IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOSHI SUB-REGISTRY

AT MOSHI

CONSOLIDATED CRIMINAL APPEAL NO. 56 & 64 OF 2023

(C/F Economic Case No. 33 of 2021 in the District Court of Moshi at Moshi)

DANIEL SHOLO MGEREZ @ ALLY

JOSEPH KIMBOYO KIOGORI

MKENGA JOSEPH MWALULU @ NYOKA **……APPELLANTS**

ADAM LIBERAT MBUYA

VERSUS

REPUBLIC…… RESPONDENT

JUDGEMENT

Date of Last Order: 15.04.2024
Date of Judgment: 20.05.2024

MONGELLA, J.

The appellants were arraigned in the district court of Moshi at Moshi (henceforth, the trial court) for unlawful possession of Government trophy contrary to **Section 86 (1) (2)(b) of the Wildlife Conservation Act No. 5 of 2009**, read together with **paragraph 14 of the First Schedule and Sections 57(1)** and **60(2) of the Economic and Organized Crime Control Act** [Cap. 200, R.E. 2019]

The particulars of the offence were that: on 22.11.2021 at Himo area within Moshi district in Kilimanjaro region, the appellants were found in unlawful possession of one (1) Elephant Tusk which is equivalent to one killed Elephant valued at 15,000USD equivalent to Thirty-Four Million Six Hundred and Ninety-Five Thousand Tanzanian Shillings (34,695,000/=) only, the property of the United Republic of Tanzania, without permit from the Director of Wildlife.

The appellants denied the charge levelled against them. To prove the offence against them, the prosecution called 5 witnesses and tendered 6 exhibits which were all admitted by the trial court. The prosecution's account was that, on the material day of 22.11.2021, when PW2, a police officer who was then stationed at Himo, was in his daily routine around Mwika, Moshi Rural at Vunjo area, he met one Samwel Gibson Chelewa & Leonard Raphael Kasungu. The two were conservation rangers from KINAPA. He offered them a lift in his personal vehicle as they too were heading to the same direction he was going, which was Himo area. They travelled through Mwika road. At a junction heading to Holili, they saw four young men standing on the road side. The young men had a green sulphate bag with them and a black motorcycle. Suspecting that they could be dealing in narcotic drugs, PW2, who was in civilian clothes, stopped his vehicle and confronted them. He questioned them on what was going on, but they paid no heed to him. He then returned back to the vehicle to call the rangers for assistance.

When the rangers emerged out of the car and approached the young men, two of the four bordered the motorcycle and escaped the scene. They left the sulphate bag and the other two men who were both Kenya nationals. PW2 and the rangers inquired on the identities of the two men, who identified themselves as Daniel and Joseph, that is, the 1st and 2nd appellants. They inquired on what was in the bag, but none of them responded. PW2 and the rangers engaged two pedestrians; PW5 and one Kasmiri, whom they requested to witness the search of the sulphate bag. It was in the said search that they found an elephant tusk with carvings of elephants and human being' faces. A seizure certificate was duly filled and signed by the witnesses, the 1st and 2nd appellants, PW1and the rangers. It was admitted as Exhibit P4.

After the tusk was seized, PW2 interviewed the 1st and 2nd appellants who mentioned the 3rd and 4th appellants as the men who escaped with the motorcycle. The 1st and 2nd appellants were sent to Himo police station and held under police custody. Case file No. Himo IR/3880/2021 was duly opened and PW1, an exhibit keeper at Himo police station was required to store the elephant tusk. The tusk was labelled Himo IR/3880/2021 and entered into the exhibit register (PF16) at entry No. S.68/2021.

On 23.11.2021, Samwel, one of the two rangers involved in the incident, showed up at the police station. He was handed the exhibit by PF 16 and a chain of custody form was duly executed. PW1 produced the form which was admitted as Exhibit P1, the

elephant tusk, admitted as Exhibit P2 and the exhibit Register Entry No. 68, admitted as Exhibit P3. The record shows that on the same date at around 10:00hrs PW3, a wildlife officer was called to evaluate the tusk on which he filed an evaluation certificate, which was admitted as Exhibit P5.

On 29.11.2021, PW4 from the National Task Force on Anti-Poaching (NTAP) arrived at Kilimanjaro region with instructions to aid the investigation. He was informed of PW2's involvement in arresting the 1st and 2nd appellants. PW4 having obtained information from the 1st and 2nd appellants, successfully arrested the 4th appellant at 19:00hrs at Moshi bus stand. With help of the 4th appellant, the 3rd appellant was arrested at his home in Holili. PW4 recorded the 4th appellant's cautioned statement which incriminated all the appellants detailing their involvement. The statement was admitted as Exhibit P6. Eventually, on 17.12.2021, the appellants were arraigned.

The trial court found the prosecution evidence to have established a prima facie case against the appellants. The court thus invited them to enter their defence and informed them on their rights. Each chose to present his own evidence without calling any witnesses. Generally, their evidence was largely on alibi. Each denied knowing the other, being involved in the alleged incident, and being aware of any statement they signed at the police. However, none of them filed a notice for alibi nor called a witness to prove the same.

The 1st appellant alleged that he was caught at Himo market while purchasing medicine for a relative, who in cross examination by the prosecution, he identified as his father. He claimed he was required to pay for his way out for being found in the country without permit. He also alleged that on 23.11.2021, he was forced to sign a statement whose contents he did not know.

The 2nd appellant alleged that he went to Himo Market whereby he was followed by a police officer who inquired on his identity. That, having refused to offer the same as he did not know the man, he was taken to the police station whereby he was put under arrest. He was then taken to Moshi Central Police station on 24.11.2021 and locked up until 28.11.2021 whereby he was interrogated.

The 3rd appellant testified to have been arrested at Holili bus stand, remanded without being informed on the charges against him and eventually arraigned. His statement was also never recorded.

The 4th appellant testified that he was found over speeding and taken to Moshi Central Police whereby he was required to pay a sum of money under threat that his licence would be suspended. Upon stating he had less, he was remanded. That, on 30.11.2021 he was interrogated and required to sign papers which he admitted were Exhibit P6.

At closure of the defence, the trial court found the prosecution to have proved its case against the appellants beyond reasonable

doubt. They were all convicted and sentenced to serve 20 years imprisonment term. Aggrieved, the 3rd appellant solely filed Criminal Appeal No. 56 of 2023 before this court. Subsequently, the 1st, 2nd and 4th appellants preferred Criminal Appeal No. 64 of 2023. For ease of determination, the two appeals were consolidated into Criminal Appeal No. 56/64 of 2023. The grounds of appeal from Criminal Appeal No. 56 of 2023 are that:

i. *That, the Honourable Court, Hon. S.A Mshasha-PRM erred in law and in fact by finding the Appellant (the then 3rd accused person) guilty of the offence charged in, that having been jointly charged with three other accused persons, neither of their defense testimonies implicated the appellant in the offence charged.*

ii. *That, the Honourable Court, Hon. S.A Mshasha -PRM erred in law and in fact by finding the appellant guilty, solely relaying on the only tendered the 4th accused person caution statement however, it is subject to legal controversy in its admission. (sic)*

iii. *That, the Honourable Court, Hon. S.A Mshasha-PRM erred in law and in fact that, the failure by prosecution to tender caution statements for the 1st, and 2nd accused persons, proves that the prosecution side failed to prove their case beyond reasonable doubt, and that the same failure cannot proceed to find the Appellant, (the 3rd accused*

person) guilty of the offence solely relaying on the disputed Exh. 6, which is, the only tendered caution statement of the 4th accused. (sic)

iv. *That, the Honourable Court, Hon. S.A Mshasha -PRM erred in law and in fact by finding that, the Appellant, (the then 3rd accused person), was properly identified by PW2 without obtaining corroborated testimony of two Conservation Rangers of KINAPA, (SAMWEL GIBSON CHELEWA & LEONARD RAPHAEL KASUNGU) who both, were mentioned by PW2 in his testimony to have accompanied him in arresting the 1st and 2nd accused persons.*

v. *That, the Honourable Court, Hon. S.A Mshasha -PRM erred in law and in fact by finding that, the Appellant, (the 3rd Accused person), ran away using motorcycle, without tendering the said motorcycle in evidence as exhibit.*

vi. *That, the Honourable Court, Hon. S.A Mshasha -PRM erred in law and in fact to give uncertain sentence.*

vii. *That, the Honourable Court, Hon. S.A Mshasha -PRM erred in law and in fact by heavily relying on prosecution case in its findings and composing Judgment without analysing and evaluating the Defense levelled by the Appellant, the 3rd accused person.*

viii. *That, the Honourable Court, Hon. S.A Mshasha -PRM erred in law and in fact to convict and sentence the Appellant whereas at the Trial Court the Prosecution failed to prove their case beyond reasonable doubt as per the evidence brought against the offence charged to the Appellant. (sic)*

The grounds of appeal in Criminal Appeal No. 64 of 2023 are that:

1. *The learned trial magistrate erred in law and factual analysis when she failed to note that the chain of custody of Exh. P2 collectively was compromised as it was crucial to prove oral evidence or proper paper trail of the sequence of events in the handing of the said exhibit from the time it was seized, controlled, transferred, stored, until it was tendered and admitted in court.*

2. *The learned trial magistrate strayed into error of law when she restricted her determination by failing to look at the non-compliance of the formalities under section 57 and 58 of the criminal procedure Act. Cap 20 R.E 2022, before admitting Exh.P6.*

3. *The learned trial magistrate erred in law and factual analysis when she failed to note that PW2 failed to give any description, complexion, attire or peculiar mark of the ones alleged to be at the crime scene and run away, as such, it is*

unknown how he identified them and in what features, moreover, it is unknown how the 3rd and 4th appellants were arrested and termed to be the ones who were at the crime scene on the material day.

4. *The learned trial magistrate erred in law and factual analysis when she failed to note that the credibility of a witness is enhanced by the ability of a witness to name a suspect at the earliest opportunity.*

5. *The learned trial magistrate erred in law and factual analysis when she relied on the alleged oral confession of the 1st and 2nd appellant made to PW2 and PW4 and failed to note that the appellants were not cautioned by reading to them the rights accorded to a suspect, nor free agents and more to that, PW2 and PW4 were police officers mandated under* ***section 57 (1) of the Criminal Procedure Act,*** *Cap 20 R.E 2022 to write down the alleged confession.*

6. *The learned trial magistrate erred in law and factual analysis when she failed to consider and give weight the 4th appellants objection in regard to the admissibility of Exh.P6 the cautioned statement, as such, she failed to make any assessment that the court or the handwriting expert can both examine the contested signature against the other evidence and reach conclusion.*

7. *The learned trial magistrate strayed into error of law when she made remarks in her judgement which are not reflected in the evidence adduced.*

8. *The learned trial magistrate erred in law and factual analysis when she relied on weak, contradictory, inconsistency, with material discrepancies and uncorroborated prosecution evidence.*

9. *The learned trial magistrate erred in law and factual analysis when she failed to consider that the charge against the appellants was not proved beyond reasonable doubt.*

The appeal was argued by written submissions whereby the 1st, 2nd and 4th appellants stood unrepresented while the 3rd appellant was represented by Mr. Modestus Njau, learned advocate. The respondent was represented by Ms. Bertina Tarimo and Mr. Ramadhani A. Kajembe, both learned state attorneys.

The 1st 2nd and 4th appellants argued the appeal on their own, and generally. They first addressed the question of chain of custody. On this, they challenged the prosecution evidence for failure of the police officers to adhere to legal procedures. Airing their grudges, they contended that since most of the witnesses in the trial were police officers, they were required to adhere to procedures laid down under the **Police General Order No. 229 (P.G.O No. 229)** in handling exhibits. Explaining what the P.G.O entails, they submitted

that the P.G.O has laid down the requirement to record movement of exhibits and reason for movement. Further, they referred to the **Criminal Procedure Act** [Cap 22 R.E 2022] (CPA) contending that the Act provides that chain of custody is proved by trail of documentation although circumstances of each particular case should be considered.

Still challenging Exhibit P2, they argued that there were a lot of doubts in relation to Exhibit P2 which were not cleared. Pinpointing the alleged doubts, they said that it was doubtful whether the said exhibit was one and same on which witnesses testified on. Specifically referring to the testimony of PW1, they contended that PW1stated that an officer from KINAPA called Samwel went to the station and was handed over Exhibit P2 through PF 16 and chain of custody form. However, they challenged that the said Samwel never testified about being handed over the said exhibit at alleged time and there was no documentation to prove the integrity of the documents. They added that, even if it would be assumed that the handover between PW1 and Samwel was done in proper terms, PW3 claimed to be the one who handed over Exhibit P2 for valuation. In that regard they found it controversial as to who between Samwel and PW3 handed over Exhibit P2.

Arguing further, the submitted that PW1 ought to have been guided by the P.G.O whereby the elephant tusk allegedly from him to Samwel should have been documented by recording the name and rank of the officers. That, even the date and time of the

handover should have been stated on the exhibit label. They added that similar documentation was also required when the elephant tusk was taken back from the said Samwel and handed to PW1 for safe custody and further procedures. To buttress their point, they referred the case of **Paulo Maduka & Others vs. Republic** (Criminal Appeal 110 of 2007) [2009] TZCA 69 (28 October 2009) (TANZLII) to support their argument on chain of custody.

The appellants then addressed the claim of contradictions on the prosecution evidence. Specifically, they addressed contradictions allegedly between the testimony of PW2 and PW5. Explaining the alleged contradictions, they contended that PW2 stated that when he approached the 1st and 2nd appellants, a sulphate bag was on the ground near where the 1st appellant was standing. However, they said, on the other hand, PW5 stated that he and PW2 found the two appellants carrying a sulphate bag while sitting down. In the circumstances, they had the contention that it is unknown who exactly was carrying the sulphate bag at the crime scene. Further they pointed discrepancy regarding the date of commission of the offence whereby they argued that while PW2 testified that the incidence took place on 22.11.2021 PW5 stated it was on 21/11/2021.

The appellants also addressed the issue of visual identification. They averred that it is settled that the court should not act on evidence of visual identification unless all possibilities of mistaken identity are eliminated. In support of this position, they cited the case of **Omari**

Idd Mbezi and three Others vs. Republic, Criminal Appeal No. 227 of 2009 (unreported), which they argued has set guidelines to avoid mistaking the identity of a suspect.

After setting the legal foundation on visual identification, the appellants alleged that the PW2's evidence on how he identified the 4th appellant at the crime scene was generalized. They claimed that it is unknown the time which PW2 had the 3rd appellant under observation so he could clearly identify him. That, PW2 also never reported to his colleagues and KINAPA rangers who were with him at the alleged crime scene and also to PW1 who handed over the alleged tusk, immediately after identifying the 4th appellant. The added that PW4 and PW2 failed to explain how they had special reason for knowing and remembering the 4th appellant at his arrest. They as well challenged the testimony of PW2 on the ground that he did not describe the body build, attire and complexion of the 4th appellant. In the premises, they held the view that generalized description was deficient rendering PW2's evidence unreliable.

Arguing further they alleged that the failure of PW2 to name the 4th appellant before people who would respond to an alarm, investigative officer or any other authority casts doubt on his credibility as a witness. To buttress their argument, they cited the case of **Samwel s/o Nyamhanga vs. Republic** (Criminal Appeal 70 of 2017) [2020] TZCA 301 (17 June 2020) (TANZLII), asking the court to find doubt in PW2's failure to name the 4th appellant at the earliest opportunity.

The appellants further challenged the prosecution evidence for failure to conduct an identification parade. They contended that PW2 made a dock identification of the 4th appellant while there was no any identification parade. Their contention was fortified by the case of **Francis Majaliwa Deus and 2 Others vs, Republic**, Criminal Appeal No. 139 of 2005 in which the reasoning in the case of **Gabriel Kamau Njoroge vs. Republic** (1982-1988) 1 KAR 1134 was adopted. In the said case, they said, the Court reasoned that dock identification in the absence of prior identification rendered the same useless.

Addressing another point, they contended that while PW2 and PW4 testified that the 1st and 2nd appellants admitted the offence, their confession in that regard was never recorded. In the circumstances, they challenged that the provisions of **Section 57(1) of the Criminal Procedure Act** were never complied with and there was never any explanation offered on why they failed to record in writing the alleged confession. Their stance was supported with the case of **Director of Public Prosecution vs. Sharif s/o Mohamed @ Athumani & Others** (Criminal Appeal 74 of 2016) [2016] TZCA 635 (5 August 2016) (TANZLII).

