IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TANGA SUB-REGISTRY

AT TANGA

CONSOLIDATED CRIMINAL APPEALS NO. 42 & 43 OF 2023

HASSAN SHAURI KASHAMBA ..... 1ST APPELLANT

ELIUDI ANDREW MJEMA ..... 2ND APPELLANT

GODSON ELIKUNDA KITAU ..... 3RD APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Arising from the judgment of the District Court of Lushoto at Lushoto in Economic Case No. 5 of 2022)

JUDGMENT

15/02/2024 & 21/03/2024

NDESAMBURO, J.:

The appellants, namely Hassan Shauri Kashamba (1st appellant), Eliud Andrew Mjema (2nd appellant), and Godson Elikunda Kitau (3rd appellant) were brought before the Lushoto District Court charged with three counts as listed below:

On the agreed day, the second appellant failed to appear. However, they met the following day, accompanied by an individual introduced as "old Hassan," who PW2 later on identified as the first appellant. The appellants requested cash for the trophies from PW2 who refused, instead, PW2 appointed Samson Hassan Herman, a park range, PW3 to accompany the two appellants to the place where the tusks were hidden for verification. They then left, and PW3 confirmed the tusks presence, weighing 24 kilograms. PW2 instructed the trio to return with the tusks to finalize the transaction. Shortly after, the trio, accompanied by a third appellant carrying a sulfate bag, returned. Upon inspection, five elephant tusks were found in the bag, leading to the revelation that they were police officers and not buyers. Appellants were subsequently arrested, and the tusks were seized and labelled. In addition to the tusks, two motorcycles, and three mobile phones, Exhibit P2 were also seized from the appellants. A certificate of seizure, Exhibit P6, was prepared and admitted into evidence, witnessed by PW3. The appellants and together with the tusks were transferred to Lushoto Police Station. D/CPL Yohana, the exhibit keeper who testified as

i. *Leading Organized crime, contrary to paragraph 4(1) of the first schedule, and sections 57(1) and 60(2) of the Economic and Organized Crime Control Act, Cap 200 R.E 2019.*

ii. *Unlawful dealing of Government trophy contrary to section 84(1) of the Wildlife Conservation Act, No. 5 of 2009, read together with paragraph 14 of the First Schedule and Section 57(1) and 60(2) of the Economic and Organized Crime Control Act, Cap 200 R.E 2019 and*

iii. *Unlawful possession of Government trophy contrary to Section 86(1) and (2)(c) (iii) of the Wildlife Conservation Act, No. 5 of 2009 read together with paragraph 14 of the First Schedule and Section 57(1) and 60(2) of the Economic and Organized Crime Control Act, Cap 200 R.E 2019.*

Ultimately, the prosecution successfully substantiated its case before the trial court, leading to the conviction of all appellants for the second and third counts. Consequently, each appellant received a sentence of 20 years in prison for each offence, with the directive that the sentences be served concurrently. The Government trophies which were found in possession of the appellants, two motorcycles which were being used by the second and third

appellant when apprehended and three mobile phones were forfeited to the Government.

To prove the case prosecution managed to summon a total number of 8 witnesses and tendered 12 exhibits comprised of both documentary and physical ones.

The facts leading to this appeal began on 1st June 2022, when Police Officer Besti Eliasali Pesa, PW2, received a tip from an informant about individuals who were selling elephant tusks. PW2 was provided with a telephone number, which was alleged to belong to the second appellant. During their conversation, the second appellant informed PW2 about the trophies and involved his two colleagues in the business. They agreed to meet on Mkomazi Road. PW2 and his fellow officers proceeded to Lushoto Police Station. There, they notified the Officer Commanding District (OCD) and the Officer Commanding Criminal Investigations Department (OC CID) of their presence in Lushoto. Subsequently, they diligently obtained a search warrant before reconvening at the predetermined meeting point to carry out the intended business transaction.

PW1, labelled the tusks with case number LS/737/2022 upon being handed over by PW2. Subsequently, he registered them as exhibit No. 53/2022 and maintained custody of them till the date he tendered before the court. Thadeo Simon Kachere, PW4, confirmed the tusks as Government trophies through weighing and valuation report. PW4 tendered the valuation report and was admitted as Exhibit P8 while the trophies were admitted as Exhibit P1.

The appellants vehemently maintained their innocence throughout the trial. Nevertheless, they were ultimately found guilty of two counts and sentenced to the term aforementioned. The first and second appellants lodged their appeals initially, followed by the third appellant. Consequently, the court decided to consolidate all appeals into one. The amended petition of appeal comprised six grounds, listed sequentially below:

i. *That, the records of the trial District Court are unclear and confusing thereby denying the appellants their right to be heard in the matter.*

ii. *That, the trial District Court failed to properly analyze evidence on record thereby reaching a wrong decision in convicting and sentencing the appellants.*

iii. *That, the testimony of the prosecution was full of serious contradictions leaving a lot of doubts in the matter to warrant conviction and sentence.*

iv. *That, there were procedural shortcomings in the issuance and admission of consent and certificate conferring jurisdiction on the trial court.*

v. *That, the chain of custody in the matter was broken and therefore the appellants were erroneously convicted and sentenced.*

vi. *That, the extra-judicial and caution statements were taken without adhering to the procedures to warrant conviction and sentence against the appellants.*

During the hearing, the appellants enjoyed the legal representation of learned counsel Mr. Hendry Njowoka and Johson Msangi while the Respondent/Republic had the service of Ms. Farida Kawella, a learned State Attorney. The hearing was conducted via written submissions. During the submission, the appellants decided to abandon ground number four.

In arguing the first ground, the learned counsel contended that the trial court records were unclear and confusing, thus depriving the appellants of their right to a fair hearing. They highlighted discrepancies, particularly concerning the cross-examination made by the 1st appellant, illustrating a lack of correlation between questions posed and the answers recorded by the learned trial magistrate during the proceedings. The counsel averred that some issues were skipped to the detriment of the appellants. The learned counsel among others cited the cases of **BMZ/UNHCR/GTZ Kigoma v Ally Khalifani & 28 Others**, [2011 – 2012] LCCD 11 and **DPP v Rajabu Mjema Ramadhani**, Criminal Appeal No. 223 of 2020, CAT (unreported).

The learned counsel then proceeded to address the third ground, which raised concerns about contradictions in the prosecution's case. They highlighted discrepancies in the identification of the elephant tusks in terms of colour, numbers and whether what was tendered were pieces of tusks or tusks themselves. They asserted that some witnesses described the

trophies as green and cream, while others stated they were black. In terms of numbers, the learned counsel asserted that there were variations in the count ranging from four to five. Further, the size of the tusks is contradictory as on the preliminary hearing, it was stated that the tusks were five pieces, therefore, it was not known what was brought in court were pieces of elephant tusks or the tusks themselves. The learned counsel argued that these contradictions were major and went to the root of the case. To bolster their argument, they cited the Court of Appeal decision in **Mohamed Said Matula v Republic**, 1995 TLR 3 where the court emphasized the court's duty to address and resolve such inconsistencies and contradictions, determining whether they are minor or fundamental to the case.

Referring to ground number 2, which complains about the trial court's failure to properly analyze the evidence on record, the learned counsel argued that the contradictions mentioned in the third ground were not adequately analyzed by the trial court. They contended that if properly analyzed, the trial court would have

found that the prosecution had not proved its case to the required standards.

Regarding the fifth ground of appeal, the appellants complained that the chain of custody was not maintained. The learned counsel urged that the prosecution failed to tender the exhibit register to prove that the trophies were kept under the custody of PW1. Furthermore, they argued that it was not testified how the items were handled from the point of interception to transfer to the police station, receipt by PW1, storage to the time they were tendered in the court. To support their assertion, they cited the case of **Paul Maduka & Others v Republic**, Criminal Appeal No. 110 of 2007 CAT.

In finalizing their sixth ground of appeal, the appellants contended that the extra-judicial statement, Exhibit P12, and cautioned statements, Exhibits P9 and P10, were admitted without adhering to proper procedures. In expanding their argument, the learned counsel argued that the trial court relied on retracted confession despite the appellants denying to have recorded the

same and were not voluntarily obtained, therefore, it was necessary to be corroborated by an independent witness. In addition, the cautioned statements were recorded out of time and it contravened the law. They also cited the case of **Richard Lubilo and Mohamed Selemani v Republic** [2003] TLR 149.

Furthermore, the learned counsel submitted that PW8 was supposed to tender the extrajudicial statements instead of the cautioned statements that he tendered.

The learned counsel thereafter urged this court to find merit in the grounds presented and to allow the appeal.

In countering the first ground, Ms. Kaswella conceded that the proceedings were indeed unclear but argued that they did not go to the root of the matter to the level of denying the appellants their right to be heard. She asserted that the discrepancies were merely clerical errors and did not fundamentally affect the case. Furthermore, she argued that the cases cited were distinguishable from the instant appeal, as the errors in the present case involve

grammatical errors rather than substantive issues that could prejudice the right to be heard.

In response to the third ground, Ms. Kaswella elaborated that the discrepancies in the colour of the trophies which was testified as green was a typing error as in the real sense elephant tusks are not green in colour and therefore the discrepancies are minor and do not go to the root of the case. She reinforced her position by referencing the decision in the case of the Court of Appeal in **Dickson Elia Shapwata & Another v Republic**, Criminal Appeal No. 92 of 2007.

The learned State Attorney also disputed the argument that prosecution witnesses, particularly PW4, stated during cross-examination that the tusks were black. Further, PW5 during re-examination mentioned black and red but he was identifying the two motorcycles and not the tusks.

Ms. Kaswella stated that the assertion regarding the number of trophies was merely a clerical error. She clarified that witnesses

identified the tusks as five in number, comprising four long in size and one short.

Ms. Kaswella succinctly addressed the second ground, maintaining that the trial court had indeed properly analyzed the evidence on record. She cited pages 15 to 18 of the judgment as evidence of this thorough analysis.

In response to the fifth ground, Ms. Kaswella contended that the chain of custody was not broken, as indicated by the oral testimony of witnesses, including PW1, PW2, PW3, and PW4, who encountered the elephant tusks. She emphasized that these witnesses explained the movement of the tusks from the moment they were seized from the appellants. Additionally, there is chronological documentation and a paper trail showing custody and transfer until they were tendered in court. Ms. Kaswella argued that the principle laid down by the Court of Appeal in the case of **Paul Maduka** (supra) was observed by the trial court.

In responding to the sixth ground, Ms. Kaswella submitted that the cautioned statements were properly admitted and referred

to pages 65-69 of the proceedings to support her argument. She further stated that the appellants were fully explained their rights before the cautioned statements were taken and were timely interrogated according to the law, as evidenced on pages 70-72 of the proceedings.

In addition to that, she averred that during the trial, the appellants had the chance to challenge the cautioned statement but did not do so. Citing the case of **Nyerere Nyague v The Republic**, Criminal Appeal no. 67 of 2010, which emphasized that an appellant who had the opportunity to object to the admissibility of an exhibit and did not do so, forfeits the right to complain about its admissibility at the appeal stage.

Regarding the extra-judicial statements, she contended that they were also properly admitted, as narrated in the evidence of PW8 as seen on pages 77-82 of the proceedings, and the appellants did not challenge them.

She therefore concluded that the appellants' grounds of appeal were baseless and beseeched this court to dismiss the appeal and uphold the conviction and sentence of the trial court.

The appellants' rejoinder submission reiterated their submission in chief urging this court to uphold the appeal.

After accurately reviewing the records of appeal and the submissions made by the parties, it becomes evident that the crux of this appeal centres on a fundamental question: Has the prosecution successfully established its case beyond a reasonable doubt? In addressing this pivotal issue, each ground of appeal will be carefully scrutinized and evaluated. It is imperative to highlight that, as a first appellate court, this court possesses the authority to re-examine the evidence on record and come up with its own decision, as elucidated in the precedent set by the case of **Juma Kilimo v Republic**, Criminal Appeal No. 70 of 2012. I shall adhere to this principle in adjudicating the present appeal.

Starting with the first ground which is based on the court records that are asserted to be unclear and confusing, thus

depriving the appellants of their right to a fair hearing. This court had enough time to thoroughly go through the records of the trial court. Upon examination, it was found that while some typographical errors were present, nevertheless, the original handwritten record remains clear and comprehensible.

Additionally, it is imperative to remind the learned counsel that courts record only the answers provided by witnesses during proceedings, and not otherwise. Accusing the court of inaccurately recording cross-examination responses without substantiated evidence is a grave allegation and cannot be entertained.

Similarly, as argued by Ms. Kaswella, the cases cited by the appellant are irrelevant to the current appeal. For instance, in the case of **DPP v Rajabu Mjema Ramadhani** (supra), the appellate court erred by raising issues *suo moto* and addressing them without allowing the parties to respond. The decision in **BMZ/UNHCR/GTZ Kigoma v Ally Khalifani** (supra), revolved around an unequivocal plea in which the appellate court found that

the recorded plea was ambiguous. Therefore, the contention of the appellant's counsel on this ground has no merit and is bound to fail.

The third ground pertains to contradictions within the prosecution's case. The appellants have raised concerns in three specific areas: the colour of the trophies, the number of trophies, and whether it was the pieces of tusks or the tusks themselves tendered in court. I shall begin with the issue of colours.

As per the appellants' submission, the trophies were described as green on page 43, with no colour specified on page 28, identified as cream on page 55, and black and red on page 63. Upon meticulous examination of the trial court's records, including the original handwritten proceedings, I must acknowledge that while the typed proceedings align with the appellants' claims, the original handwritten records present a different account. For instance, on page 43 of the typed proceedings, it states that PW2 testified the tusks were green in colour during examination-in-chief, whereas the original handwritten record indicates the colour as cream. PW4 on page 55 testified the colour to be cream. Regarding the mention of

black and red colour on page 63, I agree with Ms. Kaswella, PW5's clarification during re-examination, where he specified these colours in reference to two motorcycles, not the tusks. Had the learned counsel delved into the original handwritten records, this discrepancy might not have been raised as an issue.

Next for consideration is the contradictions in the number of the trophies which the appellant alleges were testified as five by PW1 but later showed that they were 4. Ms. Kaswelle disputed that. Again, I have revisited the testimony of PW4 and in particular the cited pages by the appellants, it is correct that the number of tusks shown in the typed proceeding is 4 but the original handwritten proceedings show them as 5. Again, had the learned counsel delved into the original handwritten records, this discrepancy might not have been raised as an issue.

The inconsistency regarding whether the items tendered in court were pieces of tusks or the tusks themselves is last to be determined in this third ground. Having thoroughly examined the record of appeal and in particular pages 28 to 30, the evidence

supported by the testimony of PW1 on the pointed pages establishes that trophies were 5 and were dully admitted as Exhibit P1. This contradicts the assertion made by the appellants.

Further, the appellants argued that during the preliminary hearing, the trophies were initially mentioned as consisting of 5 pieces. While this assertion is accurate, it is crucial to note that according to section 192 of the Criminal Procedure Act, Cap 20 R.E 2023, the purpose of the preliminary hearing is to expedite the trial process. Moreover, as per the decision of the Court of Appeal in **Pantaleo Teresphory v Republic**, Criminal Appeal No. 515 of 2019, the facts read during the preliminary hearing, save for undisputed facts signed by the parties, do not form part of the evidence:

In line with the memorandum of undisputed facts signed by the parties on the 27th of July 2023, the appellants contested fact number 8, which stated the discovery of 5 pieces of elephant tusks upon the arrest and search of the appellants. Consequently, as this fact was disputed, based on the above authority of **Pantaleo**

Teresphory is not part of the evidence that the appellants can rely on.

Ultimately, the third ground lacks merit and is dismissed.

The court will now address the fifth ground of complaint, concerning the alleged non-maintenance of the chain of custody. The learned counsel argued that the chain was compromised due to two primary reasons: firstly, the prosecution's failure to present the exhibit register, and secondly, concerns regarding the handling of the trophies from their initial interception to their presentation in court. However, the respondent contends that the chain of custody remains intact. They assert the presence of comprehensive chronological documentation and a clear paper trail demonstrating the custody and transfer of the trophies up to the point of their tendering in court.

At this point, I would like to cite the holding of the Court of Appeal on the chain of custody and in particular, I would like to begin with its decision rendered in **Paul Maduka's** case (supra) where the chain of custody was defined as follows:

"The chronological documentation and/or paper trail, showing the seizure, custody, control, transfer, analysis, and disposition of evidence, be it physical or electronic.

The Court went further and explained the idea behind recording the chain of custody:

"It is stressed, is to establish that the alleged evidence is in fact related to the alleged crime - rather than, for instance, having been planted fraudulently to make someone appear guilty.

The Court of Appeal in **Chacha Jeremiah Murimi and three others v The Republic**, Criminal Appeal No. 551 of 2015 when the court was dealing with the chain of custody. It held as follows:

"In order to have a solid chain of custody it is important to follow carefully the handling of what is seized from the suspect up to the time of laboratory analysis until finally the exhibit seized is received in court as evidence. There should be assurance that the exhibit seized from the suspect is the same which has been analyzed by the Chief Government Chemist. The

movement of the exhibit from one person to another should be handled with great care to eliminate any possibility that there may have been tampering with that exhibit.... In establishing the chain of custody, we are convinced that the most accurate method is on documentation as stated in ***Paulo Maduka and Others vs. R.****, Criminal Appeal No. 110 of 2007 and followed in* ***Makoye Samwel @ Kashinje and Kashindye Bundala****, Criminal Appeal No. 32 OF 2014 cases (both unreported). However, documentation will not be the only requirement in dealing with exhibits. An exhibit will not fail the test merely because there was no documentation. Other factors have to be looked at depending on the prevailing circumstances in every particular case. For instance, in cases relating to items which cannot change hands easily and therefore not easy to tamper with, the principle laid down in* ***Paulo Maduka*** *(supra) would be relaxed".*

As established by the aforementioned authorities, it is clear the maintenance of a clear and unbroken chain of custody is essential to ensure that the evidence is admissible in court. The maintenance of chain of custody of the exhibit needs not only to be maintained through documentation but also various other factors,

especially on exhibits that cannot easily change hands easily and therefore cannot easily be tampered with. Concerning this appeal, the exhibit in question is 5 elephant tusks which cannot change hands easily.

