IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: JUMA, C.J., MWARIJA, J.A. And KEREFU, J.A.)

CONSOLIDATED CRIMINAL APPEAL NO 110 OF 2019 AND 553 OF 2020

1. **EMMANUEL MWALUKO KANYUSI.....1ST APPELLANT**
2. **MASIMBA CHIBENA @CHING'OLE .....2ND APPELLANT**
3. **MASADO LUNGWA @ MAILE.....3RD APPELLANT**
4. **CHIBAGO STEPHANO @ MUWINJE..... 4TH APPELLANT**
5. **MAZENGO CHARAHANI @ RUNGWA ..... 5TH APPELLANT**

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Dodoma)

(Hon. Mansoor, J)

dated the 08th March, 2019 & 29th day of July, 2020

in

Consolidated Criminal Appeals Nos. 109 & 124 of 2017 And Criminal Appeal No. 95 of 2019

JUDGMENT OF THE COURT

25th & 28th May, 2021

JUMA, C.J.:

EMMANUEL MWALUKO KANYUSI (the first appellant); MASIMBA CHIBENA @ CHING'OLE (the second appellant); MASADO LUNGWA @ MAILE (the third appellant); CHIBAGO STEPHANO @ MUWINJE (the fourth appellant); and MAZENGO CHARAHANI @ RUNGWA (the fifth appellant) were

charged in the District Court of Manyoni (F.H. Kiwonde-RM) in two counts of unlawful possession of government trophy and unlawful dealing in government trophy.

The first count stated:

> ***"UNLAWFUL POSSESSION OF GOVERNMENT TROPHY*** *contrary to section 86 (1), (2) (c) (ii), (3)(b) of the Wildlife Conservation Act No. 5 of 2009 as amended by section 59(a) of the Written Laws (Miscellaneous Amendment) Act No. 2 of 2016 read together with paragraph 14(d) of the First Schedule to, and sections 57(1) and 60(2) of the Economic and Organized Crime Control Act Cap 200 R.E. 2002 as amended by section 13 (b) (2) (3) (4) and 16 (a) of the Written Laws (Miscellaneous Amendment) Act No. 3 of 2016."*

The second count stated:

> ***"UNLAWFUL DEALING IN GOVERNMENT TROPHY*** *contrary to sections 80 (1), 84 (1), 111 (1) (a) of the Wildlife Conservation Act No. 5 of 2009 read together with paragraph 14 (b) of the First Schedule to, and sections 57 (1) and 60 both of the Economic and Organized Crime Control Act Cap 200 [R.E. 2002] as amended by section 13(b) (2) (3) (4) and 16 (a) of the Written Laws (Miscellaneous Amendment) Act No. 3 of 2016."*

The particulars of both counts were that on 30/09/2016 at Mangoli village of Manyoni District (Singida Region), the appellants were found in unlawful possession of government trophy. The trophies concerned were two pieces of elephant tusks which weighed 4 kilograms valued at USD 15,000, equivalent to TZS 32,835,000/=.

Isaac Namyaro (PW2), a game warden stationed at Manyoni, testified that sometime on 28/9/2016, he and fellow game wardens traveled to Dodoma to follow up on information about a person engaged in selling government trophy. Once in Dodoma, PW2, Richard Michael, Josia Zakaria, and Daudi Mahenge met Emmanuel Mwaluko (the first appellant). After explaining their mission to purchase government trophies, the first appellant informed the visitors that his colleagues back at Mangoli village, had government trophies for sale. The game wardens asked the first appellant to contact his colleagues and arrange a meeting the following day.

PW2 testified that on 30/9/2016, he and his team picked up the first appellant and traveled to Mangoli village, where they met, among others, Masimba Chibena (the second appellant) and Masado Lungwa (the third appellant). The appellants took the wardens to where they had buried the government trophies, at which point the wardens introduced themselves and

arrested the appellants. PW2 regrets that the only village leader who could have witnessed the arrest was the village chairman, who escaped from the scene because he was also a suspect. The wardens invited a neighbour, Elias Magembe Mwandu (PW4), to witness as they exhumed two pieces of elephant tusks wrapped in a plastic bag. PW2 filled the certificate of the seizure (Exhibit P4) and the witnesses who were present, signed it.

On 1/10/2016, the day following the three appellants' arrest, another game warden Masongo Meigweri (PW1), received the two elephant tusks from PW2. After assigning them identification numbers and labelling them with the criminal case number, PW1 weighed them and filled their trophy valuation report. He valued the two tusks at Tshs. 32,835,000 (USD 15,000). PW1 prepared a Trophy Valuation Certificate (exhibit P2). According to PW1, the two elephant tusks came from one dead elephant, and the tusks weighed 4 kilograms.

Detective corporal Chiganga (PW3) of Police Station Manyoni testified that the arresting wardens took the suspects to the police station at 16:45 hours on 1/10/2016 for interrogation. One by one, he recorded their cautioned statements, beginning with that of the second appellant (exhibit P5).

In his defence, the first appellant (DW1) narrated his ordeal in the hands of the game wardens from 26/9/2016 in Dodoma. After his arrest and handcuffing, the zonal anti-poaching unit officers took him to Manyoni. He remembers how his tormentors took him to the bush in handcuffs and a stick was placed between his legs. For the following days until 2/10/2016, he endured further beatings. It was while he was in prison when he was finally sent to the hospital for medical treatment from 5/10/2016 to 10/10/2016. DW1 completely denied committing any crime. He insisted that he saw the government trophies for the first time when he appeared in court during his trial.

The second appellant (DW2) testified that on the night of 28/9/2016, several game wardens arrived at his home to demand the names of other poachers. After searching his house and found nothing, they transported him to the offices of the Anti-Poaching Unit at Manyoni, where he found other suspects, he did not know. That evening and on 29/9/2016, and also on 30/9/2016, the wardens beat him up with sticks on his legs. It was until the evening of 2/10/2016, when the wardens sent him to Manyoni Police Station, where he signed a document. He, too, was later sent to the hospital for

treatment. DW2 denied committing the alleged offence and maintained that he also saw the elephant tusks in court for the first time.

Like the second appellant, the third appellant (DW3) testified that the game wardens visited his house on the night of 28/9/2016. They woke him up from his sleep, restrained him, and asked where their gun was. After searching his home, they found a sack of maize and vegetables. They found nothing inside the bag after pouring out the contents. DW3 said that they beat him every day from 29/9/2016 to 2/10/2016. They took him to Manyoni Police Station, where a police officer slapped and ordered him to sign a document. The third appellant denied to have committed any crime; he described himself as a mere peasant and not a businessman.

In his defence, the fourth appellant (DW4), indicated that in the evening of 2/10/2016, the game wardens took him to Manyoni Police Station. Corporal Chiganga prepared a statement and asked him to sign. When he refused, the police officer slapped him; he had to sign it. He could barely walk the following day when the wardens took them to court. DW4 complains of beatings he suffered before seeking treatment in the hospital. He tendered his medical examination report (Exhibit D2), which particularized the injuries he suffered while in custody.

The fifth appellant (DW5) testified that the game wardens sent him to Manyoni police station on 2/10/2016. His legs ached and swollen following the beatings he suffered from game wardens. Corporal Chiganga wrote a statement, slapped him, and forced him to sign. DW5 tendered his medical examination report (exhibit D3) to prove the beatings he suffered.

Regarding who possessed the government trophies, the trial magistrate concluded that there was proof by oral evidence of the arresting officer (PW2) and PW4, who witnessed when the game wardens found the five appellants in possession of government trophies. According to the trial magistrate, the certificate of seizure of elephant tusks which all the appellants signed, was another evidence proving the guilt of the five appellants.

The trial court convicted all the five appellants on both counts of unlawful possession of government trophies and illegal dealing in government trophies. For the conviction on the first count, the trial court sentenced the appellants to serve five years in prison. For the second count, the trial court ordered the appellants to either pay a fine of Tshs. 66,670,000/= each or to serve two years in jail if they fail to pay the fine. The trial court ordered the sentences to run concurrently.

The appellants were aggrieved by their convictions and sentences. They filed separate appeals before the High Court at Dodoma. The Director of Public Prosecutions was not satisfied with the sentences which the trial court imposed, and preferred a cross-appeal. The first appellate High Court (Mansoor, J.) ordered the separate appeals and cross-appeal to be consolidated into one Consolidated DC Criminal Appeals Nos. 109 and 124 of 2017.

The five appellants were unsuccessful in the High Court because, on 29/7/2020, the High Court (Mansoor, J.) dismissed their consolidated appeals. The appellants faced another setback with regards to the sentences. Mansoor, J. concluded that the sentence of five years, which the trial court imposed for the offence of unlawful possession of government trophy, was lower than the minimum sentences under section 86(2)(c) (ii) of the Wildlife Conservation Act No. 5 of 2009 (which we shall refer as "**the WCA"**). The proper sentence for unlawful possession of a government trophy is a term in prison for a period between twenty and thirty years with an additional fine of five million shillings or ten times the value of the trophy, whichever is the larger. Similarly, the learned Judge declared the sentence of imprisonment for two years for the offence of unlawful dealing in a government to be equally far below the

statutory minimum. According to section 84(1) of the WCA, a proper sentence following a conviction for unlawful dealing in government trophy is a fine of not less than twice the value of the government trophy; or to imprisonment for a term of not less than two years but not exceeding five years or both. The first appellate Judge returned the aspect of sentencing to the trial court directing it to pass a proper sentence.

In their second appeal before us (CRIMINAL APPEAL NO. 110 OF 2019), the first, the second, and the third appellants relied upon eleven grounds of appeal, summarised as follows.

First, that the two courts below erred for relying on an involuntary confession that the appellants made to the police instead of sending them to a justice of the peace to make extra-judicial statements.

Two, the trial court and the first appellate court convicted and sentenced the appellants based on an improper seizure certificate.

Three, the prosecution fabricated evidence to convict the appellants. That is why the prosecution failed even to tender as evidence the instruments used to exhume buried trophies.

Four, the game warden did not observe the requirements of section 10 (2) of the Criminal Procedure Act [Cap 20 R.E. 2002, now R.E. 2019] (the CPA) to issue receipts when receiving anything during investigations.

Five appellants complain that police failed to abide with periods available for interviewing suspects under sections 50 and 51 of the CPA.

Six, the prosecution improperly obtained a seizure certificate, which the appellants did not sign to confirm their presence at the scene. It was not proper for the trial and the first appellate courts to convict the appellants based on this certificate.

Seven, by failing to issue notice to the appellant when he cross-appealed, the Director of Public Prosecutions (DPP) violated the provisions of section 381 (1) of the CPA.

Eight, the DPP's cross-appeal was filed out of time and was not properly before the High Court. It was filed beyond forty-five days that the law provides.

Nine, the appellants were convicted based on exhibits whose chain of custody did not meet the requirements of the law.

Ten, the two courts below failed to evaluate and consider the appellants' defences.

Eleven, the prosecution did not prove beyond reasonable doubt the essential ingredients of the two counts of unlawful possession of government trophies and illegal dealing in government trophies.

On their part, the fourth and fifth appellants filed four grounds of appeal (CRIMINAL APPEAL NO. 553 OF 2020), which we paraphrase as follows;

First, the prosecution did not prove its case beyond reasonable doubt.

Two, despite irregularities, the trial and the first appellate High Court convicted and sentenced the appellants.

Three, when the first appellate court heard the appeal through written submissions, the appellants did not get copies of written submissions.

Four, no evidence proved proper chain of custody of exhibits.

At the hearing of the two criminal appeals, that is, CRIMINAL APPEAL NO. 110 OF 2019 and CRIMINAL APPEAL NO. 553 OF 2020, Ms. Lina W. Magoma learned Senior State Attorney, assisted by Mr. Morice C. Sarara, learned State Attorney, represented the respondent Republic. The five appellants all appeared in person by video link from Isanga Prison Dodoma. One after the other, each appellant preferred to let the State Attorneys first submit in response to their combined grounds of appeal, and they later make their respective replies.

Ms. Magoma invoked Rule 69 (1) of the Tanzania Court of Appeal Rules, 2009 to urge us to consolidate CRIMINAL APPEAL NO. 110 OF 2019 and CRIMINAL APPEAL NO. 553 OF 2020 since the two appeals originate from the same judgment of F.H. Kiwonde—RM, in the District Court of Manyoni Economic Case No. 57 of 2016. We granted the request and the consolidated appeals became CONSOLIDATED CRIMINAL APPEALS NOS. 110 OF 2019 AND 553 OF 2020. We renumbered the appellants as follows:

EMMANUEL MWALUKO KANYUSI became the first appellant; MASIMBA CHIBENA @ CHING'OLE (the second appellant); MASADO LUNGWA @ MAILE (the third appellant); CHIBAGO STEPHANO @ MUWINJE (the fourth appellant); and MAZENGO CHARAHANI @ RUNGWA (the fifth appellant).

Before addressing the grounds of appeal, the learned Senior State Attorney informed us that she had an issue of law regarding the legality of the second count in the Charge Sheet. It is a count on unlawful dealing in government trophies. She elaborated that, upon her closer scrutiny of section 84(1) of the WCA, she discovered that the particulars of the offence of unlawful dealing in trophies do not disclose the nature of selling, or buying, or transferring or transporting, the appellants were engaged in to commit this

offence which is created under sections 80 (1) and 84 (1) of the WCA. In part, the particulars of this count state that:

> *"...on 30th day of September 2016 at Mangoli village within Manyoni District and Singida Region were found in unlawful dealing in government trophy to wit; two pieces of elephant tusks weighing four (4) kgs., valued at USD 15,000 which is equivalent to Tshs 32,835,000/= the properties of United Republic of Tanzania."*

Ms. Magoma urged us to altogether discard the second count of unlawful dealing in trophies from the record of appeal which should result in acquittal of all the five appellants. She referred us to the case of **DAVID ATHANAS @ MAKASI & JOSEPH MASIMA @ SHANDOO V. R,** CRIMINAL APPEAL NO. 168 OF 2017 (unreported) where the Court found that the particulars of the offence of unlawful dealing in government trophies did not elaborate the contents of section 80(1) and 84(1) of the WCA referred to in the statement of the offence. The particulars of the offence did not specify *"...the nature of 'selling,' or 'transferring,' or 'transporting,' or 'accepting,' or 'exporting,' or 'importing' the appellants were engaged in."*

Ms. Magoma submitted further that the lack of clarity in the particulars of the second count prevented the appellants before us from understanding the

full scope of the count to enable them to prepare their respective defence properly.

Ms. Magoma informed us that her submissions will focus on the remaining first count of unlawful possession of government trophies contrary to section 86(1) and (2) (c) (ii), (3) of the WCA. This count covers all the five appellants.

Ms. Magoma urged us to expunge all the grounds of appeal in the two sets of memoranda of appeal, which were not presented for consideration by first appellate High Court.

Ms. Magoma merged grounds **two, four,** and **six** and argued them together because these grounds concern the certificate of seizure (exhibit P4). The learned Senior State Attorney saw nothing wrong with the integrity of the certificate of seizure as evidence. She submitted further that apart from PW2, the first, second, third, and fourth appellants all signed the certificate of seizure to signify that they witnessed when the game warden seized two elephant's tusks at Mangoli village. In so far as she was concerned, the certificate of seizure complied with all the procedures under section 106 (1) (a), (b) and (c) of the WCA.

Turning to the claim in ground number five that the recording of the appellants' cautioned statements violated the CPA, Ms. Magoma disagreed.

She pointed out that the trial court dealt with the appellants' concerns through inquiries, which determined the voluntariness of their cautioned statements. In addition, the police recorded their cautioned statements within the periods which the CPA prescribes, taking into account that the appellants were arrested at night and transported to Manyoni.

Although the learned Senior State Attorney conceded ground number eight claiming that the Director of Public Prosecutions (the DPP) had filed his petition of appeal outside forty-five days of the decision of the trial district court as required under sections 378 and 379 of the CPA, she submitted that the appellants were not in any way prejudiced. They were able to raise their new grounds, which the first appellate court addressed.

Winding up with grounds ten and eleven together, the learned Senior State Attorney conceded that the two courts below convicted all the five appellants in the first count of unlawful possession of government trophy. However, she quickly added that the evidence is sufficient to prove the case against the fourth appellant only. She submitted further that the recovery of two pieces of elephant tusks, from the fourth appellant's house, was one such piece of evidence. There is also the evidence of PW2 and PW4.

Ms. Magoma next submitted on the third ground of appeal which were filed by the fourth and fifth appellants. They complained that at the hearing of DPP's cross-appeal, the first appellate Judge denied them their right to file written submissions. Ms. Magoma explained that while the DPP had readily agreed to file written submissions to prosecute his cross-appeal, the appellants declined to file written submissions. All the same, the High Court allowed the appellants to make oral submissions and were hence heard.

Finally, Ms. Magoma supported the appeals of the first, second, third, and fifth appellants against conviction in the remaining count of unlawful possession of government trophies. She supported their immediate release from prison. She, however, opposed the appeal by the fourth appellant. She urged us to not only sustain the fourth appellant's conviction on the count of unlawful possession of government trophy, but to subject him to the minimum sentence under section 86(1) (2) (c) (ii) of the WCA. When we pressed her to explain whether it was appropriate for the first appellate Judge to send a court file back to the subordinate trial court for the latter to impose the minimum sentence, she replied that the High Court Judge had the power to impose the minimum sentence.

Ms. Magoma is right about the sentencing powers of the High Court. When High Court sits to hear criminal appeals from subordinate courts, it enjoys broad powers under the CPA, which powers include to increase the sentence under section 366 (1) (a) (ii) of the CPA.

In their brief replies, one after the other, each appellant left it to the Court to do justice to their appeals.

As we have pointed earlier, this is a second appeal. Section 6 (7)(a) of the Appellate Jurisdiction Act, Cap 141 R.E. 2019 which governs appeals in criminal cases to this Court, restricts the jurisdiction of Court on matters of law, not fact. In **NOEL GURTH aka BAINTH and ANOTHER V. R.,** CRIMINAL APPEAL NO. 339 OF 2013 (unreported) we said the following about the matters of law as our main area of our concern:

> *"...on second appeal this Court is mostly concerned with matters of law but not matters of fact. The Court can however interfere with concurrent finding of facts by courts below only where there is misapprehension of the evidence, or where there were mis-directions or non-directions on the evidence, or where there had been a miscarriage of justice or violation of some principle of law or practice."*

Ms. Magoma submitted on a matter of law regarding the defect in the second count of unlawful dealing in government trophy. She urged us to

expunge the count and acquit all the five appellants. Section 80(1) and 84(1) of the WCA which creates the offence of unlawful dealing provides:

> *80.-(1) A person shall not deal in trophy or manufacture an article from a trophy for sale or carry on the business of a trophy dealer except under and in accordance with the conditions of a trophy dealer's licence.*
>
> *84.- (1) A person who sells, buys, transfers, transports, accepts, exports or imports any trophy in contravention of any of the provisions of this Part or CITES requirements, commits an offence and shall be liable on conviction to a fine of not less than twice the value of the trophy or to imprisonment for a term of not less than two years but not exceeding five years or to both.*

The learned Senior State Attorney is correct to submit that the case of **DAVID ATHANAS @ MAKASI & JOSEPH MASIMA @ SHANDOO V. R** (supra) elaborates what to expect from particulars of the offence of unlawful dealing in government trophy; which makes the second count in this appeal before us, defective:

> *"As to the second count it is obvious that the Statement of the Offence does not disclose to the appellants the nature of the unlawful dealing in government trophy for which they were charged. A close look of section 80(1) and 84(1) of the WCA, the same have the categories of the offence of unlawful dealing with*

the government trophy which would have guided the drafting of the particulars of the offence in the second count.

Sections 80(1) and 84(1) of the WCA .... provides examples of 'unlawful dealings' which should have featured in the particulars of the offence in the second count."

In the case of **JONAS NGOLIDA V. R.,** CRIMINAL APPEAL NO. 351 OF 2017 [TANZLII], the Court stated that section 80(1) of the WCA specifies the nature of dealing in the form of "manufacturing from a trophy for sale" or "carry on the business of a trophy dealer."

In the appeal before us, PW2 testified how when the game wardens who were following up on information about unlawful dealings in government trophies reached Mangoli village at the premises of the fourth appellant, and saw where the fourth appellant buried government trophies. Unfortunately, the wardens did not make any attempt to create a convivial environment for buying and selling the tusks. The wardens rushed to introduce themselves and arrested all the appellants at the premises. The wardens did not attempt to "buy" the elephant tusks. They did not even try to learn the underground network of dealings in elephant tusks. On reflection, the game wardens' military-style approach to collection of evidence probably killed off any

possibilities to collect evidence necessary to inform subsequent drafting of proper particulars of the offence of unlawful dealing in government trophies.

As is evident from what we have stated above, Ms. Magoma is, with due respect, right to submit that the particulars of the offence of unlawful dealing in government trophies do not elaborate the contents of section 80(1) and 84(1) of the WCA referred to in the statement of the offence. We, as a result, expunge the second count of unlawful dealing in government trophies from the charge sheet and we hereby acquit all the five appellants.

We turn to the next matter of law regarding new grounds of appeal which were not considered by the High Court and which, Ms. Magoma invited us to discard.

Concerning grounds of appeal number **one**, **three**, **seven,** and **nine**, we have checked the veracity of this claim. With due respect, the learned Senior State Attorney is correct to argue that the first, second, and third appellants did not include these grounds in their petition of appeal to the High Court. Our decision not to consider new grounds of appeal is jurisdictional. Under section 4 of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019, the jurisdiction of this Court is to hear and determine appeals from the High Court and subordinate courts with extended jurisdiction. As long as grounds number **one**, **three**,

seven and **nine**, did not pass through the High Court, this Court lacks the requisite jurisdiction to hear appeals that bypassed the High Court. The same applies to ground number four of the fourth and fifth appellants' appeal. In **MAKENDE SIMON V. R.,** CRIMINAL APPEAL NO. 412 OF 2017 (unreported), we said the following about new grounds of appeal:

> *"Times without number, this Court has refrained from dealing with such new grounds of appeal because it does not have the jurisdiction to entertain them on the second appeal."*

The trial District Court of Manyoni and the first appellate High Court at Dodoma made concurrent findings that the five appellants were arrested and found in possession of two elephant tusks. In the case of **FELIX S/O KICHELE & EMMANUEL s/o TIENYI @ MARWA V. R.**, CRIMINAL APPEAL NO. 159 OF 2005 (unreported), the Court restated its stand that it will not interfere with concurrent findings of facts.

On the first count, the two courts below concurred in the finding that all the five appellants were found in unlawful possession of government trophies. The learned trial magistrate stated:

> *"The accused denied it, but the prosecution evidence is to the effect the government trophies were found in possession of the*

accused persons who had no permit to that effect and so it was unlawful.

This fact is proved by the oral evidence of the arresting officer, pw2 and an independent witness, pw4 who [are] eye witnesses that the trophies were found in unlawful possession of the accused persons.

Also, PW2 said after seizing the government trophies from the accused, filled up a certificate of seizure, signed it and all of the accused persons signed the same to acknowledge or concede that the trophies were found with them and even at the trial, the document was not objected and admitted in evidence as exhibit P4.

The first appellate High Court concurred with the trial court's finding of facts:

"It was PW2, the wildlife warden accompanied by the police who organised the raid and captured red-handed all the five suspects/offenders with two elephant tusks at Mangoli village in Manyoni district in Singida Region. They seized the elephant's tusks and completed a seizure note which was signed by the

owner of the premises one Chibago Stephano Muwinje, and also signed by all the suspects/offenders and witnessed by Dr. Elias Magembe and a lady called Sabela William."

However, the learned Senior State Attorney has arrived at a different conclusion from the two courts below. From her assessment of evidence, Ms. Magoma concluded that the charge of unlawful possession of government trophy could stand against the fourth appellant only. She had in mind the evidence of PW2 (the game warden who arrested the first, second, third, fourth, and fifth appellants at Mangoli village), PW4 (an independent witness during the arrest, search, and seizure), and the evidence of the Certificate of Seizure (exhibit P4).

We agree with Ms. Magoma that the evidence of the certificate of seizure proves that only the fourth appellant committed the offence of unlawful possession of a government trophy. We will demonstrate that the two courts below misapprehended the evidence of seizure certificate (exhibit P4), which, in the circumstances, provides the best snapshot that it was the fourth appellant alone who had control over the two elephant tusks.

Elias Magembe (PW4) testified how he was awoken from his sleep and invited to witness the digging up of buried government trophies. They walked

behind the fourth appellant's house. There was a hill, and the fourth appellant showed the place he and his colleagues hid the tusks. The fourth appellant dug up the spot where two (2) elephant tusks were wrapped in a white nylon bag. PW4 and those present filled and signed a certificate of seizure.

The certificate of seizure, which PW2 read it out after the trial court admitted it as exhibit P4, confirms the arrest of the fourth appellant and finding in his possession two elephant tusks. PW2 made several vital entries in the certificate of seizure. He identifies himself as ISACK ELISARIA NANYARO from K.D.U.-MANYONI. On 30/9/2016, PW2 arrested and searched the land belonging to the fourth appellant, Chibago Stephano Muwinje. Elias Magembe (PW4) and another Sabela William witnessed when the game wardens apprehended and searched the fourth appellant's premises. After the search, the certificate also shows that PW2 seized two elephant tusks from the fourth appellant. The certificate lists the names of people who the wardens searched. These include the fourth appellant, the second, third, and the fifth appellant.

Apart from PW4 as an independent witness, the second appellant, the third appellant, and the fifth appellant were present when the fourth appellant dug up the elephant tusks from behind his house and signed the seizure certificate. We can unresistingly say that exhibit P4 is the best evidence on

possession of the two elephant tusks. This exhibit P4 does not tie up the first, second, third, and fifth appellant with the first count of unlawful possession of government trophies, two elephant tusks. But it is the best evidence that the fourth appellant was in complete control over the two pieces of elephant tusks which he dug up from the ground.

Ms. Magoma conceded that, when PW1 tendered both the Handing-over book (exhibit P1) and the trophy valuation certificate (Exhibit P2), he did not read the contents of these two exhibits. While on the one hand, the learned Senior State Attorney urged us to discard exhibits P1 and P2 because PW1 failed to read them before the trial court. On the other hand, she argued that there is the oral testimony of PW1 which is sufficient to prove the contents of the expunged exhibits P1 and P2. She expressed her confidence that the oral testimony of PW1 about the value of the two elephant tusks will help the court to impose the legal sentence which section 86 (2) (c) (ii) of the WCA prescribes.

With due respect, Ms. Magoma's line of submission that oral witnesses can prove facts in the expunged documents is in line with several decisions of this Court. **SAGANDA SAGANDA KASANZU V. R.** CRIMINAL APPEAL NO. 53 OF 2019 (TANZLII), both Certificates of seizure and valuation, which were not

read out. They were as a result expunged from the record. All the same, the Court stated:

> *"...evidence of those two prosecution witnesses together with that of PW5 proved the contents of both expunged exhibits."*

We took a similar position in **HUANG QIN & XU FUJIE V. R.,** CRIMINAL APPEAL NO. 173 OF 2018 (TANZLII):

> *"Nevertheless, we agree with Mr. Msemo that even if the said exhibits are expunged from the record of appeal, the respective witnesses who tendered them in court sufficiently explained their contents. As was correctly argued by Mr. Msemo, Exh PI was explained by PW3 as a search order in which the items belonging to the appellants were seized on 2/11/ 2013 at Mikocheni B. He also explained how they prepared the Certificate of Seizure (Exh. P2) indicating the items taken from the appellants. PW3 also explained Exh. P3 being the Handing Over Certificate that was used in handing over the seized items including 706 elephant tusks to the Wildlife Department at Mpingo House."*

We agree with Ms. Magoma that the evidence points at the fourth appellant and convicts him on the count of possession of government trophy. Mere presence of the other appellants when the game warden retrieved two

elephant tusks from the fourth appellant's land does not make them to be in possession.

The following evidence proves that the fourth appellant possessed government trophies when PW2 and other game wardens arrested him. After seizing from the fourth appellant the two pieces of elephant tusks under a seizure certificate, PW2 handed them over to Masongo Meigweri (PW1), a valuer of government trophies. PW1 gave the following oral testimony to prove the contents of the Trophy Valuation Certificate:

> *"On 1/10/2016 there were brought trophies by the Game Wardens who were from the patrol. They were two (2) elephant tusks. He was Isack Nanyaro who brought them. So, I identified them as elephant tusks, I assigned the numbers 1 and 2 and labelling the case number, weight. The tusk No. was 2.2 kgs and the tusk No. 2, weighed 1.8, a total of 4 kg the case no is GD/ZAPU/MAN/IR/70/2016.*
> *Isack Nanyaro handed the exhibits one to me in writing, I filled in the trophy valuation certificate. The handing over of trophies was done in the morning 10:00 hours on 1/10/2016.*
> *I indicated the number of trophies, the weight, the number of killed animals and value. It was 15,000 USD Tshs 32,835,000/= one dollar worth Tshs 2,189/= according to BOT network."*

Although we expunged the trophy valuation certificate from the record of appeal, the above oral testimony of the trophy valuer proved the value of the two elephant tusks as TZS 32,835,000/=, which is above the TZS 1,000,000/= mentioned under section 86(2) (c) (ii) of the WCA. A conviction under this provision attracts the sentence of imprisonment for a term of not less than twenty years. The court may in addition impose a fine not exceeding five million shillings or ten times the value of the trophy, whichever is more.

In the upshot, appeals by EMMANUEL MWALUKO KANYUSI (the first appellant); MASIMBA CHIBENA @ CHING'OLE (the second appellant); MASADO LUNGWA @ MAILE (the third appellant); and MAZENGO CHARAHANI @ RUNGWA (the fifth appellant) against the remaining first count of unlawful possession of government trophy, have merit. As a result of this, we allow their appeals and quash their convictions in that first count. These appellants shall be released forthwith unless held lawfully.

On the other hand, the appeal by CHIBAGO STEPHANO @ MUWINJE (the fourth appellant) against conviction in the remaining first count of unlawful possession of government trophy lacks merit. In the result, the fourth appellant's appeal is dismissed.

For the avoidance of doubt, the sentence that shall follow the fourth appellant's conviction for unlawful possession of government trophy is that under section 86(2)(c)(ii) of the WCA, which is pegged on the value of government trophies which was found in his possession. This means that the fourth appellant shall serve twenty years in prison counted from the date of his conviction by the trial court.

DATED at **DODOMA** this 27th day of May, 2021.

I. H. JUMA
CHIEF JUSTICE

A. G. MWARIJA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

This judgment delivered this 28th day of May, 2021 in the presence of the Appellants in person connected through video conferencing facility linked to Isanga Prison and Ms. Janeth Mgoma, learned State Attorney for the Respondent / Republic, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

H. P. Ndesamburo
DEPUTY REGISTRAR
COURT OF APPEAL