IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)

AT ARUSHA

CRIMINAL APPEAL NO. 83 OF 2023

(Arising from the District Court of Arusha at Arusha Economic Case No. 5 of 2022

SITA NYAUDIMA..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

24/10/2023 & 11/12/2023

GWAE, J

This is an appeal by the appellant; Sita Nyaudima convicted by Arusha District Court of Arusha (trial court) of the offence termed being found in unlawful possession of the Government Trophy to wit; 10 pieces of Elephant Tusks on 12th July 2023.

It was the accusations of the prosecution that on 6th June 2022 at Burka area within the City, District and Region of Arusha, the appellant was found in possession of ten (10) pieces of elephant tusks, which are equivalent to two killed Elephants valued at Tshs. 70,350,000/=, the property of the United Republic of Tanzania. It was the prosecution evidence that, a wildlife officer, PW1 received information from informer that, there were two persons in possession of the said trophy. PW1 and

his colleagues worked on such information by rushing to burka area where upon their arrival, they saw two people running. However, they managed to arrest the appellant and another person was able to escape. The appellant's bag was searched in the presence of independent witness (PW4), ten (10) pieces of elephant tusks (PE2) were impounded from the appellant's bag and certificate of search (PE3) was prepared, filled and signed. Moreover, the wildlife officer, PW3 prepared a valuation report (PE1)

On the other hand, the appellant maintained denial to the offence against him. He further contended that he was initially charged with the same offence via Economic Case No. 5 of 2022 where he was discharged on 29th September 2022 under section 191 (1) of CPA. The appellant also tendered three (3) exhibits namely; Herbal Registration Certificate, a former charge sheet and a discharge order, which were admitted as DE1, DE2 and DE3 respectively.

Aggrieved by the trial court conviction and the imposed sentence of twenty years imprisonment. The appellant is now before this court by way of an appeal. He has advanced four (4) grounds of appeal, namely;

1. That, the trial court erred in law and facts when convicted and sentenced the appellant on the case which was not proved beyond reasonable doubt against the appellant

2. That, the trial court erred in law and facts when convicted and sentenced the appellant without explaining to the appellant the reason why she took over and proceeded with the case
3. That, the trial court erred in law and facts when convicted and sentenced the appellant basing on search order and seizure certificate which was improperly conducted and procured
4. That, the trial court erred in law and facts when erroneously convicted and sentenced the appellant on the proceedings, which violates the law.

Before the court, Mr. Fridolin Bwemelo, the learned advocate represented the appellant as was the case in the trial court whilst Ms. Alice Mtenga, the learned state attorney represented the Republic. The appeal was orally argued.

Arguing the appeal, the appellant's counsel pooled the 1st and 3rd ground together, equally the 2nd and 4th ground of appeal. Starting with the 2nd and 4th ground on procedural irregularity. The counsel challenged the trial court's decision by stating that the same is a nullity for its failure to give reason for the re-assignment. Hence, a violation of the appellant's statutory rights as provided under section 214 (1) of CPA, 2019. He supported his argument by citing the case of **Hamis and 3 others vs. Republic**, Criminal Appeal No. 521 of 2020 (unreported), Court of Appeal

sitting at Shinyanga at page 14 where the requirement to inform an accused of the change of a presiding magistrate was stressed. He added that, the appellant through his advocate was not given an opportunity to complete his cross-examination to PW5. Hence, a denial of a fair hearing and violation of provisions of Article 13 of the United Republic of Tanzania of Constitution, 1977.

Mr. Bwemelo also argued that there was an abuse of Section 91 (3) of CPA, since the appellant was discharged under section 91 of the CPA, subsequently arrested, charged and brought to court but the trial did not take off immediately.

Regarding the 1st and 3rd ground of appeal, the learned counsel for the appellant argued that, the case was not proved beyond reasonable doubt due to a failure by the prosecution to tender a bag alleged to have carried ten pieces of elephant tusks, which is his opinion, was a short fall on the part of prosecution side.

Equally, on complained discrepancies of the prosecution evidence, PW2' testimony and exhibits especially PW2 who testified that he labeled the exhibits at the scene of crime, Burka area as opposed to the testimony of PW1 at page 4, which is to the effect that, the same were labeled at police station. He cited the case of **Atanas @ Makasi and another vs. Republic**, Criminal Appeal No. 168 of 2017 (unreported-CAT) at page 8

to 9 where it was stressed that the filling of certificate of seizure ought to be done at the scene of crime and not in any other place. He also cited the case of **Dickson Elia vs. Nsamba**, Criminal Appeal No. 92 of 2007 (unreported-CAT).

Mr. Bwemelo also complained on the failure to give the appellant a receipt as provided under section 38 (3) of CPA as rightly admitted by PW2 when cross-examined. He strengthened his submission by referring to the case of **Kibundala Mgaya vs. Republic**, Criminal Appeal 180 of 2020 (Unreported-CAT).

The appellant's counsel further challenged the credibility of PW5, an independent witness to the search on whether he was present or not at the scene of crime since they were not served with his statement allegedly made at Police despite the fact that, the trial court issued the order to that effect leading to a perceived hidden agendum.

Finally, the counsel argued that, there a lot of doubts as to the guilt of the appellant in relation to the offence he stood charged with. He asked the court to adhere to the principle enunciated in **Zacharia Japhet @ Jumanne vs. Republic**, Criminal Appeal No. 37 of 2003 (unreported-CAT) at page 18 of the judgment. On a way forward in the event the court also finds the irregularities are fatal he prayed the matter not to be retried

since doing so, will tantamount to filling gaps by the prosecution or an order of retrial.

Opposing the appeal, Ms. Mtenga argued that admitted that, there was violation of section 214 (1) of the CPA was. However, she argued that, non-compliance with section 214 of CPA did not prejudice the appellant since the very advocate was the one who was representing the appellant. She lubricated her argument by citing the case of **Charles vs. Republic**, Criminal Appeal No. 79 of 2019 (unreported) where the Court of Appeal stated that, non-compliance with provisions of section 214 of the CPA is curable. Similarly, she stated that the right of informing the accused person of the right of re- summoning is entirely at the discretion of the Court. She supported her submission by the case of **Hamis Abdallah vs. Republic**, Criminal Appeal 423 of 2018 (unreported) and at page 30 of **Huang Quim and another vs. Republic**, Criminal Appeal No. 2018 (unreported)

The learned counsel for the republic also responded to the applicant's the complaint that, the appellant was not afforded an opportunity to complete his cross-examination as complained by the appellant and as depicted at page 41 of the proceedings when the trial was adjourned. However, she strongly stated that, the appellant's advocate who was also before the court was expected to remind the court if he was to proceed

cross-examining the witness. According to the learned state attorney, the omission constitutes the blame worth for the trial court, defence and prosecution. She thus prayed for an order of the court of re-trial from when the defence lacked an opportunity to cross-examine her witness, PW5.

As to the complaint that, the matter was withdrawn and re-opened and according to the record of the trial court, the investigation was incomplete since the consent was not obtained. Hence, according to her it was not possible to furnish information as to completeness of the investigation and that very day since there was a requirement to secure consent adding that, there was lapse of only two months.

The learned state attorney further conceded to the complaints on the irregularities of failure to bring the bag thought stated that the same is not fatal. She invited the court to make a reference to the case of **Issa Hassani Uki vs. the Republic**, Criminal Appeal No. 127 of 2017, (unreported-CAT). She further admitted the complaint that, there is procedural error pertaining the statement of PW5 since there was an order by the trial court to the effect that the accused now appellant would be given PW5's statement.

She maintained praying for an order of trial denevo adding that the same is not for the purpose of fillings the gaps in the prosecution evidence but to ensure that, the justice is occasioned for both sides

In his brief rejoinder, the learned advocate for the appellant stated that cases cited by he learned counsel are distinguishable to the facts of the case at hand. He thus reiterated that, Kapama's case is relevant and applicable in the present matter. He also stated the defence was not in position to control the proceedings; both sides overlooked the absence of the PW5 on the following day.

Starting with the complained irregularity namely; failure to give the appellant an opportunity to complete cross-examining the witness PW5 and his statement. Examining the trial court's records, I have noted that, on 12th April 2023 the trial court (Meena, SRM, Esq) the hearing could not proceed since the prosecutor (Ms. Getrude) notified the trial court that he was not feeling well.

On the other hand, the appellant's counsel had no objection save that, he requested the leave to proceed with cross-examination on the following hearing date. On 12th June 2023, another prosecutor (Kagirwa-SA) appeared before another magistrate (J. Edward, SRM) and Mr. Fridolin Bwemelo was also present as usual. The learned prosecutor then prayed for closure of the prosecution case. In that premises, I find the omission

to avail the appellant an opportunity to complete his cross-examination to PW5 amounts to a violation of a right to a fair trial as dictated by provisions of Article 13 of the URTC.

Right to be heard goes with the right to satisfactorily cross-examine a witness in a witness box in order to test his veracity of his testimony. In our present case as earlier, the appellant's counsel did not complete cross-examination to PW5 and he was granted leave to proceed with the same on the following but that was not vividly done. Nevertheless, I have noted there are contributory inactions or gross negligences, which might be associated with the following reasons;

1. There was a change of the trial magistrate (Meena-SRM to J. Edward-SRM)
2. There was also simultaneous change of the prosecutor, from Getrude-SA to Kagirwa-SA
3. Lapse of time since the PW5's testimony was recorded (11/4/2023 to 12/062024)
4. Failure by the appellant's counsel to properly guide the trial court since he was continuous present during the trial court's sessions unlike the trial Resident Magistrate and Prosecutor. Mr. Bwemelo as an officer of the court concerned in the criminal administration of justice, a legal practitioner had an

overriding duty to the court to the standards of his profession and to the public, which may and often does lead to conflict with his client wishes or with what his client thinks are his personal interests (See the decision of this court in **Lupiana Fredrick Timoth Kaduma** (personal legal representative of **Timoth Kaguma vs. Samwel Massawe and another,** Misc. Civil Application No. 183 of 2021 (unreported-HC and **Rondel vs. Worslew** (1969) IAC 191,277)

5. Absence of the prosecution witness, PW5 on the date when the matter was set for hearing continuation of his testimony while he was still under oath (See **Bakari Jumanne @ Chilagalawe vs. Republic**, Criminal Appeal No. 197 of 2018 (unreported)

That being the noted anomaly, next question to be asked is, what will be an appropriate order between trial denovo and allowing the appeal. It is the stand of the appellant's counsel that by making an order of re-trial of the case the prosecution shall have an opportunity to fill in the gaps whilst it is the prayer by Ms. Mtenga that the matter be retried. I am aware of the danger of an order of trial denovo as correctly argued by the learned counsel for the appellant that is likelihood to fill the gaps. This

position was stressed in **Matheo Ngua and three Others vs. D.P.P**, Criminal Appeal No. 452 of 2017 (Unreported) Court of Appeal sitting at Mbeya delivered its decision on 3rd April 2020 where the appellants were found guilty of unlawful possession of Government Trophy and sentenced to 20 years jail each and a fine of Tshs. 5,000,000/=, it was held;

> *"Once again, we share Mr. Mtenga's views, because the defects in the tendering of the certificate of seizure and the omission to have the appellants participate in the exercise of destroying the meat were grave. While an order of retrial may give the opportunity to rectify some of the defects or fill the gaps which we should guard against, the other defect cannot be rectified and that renders.....prosecution case weak. Nothing for instance can be done about omission to have the appellant take part or be present at the time of destroying the meat. So an order of re-trial will be an exercise in the futility."*

In our present criminal matter, the situation of the present matter is distinguishable from the former case. I am holding that view simply because, the right to be heard is fundamental one and more important, the interest of both parties are to be equally protected. In other words, interests of both parties in judicial proceedings must be balanced. Therefore, with due respect with Mr. Bwemelo, the retrial would not be

suitable if the appellant was not represented since he would be more prejudiced taking into account that he is layperson.

In our present matter, the proceedings are illegal or defective since there is a clear violation of law and I am satisfied that, an order directing retrial serves interest of this particular case. In that premises and in my considered view, trial denovo is an appropriate order to make and it is desirable in the circumstances. I thus subscribe to **Manji vs. Republic** (1966) EA 343 where the factors to be considered in deciding whether or not to order a retrial were thus,

> *"In general, a retrial may be ordered only when the original trial was illegal or defective, it will not be ordered where the conviction is set aside because of insufficient of evidence or for the purpose of enabling the prosecution to fill in the gaps in its evidence at the first trial ...each case must depend on its own facts and in order for the retrial should only be made where the interest of justice requires."*

Having discussed as herein, I do not find any reason to proceed determining other grounds of appeal as doing so may likely preempt the decision of the trial court.

Consequently, the appeal is allowed to the above extent, the matter to be tried denovo by a different Resident Magistrate with a competent

jurisdiction. Should the appellant be found guilty, a custodial sentence shall start to run from the date of illegal sentence that is 12th July 2023

It is so ordered

DATED at **DAR ES SALAAM** this 11th December 2023

SGD: M. R. GWAE
JUDGE