

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

(CORAM: WAMBALI, J.A., KITUSI, J.A. And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 517 OF 2019

MATERA SIMANGO @ MASANA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**[Appeal from the decision of the Court of Resident Magistrate of
Musoma (with Extended Jurisdiction) at Musoma]**

(Ng'umbu, RM EXT.JUR)

Dated the 3rd day of October, 2019

in

Criminal Appeal No. 37 of 2019

JUDGMENT OF THE COURT

26th & 29th October, 2021

WAMBALI, J.A.:

The appellant, Matera Simango @ Masana was tried and convicted by the District Court of Serengeti of the offence of unlawful possession of government trophies contrary to section 86(1) and (2) (iii) of the Wildlife Conservation Act, No. 5 of 2009, 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 R.E 2002] (now R.E 2019) the EOCCA as amended by sections 13 and 16 of the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016.

The allegation which confronted the appellant as laid in the particulars of the offence was to the effect that on 5th March, 2017 at about 00:15 hours at Motukeri Village within Serengeti District in Mara Region, he was found in unlawful possession of three pieces of elephant tusks in his dwelling house, weighing 5.9 kg and valued at TZS.32, 700,000.00, the property of Tanzania Government.

Noteworthy, after the Principal State Attorney in-charge of Mara Region on behalf of the Director of Public Prosecutions (the DPP) issued the consent to prosecute the appellant and a certificate conferring jurisdiction on a subordinate court to try an economic case, the trial started before the District Court of Serengeti.

According to the record of appeal, the prosecution case essentially depended on five witnesses, namely; Halord Mlay (PW1), Wilbroad Vincent (PW2), Michael Masagali (PW3), Paschal Gohebu @ Gorobani (PW4) and No. PF. 18185 Inspector Kweka. Three exhibits, namely, three pieces of elephant tusks, trophy valuation certificate and record of search by police officer were also tendered and admitted in evidence as exhibits PE1, PE2 and PE3 respectively. It was firmly testified by the prosecution witnesses that the appellant was found in possession of three (3) elephant tusks which were discovered outside

his dwelling house after search was conducted at around 00:15 hours on 5th March, 2017.

In his defence, the appellant categorically denied to have been arrested on the said date and time in possession of the alleged government trophies. He testified that he was arrested on 4th March, 2017 at about 22:00 hours while sleeping in a house belonging to his concubine at Mbugani sub village within Motukeri Village on allegation that he possessed government trophies, to wit, three elephant tusks, which he denied.

Nonetheless, at the height of the trial, the learned trial Resident Magistrate found that the prosecution case was fully proved to warrant the conviction of the appellant. He thus convicted him as intimated above. Consequently, he sentenced the appellant to an imprisonment term of twenty years.

The appellant's desire to contest the trial court's finding on conviction and sentence encountered an obstacle as his first appeal which was transferred by the High Court and heard by Ngúmbu, RM with extended jurisdiction at the Court of Resident Magistrate of Musoma, was dismissed in its entirety; hence this second appeal. The appellant's discontent with the decision of the first appellate court is

vividly expressed through his four grounds of appeal contained in the memorandum of appeal he lodged before this Court on 18th March, 2020. We do not however intend to reproduce herein the respective grounds of appeal for the reason to be apparent shortly in this judgment.

The hearing of the appeal proceeded through the remote appearance of the appellant in person which was facilitated by a video conference facility linked between the court room and Musoma Prison. On the adversary side, the appearance of the respondent Republic was evidently marked by the presence of Mr. Kainunura Anesius, learned Senior State Attorney assisted by Mr. Mafuru Moses and Mr. Frank Nchanila, learned State Attorneys.

At the very outset, when the appeal was called on for hearing, after the appellant had adopted and urged us to consider his grounds of appeal, Mr. Anesius rose to inform the Court that the respondent Republic has no intention of contesting the appeal, but for reasons not contained in the appellant's grounds of appeal. Nevertheless, upon hearing the submission of the learned Senior State Attorney, it plainly became clear to us that the epicenter of the respondent Republic's support of the appellant's appeal revolves around the question whether

in view of the evidence in the record of appeal, the prosecution proved the case against the appellant to the required standard.

Submitting in support of the appeal; firstly, Mr. Anesius stated that considering the evidence in the record of appeal, there is apparent variance between the evidence adduced by the prosecution witnesses and the particulars in the charge sheet concerning the place where the alleged three elephant tusks were found in possession of the appellant. He amplified that while the particulars in the charge sheet allege that the said elephant tusks were found in the appellant's dwelling house at Motukeri Village; on their part, PW1, PW3, PW4 and PW5 testified that they were found outside the house. He stated further that the other variation is demonstrated by the fact that while the allegation in the particulars is to the effect that the house belonged to the appellant, the prosecution evidence in the record bears out that it belonged to a woman named as Nageni Gimirani who cohabited with the appellant for some time.

In the circumstances, Mr. Anesius described the variation as material to the extent that it tainted the prosecution case, because according to the record, an amendment of the charge sheet was not done at the trial court to rectify the anomaly as required under section

234 of the Criminal Procedure Act, Cap. 20 R. E. 2019 (the CPA). To support his stance, he referred the Court to its decision in **Issa Mwanjiku @ White v. The Republic**, Criminal Appeal No. 175 of 2018 (unreported).

Secondly, Mr. Anesius argued that there is material contradiction in the evidence of the prosecution witnesses with regard to the actual place where the three elephant tusks were found within the surrounding of the house which was searched by the same witnesses. Explaining in support of his contention, he stated that while PW1 testified that the trophies were found hidden outside the house in the flowers, PW3 testified that they were found hidden in a sulphate bag which was in an area covered by soil. In the premises, he submitted that as these were material witnesses who were at the scene of the crime, their testimony on the same issue is materially contradictory and it goes to the root of the case to the extent of eroding the prosecution case as stated by the Court in **Ibrahim Ally Mwadau v. The Republic**, Criminal Appeal No. 11 of 2018 (unreported).

On our part, we entirely agree with the submission of the learned Senior State Attorney that there is remarkable variation between what is alleged in the particulars of the charge sheet and the prosecution

evidence in the record. We similarly, agree that there is material inconsistencies and contradictions in the testimonies of the prosecution witnesses with regard to the actual place where the alleged trophies were found at the scene of crime. To demonstrate our concurrence with the learned Senior State Attorney's submission, we deem it appropriate to reproduce the relevant parts of the prosecution witnesses' evidence on the two aspects; that is variations and contradictions. According to the record of appeal, PW1 testified as follows: -

"...they searched inside the house, they got nothing but outside at the flowers, there was a sulphate bag which had three elephant tusks. It was about 5 metres from the door of the house. It was hidden in the flowers, the accused person witnessed..."

On his part, PW3, the Motukeri village chairman testified that: -

"...They told me to witness the search to the house of one woman namely Nageni Gimirani and the accused person used to reside there as her husband. He used to reside there for more than a year. Police officers searched and got nothing. Outside the house there was a place where the soil is dug, they found three (03) pieces of elephant tusks being buried

there, and they were in a sulphate bag, about 5 steps from the house..."

On the other hand, PW4 a game scout who accompanied PW1 and the police officer (PW5) is recorded to have testified that: -

"We reached there accompanied by Insp. Kweka and search was conducted. Inside the house we got nothing in respect of our information. We used our experience, we went around the house and met the place which the soil is dug, it was like a heap, and we found the three pieces of elephant tusks in "sulphate bag being burned". The accused and the sub village Chairman were also present. The place was about 5 metres from the house..."

Lastly, PW5 the police officer who led the search testified as follows:-

"We conducted the search in the house, we got nothing. We surrounded the compound of his house to see if he had hidden outside, we found the place where the soil shown us that something was burned, we took the hoe and dug the area. We found three pieces in the 'sandarusi' bag. We were all there; I identified the elephant tusks because of experience..."

From the above reproduced excerpt of evidence of the prosecution witnesses, it is apparent that though all of them were present at the alleged scene of crime, their testimonies greatly differed with the allegation in the charge on who owned the house which was searched on 5th March, 2017. Besides, their testimonies differ with regard to the actual place where the three elephant tusks, which were collectively admitted as exhibit PE1, were discovered and retrieved within the compound of the respective house.

We therefore find that the prosecution case was shaken to its root as the variance between the particulars of the offence in the charge sheet and the evidence in the record was not remedied by amendment of the charge as provided for under section 234 of the CPA. There is therefore, no doubt that the evidence in the record was not brought in line with the particulars in the charge. The Court dealt with a similar situation in **Sylvester Albogast v. The Republic**, Criminal Appeal No. 309 of 2015 (unreported) where reference was also made to its previous decision in **Leonard Raphael and Another**, Criminal Appeal No. 4 of 1992 (unreported) and stated as follows: -

"This, is not, however to say that prosecutors cannot make mistakes in drafting charges. But where there are such mistakes, the law has also provided a

*solution. The remedy, as suggested by this Court in **Leonard Raphael and Another v. The Republic**, Criminal Appeal No. 4 of 1992 (unreported) is that: - "Prosecutors and those who preside over criminal trials are reminded that when, as in this case, in the cause of trial the evidence is at variance with the charge and discloses an offence not laid in the charge, they should invoke the provisions of section 234 of the CPA 1985 and have the charge amended in order to bring it in line with the evidence."*

In the instant appeal, though the variance between the charge and the evidence did not lead to the disclosure of the offence not known to law, the same led to the material difference between the allegation in the particulars of the charge and the evidence in respect of the owner of the house in question. We are settled that the apparent variation would have necessitated amendment to the charge to bring it in line with the evidence.

Similarly, we entertain no doubt that the descriptive inconsistencies and contradictions in the testimonies of the prosecution witnesses as reflected in the evidence reproduced above, is material and went to the root of the prosecution case. It is indeed, unfortunate that the two courts below did not thoroughly address those

inconsistencies and contradictions which are apparent in the prosecution witnesses' evidence and resolve it as required by law. By way of emphasis on the importance of resolving contradictions and inconsistencies, we wish to reiterate what the Court stated in **Mohamed Said Matula v. Republic** [1995] T.L.R. 3 that:-

"Where the testimony of witnesses contain inconsistencies and contradictions, the court has a duty to address the inconsistencies and try to resolve them where possible, else the court has to decide whether the inconsistencies and contradictions are only minor or whether they go to the root of the matter."

In the instant appeal, having regard to the evidence in the record, we are satisfied that had the trial and first appellate courts considered the inconsistencies and contradictions in the prosecution evidence we have exposed above; they would have found, as we hereby find, that the gist of the evidence on material issues are inconsistent and contradictory to the extent of dismantling the prosecution case (see the observation of the Court in **Said Ally Ismail v. The Republic**, Criminal Appeal No. 249 of 2009 (unreported)).

In the circumstances, we respectfully hold that the two courts below wrongly concluded that the prosecution witnesses whose evidence we have made reference to herein were credible and reliable. More importantly, we do not hesitate to find that the first appellate court wrongly found that the prosecution proved that the appellant had knowledge and control over the three elephant tusks to the exclusion of others; and thus he was found in constructive possession of the same. In the circumstances of this case, placing reliance in **Mwinyi Jumal Kitalamba @ Igonza and Others v. The Republic**, Criminal Appeal No. 348 of 2018 (unreported); we hold that the finding of the first appellate court is not supported by the evidence in the record.

The other reason which was relied upon by Mr. Anesius to support the appellant's appeal is that exhibit PE2 (the Trophy Valuation Certificate) was wrongly tendered by the Public Prosecutor instead of the witness, that is, PW2 and that it was not read over after it was admitted in evidence. Relying on the decision of the Court in **Athumani Almas Rajab v. The Republic**, Criminal Appeal No. 416 of 2019 (unreported), the learned Senior State Attorney implored us to expunge exhibit PE2 for being irregularly tendered, admitted and relied in evidence.

It is evident from the record of appeal that exhibit PE2 was wrongly tendered by the Public Prosecutor instead of PW2 who was summoned by the prosecution to testify at the trial. As we have emphasised in several decisions of this Court, including that of **Thomas Ernest Msangu @ Nyoka Mkenya v. The Republic**, Criminal Appeal No. 72 of 2012 (unreported) and **Athumani Almas Rajab** (supra) such exhibit is liable to be expunged from the record, as we hereby do.

Lastly, when we inquired from Mr. Anesius on the propriety of exhibit PE3 (the certificate of seizure), he readily conceded that it is defective in substance by its failure to adhere to the requirement of the law. Though he did not explain further, he submitted that in view of the remarkable defects, it cannot be relied upon to support the prosecution case that the appellant was found in possession of the government trophies as alleged in the charge and by the prosecution witnesses.

On our part, having closely examined exhibit PE3, we note the following fundamental defects and inconsistencies. First, though the search order was signed by the officer in charge of Criminal Investigation Department of Serengeti District (OCCID) showing to

have been issued at 00:15 hours on 5th March, 2017, the testimony of all material witnesses, namely, PW1, PW3, PW4 and PW5 was to the effect that they searched the scene of crime in the presence of the appellant and other witnesses at 00:00 hours. In essence, this implies that the search order was issued after the search was conducted.

Second, though exhibit PE3 indicates that the OCCID intended to authorize another Police Officer to conduct the search as he had other commitments on that particular day, the record of appeal reveals that he filled his own rank and name in the appropriate place of that search order which was intended to indicate the name of the respective police officer. In the circumstances, Inspector I. Kweka (PW5) who led, conducted the search and filled the certificate of seizure had no authority to do so as he was not mentioned and legally mandated by the search order as reflected at page 43 of the record of appeal.

Third, the certificate of seizure (exhibit PE3) was not signed by the occupier of the house where the search was conducted contrary to the requirement of section 38 (3) of the CPA as the search order was issued pursuant to the provisions of section 38 (1) of the same Act. According to the evidence in the record, part of which we have reproduced above, it was not disputed that the appellant's concubine

one Nageni Gimirani, the owner and occupier of the house in which the search was conducted was present, but did not sign exhibit PE3 as a witness to the search.

Thus, considering the discrepancies we have demonstrated above with regard to exhibit PE3, there is no dispute that its authenticity is doubtful and thus, it could not have been relied in evidence by the two courts below to support the prosecution case.

In the final analysis, considering the variance between the allegation in the charge and the evidence; the material inconsistencies and contradictions in the prosecution evidence and the unreliability of the exhibits as we have alluded to above, it cannot be concluded that the case against the appellant was proved beyond reasonable doubt as found by the trial court and confirmed by the first appellate court.

To this end, we are of the settled opinion that had the two counts below critically evaluated the entire prosecution evidence in the record and subjected it to the appellant's defence, they would have found that the appellant's defence raised doubts to the prosecution case, resulting in the failure to prove the allegations laid in the charge against the appellant to the required standard. It is, therefore, not surprising that

the counsel for the respondent Republic outrightly supported the appellant's appeal though for different reasons.

In the result, we allow the appeal, quash conviction and set aside the sentence imposed on the appellant. Consequently, we order the immediate release of the appellant from prison unless held for other lawful causes.

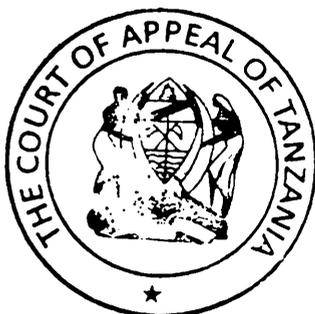
DATED at **MUSOMA** this 28th day of October, 2021.

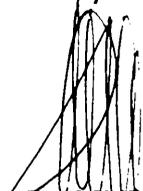
F. L. K. WAMBALI
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 29th day of October, 2021 in the presence of Mr. Frank Nchanila, learned State Attorney for the Respondent/Republic and the Appellant appeared remotely via Video link from Musoma Prison is hereby certified as a true copy of the original.




K. D. MHINA
REGISTRAR
COURT OF APPEAL