Regrettably, the trial court failed to analyze the chain of custody of the tusks, an issue raised by the appellants. However, as the first appellate, this court enjoys that mandate and which it shall exercise it. To ascertain the integrity of the chain of custody, I will scrutinize the evidence on record, particularly the evidence of the prosecution witnesses. This examination aims to determine whether the chain of custody remained unbroken, thereby minimizing the risk of tampering with the exhibit from its initial seizure by PW2, through weighing and evaluation by PW4, to its storage and eventual tendering before the court by PW1.

The sequence of events began in the forest near the Mkomazi area on the 20th of June 2022, where the appellants were apprehended by PW2 and his fellows after a trap was set for them. During the apprehension, the third appellant was found carrying a

sulfate bag. Upon inspection, five elephant tusks were discovered inside the bag, Exhibit P1. A certificate of seizure, Exhibit P6, was duly filled and signed by all appellants. Subsequently, the five elephant tusks were labelled as L, L1, L2, L3, and L5 in the vicinity.

The appellants, along with the tusks, were then transferred to Lushoto Police Station, where PW2 met PW1, the exhibit keeper, and handed over Exhibit P1 for safekeeping, the same is supported by Exhibit P5, a document referred to as the chain of custody. PW1 testified regarding receiving the five tusks from PW2, assigning each tusk a case number (Lus/737/2022 and Exhibit No. 53/2022), and storing them in the custody room. On the 21st of June 2022, at approximately 10:00 hours, PW1 was approached by Thadeo Kachenye, PW4, a wildlife officer, who requested the tusks for valuation. Exhibits P4 and P5, were signed by PW1 and PW4, confirming the transfer of the tusks. Subsequently, at 11:14 hours on the same day, PW4 returned the tusks to the custody of PW1, as evidenced by both Exhibit P4 and P5. PW4 corroborated this account, testifying to collect the tusks from PW1 for valuation

purposes and returning them after completing the assessment. PW1 maintained custody of the tusks until the day of their tendering before the trial court.

The essence of the issue at hand hinges on whether, given the testimonies and exhibits mentioned earlier, the chain of custody remained intact. While it is acknowledged that the prosecution did not tender the exhibit register as asserted by the appellants, the detailed account along with the exhibits provided elucidate how the exhibits were accurately managed in chronological order, from seizure to transfer, custody, evaluation and eventual tendering before the court. I respectfully disagree with the argument presented by the learned counsel for the appellants regarding the purported break in the chain of custody. On the contrary, this court firmly holds the view that despite the prosecution's failure to tender the exhibit register, the chain of custody was effectively established. Consequently, this ground of appeal is unlikely to succeed.

This court will now turn to the sixth ground which is based on unprocedural tendering of both the cautioned statements (Exhibits

P9 and P10) and the extra-judicial statements (Exhibit P11). The complaint is of three folds: one; the appellants retracted their confession therefore, corroboration was needed. Two, the cautioned statements were taken out of the prescribed time and contrary to the law. Three, PW8 tendered a cautioned statement instead of an extra-judicial statement. The respondent refuted these claims.

This court proposes to begin with the second fold in this ground, a claim that the caution statements were recorded out of time. The question is whether the first and second appellants' cautioned statements, Exhibit P9 and P10 were obtained out of the prescribed period of four hours. Section 50(1)(a) and (b) of Cap 20 guides this area and it provides:

> *50(1) "For the purpose of this Act, the period available for interviewing a person who is in restraint in respect of an offence is*
>
> *(a) subject to paragraph (b), the basic period available for interviewing the person, that is to say, the period*

of four hours commencing at the time when he was taken under restraint in respect of the offence;

(b) if the basic period available for interviewing the person is extended under section 51, the basic period as so extended".

On this ground, the appellants are contesting the validity of two cautioned statements, Exhibits P9 and P10, because they were recorded beyond the prescribed time limit. Ms. Kaswella argued that the confessions were obtained within the designated timeframe and further noted that the appellants did not raise any objections regarding their admission into evidence.

Before addressing the issue of timing, I had the liberty of reviewing the proceedings on the date when these exhibits were tendered. The aim is to ascertain two major issues; one if the appellant objected to the tendering and two if they objected to, whether the procedure was adhered to. Exhibit P9 was tendered by D/CPL James, PW6. Upon PW6's tendering of Exhibit P9, the appellants were given the opportunity to object to its admissibility, but none raised any objections. At this juncture, I agree with Ms.

Kaswella regarding Exhibit P9 that since the appellants were given the chance to object to the admission of this statement and chose not to do so, their subsequent complaint lacks merit. This stance finds support in the decision of the Court of Appeal in **Emmanuel Lohay and Another v The Republic**, Criminal Appeal No. 278 of 2010 (unreported) it was held as follows:

> *"It is trite law that if an accused person intends to object to the admissibility of a statement/confession he must do so before it is admitted and not during cross-examination or during defence - **Shihoze Semi and Another v Republic** (1992) TLR 330. In this case, the appellants 'missed the boat' by trying to disown the statements at the defence stage. That was already too late. Objections, if any, ought to have been taken before they were admitted in evidence."*

It also finds support in the precedent set forth by **Nyerere Nyague** (supra) cited by Ms. Kaswella, where it was held:

> *"...if an accused intends to object to the admissibility of a statement/confession, he must do so before it is*

admitted, and not during cross-examination or during defence".

Regarding Exhibit P10, the statement was tendered by D/CPL Michael, PW7. However, the records indicate that the second appellant objected to its admission, asserting that he had never seen PW7 before and that it was his first encounter with him in court. Essentially, as a layperson, the second appellant denied having authored the cautioned statement. The records reveal that the learned State Attorney was given a chance and submitted that the accused denied knowing the witness but not the statement itself. When the second appellant was allowed to respond, he maintained that he had only just seen the witness that day. Despite this objection, the court proceeded to overrule it, deeming it lacking in legal merit, and subsequently admitted the cautioned statement as Exhibit P10.

The law in this area is settled that where an objection is raised in respect of the tendering in the court of the statement of the accused, the trial court has to stop the proceeding and conduct an inquiry or trial within the trial to ascertain the involuntariness or

otherwise of the purported confession. This principle has been affirmed in various decisions of the Court of Appeal, as exemplified in the case of **Twaha Ally and 5 others v Republic**, Criminal Appeal No. 78 of 2004 (unreported) where it was stated:

> *"...if that objection is made after the trial court has informed the accused of his right to say something in connection with the alleged confession, the court must stop everything and proceed to conduct an inquiry or trial within trial into the voluntariness or otherwise of the alleged confession. Such an inquiry should be conducted before the confession is admitted in evidence".*

Yet in another decision of the Court of Appeal in **Nyerere Nyague** (supra), it was stated as follows:

> *"Objections to the admissibility of confessional statements may be taken on two grounds. First, under S. 27 of the Evidence Act that, 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 sections 50, 51 etc. Where an objection is taken under the Evidence Act, the trial court has to conduct a trial*

within a trial (in a trial with assessors) or an inquiry (in a subordinate court) to determine its admissibility. There the trial court only determines whether the accused made the statement at all, or whether he made it voluntarily".

In the current appeal as aforementioned and evidenced by the proceedings on pages 72 and 73, when Exhibit P10 was being tendered, the second appellant objected. However, instead of the trial court conducting the necessary inquiry as established by the aforementioned authorities, it proceeded to overrule the objection after hearing submissions from the parties, without conducting a trial within a trial and admitted the cautioned statement. The procedure invoked by the trial court went against the prescribed procedure outlined by the aforementioned authorities and here I disagree with Ms. Kaswella that Exhibit P10 was properly admitted.

Regarding the consequences of this procedural error, there are a plethora of authorities by the Court of Appeal including the decision of the **Juma Adam v Republic**, Criminal Appeal No. 79 of 2011 CAT (unreported) which is to expunge it from the record.

Likewise in this appeal, Exhibit P10 for the same reason is expunged from the record.

Having determined that Exhibit P9 was not objected to and Exhibit P10 has been expunged from the record, the contention regarding timing raised in the initial aspect of the sixth ground becomes irrelevant. Despite this finding, it is important to highlight that the learned trial magistrate did not base the conviction of any of the appellants on either the cautioned statements or the extra-judicial statements.

After resolving the first two issues in the sixth ground, the court now turns to address the third aspect, concerning the contention that PW8 tendered a cautioned statement instead of an extra-judicial statement. It is undisputed that the extra-judicial statement, Exhibit P11, was referred to as a cautioned statement when admitted, as evidenced on page 80 of the typed proceedings. This court has taken the time and analyse the testimony of PW8, upon analyzing his evidence, PW8 testified that he is a magistrate responsible for recording confessions of accused persons as part of

his duties. PW8 detailed the procedure preceding the recording of Exhibit P11. The appellants were shown the extra-judicial statement before its tendering in court, clarifying its nature to all parties involved.

This court acknowledges that the learned trial magistrate indeed marked Exhibit P11 as a cautioned statement instead of an extra-judicial statement, albeit a minor error. However, this error did not result in a failure of justice for the parties involved, and it can be rectified under section 388(1) of Cap 20. Additionally, the learned counsel did not explain how this omission affected their clients. Therefore, this complaint is dismissed.

This court will now address the second ground of appeal, which pertains to the analysis of the evidence presented by all witnesses.

There is no doubt that the appellate court is placed with the duty of evaluating evidence from both sides and coming up with an informed opinion before its conclusion. See **Mkulima Mbagala v The Republic**, Criminal Appeal No. 276 of 2006, CAT (unreported).

On this ground, the appellants contended that the contradictions raised in the third ground were not adequately analyzed. However, given this court's finding on the third ground that there were no inconsistencies, this ground based on alleged inconsistencies becomes irrelevant.

However, as previously mentioned, as the first appellate court, this court holds the authority to reassess the evidence and render its judgment. Thus, it is incumbent upon this court to fulfil that responsibility diligently by thoroughly evaluating the testimony of all witnesses to ascertain whether the trial court adequately discharged its duty.

The prosecution's evidence outlines the process of setting the trap and subsequently apprehension of the appellants. Upon a thorough review of PW2's testimony, who arranged the trap, it became clear how he initiated communication with the second appellant regarding the sale of trophies. A price of Tshs. 250,000/= for a tusk was agreed upon, with PW2 later sending the requested Tshs. 45,000 to the second appellant. On the 20th of June 2022,

PW2 and his associates met with the second appellant, who then telephoned the elders, proceeding towards the location where the tusks were hidden. Riding a motorbike, the second appellant led the way while PW2 and his fellows followed behind. After travelling for about three kilometers, the second appellant stopped and introduced another individual, referred to as Old Hassan (the first appellant). At this juncture, both appellants demanded payment before revealing the tusks, which PW2 refused, appointing PW3 to go with them and verify the tusks before any transaction.

PW3 complied and accompanied the appellants, later confirming to PW2 that the tusks weighed 24 kilograms. Subsequently, the appellants, PW3, and another individual (the third appellant) appeared where PW2 was, with the third appellant carrying a sulfate bag. He was instructed to place it inside PW2's car, whereupon opening it, five elephant tusks were discovered. The appellants were promptly arrested, while another person fled prompting the completion of a seizure certificate and labelling of the tusks. Subsequently, the appellants and the exhibit were transferred

to Lushoto Police Station for evaluation and custody, facts corroborated by testimonies from PW1, PW3, and PW4.

During cross-examination, the first appellant focused primarily on the beatings and their journey to the forest, while the second appellant's inquiry centred on their communication and meeting at the crime scene, as testified by PW2. The third appellant questioned PW2 about the events that transpired at the crime scene.

During their defence, the first appellant testified that on the day of the incident, he went to the market accompanied by the third appellant, his son. While at a location called Hekcho, they came across a parked motor vehicle, and upon approaching closer, they observed about seven people near the vehicle, with one person fleeing the scene. They were then attacked and assaulted by these people, who subsequently forced them into the motor vehicle and transported them to Lushoto, where they were detained in a police lockup. They were later removed from the lockup, presented with elephant tusks, and photographed with them. Subsequently, at

night, they were taken to Moshi, where they were further assaulted before being returned to Lushoto on 23rd June 2022. They were interrogated and on the next day, they were taken to Dochi Primary Court.

On being cross-examined by the third appellant, the second appellant stated that:

> *"I hired you so as to take me to Bwiko. I paid you Tshs. thirteen thousand".*

The second appellant, in his testimony, acknowledged engaging in a conversation with an individual named Ibra or Abdallah regarding a business transaction involving potatoes. He admitted to receiving Tshs. 50,000/= as an advance payment for the potatoes and agreed to meet the individual in the Mkomazi area. While en route, near the Hekcho area, he stopped to collect additional funds as promised by this individual, however, to his surprise, he was apprehended by individuals in a motor vehicle and forcibly placed inside. Inside the vehicle, he encountered the first and third appellants. Subsequently, they were all transported to

Lushoto police station, as described by the first appellant's testimony.

According to the third appellant's testimony, he worked as a boda boda driver who was regularly hired by the first appellant. On the 19th of June 2022, the first appellant contacted him by phone and subsequently met in person to request transportation services to the Hekcho area the next day, offering a payment of Tshs. 13,000/=. The agreed amount was paid, and on 20th June 2022, they commenced the journey as planned. Along the way, they picked up the first appellant's friend, Singano, who had luggage that was secured onto the appellant's motorbike.

While en route to Mkomazi, they encountered a man on a motorbike whom the third appellant did not recognize. At the first appellant's request, they stopped, and the first appellant conversed with the motorbike rider. The third appellant overheard them mentioning Old Hassan and that certain individuals were coming. Subsequently, the first appellant departed with the man on a motorbike, and shortly thereafter, they contacted Singano and

asked the third appellant to transport him to their location, which he did.

Upon arrival, they found a parked motor vehicle with the first and second appellants nearby. Singano instructed the third appellant to unload the luggage he had carried. The third appellant complied, and as he approached the motor vehicle, he was apprehended along with the first and second appellants. Singano managed to flee the scene.

During cross-examination by the prosecution, the third appellant stated that he was unaware of the contents of the sulfate bag.

The trial magistrate in her judgment concluded that the appellants were guilty of the second and third counts due to their possession of five elephant tusks, with the second appellant facilitating the sale. Furthermore, she contended that all appellants were involved in the trophy business, with each playing a distinct role: the first appellant participated by locating the trophies, the second appellant by securing a buyer, and the third appellant by

transporting the trophies. She discharged the defence by the third appellant that he did not identify the luggage he carried because he saw PW4 weighing that luggage. Further, he assisted the first and second appellant in transporting the elephant tusks in his motorbike, despite his duty being to carry passengers, not illicit goods.

Upon careful reevaluation of the evidence presented, it is evident that the learned trial magistrate failed to adequately assess the evidence pertaining to the third appellant. This is so due to the following analysis. First, throughout the proceedings, it became apparent that the third appellant was operating a motorcycle for hire, commonly referred to as a "bodaboda," transporting passengers. His testimony detailed how he was engaged by the first appellant and received payment for transporting him to Hekcho, the place where they were subsequently apprehended. Remarkably, these testimonies remained uncontested by the prosecution. Furthermore, during cross-examination by the third appellant, the first appellant openly acknowledged hiring him and fulfilling the

agreed fare. The trial court's decision to convict the third appellant solely based on his role of carrying the luggage, without presenting additional evidence to establish his guilt from the prosecution's side, raises doubts about the strength of the prosecution's case. Merely carrying luggage, which was later discovered to contain elephant tusks, does not conclusively prove his involvement in any illegal activity.

Secondly, the third appellant consistently maintained his position of being unaware of the contents within the sulfate bag, even when rigorously questioned by the prosecution during cross-examination. Despite the trial magistrate's assertion of his awareness, the prosecution failed to provide sufficient evidence to support this claim. Merely being present at the location where PW3 weighed the elephant tusks does not inherently imply knowledge on the part of the third appellant. As testified by PW3, he encountered two individuals with yellow luggage, he looked and upon inspection he discovered five elephant tusks, weighing a total of 24 kilograms. Moreover, PW3's testimony does not clarify whether the tusks were

removed from the sulfate bag or if the bag was fully opened during the weighing process, thus casting doubt on the assertion that the third appellant was cognizant of its contents bearing in mind that he was only hired by the first appellant as a *"bodaboda"* transporter. What it can be said is that the inference was not drawn from the prosecution's witnesses at all.

It is important to note that the burden of proof rests on the prosecution to establish its case against the accused beyond a reasonable doubt, as underscored by the Court of Appeal in the case of **Galus Kitaya v The Republic** (Criminal App No 301/2016) where it held:

> *"It is a cardinal principle of criminal law that the duty of proving the charge against an accused person always lay on the prosecution".*

Upon careful consideration of the provided analysis, it becomes apparent that the learned trial magistrate failed to adequately scrutinize the evidence pertaining to the third appellant. Had the learned trial magistrate conducted a thorough analysis of both sides' evidence, she would have revealed that the prosecution

had not met the requisite burden of proof against the third appellant. Consequently, it cannot be asserted that the prosecution proved its case beyond a reasonable doubt against the third appellant.

In the event, the appeal is partly allowed. The third appellant's (Godson Elikunda Kitau) conviction is hereby quashed and the sentence meted out to him is set aside. He should be released from prison forthwith unless he is otherwise lawfully held. Exhibits P2 and P3, including the motorcycle with registration number MC 459 BWQ and the mobile phone found with the third appellant, should be returned to the third appellant.

The appeal against the first and the second appellants is dismissed.

It is so ordered.

DATED at **TANGA** this 21st day of March 2024.

THE HIGH COURT OF TANZANIA

H. P. NDESAMBURO

JUDGE