IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: MUGASHA, J.A., LEVIRA, J.A., And FIKIRINI, J.A.)

CRIMINAL APPEAL NO. 347 OF 2020

MUSSA RAMADHANI BINDE.....1ST APPELLANT
ABDALLA KHALIFA ABDALLA.....2ND APPELLANT
HUSSEIN KHERI IDDI.....3RD APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Ext Jursd – Dudu, PRM)

dated the 17th day of June, 2020
in
Criminal Appeal No. 2 of 2020

JUDGMENT OF THE COURT

29th April & 5th May, 2022

LEVIRA, J.A.:

The appellants, Mussa Ramadhani Binde, Abdalla Khalifa Abdalla and Hussein Kheri Iddi were jointly charged with the offence of unlawful possession of Government trophy contrary to sections 85(1) (D), 86 (1) (2) (c) (iii) and (3) (b) of the Wildlife Conservation Act, Cap 283 R.E 2009 read together with paragraph 14 of the first schedule to, and sections 57 (1) and 60 (2) of the Economic and Organized Crimes Control Act, [Cap 200 R.E. 2002]. They pleaded not guilty to the charge.

After a full trial, the appellants were convicted as charged and sentenced to pay a fine of TZS 100,125,000/= each or to serve a term of twenty (20) years in prison in default. The appellants were aggrieved. They unsuccessfully appealed to the High Court, hence this second appeal.

To appreciate what transpired in this case, we find it apposite to narrate albeit briefly the factual background as discerned from the record. On 27/11/2017 at around 17:00 hours A/Inspector Stewart Tumsimu (PW5) and another police officer from the Regional Crimes Office, Dodoma were on normal patrol at Mailimbili Darajani. While there, they saw a motorcycle carrying the first and second appellants heading towards Mipango along Dodoma Arusha Highway. When they saw the police, they attempted to go back but could not succeed because PW5 and his fellows became suspicious and arrested them. The two appellants carried a box which had a sulphate bag inside. Upon search which was conducted in presence of an independent witness, four pieces of elephant tusks were found in the sulphate bag which the two appellants had carried inside the box. When interrogated, they told PW5 and his fellows that they were sending the said luggage to Hussein Kheri Idd, the third appellant. Those police officers decided to go with

them to where they were heading to and also managed to arrest the third appellant. The elephant tusks (exhibit P1 collectively) found in possession of the appellants, the motorcycle and the helmets (exhibit P6) were seized and later tendered in court during trial as exhibits. According to PW6, the seized motorcycle and elephant tusks were sent to the RCO's Office immediately, after the arrest. The seized tusks were handed to police officer No. F. 4815 Cpl. Salum (PW3) on 01/12/2017 at about 17:49 hours by PW5. Having received them, PW3 recorded the exhibits in Police Form PF16, labelled them as IR/DOM/11/250 and kept them in the exhibit room. On the second day, the officers from the task force collected the exhibit from PW3 and handed it to Josephat Marwa (PW4) from the Anti-Poaching Unit (KDU) for safe custody. The weight of the seized tusks was established by Bakari Yusuph Nyakupa (PW2) to be 16.4 kgs and its value was TZS. 33,375,000/=. PW2 tendered in court the valuation report which was admitted as exhibit P3.

All the appellants were interrogated at the police station and their respective statements were admitted as exhibits during trial.

The appellants denied in their respective defences to have committed the charged offence. The first and second appellants (DW1 and DW2 respectively) testified that when they were apprehended by

the police, were told the reason of their arrest was to be found riding a motorcycle without helmet. Later, while at the police station together with the third appellant they were shown a box which they did not know its source and what was inside. To their surprise, they were told that the said box belongs to them and that they were found in possession of Government trophies, the offence which they were charged with.

The third appellant's (DW3) story is quite different from that of the DW1 and DW2. According to him, on 27/11/2017 while coming from Gadafi Mosque heading to Mailimbili was arrested by the police and taken to a police vehicle where he found other people being arrested too who happened to be DW1 and DW2. DW3 testified further that, he never knew DW1 and DW2 before but was shocked to be told by the police that he was found in possession of Government trophies together with them. In short, all the three appellants denied to have been found in possession of Government trophies. Upon a full trial, all the appellants were convicted and sentenced as intimated above. Their appeal to the Resident Magistrate's Court of Dodoma (Extended Jurisdiction) was dismissed, hence this second appeal.

Initially, the appellants filed to the Court a Memorandum of Appeal containing eleven (11) grounds, that was on 11th January, 2021 which

for obvious reasons to come to light shortly, we shall not reproduce all of them in this judgment except five (5) at the appropriate time. Apart from that, on 16th August, 2021 they lodged a Supplementary Memorandum of Appeal containing four grounds which we shall as well not reproduce.

At the hearing of the appeal, two appellants entered appearance except the third appellant who was served through publication. Thus, in terms of Rule 112 (2) of the Tanzania Court of Appeal Rules, 2009, the hearing had to proceed in the absence of the third appellant. Despite absence of the third appellant, all the three appellants had a representation of Mr. Leonard Mwanamonga Haule, learned advocate. The respondent Republic was represented by Ms. Judith John Mwakyusa, learned Senior State Attorney assisted by Ms. Phoibe Clifford Magili, learned State Attorney.

Upon taking floor, Mr. Haule commenced his submission by selecting among the grounds of appeal presented in the Memorandum of Appeal, the 3rd, 4th 5th 8th and 9th to be the grounds in this appeal and abandoned the rest together with the Supplementary Memorandum of Appeal. Therefore, we shall renumber them accordingly and paraphrase the grounds of appeal as hereunder: -

1. *That the trial court and the 1st appellate court erred in law and fact when found the appellants guilty with the offence charged while the prosecution failed to prove the case beyond reasonable doubt.*

2. *That the trial court and the 1st appellate court erred in law and fact when convicted the appellant basing on contradictory evidence of prosecution witnesses.*

3. *The trial court and the 1st appellate court erred in law due to fact that the actual place where search and seizure of exhibit P1 was conducted was uncertain contrary to the requirements of section 22(3) (ii) of the Economic and Organized Crime Control Act, read together with section 38(3) of the Criminal Procedure Act Cap 20 RE 2002.*

4. *That the trial court and the 1st appellate court erred in law and fact for failure to consider that the evidence of chain of custody was not proper so as to ground conviction of the appellants.*

5. *The trial court and the 1st Appellate court erred in law by admitting the statement which was tendered by PW10 in contravention of section 34B(2)(e) of the Tanzania Evidence Act Cap 6 RE 2002.*

Mr. Haule argued all the above grounds of appeal jointly under cluster that the prosecution failed to prove its case against the appellants beyond reasonable doubt. Substantiating the appellants' complaints, Mr. Haule argued in respect of the chain of custody featured in the fourth ground of appeal to the effect that, it was compromised and broken from the time of arrest, seizure of the tusks up to when the same were tendered in court as an exhibit (P1 collectively). He went on to state that, according to the evidence of PW5, an arresting officer found at page 65 of the record of appeal, the appellants were arrested on 27/11/2017 with blue sulphate bag containing four pieces of elephant tusks by him and his fellow police officer while on patrol. They seized the said tusks and signed a certificate of seizure which was admitted as exhibit P7. Thereafter, the appellants and the seized tusks were sent to the police station where the tusks were handed to the custodian of exhibits (PW3) on 1/12/2017 at about 17:49 hours, instead of the date mentioned by PW5, that is 27/11/2017. Mr. Haule argued that, there was a lapse of five days between when the alleged tusks were seized to the day they were handed to PW3, which the prosecution failed to explain as to where the tusks were kept and whether the same tusks seized were the ones tendered in court.

He referred us to page 58 of the record of appeal where PW3 testified that, he took out the said exhibits sometimes and on the second day the exhibits were taken out. The learned counsel challenged the chain of custody on account that, it is not known as to when, where, why and by whom the said exhibit was taken from the custodian on the first day and even the second day. He added that the record of appeal is silent as to whether the said exhibit was returned to PW3 after being taken away by those unknown people. Therefore, he said, the testimony of PW3 cast doubt which was supposed to be determined in favour of the appellants. He thus submitted that exhibit P1 collectively which the appellants were arrested with is not the same which was sent to the exhibit keeper (PW3) and eventually tendered in court. He added, the one which was brought in court was received by PW1 from Japhet Maro (PW4) one year after the incident; as he (PW4) testified at page 61 of the record of appeal that on 02/11/2018 PW3 handed to him elephant tusks. This sequence of events, argued Mr. Haule, shows that the exhibit was interfered with and as a result disturbed the chain of custody. In support of his argument, he cited the case of **Peter Marwa Mgore @ Roboti and Another v. R**, Criminal Appeal No. 11 of 2014 (unreported).

Therefore, he urged us to find that the chain of custody of exhibit P1 collectively was broken and the prosecution evidence in that regard lacked evidential value as it is clouded by doubt.

Regarding contradictions complained of in the second ground of appeal, Mr. Haule referred us to page 193 of the record of appeal where the first appellate court stated categorically that, the guilt of the appellants was based on the testimonies of PW5 and PW6. It was his submission that the evidence of those witnesses was not strong enough to ground the appellants' conviction because each of them gave varied account on what had transpired on the material day, despite the fact that they were together at the scene of crime as arresting officers. He referred us to page 65 of the record of appeal where PW5 testified that while they were at Mailimbili Darajani, a motorcycle carrying two persons was moving, but when the rider saw them reduced the speed and wanted to go back where they came from. Whereas, PW6 at page 75 of the record of appeal testified that on the fateful day while at Mailimbili Darajani, they saw motorcycle carrying two people and when they saw them (PW5 and PW6) they stopped. Also, while PW5 said it was around 17:00 when the incident took place, PW6 said it was 18:30 hours. Another difference spotted is that, while PW5 at page 66

testified that those two people had carried blue sulphate bag and inside it there were four pieces suspected to be elephant tusks; at page 75 of the record of appeal, PW6 testified that those people had carried a box which had sulphate bag inside and in that bag they saw four pieces of elephant tusks. Following the shortfalls identified in PW5 and PW6's testimonies, Mr. Haule argued that their testimonies lacked coherence and thus they were not credible witnesses. He cited the case of **Ally Miraji Mkumbi v. Republic,** Criminal Appeal No. 311 of 2018.

Mr. Haule submitted further that while at page 57 of the record of appeal PW3 testified that he received elephant tusks on 1/12/2017 and labelled them as IR/DOM/11/250, at page 53 of the record, PW2 testified to have conducted valuation on 29/11/2017 and prepared a report which is found at page 111 of the record of appeal. The said report is in respect of file number DOM.RB.1265 of 2017. Therefore, the learned counsel argued that this shows that valuation was done before the custodian of exhibits (PW3) received the said elephant tusks from PW5. In this regard thus, it was Mr. Haule's argument that the valuation done by PW2 has no evidential value in this case because it has no connection with the tusks under consideration.

It was also the submission of Mr. Haule that both the trial and first appellate court did not consider the defence case that, neither were they found with the box alleged to contain tusks nor were they aware of the tusks. He added that according to the appellants they found the box at the police station and were forced to admit that it was theirs. At page 197 of the record, the Resident Magistrate with Extended Jurisdiction just reproduced the appellants' cautioned statements without any analysis, he insisted. In the circumstances, he urged us to re-evaluate the evidence on record and come up with our own conclusion.

Submitting in respect of the fifth ground of appeal, Mr. Haule stated that the statement (exhibit P9) of an independent witness recorded by PW10 was produced in court contrary to the requirements of section 34B (2) (e) of the Tanzania Evidence Act. He said, the prosecution was supposed to serve on the appellants ten days notice before tendering it which was not the case. In the premises, he urged the Court to expunge exhibit P9 from the record as it was un-procedurally received in the evidence.

Finally, Mr. Haule submitted firmly that the prosecution case was not proved beyond reasonable doubt. He thus urged us to allow the

appeal, quash conviction, set aside the sentence and acquit the appellants.

In reply, Ms. Mwakyusa started by opposing the appeal, however upon reflection, she conceded that the chain of custody of the seized elephant tusks was broken. It was her submission that, the record of appeal is silent as to where the said elephant tusks were kept from 27/11/2017 when they were seized from the appellants by PW5 to 1/12/2017 when PW5 handed them over to PW3. She added that it is doubtful whether the same tusks seized from the appellants were handed to PW3.

She referred the evidence of PW2 at page 50 of the record of appeal and commented that the said witness testified that on 27/11/2017, he was called at the police to identify the exhibit but did not discover who called him and whether the tusks he identified were those tendered in court. It was thus her submission that, the chain of custody of the said exhibit broke and it cast doubt on the prosecution case. As such, she said, in the absence of the tusks (exhibit P1) it is an uphill task to prove at the required standard the offence of unlawful possession of Government trophy. Therefore, she supported the appeal

in respect of the first ground and did not see the need to argue on other grounds presented by the appellants.

Upon concession by the counsel for the respondent that the prosecution case was not proved beyond reasonable doubt, Mr. Haule reiterated his prayers made in submission in chief.

We have carefully considered submissions by the counsel for the parties, record of appeal and grounds of appeal raised by the appellants. The main issue for our determination is whether the charge against the appellants was proved beyond reasonable doubt. In answering this issue, we shall concentrate on the complaint regarding the chain of custody of exhibit P1 collectively which the prosecution alleged to have found the appellants in possession. We think this ground alone is capable of disposing of the appeal, as rightly, in our view, suggested by the counsel for the respondent. As it can be gleaned from the record, the appellants were charged with the offence of unlawful possession of Government trophies; to wit, four pieces of elephant tusks. That being the case, it was incumbent upon the prosecution to prove possession and ensure that the tusks seized from the appellants are the same produced in court at the trial. The importance of proper handling of seized properties and the guidelines on how to handle them were stated

in the famous case of **Paulo Maduka and 4 others v. Republic,** Criminal Appeal No. 110 of 2007 (unreported) in the following terms: -

> *"... the chorological documentation and or paper trail, showing the seizure, custody, control, transfer, analysis, and disposition of evidence, be it physical or electronic. The idea behind recording the chain of custody... is to establish that the alleged evidence is in fact related to the alleged crime rather than, for instance, having been planted fraudulently to make someone guilty. The chain of custody requires that from the moment the evidence is collected* ***its very transfer from one person to another must be documented and that*** *be provable that nobody else could have accessed it..."*
>
> [Emphasis added].

The aforesaid position was restated in a number of decisions including, **Swahib Ally Bakari v. Republic,** Criminal Appeal No. 309 of 2010, **Mussa Hassan Barie and Albert Peter v. Republic,** Criminal Appeal No. 292 of 2011; **Chacha Jeremiah Murimi and 3 Others v.**

Republic, Criminal Appeal No. 551 of 2015; **Petro Kilo Kinangai v. Republic,** Criminal Appeal No. 565 of 2017 (all unreported).

In the current case, counsel for the parties are at one that there is a missing link of the chain of custody of four pieces of elephant tusks (exhibit P1 collectively) which were allegedly found in possession of the appellants. We agree with them and we shall demonstrate.

It is on record that four pieces of elephant tusks (exhibit P1) were seized from the appellants by police officers (PW5 and PW6) who were on patrol at Maili Mbili Darajani on 27/11/2017. However, the handing over of the said tusks to the exhibit keeper (PW3) was done by PW5 on 1/12/2017. It is not known as to where did PW5 keep the tusks for five days before entrusting them to PW3. Also according to PW3, the tusks in his custody were taken out by unknown people and there is no such indication in the register. So it cannot be safely vouched that the exhibit was throughout under control of PW3 after it was submitted by PW5 on 1/12/2017. That apart, it is unknown if the tusks were later returned to PW3. This shows that the chain of custody was indeed compromised because it cannot be ascertained if the tusks alleged to be found with the appellants were those tendered at the trial.

It is interesting also to note that valuation of elephant tusks allegedly seized from the appellants was done by PW2 at Dodoma Central Police and he prepared a report on 29/11/2017. This was before the tusks were entrusted to the exhibit keeper PW3 by PW5 on 1/12/2017. But as well, it is not known who entrusted PW2 the said tusks for him to make valuation on that day. Part of PW2's evidence at page 50 of the record of appeal reads: -

> *"We [was] informed that at the central police Dodoma there are suspects arrested with items* ***which they suspect to be the Government trophies I was ordered to go to the central police*** *and identify the items. And to produce the value of it according to the wildlife Act No. 5/2009. I went and* ***they show me the exhibits.*** *I identify as the four pieces of the elephant tusk. I found it to be 16.4 kgs. According to the Act No. 5 of 2009 I did produce the value of trophies...* ***I prepared the trophy valuation certificate*** *which shows value of*

TZS. 33,375,000/- for further legal steps."

[Emphasis added].

When cross-examined by the counsel for the appellants at page 53 of the record of appeal, PW2 had this to say: -

*"I **prepared the report on 29/11/2017.** I prepared the report after I was asked to go to the police station to identify the trophies"*

[Emphasis added].

The report dated 29/11/2017 which PW2 prepared was admitted as exhibit P3, it is found at page 111 of the record of appeal.

The argument of the counsel for the appellants, which we agree, was if the tusks under consideration were evaluated on 29/11/2017 it means that they were different from those which were entrusted by PW5 to PW3 on 1/12/2017. If that is the case, then the tusks which PW3 testified to have been collected from him on 2/12/2017 by the officer from KDU Manyoni (PW4) were different from those which PW5 and PW6 seized on 27/11/2017 at page 58 of the record of appeal. PW3 testified to the effect that: -

"On 2/11/2011 after investigation complete. The officer from KDU Manyoni came and took exhibits. They reported to RCO Office, RCO allow me to release the exhibit to the KDU officers. I handed out the exhibit to Mr. Japhet Marwa from KDU Manyoni for safe custody. He signed into PF 16 that he took the exhibit from my custody."

As it can be gathered from the said trend of event, the chain of custody of exhibit P1 was broken from the moment the said exhibit was seized from the appellants to the time of being sent to the exhibits keeper (PW3). In the circumstances therefore, it can not be concluded safely that exhibit P1 collectively admitted in court during trial is the same which was seized from the appellants on 27/11/2017. Thus, we discard exhibit P1 as it lacks evidential value on account of a compromised chain of custody. Consequently, in the absence of elephant tusks allegedly seized from the appellants, the offence of unlawful possession of the same cannot stand and there is nothing to link the appellants with the charged offence.

As a result, we allow the appeal, quash convictions and set aside appellants' sentences. We order immediate release of the appellants from the prison unless otherwise they are held there for some other lawful cause.

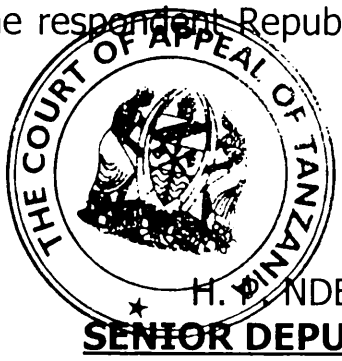
DATED at **DODOMA** this 4th day of May, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

This Judgment delivered this 5th day of May, 2022 in the presence of the 1st & 2nd Appellants in person, in the absence of the 3rd Appellant and in the presence of Ms. Judith Mwakyusa, learned Senior State Attorney for the respondent Republic, is hereby certified as a true copy of the original.



H. P. NDESAMBURO
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL