THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MWARIJA, J.A., KWARIKO, J.A. And GALEBA, J.A.)

CRIMINAL APPEAL NO. 43 OF 2020

PELO MOLOIMET MUNGA @ PELO .... APPELLANT

VERSUS

THE REPUBLIC .... RESPONDENT

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

(Mzuna, J.)

dated the 13th day of September, 2019
in
Criminal Appeal No. 64 of 2017

JUDGMENT OF THE COURT

2nd & 8th December, 2022

MWARIJA, J.A.:

The appellant, Pelo Moloimet Munga @ Pelo and other three persons who are not parties to this appeal (the others) were jointly charged in the Resident Magistrate's Court of Manyara at Babati. They were charged with the offence of being found in unlawful possession of Government trophy contrary to paragraph 14 (d) of the First Schedule to and ss. 57 (1) and 60 (2) of the Economic and Organized Crime Control Act, Chapter 200 of the Revised Laws read together with s. 86 (1) (2) (b) of the Wildlife Conservation Act, No. 5 of 2009. It was alleged that on 9/10/2014 at

Ndedo Village within Kiteto District in Manyara Region, they were found in unlawful possession of eight elephant tusks weighing 32.6 kilograms valued at TZS. 29,925,170.00, the property of Tanzania Government.

The appellant and the others denied the charge and as a result, the case proceeded to a full trial. At the trial, the prosecution relied on the evidence of five witnesses while on their part, apart from their evidence, the appellant and the others called six witnesses to testify on their behalf. At the conclusion of the trial, the trial court was satisfied that the prosecution evidence had sufficiently proved the case against the appellant. He was therefore, convicted and sentenced to pay a fine of TZS. 299,000,000.00 or imprisonment for a term of twenty (20) years in default of payment of the fine. As for the others however, the trial court found that the case against them had not been proved. They were thus found not guilty and consequently acquitted. Aggrieved by conviction and sentence, the appellant unsuccessfully appealed to the High Court hence this second appeal.

The background facts giving rise to the appeal may be briefly stated as follows: On 9/10/2014 while in his office at Arusha, Raymond Mdori (PW2) who was until the material time a Game Officer, received information from the informer of Kikosi Dhidi ya Ujangili (KDU) (the Anti-

Poaching Task Force) that there were certain persons selling elephant tusks at Ndedo Makame area in Kiteto District, Manyara Region. The sellers were acting through an agent who was in Simanjiro town. By means of telephone communication, the informer connected the agent to PW2 who, according to his evidence, drove to Simanjiro in a private car with one Rajabu Nyoni and met the agent who allegedly introduced himself as Pelo Moloimet Munga. Rajabu Nyoni posed as a buyer and together with PW2, were led to Ndedo forest at the area where the sellers had hidden the elephant tusks (the scene of crime).

At the scene of crime, PW2 found five persons and heard the agent calling one of them by the name of Moses Kanitete Kenet. That person walked few steps into the forest and returned with a sulphate bag in which, upon inspecting the contents by aid of light from a big torch, PW2 was satisfied that it contained elephant tusks. Since the sellers had a weighing machine, the tusks were weighed and the same were found to have a total weight of 32.6 kilograms. It was agreed that the buyer would buy the tusks at the price of TZS. 50,000.00 per kilogram.

At that stage, PW2 found that it was time to arrest the sellers. He pulled out a firearm which was in his possession and fired a bullet in the air. He introduced himself and Rajabu Nyoni as Game Officers and placed

all the suspects under arrest. It was PW2's further evidence that, the suspects pleaded with him offering to let him and his colleague, Rajabu Nyoni take the tusks free of charge and release them.

PW2 went on to state that, he deluded them by requiring each of them to write his name and insert his signature on a sheet of paper as a condition for being released. According to the witness, the suspects did so and also signed the certificate of seizure. However, as the last person was signing the said certificate, suddenly, all of them ran away. PW2 and his colleague could not re-arrest the suspects and thus collected the elephant tusks and a motorcycle Reg. No. T.249 BPS which they had found at the scene of crime and took them to Arusha. The witness tendered in court eight elephant tusks; four big size pieces, two medium size and to small size pieces. The same were admitted in evidence as exhibit P1 collectively. He also tendered a weighing machine which was found at the scene of crime, certificate of seizure and the motorcycle Reg. No. T.249 BPS as exhibits P2 – P4 respectively.

Testifying further, PW2 contended that the incident was reported to the Game Officer In-charge, Terati, who promised to trace and arrest the suspects. The witness learnt later, on 17/10/2014, that all the suspects including the agent had been arrested by one Solomon Jeremia (PW3)

and other Game Officers. Following the arrest of the suspects, he was called to KDU office, Arusha so that he could identify them at what he termed as identification parade. He said that, he identified three of them including the appellant.

As for the seized elephant tusks, the same were verified by Deonatus Makene (PW4), a Park Ranger who prepared a trophy valuation certificate. According to the certificate, the tusks which, as stated above, weighed 32.6 kilograms, were worth USD 17,930 which is equivalent to TZS. 29,925,170.00 computed at the rate of USD 550 per kilogram. The trophy valuation certificate was admitted in evidence as exhibit P5.

As stated above, PW3 was the one who arrested the appellant. He testified that, after having received information about the suspects' whereabouts, on 16/10/2014 he arrested the appellant and the other two suspects, Moses Kaitete and Yohana Peter Ngoira. It was his further evidence that, together with other Game Officers, he arrested the appellant at his home in Namalulu Village and sent him together with the other two suspects to KDU's task force camp at Terati. He went on to testify that, on 17/10/2016, identification parade was conducted at KDU office and at that parade, Raymond Mdoe and Rajabu Nyoni identified the appellant, among other suspects.

PW3's evidence was supported by that of Chacha Manamba Masasi (PW5) who was a Game Warden at the time of the incident. He testified that, after having received information from Noel Chambo, their patrol in-charge that the suspects who were found at the scene of crime had escaped, their names were noted down and upon investigation, they came to be arrested. He added that, the appellant was arrested on 16/10/2014 at his home. After his arrest, the appellant was interrogated by Inspector James Kilosa (PW1) who was the investigating officer of the case.

On his part, PW1 testified that, he recorded the appellant's cautioned statement in which, he said, the appellant narrated how he participated in the commission of the offence. According to his evidence, the apellant was an agent of the sellers. The cautioned statement was however, not admitted in evidence by the trial court on account that the same was not made voluntarily.

In his defence, the appellant who testified as DW1 relied on the evidence of *alibi*. He testified that between 9/10/2014 and 14/10/2014, he was attending a clan meeting at Terati Vilalge. That he left from there on 14/10/2014 and returned to his home at Namalulu Village. He went on to state that, on 16/10/2014, a number of Park Rangers went to his

home, broke the door, arrested him and proceeded to beat him severely without being informed of the cause of his arrest and beatings.

It was his further evidence that, after his wife had raised an alarm, the Hamlet Chairman, Isaya Kimaji arrived in the company of Raymond Mdoe and his other three fellows who had firearms. The Hamlet leader asked the reason for the arrest of the appellant but instead of being told the cause, he was forced to sign a paper which he did because of fear. From his home, he said, he was taken to the Village Office and later to Kesmet, Simanjiro from where, on 17/10/2014, he was transported to KDU office, Arusha.

He went on to state that while there, he was taken to a room in which there were seven persons including Donald Raymond Mdoe and one Frank. His legs and hands were chained, he was placed on a table and forced to sign on a piece of paper without being informed of its contents. He testified further that, he was later taken to Kesmet Police Station, Simanjiro. He complained in his defence, that the case against him was framed up because he had grudges with one Njathan Mollel who was at the material time a Park Ranger. He said that, the quarrels between them arose when he married a woman who was previously the girlfriend of the said Njathan Mollel.

When he was cross-examined by the prosecution, the appellant stated that, he went to Terati Village on 8/10/2014 in the company of Mathayo Lomboi and his younger brother, Tautu Moloimet Munga. He stressed that, he was not at Ndedo village on 9/10/2014, adding that Mathayo Lombei was the Chairman of the clan meeting held on that date.

DW1's younger brother, Tautu Moloimet Munga testified in supported of the appellant's evidence of *alibi.* Testifying as DW6, he contended that on 8/10/2014, he travelled with DW1 from Namalulu to Terati Village in the company of their clan leader, Mathayo Lomboi who presided over the clan meeting on 9/10/2014. He further stated that, the appellant left Terati for Namalulu Village on 14/10/2014 and that, while at home on 16/10/2014, he was arrested by Park Rangers. He went on to support DW1's evidence that the Park Rangers tortured him and later on, took him to KDU office from where he was finally taken to police station.

As stated above, after having considered the evidence, the trial court found that the case against the appellant had been proved beyond reasonable doubt. It was of the view that, PW2 who travelled with the appellant in a private motor vehicle from Simanjiro to the scene of crime, had sufficient time to observe him and given the fact that, from the

evidence, it was in the evening hours, the identification of the appellant by PW2 was not doubtful. The trial court found further that, in the circumstances, there was no need of conducting a proper identification parade to identify the appellant.

On the evidence of *alibi* relied upon by the appellant, the learned trial Resident Magistrate discounted it for the reason that the appellant did not comply with s. 194 (3) and (4) of the Criminal Procedure Act, Chapter 20 of the Revised Laws. The trial court did not further, believe the evidence that the appellant was tortured on 9/10/2014, the date on which the certificate of seizure was prepared. It thus found that the appellant had voluntarily signed the certificate. On the alleged existence of grudges between the appellant and one of the Game Officers; Njathan Mollel, the trial court was of the view that, since that person did not testify against the appellant, such sour relationship, if any, could not raise any reasonable doubt in the evidence of the prosecution witnesses. Based on those findings, the trial court convicted the appellant and sentenced him as shown above.

On appeal, the trial court's decision was upheld by the High Court. The learned first appellate Judge was of the view that, the appellant was arrested red handed with exhibit P1. Like the trial court, he found that

the evidence of PW2 was watertight because he travelled with the appellant from Simanjiro to the scene of crime. He also held that, PW2's failure to give the appellant's description to the police before his arrest did not affect the credibility of his evidence. According to the learned first appellate Judge, PW2's evidence was that of recognition rather than identification because the appellant was well known to him. He supported his finding by citing the Court's decisions in the cases of **Doriki Kagusa v. Republic,** Criminal Appeal No. 174 of 2004 and **Ezekiel Noel v. Republic,** Criminal Appeal NO. 25 of 2002 (both unreported).

In his memorandum of appeal, the appellant has raised the following seven grounds:

> *"1. That, the trial court and the first appellate court erred in law and in fact by failing to evaluate the evidence of identification which was not sufficient in the pertaining circumstances.*
>
> *2. That, the first appellate court erred in law and in fact by failing to note that the trial court failed to evaluate the evidence properly and hold that the prosecution failed to account the chain of custody of the exhibits P1, P2, P3, P4 and P5 which were tendered by PW2*

and PW4, i.e. the chain of custody was not established.

3. *That, the first appellate court and the trial court proceedings are tainted with gross incurable procedural irregularities which render the whole decision thereof null and void.*

4. *That, the conviction of the appellant was based on exhibits P3 and P5 which ought to have been expunged from the record as they were not read over to the court as required by law after having been admitted in evidence.*

5. *That, the first appellate court erred in law and in fact for failing to note that the trial court had failed to find that the facts alleged to have linked the appellant to the offence of unlawful possession of Government trophy was not proved. i.e. the appellant's defence was neglected.*

6. *That, the trial court erred both in law and in fact in convicting and sentencing the appellant . . . without satisfying itself on the proper and correctness (sic) of the scene of crime.*

7. *That, as a whole, the prosecution did not prove its case beyond reasonable doubt i.e. The prosecution witnesses contradicted themselves and thus ought not to have been believed."*

At the hearing of the appeal, the appellant was represented by Mr. John Shirima, learned counsel while the respondent Republic was represented by Ms. Eliainenyi Njiro, learned Senior State Attorney assisted by Mse. Penina Ngotea and Jacqueline Linus, both learned State Attorneys.

Before he commenced his submission, Mr. Shirima informed the Court that he would argue the 1st, 2nd, 4th and 7th grounds alone. He thus abandoned the 3rd, 5th and 6th grounds of appeal. On the 1st ground, the learned counsel challenged the finding of the two courts below that the appellant was identified as one of the persons who were found in possession of exhibit P1 on 9/10/2014. He argued that, the evidence of PW2 on identification of the appellant was doubtful because, first, he did not identify the appellant at the identification parade conducted by police and secondly, even if there was such a parade, there is no evidence showing that the same was properly conducted. He argued that, apart from the fact that no any identification parade register was tendered, the

record is silent as regards the person who identified the appellant and whether the laid down rules of conducting identification parade were followed. According to the learned counsel, in such a situation, the finding that the appellant was properly identified is erroneous.

In response to the submission made in support of the 1st ground of appeal, Ms. Njiro argued that the appellant was properly identified by PW2 who, after having met the appellant at Simanjiro travelled with him to the scene of crime. She stressed that, since the duo met in the evening, which according to her, was during the daylight and travelled together in a private car, the identification evidence of PW2 was watertight because he had sufficient time to observe the appellant.

We have duly considered the brief submissions made by the appellant's counsel and the learned Senior State Attorney on the 1st ground of appeal. It is common ground that, the question of identification was crucial to the determination of the case. The two courts below concurrently found that the appellant was properly identified by PW2. In the circumstances, this being a second appeal, the Court cannot, as a matter of principle, interfere with current findings by the two courts below unless it is shown that there has been, among other things, a misapprehension of the substance, nature and quality of the evidence or

that there has been a misdirection or non-direction on the available evidence on the record. – See for instance, the cases of **Wankuru Mwita v. Republic**, Criminal Appeal No. 219 of 2012 and **Yohana Dioniz and Another v. Republic,** Criminal Appeal No. 114 of 2009 (both unreported).

In this case, the evidence of PW2 is to the effect that, the person who took him to the scene of crime on 9/10/2014 was the agent of the sellers of exhibit P1. It was the prosecution's case, which was believed by the two courts below, that since PW2 travelled with the said agent from Simanjiro to the scene of crime, he was thereafter well known to him and when the appellant was arrested later on 16/10/2014, there was no need of conducting identification parade for him to be identified by PW2 because there could not be any possibility of a mistaken identity.

It is trite law, as observed in the case of **Waziri Amani v. Republic** [1980] T.L.R. 250 that:

> *"(i) Evidence of visual identification is of the weakest kind and most unreliable.*
>
> *(ii) no court should act on evidence of visual identification unless all possibilities of mistaken identify are eliminated and the court is fully*

satisfied that the evidence before is absolutely watertight."

The issue is whether the identification evidence of PW2 was watertight. Having considered that evidence of identification which was relied upon by the prosecution, we are satisfied that the two courts below acted on it without having properly evaluated it. In the first place, no identification parade was conducted in terms of the Police General Orders (PGO) No. 232. The one which was referred to by PW2 in his evidence is that which was purportedly conducted at the KDU, Arusha. At page 57 of the record of appeal, the said witness stated as follows:

> *"So on 17/10/2014 I was called at KDU (Kikosi Dhidi ya Ujangili), anti-poaching unit for identifying parade action (sic) the accused identification and identified three people, 1st accused Pelo Moloiment Moses Keleli 2nd accused and 3rd accused Yohane Peter Ngeria."*

The finding by the first appellate court that no identification parade was conducted is, for this reason, correct. However, with respect, it is perturbing that, notwithstanding that finding, the first appellate court maintained that there was watertight evidence of identification by PW2. In his judgment at page 226 of the record of appeal the learned Judge states as follows:

"Another point of interest is on the issue of failure to conduct identification parade and that PW2 never gave description by physique at the police station when he made his statement. ***There could not have been identification parade because PW2 was a witness of recognition as he spent more time with the appellant as was well known to him."***

[Emphasis added].

With respect to the learned Judge, the contention that the appellant was well known to PW2 is not borne out by the record. According to the evidence, PW2 met the agent who is alleged to be the appellant, on 9/10/2014 and travelled with him to the scene of crime. There is no evidence showing that PW2 named and described that person to the police before his arrest. Again, according to PW2's evidence, while at the scene of crime, he required all the suspects to write their names, meaning that he did not know any of them before.

Since therefore, PW2 did not know the appellant before the date of the incident because it was his first time to see him on 9/10/2014, the prosecution ought to have conducted identification parade. That would have enabled PW2 and/or Rajabu Nyoni to ascertain whether or not the appellant was the person who travelled with them to the scene of crime.

Failure to do so renders the evidence of identification, if any, unreliable. We thus hold that, the courts below wrongly acted on the evidence of identification to found the appellant's conviction.

Our finding on the first ground of appeal sufficies to dispose of the appeal. Without watertight evidence of identification, the case against the appellant crumbles. In the circumstances, the need to consider the other grounds of appeal does not arise. In the event, the appeal is hereby allowed. The conviction of the appellant is quashed and the sentence is set aside. He should be released from prison forthwith unless he is otherwise lawfully held.

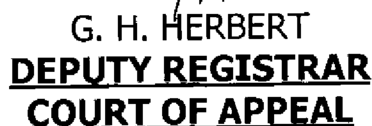
DATED at **ARUSHA** this 7th day of December, 2022.

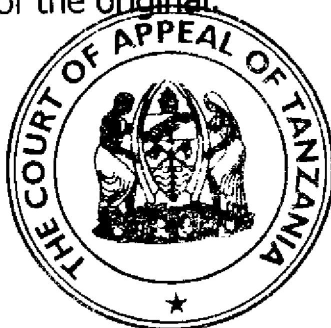
A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

The Judgment delivered this 8th day of December, 2022 in the presence of the Appellant in person and Ms. Penina Ngotea, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.





G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL