IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MWARIJA, J.A., SEHEL, J.A And MAIGE, J.A.:)

CRIMINAL APPEAL NO 615 OF 2020

1. JASON PASCAL
2. ANTIDIUS PASCAL ..... **APPELLANTS**

VERSUS

THE REPUBLIC ..... **RESPONDENT**

(Appeal from the judgment of the High Court of Tanzania, at Bukoba)

(Mashaka, J.)

dated 18th day of August, 2020

in

Economic Case No. 03 of 2020

.....

JUDGMENT OF THE COURT

12th & 19th July, 2022.

MAIGE, J.A:

At the High Court of Tanzania, Corruption and Economic Crime Division at Bukoba (the trial court), the appellants were jointly and together charged with the offence of being found in unlawful possession of Government Trophy contrary to section 86 (1) and (2) (c) (iii) of the Wildlife Conservation Act No. 5 of 2009 as amended by section 59 of the Written Laws (Miscellaneous Amendment) (No.2) Act No. 4 of 2016, henceforth, "the WCA" read together with paragraph 14 of the 1st

Schedule and section 57 (1) of the Economic and Organised Crime Control Act [Cap 200 RE: 2002] henceforth "the EOCCA ".

It was alleged that on 4th day of April ,2018 during night hours at Bumilo village, Bwoga Hamlet within Muleba District in Kagera Region, the appellants were found in unlawful possession of Elephant tusks valued at Tanzania shillings 33,780,000/=, the property of the Government of the United Republic of Tanzania. Upon a full trial, they were both found guilty of the offence and sentenced to pay a fine of TZS 33,780,000/= or each of them to serve 20 (twenty) years imprisonment in default thereof.

The substance of the evidence which justified their conviction and sentence can be summarised as follows. Vicent Tungilo (PW2) was at the material time herein, a Wildlife Officer at Burigi and Kimisi Game Reserve. His duties among others were to protect and conserve wildlife and conduct patrol within and outside the Game Reserve. In the course of his work, he received information from undisclosed informer of there being two people trafficking elephant tusks from Mbunda to Kibanga village within Muleba District. PW2 together with his fellow wildlife officers Josephat Damas and Biseko, went to Muleba Police Station and reported the incident. Three police officers namely; Othman Hamisi (PW1), G792 D/C Isack and H 802 PC John were assigned to join them in the process. PW2 together with PW1 and other four soldiers went to the area where the

suspects would pass towards Kibanga village. At that time, PW2 had already notified the informer that they were on the way to arrest the suspects and he should wait.

A meanwhile later, this team of six soldiers met with the informer at Buoga hamlet at Kibanga village. They took a hide-out somewhere in the bush until at around 7.00PM when they saw a motorcycle on the road carrying two persons whom were recognised by the informer as the suspects. PW2 and his company rushed to the road and stopped the suspects. PW1 searched the sulphate bag they had at the back of their motorcycle and found one piece of elephant tusk tied with a rubber (exhibit P2 A, B and C). He filled in the certificate of seizure (exhibit P1) and signed it having labelled the bag containing the elephant tusk with a special mark. The appellants, PW2 and Josephat Damas countersigned as well. The appellants together with the exhibits were taken to Muleba Police Station. Exhibit P2 A, B, C and the motorcycle were handed to E 4534 D/CPL Augustino (PW4), the exhibit keeper, for safe custody. On 5th April, 2018, Frederick Severine Kobero (PW5), a Wildlife Officer took the elephant tusk for valuation and it was valued at 15,000 USD (exhibit P5). The said exhibit was weighed by Harriet Lukindo (PW6) and Anyitike Tumaini (PW7), both officers from Weights and Measures Agency (WMA)

at Bukoba regional office. It was found weighing 1915 grams as per exhibit P6.

In defence, the appellants denied to have been arrested at the stated scene of crime while in possession of exhibit P2 A, B and C. They maintained that, they were arrested while at Hamidu's house and nothing was retrieved from them. They said, on the said day they had left for Muleba to visit their two children who were studying at Tibaijuka Secondary school.

As indicated earlier, the trial court was convinced by the evidence from the prosecution. As a result, it convicted the appellants with the offence and sentenced them as aforestated. Being aggrieved, the appellants have jointly preferred the instant appeal. In their initial memorandum of appeal filed on 22nd October, 2020, they raised five (5) grounds of appeal whereas in their supplementary memorandum of appeal they filed on the 8th March, 2022, twenty- two (22) grounds of appeal. However, during hearing, the appellants abandoned all the grounds in the supplementary memorandum of appeal with the exception of the 6th ground.

On careful examination, the five grounds in the initial memorandum of appeal and the sixth ground in the supplementary one raise the following grounds. **One**, the appellants were granted bail by police and

the District Court which had no jurisdiction so to do. **Two,** the appellants were belatedly arraigned as they overstayed in the police custody. **Three,** search and seizure in the forest was done in violation of section 38(3) of the Criminal Procedure Act [Cap. 20 R.E. 2019], (the CPA) as it was not witnessed by an independent witness and did not involve the leaders of the locality. **Four,** the chain of custody of the exhibits was not observed as no paper trail showing the movements of the seized exhibits. **Five,** the case was not proved beyond reasonable doubt.

On the date of hearing, the appellants appeared in persons without representation whereas Messrs. Emmanuel Kahigi and Juma Mahona, both learned State Attorneys, represented the respondent Republic.

When the appellants were invited to address the Court on their grounds of appeal, they both adopted the grounds in the initial memorandum of appeal and the sixth ground in the supplementary memorandum of appeal and urged the Court to allow the appeal. Mr. Mahona, who presented the submissions for the respondent fully supported the conviction. He however doubted the propriety of the sentence.

Having exposed the nature of the case, it is right time to consider the substance of the appeal. In so doing, we have it in our minds that, this being a first appeal, we are enjoined to re-appraise the evidence on

the record and come out with our own factual findings. This is in accordance with rule 36(1) (a) of the Tanzania Court of Appeal Rules, 2009.

We start with the first ground wherein the appellants complain that, they were granted bail by police and the District Court which had no jurisdiction so to do. Mr. Mahona submitted that, the complaint is irrelevant as the pre-trial grant of bail had nothing to do with the judgment sought to be appealed against. With respect, we agree with him. Conviction of the appellants was based on the prosecution evidence as weighed with that of the defence and no more. The first ground of appeal is therefore dismissed.

Yet in the second ground of appeal, the appellants criticise the trial court in not considering the fact that, the appellants were arraigned after expiry of more than 18 days. Again, in the same reason as in the first ground, we see no linkage between the alleged delay to arraign the appellants at the trial court and the correctness or otherwise of the judgment of the trial court. The same is also dismissed.

We proceed with the third ground in which the propriety of the search and seizure of the government trophy is questioned for being done in the absence of an independent witness and thus in violation of the requirement under section 38(3) of Criminal Procedure Act (R.E 2019).

In his reply, Mr. Mahona while not denying that, the search and seizure was made in the absence of an independent witness, he was of the contention that, since the offence was committed in remote area where independent witness could not be easily procured, the search and seizure was justified under section 106 (1) of the WCA. He cemented his contention with the case of **Emmanuel Lyabonga v. R,** Criminal Appeal No.28/2020 (Unreported) in support of the proposition that, where search is conducted in a remote area which is not a dwelling house and where no independent witness can be found, an authorised officer can, under section 106(1) of the WCA, conduct search and seizure in the absence of independent witness.

In its judgment, the trial court duly considered the above issue at page 141 of the record. While appreciating the requirement under section 38 of the CPA that, search should be conducted in the presence of an independent witness, it was of the view that, in the circumstance of this case where the appellants were arrested in the forest, there could not be other witnesses than the wildlife and police officers who were available. In particular it stated as follows:

> *"In the prosecution evidence it has been evidenced the arrested officers were hiding in the forest as adduced by PW2 where they met and arrested the two accused persons there at the road in the*

forest. The place is regarded as not easy to find an independent witness to witness the seizure. Therefore, in the circumstance of this case it was difficulty to get an independent during the arrest, filling certificate of seizure and its execution thereon. Considering the circumstances of the case it is apparent that the search and seizure had been conducted in the forest, all witnesses to the arrest, search and search are wildlife officers and police officers, who signed Exhibit P1 and the 1st and 2nd accused persons signed the same".

According to the evidence of PW1 and PW2 on the record, the appellants were arrested in the forest at Kibanga along the road. The incident happened during night. It was not in residential area. Given the remoteness of the area the appellants were arrested in and the time in which search and arrest was done, it was, as a matter of common sense, very difficult to get an independent witness. We therefore, agree with Mr. Mahona that, in a situation like this, the requirement of an independent witness is dispensed with under section 106 (1) of the WCA. We took a similar view in a number of cases including, **Jibril Okash Ahmed v. R,** Criminal Appeal No. 331 of 2017 (unreported), **The Director of Public Prosecutions vs Mussa Khatibu Sembe,** Criminal Appeal No. 130 of 2021(unreported) and **Emmanuel Lyabonga v. R.** (supra). In the latter case at page 16 of the judgment, we stated as follows:

> *"Moreover,* ***since the appellant's polythene bag was searched and seized in a remote bushland at Kitandililo, not at his dwelling house, in circumstances that no independent witness could be found,*** *we are in agreement with the learned State Attorney that the operation was properly conducted* "(emphasis is ours).

In our opinion, therefore, the trial court was right in holding that the absence of independent witnesses during search and seizure of the exhibits in question did not render the search and seizure invalid. The complaint is thus dismissed.

We proceed with the fourth ground where the trial court is criticised for convicting the appellants for an offence of being found in possession of the Government trophy despite the chain of its custody being broken. Submitting on this, Mr. Mahona while in agreement that there was no paper trail to establish chain of custody of the Government trophy in question, he was of the contention that, the chain of custody was not broken as it was sufficiently accounted for by the oral evidence of PW1, PW2 and PW4 and the documentary evidence in the certificate of seizure (exhibit P1). He placed reliance on the case of **Jibril Okash Ahmed v. R** *(supra).* In the alternative, he submitted, the principle of proper chain of

custody cannot strictly apply in the instant case because elephant tusk is an item which cannot easily be tempered with.

The principle of proper chain of custody of the exhibit was propounded in the famous case of **Paulo Maduka & Another v. R.** Criminal Appeal No. 110 of 2007 (unreported) in the following words;

> *"By "a chain of custody" we have in mind the chronological 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 appear guilty....the chain of custody requires that from the moment the evidence is collected, its every transfer from one person to another must be documented and that it be provable that nobody else could have accessed it."*

The rationale behind the rule is to establish nexus between the exhibit and the crime and thereby preventing possibility of the exhibit being fabricated to incriminate the accused.

Initially, the principle strictly required that chain of custody be, in all cases established by documentation. However, in **Joseph Leonard**

Manyota v. R, Criminal Appeal No. 485 of 2015 (unreported), the scope of the principle was narrowed down so that it could not apply strictly to the exhibits that which cannot be easily tempered with. The same position was reinstated in **Issa Hassan Uki v. R.,** Criminal Appeal No. 129 of 2017 (unreported) where it was stated as follows:

> *"We are of the considered view that elephant tusks cannot change hands easily and therefore not easy to temper with. In cases relating to chain of custody, it is important to distinguish items which change hands easily in which the principle stated in* ***Paulo Maduka*** *and followed in* ***Makoye Samwel @ Kashinje and Kashindye Bundala*** *would apply. In cases relating to items which cannot change hands easily and therefore not easy to temper with, the principle laid down in the above case can be relaxed".*

Subsequently, there were various decisions in support of the view that, in fit cases, proper chain of custody can be established by oral account. We said this consistently in a number of decisions. See for instance, **Marceline Koivogui v. R**, Criminal Appeal No. 469 of 2017 and **Ernest Jackson @ Mwandikaupesi and Another v. R**, Criminal Appeal No. 408 of 2019 (both unreported).

In **Issa Hassan Uki case** just as in the instant case, the items involved were elephant tusks. We held that, as the item was such that it could not be easily tempered with, the doctrine of proper chain of custody did not apply as strictly as in **Paul Maduka case**. Guided with this authority, we have no doubt that, this is a fit case wherein proper chain of custody can be established by oral account.

In its judgment, the trial court found that the chain of custody of exhibits P2A, B and C was established because despite the absence of documentation of handling of the exhibits, the oral evidence of PW4 established the same.

Perhaps, the question to be addressed is whether there was sufficient oral evidence to establish proper chain of custody of the Government trophy in question. We think the question is certainly yes. We shall account for our opinion as we go along. In accordance with the evidence of PW1, after he had seized the elephant tusk and other items from the appellants and filled in exhibit P1, he handed it to PW4 (the exhibit keeper) at Muleba Police Station. He did so after marking them with a special mark. Having received it, PW4 testified that, he labelled and stored it in the exhibit room. On top of that, PW4 explained very clearly how at different times and dates was the exhibit taken from him for valuation by PW5 as per exhibit P5 and weight measurement by PW6 as

per exhibit P6. In both the occasions, PW4 explained clearly that, the exhibit was returned to him for custody. PW4 further explained that, on 5th August 2020 when the same was produced into evidence by PW1, it was taken from him by the prosecuting state attorney. It is further on the record that, PW1, before tendering the exhibit, he identified it with the label he marked on the date of seizure. With this, it cannot be said that, there is missing link in this oral explanation that may raise suspicion of the exhibit being tempered with. Therefore, we entirely agree with the trial judge that, chain custody of the exhibit was properly established by oral account. Ground four is therefore dismissed.

This now takes us to the last ground where the appellants complain that the case against them was not proved beyond reasonable doubt in that; they were not properly identified. Further in their complaint was that material witnesses were not called. In response, it was Mr.Mahona's submission that, the case was proved beyond reasonable doubt. To him, all the seven witnesses were credible. The appellants were arrested at the scene of crime and the government trophy seized from them. Further that, beside the appellants signing into the certificate of seizure, the chain of custody of the exhibit was not broken.

We have taken time to examine the evidence of the prosecution in line with the defence and established that, the complaint is without merit.

The evidence of PW1 and PW2 indicates that the appellants were arrested at the forest and upon being searched, they were found with the elephant tusk in question. On top of that, the appellants signed exhibit P1 acknowledging that the elephant tusk and the other two items mentioned therein was retrieved from them. For the reason of being arrested on the spot in possession of the trophy, the issue of incorrect identification does not come in. In their evidence, the appellants claimed to have to been arrested in Muleba at the residential house of a person called Hashimu. They did not, however, through their advocate, raise this defence while cross examining PW1 and PW2.

The trial court having regarded the defence raised in the appellants' evidence as *alibi*, accorded it no weight for the reason that, it was not preceded by prior notice or particulars of *alibi* as per section 194(4) of the Criminal Procedure Act read together section 42 of EOCCA. For the reasons above discussed, it was quite right.

In the event, we are settled in our mind that, the prosecution case was proved beyond reasonable doubt. We thus uphold the trial court's conviction.

This now takes us to the validity of the sentence. Mr. Mahona's submission on this issue is based on the position of law in section 60(2) of the EOCCA that, where a person is convicted with an offence which is

provided under the EOCCA and other written law, unless the penalty in that other law is greater than that which is imposed under EOCCA, the latter will prevail. He submitted therefore that, since the minimum sentence under the EOCCA is custodian sentence of 20 years with or without fine, it was wrong for the trial court to sentence the appellants to pay fine or imprisonment of twenty years in default thereof. Section 60(2) of EOCCA provides as follows:

> *"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."*

From the clear wording of the provision, we think Mr. Mahona is quite right. Twenty years imprisonment in the respective provision is a minimum sentence. The trial court had thus no option to impose a lesser sentence of fine and custodian sentence in the alternative thereof. We thus invoke our powers under section 4(2) of the Appellate Jurisdiction

Act (R.E. 2019) and quash the sentence. We substitute in lieu thereof, a sentence of twenty years imprisonment.

In the final result, the appeal fails. It is accordingly dismissed and the conviction upheld. The sentence is substituted with twenty years imprisonment for each of the appellants.

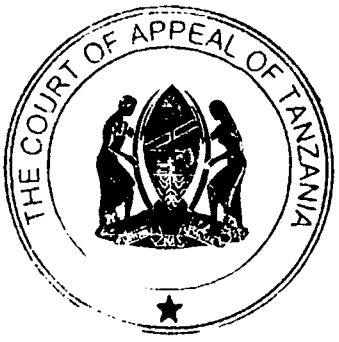
DATED at **BUKOBA** this 19th day of July, 2022.

A. G. MWARIJA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 19th day of July, 2022 in the presence of both appellants in person and Mr. Juma Mahona, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



O. A. AMWORO
DEPUTY REGISTRAR
COURT OF APPEAL