IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MWAMBEGELE, J.A., KEREFU, J.A. And KIHWELO, J.A.)

CRIMINAL APPEAL NO. 51 OF 2020

SKONA LORYAN MUNGE ..... 1ST APPELLANT
SAMWEL PAUL ..... 2ND APPELLANT
EMMANUEL MICHAEL NANYARO ..... 3RD APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Banzi, J.)

dated the 13th day of December, 2019

in

Economic Case No. 14 of 2019

JUDGMENT OF THE COURT

29th November & 6th December, 2022

KEREFU, J.A.:

The appellants, Skona Loryan Munge, Samwel Paulo and Emmanuel Michael Nanyaro (the first, second and third appellants, respectively) were jointly and severally charged with the offence of unlawful possession of government trophy contrary to section 86 (1), (2), (b) of the Wildlife Conservation Act No. 5 of 2009 (the WCA) read together with paragraph 14 of the First Schedule to and sections 57 (1), 60 (2) of the Economic and

Organized Crime Control Act, [Cap. 200 R.E. 2002] (the EOCCA) as amended by section 16 (a) and 13 (b) of the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016. It was alleged that on 6th October, 2018 at Olduvai Gate in Ngorongoro Conservation Area Authority within Ngorongoro District in Arusha Region, the appellants were jointly and together found in possession of government trophies, to wit, two (2) elephant tusks valued at TZS. 33,585,000.00 the property of the United Republic of Tanzania without permit from the Director of Wildlife. The appellants pleaded not guilty to the charge. However, after a full trial, they were found guilty, convicted and each of them sentenced to twenty years imprisonment.

In essence, the substance of the prosecution case, as obtained from the record is to the effect that, on 6th October, 2018 around 22:00 hours, while No. G. 4313 PC Edward (PW5) was on patrol together with other park rangers to reinforce the security at the Olduvai Gate, they saw light from far coming towards them. When the said light came closer, they discovered that it was the light from two motorcycles which carried three people each. It was the testimony of PW5 that, since it was within the conservation area, where no one is allowed to pass through between 18:00hrs and 06:00hrs,

they decided to go towards them for interrogation. Having realized that they were being followed, the two motorcycles turned back in a very high speed, and it was at that juncture the two suspects fell from one motorcycle and the other one fell from another motorcycle. However, the remaining three managed to escape with the motorcycles.

PW5 went on to state that, one person who fell from the first motorcycle (the first appellant) was holding a sulphate bag which contained two elephant tusks. Upon Having interrogation, the appellants introduced themselves and admitted to have no permit to possess the said tusks. Upon further interrogation, the appellants revealed that, they got the elephant tusks from the first appellant's father at Arash Village in Loliondo and they were heading to Musoma Road to meet with another person from Serengeti who was to take the elephant tusks to Dar es Salaam for sale.

PW5 stated further that, upon that revelation, they seized the elephant tusks in question and filled a certificate of seizure which was signed by the park rangers and the appellants by affixing their thumb prints. It was the further testimony of PW5 that, due to the circumstances obtaining at the scene, it was not possible to find an independent person to

witness the exercise and sign the certificate of seizure. The certificate of seizure was admitted in evidence as exhibit P5.

Subsequently, the appellants together with the two seized elephant tusks (exhibit P2) were taken to Ngorongoro Police Post where exhibit P2 was handed over to the exhibit keeper one No. H. 201 PC Enock Richard (PW2) via handing over form (exhibit P3). The handing over exercise was witnessed by the appellants who also signed exhibit P3. In his testimony, PW2 confirmed to have received exhibit P2, labelled it with No. NGOR/IR/93/2018 and stored it in the exhibit room. Then, on 7th October, 2018, PW2 handed over the exhibit P2 to Inspector Jones Kija (PW3), through a handing over certificate (exhibit P1) which was also witnessed and signed by the appellants. It was the testimony of PW3 that, he took exhibit P2 together with the appellants to Loliondo Police Station where the appellants were taken to lock-up and exhibit P2 was handed over to No. G. 1991 D/C Mabrouk (PW1). PW1 stated that he kept the said exhibit in the exhibit room until 10th October, 2018 when he handed it over to Fred Victor Ledidi (PW4) who identified and conducted the valuation of exhibit P2 and then, returned it to PW1. PW4, testified to have identified the tusks and

established that they were elephant tusks and valuated them. He then prepared a valuation certificate (exhibit P4).

In their respective defences, the appellants denied to have committed the offence. In particular, the first appellant who testified as DW1 stated that, he was a student at Mount Meru Tour Guide and International Languages School. That, on 6th October, 2018 he left home to college and he boarded a motor vehicle make Harrier which was heading to Arusha. It was his testimony that he was not arrested in a motorcycle with the tusks as claimed by PW5. He also denied knowing the second and third appellants, by stating that, he met them for the first time in court.

On his part, the second appellant, who testified as DW2, stated that he was arrested on 10th October, 2018 at Olduvai Gate on his way to attend a burial ceremony of one of his uncles scheduled to take place on 11th October, 2018. That, upon reaching at the Olduvai Gate, they were stopped and arrested at the gate and taken to Ngorongoro Police Post where he was locked up. He stated that, while in the police lock up, he was tortured to sign exhibits P1, P3 and P5. He also testified that he met the first and third appellants for the first time in court on 19th October, 2019 where they were jointly charged with unlawful possession of government trophy.

The third appellant, who testified as DW3 stated that, on 7th October, 2018 he boarded a motorcycle to Karatu but they were stopped and arrested and taken to Ngorongoro Police Station where they were locked up. He also stated that, at the police station, he was tortured and forced to sign exhibits P2 and P5. He as well stated that he met the first and second appellants for the first time in court on 19th October, 2019.

However, after a full trial, the trial court accepted the version of the prosecution's case and the appellants were found guilty, convicted and sentenced as indicated above. Aggrieved, the appellants have preferred the present appeal. In the memorandum of appeal, the appellants raised eight grounds which raise the following main complaints: **one**, failure by the prosecution to tender the appellants' cautioned statements to establish how they admitted to have committed the alleged offence; **two**, failure by the prosecution witnesses to identify the registration numbers of the motorcycles alleged to have been engaged by the appellants in the commission of the offence; **three**, failure by the prosecution to summon material witnesses who were said to be involved in the arrest of the appellants at the scene to testify before the trial court; **four**, the evidence of PW1, PW2 and PW4 was tainted with contradictions and inconsistencies

on the date of arrest of the appellants; **five**, failure by the prosecution to demonstrate how the appellants fell down from the said motorcycles claimed to be on high speed without injuries; **six**, failure by the prosecution witnesses to state the exact weight of the trophy and whether the seized item was elephant tusks, ivory and/or horns; **seven**, failure by the prosecution to summon D/C Abdillah who was mentioned by PW1 at page 46 of the record of appeal; and **finally**, that, the prosecution case was not proved beyond reasonable doubt.

At the hearing of the appeal, the appellants entered appearance in person whereas the respondent Republic was represented by Ms. Lilian Mmassy, learned Senior State Attorney assisted by Mr. Charles Kagirwa and Ms. Upendo Shemkole, both learned State Attorneys.

When given an opportunity to amplify on the grounds of appeal, the appellants adopted their grounds of appeal and preferred to let the third appellant to elaborate the same on their behalf.

Starting with the first ground, the third appellant faulted the trial court in convicting them while the prosecution failed to tender their cautioned statements to justify how they admitted to have committed the alleged offence. On the second ground, the third appellant also faulted the trial

court for convicting them while, the prosecution witnesses failed to identify the registration numbers of the motorcycles alleged to have been engaged by the appellants in committing the offence.

As for the third and seventh grounds, the third appellant argued that, although, in his evidence, PW5 testified that, at the scene of crime he was together with other park rangers, none of them was summoned to testify before the trial court to elaborate on the procedure followed by PW5 in arresting them. He further referred us to pages 46 to 48 of the record of appeal and contended that, although in his evidence PW1 stated that he was instructed by D/C Abdillah to write the date of handing over in exhibit P1, the said D/C Abdillah was not summoned to testify before the trial court to prove that fact.

On the fourth ground, the third appellant challenged the evidence of PW1, PW2, PW3 and PW4 for being contradictory in relation to the date of their arrest. He clarified that, PW1 testified that he was told by PW2 that the appellants were arrested on 6th October, 2018 and PW3 said, it was on 7th October, 2018 while, PW4 testified that they were arrested on 10th October, 2018. It was the argument of the third appellant that, the evidence of such witnesses was doubtful and unreliable to mount their conviction. He

thus invited us to find that PW1, PW2, PW3 and PW4 were unreliable and incredible witnesses.

As for the fifth ground, the third appellant faulted the trial court for failure to find that, although PW5 testified that, at the scene of crime, the appellants fell down from the motorcycles which were said to be on high speed, he failed to demonstrate any injuries on their part.

As regards the sixth ground, the third appellant challenged the evidence of PW4 for failure to state the exact weight of the trophies alleged to have been found in their possession. He referred us to page 59 of the record of appeal and contended that, at first PW4 testified that, one tusk had 31.9 Kgs and the second one had 39.1 Kgs. But later, after admission of exhibit P4 in evidence, he stated that, the first tusk had 3.1 Kgs and the second 3.9 Kgs with a total weight of 7Kgs, while in exhibit P4 it was shown that the tusks weighed 8kgs. It was his argument that PW4 was unreliable and incredible witness. Based on his submission, the third appellant urged us to allow the appeal, quash their convictions and set aside the sentences imposed against them.

On their part, the first and second appellants associated themselves with the submission made by the third appellant. In addition, the first

appellant challenged the alleged search for being conducted contrary to the requirement of the law, as it was not witnessed by an independent witness. He insisted that, since the search was conducted without any independent witness, it was invalid and had weakened the prosecution case.

In response, Ms. Shemkole from the outset, declared the stance of the respondent Republic of not supporting the appeal. Nonetheless, before starting to respond to the grounds of appeal, she indicated that she will argue the first, third and seventh grounds co-jointly, the second, fourth and sixth co-jointly and then lastly, the eight ground, separately.

Starting with the first, third and seventh grounds, the learned State Attorney stated that, the burden of proof in criminal cases lies squarely on the prosecution shoulders and the standard has always been proof beyond reasonable doubt. She further cited section 143 of the Evidence Act and argued that, the said law does not require a specific number of witnesses to prove a fact, what is required is the quality of evidence and credibility of witnesses. She then argued that, in the instant appeal, the prosecution case against the appellants was proved beyond reasonable doubt through five credible witnesses and five documentary evidence. That, having established its case, the prosecution side found it unnecessary to tender the alleged

cautioned statements and/or summon other intended witnesses. She thus urged us to find that the first, third and seventh grounds of appeal are devoid of merit.

As for the second, fourth and sixth grounds on the alleged contradictions on the date of the appellants' arrest and weight of the seized trophies, Ms. Shemkole, although, she conceded that the said contradictions do exist, she quickly remarked that, the same are minor defects which do not go to the root of the matter and dispute the fact that the appellants were found in possession of those trophies without permit. She referred us to pages 165 to 167 of the record of appeal and argued that, the said contradictions and inconsistencies were adequately considered by the trial court and found to be minor defects which do not go to the root of the matter.

On the failure by the prosecution to mention the registration numbers of the motorcycles, Ms. Shemkole contended that it was not possible for the prosecution witnesses to read those numbers, at the scene, because the said motorcycles were at a high speed and it was at night. To clarify further on this point, she referred us to page 75 of the record of appeal where PW5, who was at the scene and arrested the appellants testified that he did

not manage to see the registration numbers of the motorcycles because it was night. The learned counsel, although she also conceded that the prosecution witnesses did not demonstrate on how the appellants fell down from the said motorcycles without injuries, she challenged the appellants' complaint to be an afterthought as, she said, during the trial, they did not cross-examine PW5 on that aspect.

On the last ground, Ms. Shemkole insisted that the charge against the appellants was proved beyond reasonable doubt. That, in convicting the appellants, the trial court relied mainly on the evidence of PW5 who clearly explained on how the appellants were arrested red-handed, searched immediately and found with the said tusks (exhibit P2) and signed exhibit P5. She added that, the evidence of PW5 was corroborated by PW4 an expert in wildlife who identified exhibit P2 to be tusks from the elephant together with the evidence of PW1, PW2 and PW3 who clearly narrated all the stages followed and properly established the chain of custody of exhibit P2. To bolster her proposition, she cited the cases of **Goodluck Kyando v. Republic** [2006] T.L.R 363 and **Matata Nassoro & Another v. Republic,** Criminal Appeal No. 329 of 2019 (unreported). She then added that, even the complaint by the appellants that the search was not properly

conducted for not being witnessed by an independent witness has no basis, as PW5 at page 67 of the record of appeal clearly explained the circumstances which obtained at the scene and that it was not possible to get an independent witness, as no one is allowed to pass through that area between 18:00hrs and 06:00hrs. On the strength of her submission, she urged us to find the appellants' appeal unmerited and dismiss it in its entirety.

In his brief rejoinder, the third appellant reiterated that, in the midst of the pointed-out inconsistencies and contradictions, it was not even clear as to whether the trophy alleged to have been found in their possession were elephant tusks, ivory and/or horns as, even the case number NGOR/IR/93/2018 was initiated at Ngorongoro Police Post and the valuation was done at Loliondo Central Police. On their part, the first and second appellants did not have much to say other than insisting for their appeal to be allowed and they be set at liberty.

With the foregoing exposition of the competing arguments, we shall now proceed with the determination of the grounds of appeal in the same order argued by the learned State Attorney. However, before doing so, it is crucial to state that, this being a first appeal, it is in the form of a re-

hearing, therefore the Court, has a duty to re-evaluate the entire evidence on record by reading it together and subjecting it to a critical scrutiny and if warranted arrive at its own conclusion of fact - see **D.R. Pandya v. Republic** [1957] EA 336 and **Demeritus John @ Kajuli & 3 Others v. Republic**, Criminal Appeal No. 155 of 2013 (unreported).

Starting with the first, third and seventh grounds on the failure by the prosecution to tender appellants' cautioned statements and summon the park rangers who were alleged to be at the scene of crime and DC Abdillah mentioned by PW1, we wish to state that, as correctly argued by Ms. Shemkole, the burden of proof in criminal cases lies on the prosecution shoulders and the standard is proof beyond reasonable doubt. Therefore, the prosecution was at liberty to bring only those witnesses who could advance their case regardless of the number – see section 143 of the Evidence Act. What is required is the quality of evidence and the credibility of the witnesses. This position has been emphasized in several decisions of this Court. See for instance, the cases of **Yohanis Msigwa v. Republic** [1990] T.L.R. 148, **Hassan Juma Kanenyera v. Republic** [1992] T.L.R. 100 and **Mwita Kigumbe Mwita & Another v. Republic**, Criminal Appeal No. 63 of 2015 (unreported). In the latter case, the Court stated that:

"In each case, the court looks for quality, not quantity of the evidence placed before it. The best test for the quality of any evidence is its credibility. It was for the prosecution to determine which witness should prove whatever fact it wanted."

It is equally not a legal requirement that for the prosecution to prove a case must tender the cautioned statement of an accused person. We even find the appellants' complaint, on this aspect, baseless and not supported by the record, as there is nowhere in the record of appeal where it was indicated that such statements were recorded.

As for the appellants' complaint on the failure by the prosecution witnesses to demonstrate any injuries on their part, it is on record, and as rightly submitted by Ms. Shemkole, during the trial, the appellants did not cross examine PW5 on that aspect. It is trite law that, a party who fails to cross examine a witness on a certain matter is deemed to have accepted it and will be estopped from asking the court to disbelieve what the witness said, as silence is tantamount to accepting its truth. We find support in our previous decisions in **Cyprian Athanas Kibogoyo v. Republic,** Criminal Appeal No. 88 of 1992 and **Hassan Mohamed Ngoya v. Republic,**

Criminal Appeal No. 134 of 2012 (both unreported). In the event, we find the first, third and seventh grounds of appeal to have no merit.

As regards the second, fourth and sixth grounds on the alleged contradictions and inconsistencies on the date of the appellants' arrest and weight of the seized trophies. Having revisited the evidence on record, we do not, with respect, consider them to be material to the extent of affecting the credibility and reliability of PW1, PW2, PW3, PW4 and PW5. For instance, the issue on the different dates on the appellants' arrest was clearly settled by PW5 and PW3 who clearly testified that they were arrested on 6th October, 2018 and not otherwise. As correctly argued by Ms. Shemkole, the complained of contradictions were adequately addressed by the trial court and ruled out that they are minor defects which do not go to the root of the matter and dispute that the appellants were found in possession of those trophies without permit from the Director of Wildlife. For instance, at pages 175 and 176 when considered the contradictions on the date of arrest of the appellants, the trial court observed that:

> *"Although there was contradiction in exhibit P1 in respect of the date of arrest which on one part shows 6th October, 2018 while in other parts shows 7th and 10th October, 2018, but such contradiction does not go to the*

root of the matter because exhibit P1 is about handing over of exhibit and not the date of arrest. Besides, all witnesses clarified that it was a mere error and maintained the date of arrest was 6th October, 2018."

Furthermore, at page 166 of the same record, having considered the contradictions in respect of the weight of the seized trophies, the trial court observed that:

"In his testimony, PW4 admitted that he made an error in adding up the weight of the two tusks and recorded 8kgs in exhibit P4 instead of 7 Kgs. I have carefully considered these contradictions on PW4's testimony and exhibit P4 in respect of the weight of the tusks in question. In the considered view of this court, these contradictions do not go to the root of the matter because the valuation was not made basing on the weight of the tusks but on the value of one killed elephant."

We are also mindful of the fact that, in his submission, the first appellant contended that, due to those contradictions, it was not clear as to whether the trophy alleged to have been found in their possession were elephant tusks, ivory and/or horns. With respect, we find this argument to have no basis, because during the trial that issue was clarified and settled by PW4, the wildlife officer who identified the said tusks by describing their

shape that they have curved shape, longer in size than any other horns of other animals and that they have open space from the base to the middle part. PW4 at page 64 of the record of appeal clarified that:

> *"The proper Swahili for elephant tusk is 'Meno ya Tembo.' However, people mistakenly call them 'Pembe za Tembo' au 'Pembe za Ndovu,' but is the same as Meno ya Tembo."*

It is also evident that at page 165 of the record of appeal, the trial court considered the evidence of PW4 and found him as a credible and reliable witness who had long experience in wildlife and that he had clearly identified the said trophy to be elephant tusks and not otherwise.

In the same spirit, and since we have already observed and labeled the pointed contradictions and discrepancies to be minor defects incapable of weakening the prosecution case, we find no justification to fault the findings of the trial court on that aspect. Moreover, it has been the position of this Court that contradictions by witness or between witnesses is something which cannot be avoided in any particular case - see **Dickson Elia Nsamba Shapwata and Another v. Republic,** Criminal Appeal No. 92 of 2007 and **Marmo Slaa @ Hofu & 3 Others v. Republic,** Criminal Appeal No. 246 of 2011 (both unreported). The same position was also

taken in the case of **Issa Hassan Uki v. Republic,** Criminal Appeal No. 129 of 2017 (unreported) while citing with approval the High Court's decision in **Evarist Kachembeho and Others v. Republic** [1978] L.R.T 70 where it was observed, rightly so, that:

> *"Human recollection is not infallible. A witness is not expected to be right in minute details when retelling his story."*

In the same case of **Issa Hassan Uki** (supra), the Court also referred to the case of **John Gilikola v. Republic,** Criminal Appeal No. 31 of 1999 (unreported) where it was stated that due to frailty of human memory and if the contradictions or discrepancies in issues are on details, the Court may overlook such contradictions and discrepancies. Therefore, in the light of the above position of the law, we find the inconsistencies and discrepancies complained of did not corrode the evidence of prosecution witnesses and we thus find the second, fourth and sixth grounds devoid of merit.

In conclusion, and looking at the totality of the evidence on record, we do not find any cogent reasons to fault the findings of the trial court, as we are satisfied that the evidence taken as a whole established that the prosecution's case against the appellants was proved beyond reasonable doubt.

Consequently, and for the foregoing reasons, we find the appeal devoid of merit and hereby dismiss it in its entirety.

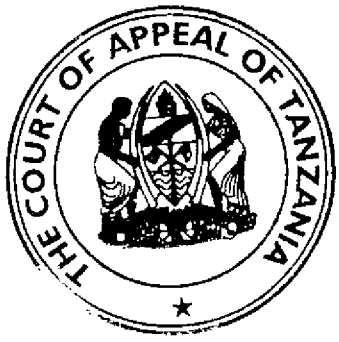
DATED at **ARUSHA** this 5th day of December, 2022.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

This Judgment delivered this 6th day of December, 2022 in the presence of the Appellants in person and Ms. Upendo Shemkole, State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL