IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: WAMBALI, J.A., FIKIRINI J.A. And ISSA, J.A.)

CRIMINAL APPEAL NO. 155" A" OF 2021

PASCHAL S/O JOHN MUNISI .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Banzi, J.)

dated the 17th day of June, 2021

in

Economic Case No. 13 of 2020

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JUDGMENT OF THE COURT

7th & 20th February, 2024

ISSA, J.A.:

The appellant, Paschal s/o John Munisi together with Joseph s/o John @ Yese who is not a party in this appeal were tried for the offence of unlawful possession of Government Trophy contrary to sections 86(1) and (2)(b) of the Wildlife Conservation Act, Cap. 283 (the WCA) read together with paragraph 14 of the First Schedule to, and sections 57(1) and 60(2) of the Economic and Organised Crime Control Act, Cap. 200 (the EOCCA). After a full trial Joseph s/o John @ Yese was acquitted while the appellant was convicted and sentenced to serve 20 years imprisonment.

The appellant's arraignment before the trial court was a result of an accusation that, on 21.7.2018 at Poland - Mto wa Mbu area within Monduli District in the Region of Arusha, the appellant was found in possession of four pieces of elephant tusks equivalent to two elephant tusks valued at TZS 34,209,900 and was in the process of selling the said tusks. The appellant pleaded not guilty to the charge. The prosecution fielded five witnesses to prove the charge, and after a full trial he was convicted as charged and sentenced to 20 years imprisonment, as stated earlier.

The brief facts of the case were that, on 21.7.2018 Novatus Hillary Haule (PW3), a Wildlife Warden of Anti-poaching Unit (KDU) Arusha was in patrol with his colleagues from Ngorongoro Conservation Area Authority (NCAA) and TANAPA. They were patrolling the Monduli area and while at Mto wa Mbu PW3 got a call from his informer that, there is a person with elephant tusks looking for a buyer. A buy-bust operation was set in motion, where PW3 would pose as a buyer. A team of four persons, Juma Nyabaiga Mwita (PW2), PW3, Valerian Joseph (PW4) and one Joel Mathias Mng'ong'o took a civilian car (Escudo) and went to Engaruka corner waiting for directions from the informer. The other members of patrol team, namely; Haji Msosa and Siwandeti Sikali waited

in the police car at Engaruka. PW3, PW2, PW4 and Joel followed the direction of the informer and went to Poland, Mto wa Mbu. On their arrival, PW3 got a call from the informer confirming if it was them and then he saw the appellant approaching the car carrying a sulphate bag on his shoulder. He got out of the car and met the appellant. The appellant after being assured of the presence of money in the car, he allowed PW3 to see the tusks. PW3 put on the torch from his cell phone and opened the sulphate bag and found four pieces of elephant tusks tied with a black rubber. He signaled his colleagues and the appellant was arrested.

PW2, a wildlife conservator of NCAA was in the team that arrested the appellant at Mto wa Mbu. After the arrest, PW2 called the other patrol members who were in the police car. He filled the certificate of seizure (exhibit P3) at 21.40 hours and the said certificate was signed by himself, the appellant, PW3, Joel and PW4 who is an independent witness. They headed to Mto wa Mbu police station, where the exhibit was handed over to Constable Hija (PW1) through the police register (exhibit P1) and the handover form was filled.

PW4, a motorcyclist commonly known as "*bodaboda*" stationed at Engaruka area was requested by the patrol team to assist them as an

independent witness on that particular day. He was taken in the civilian car and witnessed the appellant being arrested with four pieces of elephant tusks. He also signed the certificate of seizure. Elisamehe Ayubu Saul (PW5), a wildlife officer of TANAPA was assigned to identify and evaluate the seized four pieces of elephant tusks. He did the identification and evaluation on 23.7.2018 at Mto wa Mbu police station and issued a trophy valuation certificate (exhibit P4).

PC Hija (PW1) who is a police officer at Mto wa Mbu police station and an exhibit keeper testified that, on 21.7.2018 around 22.00 hours, he returned to his station and found PW2 and the appellant who had four pieces of elephant tusks (exhibit P2). PW1 gave PW2 handing over form which was filled by PW2 and then signed by himself, PW2 and the appellant. PW1 received the exhibit and labeled the sulphate bag MMB/IR/408/2018 and serial number of exhibit register was 08/2018. He also labeled each tusk with IR number MMB/IR/408/2018 and RB number MMB/RB/756/2018, and then stored them.

The appellant, in his defence, denied having committed the offence. He testified that he is a carpenter and a painter. He had grudges with one park ranger, Haji Shaibu Msosa who was also his neighbour. The source of the said grudges is that, the appellant had

done some works for Haji. He built a roof, made windows and painted Haji's house. Haji had not fully paid for the job, hence, the appellant in his attempt to recover the remaining money, he informed the TANAPA boss. Haji was furious and promised to do something to him. On 21.7.2018 Haji together with (PW3) went to the restaurant at Nanja owned by the appellant's wife and took the appellant to Ngorongoro where he was supposed to meet Haji's colleague who had a job for him, but that was the end of appellant's civilian life. The journey ended in Ngorongoro police station where he was severely beaten. On 7.8.2018 he was arraigned to the trial court facing the charge of being found with Government Trophy. He concluded that, he never recorded a statement at police station and he was never taken before a justice of peace.

The trial court convicted and sentenced the appellant on the strength of that evidence, which it found to have proved the case against the appellant beyond reasonable doubt.

Aggrieved with that decision, the appellant has instituted the instant appeal predicated on seven grounds of appeal. When the appeal was called on for hearing, the appellant abandoned the first, second and third grounds of appeal. We thus rephrase and rearrange the remaining four grounds of appeal as follow: **One,** that he did not have a fair trial

as he was not granted a right to cross-examine the second accused (Yese) (4th ground of appeal). **Two,** that the prosecution evidence was full of contradictions and inconsistencies (5th ground of appeal). **Three,** that the defence case was totally not considered (7th ground of appeal). **Four,** that the case against the appellant was not proved beyond reasonable doubt (6th ground of appeal). In this judgment, we will treat the grounds as first, second, third and fourth respectively.

When the appeal was called on for hearing, the appellant appeared in person and was fending for himself. The respondent Republic was represented by Ms. Upendo Shemkole, Ms. Lilian Kowero, learned Senior State Attorneys and Mr. Stanslaus Halawe, learned State Attorney.

The appellant submitted first and with respect to the 1st ground of appeal, he submitted that the trial judge did not grant him a right to cross-examine the second accused person. Ms. Kowero making submission for the respondent Republic in general opposed this appeal. On the issue of appellant being not granted a right to cross-examine the second accused person, she submitted that the right was availed to the appellant through his advocate Mr. Majura.

This ground need not detain us because the record of appeal on page 103 is very clear that Mr. Muhammadou Majura, the learned advocate for the appellant did cross-examine the second accused person. Therefore, this ground is devoid of merit and is dismissed.

The 2nd and 3rd grounds of appeal were argued together, but for the sake of clarity, we will determine the 2nd and 3rd grounds separately. The 2nd ground has two limbs; the first is chain of custody and the second is contradictions and inconsistencies found in the prosecution evidence supporting the case.

On the chain of custody, the appellant argued that it was broken. He enumerated instances which led him to that conviction. **One**, PW1 testified that he labeled the elephant tusks (exhibit P2) with IR number and RB number, but he did not say so in his recorded statement (exhibit D1). **Two**, PW1 handed over the said exhibit to the valuer (PW5) on 23.7.2018 by using handover form, but the hand over form was not tendered in evidence.

Three, PW2 testified that he handed over exhibit P2 to the exhibit keeper, PW1 on 21.7.2018 by using police register and he put his signature on the register, but when he was asked to show his signature on that register he failed to do so. **Four**, PW5 testified that he received

four elephant tusks from PW1 which were all marked MMB/IR/408/2018, but on cross-examination he changed that version and said three of the tusks were marked MMB/IR/408/2018 and one was marked MMB/RB/756/2018. In addition, he testified that he signed the register, but when he was shown the register he confirmed his name and denied that the signature was not his. The appellant concluded that PW5 was not honest, and the elephant tusks valued by PW5 are different to those received by PW2. To bolster his arguments, the appellant cited the cases of **Zakaria Jackson Magayo v. Republic**, (Criminal Appeal No. 411 of 2018) [2021] TZCA 207 (19th May 2021, TANZLII), **Pascal Mwinuka v. Republic**, (Criminal Appeal No. 258 of 2019) [2021] TZCA 174 (5th May 2021, TANZLII) and **Geofrey Jonathan@ Kitomari v. Republic**, (Criminal Appeal No. 237 of 2017) [2021] TZCA 17 (16th February 2021, TANZLII).

Responding on the issue of chain of custody, Ms. Kowero submitted that the chain of custody was not broken. For her part, there is clear explanation of how the exhibit was received at Mto wa Mbu police station, how and when the identification and valuation was done, and how the exhibit was kept until it was tendered at the trial court. All

those who dealt with the exhibit, namely: PW1, PW2, and PW5 testified in the trial court.

It is a settled law that the first appeal is always in a form of re-hearing (see **Edgar s/o Kayumba v. DPP**, (Criminal Appeal No. 498 of 2017) [2020] TZCA 156 (2nd April 2020, TANZLII). Therefore, this being the first appellate court it is duty bound to re-evaluate the entire evidence on record and subject it to a critical scrutiny and if warranted arrive at its own conclusion of fact. On that endeavour our starting point is the determination of the issue of chain of custody.

Having considered the contending arguments of both sides in the light of the evidence on the record, we have difficulties in agreeing with Ms. Kowero that the chain of custody was not broken. The law on chain of custody has been settled by the Court to the effect that documentation and oral evidence can both be used as reliable ways of establishing chain of custody depending on the nature of the case. See: **Alexandris Athanansios v. Republic**, (Criminal Appeal No. 362 of 2019) [2021] TZCA 614 (28th October 2021, TANZLII) and **Marceline Koivagui v. Republic**, (Criminal Appeal No. 469 of 2017) [2020] TZCA 252 (26th May 2020, TANZLII).

The complaints of the appellant in this appeal were mainly based on how the persons involved handled exhibit P2 while it was in their custody. We agree with the appellant that, there are many irregularities on that respect. **One**, the handover form between PW2 and PW1 was not admitted in the trial court. The court refused to admit the same, as the handing over form which was read over during committal proceedings was different to the one which was tendered in court. The differences are seen on the observation of the trial judge on page 54 of the record of appeal as follows:

> *"Firstly, the one read at committal does not show the time while the intended exhibit has time 2230 hours. Secondly, the document read during the committal has a cross closing mark after list of exhibits while the intended exhibit does not have it. A part from that, the time indicated on handing over between PC Hija and Elisamehe Saul is 0920 hours 'but the intended exhibit shows the time 0925 hours".*

The differences in these two documents reveal that a new handing over form was filled after committal proceedings or that there were two handing over forms and the prosecution tendered a form which was not read at the committal proceedings. PW1 on page 60 of the record of

appeal testified that the handing over form was rectified on 23.7.2018 though the date shows it was filled on 21.7.2018. **Two**, the handover form between PW1 and PW5 on 23.7.2018 was not tendered in evidence.

Three, we found an irregularity on the police register (exhibit P1). PW2 testified that he signed the register when he handed over the exhibit P2 to PW1. But when he was shown the register his signature was nowhere to be found. **Four**, PW5 testified that after identification and valuation, he wrote his name and put his signature on the police register, but when he was shown the register his name was there but the signature was not his.

The effect of these irregularities show that, the evidence were tempered with or were modified at a certain point. This creates doubt on the prosecution case and defeats the whole purpose of documentation. In **Paul Maduka v. Republic**, Criminal Appeal No. 110 of 2007 (unreported) the Court said:

> *"By "chain of custody" we have in mind the chronological documentation and/or paper trail, showing the seizure, custody, control, transfer, analysis and deposition of evidence, be it physical or electronic. The idea behind recording the chain of custody, it is stressed, 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".

It is our firm view that the chain of custody was broken, and that affected the prosecution case.

Turning to the second limb of the 2nd ground of appeal, that there are contradictions and inconsistencies in the prosecution case. After hearing rival arguments it is clear that, there are contradictions which touched the chain of custody and there are those which touched the evidence.

We start with contradictions touching the chain of custody. The appellant argued that, when PW1 testified in the trial court he said he labeled all tusks (exhibit P2) with IR number MMB/IR/408/2018 and RB number MMB/RB/756/2018, but when PW5 testified he said the tusks were labeled with IR number only. When PW5 was shown the tusks three of them were labeled with IR number and one was labeled with RB number. Responding to this issue Ms. Kowero submitted that although one tusk had a different number, all those numbers relate to the same case. One is IR number while the other is RB number.

We agree with the appellant that there was contradiction on labeling of the exhibit P2. In fact, in the statement of PW1 recorded at police station (exhibit D1) PW1 did not even mention that he labeled the exhibit P2. These facts on labeling created doubts about when the exhibit was labeled, and what happened afterward or who wiped those numbers. These are material discrepancies which go to the root of the case. Exhibit P2 is the crux of the case facing the appellant. It is our finding that the evidence on record shows that the chain of custody was broken. Therefore, the prosecution failed to substantiate that what were allegedly found in possession of appellant were the same as those produced in the trial court.

Turning to the contradictions which affects the evidence, the appellant enumerated those instances; **One**, the appellant submitted that PW2 lied in court. He testified that, while on their way to Mto wa Mbu PW3 was talking to the accused person (appellant) while PW3 gave a different version that he was talking to the informer.

Two, the appellant submitted that there was contradiction between the evidence of PW3 and PW4 regarding who opened the sulphate bag containing exhibit P2. PW3 testified that he opened the

sulphate bag while PW4 testified that the accused person (appellant) was the one who opened the sulphate bag.

Three, the appellant submitted that there was contradiction between the evidence of PW3 and PW4 regarding the position of the car. PW3 testified that the driver turned the car to the opposite direction while PW4 gave a different version while both of them were at the scene of crime.

Ms. Kowero admitted the existence of some contradictions, but submitted that, some contradictions were explained and some were minor which did not go to the root of the case and could not cause the prosecution case to flop. The contradiction between PW2 and PW3 regarding to whom PW3 was communicating to while on their way to Mto wa Mbu was clarified. She stated further that, the statement PW2 gave at the police station had an error which was caused by the writer of the statement. The truth is that PW3 was communicating with the informer. She added that, the trial judge did consider this contradiction and found it to be minor and inconsequential.

With respect to the contradiction between the evidence of PW3 and PW4 about who opened the sulphate bag, Ms. Kowero submitted that PW3 is the one who got out of the car first and met the appellant

while PW4 and PW2 remained in the car. Hence, the version given by PW3 is the correct one and even this contradiction is minor. On the issue of turning the car she submitted that it is also a minor contradiction. To buttress her argument, she relied on the Court's decisions in **Ex. G. 2434 PC George v. Republic**, (Criminal Appeal No. 8 of 2018) [2022] TZCA 609 (6th October 2022, TANZLII), **Papaa Olesikaladai @Lendemu v. Republic**, (Criminal Appeal No. 47 of 2020) [2023] TZCA 51 (20th February 2023, TANZLII) which cited the earlier case of **Dickson Elia Nsamba Shapwata and Another v. Republic**, Criminal Appeal No. 92 of 2007 (unreported). Finally, Ms. Kowero submitted that this ground of appeal lacked merit and should be dismissed.

The issue of contradictions/inconsistencies, discrepancies and omissions were dealt by the Court in **Dickson Elia Nsamba Shapwata v. Republic (**supra) in which it quoted with approval the excerpt from Sarkar, the Law of Evidence, 16th Edition at page 48 which states as follows:

> *"Normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror and the time of occurrence and those are*

always there however honest and truthful a witness may be. Material discrepancies are those which are not expected of a normal person. Courts have to label the category to which a discrepancy may be categorised. While normal discrepancies do not corrode the credibility of a party's case material discrepancies do".

We now embark on that duty of categorising and labeling the above-mentioned contradictions. The first contradiction is that, PW2 testified that while on their way to Mto wa Mbu PW3 was talking to the accused person (appellant) while PW3 himself testified that he was talking to the informer. We agree with Ms. Kowero that this contradiction was clarified by PW2, and it is minor. It did not go to the root of the case.

The second contradiction was that between PW3 and PW4, regarding who opened the sulphate bag containing exhibit P2. Here, we respectively disagree with Ms. Kowero as this contradiction raises doubt on the presence of PW3 and PW4 at the scene of crime. If PW2, PW3 and PW4 were all there when the bag was opened, it is highly unlikely to differ on this vital point about who opened the sulphate bag or what was inside the bag. Therefore, this is a material discrepancy which raises

doubt on whether the appellant was apprehended at that place in possession of the alleged elephant tusks.

The third contradiction is with respect to the position of the car. PW3 testified that the driver turned the car to opposite direction while PW4 and PW2 in their testimonies did not say anything about the car being turned. Therefore, we conclude that, there was no contradiction on this issue. All in all, considering the contradiction on how the elephant tusks were retrieved from the appellant and the broken chain custody, we are of the settled view that the second ground of appeal has merit. We accordingly allow it.

On the third ground of appeal, the appellant argued that his defence was not considered. In his defence, he stated that he was working for Haji Msosa, one of the park rangers who owed him some money. Hence, he reported Msosa to the TANAPA boss. Responding to that Msosa fabricated this case, he emphasised that the source of the charge was his bad relation with Haji Msosa.

Ms. Kowero, on the other hand, submitted that the trial judge did consider the appellant's defence. The appellant raised the defence of alibi which was considered and found to be flawed as he did not comply with the procedure stipulated under section 42(1) (2) of the EOCCA

which requires the person relying on the defence of alibi to notify the court during preliminary hearing or to furnish the prosecution with the particulars of his alibi before the closure of prosecution case. The appellant did neither of the two, but Ms. Kowero admitted that the trial court did not address the issue that the appellant was framed by Haji Msosa. Nevertheless, she prayed for the dismissal of this appeal for lack of merit.

In his brief rejoinder, the appellant insisted that Haji Msosa arrested both the appellant and the second accused (Yese). He was arrested while he was doing his work.

We agree with Ms. Kowero that, the defence of alibi was considered by the learned trial judge and dismissed it for failure to comply with the procedure. Therefore, we will focus on the issue involving Haji Msosa, a person accused of orchestrating the symphony of two arrests. There is no doubt that Haji Msosa was a park ranger working with TANAPA. PW2 in his testimony on page 67 of the record of appeal testified to the affect that, Msosa was on the team doing patrol on that day. Therefore, he witnessed the arrest of the appellant at Mto wa Mbu. Further, we note from the record of appeal that a person known as Haji Shaibu Msosa was included in the list of witnesses whose

statement was read over at the committal proceedings and also included in the information filed at the High Court, but he was not called to testify. Ms. Kowero argued that he was not a material witness that is why he was not called.

Since, it has been admitted by Ms. Kowero that this part of the defence case was not considered by the trial court, this Court has the duty to consider this defence. In **Iddy Salum @ Fredy v. Republic**, (Criminal Appeal No. 192 of 2018) [2023] TZCA 245 (12th May 2021, TANZLII), the Court stated:

> *"It is however, settled principle that where the courts below have omitted to consider the defence of the appellant, the Court has the power to undertake the duty with a view to deciding whether or not such defence raises any doubt in the prosecution case".*

In considering this defence, we will determine whether Haji Shaibu Msosa was a material witness or not, and whether the failure to call this witness entitles the Court to draw adverse inference against the prosecution case. As mentioned earlier, Haji Shaibu Msosa was among the members of patrol team and knew about the buy-burst operation.

He remained in the police car at Engaruka area but arrived at the scene of crime immediately after they were called by PW2.

Furthermore, the appellant and the other accused person (Yese) complained about Haji Shaibu Msosa being the architect of the case against them. Appellant claimed that Haji Shaibu Msosa was his neighbour and he gave him work to build a roof, make windows and paint his house. There was a misunderstanding on payments and Haji Shaibu Msosa promised to pay him back. He did pay him back with interest when he fabricated this case. Appellant said Haji Shaibu Msosa and Novatus Hilary Haule (PW3) arrested him at his wife's restaurant at Nanja.

Yese (DW2), on the other hand, also testified on page 100 of the record of appeal that, he was arrested by Haji Shaibu Msosa at African Safari office where he works on the allegation of unlawful possession of trophy. He was taken to Ngorongoro police station by his manager's car. They stopped for refueling when the police car arrived and he was shifted to the police car. Haji Shaibu Msosa got off at Mto wa Mbu and Yese was taken to Ngorongoro police station where he received a heavy beating.

The issue here is why Yese, who was later acquitted by the trial court, was arrested in the first place. PW2 in his testimony on page 66 of the record of appeal testified that, "on inquiry, the accused said he was given the parcel by his friend Yese". The inquiry was made at the site of arrest as confirmed by PW3 on page 77 of the record of appeal. PW3 said:

> *"Then we took him to the vehicle where there was light. The independent witness was witnessing everything. We interviewed him if he had permit and said he had none. We also asked him where he got them. He said that, he got them from his colleague, Yese".*

It is not clear if Haji Shaibu Msosa was present during interview, but shortly afterward he arrived and he later took the initiative and arrested Yese on 24.7.2023.

Turning to the question of whether Haji Shaibu Msosa is a material witness, our answer is in the affirmative. Considering the defence of the appellant which raised doubts concerning the case being formed because of the misunderstanding with Haji Shaibu Msosa and the gap in the prosecution evidence, he is a material witness and he could have cleared doubts surrounding this case if he was called to testify. The law

is settled regarding the affect of not calling a material witness that the court is entitled to draw an adverse inference. In **Boniface Kundakira Tarimo v. Republic**, Criminal Appeal No. 350 of 2008 (unreported) the Court said:

> *"It is thus settled that, where a witness who is in a better position to explain some missing links in the party's case, is not called without any sufficient reason being shown by the party, an adverse inference may be drawn against that party, even if such inference is only a permissible one".*

In this case, Haji Shaibu Msosa is the one who could explain if he is a neighbour of the appellant, if the appellant did some work for him and if there were misunderstandings between them. Similarly, Haji Shaibu Msosa could explain why he arrested Yese and why he took him far away to Ngorongoro police station when he knew the case was filed at Mto wa Mbu police station. Further, the defence evidence about Haji Shaibu Msosa was not shaken by prosecution when the appellant was cross-examined. Therefore, these facts entitles the Court to draw an adverse inference, as we hereby do, against the prosecution case. In the event, we allow the third ground of appeal.

In the fourth ground of appeal, we have been called to determine whether the prosecution proved its case beyond reasonable doubt. Basically, based on the above discussion and finding, we are of the firm view that the prosecution failed to discharge that burden. We accordingly allow this ground of appeal. Ultimately, we find this appeal has merit. Consequently, we quash the conviction and set aside the sentence imposed on the appellant. Finally, we order that the appellant be set free unless he is being held for other lawful cause.

DATED at **ARUSHA** this 19th day of February, 2024.

F. L. K. WAMBALI
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

A. A. ISSA
JUSTICE OF APPEAL

The Judgement delivered this 20th day of February, 2024 in the presence of the appellant in person and Ms. Caroline Kasubi, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL