

**IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA**

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

CRIMINAL APPEAL NO. 04 OF 2021

**SWALEHE NGOMA1ST APPELLANT
HABIB RAMADHANI CHUWA.....2ND APPELLANT**

VERSUS

THE REPUBLICRESPONDENT

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

(Luvanda, J.)

dated 16th day of November, 2020

in

Economic Case No.04 of 2020

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JUDGMENT OF THE COURT

11th & 14th December, 2023

MAIGE, J.A.:

At the trial court, the first appellant, one SWALEHE NGOMA SAID, was the first accused whereas the second appellant, one HABIB RAMADHAN CHUWA, was the fourth accused in a criminal case for unlawful possession of Government Trophies contrary to section 86(1) and (2) (b) of the Wildlife Conservation Act, 2009 read together with paragraph 14 of the 1st Schedule to, and section 57(1) and 60(2) both of the Economic and Organized Crime Control Act as amended by section 16(a) and 13(b), respectively of Act No. 3 of 2016. JUMA S/O OMARY CHIZENGA and RAMADHANI S/O ZACHARIA

KIJUNGA who are not parties to this appeal, were the second and third accused persons , respectively. The particulars of the charge was that, on 20th day of October 2017 at Wifi Guest House-Kibaya Town within Kiteto District and Manyara Region, the appellants together with the other two accused persons were jointly and together found in possession of two (2) pieces of Elephant tusks worth USD 15,000 which was equivalent to TZS 33,435,000, the property of the Government of the United Republic of Tanzania.

DAUD THOMAS MAHENGE (PW2) who was by then a game warden at Anti-Poaching Unit- Arusha testified that, having been notified by an informer on 18th October, 2017 that, there were some people vending elephant tusks at Kiteto area, he, on the next day, went to Kiteto area. While there, he met the informer and caused him to communicate with the suspects in pretense that PW2 was a reliable purchaser. After the informer had agreed with the suspects on the time and place where the business would be transacted, on 20th October, 2017, in the afternoon, being the time agreed upon, PW2 in a company of ASP Meshack Lameck (PW3), other policemen and the informer proceeded to the Guesthouse where they found the appellants and the other two suspects standing outside. PW3 and his fellow policemen took a hide-out in a nearby place. PW2 and the informer

approached the four who disclosed to them that, the said elephant tusks were in the room which they had jointly rented out. Suddenly, PW3 and his fellow policemen appeared at the place and put them under arrest. Eventually, the four led PW2 and his company to room number 3 of the Guesthouse where the elephant tusks were kept. That was done in the presence of among others, the attendant of the Guesthouse one Losieku Kilusu (PW8). Upon search, a bag carrying two elephant tusks (exhibit P2) was discovered in the room and eventually seized by PW3.

PW3 added that, when he went at the locus in quo with his fellow policemen together with PW2, he was in possession of search warrant (exhibit 4). That, in the course of seizing exhibit P2, he filled in a certificate of seizure (exhibit P3) and caused the suspects and the independent witnesses to sign therein. On the same day, he further testified, he handed over exhibit P2 to the exhibit keeper one G. 4926 PC Sumail (PW4) and recorded in chain of custody form (exhibit P1).

PW4 testified that having received the exhibit from PW3, he kept it in a store. He said, on 21st day of October, 2017, he handed it over to Isack Mushi (PW5) for valuation and it was on the same day returned to him after PW5 had conducted the valuation as per exhibit P5.

PW6 testified that on 22nd October, 2017 he took exhibit P2 from PW4 and conveyed it to Arusha where he handed it over to ASP James Kilosa (PW7). On receipt of the exhibit, PW7 testified, he produced it to James Kagusa (PW1) on 23rd October, 2017. It is this witness who tendered the exhibit into evidence.

In defence, the appellants denied commission of the offence. They denied presence at Kiteto area as well. They denied what appears to be their signatures in exhibit P3. While the first appellant claimed that, he was arrested, on 24th October, 2017 at Mkoka village, the second appellant testified that, he was arrested, on 17th October, 2017 at Weza Mtima Village, Kongwa District in Dodoma.

In its judgment, the trial court convicted the appellants who were the fourth and first accused, respectively and sentenced them to 20 years imprisonment each. Conversely, the second and third accused persons were acquitted. The reason being that they were not identified by either of the prosecution witnesses. On this, the trial court observed at page 169 of the record of appeal as follows:

"As I have stated above, PW2 was not specific as to whom the informer was communicating with among the four accused persons, it was put in general terms that there are people vending elephant tusks. PW8 said he

welcomed three people who rented room No. 3 at Wisi Guesthouse on 19/10/2017. However, PW8 was unable to identify the said three people among the four accused persons at the dock. Even on cross examination by defence Counsel for the second accused, he was honest that he was unable to identify even a single accused, apart from his observation that their faces were not strange on his eyes. He only managed to recite and capture a name of a person who registered his personal particulars in visitor's book, to wit Habib R. Chuwa who is the fourth accused , who had eventually opened the door of room number three on the fateful evening 20/10/2017. But still he (PW8) was unable to identify him at the dock".

