**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**DAR ES SALAAM SUB REGISTRY**

**AT DAR ES SALAAM**

**CRIMINAL APPEAL NO. 5483 OF 2024**
**(Arising from the Jugdement of the District Court of Bagamoyo at Bagamoyo in Economic Case No. 14 of 2021 (Hon. V.P. Mwaria, RM)**

**JOHN DAMAS JOHN ..... APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

# JUDGEMENT

***Date of last order: 23rd May 2024***
***Date of Judgement: 27th May 2024***

**MTEMBWA, J.:**

In the District Court of Bagamoyo, the Appellant was arraigned for the offence of unlawful possession of government trophies contrary to ***section 86 (1) and (2) (c) (iii) of the Wildlife Conservation Act, Cap 283, R.E. 2022*** read together with ***paragraph 14 of the first schedule to*** and ***section 57(1) and 60 (2) of the Economic and Organized Crime Control Act, Cap 200, R.E. 2022.*** It was alleged that, the Appellant, on **29th October 2021,** while at Sanzale checkpoint area within Bagamoyo District of Coast Region was found in possession of two pieces of Elephant Tusks valued at United State Dollars 15,000,

equivalent to Tanzanian Shillings 34,575,000/= being the property of the United Republic of Tanzania.

The Respondent forcefully resisted the charge. As a result, prosecution fronted, as per the impugned Judgement, five (5) sworn witnesses and tendered seven (7) exhibits. The Respondent relied on his sworn testimonies and tendered no exhibit. Having evaluated the evidence adduced, the learned trial Magistrate was convinced beyond reasonable doubts that the charge was proved against the Respondent. As the day follows the night, the Respondent was accordingly convicted and ultimately sentenced to serve twenty (20) years imprisonment.

Still undaunted to demonstrate his innocence, the Respondent preferred the following grounds of appeal and I quote in verbatim;

> *1. That, the learned trial magistrate erred in law and fact in trying the case without any legal jurisdiction as neither the DPP's consent nor the certification to confer jurisdiction was filed and/or endorsed by the court before plea taking.*
>
> *2. That, the learned trial magistrate erred in law and fact in convicting the appellant while the evidence in records was at variance with the particulars of the offence in respect of the alleged seized elephant tusks, the omission renders a defective charge against the appellant.*
>
> *3. That, the learned trial magistrate erred in law and fact in convicting the appellant based on the evidence of PW5 (ASS. INSP. FREDERICK KJZEE) and statement of MAULID JUMA (uncalled*

*witness) when the requirement of section 34B (2) a-f did not comply with the omission which renders the alleged search and seizure lack evidential value to stand.*

*4. That, the learned trial magistrate erred in law and fact in convicting the appellant when the prosecution evidence adduced in court did not establish the chain of custody of the alleged seized elephant tusks beyond all reasonable doubts against the appellant as required by P.G.O NO.229.*

*5. That, the learned trial magistrate erred in law and fact in convicting the appellant based on the weakness of the defense case on the failure to call a material witness and cross- examine the prosecution witness (PW1) in respect of the mode and place he was arrested, the omission which contravened the cardinal principles of law governing defense case in criminal matters.*

*6. That, the learned trial magistrate erred in law and fact in convicting the appellant without making a critical evaluation, analysis, assessment, determination, weighing, and consideration of the issues and/or doubts raised by defense evidence the omission which resulted in a serious misdirection amounting to a miscarriage of justice and constituted a mistrial.*

*7. That, the learned trial magistrate erred in law and fact in convicting the appellant in a case where the prosecution did not prove its charge against the appellant beyond all reasonable doubts as required by law*

When the matter came for orders on 27th March 2024, the Republic was represented by **Mr. Clement Masua**, the learned State attorney while the Appellant enjoyed the representation of **Mr. Deogratius**

**Godfrey** assisted by **Mr. Ashrafu Muhidini**, both learned counsels. By consent, parties agreed to argue this Appeal by way of written submissions. Both parties appear to have complied with the schedule of which I personally recommend.

Arguing on the first ground of appeal, Mr. Godfrey submitted that, being an economic offence within the dictate of ***section 26(1)(2) of the Economic and Organized Crime Control Act, Cap 200, R.E 2019,*** it must be commenced after issuance of consent and certificate by the Director of Public Prosecutions (the DPP) or a person (officer) assigned by him. He added further that, for the Court subordinate to the High Court, section 12 (3) of the same law has the same import. The learned counsel noted that, the records are silent on whether the DPP issued and or supplied any consent and certificate conferring jurisdiction to the trial Court before or after the plea taking. He faulted the trial Court by proceeding to determine the matter without such authorizing documents. He referred this Court to page 13 of the case of ***Hashim Nassoro @ Almas Vs. DPP, Criminal Appeal No. 312 OF 2019.***

On the second ground of appeal, Mr. Godfrey submitted that, the learned trial magistrate erred in law and fact in convicting the appellant in the circumstances where prosecution failed to prove the charge against

the appellant beyond all reasonable doubts. He identified the errors as follows; that, the evidence on records was in variance with the particulars of the offence in respect to what was actually seized from the Appellant thereby rendering the charge defective and as such, the same was not proved to the required standards. He related the contradictions with the testimonies of PW1, PW2, PW3 and PW4. He referred this Court to the particulars of the offence in the charge. To fortify, he cited the case of ***Thabit Bakari Vs. Republic, Criminal Appeal No. 73 of 2019*** where the Court observed that;

> *Having found that the charge was at variance with the evidence adduced in court, the issue left for determination is what are the consequences thereto. Undoubtedly, a charge sheet is a basis of a criminal trial. Its purpose among others being to inform the accused person the nature and magnitude of the charge facing him to enable him/her to prepare his/her defense. In criminal charges, the prosecution side has the duty to prove the charge against an accused person beyond reasonable doubt and this burden never shifts.*

He implored this Court to expunge the exhibit from the records for lack of evidential value.

Mr. Godfrey compressed the third, fourth, fifth, sixth and seventh grounds of appeal and argued them altogether. On this, he complained that, the learned trial magistrate erred in law and fact in cementing his

decision basing on the weakness of the defense case and not on the strength of prosecution evidence proving the offence to the required standards. He added that, the accused or Appellant is not dutifully required to prove his innocence. He cited the case of ***Republic Vs. Krestin Cameron (2003) TLR 84*** where it was observed that;

> *It is the law of our land that in cases of this nature (criminal cases) the accused can only be convicted on the strength of the prosecution case and not on basis of the weakness of defense case even suspicion, however strong can never be a basis of criminal conviction or substitute for proof of beyond reasonable doubt.*

To add, Mr. Godfrey observed that, the learned trial Magistrate misdirected himself for holding that, the Appellant failed to cross examine and or call material witnesses to support his defense and that, such an error resulted into a serious miscarriage of justice. He cited the case of ***Kwingamasa Vs. Samweli Mitubatwa (1980) TLR 103*** where the court observed that;

> *A failure to cross examine in merely a consideration to be weighed up with all other factors in the case in deciding the issue of truthfulness so otherwise of the challenged evidence, The failure does not necessarily prevent the court from accepting the version of the omitting part on the point the witness story maybe improbable, vague or contradictory that the court would be justified to rejection withstanding the opposite parts failure to challenge it during cross examination in any case it may be apparent on the record of the case as it is in the instant case that the opposite party*

*in omitting to cross examine the witness was not making concession that the evidence was true*

The learned counsel also argued that, the learned trial Magistrate wrongly convicted the Appellant in the circumstances where the prosecution failed to establish the chain of custody to the required standards. He added further that, what can be seen in the certificate of seizure (exhibit P1) differing from what was tendered in Court. That, since the independent witnesses were not called to testify, prosecution evidence could not prove the charge. On the procedure used to conduct seizure, Mr. Geofrey argued that, the same was tainted with illegalities in view of ***section 38 (1) (2) (3) of the Criminal Procedure Act, Cap 20 R.E 2022*** as neither search warrant or emergency search order nor police notebook were tendered during hearing.

Lastly, he beseeched this Court to find that, this Appeal has merits and proceed to revise and nullify the proceedings of the trial Court, quash the conviction and the sentence meted therefrom.

Responding to the first ground of appeal, the learned state attorney joined hands with the Appellant's counsel that the records are silent as to whether the said documents were filed or endorsed by the trial Court. He cited the case of ***John Julius Martin & Another Vs.***

***Republic, Criminal Appeal 42 of 2020, [2022] TZCA 789 (8 December 2022)*** where the Court noted that, because the instrument of Consent and Certificate were neither endorsed as having been admitted by the trial court, nor does the record show that the documents were admitted. In view of the foregoing, the learned state attorney resolved that, the trial Court proceeded without jurisdiction.

He contended further that, the effect of entertaining the matter without jurisdiction renders the decision a nullity. He implored this Court to order trail *de novo*. On the contrary, the learned state attorney observed that he was not able to go through the hand written proceedings to be sure as to whether the said error so appear as alluded.

In reply to the second ground of appeal, the learned state attorney argued that, the variance between the particulars of the offence and the evidence does not make the charge defective rather the same renders the charge unproved. He added further that, the noted variances by the Appellant's counsel are minor and do not corrode the prosecution evidence. He implored this Court to disregard such argument.

In respect of the third ground of appeal, the learned state attorney

submitted that, the evidence of PW5 who tendered the statement of Maulid Juma is not reflected in the typed proceedings supplied to them. That, since the lower Court records were not available at the time of preparing the submission, the learned state attorney was unable to know whether the said defects are traceable therein. From what I gathered is that, if everything remains constant as per the typed proceedings, this Court should order a *trial de novo*.

Replying to the fourth ground of appeal, the learned state attorney argued that, there is an oral account on the seizure, storage and transfer of the exhibit from the time of seizure to the time it was taken to Court. He added further that, the said exhibit was seized by PW1, stored by PW3 and tendered in Court by PW1. In that stance, he observed that, the oral account on the chain of custody of an exhibit is acceptable. He cited the case *of* ***Director of Public Prosecutions Vs. Akida Abdallah Banda, Criminal Appeal No. 32 of 2020 [2023] TZCA 209 (28 April 2023)*****.** To buttress however, he contended that, elephant tusks do not exchange hands easily hence cannot be tempered with so easily.

In respect of the fifth ground of appeal, the learned state attorney submitted that, at page 7 of the typed Judgement, the learned trial

Magistrate having analyzed the evidence available, satisfied himself that, the appellant was found unlawfully in possession of elephant tusks. He implored this Court to disregard the arguments by the Appellant's counsel that the appellant was convicted on the strength of the prosecution evidence especially the testimonies of PW1.

In response to the sixth ground of appeal, the learned state attorney submitted that, in its Judgement, the trial Court analyzed both the prosecution and defense evidence then came up with its decision that the case was proved beyond reasonable doubts against the Appellant. He beseeched this Court to disregard the sixth ground of appeal.

Replying to the seventh ground of appeal, the learned state attorney submitted that, the offence to which the Appellant was charged with was proved to required standards. He placed on menu the evidence of PW1 who testified that, the Appellant was found in possession of the elephant tusks whereas the same were valued by PW2. He contended that, the said evidence was corroborated by the testimonies of PW3, the exhibit keeper and the statement of Juma Maulid, the independent witness.

Lastly the learned state attorney concluded that the raised grounds of appeal are devoid of merits and implored this Court to disregard and

dismiss them accordingly.

Rejoining to the second ground of appeal, Mr. Godfrey submitted that, the learned counsel's admission on the variance of evidence is an indication that prosecution failed to prove the charge to the required standards. He implored this Court to nullify the proceedings and the resultant Judgment of the trial Court. He rebutted a prayer that this matter be set for *trial de novo*.

On third, fourth, fifth, sixth and seventh grounds of appeal, Mr. Godfrey reiterated what he observed in chief that the learned trial magistrate erred by pegging his decision on the weakness of the defense case. He added further that, always prosecution has a statutory duty to prove the charge beyond reasonable doubts and that such duty, never shifts to the Accused. He reiterated also that, the learned trial Magistrate wrongly convicted the Appellant in the circumstances where a chain of custody was not properly established.

Mr. Godfrey insisted that, if an order of retrial is entered, will result into miscarriage of justice because prosecution will have an opportunity to rectify a charge and evidence at the Appellant's detriment. He cited the case of ***Kasimba Aman Simba Vs. Republic, Criminal Appeal No. 378 of 2021***. Lastly, Mr. Godfrey beseeched

this Court to nullify the proceedings of the trial Court, quash the conviction and sentence meted therefrom.

Indeed, in ***Daniel Matiku Vs. Republic, Criminal Appeal No. 450 of 2016, Court of Appeal of Tanzania at Mwanza,*** the Court reinstated the everlasting salutary principle of law that;

> *.....a first appeal is in the form of a rehearing. Thus, the first appellate court, has a duty to re-evaluate the entire trial evidence on record by reading it together and subjecting it to a critical scrutiny and if warranted arrive at its own conclusions of fact.*

Guided by the above principle, I have dispassionately considered the rival submissions by the learned counsels for both parties and thoroughly examined the Court records. The question would be whether the offence of unlawful possession of government trophies contrary to ***section 86 (1) and (2) (c) (iii) of the Wildlife Conservation Act, Cap 283, R.E. 2022*** read together with ***paragraph 14 of the first schedule to*** and ***section 57(1) and 60 (2) of the Economic and Organized Crime Control Act, Cap 200, R.E. 2022*** was proved to the required standards, that is, beyond reasonable doubts.

The first ground of appeal needs not to detain us long here as, in my views, it was raised as a result of failure to peruse the original records of the trial Court before filing this Appeal. According to hand written

proceedings dated **16th January 2023**, upon submissions by Mr. Jonathan Bitulo, the prosecutor, the trial Court admitted consent, certificate and Charge to form part of the records. The records reveal further that, on the scheduled date, the Respondent appeared in person. In addition, the said documents are traceable in the original file.

Since there is always a presumption that Court records accurately represent what happened on the material day, I see no reason to believe otherwise ***(***see ***Halfan Sudi Vs. Abieza Chichili [1998] TLR 527)***. To that end, the first ground of appeal is devoid of merit.

Having further scrutinized the records, I feel instructive first to look into the third ground of appeal as per the Petition of Appeal. For easy reference, I shall reproduce it in verbatim.

> *That, the learned trial magistrate erred in law and fact in convicting the appellant based on the evidence of PW5 (ASS. INSP. FREDERICK KIZEE) and statement of MAULID JUMA (uncalled witness) when the requirement of section 34B (2) a-f did not comply with the omission which renders the alleged search and seizure lack evidential value to stand.*

The Appellant's counsel seemed to have not given the thoughtful attention to it. He only indicated the variances or differences noted between what can be seen in the certificate of seizure and what was tendered in Court. He was of the views that, since the independent

witnesses were not called to testify, the charge was not proved to the required standards. In rebuttal, the learned state attorney could not satisfactorily reply thereto owing to the reason that, the evidence of PW5 who tendered Exhibit P7 could not be traced from the records. He implored this Court to enter an order of *trial de novo*. On his part, Mr. Godfrey did not find it worth purchase. He observed that, an order of retrial will allow prosecution to rearrange the evidence.

As said before, having evaluated the evidence adduced during hearing, the learned trial Magistrate was satisfied that the offence was proved to the required standards, that is, beyond reasonable doubts. The conclusion was arrived at having considered too the testimonies of PW5 one Assistant Inspector Fredrick Kizee who tendered Exhibit P7.

The records are silent as to when prosecution case was closed but that did not amuse me at all because it was not on menu. The learned state attorney too seemed to have not been prejudiced by that. To my surprise, the evidence of PW5 could not be traced from the records (whether from the typed script or original hand written papers). However, Exhibit P7 tendered by him is traceable from the records.

As per the records, on 22nd November 2023, the prosecutor informed the Court of the Republic's intention to tender the witness

statement in view of section 34B of CPA. The prayer was granted and the matter then was adjourned to 6th December 2023 for hearing. On the scheduled date, surprisingly, a ruling on the case to answer was delivered and defense hearing commenced. As per the records, it is not easily established when PW5 testified. It is not even clear whether the Respondent was accorded the right he deserved in accordance with the law during hearing. The records are also silent on whether PW5 testified under oath/affirmation or not to enable this Court to assess and assign to the testimony the credence it deserves.

In fine, there is discrepancy between the Jugdement and what the trial Court's records represent. In the circumstances, I cannot properly determine the Appeal owing to none inclusion of PW5's testimony or evidence into records. For future guidance however, a Magistrate or any decision maker must seriously stretch him or herself to make sure that, the Judgement or final decision reflects what is on records to enable the appellate Court to properly evaluate or and asses the evidence when the appeal is preferred or when the said decision is called into question. It must be noted that, the Court records is not only for parties' use but are also subject to public scrutiny and thus if accuracy is not observed and or maintained, winning public confidence will never be attained. In the

premises, I will not determine other remaining grounds of appeal.

To that end, the proceedings and the resultant Judgement of the trial Court are hereby quashed and set aside. Since an error is not predicated on inadequacy or insufficiency of the prosecution evidence, I order that the records be remitted to the trial Court for prompt and expedient retrial by another learned Magistrate of competent jurisdiction. The Respondent shall remain in custody unless is bailed out in accordance with the law.

I order accordingly.

Right of appeal fully explained.

**DATED** at **DAR ES SALAAM** this 27th day of May 2024.


**H.S. MTEMBWA**
**JUDGE**