

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(MOROGORO SUB REGISTRY)**

**AT MOROGORO**

**CRIMINAL APPEAL NO. 51 OF 2023**

(ARISING FROM ECONOMIC CASE NO.08 OF 2023 AT KILOMBERO DISTRICT COURT)

**RASHID MOHAMED MKUMULE ..... 1<sup>ST</sup> APPELLANT**

**KILEMBU JUMBE @LOVILINYA ..... 2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

Date of Last Order:13.05.2024

Date of Judgement:31.05.2024

**JUDGEMENT**

**MAGOIGA, J.**

The appellants, **Rashid Mohamed Mkumule** and **Kilembu Jumbe @Lovilinya** were arraigned before Kilombero district court (trial court) for one count of unlawful possession of Government trophies contrary to section 86(1), (2)(b) and (3) of the Wildlife Conservation Act, [Cap 283 R.E 2022] read together with paragraph 14 of the First Schedule to and sections 57 (1) and 60 (2) of the Economic and Organized Crime Control Act, [Cap 200 R.E.2022]. The appellant denied the charge.

The facts as per the charge sheet were that, on 01<sup>st</sup> day of February, 2023 at Sanje area, Sanje ward, Mang'ula division within Kilombero district in Morogoro region, the appellants were found in possession of Government trophies, to wit: twelve (12) Elephant tusks valued at

USD.105,000/- equivalent to Tshs. Two Hundred Forty-One Million, Two Hundred One Thousand Six Hundred Only (TZS.241,281,600) the property of the Government of the United Republic of Tanzania without a permit from the Director of Wildlife or authorization.

After full trial, the appellants were found guilty as charged, convicted and sentenced to pay a fine of Tshs. 2,412,816,000/- or serve term jail of twenty years.

Aggrieved with both conviction and sentence, the appellant preferred this appeal faulting the trial court findings armed with 10 grounds of appeal for reasons to be apparent in this judgement, I beg to reproduce them as couched and filed, to wit:

- 1. That, Your Honourable Judge, the trial magistrate erred in law and upon facts when admitting the evidence of PW2 one Asegulile Mwakigove who didn't even witness arrest process done by Park Rangers during night just called to see the exhibit P2 and the appellants as observed at page 11 of the proceedings. Your Honour, there is a question of doubt as to whether appellants are actual offenders managed to have in possession of the said P2.*
- 2. That, Your Honour; the prosecution witnesses have never clarified the distinct features of the exhibit so tendered to be admitted by court, the omission that affecting the root of the case from the*



charge sheet. The trial court erred in law convicting appellants basing on imagination story. It was the duty of an expert to clarify the district features as stated in the case of **Republic Vs Kerstin Cameron (2003) T.L.R 85.**

3. That, search was not properly conducted to appellants. As pointed out by PW1 that it was a joint patrol conducted during night they didn't express the distance and intensity of light that helped in identification of appellants. A mere deem light of a car can never identify the person from behind.
4. That, no identification parade book was tendered and in fact no identification parade was conducted to clear doubts that appellants are the one who were arrested during the alleged date of incidence. That is to say identification of appellants in connection to exhibit P2 leaves doubts.
5. That, Your Honour, no caution statements were taken or caused to be taken from appellants contradicting the requirements of Section 50, 51 and 58 of the Criminal Procedure Act. Cap 20 R.E 2019.
6. That, Your Honour, the trial magistrate erred in law and upon facts replying on repudiated/retracted confession imposing conviction to appellants without full consideration of the circumstances that it was true given by the appellant. May it please your honour, refer

*the case of R Vs Daniel Ndababoye HC (T) Bukoba Criminal Session Case No 13 of 2017 (unreported) in which the case of Hemed Abdallah V.R (1995) TLR 172 the court stated that "Generally it is dangerous to act upon a repudiated or retracted confession unless it is collaborated in material particular ....."*

*The trial magistrate just relied on the testimony of PW1 and PW4 and for him that was confession. Your honour, this is FATAL and has caused miscarriage of justice that affected appellants.*

*7. That, the trial process was not fair as appellants were not accorded with enough time for defence and calling our witnesses.*

*8. That your Honour, the trial magistrate did not consider the strong defence testimony of appellants who informed the court that the parcel exhibit P2 was thrown by unidentified person who was walking in front of us and some of the park rangers ran after him unsuccessfully. The arrest of the appellants was maliciously motivated by PW1 whose culprit (poacher) escaped (went on missing) in sugarcane plantations.*

*Your Honour, appellants are not expert on Wildlife. Is it possible to know that this is elephant tusk? Carrying along the road knowing that it is a government trophy? A reasonable person can conclude by saying No. All these questions leave doubts as to the conviction*





*against appellant. We pray to this Honourable Court to consider it widely.*

*9. That, the arresting officer forced us to sign the document at the gun point or else they could shoot appellants. We object admission of those documents but in vain. We again pray that all documents admitted during the trial be expunged from records as they were wrongly prepared in evil intent to incriminate appellants.*

*10. That, DW2 is the friend of DW1 who accordingly reported to local leaders of Sanje upon his arrival. Since both DW1 and DW2 went by foot to visit parent of DW1 at Mkula during the evening how could the same people carry a luggage exhibit P2 from the foreign house?*

*Prosecution failed to clear these doubts in the case and the trial magistrate erred too in his determination.*

When this appeal was called on for hearing, the appellants appeared in person and unrepresented and were ready for hearing. On the other hand, the Republic was represented by Mr. John Mkonyi and Ms. Monica Matwe, learned State Attorneys.

When this court invited the appellants to argue their appeal, they informed the court that based on their grounds of appeal will prefer to



hear the learned State Attorneys first and will reply later on. I granted the prayer.

Mr. Mkonyi, learned Attorney readily told the court that they strongly oppose this appeal and prayed that this appeal be dismissed for want of merits on all ten grounds raised.

Starting with first ground of appeal, the learned Attorney argued that this ground is unmerited because the evidence of PW2 was that he witnessed search and not arrest, which the appellants were found in possession of the Government trophies in issue and signed the seizure of certificate (**exhibit P2**) as independent witness as reflected at pages 13-15 of the typed proceedings. According to the learned Attorney, no error of law and fact was occasioned by the trial Magistrate in considering his evidence which corroborated that, indeed, the appellants were found with the disputed Government trophies which was retrieved from the sulphate belonging to the appellants.

On the second ground which was that the prosecution witnesses never clarified any distinctive features of the **exhibit P2** and therefore it was wrong for the trial Magistrate to convict them on imaginary story.

In response, the learned Attorney, focused and brief to the point, argued that exhibit P2 was clearly identified and marked as S1-S12 and that PW4 explained in details of its contents at pages 15-16 of the typed



proceedings and urged this court to dismiss this ground for want of merits.

On the 3 and 4 grounds which main complaint was on search and identification parade, the learned Attorney argued them jointly that, there was nothing wrong for the search done and the evidence in this case was not on identification. According to the learned Attorney, the appellants were arrested as explained by PW1 and stayed with arresting officers till morning, so the issue of identification do not arise at all.

On the 5<sup>th</sup> ground of appeal that no cautioned statement was taken or caused to be taken contradicting the requirement of sections 50, 51, 57 and 58 of the CPA, [Cap 20 R.E.2019]. In this ground, it was the brief and focused response of the learned Attorney that, no cautioned statement was tendered during trial and as such this ground was raised as an afterthought and urged this court to disregard it.

On the sixth ground of appeal that the trial court erred to convict the appellant on repudiated or retracted confession, in response, the learned Attorney was brief and to the point that, no cautioned statement was tendered during trial and nowhere in the judgement, the trial Magistrate relied on the same to convict the appellants and as such invited this court to dismiss this ground as well.



On the seventh ground of appeal, the main complaint was that trial was not fair as the appellants were not accorded with enough time for defence and calling witnesses. In response, the learned Attorney, argued that, the trial was fair because the appellants were given chance to defend and none wanted to call any witness and denied. According to the learned Attorney, the appellants informed the trial court that, they have no witnesses to call and section 231 of the CPA was fully complied with.

On the eighth ground of appeal, the main complaint was the trial court did not consider the strong defence testimony and that the arrest of the appellant was maliciously motivated by PW1 after failing to arrest the real culprit who escaped to sugarcane plantation.

In response to ground number eight, the learned Attorney was brief to the point that the record is clear the trial court considered the defence evidence but did not believe the appellants and the other person escaped in was not mentioned at all.

On the ninth ground of appeal, the main complaint was that the signing of certificate of seizure was done at gun point and the appellants' objection to their admission was in vain and prayed to expunge them from the record





In response to ground number ten, the learned Attorney was that the appellants signed the certificate of seizure as free agents without any undue influence and urged this court to dismiss this ground as well.

On the tenth ground of appeal, the main complaint was that DW1 and DW2 are friend who went to visit parent of DW1 and reported to local leader as such they could not carry a luggage from foreign house.

In response, the learned Attorney argued that this ground is baseless because the appellants never called such witnesses to support their story.

On the totality of the above responses on each ground of appeal argued and replied, the learned Attorney urged this court to dismiss this appeal for want of merits.

In response, by the appellants, the 1<sup>st</sup> appellant told the court that he has nothing to reply and leave it to the court to do justice to this appeal based on grounds of appeal which were couched with arguments, case law and it was for this reason, I resorted to reproduce them verbatim herein above. As to the 2<sup>nd</sup> appellant argued that it is true the elephant tusks had marks S1-S12 but none of the prosecution witness explained the meaning of S1-S12. The 2<sup>nd</sup> appellant pointed a contradiction in the prosecution case that PW1 said the appellants were arrested at Sanje but PW2 said the appellant were arrested at Mkula village two different

places impossible to be at the same time. The 2<sup>nd</sup> appellant, like his co-appellant, prayed and urged this court to do justice and set them free.

This marked the end of hearing of this appeal.

Having considered the grounds of appeal, the oral submissions by the learned State Attorney and reply by the 2<sup>nd</sup> appellant and most importantly read the record of appeal, I will endeavour to answer each ground raised and argued for the interest of justice.

I will start with the first ground of appeal whose main complaint was that the trial Magistrate erred in law for admitting the evidence of PW2 who did not witness arrest but was called to witness exhibit P2.

Having read the record of appeal and the testimony of PW2, in particular, PW2 did not witness the arrest of the appellants but was called and asked to volunteer to witness search in which ended up recovering exhibit P2 from the appellants. In the circumstances, I agree with the learned Attorney that the testimony of PW2 was on search and not arrest and I found no reason to fault the trial court on this ground.

That said and done, the first ground is hereby dismissed for want of merits.

This takes me to the second ground which main complaint was that the prosecution witness failed to clarify on distinctive features which goes to the roots of the case. Having gone through the record of appeal and



revisited the testimony of all prosecutions witnesses as correctly argued by the learned Attorney, I find this ground wanting in merits because PW1, PW2, PW3, PW4 and PW5 all identified exhibits P2 by the identifying marks S1-S12. Therefore, the argument by the 2<sup>nd</sup> appellant that none told the court what is the meaning of S1-S12 was argued out of context because it was enough by the marks which were put on exhibit P2 to make meaningful identification.

That said and done, the second ground too is to fail in this appeal for want of merits.

This takes me to the 3<sup>rd</sup> and 4<sup>th</sup> grounds which main complaints were that search was not properly done for failure to tell the trial court the intensity of light which enabled PW1 and others arresting officers to identify the appellants and that no identification was conducted.

I have carefully gone through the trial record on this point, but with due respect to the appellants, as correctly argued by the learned Attorney for the respondent, and rightly so in my opinion, the extent of light and identification parade, were not needed in circumstances of this appeal because appellants were arrested and stayed with the arresting officers who came to testify in court till next day. Indeed, the issue of identification and extent of light do not arise in this appeal.



That said and done ground number 3 and 4 are akin to fail and are hereby dismissed for want of merits.

This trickles this appeal to the fifth and sixth grounds of appeal whose main complaint boils down to the cautioned statement and repudiated/retracted cautioned statements. I have carefully gone through the trial court record, and with due respect to the appellants, I find no where the said cautioned statements were intimated to be tendered nor were tendered and as such the issue of repudiated and retracted and the abrogation of sections mentioned do not arise at all.

In the foregoing, as rightly submitted by the learned Attorney, these two grounds were raised out of context and as an afterthought.

That said and done, ground number fifth and sixth are hereby dismissed for want of merits.

Next is the seventh ground of appeal which main complaint was that the appellants were not accorded enough time to defend and call witnesses. Having gone through the trial proceedings I find that the learned advocate for the appellant after being found with a case to answer, their learned advocate informed the court in the following language:

**“they will make sworn testimony. They will not call any witness.”**





The above statement was in compliance of section 231 of the CPA where the advocate for the appellants informed the court that they will defend themselves and will not have any other witnesses. Not only that but I found as well that the appellants testified as reflected at pages 26 to 31 of the typed proceedings. So, in my respect opinion, and as rightly argued by the learned Attorney, this ground was raised out of context and same is hereby dismissed for want of merits.

Next is the eighth ground of appeal which main complaint is that the trial Magistrate did not consider the strong evidence by the appellants that the sulphate with the elephant tusks was dropped by un-identified person who managed to ran away before his arrest.

This being a serious allegation, it behoved me to revisit the trial court judgement and I noted that as correctly argued by the learned Attorney, at page 5 of the typed judgement, with due respect to the appellants the trial court considered their defence and gave reasons for its rejection because the issue of someone was not cross examined by the appellants as against PW1 and PW2.

That said and done, I find this ground wanting in merits in this appeal and same is equally dismissed.



Next is ninth ground which main complaint was that signing of certificate of seizure was done by the appellants under gun point and that their objection was in vain before trial court.

These allegations moved this court to revisit the trial court proceedings on the point and I noted at page 8 of the typed proceedings that, certificate of seizure **exhibit P1** was admitted without any objection and no question was put on issue of gun point to PW1. I find this as an afterthought on the part of the appellants and is rejected.

With that note, I find this ground wanting in merits and is hereby dismissed.

This takes me to the last ground number ten which main complaint was that much as DW1 and DW2 were friend and went to visit DW1 father at Mkula village there was no possibility of them carrying a luggage from the foreign house. This point as rightly argued by the learned Attorney is baseless in the circumstances of this appeal because the appellant never called the leaders they reported and not only that but no reason was given that being foreign they could not carry the elephant tusks.

Without much ado, this ground is baseless and is dismissed in its entirety.

On the foregoing, the whole appeal is found wanting in merits and is hereby dismissed in its entirety.





It is so ordered.

Dated at Morogoro this 31<sup>st</sup> day of May, 2022.



  
**S. M. MAGOIGA.**  
**JUDGE**  
**31.05.2024**

**COURT:** Judgement delivered in chambers at Morogoro in the presence of the appellants in person and Mr. John Mkonyi, learned State Attorney for the Respondent today on 31<sup>st</sup> day of May, 2024.



  
**S. M. MAGOIGA.**  
**JUDGE**  
**31.05.2024**

**COURT:** Right of appeal fully explained.



  
**S. M. MAGOIGA.**  
**JUDGE**  
**31.05.2024**