IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

CRIMINAL APPEAL NO. 137 OF 2022

(Originating from Karatu District Court, Economic Case No. 1 of 2019)

PHILIPO PAMPHIL ISANGU @ AMMY ..... 1ST APPELLANT

PASCAL PAULO MASONG @ VASCO DA GAMA ..... 2ND APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGEMENT

30/10/2023 & 14/11/2023

KINYAKA, J.:

The Appellants were both convicted by the District Court of Karatu on 11/08/2022 with one count of unlawful hunting of scheduled animals without permit contrary to section 47(a) and (aa) of the Wildlife Conservation Act, No. 5 of 2009 (herein after, the "WCA") read together with paragraph 14 (a) of the First Schedule to the WCA, and sections 57(1) and 60(2) of the Economic and Organized Crimes Control Act, Cap 200 R.E. 2019 (herein after, the "EOCCA") as amended. The Appellants were sentenced on

11/08/2022 to serve thirty years in prison. The Appellants are aggrieved by the conviction and sentence of trial Court and have preferred nineteen grounds of appeal which are reproduced below:-

1. That the trial Court erred in law and fact to convict the Appellants while the prosecution side totally failed to prove the case beyond reasonable doubt;

2. That the trial court grossly erred in law and fact to convict the Appellants while there were material contradictions between the charge, oral evidence and documentary evidence (exhibits) as to when the purported elephants were killed and objects/weapon used;

3. That the District Court erred in law and fact to ground conviction on circumstantial evidences which do not meet the required principles/conditions provided under the law;
4. That the District Court erred in law and fact for it totally failed to properly analyze evidence adduced and employ wrong reasoning thus made a wrong findings and decision;

5. That the District Court grossly erred in law and fact to convict the Appellants based on materially contradictory evidence by the prosecution witness;

6. That the District Court erred in law and fact for failure to rule on important matters/facts/allegations raised during hearing by the Appellants during cross examination and defence;

7. That the District Court was wrong to make decision without considering the defence case at all and accord no weight without stating reason for so doing;

8. That the District Court erred in law and fact to admit, rely and accord weight on the repudiated/retracted confessions of the Appellants (exhibits P4 and P6) obtained involuntarily;

9. That the trial court erred in law and fact to admit and rely on cautioned statements of the Appellants (exhibits P4 and P6) taken/recorded out of statutory prescribed time;

10. That the District Court erred in law and fact to rely on the cautioned statements of the Appellants (exhibits P4 and P6) which brings serious doubt on the signatures/thumb prints of the accused being put before the same was written hence forged;

11. That the trial court erred in law and fact for failure to endorse the extra-judicial statements (exhibit P10) in accordance with the law and practice hence can be easily tempered with;

12. That the District Court erred in law and fact to admit and rely on the extra-judicial statements of the Appellants (exhibit P10) tendered by PW9 without conducting an inquiry after being rejected (retracted/repudiated) by the Appellants;

13. That the District Court erred in law and fact to rely on the extra-judicial statements of the Appellants (exhibit P10) which brings serious doubt on the signature/thumb prints of the accused being put before the same was written hence forged;

14. That the District Court erred in law and fact to admit and rely on the extra-judicial statements of the Appellants (exhibit P10) which was

not prepared in accordance with the Chief Justice's guide and required procedures/requirements;

15. That the whole proceedings and judgement of the trial court are nullity for there has been change of venue/presiding magistrate without complying with the law;

16. That the trial court erred in law and fact to admit and rely upon the inventories (exhibit P7, P8, and P9) purported to have been written in 2012, 2013 and 2018, respectively with the same magistrate and the same OC-CID who were indeed not in the same office in all those years;

17. That the trial magistrate wrongly passed the maximum sentence/punishment without adducing reasons and without considering governing principles;

18. That the trial court erred in law and fact for failure to rule against the prosecution case on the Appellants being arraigned in court after the statutory prescribed time; and

19. That the trial court erred in law and fact to convict the Appellants after the previous records from the prosecution.

At the hearing of the appeal, the 1st Appellant was represented by Advocate John Lairumbe and the 2nd Appellant appeared in person. The Respondent was duly represented by Ms. Alice Mtenga, learned State Attorney.

Counsel for the 1st Appellant opted to argue the first ground of appeal and abandoned the remaining grounds of appeal. He informed the Court that he will discuss matters touching the other grounds of appeal within the first ground of appeal.

Submitting on the first ground, Counsel contended that the accused can only be convicted of an offence charged if the court finds that the accused person has committed the offence. He submitted that it is the duty of the prosecution to give evidence that proves the elements of the offence, referring to the case of **John Makolobela Kulwa and Derick Juma @ Tanganyika v. R. (2002) TLR 296**, where the Court held that the accused person shall not be convicted on his weak evidence, but only where there is

prosecution evidence to prove beyond reasonable doubt that the accused person committed the offence charged.

Counsel submitted that the record of proceedings before the trial court which include evidence of PW1 to PW8 confirm that the Appellants were not found in possession of elephant tusk, they were not found hunting and killing the elephants, and were not found hunting unlawfully, as testified by PW1 during cross examination. He stated that the charge sheet show that the Appellants committed the offences from 2012 to 2018, but were arraigned in court on 18/01/2019 and charged for the first time on three counts of killing elephants at different times. He submitted that in the circumstance, the 1st Appellant casts doubt on the evidence of prosecution and the offence he was charged.

Counsel contented that the delay in prosecuting the Appellants casts doubt on the prosecution case in proving the alleged commission of offence by the 1st Appellant, citing the case of **Mfaume d/o Daudi Mpoto and 2 Others v. R. Criminal Appeal No. 419 of 2020**, where the Court of Appeal held on page 18 that delays to prosecute the accused person, violates the right of a fair hearing.

Counsel faulted the decision of the trial court to have found conviction based on caution statements and extra-judicial statements that were objected to by the Appellants. According to the Counsel, it was wrong for the trial court to rely on the repudiated confessions. He cited the case of **Mohamed Musero v. R (1993) TLR 290**, where it was held that the court should not have acted on the statement by way of conjectures because conjectures and speculations have no room in criminal trial. Counsel also cited the case of **Janta Joseph Komba & Others v. R., Criminal Appeal No. 95 of 2006** (unreported) where the Court held that it is not enough for the prosecution to establish that the accused person had confession which led to discovery of the stolen item, but to prove that the offence charged exactly relate to the offence charged and are subject matter of a charge. He submitted that the trial court erred to rely on the confession statements without establishing elements of offence under section 47(a) and (b) of the WCA.

Counsel attacked the decision of the trial court for failure to find that the caution statements were procured contrary to the required procedures and were objected to by the Appellants. He complained that the valuation report, Exhibit P3, was procured by unauthorized person contrary to section 84(4) of the WCA which require valuation report to be prepared by the Director of

Wildlife with a rank of Wildlife Officer. According to him, the proceedings on page 54 reveal that Donata Damian (PW5) is not an authorized person to procure the valuation report, referring to the case of **Swalehe Thomas @ Gambashore v. R., Criminal Appeal No. 157 of 2022**, where on page 5 of the decision, the Court of Appeal cited the case of **Petro Kilokinanga v. R., Criminal Appeal No. 565 of 2017** (unreported), which held that a valuation report which has been conducted by unauthorized person lacks value and it must be expunged.

Counsel submitted that there was no consent and certificate of the Director of Public Prosecution (the DPP) to prosecute the offences before the trial court. According to the Counsel, there is no record that the prosecution applied before the trial court for the consent and the certificate of DPP in order to prosecute the matter. He stated that on page 24 up to 30 of the proceedings, it is shown that the consent and certificate were defective, but there is no record to show if the prosecution submitted another consent and certificate before the trial court. He cited the case of **Swalehe Thomas @ Gambashore (supra)** to support his position that lack of consent and certificate vitiates proceedings of the trial court.

Counsel attacked the decision of the trial court to convict the Appellants without existence of the elephant tusks and in abrogation of the procedure of their destruction and procurement of Inventories. Counsel contended that evidence of PW8 who prepared the Inventory Forms, reveal that the elephant tusks were destroyed in 2018 before the Appellants were arraigned in court, contrary to section 101 of the WCA. Counsel referred to the case of **Alex Mwalupulango @ Mamba v. R., Criminal Appeal No. 25 of 2020** where the Court of Appeal referred to the case of **Michael Gabriel v. R., Criminal Appeal No. 240 of 2017** (unreported), to buttress his argument since the procedure of disposition of the elephant tusks were not complied with, the prosecution failed to prove the offence against the 1st Appellant beyond reasonable doubt.

Counsel submitted that the charge sheet and the prosecution evidence vary on the various dates when the Appellants were alleged to have been found in possession of elephant tusks or found to have been hunting elephant tusks. Counsel submitted that the variance casts doubt on the prosecution case, citing the case of **Salum Rashid Chitende v. R., Criminal Appeal No. 204 of 2015**.

Counsel attacked the trial court for its failure to consider the evidence of the 1st Appellant on the dates and years of the alleged commission of the offence to find that the Appellant did not commit the offence. Further, the 1st Appellant informed the trial court to have been tortured and tendered Exhibit D1 to prove that he was tortured during the procurement of caution statement by the police. Counsel submitted that the trial court failed to consider the defence evidence which is a serious error, relying on the case of **Hussein Idd v. R. (1986) TLR 166**.

Counsel submitted that at no point, the 1st Appellant was found to be hunting or killing the animals, or found in possession of the elephant tusks. Counsel concluded that the prosecution failed to prove the case beyond reasonable doubt due to doubts in the prosecution case, Counsel prayed for the appeal to be allowed, reversal of the conviction and setting aside the sentence against the 1st Appellant.

The 2nd Appellant submitted that there are contradictions of evidence of the prosecution witnesses. While the Justice of Peace (PW9) testified to have taken him at Morogoro Police Station, PW7 testified that he took him at

Karatu Police Station, and PW6 who was the Regional Police Commander (RPC), testified not to have seen him at Ngorongoro Police Station.

He submitted that the prosecution did not have consent and certificate of the DPP as he asked them to show him the consent and the certificate but the prosecution did not provide. He complained that the trial magistrate did not find that as anomaly contrary to section 26 of the Economic and Organized Crimes Control Act, referring to the case of **Aloyce Joseph v, R., Criminal Appeal No. 35 of 2020** on page 7 of the decision. He stated further that he requested for certificate of seizure and receipt but the prosecution failed to provide to him.

The 2nd Respondent averred that there are variances in the record of the trial court where on page 5 and 7 of the judgement, it is stated that the arresting officer was PW7, while in the proceedings, PW7 was an investigator, and PW1 was an arresting officer. He contended that the trial magistrate erred in not taking into consideration the variances that weakened the prosecution case. The 2nd Respondent argued that the prosecution testified that he had one scar but when he was checked, it was confirmed that he had many scars.

The 2nd Appellant complained that he was not given tools to write his statement because he knows how to read and write. He stated that he was denied the right to call his relatives and Village Executive Officer and to ask questions. He contended to have been beaten, tortured, and forced to sign the caution statement. He contended further that he was denied food for two days and was later on given upon signing the statement, which according to him was contrary to Article 13(6) (e) of the Constitution of the United Republic of Tanzania, 1977 as amended from time to time.

The 2nd Appellant argued that the prosecution failed to avail before the trial court the elephant tusks, poison and pumpkin which were exhibits pertaining to the commission of the offence. He complained that the first accused who was facing the same charges, was acquitted. He stated that the trial court ought to have acquitted all of accused persons. He contended that he was not seen or found to have been committing the offence and therefore the conviction was wrong, referring to the case of **John Julius Martin, Paulo Samwel v. R., Criminal Case No. 42 of 2022**, where the accused were acquitted in similar circumstances as in the present case. He complained to have been denied witness statements by the prosecution. He also

complained to be kept in custody for 13 days before he was arraigned in court, contrary to law.

The 2nd Appellant contended that the exhibits which were admitted in evidence, were not read in court. He contended further that the case is a fake case and he was fixed. He prayed to the Court to reverse the conviction, set aside the sentence and set him free.

The Counsel for the Respondent was in agreement with the appeal on the aspect of the failure by the prosecution to prove the case beyond reasonable doubt. According to her, the record does not reveal a direct evidence that linked the Appellants and the offences charged. She contended that the evidence relied upon to convict the Appellants were caution statements, Exhibit P4 and P6, and extra-judicial statements, Exhibit P10.

Counsel submitted that there was an error in the admission of the caution statements whereby, the co-accused were not given a chance to cross-examine prosecution witnesses and co-accused during inquiry which offended the right to be heard. Counsel referred to the case of **Charles Kidaha and 2 Others v. R., Criminal Appeal No. 395 of 2018**, where

the Court of Appeal held on page 11 that the learned Judge breached the basic rights of the second and third Appellant when he proceeded to hear and determine the admissibility of the Exhibit P2 without giving an opportunity to the Appellants to cross examine witnesses for both prosecution and the defence.

Counsel submitted that the extra-judicial statement was denied by the 2nd Appellant on the basis that the statement was not his, as if he was his, he would have written the same by himself. She stated that in the circumstances, and as required by section 27 of the Evidence Act, the trial court should have conducted inquiry to determine if the confession was given by the accused at a free will, or the confession statements were his, referring to case of **Nyerere Nyague v. R., Criminal Appeal No. 67 of 2010** on pages 6 to 12 of the decision. She concluded that the trial court erred in admitting the confession statement without conducting an inquiry contrary to law.

The Counsel submitted that apart from the confession statements, the prosecution did not have any other evidence that linked the Appellants with

the offences charged and convicted of. She concluded that the prosecution failed to prove the offence beyond reasonable doubt.

The Counsel argued that the Respondent opposes the Appellants' submissions in several aspects. She stated that it is not true that there was no consent and certificate of the DPP. According to her, the consent and certificate was attached to the charge sheet and on page 29 of the proceedings, the prosecution informed the trial court on the consent and certificate and was read over. She disagreed that the valuation was conducted by unauthorized officer. She contended that PW5 was a Wildlife Officer and therefore section 86(4) of the WCA was complied with.

Counsel disagreed that the offence was not proved on the reasoning that the tusks were not tendered in Court. She stated that the evidence of prosecution was very clear that they found remains of dead elephants and the incidents were rampant in 2012, 2013 and 2018. She contended that the prosecution did not state that they found the Appellants in possession of elephant tusks nor found them to have been hunting the elephants. She stated further that when the elephants were destroyed, the Appellant were

not yet arrested and thus impossible for the destruction to be conducted in the presence of the Appellants.

Counsel disagreed that there was variance between the charge and evidence of the prosecution. She submitted that the charge sheet clearly stated that the Appellants were charged with unlawful hunting of scheduled animals without permit. She contended that to prove the offence, it is not necessary that one should be found hunting or possessing scheduled animals. She stated that the prosecution gave evidence that linked them to the unlawful hunting of scheduled animals. She also disagreed that the trial court did not evaluate evidence as on pages 5, 6 and 7 of the judgement, the evidence was narrated but was not evaluated. She contended that the error is curable by the first appellate court to step into the shoes of the trial court to evaluate and consider the defence evidence before making a decision.

Counsel concluded by praying for reversal of the decision of the trial court and setting the Appellants free.

In his rejoinder, Counsel for the 1st Appellant submitted that the record of the trial court, on page 24 to 30 does not indicate that the trial court recorded the consent and certificate contrary to section 12(3) of 26 of the EOCCA. He

stated that it is a trite of the law that the consent and certificate conferring jurisdiction must be shown in the record of the proceedings of the trial court.

Counsel reiterated the variance between the offence in the charge and evidence of the prosecution. He stated that while PW1 testified to have found the tusks from killed animals, the charge under section 47 of WCA is on unlawful hunting. He stated that on page 1 of the judgement, the Appellants were accused of unlawful possession and killing of three elephants. He contended that the elephant tusks should have been disposed of in the presence of the Appellants after commencement of the trial. He concluded that the prosecution failed to prove the case beyond reasonable doubt.

In rejoinder, 2nd Appellant submitted that the Respondent's submission that it is not necessary for the accused to be found with a trophy is incorrect because there must be proof that the accused person committed the offence. The 2nd Appellant reiterated that the prosecution failed to prove its case beyond reasonable doubt.

Having heard the Parties, it is the duty of the Court to establish whether the trial, conviction and sentence of the Appellant by the trial court was proper

and correct both in law and fact. The submissions of the parties revolves around whether the prosecution managed to prove the case against the Appellants beyond reasonable doubt to warrant conviction of the Appellants.

Before I determine the issue, it is important to first determine the contention over propriety of the admission of the caution statements of the Appellants (Exhibit P4 and P6). It is clear from the record of the trial court that upon objection by the 1st and 2nd Appellants to admissibility of the caution statements, the trial court conducted a trial within a trial as shown in the proceedings of the trial court on pages 58 to 70 and 85 to 91, respectively. However, it is clear from the trial court's proceedings on pages 64, 65, 66, 88, and 89 that although the accused persons were given the right to cross examine prosecution witnesses, the trial court did not accord the Appellants right to cross examine the defence, the co-accused persons. It should be noted that the accused persons were charged with same offences. It was the duty of the trial court to make sure that the accused persons are given right to cross examine each other during trial within trial, that led to admission of the Exhibits P4, and P6.

I find that the trial court breached the basic rights of the Appellants of a fair hearing when it proceeded to hear and determine the admissibility of the Exhibit P4 and P6, without giving an opportunity to the Appellants to cross examine witnesses for the defence. I accordingly nullify the entire trial court proceedings. In holding as I do, I am guided by the decision of the Court of Appeal in the case of **Charles Kidaha and 2 Others (supra)**, on page 11 of the decision where it was held:-

> *"Thus, in this appeal, the learned Judge breached the basic rights of the 2nd and 3rd appellants when he proceeded to hear and determine on the admissibility of Exhibit P2 without giving an opportunity to the 2nd and 3rd appellants to cross-examine the witnesses for both the prosecution and the defence. Consequently, consistent with settled law, we are of the firm view that the decision of the trial court was reached in violation of the 2nd and 3rd appellant's constitutional right to be heard and it cannot be allowed to stand".*

Upon nullifying the trial court proceedings, the way forward is to order a re-trial in case I find the evidence of the prosecution established the offence against the Appellants beyond reasonable doubt.

Regarding the propriety of the consent and the certificate of the DPP in the trial court's proceedings, the Appellants contended that there was no

endorsement and record of the consent and the certificate in the trial court's proceedings. But the Respondent argued that the same were produced and read over as shown on page 29 of the proceedings. I have read the record of proceedings of the trial court. It is true that on 26/11/2020, as shown on page 27 of the proceedings, the prosecution informed the trial court that the certificate was taken back to the DPP for rectification. It is in the record of the proceedings of the trial court on page 29 that on 21/11/2021, the prosecution informed the court that the consent and the certificate are ready and in possession of them. According to the record, the consent and the certificate were endorsed by the trial court on the same date.

Since the consent and the certificate were received by the trial court and are reflected in the proceedings thereof, I find that the same were properly filed and endorsed by the Court. There was a proper consent of the DPP to commence the prosecution and a certificate that conferred jurisdiction on the trial court to try the offence the Appellants were charged. The Appellant's allegation that there is no record to show that the consent and certificate were filed in court after the Respondent's prayer for rectification, unfounded. The decision of this Court in the case of **Swalehe Thomas @ Gambashore (supra)** referred by the Counsel for the 1st Appellant supports my position

above. The decision in **Aloyce Joseph (supra)** is distinguishable with the present case as in the said case, the consent and certificate of the DPP were attached to the charge sheet but were neither endorsed nor reflected in the trial court's proceedings. Based on above findings, the Appellant's allegation that the trial court lacked jurisdiction to try the offence they were convicted with, due to lack of endorsement or recording of the consent and the certificate, lacks merit.

Regarding the variance between the charge and the evidence of prosecution, I agree with the learned State Attorney that the offence under the charging provision relate to anyone who hunts, kills or wounds any specified animal or scheduled animal without permit. It does not require that the person should be found hunting or killing scheduled animals. The prosecution evidence was to the effect that they found dead elephants and upon investigation, they managed to obtain information that the Appellants were involved in the hunting and killing of the elephants. The prosecution relied on the confession statements of the Appellants who admitted to have hunted and killed the elephants.

The argument by the 2nd Appellant that the exhibits were not read in the trial court is unfounded. I have read the proceedings of the trial court which clearly establishes that every admitted exhibit was read before the trial court in the presence of the 2nd Appellant.

The 2nd Appellant's complaint on a mix up between PW1 and PW7 in the judgement of the trial court; the prosecution evidence of one scar while he had many scars; the contradictions of the prosecution witnesses on the names of the police stations that the 2nd Appellant was taken; and failure by the prosecution to give him all witness statements; are minor irregularities that do not go to the root of the case.

The mix up was done by the trial court in composing judgement but does not change the evidence of PW1 and PW7 in record of the proceedings. The variance in testimony of one scar and many scars does not affect the evidence that sought to prove unlawful hunting of scheduled animals, so as the variance on the names of the police station. The alleged failure to avail the 2nd Appellant with all witness statements is not fatal as the 2nd Appellant was present in court while the witnesses were testifying and was accorded the right to cross examine them and to give his defence. I find that the minor

irregularities did not cause injustice to 2nd Appellant in the proceedings before the trial court.

In respect of the 1st and 2nd Appellant's extra-judicial statements which were admitted collectively as Exhibit P10, it is clear from pages 101, 102, 103, 111, 112, 113 and 114, of the trial court's proceedings, that the trial court failed to conduct inquiry despite objections from the Appellants to the admissibility of the statements. The trial magistrate admitted the statements without conducting an inquiry. Under section 27 (2) of Evidence Act, the law imposes a burden to the prosecution to prove that any confession made by an accused person was voluntarily made by him. In the case of **Nyerere Nyague (supra)**, the Court of Appeal held in the last paragraph of page 6 Through to page 7 of the decision that:-

> *"Objections to the admissibility of confessional statements may be taken on two grounds. First, under s. 27 of the Evidence Act that, it was not made voluntarily or not made at all. Second, under section 169 of the Criminal Procedure Act: that it was taken in violation of the provisions of the CPA, such as section 50, 51 etc. where objection is taken under the Evidence Act, the trial court, has to conduct a trial within trial (in a trial with assessors) or an inquiry (in a subordinate*

court to determine its admissibility). There the trial court only determines if at all, or whether he made it voluntarily."

I find that Exhibit P10 were not procedurally admitted in evidence as, indeed, the record of appeal bears it out that after the objection raised by the appellant on its admissibility, trial within a trial was not conducted to determine its voluntariness. Guided by the decisions of the Court of Appeal in **Salum Ally Salum v. R., Criminal Appeal No. 9 of 2021** (unreported) on page 13 through to 14, and **Nelson George @ Mandela and Five Others v. R., Criminal Appeal No. 31, 93 and 94 of 2010** (unreported), I out rightly expunge Exhibit P10 from the record.

In respect of the complaint regarding failure by the prosecution to produce the elephant (the government trophy), the prosecution relied upon Exhibit P7, P8 and P9 which are inventory forms evidencing destruction of the perishable dead elephants. I have read the proceedings and found that the order for destruction were made on 17/02/2012, 06/05/2013 and 27/03/2018 before the 1st and 2nd Appellants were arrested on 15/12/2018 and 20/12/2018, respectively. The procurement of the inventories and subsequent destruction of the elephants were done contrary to the

requirement of paragraph 25 of Police General Orders (PGO) No. 229 (INVESTIGATION - EXHIBITS) which provides that:-

'25. Perishable exhibits which cannot easily be preserved until the case is heard, shall be brought before the Magistrate, together with the prisoner if any, so that the Magistrate may note the exhibits and order immediate disposal. Where possible, such exhibits should be photographed before disposal.'

In the case of **Mohamed Juma Mpakama (supra)**, the Court emphasized compliance of paragraph 25 of Police General Orders (PGO) No. 229 (INVESTIGATION - EXHIBITS) and held on page 23 that:

> *"..... This paragraph 25 in addition emphasizes the mandatory right of an accused (if he is in custody or out on police bail) to be present before the Magistrate and be heard.' ..... In the instant appeal, the appellant was not taken before the primary court magistrate and be heard before the magistrate issued the disposal order (exhibit PE3). While the police investigator, Detective Corporal Saimon (PW4), was fully entitled to seek the disposal order from the primary court magistrate, the resulting Inventory Form (exhibit PE3) cannot be proved against the appellant because he was not given the opportunity to be heard by the primary court Magistrate.* ***In addition, no photographs of the perishable Government trophies were taken as directed by the PG. Exhibits PE3*** *cannot be relied on to prove that the*

appellant was found in unlawful possession of Government trophies mentioned in the charge sheet".

I noted from the evidence before the trial court that the accused persons were arrested after the trophies were destroyed due to the circumstances of the case that the offences of killing elephants were committed around the years 2012, 2013 and 2018. However, despite the fact that the Appellants were not involved in the application and order of destruction of the trophies as they were not arrested at the time of destruction of the trophies, the prosecution ought to have at least photographed the trophies and tender the same before the court during hearing. The above anomaly is a fatal irregularity tantamount to the prosecution's failure to adduce evidence on the existence of the trophies alleged to have linked the Appellants with commission of the offence. I therefore expunge Exhibit P7, P8 and P9 from the record for the improper procuring of the Inventories.

It is clear from the above findings that the prosecution evidence that linked the Appellants with the offence committed are Exhibits P4, P6, P7, P8, P9 and P10. The oral evidence of the Prosecution's witnesses heavily relied upon Exhibits P4, P6, P7, P8, P9 and P10. The trial court's conviction of the offence of unlawful hunting of scheduled animals without permit was also based on

the caution statements (Exhibits P4 and P6), extra-judicial statements (Exhibit P10), and existence of the trophies through the Inventories (Exhibit P7, P8, and P9). On the basis of my findings that Exhibits P4, P6, P7, P8, P9, and P10 were improperly admitted by the trial court, there is nothing remaining in the record to establish that the Appellants committed the offence charged.

In the circumstance, I cannot order retrial as the evidence on record does not prove the offence charged against the Appellants. I hereby quash the trial court's conviction against the Appellants, set aside the sentence and order the Appellants' immediate release from prison, unless they are held therein for any other lawful cause.

It is so ordered.

Right of Appeal fully explained.

DATED at **ARUSHA** this 14th of November 2023.

H. A. KINYAKA

JUDGE