

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
CORRUPTION AND ECONOMIC CRIMES DIVISION
AT BUKOBA

ECONOMIC CASE NO. 01 OF 2020

*(Originating from Bukoba Resident Magistrate's Court,
Economic Case No.09 of 2019)*

REPUBLIC

VERSUS

1. PAULO ANDREA @MBWILANDE

2. JOHN PAULO

JUDGMENT

Date of last order: 05/08/2020

Date of Judgment: 17/08/2020

MASHAKA, J:

The 1st accused Paulo Andrea @ Mbwilande and 2nd accused John Paulo, are jointly and together charged with an offence of unlawful possession of government trophy contrary to section 86(1) and (2)(b) of the Wildlife Conservation Act No. 5 of 2009 read together with Paragraph 14 of the First Schedule to, and section 57 (1) and 60 (2) of the Economic and Organized Crimes Control Act, [Cap 200 R.E. 2019) as amended.

The particulars of the offence according to information amended states that, Paulo Andrea @ Mbwilande and John Paulo, being the first and second accused persons respectively on the 22nd day of July 2018 at Nyamigere village within Biharamulo District in Kagera Region were found in unlawful possession of government trophies to wit; three pieces of elephant tusks valued at USD 30,000 equivalent to TZS. 68,382,000/= only being the property of the Government of the United Republic of Tanzania.

I recognize the assistance of members at the bar. The prosecution was represented by Ms. Suzan Masule, learned State Attorney, Ms. Veronica Moshi, State Attorney and Mr. Juma Mahona, State Attorney. Throughout the trial, the accused persons enjoyed the services of Mr. Ibrahim Mswadick, Advocate. I extend my appreciation to the team of members of the bar for the commitment, hard work in representing the interests of your clients and cooperation for the pursuit of justice in this case.

Before plea was taken, on the 29th July 2020 with the leave of this Court, the prosecution prayed to amend and substitute information, which was granted. The amended information was read over to the accused persons. On the 29th day of July 2020 the accused persons entered their respective pleas on the offence charged with. In their plea, both accused persons denied the charge against them and the court entered a plea of not guilty to the offence. On the same day, the court conducted preliminary hearing. Facts of the case were read over to the accused persons. The 1st

accused admitted his name, tribe, religion, work, his residence and the fact that he was arraigned before the court with the offence. The 2nd accused person admitted his name, tribe, religion, work, his residence and the fact that he was arraigned before the court with the offence.

Brief facts of the case are that the 1st accused is Paulo Andrea @ Mbwilande and the 2nd accused is John Paulo both are charged with unlawful possession of government trophy to wit, 3 pieces of elephant tusks valued at TZS 68,382,000/=. That on the 21/07/2018 evening hours, while doing patrol with other Wildlife Officers along the areas of Malagarasi, Kasulu District, Kigoma Region, a Wildlife Officer Paulo Mbeya received information that there are people selling government trophies to wit elephant tusks in Nyamigere Village, Kalenge Ward in Biharamulo District, Kagera Region.

On the 22/07/2018 the same Wildlife Officer and his fellow Officers left for the Kalenge Police Station at Kalenge Ward and requested for assistance from the OCS A/Insp. Mkuwele after informing him the purpose of their visit. The A/Insp. Mkuwele together with E 9360 D/CPL Daniel provided the assistance and together with the Wildlife Officers went to Nyamigere Village where they met the two accused persons; while the 2nd accused was carrying a black bag, which was found with 3 pieces of elephant tusks after being searched. A/Insp. Mkuwele filled the certificate of

seizure, it was signed by both the accused persons and witnesses who witnessed the search. Both accused persons were taken to the Police Station Biharamulo and the 3 (three) pieces of elephant tusks were taken and kept in the Exhibit room.

On the 23/07/2018, the 3 pieces of elephant tusks were taken by D/CPL Nyanda to the Wildlife Office for identification and valuation of the same, where the Wildlife Officer one Frank Mapunda identified the same to be 3 pieces of elephant tusks valued at TZS. 68,382,000/=. Frank Mapunda filled a Trophy Valuation Certificate and handed over the said Certificate and the 3 (three) pieces of elephant tusks to E.8213 D/CPL Nyanda. These exhibits were taken by F.5669 D/Sgt Evodius to the Weights and Measures Office to know their weight. After being weighed, the 3 pieces of elephant tusks were returned back of the Biharamulo Police Station. After completion of investigation the accused persons were arraigned before the court and charges were read over to them.

To prove the case against the 1st and 2nd accused persons, the prosecution paraded six witnesses PW1 A/Insp. Jordan Mkuwele, PW2 Jacob Petro @ Kihelele, PW3 G. 7973 PC Elimboto, PW4 E. 8213 D/CPL Nyanda, PW5 Neema Christine Uronu and PW6 Frank Mapunda. They tendered documentary and physical exhibits namely Certificate of seizure dated 22/07/2018 marked Exhibit P1, three pieces of elephant tusks, a black nylon bag and black worn out bag marked Exhibit P2A,B, and C, respectively, Chain of custody record marked Exhibit P3, Exhibit receipt No. D460613

marked Exhibit P4, Letter from the Weights and Measures Agency Office dated 30/07/2019 marked Exhibit P5 and Trophy Valuation Certificate marked Exhibit P6.

In his testimony, PW1 A/Insp. Jordan Mkuwele stated that, on the 22/07/2018 at 8.00 am, while at the Police Post Kalenge, he received Wildlife Officers who introduced themselves to be involved in anti-poaching activities. One of them introduced himself as Paulo Mbeya who was known by PW1. Paulo informed PW1 that there are people living in Nyamigere Village, Kalenge Ward involved in selling government trophy that is elephant tusks and they have an informant who they have directed to the people and to pose as a buyer of the elephant tusks. PW1 did provide support himself and E 9360 D/CPL Daniel joined together with the said Wildlife Officers and they went to Nyamigere Village where they hid themselves in a forest where there are no houses, along a path where they set a trap.

That while there, PW1 saw three (3) people coming along the path, then the Wildlife Officer Paulo Mbeya told PW1 and his colleagues that the people are the ones and one of them is his informant. One among the 3 was carrying a small black bag and another was carrying a black nylon bag and the other one was not carrying anything he covered himself with a Masaai cloth. PW1 stopped the said 3 people and got closer to them, he introduced himself to them and informed them that he suspected them with

what they were carrying and ordered them to sit down with the bags they were carrying.

That, PW1 sent E 9360 D/CPL Daniel to get the Chairman of the Village and came back with the Chairman (PW2) of Nyamigere Village. PW1 introduced the said Chairman to the Wildlife Officers and the three persons who were sitting that they are suspected to have in possession government trophies. PW1 also informed PW2 that he was called to witness the search the people who were sitting on the ground. The Chairman agreed to witness the search and PW1 commenced the search in the bag carried by Paulo Andrea @ Mbwilande 1st accused and he found nothing. PW1 continued to search John Paulo the 2nd accused who was carrying a nylon black bag and inside there was a worn-out bag. When PW1 opened the worn-out bag, inside he saw 3 pieces of suspected elephant tusks.

After the search witnessed by the Chairman (PW2), PW1 filled the certificate of seizure (Exhibit P1), signed by him and John Paulo the 2nd accused. PW1 and the Wildlife Officers conducted search of the premises of Paulo Andrea, the 1st accused where they found nothing. PW1 took the 3 (three) pieces of elephant tusks (Exhibit P2A) contained in a black nylon bag (Exhibit P2B) and inside a worn out small black bag (Exhibit P2C), the suspects accompanied by the Wildlife officers and the informant to the Kalenge Police Post. PW1 wrote a label KAL/RB/73/2018 using a black marker pen on the elephant tusks. PW1 placed the suspects in the lock up and

recorded the statements of some witnesses and his own statement. PW1 filled the chain of custody record (Exhibit P3) for the handing over of the exhibits and took it with the elephant tusks and the suspects to the District Police Station Biharamulo where he handed over Exhibit P2 A, B and C to WP. 8334 PC Maria who was on duty at the CRO and both signed the chain of custody record (Exhibit P3). WP. 8334 PC Maria labelled each of the elephant tusks using a black marker pen the mark BI/IR/1265/2018.

PW1 identified the 1st and 2nd accused in the dock. PW1 also stated that the third person he placed under arrest together with the two accused persons was the informant. That the accused persons were arrested at a path where there are no houses in Nyamigere Village and there are 6 (six) people who witnessed the seizure, namely PW1, Jacob Kihelele, E 9360 D/CPL Daniel, Herman Kahigi, Paulo Mbeya and the other Wildlife Officer who all signed and wrote their names in the presence of the two accused persons.

PW2 Jacob Petro Kihelele, testified that on the 22/07/2018, he was in his office at Nyamigere Village. While there, PW2 received a phone call from Paulo Andrea @ Mbwilande, but heard the voice of a person who introduced himself as Afande Danny and not Paulo Andrea, the owner of the number. The said Afande Danny needed to see PW2. After being directed where PW2 was, Afande Danny went to meet him and told PW2 that he needed him to witness an incident which occurred in PW2's Village. Therefore, they went

together to the scene of incident at a place known as Kanyerahyera, Nyamigere Village in a forest area, there was a thicket. PW2 testified that he saw three people who were sitting down and among them was the 1st and 2nd accused persons.

After PW2 introduced himself, then PW1 introduced himself his name and rank and told PW2 the purpose of PW2 being there is to witness a search of things he had placed under arrest. PW2 witnessed a small bag in front of Paulo Andrea and another bag was in front of John Paulo who was handcuffed and there was nothing in front of the third person.

Then PW1 commenced to search the bag which was in front of the 1st accused person and he found nothing, then he searched the second bag, which was in front of the 2nd accused, he opened this worn out long black bag and inside there was a nylon bag containing the 3 pieces of elephant tusks, he took them out of the bag. PW2 witnessed the three pieces of elephant tusks taken out of the bag, he touched them and tried to fit them together; two sides of the two elephant tusks fitted well. PW2 was allowed by PW1 to interview the 2nd accused about the three pieces of elephant tusks, the 2nd accused stated that they were not his property, that it belongs to the third person. PW2 asked the third person who stated that he comes from Shinyanga and the three pieces of elephant tusks belong to the 2nd accused. PW2 signed the certificate of seizure (Exhibit P1), which was filled by PW1. Then they all left

and went to the residence of the 1st accused to conduct a search where they found nothing. After the search, they all left by motor vehicle and went to the Police Post Kalenge, they all dropped but the third person remained in the m/vehicle. PW2 was informed by PW1 that the third person was an informant. That PW1 recorded his statement and in his presence labelled KAL/RB/73/2018 on each of the three pieces of elephant tusks Exhibit P2A using a black marker pen. PW2 identified Exhibit P1 and Exhibit P2 A, B and C. Also, PW2 identified the 1st and 2nd accused in the dock.

In his testimony PW3 G7973 PC Elimboto, stated that on the 22/07/2018 afternoon hours he was at the Biharamulo Police Station. WP. 8334 PC Maria handed over to PW3 the exhibits which were three pieces of elephant tusks in a black bag and inside there was a nylon black bag (Exhibit P2 A, B and C). WP. Maria brought the said exhibits to be kept under custody in the Exhibits room because PW3 was the Exhibits Keeper. Together with said exhibits, WP Maria also brought a handing over form known as chain of custody record of the exhibits (Exhibit P3) and PW3 signed after receiving the said exhibits. That the Exhibit P2A was labelled the marks KAL/RB/73/2018 and BI/IR/1265/2018. PW3 registered the exhibits in the Exhibit register and gave them a registration number 48/2018. He also issued a receipt (Exhibit P4).

That on the 23/07/2018 D/CPL Nyanda (PW4) being the investigator of the case went to PW3's office to take the Exhibit P2A,

B and C for further investigation of the file no. BI/IR/1265/2018. PW3 handed over the exhibits to PW4 and both signed the chain of custody record (Exhibit P3) used for handing over the exhibits. On the same day 23/07/2018, PW4 returned the three pieces of elephant tusks to PW3 and signed the chain of custody record (Exhibit P3).

That on the 30/07/2019 F.5669 D/Sgt Evodius went to the Exhibits room and PW3 handed over the three pieces of elephant tusks to him for the purpose of taking them to the Weights and Measures Agency office. F.5669 D/Sgt Evodius returned the three pieces of elephant tusks to PW3 on the same day. They both signed the handing over and receiving the said exhibits on the Exhibit P3 chain of custody record. On the 06/08/2019 PW3 handed over the exhibits to PW4 for the purpose of taking them to the RCO. Both PW3 and PW4 signed Exhibit P3 for handing over and receiving the said Exhibit P2A, B and C.

PW3 stated that he has not tendered the Exhibit register instead he tendered the receipt (Exhibit P4). That according to the chain of custody record Exhibit P3, WP.8334 PC Maria received the exhibits from A/Insp. Mkuwele on the 22/07/2018. On the 23/07/2018 PW3 handed over the same to PW4 and on the same day the said exhibits were returned to PW3 to be kept in custody, that they were not returned on 30/07/2019 as PW3 wrote by

mistake in Exhibit P3. PW3 identified Exhibit P2A, B and C and Exhibit P3.

PW4 E 8213 D/CPL Nyanda testified that, on the 23/07/2018 morning hours he was at the CID Unit offices. That he was assigned case file no. BI/IR/1265/2018, informed by his boss there are two (2) suspects Paulo Andrea and John Paulo who were kept in Police lock – up for unlawful possession of government trophies and directed to interrogate the suspects and take the exhibits to the Wildlife Office for identification and valuation. PW4 took the suspects from lock – up and interrogated them assisted by a fellow investigator D/C Ernest.

After recording statements of the accused persons, PW4 went to the Exhibits room to take the three (3) pieces of elephant tusks. PW4 requested for the said exhibits concerning BI/IR/1265/2018 from PW3. PW3 handed over the Exhibits P2A, B and C to PW4 together with the chain of custody record Exhibit P3 and they both signed Exhibit P3 to acknowledge the handing over and receiving of the exhibits.

After receiving the exhibits, on the same day 23/07/2018 PW4 went to the Wildlife Office at Biharamulo for identification and valuation. PW4 met one Frank Mapunda (PW6) a Wildlife Officer and handed over the exhibits to PW6 through the chain of custody record Exhibit P3. PW6 conducted his identification and valuation

of the three pieces of elephant tusks. After he completed his task, he handed over a letter of identification and valuation of the three pieces of elephant tusks (Exhibit P6), handed over the exhibits and both signed Exhibit P3. Then PW4 returned back to the Police Station. At the Police Station, PW4 handed over the Exhibit P2A, B and C to PW3 and both signed Exhibit P3. The value of the three pieces of elephant tusks Exhibit P2A was valued at TZS. 68,382,000/=. Then PW4 prepared charges and the 2 suspects were arraigned in court on the 24/07/2018.

On the 30/07/2019, PW4 drafted a letter to take the three pieces of elephant tusks to the Weights and Measures Agency to know the weight of the said tusks (Exhibit P2A). The OC - CID Biharmulo sent F.5669 D/Sgt Evodius to take the said exhibits to the Weights and Measures Agency Office, Kagera Region. The Exhibit P3 was used for the handing over and receiving of the exhibits between PW3 and F.5669 D/Sgt Evodius, both signed the Exhibit P3 chain of custody record, F.5669 D/Sgt Evodius took the exhibits to the Weights and Measures Agency Office and returned on the same day on the 30/07/2019 with a letter from the Weights and Measures Agency Office, the exhibits and the chain of custody record Exhibit P3. F.5669 D/Sgt Evodius handed over the exhibits to PW3 and both signed the Exhibit P3 as handing over officer and receiving officer.

He stated further that on the 06/08/2019 he received instructions from the OC-CID that the case file, the suspects and the exhibits be forwarded to the RCO Kagera. He took Exhibit P2A, B and C from PW3 by both signing Exhibit P3 and assisted by CPL. Kiluma, the suspects, the case file and the exhibits, they travelled to Bukoba to hand over the case file, suspects, and exhibits to the RCO Bukoba. When they arrived, RCO directed that the exhibits to be handed over to G. 8268 D/C Asifiwe through the Exhibit P3. G. 8268 D/C Asifiwe handed over the Exhibit P2A, B and C to H.367 D/C Nisile. On the 03/08/2020, PW4 went at the Bukoba Police Station and H.367 D/C Nisile handed over to him Exhibit P2A, B and C to bring to court for trial. PW4 also identified the 1st accused is Paulo Andrea @ Mbwilande and the 2nd accused is John Paulo in the dock, Exhibit P3 and Exhibit P2A, B and C.

PW4 further testified that, on the 23/07/2018, he took the exhibits from PW3 and he returned the same on the same day to PW3, and not on the 30/07/2019 as written in the Exhibit P3.

In her testimony, Neema Christine Uronu PW5, testified she is a Weights and Measures Officer working at the Weights and Measures Agency Office Kagera Zone. That on the 30/07/2019, she was in her office at work. An Investigator F.5669 D/Sgt Evodius went to their Office with a letter and exhibits requesting the Office to verify the weight of the exhibits and to sign Exhibit P3 as proof that the Weights and Measures Officer received the said exhibits.

The letter stated that the exhibits were suspected to be elephant tusks. PW5 stated that F.5669 D/Sgt Evodius handed over the exhibits and she received them. PW5 took the exhibits to the standard room where there is a digital weighing scale. PW5 weighed the exhibits and found the exhibits which were suspected to be elephant tusks weighed 8 kilograms. She wrote a letter she tendered before the court and was admitted and marked Exhibit P5 to reply the letter which brought the exhibits. Then PW5 handed over the exhibits on the same day to the Investigator F.5669 D/Sgt Evodius and they both signed Exhibit P3. PW5 identified Exhibit P2 A, B, C and Exhibit P3.

PW5 stated that her names on Exhibit P3, written Neema C. Uronu. Before the court, she stated her name to be Neema Christine Uronu. That in Exhibit P5, PW5 wrote Neema C. Uronu. That the person who replied the letter Exhibit P5 and the person who received the Exhibit P2A, B and C and signed Exhibit P3 are one and the same person that is Neema Christine Uronu.

PW6 Frank Mapunda, testified that on the 23/07/2018 he was in the office of the Burigi Game Reserve. That at 2.00pm in the afternoon he was given a letter and three pieces which were suspected to be elephant tusks (Exhibit P2A, B and C) together with a handing over form chain of custody record (Exhibit P3) by PW4. The letter requested PW6 to identify if the said pieces were government trophies, to assess the value and issue a certificate.

The exhibits were in a small bag black in colour, had some red colour and it was kept in a Rambo bag black in colour. He signed the handing over form chain of custody record Exhibit P3 and identified the three pieces to be elephant tusks. That the pieces of tusks were from two different elephants. PW6 was able to identify according to the size of each piece, it showed two of the pieces came from one elephant and the other piece came from another elephant. PW6 filled the Trophy Valuation Certificate which he tendered, was admitted and marked Exhibit P6. PW6 assessed the value of one elephant according to the Trophy Valuation Regulation GN 206/2012 which provide the value of one elephant is USD 15,000. From his identification, the value of the elephant tusks was USD 15,000 multiply by 2 that is USD 30,000. That the rate of one USD on 23/07/2018 was equivalent to TSHS. 2279/40 at that time. Therefore, the value of the three pieces of elephant tusks were valued at TZS. 68,328,000/=. Then PW6 filled the Trophy Valuation Certificate on the 23/07/2018, signed and placed an official stamp. Then PW6 took the three pieces of elephant tusks (Exhibit P2 A, B and C), the Trophy Valuation Certificate (Exhibit P6) and the handing over form chain of custody record (Exhibit P3) which he signed and handed over to PW4. PW6 identified the Exhibit P2 A, B & C and Exhibit P3.

PW6 further stated that, the official stamp he placed was for Burigi Game Reserve Project representing all the three Game Reserves that is Burigi, Biharamulo and Kimisi under one management. That the exhibits which were brought by the Police

had the labels placed by a black marker pen on each piece of the elephant tusk, which were KAL/RB/73/2018, BI/IR/1265/2018 and Exh. Reg. No. 48/2018. PW6 did not open a file, they just kept record and the case file remains with the Police. The only exhibit from their office is the Trophy Valuation Certificate (Exhibit P6) and handing over form chain of custody record (Exhibit P3).

After close of the prosecution case, the court found on the basis of the evidence adduced by the prosecution, a prima facie case was established against the 1st and 2nd accused persons and the said 1st and 2nd accused persons have a case to answer. The accused persons were called upon to defend themselves and they were the only defence witnesses.

In his testimony DW1 Paulo Andrea Mbwilande, stated that, on the 22/07/2018, in the morning he prepared himself to go to church to bid farewell to their Parish Priest. He took 5000/= to go and buy soap and candles together with a phone and a small bag it values is TZS. 7000/=. He called his son John (2nd accused person) and told him it's their turn to provide offerings at the church. That John (2nd accused) responded and they left home together when they reached the main road he was surprised as he found Police Officers along the main road which was not yet in uses. They had parked their motorcycle with the registration number PT on the back on the road. When DW1 and 2nd accused person stopped on the main road, the Police Officers ran to them and told them to sit down. They were alone without the village leaders. DW1 stated that

they were three people who were arrested, the other person was a Sukuma, due to his Sukuma intonation when speaking Swahili.

Immediately the Head of Police Post (PW1) went to DW1 and took the bag he had and started to search in the bag. The 2nd accused person had nothing in his hands, DW1 was the only one carrying a bag. The other person who unknown to the DW1 was carrying a bag, he dropped the bag and ran away, mixed himself with people who were going to church and disappeared. That the Police Officers went to get the bag which was on the ground and commenced to search it. Police Officers did not chase the other persons who ran and they did not have any firearms.

DW1 further stated that, the Police Officer took out of the bag, three pieces of suspected elephant tusks. The OCS of Police Post (PW1) handcuffed DW1 and the assistant to the OCS CPL Daniel handcuffed the 2nd accused. They started talking on where they will get the Chairman of the Village, DW1 assisted them by giving them his phone and called the Village Chairman because he had his number. DW1 called the number of his Chairman and when it rang, he gave it to Afande Daniel who talked to the Chairman, went to collect him from his Office and returned with him to where the accused persons sat.

That Afande Daniel commenced to explain to the Chairman about the people who were placed under arrest, after some time, the Wildlife Officers arrived at the scene of incident and they wanted to know if the Village Chairman had arrived because they wanted to

search DW1's house. DW1 together with the Police Officers, Wildlife Officers, Village Chairman and 2nd accused person, all went to DW1's house at Mkuyuni Hamlet (Kitongoji), Nyamigere Village where they searched and found nothing. Then they left and went to the Kalenge Police Post. DW1 and 2nd accused person were placed in the lock – up for 15 minutes then they were taken to the Biharamulo Police Station.

That charges were instituted against them for unlawful possession of government trophies. DW1 identified Exhibit P2, A, B, C are the same items seized at the scene of crime, but noted that there were no writings on Exhibit P2A. DW1 stated that they were two of them when they left home and three of them when arrested. The third person who was arrested with the accused persons was said that he was the informant and he was also carrying a bag.

DW2 John Paulo in his testimony stated that on the 22/07/2018 he was at home Mkuyuni Hamlet (Kitongoji) Kalenge Ward, Biharamulo District. During morning hours his father DW1 asked him if he is going to church. Then DW1 took an empty bag which was red in colour, he wanted to go and get offerings to take to church. When they reached the highway road from Biharamulo to Kigoma, one person in front of them threw a bag near DW1 and DW2 and ran away, that there was another person near them. There were Police Officers nearby, they arrested them and asked why the other person ran. Also, they asked them what was in the bag. They replied that they did not know what is in the bag.

Another Police Officer came and commenced searching the bag carried by the DW1 and searched the bag which was thrown. Inside the Police Officer found three pieces of elephant tusks (Exhibit P2A). The Police Officer asked where he could get the Village Chairman. DW1 replied and stated that he had his number. The Police Officer called the Village Chairman to come and witness the incident.

That when the Village Chairman arrived at the scene of incident, the Police Officer called other Officers who came with a motor vehicle. Together they went to search the house of DW1 and nothing was found. Then they left together and went to the Kalenge Police Post where they were kept in the lock – up. After 15 minutes, they were taken to the Biharamulo Police Station where they recorded their statements. They were arraigned in court. That the nylon black bag (Exhibit P2 A, B and C) belongs to the third person who ran away, because he threw the bag in front of them. DW2 testified that the third person who was arrested together with them was the informant. That he did not carry any bag.

Having passed through the evidence both oral and documentary adduced by both the Republic and the Defence, the issues for determination in this case are three. **Firstly**, whether the three pieces of elephant tusks were found in the possession of the 1st and 2nd accused persons. **Secondly**, whether or not the chain of custody was unbroken. **Thirdly**, whether the Defence raised any reasonable doubt against the prosecution case.

Starting on the first issue, whether the three pieces of elephant tusks were found in the possession of the 1st and 2nd accused persons. The facts are clear that it is beyond dispute that the 1st and 2nd accused persons were arrested at Nyamigere village or thereabout within Biharamulo District. The accused persons themselves admit that much in their respective evidence in defense. I am persuaded with the evidence adduced for the prosecution, both oral and documentary that, the accused persons were indeed arrested at the scene. This evidence is reliable and is not doubted even by the accused persons themselves. The accused persons' dispute is whether or not they were caught with the three pieces of elephant tusks as contended by the prosecution.

It is the evidence of the prosecution, particularly PW1 and PW2 that on the 22/07/2018 before arrest the bag was carried by the 2nd accused person and the same bag, which was placed in front of the 2nd accused person was the bag found with the three pieces of elephant tusks. This connotes that the said Exhibit P2A, B and C were found in possession of the 2nd accused person. In their testimonies, both 'accused persons testified that they recognized Exhibit P2A, B and C are the same items, which were seized at the scene of crime. Also, in his testimony the 2nd accused stated that the said bag was thrown in front of them by an unknown person before they were arrested and after being searched the three pieces of elephant tusks were found in the same bag.

At the scene of incident, the 2nd accused signed the certificate of seizure Exhibit P1 to acknowledge the search and seizure of Exhibit P2A, B and C conducted by PW1. By the signing of the Exhibit P1, it shows that the said exhibits were retrieved from the 2nd accused person. As held in the case of **Song Lei vs the DPP, and the DPP vs Xiao Shaodan and Two Others**, Consolidated Criminal Appeal Nos. 16'A' of 2016 & 16 of 2017, CAT at Mbeya (Unreported), the Court of Appeal stated that, *“having signed the certificate of seizure which is in our considered view valid, he acknowledged that the horns were actually found in his motor vehicle”*.

It is my considered opinion that the search and seizure were properly done by PW1 in compliance to section 38 (1) and (3) of the Criminal Procedure Act, (the CPA) [CAP 20 R.E 2019] and properly involved the independent witness (PW2) in the presence of the 2nd accused.

It is evidenced that 1st and 2nd accused persons were together in the same journey for the same purpose. On the question whether the Exhibit P2A, B and C being carried by 2nd accused person meant that the 1st accused person had no knowledge on the possession of the same. I have considered this issue and in the case of **Moses Charles Deo vs Republic** [1987] TLR 134, where the Court explained that;

*“for a person to be found to have had possession, **actual or constructive**, of goods it must be proved either that he was*

aware of their presence and that he exercised control over them, or that the goods came albeit in his presence, at his invitation and arrangement".[Emphasis added]

During the testimony of PW2, he testified that 2nd accused lived and was totally dependent on his father (1st accused) for his livelihood. The 1st and 2nd accused persons were together with the informant who had posed as a buyer of the elephant tusks and as testified by PW1, the 1st accused was carrying a bag and the 2nd accused was carrying the other bag found with the elephant tusks. The 1st and 2nd accused persons both knew about the elephant tusks and accompanied the informant. The 1st accused testified in his defence that he knew the informant to be a 'Msukuma' as correctly testified to by PW1 and PW2 that he comes from Shinyanga. As per testimony of PW1, it was planned after receiving information from the Wildlife Officer who used their decoy the third person who was arrested by the 1st and 2nd accused persons. The 1st and 2nd accused persons were in possession of the three elephant tusks seeking to sell them to or through the informant.

In the light of the above authorities, it is my considered view that, the 1st accused was found in constructive possession and the 2nd accused was found in actual possession of Exhibit P2A, B and C the three elephant tusks, a black nylon bag and a worn-out black bag. The contention that the said exhibits in the bag was thrown by an unknown person does not hold water. There was no such person who threw the bag for PW1 testified they were only three

people, the 1st and 2nd accused persons and the informant walking together along the path and after the Wildlife Officer identified the informant told PW1 who proceeded to introduce himself and placed them under arrest.

Coming to the second issue whether chain of custody in handling the seized elephant tusks from seizure to tendering in court was preserved and unbroken. It is the evidence of the prosecution that after the Exhibit P2A, B and C were seized by PW1 from the 1st and 2nd accused persons, he marked each tusk KAL/RB/73/2018 using a black marker pen and filled the chain of custody record Exhibit P3. PW1 handed over the tusks to WP. 8334 PC Maria stationed at Biharamulo Police Station by both signing the Exhibit P3 chain of custody record. WP. 8334 PC Maria was on duty at the CRO and she labelled the mark BI/IR/1265/2018 on each of the tusks. WP. 8334 PC Maria handed over the tusks Exhibit P2A, B and C to PW3 the Exhibits Keeper at Biharamulo Police Station and both signed Exhibit P3 the chain of custody record. PW3 registered the same in the exhibit register and gave them Exh. Reg. no. 48/2018 and labelled each tusk with the exhibit registration number. This Exhibit P2 A, B and C was taken from the Exhibits room and PW3 handed over to PW4, F.5669 D/Sgt Evodius, PW5, G.8268 D/C Asifiwe and H.367 D/C Nisile on different dates by both signing the Exhibit P3 the chain of custody record.

The prosecution tendered the chain of custody record Exhibit P3 to illustrate how the said exhibits moved from one person to another. All potential witnesses who dealt with the exhibits were paraded in the court to prove the unbroken chain of custody. Nevertheless, there is inconsistency on the date of handing over and receiving of the exhibits between PW4 and PW3 after the same being taken to PW6 Wildlife Officer for identification and valuation reads 30/08/2019 instead of 23/07/2018. In the case of **Joseph Sypriano vs Republic**, Criminal Appeal No. 158 of 2011, CAT at Arusha (Unreported), the Court of Appeal held that;

“Accordingly, we would have ruled out that discrepancies were not fatal if that was only discrepancy. This is because not every inconsistency however so minor, irrelevant, or flimsy would be taken into account in assessing a witness credibility the entire evidence has to be considered as one whole before a decision can be reached as to its veracity”.

In resolving the existing inconsistency, I am of the considered view that since the Police officer (PW4) handed over the Exhibit P2A, B and C, signed on 23/07/2018 and the receiving Exhibits keeper (PW3) signed on 30/08/2019, it does not reject the fact that the exhibits were seized from the accused persons, PW4 took and returned the same exhibits to PW3 after being work upon at the first time. Thus, the inconsistency of the single date of handing over does not go to the root of the case for even without the Exhibit P3, the prosecution in this case could prove the unbroken chain of custody through prosecution witnesses PW1, PW3, PW4, PW5 and

PW6. It is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness as held by the Court of Appeal in the case of **Goodluck Kyando v. Republic**, Criminal Appeal No. 118 of 2003, CAT at Mbeya (unreported). In this present case there is no cogent reasons for the court to not believe PW3 and PW4 on the manner they handled the Exhibit P2A, B and C on the 23/07/2018.

In the case of **Chacha Jeremiah Murimi and 3 Others vs Republic**, Criminal Appeal No. 515 of 2015, CAT at Mwanza (Unreported), the Court of Appeal explained that;

*“In establishing chain of custody, we are convinced that the most accurate method is on the documentation as stated in **Paulo Maduka & Others vs. The Republic**, Criminal Appeal No. 110 of 2007 and followed in **Makoye Samwel @ Kashinje and Kashindye Bundala**, Criminal Appeal No.32 of 2014 cases (both unreported). However, documentation will not be the requirement in dealing with exhibits. An exhibit will not fail the test merely because there was no documentation. Other factors have to be looked depending on the prevailing circumstances in particular case.”*

In this present case the prosecution provided both oral and documentary evidence to prove that the chain of custody was unbroken. It is worthy to take note that the three pieces of elephant tusks were labelled with the distinct marks KAL/RB/73/2018 by

PW1, BI/IR/1265/2018 by WP. 8334 PC Maria and Exh. Reg. no. 48/2018 by PW3. As held in **Song Lei vs the DPP, and the DPP vs. Xiao Shaodan and Two Others (Supra)** that, “....rhino horns are items which cannot easily change hands and in the absence of any evidence that Exhibit P13 was mishandled or handled by any other unidentified person, we are satisfied that it was at all time from seizure to tendering at the trial under the control and supervision of PW5 and the chain of custody was not broken”. In the case of **Issa Hassan Uki vs. Republic**, Criminal Appeal No. 129 of 2017, CAT at Mtwara (unreported) held that “elephant tusks constitute an item that cannot change hands easily and thus cannot be easily altered, swapped or tampered with”. Thus, the three pieces of elephant tusks could not easily be altered, swapped or tampered with to break up the chain of custody. Therefore, this issue is determined in the affirmative the chain of custody of Exhibit P2A, B and C was not broken from the time they were seized from the accused persons to the same being tendered before the court.

On to the third issue, whether the defence case raised any reasonable doubt against the prosecution case. It is the evidence of the defence that both 1st and 2nd accused persons were arrested after an unknown person a 4th person threw the Exhibit P2A, B and C in front of them and ran away. However, they both admitted in their testimonies that the Exhibit P2A, B and C is the same which PW1 found in the possession of 2nd accused person. Also, in the defence evidence DW1 and DW2 testified to the effect that the

Exhibit P2A, B and C were seized by PW1 in their presence and the 2nd accused signed Exhibit P1.


It is trite law in criminal law the guilt of the accused is never evaluated on the weakness of his defence, rather conviction shall be based on the strength of the prosecution case. In the case of **Samson Matiga vs Republic**, Criminal Appeal No. 205 of 2007 (unreported), the Court held that; *"..... to put it simply, is that the prosecution evidence must be so strong as to leave no doubt to the criminal liability of an accused person. Such evidence must irresistibly point to the accused person, and not any other, as the one who committed the offence"*. Also, the Court of Appeal emphasized in the case of **Christian s/o Kaale and Rwekiza s/o Bernard Vs R.** [1992] TLR 302, *"that an accused ought to be convicted on the strength of the prosecution case."*

In the light of above authorities, it is my considered view that the evidence of DW1 and DW2 did not raise any doubt against the prosecution evidence. Therefore, the prosecution evidence remains strong to prove the charge against the 1st and 2nd accused persons in this case.

In the upshot, I am settled the evidence adduced by the prosecution has proved the offence against the 1st and 2nd accused persons and are found guilty for unlawful possession of government trophies to wit three pieces of elephant tusks under section 86(1)

and (2) (b) of the Wildlife Conservation Act No. 5 of 2009 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. 2019] as amended. I therefore convict the 1st and 2nd accused persons for the offence as charged in this case.




L. L. MASHAKA
JUDGE
17/08/2020

2nd Accused:

I pray for a lenient sentence. My parents depend on me.

That is all.

Court:

I adjourn for 30 minutes and will resume to pronounce sentence and necessary orders.

**Sgd: L.L. Mashaka
Judge
17/08/2020**

COURT RESUMES

CORAM: As earlier constituted.

State Attorney Masule for Republic:

We are ready for sentence.

Court:

Sentence is ready for delivery.

SENTENCE

The 1st and 2nd accused persons were found guilty and convicted for unlawful possession of government trophies to wit three pieces of elephant tusks under section 86(1) and (2) (b) of the Wildlife Conservation Act No. 5 of 2009 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. 2019] as amended.

Before sentencing, on previous record of conviction learned State Attorney Mahona submitted that both 1st and 2nd accused persons have no criminal record. They are first offenders. However, learned State Attorney prayed to the court to hand out a heavy sentence to the 1st and 2nd accused persons because they killed two elephants who are attract tourism and have deprived of the Government revenue. That this court should not show clemency to the accused persons due to old age, sickness and taking care of a big family, it should not be an excuse to be lenient. That the accused persons should have known the consequences and a harsh sentence to be handed over to the 1st and 2nd accused persons.

Learned State Attorney for the Republic prayed to the court to order forfeiture of the three pieces of elephant tusks Exhibit P2A, B and C under section 111 (1)(a) of the Wildlife Conservation Act No. 5 of 2009.

In mitigation learned Counsel Mswadick for the accused persons prayed for a lenient sentence for both accused persons that the 1st accused is old, aged 68 years, sick and his family is dependent on him. That his wife is old, aged 65 years and is sick. That he is a first offender. He is sick has diabetes and chest pains. The 2nd accused is young, first offender and the nation depend on his contribution in production activities. That his mother is sick and he was taking care of her.

In Allocutus, the 1st accused prayed to the court for lenient sentence because he is old and sick. He prayed for a custodial sentence so he can get access to medical treatment. The second accused prayed for a lenient sentence because his parents depend on him.

I heard the prayer by learned State Attorney for Republic that a stiff punishment be imposed on the accused persons who illegally killed two elephants our national heritage, our wildlife and a source of revenue through tourism. I have also heard the mitigation by learned Counsel for the accused persons and allocutus by both accused persons.

I have considered the mitigation factors advanced and the relevant legislations that is the Wildlife Conservation Act No. 5 of 2009 and the Economic and Organized Crime Control Act [CAP 200 R.E 2019] on the punishment provided for the offence committed under section 86(1) of Act No. 5 of 2009 by the 1st and 2nd accused persons.

Section 86(2) (b) of Act No. 5 of 2009 provides that;

"(2) a person who contravenes any of the provisions of this section commits an offence and shall be liable on conviction-

(a)

(b) Where the trophy which is the subject matter of the charge or any part of such trophy is part of an animal specified in Part I of the First Schedule to this Act, and the value of the trophy exceeds one hundred thousand shillings, to a fine of sum of not less than ten times the value of the trophy or imprisonment for a term of not less than twenty years but not exceeding thirty years or to both".

While Section 60 (2) of the Economic and Organized Crime Control Act [CAP 200 R.E 2019] provides that:-

"Notwithstanding provision of a different penalty under any other law and subject to subsection (7), a person convicted of corruption or economic

offence shall be liable to imprisonment for a term of not less than twenty years but not exceeding thirty years, or to both such imprisonment and any other penal measure provided for under this Act;

Provided that, where the law imposes penal measures greater than those provided by this Act, the Court shall impose such sentence”.

Bearing in mind that the two elephants were illegally killed by the accused persons, and in consideration the accused persons are first offenders, I hereby sentence the 1st and 2nd accused persons to pay a fine of TZS 683, 820,000/- or serve 20 (twenty) years imprisonment.

The court has considered the time the 1st and 2nd accused persons have spent in remand since they were arrested on the 22/07/2018 until today. They have been in remand under the custody of either the Police at the Police Station and the Prisons. The accused persons remained and were presumed innocent until proven guilty as it was well articulated in the case of **VUYO JACK Vs THE DPP**, Criminal Appeal No. 334 of 2016 CAT at Mbeya (unreported), where the Court of Appeal held.

“On the aspect of sentencing we have this to say; since the appellant was at the time of arrest not yet convicted, bearing in mind a legal maxim that an accused person is presumed innocent before conviction, he could not be subjected to serve any sentence. The time spent by the appellant behind the bars before being found guilty, convicted and sentenced, would have been a mitigation factor in imposing the sentence.....”

The 1st and 2nd accused persons were found guilty, convicted and sentenced. I accordingly order that the time spent in remand behind bars

before this conviction is taken by the Prisons Service as time already served towards the sentence.



L. L. Mashaka
Judge
17/08/2020

Right of appeal fully explained to both 1st and 2nd accused persons.

L. L. Mashaka
Judge
17/08/2020

The sentence was read and delivered in the presence of State Attorney Masule, State Attorney Moshi and State Attorney Mahona for the Republic, the 1st and 2nd accused persons and learned Counsel Ibrahim Mswadick for the 1st and 2nd accused persons, in open court today the 17th day of August 2020.

Sgd: L.L. Mashaka
Judge
17/08/2020

Order:

1. The three pieces of elephant tusks (Exhibit P2 A, B, and C) are forfeited to the Government and to be disposed of under section 111(1) and (3) of the Wildlife Conservation Act, No. 5 of 2009.



Sgd: L.L. Mashaka
Judge
17/08/2020