IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

CORRUPTION AND ECONOMIC CRIMES DIVISION

AT ARUSHA SUB - REGISTRY

ECONOMIC CASE NO. 02 OF 2020

(Originating from Resident Magistrate's Court of Arusha Economic Crimes Case No. 112/2017)

REPUBLIC

VERSUS

SHABANI ALLY ATHUMAN

JUDGMENT

Date of last order: 11/11/2020
Date of Judgment: 13/11/2020

MASHAKA, J:

The accused person Shabani Ally Athuman stand charged with the 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 Sections 57(1) and 60(2) of the Economic and Organised Crime Control Act [Cap.200 R.E 2002] as amended by section 16(a) and 13(b) of the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016.

The particulars of the offence according to the information filed alleges that Shabani Ally Athuman on the 30th day of October 2017 at Lusaka Guest House Kibaya town within Kiteto District and Manyara region was found in unlawful possession of government trophies to wit; one (1) piece of elephant tusk equivalent to one killed elephant valued at USD 15,000 which is equivalent to TZS thirty four million three hundred sixty five thousand (TZS

34, 365, 500/=) only, being the property of the Government of the United Republic of Tanzania without a permit from the Director of Wildlife.

Before the court, Ms. Agnes Hyera, Senior State Attorney, Ms. Penina Ngotea, State Attorney and Mr. Ahmed Hatibu, State Attorney represented the Republic. The accused was represented by Mr. Elibariki Maeda, Advocate. My appreciation to the team of members of the bar for the resilience and hard work in representing the interests of your clients.

On the 24th day of April 2020 the accused person entered his respective plea on the offence charged with before Hon. I. K. Banzi, J. In his plea, accused person denied the charge against him, and the court entered a plea of not guilty to the said offence. On the same day, a preliminary hearing was conducted. Facts of the case were read over to the accused person. The accused admitted his name, age, tribe, religion, occupation, his address and he stand charged with the offence of unlawful possession of government trophy.

On 30th day of October,2017 Insp. MESHACK P.L. LAMECK a police officer at Kibaya Police Station, Kiteto District in Manyara region received information from an informant that there was a man at Lusaka Guest House, which is located at Kibaya Town with a sulphate bag and were suspicious of him. Insp. Meshack together with other police officers went to the said Lusaka Guest house and found the accused person drinking a soft drink and a sulphate a bag was kept between his feet. Insp. Meshack inquired from a waitress of the Lusaka Guest house one STELLA d/o LOSI as to whether the accused came with a sulphate bag and the waitress responded affirmatively. Insp. Meshack approached the accused, introduced himself that he is a police officer and told him his name. Insp. Meshack asked his name and the accused introduced himself. The accused was then asked what was inside the sulphate bag and replied that it contained an elephant tusk. Insp. Meshack requested him to remove the said tusk and the accused removed it and placed it on the table. Insp. Meshack inquired as to how he came into possession of the elephant tusk and the accused stated that he found it in his farm while digging and he was there to find a buyer and sell it.

The accused was placed under arrest and Insp. Meshack filled a certificate of seizure of the said government trophy in the presence of an independent witness. The accused person was taken to Kibaya Police Station, was interviewed and he confessed to being found in unlawful possession of the said government trophy.

On the 31st day of October, 2017 one ISSAC MUSHI a Game Officer after being informed went to the Police Station Kibaya, identified and evaluated the government trophy. He identified to be a piece of an elephant tusk and its value was TZS. 34,365,000/=. The exhibit was handed over to the Exhibits keeper one G4926 PC SUMAILY for storage. The investigation was conducted, witnesses were interviewed and eventually the accused person was arraigned in court for the offence he stands charged.

To prove the case against the accused person, the prosecution paraded seven (7) witnesses, PW1 James Kugusa, PW2 ASP Meshack P.L Lameck, PW3 Stella Losi, PW4 G. 4926 PC Sumaily, PW5 A/Insp Kaitira Machunde, PW6 Isaac Rangia Mushi and PW7 ASP James Kilosa. Also, (5) five exhibits were admitted in evidence, the chain of custody record form marked Exhibit P1, one piece of elephant tusk marked Exhibit P2, the certificate of seizure marked Exhibit P3, Trophy Valuation Certificate dated 31/10/2017 marked Exhibit P4 and cautioned statement dated 30/10/2017 marked Exhibit P5.

Having carefully gone through the evidence both oral and documentary adduced by both the prosecution and the defence; I find it pertinent to draw up issues for determination in this case. **Firstly,** is whether the government trophy was found in the possession of the accused person. **Secondly,** whether or not the chain of custody was broken. **Third issue is**, whether the defence case raised any reasonable doubt against the prosecution case.

Commencing to determine the first issue, whether the government trophy was found in the possession of the accused person. It is the evidence of the prosecution particularly the testimonies of PW2 and PW3 that on the 30/10/2017, around 18.00 hours at Kibaya area within Kiteto District, the accused person was placed under arrest after being found in unlawful possession of one piece of an elephant tusk Exhibit P2 following the search conducted in the restaurant at Lusaka Guest House and Restaurant. PW2 testified that after receiving intelligence information, went to the Restaurant at Lusaka Guest House and Restaurant where he found the accused person drinking soda while he had placed a sulphate bag between his feet. PW2 and PW3 stated that PW2 introduced himself to the accused person, asked about the sulphate bag and the accused person's name, the accused person replied that the sulphate bag belongs to him, stated his name is Shabani Ally and in the sulphate bag there is an elephant tusk.

After PW2 requested the accused to open the sulphate bag, he opened the sulphate bag, took out the black bag and from it took out an elephant tusk Exhibit P2 and placed it on the table. The accused stated he did not have a permit to have in possession the elephant tusk. PW2 placed the accused under arrest and filled a certificate of seizure Exhibit P3 in the presence of PW3 the independent witness, D/C Cleopa and the accused person Shabani Ally; they both signed the certificate of seizure. This evidence shows that PW2, PW3, accused person and one G.9659 D/C Cleopa signed Exhibit P3. The accused person denied to have been arrested in possession of Exhibit P2 at Lusaka Guest House and Restaurant Kibaya, Kiteto District on the material date and time. In his testimony the accused person DW1 stated that he was arrested on the 28/10/2017 at Soya village, Chemba District, Dodoma region. That after his arrest was taken to Arusha, thus on 30/10/2017 he was at Njiro Police Station. The accused person raised the defence of alibi, which I will consider and decide later.

It is trite law that the certificate of seizure ought to be signed at the place where the search was conducted and in the presence of an independent witness, this was held by the Court of Appeal in the case of **David Athanas@ Makasi Joseph Masima@ Shando Vs. The Republic,** Criminal Appeal No. 168 of 2017, CAT at Dodoma (unreported). In this case PW2 testified that he conducted the search at Lusaka Hotel Guest House, and he did not issue a receipt after seizure while PW3 stated that the search was conducted by PW2 in the Restaurant of Lusaka Guest House and Restaurant at the table where the accused person sat. The certificate of seizure Exhibit P3 shows the search was conducted at the Lusaka Hotel/Guest House. There are discrepancies with regard to the name of the guest house and the failure to issue a receipt. This court considers these are discrepancies in prosecution evidence and the failure to issue a receipt is not fatal. A certificate of seizure was prepared and issued and in such emergency situations PW2 Insp. Meshack had to act promptly. It is generally accepted that even where an event occurs in the presence of several people, their testimonies in court is susceptible to such minor discrepancies.

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".

This court is of the considered view that, PW2, PW3 and the certificate of seizure Exhibit P3 refer to the one and same place where the search was conducted, the accused person arrested, Exhibit P2 was seized and the certificate of seizure filled and signed by PW2 the officer executing the search and seizure, PW3 the independent witness and the accused person himself. It is just a matter of semantics the use of Lusaka Hotel/Guest House or Lusaka Guest House and Restaurant, it meant the same place.

In the case of **Song Lei Vs. the DPP, and the DPP Vs Xiao Shaodan and Two Others,** Consolidated Criminal Appeal Nos. l6'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."

In the case at hand the certificate of seizure Exhibit P3 was filled and signed at the Lusaka Guest House and Restaurant the place where the accused person was arrested and found in unlawful possession of Exhibit P2 in the presence of PW3 after the search and seizure. The accused person signed the Exhibit P3 by writing his first name and placed a right thumbprint to acknowledge being found in possession of Exhibit P2. PW2 the arresting officer and PW3 the independent witness signed Exhibit P3. The evidence of the accused person that he was arrested at Soya village within Chemba

District Dodoma region and that he signed the Exhibit P3 at the time he signed Exhibit P5 at KDU (Kikosi Dhidi ya Ujangili) Arusha on 03/11/2017 does not hold water and has no value since the two documents Exhibit P3 certificate of seizure and Exhibit P5 cautioned statement shows different inks were used to place the right thumbprint of accused person on the said documents. The court observed Exhibit P3 the ink used was black while the ink used on Exhibit P5 was purple ink. Therefore, the court holds the one piece of elephant tusk Exhibit P2 was found in the possession of accused person at the Lusaka Guest House and Restaurant.

Going to the second issue on whether or not the chain of custody was broken. It is the evidence of the prosecution particularly PW2 that after the seizure of Exhibit P2 from the accused person and his arrest at the scene of crime on 30/10/2017, PW2 took the said exhibit to Kibaya Police Station and handed it over to PW4 G. 4926 PC Sumaily who labelled the piece of elephant tusk 'L' and 'KIB/IR/1679/2017' and then was stored in the exhibit room. PW2 filled the chain of custody record Exhibit P1, which was signed by PW2 and PW4 as releasing and receiving officers respectively. The evidence on the 31st October 2017 shows PW4 handed over the Exhibit P2 to PW6 for identification and valuation, whereby both PW4 and PW6 wrote their names and placed their signatures in Exhibit P1 as releasing and receiving officers respectively. After identification and valuation of Exhibit P2 by PW6, he returned back Exhibit P2 to PW4 and both wrote their names and placed their respective signatures as releasing and receiving officers. PW6 testified that he placed labels on Exhibit P2, they are 1, 2.36kgs and underneath wrote UR 47cm before returning the said Exhibit P2 to PW4. PW6 explained that UR meant 'urefu' the length of Exhibit P2 and its weight was 2.36kgs.

Also, PW4 stated that when PW6 returned back to him Exhibit P2, he had placed the said labels.

It is the testimonies of PW4 and PW5 that, on the same day of 31/10/2017 PW4 handed over the Exhibit P2 to PW5 who took the same to Arusha. PW4 and PW5 testified that they placed their names and signatures on Exhibit P1 to acknowledge the handing over and receiving of the said Exhibit P2. The PW5 stated that when the Exhibit P2 was handed over to him, it was labelled KIB/IR/1679/2017, UR 47cm and 2.36kg. It is the testimony of PW5 and PW1 that on 31/10/2017 PW5 handed over the Exhibit P2 to PW1 at KDU Arusha and they both wrote their names and placed their signatures as the releasing and receiving officers respectively. PW1 testified that after receiving the said Exhibit P2 he wrote on it the name of accused Shabani Ally and reg. no. 580 meaning registration and later after obtaining the case number he wrote on the said Exhibit P2 'EC/Na 112/2017'. PW1 stated that he is the one who kept Exhibit P2 under his custody until the day he appeared before the court, tendered, admitted and marked Exhibit P2.

The court recognizes the importance of the integrity of chain of custody of exhibits is assurance of their reliability. The chain of custody record is there to show the movement of an exhibit from one person to the other until the same is tendered and admitted in evidence before the court. The landmark case on the principle of chain of custody is **Paul Maduka and 4 Others Vs. Republic,** Criminal Appeal No. 110 of 2007 CAT at Dodoma (Unreported) laid down and emphasized on the chronological documentation on how the exhibit is handled until tendered in court.

In the case of **Deus Josias Kilala @ DEO Vs. Republic,** Criminal Appeal No. 191 of 2018, CAT at Dar es Salaam (unreported) the Court of Appeal stated that; "*...our decision in **Paulo Maduka** {supra) is authority of* *the peremptory requirement for the prosecution to produce evidence or chronological documentation and or paper trail, showing the seizure, custody, control, transfer, analysis and disposition of an exhibit allegedly seized from the accused.......the said requirement must be relaxed in cases relating to items which cannot change hands easily and therefore not easy to tamper with."*

And in the case of **Mwinyi Jamal Kitalamba @ Igonza and 4 Others Vs. Republic**, Criminal Appeal No. 348 of 2018, Court of Appeal of Tanzania at Dodoma, the Court of Appeal held that; *"In any case, as we held in **Issa Hassan Uki v. Republic**, Criminal Appeal No. 129 of 2017 (unreported), elephant tusks constitute an item that cannot change hands easily and thus it cannot be easily altered, swapped or tampered with."*

In this case at hand the prosecution paraded five (5), PW1, PW2, PW4, PW5, PW6 and one documentary evidence Exhibit P1 to prove the chain of custody of Exhibit P2. The five prosecution witnesses explained how Exhibit P2 was seized from the accused person, how it was moved and preserved from when it was seized up to the point when it was tendered before the court. Additionally, PW1, PW4, and PW6 explained on how they labeled the said Exhibit P2 with unique features for identification. The Exhibit P2 is an item that cannot change hands easily, thus cannot be easily tampered with or altered or swapped. The requirement of bringing to the court the Exhibit Register PF 16 and tender as exhibit as raised by the defence during cross examination of PW4 is not fatal to the prosecution case because there is Exhibit P1 the chain of custody record and the testimonies of PW1, PW2, PW4, PW5 and PW6 on the movement of Exhibit P2 the piece of an elephant tusk. Therefore, it is my considered opinion the chain of custody record of Exhibit P2 was not broken from the time it was seized from the accused person to the time it was tendered before the court.

On the third issue, whether the defence case raised any reasonable doubt against the prosecution case. It is imperative to note that there is no dispute the government trophy seized is a piece of elephant tusk, valued at TZS. 34,365,000/= as shown on Exhibit P4 the Trophy Valuation Certificate issued by PW6. PW1 and PW6 are Game Warden and retired Game Officer respectively. PW1 identified it as the middle part of an elephant tusk by its unique features, it has hollow opening at the base which is closed in the middle of an elephant tusk, has the schreger lines on the other end and it shows there was another piece it was cut from by a saw and the other end shows was extracted from a skull. PW6 testified that the government trophy found is a piece of an elephant tusk, it is round shaped, its colour like milk, has a hollow opening on one end showing that it was extracted from a skull of an elephant and the other end it had been cut. The elephant tusk is a lateral incisor and it is curved. The front part of said tusk that has been cut off, there are schreger lines which are only found in elephant tusks. When one looks closely can see diamond shaped lines which are the schreger lines. Also, PW6 identified it to be an elephant tusk due to his working experience at the Game Office. PW6 further stated that he prepared and issued the Trophy Valuation Certificate Exhibit P3 after conducting identification and valuation of Exhibit P2.

In the case of **Sylvester Stephano Vs. Republic**, Criminal Appeal No. 527 of 2016, CAT at Arusha (unreported), the Court of Appeal held that;

*" We subscribe to the position set in the persuasive decision of the High court in the case of **Republic Vs. Kerstin Cameron** (supra) cited by the*

learned State Attorney that the duty of an expert is to furnish the court with the necessary scientific criteria for testing the accuracy of their conclusions so as to enable the court to form its own independent judgment by application of these criteria to the facts proven in evidence."

I concur with this position held by the Court of Appeal of Tanzania; the case at hand PW1 and PW6 were experts who furnished this court with the scientific characteristics for testing the accuracy of their conclusion that the government trophy in question is a piece of elephant tusk.

The testimonies of PW1, PW2, PW4, PW5, PW6 and PW7 consist of several omissions in their recorded statements at the Police Station after participating in this case as there are facts which the witnesses did not state in their written statements, also there is omission on the part of Exhibit P1 to fill the place of REGION/STATE. Having carefully assessed the said omissions by the witnesses mentioned above, the documentary evidence and the entire evidence before the court, I found they are merely omissions and not contradictions. All the witnesses did not come with a new version of their testimonies, which contradicts the previous recorded statements at the police station. Learned Counsel for accused had an opportunity to cross - examine the witnesses under section 154 of the Evidence Act, Cap 6 R.E. 2019 but did not tender their statements for the court to distinguish the contradictions and determine the credibility of the witnesses because there were no contradictions. Thus, I find the omissions are minor, do not go to the root of the case and did not prejudice the right of the accused person in any way. In the case of **Goodluck Kyando Vs. R (2006) TLR** at paragraph 363, the Court of Appeal held 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."*

In this case the court has reached considered opinion, there is no good and cogent reasons for not believing the testimonies of PW1, PW2, PW3, PW4, PW5, PW6 and PW7.

In his defence case, DW1 stated that he was arrested on the 28/10/2017 at Soya village, Chemba District Dodoma region by Raymond Mdoe and Solomon Jeremiah and then taken to Njiro Police Station, Arusha. DW1 stated he was arrested because as he was driving his cart from fetching water caused an accident of a motor vehicle which swerved out of the road and cracked its wind shield. That in the motor vehicle was Raymond Mdoe and Solomon Jeremiah. That DW1 signed the Exhibit P3 at KDU office, Arusha on the 03/11/2017 after being forced and beaten in the presence of PW7 ASP James Kilosa. However, all these matters were not raised in cross examination when prosecution witnesses testified concerning the matters in this piece of defence and the Exhibit P3. In the case of **Martin Masara Vs. The Republic**, Criminal Appeal No. 428 of 2016, CAT at Sumbawanga (unreported), the Court of Appeal held that,

"No cross -examination was done when PW1 testified. It is trite law in this jurisdiction founded upon prudence that failure to cross-examine on a vital point, ordinarily implies the acceptance of the truth of the witness evidence; and any alarm to the contrary is taken as an afterthought if raised thereafter".

Therefore, this court finds the failure of the Defence to cross examine the evidence of PW2 and PW3 with regard to the date of arrest by the arresting officer at the place of arrest Lusaka Guest House and Restaurant in Kibaya area, Kiteto District, Manyara region, implies acceptance of the truth of said evidence. Thus, evidence raised during the defence case as stated, I find the evidence of DW1 is an afterthought.

Also, it is the evidence of DW1 that he was not at the scene of the crime and was not arrested at the place and time alleged by the prosecution. It is the evidence of PW2 and PW3 that the accused person was arrested at Kibaya Kiteto on 30/10/2017 18.00 hours at Lusaka Guest House and Restaurant. While the evidence of DW1 states that on the 30/10/2017 he was in Arusha at Njiro Police Station. From these evidences, this court considers the evidence adduced by Defence to rely on the defence of alibi.

The Court of Appeal of Tanzania in the case of **The DPP Vs Chibango Mazengo and 2 Others**, Criminal Appeal No.109 of 2019, CAT at Dodoma, held that;

> *"...failure to give notice of alibi in terms of section 194 of the CPA does not mandate or authorize an outright rejection of the alibi though it may affect the weight to be placed on it."*

Also, the Court of Appeal in the case of **Hamisi Bakari Lambani Vs. Republic,** Criminal Appeal No. 108 of 2012, CAT at Mtwara (Unreported), explained that;

> *"the law requires that person who intends to rely on the defence of alibi to give notice of that intention before the hearing of the case, S. 194(4) of the Criminal Procedure Act, Cap 20). If the said notice cannot be given at that early stage, the said person is under obligation, then, to furnish prosecution with the particulars of the alibi at any time before the prosecution closes its case S.194 (5) Cap 20. Should the accused person raise the alibi much later, later than what is required*

under subsections (4) and (5) above, as was the case herein, the court may, in its discretion, accord no weight of any kind to the defence s.194 (6). "

The provision of section 194 of the Criminal Procedure Act, [CAP 20 R.E 2019] is in pari materia with section 42 of the Economic and Organised Crime Control Act [CAP 200 R.E. 2019]. The above cited cases explain the mandatory requirements imposed under section 42 of the Economic and Organised Crime Control Act [CAP 200 R.E. 2019]. If the accused person intended to rely upon the defence of alibi, he was mandatorily required to indicate to the court the particulars of the alibi during the early stages of hearing of the case and if not had to furnish the prosecution with the notice and particulars of the alibi he intended to rely on as a defence at any time before the close of the prosecution case. The failure to observe and adhere to the requirements of law, the court may accord no weight of any kind to the defence.

In the case at hand, it is my assessment the accused raised the defence of alibi at the defence stage. The Defence failed to comply with the mandatory requirements of section 42(1), (2) and (3) of CAP 200 R.E 2019 and therefore this court shall accord no weight to the defence of alibi adduced by DW1 the accused person.

Furthermore, it is the opinion of this court that the defence evidence adduced by DW1 the accused person the essential part was testified by the prosecution witnesses in a different version. Therefore, it was the duty of the defence to cross examine on the essential matters which go to the gist of the case rather than wait and raise during the defence case. Therefore, this court accords evidential weight to the evidence of the prosecution rather than that of the defence.

It is a matter of principle, a party who fails to cross - examine a witness on a certain matter, will be estopped from asking the trial court to disbelieve what the witness said. This was held in the case of **Nyerere Nyague vs. Republic**, Criminal Appeal No. 67 of 2010, CAT at Arusha (unreported). Hence, this court as stated earlier accepts as true the evidences of the witnesses paraded by the prosecution.

The Court of Appeal held in the case of **Simon Edson @ Makundi Vs. Republic,** Criminal Appeal No. 5 of 2017, CAT at Moshi, *"It is trite law that the burden of proof in criminal case lies on the prosecution and it never shifts to the accused."* Also, in the case **of Christian s/o Kaale and Rwekiza s/o Bernard Vs. Republic [1992] TLR 302**, the Court held that *"an accused ought to be convicted on the strength of the prosecution case".*

As held in the above cited cases, the court in this case does not require the accused person to prove his innocence rather raise reasonable doubt against the prosecution case. After considering the evidence of both the Prosecution and Defence and the legal position set by legal authorities, I am of the settled view that the evidence of the prosecution both oral and documentary, save for Exhibit P5 the cautioned statement; proved beyond a reasonable doubt the offence against the accused SHABANI ALLY ATHUMAN.

In the upshot, the cumulative evidence of the prosecution has proved beyond reasonable doubt the offence against the accused and I find him guilty for unlawful possession of government trophy to wit one piece of elephant tusk 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 accused person for the offence as charged in this case.

HIGH COURT OF TANZANIA CORRUPTION AND ECONOMIC CRIMES DIVISION

L. L. MASHAKA
Judge
13/11/2020

SENTENCE

The accused person was found guilty and convicted for unlawful possession of government trophy to wit one piece of elephant tusk 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, Senior State Attorney Hyera for the Republic submitted on the previous record of conviction that the accused person has no criminal record. He is a first offender. However, SSA prayed to the Court to heavily sentence the accused for it to be a lesson to himself and others who involve themselves in unlawful business of elephant tusks, hence contribute to the destruction of our natural resources and our national economy, the loss of revenue in tourism.

In mitigation learned Counsel Maeda for the accused person prayed for a lenient sentence for the accused person being a first offender, is a parent, has a wife and four children aged 9 years, 7 years, 5 years and 4 years. That he has his mother who he was taking care of and is dependent on him. Learned Counsel prays for a lenient sentence otherwise his children will suffer without his care. Further learned Counsel submitted that the accused has been in remand since the 30/10/2017; it is three years plus and is remorseful on what happened; thus, the accused prays to the court to consider the time spent in remand when sentencing. That the accused found the piece of elephant tusk in his farm and considering his level of education and knowledge of the law and the effect of being found in possession of the piece of elephant tusk, prays for a lenient sentence. So, he can serve his lenient sentence, return to the community being 39 years of age, with full of energy he can contribute in building and serving his community and become a good example to those involved in such illegal businesses.

In Allocutus, the accused prayed to the court for a lenient sentence and repeated what was stated by learned Counsel. The accused added that both his parents are dependent on him. The accused did not know that he had in possession an elephant tusk, it was his mistake, he greatly regrets what he has been through and is remorseful. He prays for a lenient sentence so he can serve his time, return to build his community, take care and educate his children.

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

I have considered the mitigation factors advanced and I am guided by 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 accused person.

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".

The court has considered the time the accused person has spent in remand since he was arrested on the 30/10/2017 until today. In the case of **Livinus Uzo Chime Ajana Vs Republic,** Criminal Appeal No. 13 of 2018, Court of Appeal of Tanzania at Dar es Salaaam (unreported), the Court of Appeal stated that;

"On our part, we cannot be precise more than reproducing what we stated in ***Vuyo Jack Vs the Director of Public Prosecutions,*** *Criminal Appeal No. 334 of 2016 (unreported), where on being encountered with an akin situation, we stated thus: - since the appellant was at the time arrest not yet convicted, bearing in mind the 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 bars before being found guilty, convicted and sentenced, would have been a mitigating factor in imposing the sentence but not (as erroneously imposed by the trial Judge) to commence from the time of arrest as erroneously imposed by the trial Judge."* The Court of Appeal held that; *"To that end, we hold that it was improper for the trial Judge to order the sentence against the appellant to start running from when he was detained because by then, it had not yet been proven that he was guilty of the charged offence."*

In this case at hand the accused person was arrested on the 30/10/2017 three years ago and spent all three years in remand, this is one of the mitigating factors for this court to consider in imposing the sentence. In consideration to the mitigating factors, the accused person being a first offender, is young, has a family of young children and dependent parents, has spent three years in remand; I hereby sentence the accused person SHABANI ALLY ATHUMAN to serve 20 (twenty) years imprisonment.

The accused person SHABANI ALLY ATHUMAN is found guilty, convicted and sentenced.

HIGH COURT OF TANZANIA CORRUPTION AND ECONOMIC CRIMES DIVISION

L. L. MASHAKA
Judge
13/11/2020

Order:

1. The one piece of elephant tusk Exhibit P2 is forfeited to the Government and to be disposed of under section 111(1)(a) and (3) of the Wildlife Conservation Act, No. 5 of 2009.

L.L. MASHAKA
Judge
13/11/2020

The judgment was read and delivered in the presence of Ms. Agnes Hyera, Senior State Attorney for the Republic, the accused person Shabani Ally Athuman and learned Counsel Elibariki Maeda for the accused, in open court today the 13th day of November 2020.

L.L. MASHAKA
Judge
13/11/2020

Right of appeal fully explained to the accused and the Republic.

L.L. MASHAKA
Judge
13/11/2020