IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)

AT ARUSHA

CRIMINAL APPEAL NO. 19 OF 2020

(Originating from Resident Magistrate of Manyara in Economic Case No. 13 of 2016)

PARICULIS S/O SINJOLE TONGOLI MAKAOLI @
TONGOLI SINJOLE MELAA.....1ST APPELLANT
YOHANA S.O KAPURWA KILIMO.....2ND APPELLANT
ISAYA S/O LEMIKWETI MAKALYA @
LAMBAIWA LEMBRIS .....3RD APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

20/07/2022 & 28/09/2022

GWAE, J

The appellants namely; Pariculis s/o Sinjole Tongoli Makaoli @ Tongoli Sinjole Melaa, Yohana Kapurwa Kilimo and Isaya s/o Lemikweti Makalya @ Lambaiwa Lembris to be referred herein after the 1st, 2nd and 3rd appellant respectively along with two other persons were charged, tried and convicted by the Resident Magistrate Court of Manyara at Babati (hereinafter to be referred to as the trial court).

Aggrieved by the conviction and sentence of twenty (20) years' imprisonment, the appellants have knocked the doors of this court by way of appeal armed with the following four grounds of appeal to wit;

1. That, the trial court erred in law and in fact by convicting and sentencing the appellants based on the defective trophy valuation certificate or and trophy valuation certificate signed by unqualified person
2. That, the trial court erred in law and in fact by convicting and sentencing the appellants while the prosecution had failed to prove beyond reasonable doubt that the appellants were found in possession of the Government Trophy at Kinua Village within Kiteto District in Manyara Region
3. That, the trial court erred in law and in fact by convicting and sentencing the appellants based on the cautioned statements which were illegally and involuntarily taken
4. That, the trial Magistrate erred in law and in fact by convicting and sentencing the appellants while the prosecution failed to prove beyond reasonable doubt the charge against the appellants as per the evidence adduced during trial

Seemingly, the appellants after they had filed their appeal, the same was dismissed on 6th day of November 2020 for want of prosecution to wit; a failure by their advocate (Tadey Lister) to file written submission in support of their appeal. However, their appeal was restored after their

application for setting aside dismissal order being successful through Misc. Criminal Application No. 82 of 2020.

The factual background that led to the trial court's satisfaction that the appellants' guilt to have been sufficiently proved is as follows; that, on 13th July 2016 at Kinua Village within Kiteto District in Manyara Region, the appellants and two other persons known by name of Ikwayo Lemikweti Lembris (4th accused) and Lazaro Lembris Makalya (5th accused person) were found in unlawful possession of Government Trophy to wit; 10 pieces of elephant tusk weighing 36.8 kilograms valued at Tshs. 66, 360, 000/=, the Property of Tanzania Government (1st count for all accused persons) and in the 2nd count against the 1st appellant only where the prosecution alleged that on 14th July 2016 at Kimana village within Kiteto District in Manyara Region he was found in unlawful possession of three (3) lion claws valued at Tshs. 10, 838, 800/=, the property of Government of Tanzania.

The alleged unlawful acts in both counts aforementioned on the offence of unlawful possession of Government Trophies are contrary to section 86 (1), (2) (c) (iii) of the Wildlife Conservation Act, No. 5 of 2009 as amended by section 59 (a) (b) of the Written Laws (Miscellaneous Amendment) (No.2) read together with paragraph 14 of the 1st schedule to and sections 57 (1) and 60 (2) of the Economic and Organized Crime

Control Act (Cap 200, Revised Edition, 2002) as amended by sections 16 (a) and 13 (b) respectively of the written laws (Miscellaneous Amendment) (No. 3) Act, 2016.

That, on the material date that is on 13/7/2016 the police received information that, there was a person who was in unlawful possession of Government trophies and was looking for a client/purchaser. The policers who received the information (PW1) mobilised his police colleagues including, D/CPL. Hassani (PW7). Consequently, the police officers made a trap by pretending to be potential buyers of the trophies and then managed to apprehend the 1st appellant while at Ngeju area after being shown by the police informer and when they interviewed the 1st appellant, they were told that trophies were with 3rd appellant at Kuti area. That, while heeding to Kuti, the police with the 1st appellant saw the 2nd appellant, arrested him and proceeded to the homestead of the 3rd appellant whom they found therein while together with two other persons (4th and 5th accused).

It is further the prosecution evidence, that, upon arrival at the 3rd appellant's homestead, the appellants and two others took a lead into showing where the elephant tusks were hidden about 20 steps from the 3rd appellant's residence. Then the 3rd accused's gun made rifle 375 was seized. Ten (10) pieces of elephants tusks, the rifle and certificate of

seizure were tendered accordingly and the same were admitted as PE1, PE2, PE3 respectively. More so, the prosecution evidence is to the effect that the 1st appellant's house was subsequently searched on the 14th July 2016 and a rifle with Reg. No. 458 (PE4) was found and seized from therein together with 3 lion claws. The seized items were then handed over to the police exhibit keeper (PW3) and the same were valued through valuation report (PE7) by Issaya Langai Mushi, a game officer (PW2).

Similarly, the prosecution evidence is that, the appellants and two other persons did confess to have committed the offence before police officers namely; PW1, PW5, PW6 and PW7 who recorded the cautioned statements of the following; 1st, 3rd and 2nd appellant as well as the 5th accused respectively which were received and labelled as PE6, PE9, PE10, PE10 respectively.

The defence was accordingly entered by all accused persons now appellants and the said other two persons who enjoyed the legal services from Mr. Tadey Lister, the learned advocate. Principally, the appellants denied to have committed the offence (s) however they admitted to have been arrested on 13/7/2016, searched but nothing illegal was found from their respective residences and that, the 3rd appellant admitted being found in possession of the gun (PE2). The 3rd appellant's testimony that he was the one who was found by police in possession of the gun (PE2),

was corroborated by that of the 1st appellant, the 4th and 5th accused as well as DW7, Lembris William, his siblings who contended to have been found by police at the 3rd appellant's residence after they had come back from grazing their goats at Kuti area

In his unique style of his defence, the 1st defendant denied to have known the 3rd appellant's residence nor to have been familiar with the 3rd appellant as well as 4th and 5th accused person till on the material date when they were all put under police restraint. The appellants also contended to have been dangerously injured by police and that on 16th July 2016 when they were removed from police lockup, they were shown a black bag in the presence of Mushi (PW3) who was told by police that the same was seized from the appellants.

The evidence of the 1st appellant was corroborated by one Mbaiyo Paulo, Kinua Village Chairperson, DW6 who testified before the trial court that, the 1st appellant's house was searched but nothing illegal was found including gun and that the 1st and 3rd appellant as well as the 4th and 5th accused persons are the residents to Njeju hamlet in Kinua Village and adding that on the material date police went to Njegu centre while he was in a company of the 1st appellant other villagers and one Zuberi Mbuni pointed the 1st appellant to police telling them that the 1st appellant was in a possession of a gun when DW6 cross examined by Miss Chacha, the

learned senior state attorney on whether the 3rd appellant had a residence at Kuti area, he replied to the positive.

Another witness apart from the accused persons was one Michael who (DW8) testified that Kuti area is within Ndighigush village and that in Kinua village there is no area known as Kuti. He expounded his knowledge of the geographical location due to the fact that he happened to be among those who participated in the division of villages as councillor of Namelocki Ward.

In its final analysis of the evidence adduced by both sides, the trial court found the charge against the 1st, 2nd and 3rd appellant to have been proved beyond reasonable doubt nevertheless it found the 4th, 5th accused and the 1st appellant not guilty in respect of the 1st and 2nd count to the charge respectively. Eventually, the 1st, 2nd, and 3rd appellant were sentenced to the minimum sentence of twenty (20) years jail

On 20th July 2022 when this appeal was called on for hearing, the appellants were under legal representation of Mr. John Shirima, the learned advocate whilst the DPP was represented by Miss Allice Mtenga, the learned state attorney.

Arguing for the appellants' appeal, Mr. Shirima combined ground 2 and 4, he thus argued them jointly. Submitting on the 1st ground, he stated that, the reception and reliance of the Certificate of valuation of

the trophy by the trial court was improper since the same was prepared by unqualified person, PW2 who was by then a game warden. He added that, according to the law, the valuation of trophy was to be prepared by the Director or Wildlife Officer pursuant to section 114 (3) of the Wildlife Conservation Act, 2009.

Submitting on the appellants' complaints No. 2 and 4, the learned counsel argued that, it is the requirement of the law under section 38 of CPA, 2002, that, whenever there is search or seizure or both, there must be presence of an independent witness. He invited this court to make a reference to the case of **Maliki Hassani vs. Zanzibar Government** (2005) TLR 237 where the Court of Appeal sitting at Zanzibar held that, in executing search warrant there must be an independent witness from the locality and that all list of the articles/things seized must be recorded, signed by witnesses including one inhabitant witness as well as the case of **Paschal Mwinuka vs. Republic**, Criminal Appeal No. 148 of 2019 (unreported-CAT). He then urged this court to draw an adverse inference against the prosecution evidence since no independent witness was called and summoned during trial.

In the 3rd ground, the counsel for the appellants strongly argued that, the trial court erred in law and in fact by relying on the cautioned statements of the appellants which were not recorded within four hours

as required under section 50 (1) of CPA neither the investigation sought extension of time after lapse of time as per section 51 (b) of the Act. He added that, the prosecution did not explain the reason as to why it failed to record the cautioned statements of the appellants within the statutory period. Bolstering his arguments, Mr. Shirima cited the authority in the case of **Twalib Omari vs. Republic** Criminal, Appeal No. 262 of 2014 (Unreported-CAT at Arusha) at page 10 of the typed proceedings where it was directed how the statement can be taken after lapse of the period prescribed by the law. He finally sought an order expunging the cautioned statements from the record.

The learned counsel for the appellants also attacked the credibility of the prosecution evidence adduced by PW2 in that, it is contradictory especially in a total number of elephants killed. He then prayed for the release of the appellants from the custody on the basis of the above reasons.

Responding to the submission advanced by the counsel for the appellants, in respect of the 1st ground Ms. Mtenga submitted that, the one who prepared valuation report was a competent officer as per the provisions of section 3 of the Wildlife Conservation Act where the word "officer" includes Game Warden and Ranger. Hence, all officers qualify to make a valuation report. In support her submission, the learned counsel

alluded to the decision of the Court of Appeal of Tanzania in the case of **Jamali Msombe and another vs. Republic**, Criminal Appeal No. 28 of 2020 (unreported).

Admittedly, the learned counsel for the respondent stated that there are contradictions as to the number of killed elephants during trial but in essence there were two (2) elephants that were killed (smaller and bigger). She however added that, the fact that the appellants were found in unlawful possession of ten (10) pieces of elephant tusks remains steady or unquestionable.

In the complaint on the absence of an independent witness, Ms. Mtenga argued that, each case is to be decided depending on the facts and its circumstances. According to her, in this case there was no possibility of having an independent witness since the appellants were found in the forest at a Maasai Boma. Adding that, the homestead owned by the 3rd appellant there was no any other independent witness who would be involved.

Arguing as to the complaint on the alleged non-compliance with section 50 (1) of the CPA, Ms. Mtenga stated that since PE6 was not read, it is thus subject to being expunged from the record. She however said that cautioned statements, PE9 and PE10 in regard to the 2nd and 3rd

appellant were properly recorded as the same were recorded within the time (19: 00 hrs). She then prayed for an order of the court dismissing this appeal on the ground that, the charge against the appellants was proved to the required standard.

In his brief rejoinder, Mr. Shirima stated that, there is serious contradiction in evidence in relation to a number of elephants adduced by PW2 adding that, the trophies in question were not found in the house owned by the 3rd appellant as wrongly argued by the counsel for the Republic. He further strongly stated that, the place where said trophies were allegedly found was not forest and that, it was day time taking into consideration that, the appellants were arrested since morning of the material date. Mr. Shirima then reiterated that, the appellants' appeal be indorsed by quashing the trial court's conviction and setting aside the sentence.

I now turn to the court's determination of the grounds of appeal as raised by the appellants and argued by the parties' counsel. Starting with the 1st ground of appellants' appeal on the complained incompetence of the one who conducted the valuation report of the trophies. According to the record especially a Government trophy valuation report (PE7) in which it is clearly revealed that, the valuation was conducted by one Issac

Rangia Mushi (PW2) with the rank of Principal Game Warden by then as correctly argued by the appellants' counsel. In order to be safer in determining the 1st ground, it is apposite to have section 114 (3) of the Wildlife Conservation Act (WCA) cited by the learned counsel for the appellant reproduced herein below;

> *"(3) In proceedings for an offence under this section, a certificate signed by the Director or wildlife officers of the rank of wildlife officer, shall be admissible in evidence and shall be prima facie evidence of the matters stated therein including the fact that the signature thereon is that of the person holding the office specified therein".*

According to the wording of the above section, the requirement of the valuation of a Government trophy to be conducted and signed by the Director or Wildlife officers of the rank of wildlife officer coaches to the mandatory requirement in order the certificate of valuation can be legally admissible in evidence however under section 3 of the WCA, the term "Wildlife Officer", is defined to mean: "a wildlife officer, wildlife warden and wildlife ranger engaged for the purposes of enforcing the WCA. Also under section 3 of the Wildlife Conservation Act, 2013, the term 'Authorized Officer' includes; the Director of Wildlife, the Director General of National Parks, Tanzania Wildlife Management Authority, a Wildlife

Officer, Wildlife Warden, Wildlife Ranger and a Police Officer. It follows therefore since PW2 conducted and signed PE7 in 2016, he was therefore the competent officer to conduct the requisite valuation and to sign the valuation report thereof. This position of the law was stressed by the Court of Appeal in the case cited by the learned counsel for the Republic that is in **Jamali Msombe and another vs. Republic**, Criminal Appeal No. 28 of 2020 (unreported) whose judgment was delivered on 30th March 2022 delivered in 2022 and it was held and I quite;

> *"It is our considered view, from the above discussion and the definition of who is "game ranger", that a game warden, wildlife officer, wildlife ranger and a game ranger are same persons whose main task is to protect wildlife".*

Basing on the interpretational section and case law quoted above, I see no reason to proceed deliberating on the 1st ground of appeal. I uphold the argument advanced by the learned counsel for the Republic. Therefore, the 1st complaint is found devoid of merit.

Turning to the Complaint that, there were contradictions in the prosecution evidence regarding a number of elephants that were killed by the appellants. It is clear from the records that, throughout the trial, the charge sheet, preliminary hearing and the prosecution evidence are to the

effect that, there were 10 pieces of elephant tusks. Carefully examining the testimony of PW2 and observed as complained by the appellant that PW2, an expert testified that it was four elephants that were killed however when he further gave his evidence using the valuation report he said that there were two elephants that were killed. However, I find the contradiction as rightly submitted by Ms. Mtenga that, even if there are such contradictions, yet the said contradictions cannot affect the fact that the accused persons now appellants were found in unlawful possession of ten (10) pieces of Government Trophy to wit; elephant tusks cannot be discredited by a mere difference or discrepancy on a total number of elephants that were to alleged have been killed since the said pieces of tusks are said to have been found in the possession and above all the same were subsequently valued by PW2 and the total of the pieces of the said tusks are reflected not only in the charge sheet but also in the trophy valuation report (PE7). I am thus of the considered view that this complaint is unmeritorious.

On the 2nd complaint on the absence of an independent witness during search and seizure by police at Kinua. It is well established principle that in the administration of criminal justice, it is indispensable to involve an independent witness whenever a search is conducted in the private

premises in order to avoid superfluous complaints that a case or cases are being planted by police. And of course no institution whose employees maintain their required integrity or perform their duties in conformity with the law and code of good conduct 100 % that is why there are laws and rules governing conducts in day today discharge of official duties. This requirement is provided under section 38 (3) of the Criminal Procedure Act, Cap 20 R.E, 2019 (CPA) which reads and I quote;

> *"(3) Where anything is seized in pursuance of the powers conferred by subsection (1) the officer seizing the thing shall issue a receipt acknowledging the seizure of that thing, being the signature of the owner or occupier of the premises or his near relative or other person for the time being in possession or control of the premises, and the signature of witnesses to the search, if any"*

The above statutory provision was correctly interpreted by the Court of Appeal of Tanzania in the case of **Pascal Mwinuka v The Republic,** Criminal Appeal No. 258 of 2019 (Unreported) where it was stated;

> *"Be that as it may, in the instant appeal, since the police officer in charge (PW1) issued the search order (exhibit P3) under the provisions of section 38 (1) of the CPA, we are settled that the procedure laid down under the provisions of section 38 (3) had to be complied with fully. Thus, since the credibility of PW2 is questionable because he did not sign exhibit P3, if another independent witness,*

namely, Boniface Siame who allegedly signed it could have been summoned to testify he would have filled the gap caused by the unworthy evidence of PW2"

In this criminal matter, it is evidently established via certificate of seizure (PE3) that, there was no independent witness who was involved in the alleged search exercise where ten (10) pieces of elephant tusks are said to have been retrieved (20 paces from the 3rd accused's homestead) where the police officers (PW1, PW4, PW5 PW6 and PW7 and another police) arrested the 3rd defendant under the lead of the 1st and 2nd appellant. Therefore, according to the prosecution evidence the seizure of the trophy (PE1), rifle and its registration card (PE2) was witnessed by no other person except police officers together with the suspects by virtue of the PE3 showing that, the search was conducted at the 3rd appellant's residence Kinua-ngeju hamlet-Namelocki-Kibaya.

It is trite law that, whenever a search is conducted where there are no other independent witnesses within the vicinity, it is the duty of the investigation that, there should be such explanation to that effect during trial and I would wish to add for avoidance of doubts there should be an indication in the search order or warrant of search so that the requirement of having independent witness involved in the search may be justly and fairly dispensed of otherwise a lot will be left to be desired.

Having carefully looked at PE3, there is no indication that there were independent witnesses neither the PW1 nor PW7 or PW5 who explained that there was no private person other than the suspects that is 1st-5th accused save that, mere evidence adduced by PW1 that the 3rd accused boma is located at Kuti area which is in bush. This kind of explanation, in my considered view, is insufficient to satisfy the requirement of the law taking into account of the defence evidence that, the police went to the 3rd appellant's residence and found other persons therein, these were 4th, 5th accused person and DW7. This ground of appeal is thus partly allowed and in that the search is not indicative that the said pieces of the trophy were not impounded at kuti area but at Kinua village at Ngeju street within Kiteto District in Manyara Region as I shall explain herein under. Therefore, the 2nd ground of the appellant's appeal is partly allowed to the above extent and it is disallowed on the basis that the prosecution side through its key witness, PW1 testified that the 3rd appellant's homestead was at the forest, indicative that it was not very easy to secure a private person.

Regarding the 3rd ground as to the complaints on the reception of the appellants' cautioned statements (PE6, PE9 and PE10) by the trial court. It is requirement of the law that, after a document has been

admitted by the trial court, contents of such document must be read over to the court so that, the defence side may able to know its contents and therefore be in a better position to enter defence. Examining the proceedings of the trial court, it is evidently clearly that the cautioned statement, PE6 was not read over to the trial court as vividly depicted in the trial court proceedings and focusedly submitted by the learned counsel for the Republic. It has been consistently emphasized by our courts that, a failure to read the contents of the cautioned statement after its admission in evidence is incurable irregularity for instance in the case of **Mbaga Julius vs. The Republic,** Criminal Appeal No. 131 of 2015 (unreported-CAT). The cautioned statement of the 1st appellant (PE6) is consequently expunged from the record.

As to the complaint on the reliance of the cautioned statements by the trial court while the same was recorded out of the prescribed period. Having expunged PE6, the 1st appellant's cautioned statement, I now turn to the determination of the 2nd appellant's cautioned statement and that of the 3rd appellant which were received and marked as PE9 and PE10 respectively. In PE9 is indicative of the date (13/7/2016) when the statement was recorded. PW5 testified that he started recording the statement at 19: 05 hrs of 2016 and completed recording it at about 20:55 hrs as reflected in the PE9 and according to the testimony of PW1, the

certificate of seizure was filled on 13/07/2016 at about 16:00 hrs, thus by recording PE9 at 19:05 hrs, and even by taking that, the 3rd appellant was arrested at 13: 00 hrs or before yet the four hours as required under section 50 (1) of the CPA could not be found to have elapsed or the same would have been cured under section 50 (2) of the Act, the chain of investigation explained during trial would obviously cure that defect as provided under. Sub section 2 of section 50 provides;

> "*In calculating a period available for interviewing a person who is under restraint in respect of an offence, there shall not be reckoned as part of that period any time while the police officer investigating the offence refrains from interviewing the person, or causing the person to do any act connected with the investigation of the offence—*
> *(a) while the person is, after being taken under restraint, being conveyed to a police station or other place for any purpose connected with the investigation*".

In our instant criminal matter, it is clearly established that, the 3rd appellant was arrested much later than the 1st and 2nd appellant and the acts of arresting the suspects, the alleged acts of the 3rd appellant and other suspects of leading police officers to the retrieval place of the Government Trophy in question, searching and seizing of the said items (PE1 and PE2) would cure the complained non-compliance of the requirement of recording a cautioned statement of a suspect with the

prescribed period of four hours, if any, since such suspect became under the police restraint. My finding is fortified by a judicial jurisprudence in **Yusuph Masalu @ Jiduvi and 3 Others vs. Republic**, Criminal Appeal No. 163/ 2017 (unreported) referred by this court (**Mustafa, J now JK**) in **Republic vs. Mboya and three others**, Economic Criminal Case No. 16 of 2021 (unreported) where the Court of Appeal of Tanzania faced with similar circumstances, observed the following:

> *"In this case, the appellants were arrested on 8.7.2014, but the cautioned statements were recorded on the following day The reason for failure to record the statements within time was stated to be the nature of the crime and the complications in the investigations. The fact that the appellants sometimes were to move from one place to another as explained by PW1 andPW6 cannot be ignored. This shows investigation was in progress. That being the case, the delay was with plausible explanation and in the circumstances, we find justification in recording the same outside the four hours prescribed under the prevision of section 50 (2) of CPA which provides an exception to the four hours period prescribed by law"*

In view of the above decision and the provisions of the law cited above as well as circumstances surrounding the case, I am persuaded that the complaint that the cautioned statement of the 3rd appellant is not

reliable and be expunged from the record is not maintainable in law for the above stated reasons.

Now, as to the cautioned statement of the 2nd appellant which was recorded by PW7. Before I start determining this sub-ground, I would wish to point out that the trial court wrongly labelled since both typed proceedings at page 113 and handwritten proceedings show that the cautioned statement of the 5th accused was also admitted and marked as PE10 however it was also not read as was the case for PE6. Equally, statement of the 2nd appellant was also received and marked as exhibit (PE10) as revealed by the trial court's typed proceeding at page 119 as well as in the handwritten proceedings dated 7th day of December 2017 instead of PE11. This is wrong on the part of the trial court however its mischief does not go to the root of the case.

Turning to the admissibility of PE10-PE11, it is clearly shown in the cautioned statement that the time set for interviewing the suspect now 2nd appellant had elapsed since his statement was recorded on 14th July 2016 at 16: 00 hrs while the 2nd appellant was arrested on 13th July 2016 day hours and he officially became under restraint of police officers after the alleged impounding of the Government trophy and seizure at 16: 00 hrs of the material date (13/07/2016). So, there is a clear evidence that the statement of the 2nd appellant was recorded out of the required period

within which an interview by a police is supposed to be done to a suspect. I don't see as to why the 2nd appellant was not interviewed within the time frame as was the case to the 3rd appellant. I thus find that, the cautioned statement of the 2nd appellant was plainly recorded out of the prescribed period like the case for the 1st appellant's cautioned statement (PE6) which was recorded on 14th July 2016.

Even if, the 1st appellant and 2nd appellant were to be searched on the following day (14/7/2016) yet their cautioned statements would be recorded upon arrival at the police on 13th July 2016 and their additional statements would, if need arose especially if anything was illegal found and seized, be recorded on the following. I am saying that, it was obligatory for the investigation to record the cautioned statement after arrival at Kibaya Police station on 13th July 2016 taking into account that the said pieces of elephant tusks were said to have been seized on 13th July 2016. The cautioned statement of not only that of the 2nd appellant which is suffer from being expunged but also to that of 1st appellant it was not expunged on the ground that it was not read over in respect of the government trophy in question. I would like to subscribe my holding by a decision of the Court of Appeal in **Ramadhani Mashaka v. Republic**, Criminal Appeal No. 311 of 2015 (unreported) the Court observed that:

"It is now settled that a cautioned statement recorded outside the prescribed time under 16 section 50 (1) (a) and (b) renders it to be incompetent and liable to be expunged in the instant case".

Having found at herein above, the repudiated cautioned statement of the 2nd appellant (PE10) is liable to being expunged. Equally, the repudiated statement allegedly made by the 1st appellant (PE6) would be expunged if it was not expunged on the reason that its contents were not read over (See Again **in Mashaka Pastory Paulo Mahengi @ Uhuru and 5 others vs. Republic**, Criminal Appeal No. 49 of 2015 (unreported-CAT).

Last ground for the consideration is ground No. 4 and 2 which are on, whether the prosecution proved its charge beyond reasonable doubt. As explained herein above on one hand, there were pieces of prosecution evidence namely; the appellants' act of leading to the place where the ten pieces of elephant tusks were hidden, certificate of seizure of the said tusks followed by the cautioned statements (PE6, PE9 and PE10) of the appellants but on the other hand, there are doubts to those pieces of evidence to wit; the cautioned statements showing to have plainly been recorded by the arresting policers officer who also played a role of search, filling of the certificate of seizure. The recorders (PW1, PW5 and PW7) of

those statements cannot be said that they were not familiar with the facts of the case prior to the recording of the said cautioned statement. I think the recorders being the ones who received information from the police informer, arresting officers, the ones who searched and seized the trophies as well as rifles were not proper persons to interview the appellants and record their cautioned statements as the roles played by them negate the impartiality and credibility of their testimonies as far as the cautioned statements are concern (See a judicial decision in **Shani Kapinga vs Republic,** Criminal Appeal No. 337 of 2007 (Unreported-CAT)

Similarly, I have not lightly considered the issue of the place where exactly the said ten pieces of elephant tusks were impounded, was it at Tuki area as per the ormer charge admitted on 28th February 2017 while the later charge admitted on 12th June 2017 indicated that the appellants and two others were found in unlawful possession of the Government Trophy in Kinua Village within Kiteto District. According to the evidence adduced by both sides, Kuti and Kinua are two patently different areas yet the charge and evidence adduced are at variance. In the case of **Michael Gabriel versus The Republic** Criminal Appeal No. 240 of 2019 (unreported), the Court of Appeal sitting at Arusha when faced the variance in the charge and the place where the offence was allegedly

committed and where the appellant was arrested and had had these to say:

> *"In the particular circumstances of this case, it was necessary to amend the charge because the evidence did not support the charge as regards the place at which the offence was committed. However, that was not done. The effect of omission was to water down the prosecution evidence. Where as a result of the variance between the charge and the evidence, it is necessary to amend the charge but such amendment was not made, the offence will remain unproved".*

Further to that, the certificate of search and seizure (PE3) indicates that the pieces of trophies were seized at Kinua Village at Ngeju hamlet, thus no mentioning of Kuti area in the search. If the search and seizure were conducted at Kuti area why the one who filled the certificate of seizure recorded the place to be Kinua Village at Ngeju hamlet. Therefore, the trial court's finding that the difference does not go to the root of the case provided that the two areas aforementioned are within Kiteto District is a misdirection since the specific area searched is vitally important, a house searched and owned by Mr. T cannot be in any way be the searched and owned by Mr. R. thus, the observed discrepancy goes to the root of the evidence relating search and seizure thereof. Above all, the learned Resident Magistrate looked at the testimony of DW8, Michael who said

that, Kuti is in Ndighigushi Village within Ndighigushi Ward whereas Kinua Village is Namelock Ward as well as the testimony adduced by the 3rd appellant's relative.

In the upshot, I find that, the case for the prosecution was not proved to the required standard in criminal cases. I therefore allow the appellants' appeal. The conviction and sentence passed to the appellants are respectively quashed and set aside. I order the appellants be released from prison forthwith unless they are held therein for different lawful cause (s).

It is so ordered.

M. R. GWAE
JUDGE
28/09/2022

Court: Right of appeal fully explained

M. R. GWAE
JUDGE
28/09/2022