While the conviction of the second appellant was for the reason that PW8 was able to recite his name as among the four persons who rented the room in which exhibit P2 was found, the conviction of the first appellant was because of the testimony of PW2 that, he was the one who disclosed where the trophies were.

The appellants are aggrieved by the decision of the trial court and thus the current appeal. In the memorandum of appeal, they raised eight grounds. During hearing, however, the appellants through their counsel abandoned the first, third, seventh and eighth grounds and argued the second, fourth, fifth and sixth grounds. The complaint in the second ground

is that exhibit P2 was irregularly seized in so far as the appellants were not issued with any receipt. The fourth, fifth and sixth grounds, can conveniently be reduced in a complaint that, the case against the appellant was not proved beyond reasonable doubt.

At the hearing, the appellants were represented by Mr. John Melchior Shirima, learned advocate. On the other hand, the Respondent Republic had the services of Ms. Janeth Sekule, learned Senior State Attorney, Ms. Amina Kiango, learned Senior State Attorney, Mr. Charles Kagirwa, also learned Senior State Attorney and Ms. Tusaje Samwel, learned State Attorney.

Addressing the second ground, it was Mr. Shirima's submission that the seizure of exhibit P2 without the appellants being issued with a receipt was violative of the mandatory requirement of section 38(3) of the Criminal Procedure Act. He submitted, making reference to the case of **Andrea Augustino @ Msigara and Another v. R**, Criminal Appeal No. 365 of 2018 (unreported) that, the omission rendered exhibit P2 unreliable and, therefore, the same should be expunged from the record. Once expunged, he submitted, there will be no evidence to link the appellants with the offence.

In response, Ms. Sekule while admitting that indeed no receipt was issued, she was of the contention that, such requirement is not necessary in

cases where a certificate of seizure is issued and the suspect signs therein. She placed reliance on the case of **Papaa Olesikaladai @ Lendemu and Another v. R**, Criminal Appeal No. 47 of 2020 (unreported), where the Court observed:

*" We agree with Ms. Madikenya that the complaint for non-issuance of a receipt will have no place in cases where a certificate of seizure is issued. We discussed this position at some considerable length in **Gitabeka Giyaya v. Republic**, Criminal Appeal No. 44 of 2020 (unreported), a judgment we rendered on 28.12.2022. In that appeal, we relied on a number of previous decision including **Ramadhan Idd Mchafu v. Republic**, Criminal Appeal No. 328 of 2019, **Abdallah Said Mwlingereza v. Republic**, Criminal Appeal No. 258 of 2013 (both unreported) and **Matata Nassoro and Another** (supra) to underscore the point that where, like here, a certificate of seizure is issued and is signed by the accused person, the same constitutes evidence even without a receipt."*

It would appear to us from the above two authorities that, both the receipt and certificate of seizure are there to establish movement of an exhibit from the suspect to a police officer. As held in *Papaa Olesikaladai @* case (supra), a receipt would not be necessary where a certificate of seizure which is signed by the suspect has been issued. In this case, a certificate of seizure purporting to have been signed by the appellants was produced into

evidence(exhibit P3). In the circumstances, issuance of a receipt was unnecessary. For that reason, therefore, we dismiss the second ground of appeal.

This now takes us to the fourth, fifth and sixth grounds of appeal which raise an issue as to whether the case at the trial court was proved beyond reasonable doubt.

In his submissions on this respect, Mr. Shirima assigned two main reasons why the case was not proved beyond reasonable doubt. **First**, while the originating charge at the Resident Magistrate Court was filed on 27th October, 2017 and the proceedings registered as Economic Crime No. 103 of 2017, PW1 testified at page 56 of the record of appeal that, upon receipt of exhibit P2 on 23rd October, 2017, he labeled it with the registration number of the case. He submitted therefore, that if the case was at that time not yet to be filed, where could PW1 get the case number. He, therefore, looked at the charge against the appellant suspiciously.

Second, while the appellants denied presence at the Guesthouse on the material day, the prosecution did not tender the visitors' book into evidence despite the same being listed, during the preliminary hearing, as among the exhibits which would be tendered. He submitted that as the document was pertinent in establishing the case, failure to produce it

without disclosing the reasons raises a reasonable doubt that perhaps if it was produced, it would defeat the prosecution case.

In relation to the first reason, Ms. Sekule started her submission by drawing our attention at page at page 54 of the record where PW1 testified that: " *I measure to get weight, length, record register number for every exhibits entered there, later after obtaining economic number I also record economic number*". Basing on that piece of evidence, she submitted that the labelling in question might have been done subsequent after the institution of the case as a matter of procedure.

On the issue of failure to produce the visitor's book, she submitted, the evidence available on the record was sufficient to prove the case beyond reasonable doubt in the absence of the same. She gave three reasons to substantiate her contention. **One**, both the appellants signed in exhibit P3 to acknowledge that exhibit P2 was seized from them. **Two**, there is evidence from PW8 and PW2 that it was the second appellant who was in the possession of the key to the room in question. **Three**, there is evidence that it was the first appellant who told PW2 and his company that exhibit P2 was in room number three.

In his rejoinder submission, Mr. Shirima reiterated his submission in chief and added that since the authenticity of the prosecution story was in doubt, such evidence was necessary.

We shall start our discussion on this complaint in the first ground on the labelling of exhibit P2. Our careful reading of the evidence of PW1 reveals that he was not the one who labelled exhibit P2. The evidence suggests that he received exhibit P2 from PW6 on 23rd October, 2017 while it has already been labelled. In his own words, PW1 stated at page 54 of the record of appeal as follows:

" On 23/10/2017 I was at office proceeding with my duties, while there came Inspector James Kilosa who had exhibits, the purpose of his visit, was to hand over exhibits to me. When he arrived, he took out exhibits, I saw two elephant tusks which were already labelled as follows: they were already measured weight, one piece had weight of 1.4 kg, another 0.68 grams. Another label was labelled by mark, one piece labeled W1, a second piece was W2. Also had IR number 1633/2017".

According to the evidence at page 92 and 93 of the record of appeal, exhibit P2 was labelled by PW4. This can be gathered from his testimony where he said:

" I will recognize of chain of custody through my name, signature and date of receiving exhibits, also case No. KIB/IR/1633/2017 which assisted me to label those exhibits."

PW4 testified that he received the exhibit from PW3 on 19th October, 2017. On 22nd October, 2017, he handed it over to PW6. That was the last time for PW4 to be in control of the exhibit. This is in accordance with his testimony at page 95 of the record of appeal where he said:

"After handing over to DC Cleopa, they were no longer under my control, I proceeded with other duties."

The proceedings at the Resident Magistrate Court, Mr. Shirima correctly submitted, were initiated on 27th October, 2017. The fact that PW4 ceased to be in a control of exhibit P2 since 22nd October, 2017, leaves much to be desired. It is not clear how possible would he know the case number of a proceeding which was filed 6 days after.

We turn to the complaint in relation to failure to tender into evidence the visitors' book. The offence in this case pertained to possession of Government trophies. The same were not found in actual possession of the appellants. The appellants were linked with them on account that they were found in a room which they had hired. It is a fact, however, that the appellants denied presence at the Guesthouse on the material day. They

equally disowned the signatures in exhibit P3. The appellants were not identified by any of the prosecution witnesses at the dock. PW8, the attendant of the Guesthouse conceded that he could not identify either of the appellants by face. He only identified the name of the second appellant because he saw it in the visitor's book. In the circumstances, the visitor's book was material evidence in linking the appellants with room number three wherefrom from the Government trophies were discovered.

In this case, for undisclosed reasons, the visitor's book was not exhibited despite being listed among the exhibits to be relied upon. We think this was a fit case for the trial court to draw an adverse inference against the prosecution for such a failure.

There is yet another element which affects the credibility of the prosecution case. While the oral evidence of PW3 and the documentary evidence in exhibits P1 and P3 suggest that the trophies were seized on the material day at 17:33 hours, PW4 to whom the exhibit was handed over testified consistently that he received it on the material day at 15:00 hours. It leaves much to be desired how the document would possibly be handed over to PW4 more than two hours before being seized. There being no evidential clarification from the prosecution, this, considered together with the other discrepancy we have pointed out herein above and the

unreasonable failure of the prosecution to produce the visitor's book, raises reasonable doubts on the prosecution case which should have been applied at the benefit of the appellants.

In the event, we allow the appeal and accordingly quash the conviction and set aside the sentence imposed on the appellants. Consequently, we order for immediate release of the appellants from prison unless they are held therein for some other lawful cause.

DATED at ARUSHA this 14th day of December, 2023.

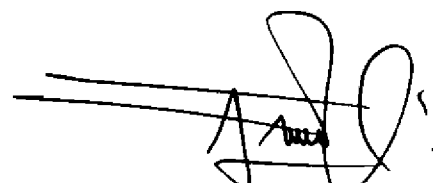
A. G. MWARIJA
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

B. S. MASOUD
JUSTICE OF APPEAL

The Judgment delivered this 14th day of December, 2023 in the presence of Appellants in person but also represented by Jane Ayo holding brief of Mr. John Shirima and Ms. Helena Sanga, learned counsel for State Attorney for the Respondent, is hereby certified as a true copy of the original.




E. G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL