and his fellow who was not in court.

PW7 was called as independent witnesses on the search and seizure and certificate of seizure was admitted in court as exhibit PE7. PW3, PW6, PW7 and PW8 were called to prove the offence, PW8 did the identification and valuation. He argued that the Appellant admitted the offence through cautioned statement (exhibit PE9). Therefore the case was proved beyond reasonable doubt, stressed Mr. Mwapili.

On the issue of improper certificate of seizure, the learned State Attorney argued that it was not true as there was a name and signature of the arresting officer, independent witnesses and the accused person.

On the issue of chain of custody, he said it was established through an oral account. PW1 who was the custodian explained the chain of custody from the moment he was handed the same to the time they were tendered in court.

On the complaint on irregularities in the tendering of the certificate of seizure (exhibit PE8), he concedes that the same was not read in court after the admission. He argued that even if exhibit PE8 is

expunged from the record, evidence in court is enough to form a conviction because the Appellant also admitted the offence.

Responding on the complaint concerning the sentence, he said the appellant was charged with economic offence of which its sentence is provided under **Section 60 (2) of the Economic and Organised Crime Control Act [CAP. 200 R.E. 2019]** which does not give fine as an alternative but rather an addition to. To cement his argument he cited the case of **Paulo Andrea @ Mbwilande and Another, Criminal Appeal No. 613 of 2020**. Mr. Mwapili argued the Court to dismiss the appeal.

In rejoinder, the appellant reiterated his prayers.

I have critically gone through the trial court's record assessed the evidence, proceedings and the submissions for and against the appeal. The important question here is whether the appeal is meritorious in view of the submissions made, evidence received and the proceedings of the case.

Starting with 2nd ground of appeal, on an improper seizure certificate.

PW2 and PW3 were the arresting officers. PW2 made the search and seizure and tendered Certificate of Seizure (exhibit PE7), two elephant tusks and four hippopotamus teeth. PW7 was the independent witness who witnessed the search and seizure. Regarding the certificate of seizure to seize motorcycle MC 176 CHN (exhibit PE8); PW2 tendered a certificate of seizure as exhibit PE8. Unfortunately, PW2 did not read the contents of the said certificate to the Appellant and the other accused persons who are not part to this appeal. The learned State Attorney for the Respondent conceded to the argument by the Appellant that certificate of seizure was not read in court after its admission.

It is now settled that failure to read out an exhibit after its admission is fatal and the same must be expunged from the record - see: **Mabula Mboje & Others v. Republic**, [2020] TZCA. Guided by the same principle, I expunge the certificate of seizure to seize motorcycle, i.e., (exhibit PE8) from the record.

Having expunged exhibit PE8 from the record, the question is whether there remains evidence to establish that the appellant was found in possession of two elephant tusks and four hippopotamus teeth. Exhibit PE7 is a certificate of seizure to seize two elephant tusks

and four hippopotamus teeth. This evidence establish the fact that the Appellant was found in possession of the government trophy. I therefore dismiss the second ground of appeal for want of merits.

The 3rd ground of appeal is a complaint on the failure by the prosecution to establish chain of custody.

The intention of adhering to the chain of custody procedure is to avoid the use of evidence that could be the subject of tempering, substitution or contamination - see **Avyalimana Azaria and 2 Others vs Republic**, Criminal Appeal No. 539 of 2015 CAT, at Bukoba. Therefore it means that, strictness in observing the chain of custody is put more on the evidence which can easily be subject of tempering, substitution or contamination. The above view is in line with the position underscored by the CAT in numerous decisions such as **Issa Hassan Uki vs Republic**, Criminal Appeal No. 129 of 2017; and **Vuyo Jack vs Director of Public Prosecutions**, Criminal Appeal No. 334 of 2016 (both unreported) it was observed that:

> *"The chain of custody principle should not be treated as a straitjacket but one that must be relaxed when dealing with items which cannot be easily altered, swapped or tampered with"*

Indeed, the chain of custody of the elephant and hippopotamus tusks cannot be easily doubted because of their possessory nature of such trophies. Similar findings were reached by the Court of Appeal of Tanzania in the case of **Joseph Leonard Nanyota vs the Republic,** Criminal Appeal no 485 of 2015 (unreported) where it was held that;

> *"The elephant tusks in the case at hand were such that they could not change hands easily and therefore could not easily be tempered with..."*

In the case at hand, PW2 Insp. Lwambano and PW3, Issack Elisana Nanyaro (who is the Wild officer) testified that on 28.05.2022 at 13:00 hours they arrested the first and second accused who were in possession of two elephant tusks, four hippopotamus teeth in sulphate bags. Initially PW2 and PW3 were tipped by the informant that the first and second accused were looking for purchasers of elephant tusks. In that regard PW2 and PW3 communicated with the accused persons and agreed where to meet. They set a trap and agreed to trade besides petrol station at Kiranjeranje, Kilwa, at Lindi. They introduced themselves as buyers of the trophy. Thereafter they arrested 1st and 2nd accused persons and one motorcycle rider.

After arresting them they called village leader of village executive office of Kiranjeranje who was the independent witness. When he arrived, they ordered the accused persons to open the sulphate bags inside of which they found two elephant tusks and four hippopotamus teeth. PW3 interrogated the accused persons if they had permit, but they did not have any. After that they marked the trophies and filled the certificate of seizure which was signed by the accused persons, PW2, PW3 and two independent witnesses. The accused persons informed PW2 and PW3 that there is another accused (3rd accused) who is at Makangaga repairing the motorcycle they used to carry the trophies. The said motorcycle knocked on their way to Kiranjeranje. PW2 communicated with the leader of Makangaga to arrest the 3rd accused. After the arrest all accused, persons were taken to Kilwa Masoko police station. PW1, Coplo Alto (custodian of exhibits) told the trial court that he was handed over the exhibits which are two elephant tusks and four hippopotamus teeth marked KRL and KR2, KRS3, KR4, KR5, and KR6; and motorcycle T.176 CHN by PW2. PW1 entered the said exhibits in the exhibit register, numbered them (exhibit 30) and kept them in the store. On 30.05.2021 PW8, Wildlife officer (the trophy valuer) went

to identified and value the exhibit (trophies). PW1 handed the exhibits to PW8, and after the valuation PW8 handed them back to PW1. PW1 kept the exhibits at the store until he took them to court.

It suffices to say at this stage that the chain of custody was properly established by the prosecution. I accordingly dismiss the third ground of appeal for want of merits.

I new turn to the 1st, 4th, 5th, and 6th grounds of appeal which raised the issue on whether the prosecution proved the case at the required standard.

It is the principle of law that the burden of proof in criminal cases rests squarely on the shoulders of the prosecution side unless the law otherwise directs; and that the accused has no duty of proving his innocence - See **Armand Guehi v. Republic**, Criminal Appeal No. 242 of 2010, CAT (unreported). I am also mindful of the fact that this being the first appellate court, it is dutybound to reconsider and evaluate the evidence on record and come to its own conclusions of facts bearing in mind that it never saw the witnesses when they testified; see **Maramo Slaa Hofu and Others vs Republic**, Criminal Appeal No. 146 of 2011 CAT at Arusha, (unreported).

Having gone through the prosecution evidence and in considering the entire proceedings, it is apparent that PW2, PW3 and PW7 were eye witnesses. According to the evidence PW2 (police officer) and PW3 (wild officer), they received a tip from the informant and managed to set a trap which led to the arrest of the Appellant as narrated earlier.

The Appellant absconded bail. After his arrest he said in his defence that he did not commit the offence and that on 27.05.2021 at 22:00hrs he was called by arelative of the 4th accused to go and pick up two passengers who wanted to go to Kiranjeranje. He took them the next day and was asked by the 4th accused to go the 3rd accused premises.

When at Makangaga the motorcycle knocked and they hired motorcycle which took them to Kiranjeranje. Later on, 2nd accused another joined them in the company of four people . The 2nd accused put his luggage in the vehicle and after few minutes the 2nd accused was arrested and they were also arrested including the motorcycle rider. After a short time many police offices they brought a sulphate bag. On opening it, there were found arrived

and pieces of elephant tusks. They were photographed and the ward councilor had to fill some forms. Later they were taken to Kilwa Masoko police station.

All of the above narrated evidence is clear as broad day light that there is enough evidence on the apprehension of the Appellant in possession of the government trophies. It is also apparent from the record that the Appellant did not object the tendering of any exhibit nor cross examined the witnesses. It is settled law that failure to cross examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness evidence. It was held in the case **Fabian Chumila vs. Republic**, Criminal Appeal 136 of 2014, that:

> *"The principle has always been that failure to cross-examine on an important point implies that one is admitting the truthfulness of the testimony on the point."*

Notwithstanding the principle that the accused is not dutybound to prove his innocence, it is my view that the appellant's evidence in this case corroborated the prosecution case. It is not a new phenomenon for the accused/appellant to do so. In the case of **Felix Lucas Kisinyila v. Republic**, Criminal Appeal No. 129 of 2002,

CAT (unreported) it was found that the appellant's evidence corroborated prosecutions case. Again, the appellant's complaint is dismissed.

Now as to the sentence as observed by Mr. Mwapili, indeed the Appellant was convicted with the offence which its sentence is provided under **section 60(2) of EOCCA, Cap 200 RE 2022** which states that:

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

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

From the above position of the law, the provision of a different penalty from any other law notwithstanding, the mandatory sentence for the economic offence that the Appellant was

convicted with is a custodial sentence of 20 years with no option of payment of fine. The sentence imposed by the trial court is therefore illegal. I subscribe to the cited case of **Paulo Andrea @ Mbwilande and Another VR (supra)** where the court declared the imposed sentence by the trial court as illegal and proceeded to impose a proper sentence. I follow suit and accordingly exercise revisional powers of this court under **section 373(1)(a) of the Criminal Procedure Act, Cap 20, RE 2022** to revise the sentence imposed by the trial court and set is aside.

In lieu thereof, I substitute the sentence for both counts to twenty years imprisonment with no option as to fine.

For all purpose and intent, this appeal is dismissed and conviction upheld. The sentence imposed upon the Appellant is substituted to twenty years on each count to run concurrently and be counted from the date when the Appellant was sentenced by the trial court.

Accordingly ordered.

R.A Ebrahim

JUDGE

Mtwara

13.09.2023