In addition, they challenged the testimony of PW2 and PW4 for failure to state what circumstances prevented them from recording the content of the interviews after arrest of the other appellants. Further, they contended that there was neither evidence that the 1st and 2nd appellants were free agents at the time of giving the

alleged confessions nor was evidence led to prove that they were cautioned at any time.

The appellants further faulted the trial magistrate for failure to consider and assign weight to the objection raised against admissibility of Exhibit P6. They argued that the trial magistrate, in the circumstances, failed to take into account that either the court or a handwriting expert can both examine the contested signature against the other evidence and reach a conclusion. In that respect, they held the view that usually an expert witness only offers opinion which does not bound the court.

Still insisting on the court's own observation of signatures, the argued further that expert report is not the only way for the court to reach its conclusion. That, the court can also examine the contested signature and reach its own conclusion. To bolster their argument, they cited the case of **DPP vs. Shida Manyama @ Seleman Mabuba,** (Criminal Appeal 285 of 2012) [2013] TZCA 168 (25 September 2013) TANZLII whereby the Court made refence to **Section 75 of the Evidence Act**. In the foregoing, they challenged the trial Magistrate for failure to adhere to such procedure thereby according no weight to the objection raised by the 4th appellant contesting the genuineness of the contested signature.

Finalising their submission, the 1st, 2nd, and 4th appellants held the stance that the listed flaws rendered the prosecution case

suspicious and doubtful. They thus prayed for the appeal to be found with merit and allowed.

As pointed put earlier, the 3rd respondent was represented by Mr. Modestus Njau, learned advocate and he filed his own set of grounds of appeal. Addressing his 1st ground, Mr. Njau, faulted the trial magistrate on the ground that he failed to interpret and apply the provisions of **Section 23 of the Penal Code** [Cap 16 R.E 2022] in convicting and sentencing the 3rd appellant. He said, the provision addresses commission of offence by multiple offenders. Explaining the application of the provision, he held the view that the provision provides for three (3) conditions whose fulfilment would render suspects liable as joint offenders. That, one, more than one person should form a common intention to prosecute an unlawful purpose in conjunction with another; two, that, purpose should be executed and; three, that the offence so committed should be the probable consequence of the common purpose.

Still maintaining his point as above, he contended that reading from the entire trial proceedings, it shows that the prosecution failed to prove the charge against the 3rd appellant beyond reasonable doubt in relation to common design or intention on the alleged crime. He challenged the trial magistrate arguing that he failed to know that, if common design is not shown then the same shows there is misjoinder of accused persons which renders the conviction invalid.

Mr. Njau further pointed out that the trial magistrate failed to observe that none of the appellants admitted to know each other and no identification parade was held to identify the 3rd appellant on his arrest. Further that, the cautioned statement of the 1st, 2nd and 3rd appellants were never tended as evidence, which proves that the prosecution failed to prove beyond reasonable doubt that the appellants had common interest in the unlawful act. Addressing the burden that the prosecution side bears in proving a case, he averred that the prosecution is bound to prove the case beyond reasonable doubt and an accused person ought to be convicted on the strength of prosecution's case, which was not done in the case at hand. He cemented his argument with the case of **Christian s/o Kaale and Another vs. Republic** [1992] TLR 302.

Submitting on the 2nd and 3rd grounds jointly, Mr. Njau found the admission of Exhibit P6 questionable. He contended that the trial Magistrate forcefully admitted the exhibit despite the 4th appellant contesting its contents. In his view, it was imperative to involve a justice of peace in the investigation. For failure to do that, he challenged the trial Magistrate for stating that the interview of the 4th appellant was governed by **Sections 53, 54, 55 and 57 of the CPA**, while the requirements under **Section 57 (2)(d) of the Act** were not observed. He held the stance that the failure to adhere to the said provision led the 4th appellant to raise an issue about the requirement to have him taken to the justice of peace prior to the cautioned statement being admitted. In support of his contention, he cited the case of **Magongwa vs. Republic** [1981] TLR 92 which

ruled that statements made by suspects before justices of peace are admissible.

In addition, he contended that Exhibit P6 implicated other appellants but the same was uncorroborated. Referring to **Section 33(2) of the Evidence Act**, he contended that the provision prohibits a conviction of an accused to be solely based on a confession by a co-accused. In the circumstances, he held the view that the same ought to be treated with caution as it is evidence of a co-accused. In support of his contention, he referred the case of **Republic vs. Mabuku and Another** [1972] H.C.D 95 and **Gopa s/o Gidamebanya and Others vs. Republic** [1953] 20 E.A.C.A 318.

Still challenging the admission of the cautioned statement, he was convinced that the same would be saved if corroborated by another independent evidence. He contended that some independent evidence from a trustworthy source was needed to support the cautioned statement allegedly procured from the 4th appellant. He further challenged the cautioned statement on the ground that it lacked support from the co-appellants whose statements were not tendered in court as evidence. He concluded with a stance that the trial magistrate should have refrained from relying on the purported confession to secure the appellant's conviction.

With respect the 4th and 5th grounds of appeal, Mr. Njau challenged the prosecution evidence for failure to present a material witness.

He claimed that it is the duty of the prosecution to call material witnesses to prove its case. In that respect, he challenged the prosecution for failure to call one Samwel Gibson Chelewa and Leonard Raphael Kasungu, the alleged rangers of KINAPA, who were mentioned by PW2 thereby rendering the identification of the 3rd appellant faulty. Mr. Njau held the view that the failure to bring the two rangers raises questions on whether Exhibit P2, the sulphate bag allegedly containing an elephant tusk, was found by itself on the road or was in their possession. To that effect, he cited the case of **Aziz Abdallah vs. Republic** [1991] TLR 71.

Just like the 1st, 2nd, and 4th defendants, Mr. Njau also challenged the omission to record cautioned statement of the 1st and 2nd appellants, who allegedly, in an oral interview, the mentioned the involvement of the 3rd and 4th appellants. He as well, challenged the omission to seize and tender in court the motorcycle alleged to have carried the appellants. In the circumstances he found PW2's testimony on what was stated by the 1st and 2nd appellants being hearsay and lacking credibility.

Mr. Njau also challenged the identification of the 3rd appellant by PW2 at the crime scene. Citing the case of **Waziri Amani vs. Republic** [1980] TLR 250, he faulted the trial magistrate for stumbling into an error of law and fact by finding that the 3rd appellant was properly identified. The basis of his argument was that there was not any corroborating testimony from the two rangers that were mentioned by PW2.

Mr. Njau jointly submitted on the 6th, 7th and 8th grounds of appeal. He cited **Section 388 of the Criminal Procedure Act** averring that this court has jurisdiction to reverse the findings of the trial court where an error, omission or irregularity has occasioned failure of justice. Arguing on how a proper judgement is to be composed, he contended that a judgement is an expression of the opinion of court arrived at after due consideration of the evidence and of the argument presented by the parties before it. On those bases, he challenged the trial court's judgment on the ground that the trial magistrate heavily relied on the prosecution case in his findings and composed judgement without analysing and evaluating the defence put up by the appellants.

Referring to the case of **Mohamed Said Matula vs Republic** [1995] TLR 3, the learned counsel further averred that the burden of proving a case beyond reasonable doubt lies on the prosecution. That under law and practice, the accused, in his defence, only has to raise reasonable doubt on the prosecution evidence. He contended that the prosecution does not merely discharge its burden by showing that the accused person is not truthful, but must prove the case beyond reasonable doubt. He cemented this averment with the case of **Moshi d/o Rajabu vs. Republic** [1967] HCD. He insisted that the court must consider the entire evidence of the parties including whatever lie by the accused. That, the court must not convict an accused based on weakness of his defence.

Still challenging the trial court judgement, Mr. Njau further contended that the trial court raised issues of inducement, retraction and repudiation from the defence, but did not put the same into consideration. He alleged that while an accused could be convicted based on his confession, the prosecution must prove that the confession was voluntarily made. He supported his averment with the case of **Tuwamoi vs. Uganda** [1967] E.A 84.

On those bases, he challenged that the trial court erred in stating in its judgement that there was no need of involving the justice of peace as the law was observed. In his stance, the law requires presence of justice of peace, but that same was not adhered to in the matter at hand. He contended that the 4th appellant's request should have not been ignored by the trial magistrate. He thereby cited the case of **Magongwa vs. Republic** in regard to admissibility of statements made before justice of peace.

To sum up, Mr. Njau held the stance that a failure of justice was occasioned by the trial magistrate in her judgement. He maintained that the prosecution did not duly exercise its duty of proving the case beyond reasonable doubt. He thus prayed for the appeal to be allowed.

Both appeals were opposed by the respondent. Ms. Tarimo replied to the submission of the 1st, 2nd and 4th appellants. Addressing the 1st ground, Ms. Tarimo averred that PW1, the exhibit keeper, gave a clear account on how Exhibit P2 was handed to him and later to

PW3 for evaluation and finally brought to court. She argued that the chain of custody can be proved by oral evidence without paper trail. Considering the exhibit in the case at hand, she had the stance that an elephant tusk constitutes an item that cannot change hands easily and thus cannot be easily altered, swapped or tampered with. On those bases, she argued that the even if the chain of custody was broken but there was no danger of the exhibit being tampered with, the court can safely rely on such evidence. In support of her stance, she cited the case of **Anania Clavery Betela vs. Republic** (Criminal Appeal 355 of 2017) [2020] TZCA 245 (22 May 2020) in which the Court referred to its previous decisions in **Vuyo Jack vs. Director of Public Prosecutions** (Criminal Appeal 334 of 2016) [2018] TZCA 322 (12 December 2018) and **Joseph Leonard Manyota vs Republic**, Criminal Appeal No. 485 of 2015 (unreported) which settled that position.

Referring to the trial court record, she pointed out that the same shows that PW1 received Exhibit P2 from PW2 and marked it Case No. Himo IR/3880/2021 and registered it in the exhibit register as Reg. No. 68/2021. She added that the exhibit was identified in court by PW3 who identified both the case number and exhibit register number.

As to the alleged controversy on the date of the incident, she contended that the date of incident was specified by PW5 during re-examination to be 22.11.2021. That, all prosecution witnesses testified on the said date.

Jointly submitting on the 2nd and 6th grounds of appeal, Ms. Tarimo disputed there being any error in admission of Exhibit P6. She argued that the trial magistrate determined the objection raised by defence advocate prior to overruling the same. Thus, in her view, the trial court complied with the requirement of conducting a trial within a trial. She referred to the case of **Paulo Maduka & Others vs Republic** (supra) in support of her argument.

With regard to the 3rd and 4th grounds, Ms. Tarimo conceded on the requirement that a witness who identifies a suspect at the crime scene should give description of the suspect before the person to who he first reports. She referred the case of **Cosmas Chalamila vs Republic** (Criminal Appeal 6 of 2010) [2015] TZCA 196 (12 August 2015) TANZLII to that effect. However, she contended that the said principle does not apply to the present case whereby it was the 1st and 2nd appellants who directed the police on where to find the 3rd and 4th appellants. Further, she argued that during the arrest, PW2 was also present to prevent the arrest being founded under mistaken identity of the 3rd and 4th appellants.

Addressing the appellant's contention in naming the suspect at earliest opportunity, she held the stance that the case at hand is different since the 1st and 2nd appellants were caught red handed while the other two were named by the 1st and 2nd appellants during their arrest. In the premises, she considered the appellants to have misdirected themselves.

Arguing on the 5th ground, Ms. Tarimo disputed there being any discrepancies on the prosecution evidence or breach of **Section 57(1) and (2) of the Criminal Procedure Act**. She submitted that **Section 3(1) (a), (b) and (c) of the Evidence Act** [Cap 6 RE 2022] provides that oral confessions are recognizable and a suspect could be convicted solely basing on such evidence. Insisting on that position, Ms. Tarimo cited the case of **Alex Ndendya vs. Republic** (Criminal Appeal 207 of 2018) [2020] TZCA 202 (6 May 2020) TANZLII in which also the case of **Posolo Wilson Mwalyego vs. Republic**, Criminal Appeal No. 613 of. 2015 (CAT at Mbeya, unreported) was referred to.

She further contended that oral admissions or confessions are admissible in certain circumstances if extreme care is taken prior to taking them. That, such statements are valid if at the time the suspect was making the statement, he was a free agent. In the matter at hand, she argued that PW2 stated that he held a friendly interview with the appellants who admitted to have been found in possession of a government trophy and that the same was given to them by 3rd and 4th appellants who ran away. She cemented her averment with the case of **Safari Anthony @ Mtelemko & Another vs. Republic** (Criminal Appeal No. 404 of 2021) [2023] TZCA 17768 (23 October 2023) TANZLII. In the foregoing, she maintained that there was no breach of **Section 57 of the Criminal Procedure Act**.

Replying on the 7th ground, she contended that the trial magistrate did not consider any evidence that was not produced in trial.

Further that, the trial magistrate properly analysed the evidence of both the prosecution and defence in composing the judgement. She was convinced that the trial magistrate duly complied with the requirement set under **Section 312 of the Criminal Procedure Act.**

As to the 8th and 9th grounds, Ms. Tarimo averred that it is evident that the appellants were found in unlawful possession of government trophy as per the evidence of the prosecution witnesses together with exhibits P1, P2 and P6. She argued that the appellants failed to state whether they were authorized or had permit in having the said elephant tusk, which connotes that it was unlawfully acquired. In her view, the prosecution evidence was water tight and strong enough to convict the appellants. She prayed that the appeal is dismissed and conviction and sentence of the trial court upheld.

Mr. Kajembe replied to the submissions by the Mr. Njau for 3rd appellant. He held the stance that there was enough evidence to implicate the 3rd appellant. Explaining further, he contended that, PW2 and PW4's evidence implicated the 3rd appellant as evident on the typed proceedings to the effect that the 3rd appellant was one of the suspects who ran away during the arrest of 1st and 2nd appellant. He challenged Mr. Njau for failure to cross examine on such evidence and contended that failure to cross examine a witness on a certain fact or matter implies acceptance of such fact. He referred the case of **Nyerere Nyague vs. Republic** (Criminal

Appeal Case 67 of 2010) [2012] TZCA 103 TANZLII to buttress his point.

Insisting on the evidence he considered overwhelming against the 3rd appellant; he contended that the act of the 3rd and 4th appellants fleeing the scene when approached by KINAPA officers implies that they knew they were committing an offence. He added that this fact was also not contested by the 3rd appellant during trial. He found the trial court to have correctly analysed the testimony of PW2 and PW3 in its judgement in which it accepted the oral statements made by the 1st and 2nd appellants in the presence of PW2. He maintained that such statements implicated the 3rd appellant.

Mr. Kajembe further challenged the 3rd appellant for failure to indicate how the failure by the trial court to interpret and apply the provisions of **Section 23 of the Penal Code** prejudiced the appellants herein. He was of the view that there was no reason to fault the judgement of the trial court as per **Section 388 of the Criminal Procedure Act**.

Addressing Mr. Njau's arguments on common intention, Mr. Kajembe cited the case of **Director of Public Prosecutions vs. Justice Lumima Katiti & Others** (Criminal Appeal 15 of 2018) [2022] TZCA 505 (12 August 2022), in which the Court stated that common intention may be inferred from actions or omissions of the suspect. He alleged that although the trial court did not consider the

doctrine of common intention, the said omission does not weaken the prosecution case or cause any injustice to the appellants. In his view, common intention was established on evidence as drawn from acts and omissions by the appellants. He averred that PW2 testified to have seen 4 young men in possession of a sulphate bag, two of which fled the scene with a motorcycle. That, there was also evidence that the 1st and 2nd appellants were searched and found in possession of government trophy, to wit, elephant tusk. That the two stated in their oral statements that they were given the trophy by a suspect that ran away.

He added that PW4 also stated that the 4th appellant also gave an oral statement that he and the 3rd appellant were selling the said trophy. In his stance, Exhibit P6 speaks volumes on there being common intention. He as well challenged that the appellants failed to show that they had permits for possessing the said elephant tusks as per **Section 100 (1) of the Wildlife Conservation Act.**

With regard to whether Exhibit P6 was properly admitted or not, Mr. Kajembe contended that Exhibit was correctly admitted by the trial court as reflected at page 50 of the typed proceedings. He argued that a trial within trial (an inquiry) was held in response to an objection raised by Mr. Njau and upon request from the state attorney representing the prosecution at the time. He was thus convinced that **Section 53, 54, 55 and 57 of the Criminal Procedure Act** were observed prior to Exhibit P6 being tendered and admitted. He distinguished the case of **Magongwa vs. Republic**

(supra) on the ground that the case is inapplicable in the matter at hand as the same relates to extra-judicial statements made before justice of peace. He argued that in the case at hand, the appellants were not taken to a justice of peace nor their extrajudicial statements recorded.

He further challenged the 2nd appellant for failure to object to the admission of Exhibit P6 arguing that it is a settled principle that failure to raise an objection when an exhibit is tendered as evidence implies that the same is effectually proved. That, failure to object implies acceptance of the contents of the said document. In his view, raising the concern at this stage was merely an afterthought. He cemented his argument with the case of **Eupharacie Mathew Rimisho t/a Emari Provision Store & Another vs. Tema Enterprises Limited & Another** (Civil Appeal No. 270 of 2018) [2023] TZCA 102 (13 March 2023) in support of his argument.

As to the contention that the 3rd appellant was not taken to the justice of peace, he contended that there is no legal requirement or procedure mandating an accused to be taken to a justice of peace after he has given his cautioned statement at the police. He argued that even if the requirement under **Section 52 and 57 of the Criminal Procedure Act** were not observed, taking the appellant to a justice of peace would have not salvaged the situation. He believed that Exhibit P6 was sufficiently corroborated by PW2 who testified that the 1st and 2nd appellants confessed to him that the elephant tusk was given to him by the 3rd and 4th appellants who

had fled the scene. He added that PW4 testified that the 3rd and 4th appellants admitted to being in possession of the trophy and were selling the same to the 1st and 2nd appellants when they were arrested. He also found Exhibit P4 corroborating Exhibit P6 on what was found at the crime scene.

Mr. Kajembe acknowledged that **Section 33 (2) of the Evidence Act** does not provide for an accused to be solely convicted on confession by a co-accused. He as well conceded to the contention that the said confession ought to be corroborated by another independent evidence. However, on the other hand, he counter argued that the trial court did not rely solely on Exhibit P6 in convicting the appellants. He contended that the trial court also considered other independent evidence on record, being; oral confession of the 1st and 2nd appellants before PW2; Exhibit P4; Exhibit P2; and oral evidence of PW2, PW1, PW3, PW5 who also explained on paper trail and chain of custody.

Arguing further, he disputed the contention that the statements of the 1st, 2nd, and 4th appellants were not tendered in evidence. On that, he found it immaterial for the prosecution to tender the statement by the 1st, 2nd and 4th appellants since the same had been made orally before PW2 and PW4. He added that as a matter of law, an oral confession is a valid confession and a conviction can be founded on it. That, oral confession by one of the accused persons makes the best evidence as stated in **Mawazo Anyandwile Mwaikwaja vs. DPP** (Criminal Appeal 455 of 2017) [2020] TZCA 268

(3 April 2020) TANZLII. Referring to PW2's testimony, he averred that PW2 testified that the 1st and 2nd appellants made a confession before him while PW4 testified that the 4th appellant gave an oral statement before him in which he confessed that he was involved in selling the elephant tusk and fleeing the scene with the 3rd appellant. That, the 4th appellant also confessed to the 3rd appellant being involved in possession of the government trophy. In the circumstances, he held the view that the oral statement held the same weight as the cautioned statement made by the 4th appellant. He believed that the oral confession was sufficient and there was no need of written cautioned statements of the 1st, 2nd and 3rd appellants as their oral evidence was enough.

On omission by prosecution to call two conservation rangers to corroborate the identification of the 3rd appellant by PW3 and the failure to tender the mentioned motorcycle, Mr. Kajembe was of the view that the same was not fatal nor did it weaken the prosecution's case. In his stance, the prosecution only had the duty to prove that the appellants were in illegal possession of the government trophy thereby rendering the presence of the said motorcycle immaterial. Further, he argued that the 3rd appellant was arrested based on information gathered from the 1st ,2nd and 4th appellants in relation to him fleeing the scene and his whereabouts at the time. That, PW2 also testified to have marked the appellants' faces and appearances as the incidence took place on broad daylight. That, the 3rd appellant was arrested after

his whereabouts were exposed by the 4th appellant. That, PW2 and PW4 both identified the 3rd appellant at the trial court.

In addition, he referred to **Section 143 of the Evidence Act** contending that under the provision there is no legal requirement on specific number of witnesses to be furnished to prove a fact. That, what is required is the quality of the evidence and their credibility of the witnesses presented. He supported his arguments with the case of **Christopher Marwa Mturu vs. Republic** (Criminal Appeal 561 of 2019) [2022] TZCA 652 (27 October 2022) TANZLII.

Concerning the sentence imposed by the trial court, he supported the same for being certain in accordance with the law as each appellant was sentenced to serve 20 years in prison. With regard to composition of the Judgement, he firmly argued that the same complied with the requirement set under **Section 312 of the Criminal Procedure Act**. That, the trial court properly analysed and evaluated the evidence of both prosecution and defence. In that respect, he found **Section 388 of the Criminal Procedure Act** being irrelevant on how a judgement ought to be composed. In his view, the appellant misdirected himself.

In conclusion, Mr. Kajembe held a firm stand that the prosecution proved the case beyond reasonable doubt. He was convinced that PW1, PW2, PW3, PW5 and Exhibits P1, P2 proved that the appellants were found in possession of a government trophy. He reiterated his argument that the appellants failed to discharge their

burden of proving that they had permit to possess the government trophy as set under **Section 100(3) (a), (c) and (d) of Wildlife Conservation Act.** He further reiterated his position that the appellants as well never objected the tendering and admission of the certificate of seizure. That, in their defence, they simply stated that they were arrested but did not know the reason of their arrest. In the premises, he prayed for the appeal to be dismissed for lack of merit.

Rejoining, the 1st, 2nd and 4th appellants first reacted on their claim on calling material witness. They contended that the respondent failed to answer on why the prosecution failed to call the said Samwel who was handed over Exhibit P2 by PW1. They also challenged why the respondent did not explain why PW3 claimed to have been handed Exhibit P2 while PW1 claimed to have handed the same to Samwel.

Regarding the manner in which the cautioned statement was admitted, they challenged the trial magistrate for failure to consider their points of objection. They averred that although the trial magistrate conducted an inquiry on the voluntariness in obtaining the cautioned statement, in her assessment, she never considered the appellants' objection regarding the same. They challenged the trial magistrate for failure to take note that there was non-compliance of **Section 57 and 58 of the Criminal Procedure Act.** In their view, there was an importance of having a

handwriting expert examine the contested signature following the appellant's objection.

As to whether the appellants were properly identified, the appellants contended that although it was alleged that the 1st and 2nd appellants directed the arresting officers on where to find the 3rd and 4th appellants, the respondent misdirected the court on two things, being; first, that the 1st and 2nd appellants never led the arresting officers to arrest the other appellants; and the allegation by PW2 and PW4 that the two appellants mentioned the 3rd and 4th appellants was not true. Second, that PW2 admitted to have identified the 3rd and 4th appellants at the crime scene and he was among the arresting officers, but did not name the suspect at the earliest opportunity. They contended that the rule of naming a suspect at earliest stage does not exempt police officers as identifying witnesses.

The appellants admitted that oral confessions are recognized and are admissible in some circumstances if extreme care is taken prior to being taken. However, they held the view that an oral confession is valid if at the time the suspect made the same, he was a free agent. They insisted that since the witnesses were police officers, they had the duty to record the interview as per **Section 57(1) of the Criminal Procedure Act**. In that case, they found the oral confessions made being invalid. Insisting on their point as to confessing out of free will, they argued that an oral confession stands if at the time the suspects gave the same, they were free

agents, which would have in this case meant that the suspects were to be warned as per **Section 53 of the Criminal Procedure Act** prior to being interviewed. They supported such averment with the case of **Twinogone Mwambela vs. Republic,** Criminal Appeal No. 388 of 2018 and maintained their prayer for the appeal to be allowed.

Rejoining on 3rd appellant's submissions, Mr. Njau reiterated his submission in chief in regard to common design or intention and misjoinder of accused persons. He considered the same rendering the conviction invalid.

He maintained that the appellants did not know each other prior to their arrest and no identification parade was conducted to identify the 3rd appellant. He reiterated his argument on non-tendering of cautioned statements of the 1st, 2nd and 3rd appellants as evidence to support the prosecution case which left unanswered questions regarding whether the appellants admitted to have committed the offence.

On foregoing reasons, Mr. Njau had the stance that the prosecution failed to prove the charge against the accused person beyond reasonable doubt rendering the prosecution case to lack strength. He recited the case of **Christian s/o Kaale and Another vs. Republic** (supra) to support his argument.

He further reiterated his stance that the cautioned statement by the 4th appellant needed to be corroborated by the extrajudicial statement from a justice of peace to prove its voluntariness. He was concerned that the 4th appellant retracted the said statement, but the same implicated other appellants. In conclusion, he maintained his prayers for the appeal to be allowed, the conviction and sentence of the trial court be quashed and set aside, and the appellants be set at liberty.

After considering the grounds of appeal, and the submissions by both parties I find three matters in controversy, being: **one**, whether Exhibit P6 (the 4th appellant's cautioned statement) was rightfully procured and admitted; **two**, whether the oral confessions made by the 1st and 2nd appellants were made in compliance with the law and; **third**, whether the prosecution proved its case beyond reasonable doubt.

The appellants challenged the admissibility of Exhibit P6, a cautioned statement by the 4th appellant on the ground that it was improperly procured. Such argument relates to the requirement under **Section 53, 54, 57 and 58 of the Criminal Procedure Act**.

The requirement to caution a suspect prior to interviewing him or her is set under **Section 53 of the Criminal Procedure Act**. The provision sets a number of matters that must be taken into consideration prior to a police officer interviewing a suspect. The provision states:

53. Where a person is under restraint, a police officer shall not ask him any questions, or ask him to do anything, for a purpose connected with the investigation of an offence, unless-

(a) the police officer has told him his name and rank;

(b) the person has been informed by a police officer, in a language in which he is fluent, in writing and, if practicable, orally, of the fact that he is under restraint and of the offence in respect of which he is under restraint; and

(c) the person has been cautioned by a police officer in the following manner, namely, by informing him, or causing him to be informed, in a language in which he is fluent, in writing in accordance with the prescribed form and, if practicable, orally-

(i) that he is not obliged to answer any question asked of him by a police officer, other than a question seeking particulars of his name and address; and

(ii) that, subject to this Act, he may communicate with a lawyer, relative or friend.

Contrary to the allegation by the appellants that the 4th appellant was not cautioned, Exhibit P6 well depicts on its first page that the 4th appellant was cautioned. PW4, the police officer that recorded

his statement introduced himself before him. The 4th appellant was then informed of the offence for which he was a suspect. He was further cautioned that he would not be forced to give any statement and that everything he would state could be used as evidence in court. He was further informed of his right to representation by an advocate friend or relative. Compliance of all these procedures can as well be seen under page 48 of the trial court's typed proceedings in which PW4 stated:

> *"I then prepared a room, to use doing the interrogation. The room is within the police premises. I was there alone with the accused person. I then introduced myself to the suspect and told him I was the one investigating the case against him and I told him that I was assigned to record his statement on the accusations he was facing. I then informed the accused that he had the right to give or not to give his statement as he was not forced to give his statement. He then reply, (sic) he was willing to give his statement I gave him the statement to sign his voluntariness to give his statement and he signed. He put both his signature and thumbprint. I also explained to him his rights of calling his advocate, relative or friend, to be present at the time of recording his statement and he said he was willing to proceed on his own. I then gave him the statement to sign the said voluntariness, he signed first and I also signed."*

PW4 further stated that the 4th appellant did annex his thumbprint and signature as proof of being cautioned. The 4th appellant's interview was governed by Section 57 of the CPA. Section 57 (2)(b) which includes the requirement to caution a suspect was, in my

view, adhered to with respect to the 4th appellant. Other requirements for recording the time and place in which the statement was recorded were also observed. PW4 did specifically state so in his testimony whereby he said:

> *"I started recording his statement at about 20:20hrs up to 21:45hrs, where the Accused admitted being found in possession of an elephant tusk and their intention was to sell it. After I completed recording his statement, I gave him the statement to read it, as I found out he knew how to read and write."*

At the end of the caution statement, there was a certification by the 4th appellant which he wrote himself certifying the information recorded being accurate and without need for alteration. This signifies that **Section 57(3)(a) of the CPA** was complied with.

From the foregoing, it is without doubt that the cautioned statement was procured according to the requirements of the law. Nevertheless, Mr. Njau who represented the 3rd and 4th appellant during trial did object the admission of the cautioned statement. His objection, as reflected on record of the trial court, was that his client did not know anything about the statement as the signature and attestation were not his. Considering the terms of the objection, it is clear that the 4th appellant was denying to have ever made such statement or in legal terms he was repudiating the statement.

When a party retracts or repudiates a cautioned statement or confession, the trial court has the duty to hold an inquiry (for lower courts, such as, the trial court) or a trial within trial (for the High Court). To that effect, an inquiry was duly held by the trial court to determine whether the 4th appellant made the statement or not. PW4 stood as witness for prosecution and the 4th appellant for defence. PW4 testified on how he recorded the statement. On defence, in fact, contrary to the objection, the 4th appellant alleged that he rejected the cautioned statement because a justice of peace was not involved and he was not free. He further alleged that he was only with an officer questioning him but his statement was never recorded. He stated that he was required to sign a certain document but refused to do so as he had not been given the same to read. He was surprised why the statement was signed.

As indicated in the typed proceedings, the trial magistrate gave her ruling in relation to the objection. She noted that the 4th appellant never denied being interviewed by PW4 nor state that he was tortured or forced to do anything during the interview. The magistrate also noted that involvement of a justice of peace was immaterial in the procedure. She also found that the 4th appellant, contrary to his objection, had in fact seen the statement before, which is why he could argue that it was then unsigned but during trial it had signatures and thumbprints. The trial magistrate found the allegations raised without merit and found no need to go further to investigate the signatures. She thus overruled the objection.

Considering what transpired in the inquiry, I am of the view that the trial magistrate was right to overrule the objection without further addressing the question of signatures or thumbprint. This is because the 4th appellant's objection was that he was never interviewed, never made the statement, never saw it rendering the signature and thumbprints not his. However, as seen, he altered his allegation to having being questioned but a statement not recorded and being shown the said statement. It was in that regard that the trial court found the prosecution to have proved the statement being appropriately recorded and the 4th appellant was only challenging the same as an afterthought.

Going beyond the findings of the inquiry, in his defence as DW4, the 4th appellant changed his statement. He alleged that he was questioned by a Police Officer by name of Naftaeli on dropping off a certain passenger at Himo and the officer recorded the conversation. He alleged that later on PW4 showed up with some papers requiring him to sign the same and he did. The documents, were Exhibit P6 and he expressly stated he was not forced to sign the same. His exact words, as found on page 80, of the typed proceedings were:

> *"He was recording what I was telling him. He then locked me in the said room and later he returned with another police who had some papers and asked me to sign so I signed because it was about what transpired at Moshi central police. That police is the one who testified in court (PW4). Those documents are*

> *the ones which were admitted in court as exhibit P6. I expected a justice of peace would be the one to record my Admission. The accused has a right to give his statement before justice of peace. I was not forced to sign on that specific document. I did not refuse to sign as I knew that I was accused of a Road traffic offence. I do not know what was recorded in that cautioned statement."*

In the foregoing, I find there was no need for the trial magistrate to further investigate the signature and thumbprints on Exhibit P6. The statement was recorded according to the requirement of the law, before the 4th appellant and was dully signed by him.

With regard to the claim of involvement of a justice of peace, the law does not compel a suspect to be taken to the justice of peace after his cautioned statement is recorded. A justice of peace records extra-judicial statements or confessions. The powers thereof are derived from **Sections 57,58, and 59 of the Magistrates' Courts Act** [Cap 11 R.E 2019]. As such, no contravention of the provisions of the Criminal Procedure Act was occasioned.

Under the 2nd issue, the appellants challenged the alleged oral confessions made by the 1st and 2nd appellants on the ground that they were not made in compliance with the law. Under the law, oral confessions made by a suspect in the presence of a reliable witness, whether civilian or not, are admissible. This was well expounded in the case of **Mawazo Anyandwile Mwaikwaja vs. DPP** (supra) whereby the Court of Appeal stated:

> "As to the value to be attached, it is settled that an oral confession made by a suspect before or in the presence of reliable witnesses, whether they be civilians or not, they carry equal weight to the written one and a valid conviction can be founded on it."

See also; **Posolo Wilson Mwalyego vs. Republic** (supra); **Gerson Geteni vs. Republic** (Criminal Appeal No. 73 of 2021) [2024] TZCA 52 (19 February 2024) and; **Tabu s/o Malebeti @ Medard & Others vs. Republic** (Criminal Appeal No. 115 of 2020) [2023] TZCA 17945 (12 December 2023).

The oral confessions challenged was the one made before PW2 and PW4. The appellants questioned why the 1st and 2nd appellants' confessions were not cautioned. It however, should be noted that the oral confessions mentioned cover confessions other than those before a justice of peace or a police officer during an interview. As expressly stated by PW2 in his testimony, he never interviewed the 1st and 2nd appellants. He simply inquired on the involvement of other appellants who had escaped the crime scene. In that regard, there was no need for PW2 at that time to caution the 1st and 2nd appellants.

In oral confessions, the court is only interested in ensuring that the suspect made the confession as a free agent. The duty to determine whether the confession was voluntarily made lies on the trial court. This was expounded in the case of **Chamuriho Kirenge @**

Chamuriho Julius vs. Republic (Criminal Appeal 597 of 2017) [2022] TZCA 98 (7 March 2022) whereby the Court of Appeal stated:

> "The Court insisted that such an oral confession would be valid as long as the suspect was a free agent when he said the words imputed to him. It means therefore that even where the court is satisfied that an accused person made an oral confession, still the trial court should go an extra mile to determine whether the oral confession is voluntary or not. What amounts to an involuntary confession is provided for under subsection (3) of section 27 of the Evidence Act, Cap 6…"

Upon observing the trial court's judgement, I find that the trial magistrate considered the oral confessions by the 1st and 2nd appellants. This is evident at pages 11 and 12 of the Judgement whereby the Hon. Magistrate noted that there were two confessions, one made before PW2 and another before PW4. She reasoned that the appellants were free agents at both times. It is also clear on record that the testimony of PW2 regarding the alleged oral confessions were never challenged during trial by the appellants, rendering the claim an afterthought at this stage. The trial court, in my view, was therefore correct in relying on the testimony of PW2.

On the other hand, PW4 seemingly interviewed the 1st and 2nd appellants. I say so considering the testimony of PW4 to the effect that on 29.11.2021 the appellants were removed from custody and interrogated. PW4 used the term "we" connoting that there was

more than one person. However, he did not disclose the identity of the other people in his company.

However, despite stating that the 1st and 2nd appellants had disclosed in the interrogation the names of the 3rd and 4th appellant, when cross examined by the 2nd appellant, PW4 denied ever interviewing or questioning the 2nd appellant. This is a serious discrepancy that I find ought to have been noted by the trial court. There are clear doubts on whether there was any confession made before PW4 by the 1st and 2nd appellants. It is also questionable that PW4 never recorded in writing the statements of the 1st and 2nd appellants whom he claimed to have interviewed upon willingness to disclose the truth of the matter. That was a clear violation of **Section 57(2) of the Criminal Procedure Act**. The trial court thus erred in relying on the 1st and 2nd appellant's confessions allegedly made to PW4.

The last issue is on whether the case was proved against the appellants beyond reasonable doubt. There are multiple reasons advanced by the appellants in substantiating their assertion that the prosecution case was not proved beyond reasonable doubt. **one** was that the 3rd and 4th appellants were not properly identified; **two**, that the chain of custody was broken; **three**, that the trial court solely relied on Exhibit P6 to convict the appellants and; **four**, the trial court failed to show common intention between the appellants.

On the 1st reason, it was alleged that the 3rd and 4th appellants were not properly identified. In fact, the appellants faulted the failure of PW2 to name the appellants at the earliest stage and there not being an identification parade. It is well settled that the ability to name a suspect at the earliest opportunity is vital proof of a witness' credibility. See, **Mohamed Said Rais vs. Republic** (Criminal Appeal 167 of 2020) [2022] TZCA 479 TANZLII; **Mwita Marwa Wangiti vs. Republic** [2002] T.L.R 39; **Chacha Jeremiah Murimi & Others vs. Republic** (Criminal Appeal 551 of 2015) [2019] TZCA 52 TANZLII **Director of Public Prosecutions vs. Chibago s/o Mazengo & Others** (Criminal Appeal 109 of 2019) [2020] TZCA 315 TANZLII and; **Mohamed Hamisi @ Bilali vs. Republic** (Criminal Appeal 300 of 2021) [2023] TZCA 195 TANZLII.

It is also well settled that a witness present at the crime scene ought to give detailed description of a suspect to the person to whom he first reports to. This position was settled by the Court of Appeal in the case of **Cosmas Chalamila vs. Republic** (supra), in which it was ruled that:

> "… it is now settled that a witness who alleges to have identified a suspect at the scene of crime ought to give a detailed description of such a suspect to a person whom he first reports the matter to him/her before such a suspect is arrested. The description should be on the attire worn by a suspect, his appearance, height, colour and/or any special mark on the body of such a suspect."

In the case at hand, PW2, in his testimony, alleged to have seen the 3rd and 4th appellants escaping from the crime scene. In fact, he stated that he marked their faces and could recognize them during their arrest on which he took part. However, the statement which PW2 alleged to have recorded at the police station on the incident was never tendered. PW2 as well did not disclose before whom he mentioned the suspects.

On the other hand, however, I do not find the omission by PW2 as fatal in this case. I say so because, it was not PW2's identification of the suspects that led to their arrest. Rather, it was the oral confession made by the 1st and 2nd appellants in the presence of PW2 and subsequent investigation. The 4th appellant was thus arrested based on such investigative procedures and oral confessions. The 3rd appellant was then arrested owing to the said information and with the aid of the 4th appellant. In the premises, I find there was no need for identifying the 3rd and 4th appellants. Further, their identification was also not in question during trial.

Concerning the claim on chain of custody, the law allows proof of the same by oral evidence and or documentation. In **Paulo Maduka & Others vs. Republic** (Criminal Appeal 110 of 2007) [2009] TZCA 69 (28 October 2009) TANZLII, the Court of Appeal stressed on the importance of recording the chain of custody. It stated:

> "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. Indeed, that was the contention of the appellants in this appeal. The chain of custody requires that from the moment the evidence is collected, its every transfer from one person to another must be documented and that it be provable that nobody else could have accessed it."

See also; **Moses Mwakasindile vs. Republic** (Criminal Appeal 15 of 2017) [2019] TZCA 275 (TANZLII).

The evidence on record shows that upon PW2 and the alleged two rangers, that is, one, Samwel and one, Leonard, arresting the 1st and 2nd appellants on 22.11.2022, a help from two independent witnesses, that is, PW5 and one Kasmir was sought to search the appellants, who were allegedly in possession of a green sulphate bag. A curved elephant tusk was found in the sulphate bag. A seizure certificate (Exhibit P4) was then duly prepared and signed by the two appellants, the independent witnesses and PW2. On the same day, the two appellants were sent to Himo Police Station and held in police custody. A case file with no. Himo IR/3880/2021 was opened at the station. PW1, an exhibit keeper at Himo Police Station, was required to store the elephant tusk. The tusk was labelled Himo IR/3880/2021 and entered into the exhibit register (PF16) at entry No. S.68/2021.

On 23.11.2021, Samwel, one of the two rangers involved in the incident, showed up at the police station. He was handed the

exhibit by PF 16 and a chain of custody form (Exhibit P1) was duly executed. It was alleged that all exchanges were reflected in exhibit Register Entry No. 68 (Exhibit P3) and Exhibit P1. The evidence on record further shows that on the same date, at around 10:00hrs, PW3, a wildlife officer, was called to evaluate the alleged trophy.

Under Exhibit P1, the first hand over from PW2 to PW1 is shown. The 2nd hand over allegedly from PW1 to one Samwel on 23.11.2021 at noon hours is also reflected. However, the hand over from PW1 to Samwel seems to contain an error. The form shows that PW1 released Exhibit P1 on 23.11.2021, but the receipt date is 24.08.2022. Further, it appears that PW3, one Honest Amani Minja, a wildlife officer at Moshi District Council, took the trophy from PW1 after 10:00am whereby he valued the same and filled a certificate thereto (Exhibit P5). On the other hand, Exhibit P3 shows that the trophy was returned and handed to one Samwel for putting in storage and at 18:30hrs the same was handed over to PW1 for storage. On 24.08.2022 the trophy appears to be taken to court. This, in fact, is another error affecting the chain of custody.

It is apparently clear that the chain of custody is unclear from when one Samwel took the trophy for valuation to when it was tendered in court in evidence. However, exhibit P3 shows hand over being made to Samuel at 17:30hrs to take the trophy to PW1 who received it at 18:30hrs.

Further, from details shared by PW1, PW2, PW3 and PW5, the elephant tusk had carvings of human faces and elephants. This unique decoration would render the same incapable of easily being tempered with. In the premises, I am of the view that even if the chain of custody might have been faulty, the nature of the exhibit would still ensure the exhibit was legit. The Court expounded on this situation in the case of **Joseph Leonard Manyota vs. Republic** (Criminal Appeal No. 485 of 2017) [2017] TZCA 261 TANZLII whereby it stated:

> "...it is not every time that when the chain of custody is broken, then the relevant item cannot be produced and accepted by the court as evidence regardless of its nature. We are certain that this cannot be the case, say where the potential evidence is not in the danger of being destroyed or polluted, and/or in any way tempered with. Where the circumstances may reasonably show the absence of such dangers, the court can safely receive such evidence despite the fact that the chain of custody may have been broken, of course, this will depend on the prevailing circumstances in every particular case."

See also; **Stephano s/o Victor @ Mlelwa vs. Republic** (Criminal Appeal 257 of 2021) [2023] TZCA 152 TANZLII. In the foregoing, I find the exhibit being correctly admitted by the trial court, despite the minor flaws in the chain of custody as observed hereinabove.

The appellants, as well, faulted the trial court Judgement alleging that the trial court solely relied on Exhibit P6 to convict the

appellants. **Section 33 (2) of the Evidence Act** prohibits conviction of an accused person by solely relying on confession by co-accused. It is thus without doubt that courts are warned on relying on the evidence of a co-accused only to convict other accused(s). Courts are as well warned on relying on retracted or repudiated confessions to secure conviction without there being independent evidence corroborating the confession. In **Nuru s/o Venevas & Others vs. Republic** (Criminal Appeal No.431 of 2021) [2023] TZCA 17300 (2 June 2023) TANZLII the Court of Appeal stated:

> "It is trite principle that confession evidence which has been retracted or repudiated cannot be acted upon to found conviction and it is always desirable to look for corroboration in support of a confession which has been repudiated or retracted. This was emphasized in the case of TUWAMOI VS UGANDA (1967) EA 84 whereby the Court held:
>
> > "The present rule then as applied in East Africa, with regard to retracted confession, is that as a matter of practice or prudence the trial court should direct itself that it is dangerous to act upon a statement which has been retracted in the absence of corroboration in some material particular, but that the court might do so if it is fully satisfied in the circumstances of the case that the confession must be true".

Explaining on the application of **Section 33 (2) of the Evidence Act**, the Court of Appeal in **Hussein Malulu @ Elias Hussein & Others vs.**

Republic (Criminal Appeal No. 263 of 2021) [2023] TZCA 17939 (13 December 2023) TANZLII held:

> "What we gather from the quoted provision is that the testimony of a co accused, arising out of his confession to committing an offence must be given force through corroboration. This means that conviction of a co-accused without there being corroborating evidence fails the test of a properly grounded conviction. As we alluded to earlier on, conviction based on the testimony of a co accused, as a general rule, must be cautiously applied. Thus, in **Pascal Kitigwa v. Republic** [1994] T.L.R. 65, we underscored the fact that it is not illegal to convict an accused person based on an uncorroborated testimony of the co-accused. However, such conviction must be preceded by a warning, by the convicting court, of the dangers of relying on such testimony."

Foremost, I see it is important to point out that the trial court did not solely rely on Exhibit P6, the caution statement of the 4th appellant, in convicting the appellants. At least not the 1st and 2nd appellants who were found in possession of the trophy. It is true that Exhibit P6 provided details on what transpired on the fateful day of 22.11.2021. In fact, the statement contains details on plans to sell the trophy, details on where it had come from and the role of every appellant in the matter. It is in fact from such details that it was evidently derived that the 1st and 2nd appellants were Kenyans.

Exhibit P2 belonged to the late Joseph @ Nyoka, the 3rd appellant's father and the 4th appellant was first shown the same. It is from such

details that the 4th appellant admitted to have been in search of purchasers when he found the 1st and 2nd appellants who offered to buy the trophy. In my view, while indeed Exhibit P6 had details implicating all appellants, the trial court ought to have observed whether there was other evidence corroborating the involvement of the 3rd and 4th appellant or rather warned itself prior to relying on Exhibit P6.

As the 1st appellate court, I have observed the evidence on record. The record shows that, apart from Exhibit P6, there is still evidence from PW2 who arrested the 1st and 2nd appellant and seized the trophy. In addition, although the seizure certificate bore their signatures and involved them, the 1st and 2nd appellants never objected its admission. This, in the light of the decision in **Eupharacie Mathew Rimisho t/a Emari Provision Store & Another vs. Tema Enterprises Limited & Another** (supra) implies admission of the seizure certificate in evidence. These two facts being true, they reflect the truth of the whole incident and further prove credibility of PW2, who also testified to have seen two other people escaping the scene. This is despite the identification of those alleged to escape the crime scene being in question.

It was based on such fact, that further investigation was held which led to the arrest of the 3rd and 4th appellants. There was also an oral confession by the 1st and 2nd appellant who stated that the trophy belonged to the 3rd and 4th appellants. Thus, apart from Exhibit P6,

the 1st and 2nd appellants played a role in the identification and arrest of the 3rd and 4th appellants.

Finally, Exhibit P6 disclosed details that explained the whole association between the appellants. What are the chances that two Kenyan men would be randomly arrested on the same day at Himo market.? Is it a coincidence that 4th appellant knew where to find the 3rd appellant if he had never visited him? I am of view that the evidence on record was capable of proving the appellants to have had common intention to trade in the trophy and thus were all rightfully found in possession of the same on the material day. Since no evidence was produced to prove lawful possession on their part, clearly, they were in unlawful possession of the trophy as charged.

The appellants further alleged that the trial magistrate did not consider their defence in her judgement. I have observed the trial court Judgement. At page 6 and 7, the trial magistrate summarized the defence case. At page 14, the trial magistrate simply stated that she did study the evidence of the prosecution and found the same not raising any reasonable doubt on prosecution case.

There is no limit on how much or less a magistrate or judge is to address the defence case. It is however mandatory that all evidence is considered. The trial magistrate still had the duty to reason why the said defence raised no doubts. Since there was clearly an omission on her part and this being the 1st appellate

court, I shall consider the defence case and make findings thereto accordingly.

The 1st and 2nd appellants' defence was on alibi. The law is trite that where the defence of alibi is raised, the accused becomes obliged to demonstrate the same albeit on balance of probabilities. This position was settled in the case of ***Kubezya John v. The Republic*** (Criminal Appeal No. 488 of 2015) [2019] TZCA 472 (12 December 2019), whereby the Court of Appeal, at page 23 held:

> "We wish to interject here that we are alive to the position of the law that an accused person is under no legal duty to prove his innocence. But in situations where, like here, the accused person is depending on the defence of alibi, it is his duty to demonstrate his alibi albeit on a balance of probabilities…"

In the case at hand, apart from the fact that the appellants failed to comply with the provisions of **Section 194 (4) and (5) of the Criminal Procedure Act**, which requires filing of a notice of intention to rely of the evidence of alibi, they also never furnished any witness to support their allegation. They furnished no witness to explain as to their whereabouts on the material day or as to the place they were arrested from. None of them even bothered to prove the alleged circumstances of their arrest. On the other hand, the 3rd and 4th appellants only testified on their arrest. Their defence thus did not raise any doubts on the prosecution case.

In the foregoing, having found that the prosecution rightly discharged its burden, I find no reason to interfere with the conviction and sentence imposed by the trial court against all appellants. The consolidated appeals are therefore dismissed.

Dated and delivered at Moshi on this 20th day of May, 2024.

X

L. M. MONGELLA
JUDGE
Signed by: L. M. MONGELLA