IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

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

CRIMINAL APPEAL NO. 47 OF 2020

PAPAA OLESIKALADAI @ LENDEMU ..... 1ST APPELLANT

BATIAN MALEE @ PESHUTI ..... 2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

[Appeal from the Judgment of the High Court of Tanzania (Corruption and Economic Crimes Division), at Arusha]

(Matupa, J.)

dated the 4th day of October, 2019

in

Economic Crimes Case No. 1 of 2019

.....

JUDGMENT OF THE COURT

29th November & 20th February, 2023

MWAMBEGELE, J.A.:

This is a first appeal. It stems from the decision of the High Court of Tanzania (Corruption and Economic Crimes Division) in Economic Crimes Case No. 1 of 2019 in which the appellants, Papaa Olesikaladai @ Lendemu and Batian Malee @ Peshuti were jointly charged with and convicted of the offence of unlawful possession of Government trophy contrary to section 86 (1) and (2) (c) (ii) of the Wildlife Conservation Act, No. 5 of 2009 (the Wildlife

Act); now Cap. 283 of 2022, read together with paragraph 14 of the First Schedule to, and sections 57 (1) and 60 (2) of the Economic and Organized Crime Control Act, Cap. 200 of the Revised Edition, 2002 (Cap. 200) as amended by sections 16 (a) and 13 (b) of the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016. They were sentenced to pay a fine of Tshs. 71,519,800/=, the tenfold value of the trophies, or a jail term of twenty years in default thereof. They are now appealing against the conviction and sentence through a joint memorandum of appeal.

The material background facts leading to the appellants' arrest, as can be gleaned from the record of appeal, are as follows: the information leveled against the appellant has it that on 29.07.2017 at Ndarakwai Village, Siha District in Kilimanjaro Region, the appellant were found in unlawful possession of Government trophies to wit; three elephant tusks equivalent to two killed elephants each valued at USD 15,000.00, a sum total of USD 30,000.00 equivalent to Tshs. 67,260,000/=, the property of the Government of the United Republic of Tanzania.

A holding charge was preferred against the appellants in the Court of the Resident Magistrate of Arusha in Economic Crimes Case No. 76 of 2017

and later, after the appellants were committed for trial by the High Court, an information was filed in the High Court in Economic Crimes Case No. 1 of 2019 to which the appellants pleaded not guilty.

At the trial, the prosecution fielded four witnesses to prove its case. James Anthony Kugusa (PW1) is a person in charge of the store which keeps exhibits. He testified that he was handed the Government trophies and a motorcycle by PW2 in the presence of the appellants. He tendered the handing over certificate which was admitted in evidence and marked Exh. P1. He also tendered another handing over certificate between him and Hezron Joseph Mongi (PW3) who conducted the valuation of the trophies. It was admitted and marked Exh. P2. He also tendered the three pieces of the elephant tusks which were marked Exh. P3(a), P3(b) and P3(c). The motorcycle was also tendered and marked Exh. P4.

What actually happened is found in the testimony of Ronald Lyimo (PW2), a Game Officer who was on patrol on the night of the material date at a place called Mitimirefu where he and his colleagues had camped. He got wind from an informer to the effect that there was a person carrying elephant tusks and was to pass through Ndarakwai area heading to Arusha

from Tingatinga area. He and his colleague, a certain Joseph Masele, planned to and did waylay them. After a short while, they saw two motorcycles approaching. They stopped them but one of the motorcycles did not stop; it u-turned and disappeared in thin air. The one that stopped had the appellants on it. Upon being searched, they were found in possession of the said three elephant tusks. He prepared a certificate of seizure which was also signed by the appellants by their respective thumbprints. They took them to Njiro police station and later arraigned in court.

PW3 is a wildlife officer who prepared the Trophy Valuation Certificate (Exh. P6). Asst. Inspector Kaitila Machinde (PW4) wrote the first appellant's cautioned statement which, however, the learned trial Judge, for reasons stated, refrained from relying on it to convict the appellants.

The appellants did not call any witness except for themselves. In their respective defences, they testified that they were arrested in a farm belonging to a white man and thus popularly known in Kiswahili as *Shamba la Mzungu*, meaning "the White Man's Farm". While the first appellant testified that he was caught grazing his cattle therein, the second appellant

testified that he was arrested in that farm after he went there in response to an alarm raised by a certain person asking for help. Both appellants deny to have been arrested in the manner stated by the prosecution, let alone being arrested in possession of the Government trophies.

