THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO 40 OF 2023

(Originating from Liwale District Court at Liwale in Criminal Case No. 4 of 2023 Hon. C. Mtui, RM)

SEIF RASHID BWABWALA ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

17th & 31st of July 2023

LALTAIKA, J.

The wisdom embodied in the admonition **"To whom much is given, much will be required"** (see Luke 12:48) is especially relevant to Tanzania's biodiversity conservation obligation. With over 55,000 confirmed species of *fauna* and *flora,* Tanzania is one of the most biodiverse countries in the world. It is also home to 6 out of the 25 *global biodiversity hotspots,* meaning areas where species richness and endemism coincide. In this judgement I will shade some light on the role of law in carrying out this noble task of conservation for the benefit of present and future generations. Some challenges that may need to be addressed in Tanzania and the global South in general shall also be highlighted, albeit as an ***obiter dictum.***

The appellant herein, **SEIF RASHID BWABWALA** was arraigned in the District Court of Liwale at Liwale charged with two counts *to wit* 1. Unlawful possession of government trophy c/s 86(1) and (2)(c) (iii) of the **Wildlife Conservation Act No 5 of 2009** read together with para 14 of the first schedule to and section 57(1), 60(2) of **the Economic and Organized Crimes Control Act Cap 200 RE 2019** and 2. Unlawful possession of firearms c/s 20(1)(b) and (2) of the **Firearms and Ammunition Control Act No 2 of 2015** read together with paragraphs 31 of the first schedule to and section 57(1) and section 60(2) of the Economic and Organized Crimes Control Act (Supra).

It was the prosecution's story that on 20/1/2021 at **Mirui Village** within **Liwale District, Lindi Region,** the appellant and another were found with unlawful possession of government trophy namely two (2) pieces of **African Elephant Tusks valued at TZS 23,930,000/=** property of the government of the United Republic of Tanzania without a permit from the Director of Wildlife. As for the second count, the prosecution alleged that on 20/1/2021 at Mirui Village, Liwale District, Lindi the appellant and another were found with a firearm make Rifle 458 with Registration Number 1818 without lawful authority.

When the charge was read over and explained to the accused persons, they denied wrongdoing. This necessitated conducting of a full trial after the Director of Public Prosecutions DPP had granted consent and certificate conferring jurisdiction to the trial court. The prosecution paraded a total of 7 witnesses and tendered 7 exhibits. No exhibit was tendered by the accused persons who were the only defence witnesses.

Having been convinced that the prosecution had left no stone unturned in proving the allegations against the first accused (appellant herein) the trial Magistrate convicted the appellant as charged and sentenced him to **pay a fine of TZS 230,983,000** for the first count and in default, to serve a 20-year jail term. As for the 2nd count, he was sentenced to a term of 20 years imprisonment. The sentences were ordered to run concurrently.

The second accused, on the other hand, was acquitted on both counts. The allegations against him were not proved to the required standard, namely beyond reasonable doubt. It appears as the trial court made a finding that he was merely a visitor to the appellant's home. The finding was largely contributed by the appellant who consistently sought to exonerate his co-accused. I have no reason to interfere with this finding.

Dissatisfied with the trial court's decision, the appellant has appealed to this court by way of a petition of appeal containing five grounds. I take the liberty to reproduce them hereunder:

1. *That the learned trial Magistrate erred in law and fact by convicting the appellant on incredible and unreliable evidence adduced by the prosecution.*
2. *That the learned Magistrate erred in fact by admitting evidence adduced by PW3 VEO of Mirui while appellant is residence (sic!) of Lineng'ene village brings doubt on procedure of arrest.*
3. *That the trial Magistrate erred by holding that the prosecution proved the case beyond reasonable doubt as charged since the evidence adduced by PW3, PW5 create doubt of material time.*
4. *That the learned trial Magistrate erred in law and in fact by convicting the appellant on incredible evidence adduced by prosecution side.*
5. *That the trial court erred in law and fact by accepting exhibits P3, P4, P5 and P6 without proper request of the prosecution to the Court that the exhibits could be read oxen (sic!)*

When the appeal was called for hearing on the 17th day of July 2023, the appellant appeared in person, unrepresented. The respondent Republic, on the other hand enjoyed **skillful services of Mr. Melchior Hurubano**, learned State Attorney.

The appellant prayed that his expounded written grounds of appeal that had been filed in court as a part of the petition be duly adopted and considered. Other than that, he prayed that the learned State Attorney is allowed to proceed with his response. The appellant, however, reserved his right to add a word or two if the situation so demanded.

Taking the podium, Mr. Hurubano announced boldly that the respondent fully supported the trial court's decision. He proceeded to counter the grounds of appeal as summarized in the following paragraphs.

Mr. Hurubano stated that the appellant had appealed on five grounds, which he would address as follows: the 1st, 2nd, 3rd, and 4th grounds would be argued collectively as they questioned the proof of the case beyond reasonable doubt.

Addressing the above grounds head-on, Mr. Hurubano expressed his opinion that for the 1st count to be proved, the prosecution needed to establish two ingredients: **firstly, that the items were government trophies**. On this element, he referred to the trial court's proceedings on page 38, where PW4, a Wildlife Officer, had testified that the items were indeed elephant tusks and had a value of **TZS 23,098,300/=.**

Mr. Hurubano acknowledged that in terms of section 86(4) of the Wildlife Conservation Act (the WCA), trophy valuation certificate served as

prima facie evidence regarding the type of trophy, and since PW4 had presented the evaluation certificate in court, this element was considered established. He also mentioned that on page 38, PW1 had explained how he identified the elephant tusks.

Regarding the **second element, that the said trophy belonged to the appellant,** Mr. Hurubano asserted that the prosecution had successfully proved it through PW1's testimony recorded on page 23. PW1 had testified that the appellant was found in possession of the two pieces of elephant tusks in his home place, and there was an independent witness, PW3, who supported this statement.

The learned State Attorney went on to argue that the appellant had also signed the certificate of seizure, which further strengthened the case that the tusks were taken from him. Mr. Hurubano concluded that, in his reasoned opinion, the second element was proved, and he reiterated that the witnesses, PW1 and PW3, were credible, emphasizing PW1's authority as a police officer empowered to conduct searches under section 186 of the WCA, while PW3 was an independent and deserving credible witness. The learned State Attorney emphasized that he believed that the prosecution had successfully proved the case beyond reasonable doubt.

Moving on to **ground number 5,** Mr. Hurubano mentioned that the appellant challenged the admission of exhibits P3, P4, P5, and P6 on the grounds of a lack of special request by the prosecutor. In response to this challenge, the learned State Attorney asserted that any procedural irregularity, even if it were present, could not vitiate the judgment. However,

he stated that the appellant's claim was untrue and urged the court to review specific pages (page 24 for exhibit P2, page 25 for exhibit P3, page 39 for exhibit P5, and pages 53 and 54 for exhibit P6) of the lower court's proceedings, as these pages demonstrated that there was no irregularity in admitting the mentioned exhibits. **He prayed for the dismissal of the entire appeal.**

The appellant, on his part, stated that he had not been fairly treated in the lower court. He explained that he was not allowed to communicate with his witnesses, and as a result, they were barred from testifying. His witnesses were asked if they were ready to testify on his behalf, but they all declined. The reason for their reluctance was that they had been summoned by the respondent.

The appellant claimed that he was the one who had given the summons to the prison wardens, but he was not allowed to instruct his witnesses on what they needed to testify. He further stated that he was not **from MIRUI** village but from **LINENGENE** in the same Ward. He mentioned that the witnesses who came to his place did not bring his village leaders as independent witnesses but instead brought the Village Executive Officer from another village.

The appellant brought up the fact that he was charged with **Issa Rashidi Mbalala**, but the latter was acquitted by the magistrate who stated that Issa Rashidi Mbalala was outside the house during the incident. The appellant revealed that he and Issa Rashidi Mbalala knew each other and

that ***Issa Rashidi Mbalala*** was his grandson who had brought him pesticides from Mtwara Town.

The appellant recounted that they were invaded and beaten up, and he was taken inside the house on allegations that he illegally owned a firearm. He showed them the gun, which was Rifle 488, and explained that he had received it from Morogoro and that his father had given it to him when he was 66 years old. His father had passed away at the age of 92 in 2009. He remembered that the gun was officially given to him in 2006 in front of the police.

The appellant shared that his father was a **hunter in Morogoro and originally from Kilosa**. He had moved to Lindi in 2014 to marry a woman he had met at Morogoro Ilonga Research College. They got married in 2011 and had one child, but they eventually divorced in 2012 because she thought he was too poor. After the divorce, he moved to MIRUI ward. He emphasized that he had never used the gun but received training when he was given the firearm.

I **have dispassionately considered the grounds of appeal and submissions by both parties**. I have also carefully examined the court records. My role as the first appellate court is to re-evaluate the evidence tendered in the trial court and come up with my own findings if necessary. See **LEORNARD MWANASHOKA V. REPUBLIC** Crim Appeal No 226 of 2014 CAT. Nevertheless, I am inclined, as a Court of record, to go beyond re-evaluating the evidence.

Using the **Offence, Witness(es), Evidence and Principle(s) (OWEP)** tool of analysis used in **legal writing**, I will take a much broader approach to address the grounds of appeal raised in the light of both substantive and procedural criminal law and tenets of fair trial. (For an inspiration on application of various forms of legal writing in court see Guberman, R.; ***Point Taken: How to Write Like the World's Best Judges***. (Oxford: 2015) Chapter 1.

As stated earlier, the appellant was arraigned on two counts of Unlawful possession of government trophy and Unlawful possession of firearms respectively. I have gone through the sections cited (substantive law) of the **Wildlife Conservation Act No 5 of 2009** (herein after WCA) **the Economic and Organized Crimes Control Act Cap 200 RE 2019** (herein after EOCA) and the **Firearms and Ammunition Control Act No 2 of 2015.** I am convinced that the sections were correctly cited and, more importantly, they create the offences charged. The chargesheet is equally well drafted to include the necessary information.

The keyword on both counts is *possession*. I must acknowledge the learned trial Magistrate's **commendable** job in analyzing the concept of possession as used in our criminal law. Since neither the charge sheet no elements of the offence(s) have been appealed against, I find it imperative to refrain from discussing this point further. I subscribe to authorities cited by the learned Magistrate including those that are merely persuasive to this court.

The importance of paying attention to the details on the side of the prosecution when it comes to offence(s) alleged to have been committed by accused cannot be overemphasized. While some offences may have been a part of the common law, or even customary law and many people know they involve a "prohibited action" such offences must be fully enacted (and clearly defined) to conform to the doctrine of "no crime without law" ***Nullum crimen sine lege*** which is an important tool against arbitrariness in criminal justice. When they are enacted, they must be correctly cited. Short of that, lack of diligence may result in acquittal.

On Witnesses, the position of our law is that every witness must be given credence unless there are sufficient reasons for not doing so. See **GOODLUCK KYANDO V. REPUBLIC** [2006] TLR 367. I am alive to the fact that the demeanor of witnesses is the monopoly of the trial court. Nevertheless, having gone through the proceedings of the trial court, I have not come across any major inconsistency. Both prosecution and defence witnesses (DWs) testified under oath and they appear to have assisted the court in finding out the truth.

It should be noted that the appellant has complained against one witness, namely PW3. According to the appellant, the evidence of PW3 who was dubbed "independent witness" was erroneously admitted because he was the Village Executive Officer (VEO) of Murui while appellant was allegedly from another village of Lineng'ene. The appellant, however, chose not to contradict the evidence of the rest of PWs that he was found in a house within Murui village where he was arrested and later charged. I find

this complaint without merit. One can maintain houses (and residence) in more than one village.

On **Evidence** my interest has been on observance of miniatous of the chain of custody. This means how the evidence had changed hands and kept until production in court. See **PAUL MADUKA V. REPUBLIC** CRIM APPEAL NO 110 of 2007. I think there has not been any dispute as to whether the impounded items were elephant tusks. In other words, "it goes without saying" that the impounded material were two elephant tasks valued **at TZS 23,930,000.** The complaint is, however, that the trial court based its conviction on "incredible and unreliable evidence adduced by the prosecution" (see the first ground of appeal.)

It is noteworthy that PW2 and his fellow game rangers were in their usual patrol activities. I assume this is a part of their daily activities. In the night hours they received a tip from an informer that the appellant (and another) was in possession of ***nyara za seikali*** as government trophies are *dutifully* (and at times fearfully) known in Kiswahili.

The brave askaris proceeded to act on the tip, obviously risking their lives in the process. They passed through the household of PW3 the VEO in whose village the suspects were located, and the operation proceeded to the appellant's house. This is a legal requirement in conducting searches in dwelling houses as per the WCA.

A detailed account is given of how the search was conducted and the two elephant tusks as well as the gun were found hidden in the appellant's

house. The tusks were later valuated and when they were later produced in court, PW4 successfully identified them.

I have no problem with how the elephant tusks were identified by PW4 who introduced himself as a graduate in Wildlife Management from Mweka Wildlife College. The witness went a long way to explain chemical composition of a tusk and why it is harder that the rest of the body of the largest land mammal. I can only say albeit in passing that the expert should not expect to receive a similar node of approval when it comes to say bushmeat. These type of "trophies" would most certainly need forensic examination results to assist the court in deciding a criminal case at the required standard namely proof beyond reasonable doubt. See **Hussein Issa Kamtande vs Republic** (Criminal Appeal Case No.59 of 2022) [2023] TZHC 18462 (28 June 2023).

I am also alive to the fact that the Court of Appeal of Tanzania in **SKONA ROLYAN MUNGE & OTHERS VS REPUBLIC** (Criminal Appeal 51 of 2020) [2022] TZCA 773 (6 December 2022) refused to entertain the common confusion among Kiswahili speakers on whether elephant tusks are teeth ***"meno ya tembo"*** or horns ***"pembe za ndovu."*** The Court relied on the expert witness' description and moved on. Even in English the words "ivory" and "elephant tusks" are sometimes used interchangeably. Nevertheless, courts in many countries have refused to be swayed back and forth through technicalities, semantics, and tautology, when it comes to easily identifiable objects such as elephant tusks.

The story did not end with locating the tusks mixed with dried cassava and craftly tied on a sulphate bag. On further search, the gun described earlier was found neatly tied to a local bed ***kitanda cha kamba***. Surprisingly, the appellant never denied that he was found with the gun. His only claim which falls short of convincing, was that he obtained it legally. Even on appeal to this court, he appeared to take the issue of the gun very lightly. He claimed that he inherited it from his father who was a veteran hunter in Morogoro and passed away at the age of 91.

It is hard to imagine that the appellant had the gun with him all these years in a village he chose to move to, probably because it is strategically located near the Selous, a wildlife rich area. Safety of the men and women in boots protecting our wildlife resources must have been extremely in danger. The intention of the bearer of the gun and his network was, most certainly, not only to kill elephants but also innocent game rangers who would have come his way.

Apparently, the now well-known Presidential Committee for Criminal Justice Reforms (**Hon. Chief Justice, Rtd. Chande Othman's Committee**) indicated that many citizens of this country, the *wananchi*, are not happy with *militarized conservation*. They would rather do away with too many paramilitary groups. In conservation circles, as this judgement has shown, the matter is probably more complicated than in other areas. As a matter of facts, dealing with highly armed wildlife traffickers is a matter of life and death. An armed *jangili* cannot be matched with a civilian in tracksuits. The gun allegedly found with the appellant is an extremely dangerous weapon.

Be it as it may, I think the main disadvantage *wananchi* see with militarized conservation is when local communities in neighbouring villages are treated as if they are an *occupied territory*. While awaiting reforms that may come from the committee's recommendations, the middle ground is, in my opinion, investing in empowering the *askaris* with knowledge, attitude and behavior of respect for human rights and humane application of their might against local communities. Application of **community-based natural resource management (CBNRM)** and good neighbourliness ***ujirani mwema*** principles must be emphasized.

The appellant has also complained that there was inconsistence between PW3 and PW5 on "material time" (see the third ground of appeal). I have examined the complaint closely and I am fortified that the inconsistency was a minor one as argued by Mr. Hurubano. Indeed, the dates 19th and 20th were at some point mixed up because the incident took place during midnight "*saa sita za usiku.*" In our culture a day starts at 7:00 in the morning (*saa moja asubuhi*) and not after midnight. In any case, the appellant was not prejudiced.

Coming to **Principles**, our criminal justice requires that the prosecution case is proved beyond reasonable doubt. This duty rests on the prosecution. See **WOODMINTON V. DPP** [1935] AC 462. As meticulously stated by the learned trial Magistrate, the term proof beyond reasonable doubt has not been defined in statutes. In the case of **MAGENDO PAUL AND ANOTHER V. REPUBLIC** [1993] TLR 219 the CAT held that

> *"For a case to be taken to have been proved beyond reasonable doubt its evidence must be strongly against the*

accused as to leave a remote possibility in his favour which can easily be dismissed."

In the matter at hand, there has been a seamless connection between testimonies of prosecution witnesses and both documentary and physical evidence produced. In my reasoned opinion, the entire process spanning from receipt of the tip from the informer, search of the appellant's dwelling house, arrest, trial, conviction, and subsequent sentence was compliant to our criminal justice. The minor errors identified have neither prejudiced the appellant nor shaken the prosecution's case.

Before I pen down, I am inclined to state, albeit in passing as earlier alluded to, that the African elephant ***Loxodanta africana,*** the subject matter of this appeal, is an endangered species. As a result of commendable efforts by many stakeholders, the number of elephants has started to rise. In Tanzania, according to the African Wildlife Foundation the elephant population has increased from approximately 43,000 in 2014 to 60,000 individuals in 2021. See 2022 AWF, **ELEPHANT CONSERVATION REPORT** available online.

As a part of "the big five", the African elephant is an important tourist attraction for our country. No wonder that the founding father of our nation **Mwalimu Julius Kambarage Nyerere** appealed to "other nations to co-operate with us in the important task [of conservation of 'wild creatures and the wild places']. See **The Arusha Manifesto** partly reproduced by **Hon. Muruke, J.** (as she then was) **in NGUYEN VAN CHAT V. REPUBLIC** [2016] TLS LR 5.

Mwalimu probably had in mind illegal trafficking in wildlife and their derivatives (trophies) in general and trade in endangered species in particular. This highly organized crime cannot be tackled by one country without the assistance of the rest of the international community. In addition to national laws illegal wildlife trade offences are normally committed in contravention with the **Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) of 1976.**

While there are other International Conventions related to conservation of wildlife resources to which Tanzania is a member, CITES is probably the most important when it comes to wildlife crimes the crux of this judgement. An in-depth knowledge of CITES and its enforcement mechanism is vital for all policy makers and law enforcement professionals including those that work to secure entry and exit points such as airports and harbours.

In short, CITES is a unique international law instrument that plays three roles in one **namely prohibitive, permissive, and facilitative roles** in conservation of wildlife resources. A leading author in the area of International Wildlife Law namely Lyster, Simon ***International Wildlife Law: An Analysis of International Treaties concerned with the conservation of wildlife*** (Cambridge University Press 1993) expounds on these roles on page 240 as follows:

> *"The basic principle of CITES are quite straightforward. It regulates international trade in wild animals and plants which are listed in the three Appendices to the Convention. It is a protectionist treaty in the sense that* ***it prohibits, with a few exceptions,*** *international commercial trade in species that are threatened with extinction (they are listed in Appendix I). It is also a trading treaty in the sense that*

> ***it allows a controlled international trade*** *in species whose survival is not yet threated but may become so (they are listed in Appendix II.) CITES limits export of Appendix II species to a level which will be detrimental to their survival. Appendix III provides a mechanism whereby a Party which has domestic legislation regulating the export of species not in Appendix I or II* ***can seek the support of other Parties in enforcing its own domestic legislation.*** *" (Emphasis added)*

It should be noted however that CITES has also received many criticisms over the years from scholars in the global South. This is due to the *rigid* approach that makes it nearly impossible for countries in the South to trade in trophies for the purpose of improving conservation. As a result, conservation remains an extremely burdensome task to the global South. This is reflected on how the African elephant is viewed by different people. According to an International Environmental Law researcher:

> *"Elephants are different things to different people. To a relatively affluent person from a developed country with no elephant population, elephants might be seen as great, intelligent animals to be preserved at all costs. To a government official in a developing nation, elephants might represent economic resources.* ***A farmer in an area with a booming elephant population might view elephants as pests capable of consuming a year's worth of hard labour in a single night****.... These differing view on the elephant give rise to differing opinions about its preservation and conservation."* Sam B. Edwards, III, *"Legal Trade in African Elephant Ivory: Buy Ivory to Save the Elephant?"* 7 ANIMAL L. 119, 139 (2001).' (Emphasis added)

As the above researcher has pointed out, the African elephant is indeed known for causing havoc. Complete destruction of crops and loss of lives are common in many parts of Africa. For countries such as Tanzania which have opted to offer consolation "*kifuta machozi*" the amount payable is almost always disproportional to the loss occasioned. This is probably due to the

fact that conservation is not one of those activities carried out for the purpose of making profit. Outside famous protected areas visited by tourists, there are almost no ways of making money through conservation. Other activities are incompatible with international agreements unless a *consensus* is reached to relax the rules, albeit temporally.

The importance of understanding these challenges in their broader international, ecological, policy and legal context cannot be overemphasized. A court of law must strike the right balance between these competing views. Policy makers, on their part, at national, regional, and international level must also strive to address the ever-growing burden of conservation in the global South. A starting point would be, in my opinion, investing in innovative technologies that would ease human-wildlife conflict and increase economic empowerment programs for communities living closer to wildlife rich areas, whether protected or not.

All said and done, **I dismiss the appeal in its entirety.** The judgment and orders of the District Court of Liwale are upheld.

It is so ordered.

THE HIGH COURT TANZANIA
Court

E.I. LALTAIKA
JUDGE
31.07.2023

Judgement delivered under my hand and the seal of this court this **31st day of July 2023** in the presence of Mr. Melchior Hurubano, learned State Attorney and the appellant who has appeared in person, unrepresented.

E.I. LALTAIKA
JUDGE
31.07.2023

Court

The right to appeal to the Court of Appeal of Tanzania fully explained.

E.I. LALTAIKA
JUDGE
31.07.2023