IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SONGEA SUB-REGISTRY

AT SONGEA

CRIMINAL APPEAL NO. 55 OF 2023

(Originating from Economic Case No. 15 of 2022, Tunduru District Court at Tunduru)

SAID ALLY @ MANYANG'ANYA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGEMENT

Dated: 30th October and 24th November, 2023

KARAYEMAHA, J.

Said Ally @ Manyang'anya, the appellant herein, was arraigned before Tunduru District Court at Tunduru for the offence of unlawful possession of Government Trophy contrary to section 86(1)(2)(c)(ii) of the Wildlife Conservation Act, Act No. 5 of 2009, read together with paragraph 14 of the first scheduled to, and sections 57(1), 60(2) of the Economic and Organised Crime Control Act [Cap 200 Revised Edition 2022].

Facts of the case are pretty straight forward. They are to the effect that on 24th July, 2022 Samson Herman (PW7) a park ranger while on special task force at Tunduru with his co-park rangers, was tipped that the appellant was at Magingo Guest house with elephant tusks.

Following that information, he went to Tunduru police station to seek for assistance in order to have the appellant arrested. He later left for Magingo Guest house in a company of Inspector Zengo (PW1) and D/CPL Robert. Prior going to Magingo Guest house, they found Hashimu Likambale (PW4) the owner of Mango guest house and Fatuma Mleane (PW5) the Muungano Village Executive Officer (VEO), the independent witnesses. After gathering all the needed and important witnesses, they proceeded to the scene of crime. They entered in room number 3 where the appellant was and introduced themselves. On being searched, the appellant was allegedly found with 15 pieces of elephant tusks which were wrapped in a white sulphate bag. Further interrogation revealed that the appellant did not have a permit to possess government trophies. Having seized them, PW1 marked them X, X_1 to X_{14}. The certificate of seizure was filled in by PW1 and signed by the appellant and other witnesses. Thereafter, the accused and exhibits were conveyed to police station. At police, Dunia Shauri Almasi, PW6, a wildlife officer stationed at Tunduru District Council in a Natural Resource Department identified and conducted the valuation. According to him, the seized 15 elephant tusks weighed 16.1kgs and valued at 15,000 USD. PW6 tendered the valuation report he prepared and was admitted as exhibit P4. After investigation and being satisfied that the

available evidence connected the appellant with the commission of the offence, G. 3589 D/CPL Mohamed charged the appellant and arraigned before the trial court.

In his defence testimony, the appellant denied any involvement in the commission of the offence, arguing that he was arrested at the bus stand and told that he was in unlawful possession of elephant tusks. The appellant further contended that he was not in Magingo guest house and was arrested on 22nd July, 2022.

At the end of the trial proceedings in which seven (7) prosecution witnesses testified, the trial court was convinced that the guilt of the appellant had been established. It convicted the appellant and sentenced him to serve twenty (20) years imprisonment.

Utterly dissatisfied with the decision that convicted and sentenced him, the appellant took an appeal to this Court. He has raised four (4) grounds of appeal, reproduced in verbatim as follows:

1. *The trial court erred in law and facts to convict the appellant basing on the charge sheet which was filed out of time and the appellant was interrogated out of time.*
2. *The trial court erred in law and facts to convict the appellant without considering that, the prosecution witnesses failed to identify the alleged elephant tusks (exhibit).*

3. *The trial court erred in law and facts to convict the appellant without considering defence evidence.*
4. *The trial court erred in law and facts for convicting the appellant while the trial was conducted in a chamber where the place was not enough which hinder the appellant to cross examine the prosecution witnesses accordingly.*

At the hearing of this appeal the appellant appeared in person fending for himself while Mr. Gaston Mapunda and Ms. Lucia Bukuku, learned State Attorneys appeared for the respondent, Republic.

Upon taking the floor, the appellant preferred a general submission to all grounds of appeal. He commenced by denying the name appearing in the charge sheet contending that it is not his. He also, asserted that he is the resident of Machemba village the fact which was supported by VEO and Village Chairman, but the prosecution failed to call the witness to proof that fact. The appellant insisted not to have been found in possession of the Government trophies and casted blames on the trial court stating that it failed do justice. Finally, he prayed to be set at liberty.

Mr. Mapunda's submission began with a preambular statement expressing his support of the trial court's decision that convicted and

sentenced the appellant. He then responded to each ground as presented.

Starting with the first ground of appeal, Mr. Mapunda dissected it into two limbs; **firstly,** a charge sheet being filed out of time and **secondly,** the interrogation was conducted out of time. The learned counsel submitted that the complaint that the charge sheet was filed out of time was not raised during the trial. He, therefore, held the view that the appellant is estopped from raising it at the appeal stage. On this position he referred this court to the unreported case of **Athuman Hassan v. Republic,** Criminal Appeal No. 292 of 2017, CAT-Arusha at page 9.

Mr. Mapunda went further and cited the provision of section 131A(1) of the Criminal Procedure Act [Cap 20 R.E. 2022] (hereinafter the CPA), which provides for an exception where the case can be filed in court even when the investigation is incomplete especially where the suspect is facing a serious offence including unlawful possession of Government trophies, the offence laid on the appellant's door.

On whether the appellant was interrogated late, Mr. Mapunda submitted firmly that it was not supposed to be raised at this stage too.

He challenged the appellant's allegation that the cautioned statement is not part of the evidence.

With respect to the 2nd ground of appeal, Mr. Mapunda submitted citing page 29 of the typed proceedings of the trial court that admission of exhibit complied with the procedure. He then explained that PW1 identified the exhibits, to wit, 15 elephant tusks he earlier marked X, X_1 – X_{14}, showed them to the trial court to be the ones he seized. The learned counsel took refuge to the Judiciary Judiciary Exhibit Management Guideline of September, 2020 at page 6 to underscore his views.

Untiredly, Mr. Mapunda argued that the appellant did not object the exhibits admissibility hence disabled to raise the same at this stage. To buttresses his view, he cited the case of **Vicent Ilomo v. Republic**, Criminal Appeal No. 337 of 2017 in which the Court of Appeal relied on its earlier decision in **Emmanuel Lohay and Ndagane Yotasha v. Republic**, Criminal Appeal No. 278 of 2010. Mr. Mapunda was thus convinced that the appellant's failure to object the admissibility of the exhibit is tantamount to accepting that he was arrested with them. It was his firm argument that raising an objection at this stage is an afterthought.

Submitting in respect of the third ground of appeal, Mr. Mapunda attacked the appellant's assertion on several angles. He said that **first,** that the appellant did not contest his personal particulars contained in the charge sheet before it was read over to him which indicated that his name was Said Ally Manyang'anyi. **Second,** that the appellant did not dispute that name during the preliminary hearing. In asserting further his submission, the learned State Attorney, contended that by admitting his name, the prosecution had no duty of proving it. Asking this court to dismiss this ground, Mr. Mapunda submitted that this ground was raised at the appeal stage hence unworthy of consideration. He put reliance in the case of **Athuman Hassan** (supra).

Responding to the last ground of appeal in which the trial court was faulted for conducting proceedings in chamber court, Mr. Mapunda admitted that cases should be heard in open court. He, however, argued, **first,** that if the appellant was uncomfortable, he ought to have complained during the trial. **Second,** he argued citing page 31 and 32 that he ably cross-examined PW1 and PW2 and capably defended himself. In addition, he argued that the appellant was not prejudiced by conducting the trial in chambers.

Having submitted as such he prayed this appeal be dismissed.

In his concise rejoinder, the appellant constantly disowned the name of Said Ally Said. That his cautioned statement was tendered and admitted before the trial court though it was recorded out of time. He contended further that, after being arrested things was shown to him and he was accepting as he did not know how to read. That he was arrested on 22nd July, 2022 and the investigation was completed on 30th May, 2023. Even the charge sheet was substituted three times. The appellant alleged that the trial magistrate gave him severe punishment due to the hatred he had against him.

The parties' contending submissions bring about one grand question. This is as to whether this appeal carries with any merits that justify the appellant's prayer for its allowance.

Before embarking on the determination of the merit of this appeal, I wish to point out at the outset that this being the first appeal it is in form of rehearing whereby this court has a duty to re-evaluate the evidence of the trial court and come to its own findings. This stance was pronounced in the case of **Pendo Fulgence Nkwende v. Dr. Wahida Shangali**, Civil Appeal No. 368 of 2020, CAT-DSM at page 15, and the case of **Kaimu Said v. Republic**, Criminal Appeal No 391 of 2019, to

mention but a few. In the former case the court of appeal had this to say:

> *"We understand that it is settled law that a first appeal is in the form of a re-hearing as such the first appeal court has a duty to re-evaluate the entire evidence in an objective manner and arrive at its own finding of fact"*

In the light of the above principle, let me commence by addressing the contention by Mr. Mapunda that complaints in the 1st and 4th grounds of appeal were not raised during the trial hence cannot be raised at the appeal stage. Admittedly, going through the trial court's record it is categorical that the appellant neither complained during the trial that the charge sheet was filed out of time nor that interrogation was made out of time. As matters stand in the record, the complaint that interrogation was done out of time is remedied by non-introduction of the cautioned statement in the evidence. Equally, the appellant did not complain before the trial court that by conducting the proceedings in the chamber, he failed to cross-examine the prosecution witnesses and defend himself hence prejudiced. In law these complaints cannot be entertained at this stage because the trial court did not make any findings on them.

One of the principles established in the case of **Joel Mwambangako v. Republic** (Criminal Appeal No. 516 of 2017) [2020] TZCA 1880 (27 November 2020) is that the court (appellate court) will generally not look at issues or matters that were neither raised nor decided by the trial court unless they are pure matters of law. As much as the complaint by the appellant is not a point of but a factual issue, this court is unmoved.

Apart from this court lacking requisite jurisdiction, it is ridiculous to condemn the trial Magistrate on issues that were not brought to his attention. With respect, therefore, I agree with Mr. Mapunda that the appellant's complaints in grounds one and four of the appeal are an afterthought and this court is curtailed to consider and determine them.

The second appellant's complaint is that the admission of the exhibits perforated the procedures. Expectedly, being a layman, the appellant did not elaborate. Nevertheless after going through the record, I agree with Mr. Mapunda that this complaint is unmeritorious. I am supported by the trial court's proceedings on this position because page 29 reveals what transpired when PW1 was testifying. As correctly submitted by Mapunda, prior tendering a bale of 15 pieces of elephant tusks exhibits (X, X_1 to X_{14}), PW1 identified and described them.

Thereafter he was shown the 15 elephant tusks and prayed to tender them as exhibits. What PW1 did corresponds to what the Court of Appeal emphasized in the case of **Huang Qin and Another v. Republic** (Criminal Appeal No. 173 of 2018) [2021] TZCA 210 (25 May 2021) TanzLII at page 23, while borrowing the principle from the case of **Ally Zuberi Mabukusela v. Republic,** Criminal Appeal No. 242 of 2011 that:

> *"The claimant should make a description of special marks on an item before it is shown to him and allowed to be tendered as an exhibit That way an identification of the item can be established to the court, beyond reasonable doubt"*

It is the finding of this court that the foundation laid down by PW1 before tendering exhibit (elephant tusks) was enough and shedding a light that he was tendering what he seized. In addition, the appellant herein did not abject the admissibility of the exhibit intimating that he had no any qualms with it. For that reason, he is stopped by the law to challenge the same at this stage.

The third ground of appeal raises the grievance that the appellant told the trial court during defence that his names was Athumani Ally @ Manyang'anya but that was not considered even if the prosecution did not object. The general principle is that failure by the court to consider

the defence case is fatal and usually leads to a conviction being quashed. See the decision in the case of **Jose Mwalongo v. Republic** (Criminal Appeal 217 of 2018) [2020] TZCA 1735 (19 August 2020) TanzLII.

I have carefully examined the trial court's typed proceedings especially at page 60. What is apparent is that when the appellant was cross-examined by a public prosecutor, he alleged that his name is Athumani Mohamed Manyang'anya and not Said Ally Said @ Manyang'anya as it appears in the charge sheet. At page 24 of the trial court's typed proceedings indicates that when conducting the preliminary hearing, the trial court drafted the undisputed facts. I quote for ready made reference:

> ***"Undisputed facts***
>
> ***Personal particular of accused person***
>
> - *That the accused person were arrested and sent to police Tunduru*
> - *That on 1/8/2022 the accused were brought before this court*
>
> ***Accused**: I agreed all undisputed facts as listed herein above*
>
> ***Accused: Signed***
>
> ***Public prosecutor: Signed***
>
> ***SGD: SENIOR RESIDENT MAGISTRATE***
>
> ***30/5/2023"***

From the above quoted excerpt, indisputably, the appellant's particulars were spelt out and had no dispute on them. Moreso, the public prosecutor referred to the appellant's particulars during the

preliminary hearing which were contained in the charge sheet. He was recorded as follows:

"Personal particulars as per charge sheet"

Notwithstanding the afore argument, the appellant before defending himself mentioned his name to be Said Ally Said @ Manyang'anya and throughout the whole defence evidence in chief. The denial surfaced during cross-examination by the public prosecutor. It was at that time when he claimed to be Athumani Ally Manyang'anya. I have wholeheartedly gone through the record to see if there is proof but found none. I expected the appellant to at least place before the trial court a National Identity card, voter registration card or any relevant document proving his names.

Admittedly, the appellant's allegation was an afterthought and cannot be entertained by this court. I am bound to respect the trial court's record. It is now a settled principle that the record of the court is accurate and represents what happened to the court. On this position I am fortified by the decision in the case of **Halfan Sudi v. Abieza Chichili** [1998] TLR 527, where it was observed as thus;

(i) a court record is a serious document; it should not be lightly impeached;

(ii)is always a presumption that a court record accurately represents what happened"

Guided by the above authority and the record I will be the least to believe the appellant on the issue of names. Therefore, the appellant's grumble is unsupported.

In a nut shell, and in view of the discussion, I am destined to a conclusion that the appellant's conviction was grounded on strong and reliable prosecution evidence. Consequently, I find the appeal devoid of merit. It is hereby accordingly dismissed and uphold the conviction and sentence imposed by the trial court.

It is so ordered.

DATED at **SONGEA** this 24th day of November, 2023.

J.M. KARAYEMAHA
JUDGE