After a full trial, the appellants were found guilty as charged, convicted and sentenced in the manner alluded to above. Dissatisfied, the appellants have knocked the doors of this Court still protesting their innocence. They lodged a joint memorandum of appeal comprising ten grounds on 07.09.2021 and on 25.11.2022, they lodged a supplementary memorandum of appeal consisting of three grounds. That makes thirteen grounds of appeal in total.

At the hearing of the appeal, both appellants appeared in person, unrepresented. Ms. Janeth Sekule, learned Senior State Attorney, Ms. Grace Madikenya, learned State Attorney and Ms. Janeth Masonu, also learned State Attorney, teamed up to represent the respondent Republic.

In their written submissions, the appellants started to argue the grounds in the supplementary grounds of appeal in which the first ground is a complaint over the appellants being convicted on an information which was

incurably defective. They submitted that the information showed the value to be Tshs. 67,260,000/= but none of the witnesses made reference to it. This, they argued, is clear variation between the information and evidence. They argued that the prosecution ought to have amended the information in terms of section 234 (1) of the Criminal Procedure Act, Cap. 20 (the CPA), failure of which made the information defective and that was fatal. The appellants cited **Issa Mwanjiku @ White v. Republic**, Criminal Appeal No. 175 of 2018 (unreported) in which we observed in an akin situation that the prosecution ought to have amended the charge and require an accused person to plead to the altered charge.

Responding to this ground, Ms. Madikenya submitted that the record bears out at p. 35 that the information leveled against the appellants had all the ingredients of the offence. She submitted further that the appellant's complaint that there is no evidence to support the information is not supported by record. She added that at p. 58 of the record of appeal, PW3 testified that the elephant tusks he conducted valuation on belonged to two elephant tusks. Since the value of one elephant is USD 15,000.00, he doubled the amount and multiplied with the exchange rate of the day of a dollar to a shilling to get the amount in the information. The learned State

Attorney added that the Trophy Valuation Certificate shows the value of Tshs. 67,260,000/= and was tendered in evidence without any objection and admitted as Exh. P6. The appellants' complaint is thus not backed by record and should be dismissed, she argued.

We have considered the ground of appeal and the contending submissions of the appellant and the learned State Attorney in the light of the record of appeal. We agree with the learned State Attorney that the appellants' complaint is not backed by record. As rightly put by the learned State Attorney, PW3 conducted the valuation of the trophies and stated the basis upon which the amount in the Trophy Valuation Certificate (Exh. P6) was pegged. The value of the trophies in Exh. P6 is shown to be Tshs. 67,260,000/=. This is the amount shown in the information at p. 35 of the record of appeal. In view of this, we are afraid, we cannot accept the appellants' complaint that, as regards the value of the trophies, the information is at variance with the evidence. On the contrary, the evidence of PW3 and Exh. P6 is in all fours with the details in the information in respect of the value of the elephant trophies [Exh. P3(a), (b) and (c)]. We, like Ms. Madikenya, are of the considered view that this complaint by the appellants is baseless. We dismiss it.

The complaint in the second ground of the supplementary memorandum of appeal is that courts below erred in law and in fact for failure to field an independent witness. They submitted that one Joseph Masele is said to be present during the arrest of the appellants but was never called to testify. This witness was very important for the prosecution and should have been called to testify given the disputed evidence of the arresting officer, they argued. They cited **Pascal Mwinuka v. Republic**, Criminal Appeal No. 258 of 2019 (unreported) in which we observed the need to call independent witnesses.

Responding, Ms. Madikenya submitted that Joseph Masele was a wildlife officer and not an independent witness as alleged by the appellant. This is borne out by the record of appeal at p. 51 where PW1 testified that he was with his colleague Joseph Masele who works with the Anti-Poaching Unit known in Kiswahili as *Kikosi Dhidi ya Ujangili (KDU)*. She added that the search in the present matter was conducted at the *locus in quo* where no people resided and therefore an independent witness could not be readily available and thus his presence could be dispensed with. To buttress this stance, she referred us to our unreported decision in **Jason Pascal and Another v. Republic**, Criminal Appeal No. 615 of 2020.

Having considered the contending arguments of both sides in the light of the evidence on record, we find no difficulties in agreeing with the learned State Attorney. It is clear in evidence that the said Joseph Masele was not an independent witness but a wildlife officer working with the Anti-Poaching Unit like PW2. In the circumstances, contrary to what the appellants would wish, he could not play the role of an independent witness. The complaint that the said Joseph Masele was not called to testify will not consume much of our precious time to answer it in detail, for it is trite law that, in terms of section 143 of the Evidence Act, Cap. 6 of the Laws of Tanzania, no particular number of witnesses is required to prove a certain fact. What matters is the credence of the witness or witnesses who testify in support of that fact. That is to say, what is important is the quality, not the quantity, of the evidence placed before the court – see: **Mwita Kigumbe Mwita and Another v. Republic**, Criminal Appeal No. 63 of 2015 (unreported).

We agree that no independent witness was fielded by the prosecution in support of its case. This is understandable, for PW2 testified that they waylaid the appellants at a place where no other people lived. In terms of section 106 (1) of the WCA, the presence of an independent witness depends on the circumstances of each case. Where, like here, an offence is

committed in a remote area, bush or forest where an independence witness cannot be procured, his presence can be dispensed with in terms of section 106 (1) of the WCA - see: **Emmanuel Lyabonga v. Republic**, Criminal Appeal No. 257 of 2019, **Matata Nassoro and Another v. Republic**, Criminal Appeal No. 329 of 2019 (both unreported) and **Jason Pascal and Another** (supra). The complaint in this ground is therefore dismissed.

The third ground in the supplementary memorandum of appeal will not detain us. It is a complaint that the information and the evidence adduced were at variance in that the information shows that the appellants were found in possession of three elephant tusks while the Certificate of Seizure (Exh. P1) shows that there were two elephant tusks and one piece of elephant tusk. He added that the information showed that the elephant tusks found in possession of the appellant exhibited two elephants killed while the evidence showed three elephants killed. Ms. Madikenya submitted in response that the variance complained of was nonexistent. She submitted that there were three pieces of elephant tusks; one was not complete. The one not complete belonged to a different elephant. She argued that the appellants' complaint therefore has no merit.

We think Ms. Madikenya is right. The complaint with regard to the number of the elephants killed was clear in evidence. We have discussed this issue above when determining ground one in the supplementary memorandum of appeal. PW2 testified that the second appellant was found in possession of one piece of an elephant tusk and that there were three elephant tusks signifying that two elephants were killed. The same details are in the charge sheet, the Trophy Valuation Report and the Certificate of Seizure. The appellants' complaint has no justification at all. It is dismissed. That is all with the grounds in the supplementary memorandum of appeal.

We now turn to the grounds of appeal. As stated above, there are ten of them. However, on our careful examination, we think some are intertwined, either with other grounds in the memorandum of appeal or with grounds in the supplementary memorandum of appeal. We shall state so when we reach to determine those grounds and combine them accordingly.

Ground one in the memorandum of appeal is a complaint that the trial judge erred in conducting the trial while the record does not show that an order of 17.09.2019 for fresh committal proceedings to be conducted was complied with. At the hearing of the appeal, the appellants did not argue

this ground of appeal. Neither did they do so in their written submissions. Ms. Madikenya, responded to the first ground that the complaint is not backed by evidence because the record bears out at p. 39 that the order of the trial judge was complied with. We agree with her. The record of appeal shows at p. 39 that on 17.09.2019, the trial judge noted that the committal proceedings had some discrepancies he did not mention. He ordered that the committal proceedings be conducted afresh. He also ordered the same to be conducted on the same day and trial would proceed on the following day.

On 18.09.2019, the trial judge commenced the trial by taking the plea of the appellants and conducted a Preliminary Hearing. Admittedly, the typed court record of appeal does not show compliance of the order of the trial court of 17.09.2019. However, the original file show that the Court of the Resident Magistrate of Arusha complied with the order hence the continuation of the trial on 18.09.2019. We will thus dismiss this complaint for not being backed by the original record of appeal.

The second ground of appeal faults the trial court for convicting the appellants while no receipt was issued thus flouting the provisions of section

38 (3) of the CPA. They argued that as those provisions were not complied with, the trial court should not have convicted them. Relying on our unreported decisions in **Shaban Said Kindamba v. Republic**, Criminal Appeal No. 390 of 2019 and **Mustafa Darajani v. Republic**, Criminal Appeal No. 227 of 2008, they submitted that the search was illegal and that the omission was fatal. The learned State Attorney submitted that issuing a receipt after a certificate of seizure is prepared is not a requirement of the law. He argued that it was held in **Matata Nassoro and Another** (supra) that a receipt is not necessary when a certificate of seizure is issued.

We agree with Ms. Madikenya that the complaint for non-issuance of a receipt will have no place in cases where a certificate of seizure is issued. This stance is fairly settled in our jurisdiction. We discussed this position at some considerable length in **Gitabeka Giyaya v. Republic**, Criminal Appeal No. 44 of 2020 (unreported), a judgment we rendered on 28.12.2022. In that appeal, we relied on a number of previous decision including **Ramadhan Idd Mchafu v. Republic**, Criminal Appeal No. 328 of 2019 **Abdalah Said Mwingereza v. Republic,** Criminal Appeal No. 258 of 2013 (both unreported) and **Matata Nassoro and Another** (supra) to underscore the point that where, like here, a certificate of seizure is issued

and is signed by the accused person, the same constitutes evidence even without a receipt.

In the appeal before us, the appellants thumb printed the certificate of seizure and PW2 testified that they were found in possession of the elephant tusks after waylaying them. Given the authorities referred to above, and in the light of the testimony of PW2, we find and hold that the omission to issue a receipt in terms of sections 38 (3) of the CPA or 22 (3) of Cap. 200 was not fatal. The ailment is curable under the provisions of section 388 of the CPA. For the avoidance of doubt, and as we held in **Gitabeka Giyaya** (supra), we add that the use of the word "shall" in the two provisions should not be taken to be imperative as provided by section 53 (2) of the Interpretation of Laws Act, Cap. 1 of the laws of Tanzania, but is relative and subjected to the provisions of section 388 of the CPA – see: **Bahati Makeja v. Republic** [2010] T.L.R. 49, the decision of the Full Bench of the Court. We thus find the complaint in the second ground of appeal to be wanting in merit and dismiss it.

The third ground of appeal seeks to fault the trial court for convicting the appellants on the strength of the handing over forms, certificate of

seizure and the cautioned statement which were tendered in evidence by the prosecution witnesses but the same were not known to the appellants as they could not read and write and there was no evidence that the same were read to them before they thumb printed the same. Ms. Madikenya resisted and submitted that the appellants signed the documents complained of and that PW2 testified as evident at p. 52 of the record of appeal that the appellants spoke Kiswahili and it is the language that was all along used to communicate. After all, she added, the handing over forms were tendered in evidence as evident at p. 47 of the record of appeal without any objection.

We have considered this complaint. Except for the cautioned statement of the first appellant, all documents complained of were tendered and admitted in evidence without any objection from the appellants. The appellants were represented at the trial and therefore, we have serious doubts on the genuineness of the complaint. On our part, we think this complaint is more of an afterthought than a genuine one. The High Court addressed this question at p. 187 of the record of appeal and dismissed the complaint as not depicting the truth. The learned High Court Judge observed at p. 188 of the record of appeal as follows:

"Another significant contention by the learned counsel for the accused persons is that, the accused persons do not know Kiswahili. As such, they could not communicate with the officers when they were arrested and questioned. I am not persuaded with this angle of the case. This is because the accused persons were able to record their respective statements within four hours allowed basic period for investigation under section 50 of the Criminal Procedure Act. the details in the statements are inconsistent with the claim that the maker of the statements was not able to communicate. I hold that the claim at the trial and in the final submission of the learned counsel for the accused persons that the accused persons did not understand Kiswahili was not made at the time of recording the statement or when they were arrested. I should not be misunderstood on this position I am taking to mean that the statements were voluntarily given. Recording of a statement is one thing, the voluntariness of recording is another. In the present case there was communication which was recorded the voluntariness of recording is doubtful."

We agree with him entirely. As already alluded to above, it seems to us that, except with regard to the cautioned statement, this complaint by

the appellants is but a lame attempt to rescue the otherwise capsized and now sinking boat.

As regards the complaint on the cautioned statement of the first appellant, the record speaks loudly and clearly that the appellants objected to its being tendered in evidence. That objection was overruled by a ruling of the trial court commencing from p. 67 of the record. The High Court Judge observed that the admission of the same was one thing and the weight to be attached to it was quite another. Indeed, in his judgment, the trial judge approached the cautioned statement with circumspection. Having addressed the circumstances of the case and the manner in which the cautioned statement was taken, the learned trial judge concluded that he could not rely on it. The trial Judge indeed walked the talk by not relying on it to found a conviction against the appellants. It follows that the appellants' complaint with regard to the cautioned statement has no merit as well. This said, we find and hold that the complaint under this ground of appeal is without merit. We dismiss it.

Grounds four and five of the memorandum of appeal challenge the cautioned statement (Exh. P7) that it was repudiated and taken out of the

prescribed time. We have already answered this complaint in the foregoing paragraph. The trial Judge did not rely on Exh. P7 to found a conviction against the appellants as he was satisfied that there was no explanation made by the respondent Republic why it was not timely made. The complaint in grounds four and five are therefore dismissed.

Ground six is a complaint by the appellants on the trial court not making an adverse inference against the prosecution for not calling Japhet Masele. We have already determined this complaint above when considering ground two of the supplementary memorandum of appeal; a complaint that no independence witness was fielded by the prosecution. We shall not repeat here. It only behooves us to dismiss this ground of appeal as well.

The complaint in the seventh grounds of appeal is failure by PW2 to testify on which elephant tusks were retrieved from the first appellant and which from the second appellant. The appellants prayed in their written submissions that this ground be considered as it is and would make a rejoinder if need to do so arose. At the hearing, they did not make any rejoinder. Ms. Madikenya submitted that PW2 testified at p. 50 of the record of appeal who was found in possession of which elephant tusks. We agree.

Indeed, at pp. 51-52 of the record of appeal, PW2 testified that the first appellant was found with elephant tusks and the second appellant was found with one piece of elephant tusk. This signifies that the second appellant was found in possession with only one piece signifying that the rest were found in possession of the first appellant. In the circumstances, we fail to comprehend the appellants' complaint that the witness did not tell which elephant tusks were found in which appellant. Since both of them were found in possession of the elephant tusks, this complaint is without merit and is therefore dismissed.

The remaining grounds of appeal were argued conjointly by the appellants by simply stating that they should be considered as they were and that they would rejoin after the response of the Republic. However, at the hearing, the appellants did not make any rejoinder on it. The Republic also combined them in their response. Ms. Madikenya simply stated that the case was proved against the appellant beyond reasonable doubt. The complaint in the eighth ground was that the evidence of the appellant was weak, tenuous, contradictory, uncorroborated and wholly unreliable. It is a cherished principle of law enshrined in section 110 of the Evidence Act, Cap. 6 of the Laws of Tanzania that he who alleges must prove. The appellants

have just alleged these three grounds of appeal but have not brought any material to support them. We think it was incumbent upon the appellants to prove what they alleged. Be it as it may, we fail to see any material contradiction in the prosecution evidence. If anything, contradictions that are evident in the record of appeal are minor which do not go to the root of the matter and therefore they can be overlooked – see: **Dickson Elia Nsamba Shapwata and Another v. Republic**, Criminal Appeal No.92 of 2007 (unreported). This ground also fails.

Given the reasons we have endeavoured to assign above, we find this appeal without merit.

With regard to the sentence imposed, upon being prompted, Ms. Madikenya submitted that the appellants ought to have been sentenced in accordance with section 60 (2) of Cap. 200 as amended by sections 16 (a) and 13 (b) of the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016. For their part, the appellant left to us to decide the sentence the way we deem fit in accord with the law. We think Ms. Madikenya is right. The appellants, as already stated at the beginning of this judgment, were sentenced to pay a fine of Tshs. 71,519,800/= which is the tenfold value of

the trophies they were found in possession with, or to a jail term of twenty years in default. We think the trial Judge, in so sentencing, strayed into error, for that is no longer the position of the law following the coming into force of the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016 whose section 13 amended section 60 (2) of Cap. 200. We shall demonstrate. That amendment reads:

> "*Notwithstanding provisions of a different a different penalty under any other law and subject to subsection (3), a person convicted of corruption or economic offence shall be liable to imprisonment for a term of not less than twenty years but not exceeding thirty years, or to both that imprisonment and any other penal measure provided for under this Act;*
>
> *Provided that,* ***where the law imposes penal measures greater than those provided by this Act, the court shall impose such sentence."*** (emphasis supplied).

Since these amendments had a force of law on 08.07.2016 and the offence was committed on 29.07.2017 after the coming into force of the amending section, and actually the amending law was stated in the charge,

the trial judge, having convicted the appellants, ought to have complied with the letter of section 60 (2) of Cap. 200 as amended. That section requires that a stiffer sentence be imposed. In the circumstances, we use our powers of revision bestowed on us under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 of the Revised Edition, 2019 to set aside the sentence imposed on the appellants and replace it with one of twenty years in prison.

With the above variation of sentence, the appeal stands dismissed.

DATED at **DAR ES SALAAM** this 16th day of February, 2023.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Judgment delivered this 20th day of February, 2023 in the presence appellants in person and Ms. Akisa Mhando, learned Senior State Attorney for the Respondent/Republic through video link is hereby certified as a true copy of the original.

A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL