

TANZANIA / JUDGMENT

JUDGMENT Alphonse Agustine Mlilo v Republic

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THE JUDICIARY OF TANZANIA IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA AT
KIGOMA ECONOMIC APPEAL NO. 000003653 OF 2025 ALPHONCE AGUSTINO
MLILO COMPLAINANT / APPELLANT / APPLICANT VERSUS
REPUBLIC RESPONDENT / DEFENDANT

JUDGMENT

NKWABI, J 11/03 & 03/04/2025 The appellant is brutally fighting his conviction and sentence. He was convicted by the district court of Kasulu, K.V. Mwakitalu- SRM, for unlawful possession of Government trophy contrary to section 86(1) (2) (b) of the Wildlife Conservation Act, Cap. 283, R.E 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 R.E 2022]. Finally, in the trial court, the appellant was sentenced to twenty years imprisonment. It was initially alleged, in the trial court, that the appellant together with another person, who was later acquitted, were, on the 14th day of June, 2024 found in possession of 24 pieces of elephant tusks. They were valued and found to have the value of USD 100,000.00 equivalent to T.sh 261,500,000/- The appellant was then sentenced to twenty years imprisonment. He is now challenging the conviction and sentence just as I have demonstrated above. He is praying this Court to allow his appeal, the conviction be quashed, the sentence imposed on him set aside while he be set free. The most significant ground of appeal is that, the guilty of the appellant was not proved beyond reasonable doubt. This ground of appeal stood as the 6th one in the petition of appeal. When the appeal was called on for hearing, the appellant was unrepresented while the Republic was represented by Mr. Dickson Makongo, learned State Attorney. The hearing of the appeal was carried out by way of oral submissions. The appellant's submission in chief was succinct. He urged this Page. 1 Hon... JOHN NKWABI Court to consider his grounds of appeal and decide accordingly. Contesting the appeal, Mr. Makongo sturdily submitted that there was no contradiction in the prosecution's witnesses as pointed in the second and third grounds of appeal. According to Mr. Makongo, a trap was set up prior to the arrest of the appellant. As for the first ground, Mr. Makongo responded that the respondent's evidence was not weak as suggested by the appellant. He added that there was an independent witness and for that case the appellant's first ground of appeal has no basis and deserve to be dismissed. Submitting on the appellant's fourth ground of appeal on the

contention that his defence was not considered by the trial court, Mr. Makongo indicated that the appellant's defence was lame and it was rightly not considered by the trial court. He cited the case of Jibril Okash Ahmed v. Republic, Criminal Appeal No. 331/2017 CAT- Arusha (unreported), Mr. Makongo went on to maintain that it is not a mandatory requirement of the law for the prosecution to tender a receipt, and as per the cited case such omission is minor. Mr. Makongo contended on the sixth ground that without a permit or license the appellant was found in possession of government trophies. Consistent with dismissal of this ground, he argued that the appellant did not defend on the claim that communication be tendered before the trial court. In his rejoinder the appellant left it all to the Court to decide the appeal and let justice be done, to him. The stand points of both parties to this appeal being as stated above, in this case, credibility of witnesses is very important. Unfortunately, contrary to what Mr. Makongo submitted, the prosecution witnesses are not credible due to terrible contradictions and inconsistencies in their testimonies especially concerning the independent witness how and the reasons he was picked as an independent witness. In Awadhi Abrahamani Waziriv. Republic, Criminal Appeal No. 303 of 2014, CAT which quoted with thumb-up, the decision in Augustine Njirige Ritho @ Chabah v. Republic, Criminal Appeal No. 99 of 1986, CAT, where it was held that: "It is trite law that where evidence is inconsistent or where it is contradicted it cannot be relied upon." Of equal importance is the findings of the Court of Appeal of Tanzania in Sikujua Deogratias Makamba @ Siku v. Republic, Criminal Appeal No. 740 of 2023, CAT, (unreported) dated 24/03/2025, the Court acquitted the appellant who had been convicted of rape while reiterating its stance that the testimony of the victim of sexual offence should not be taken as gospel truth but has to pass the test of truthfulness. See also Shabani Daudi v. Republic, Criminal Appeal No. 28 of 2000, Page. 2 Hon... JOHN NKWABI CAT, (unreported) where it was underscored that: "The credibility of a witness can also be determined in two other ways: One, when assessing the coherence of the testimony of that witness. Two, when the testimony of that witness is considered in relation with the evidence of other witnesses, including that of the accused. Likewise, in Nyakuboga Boniface v. The Republic, Criminal Appeal No. 434 of 2016, CAT, 29/11/2019 (unreported) in its wisdom, the Court of Appeal of Tanzania unambiguous that: "... it is the fact that observation and assessment of the demeanour of a witness, is in the exclusive monopoly of the trial Judge/magistrate. Moreover, besides observing the appearance of the witness, in resolving as to whether the witness is trustworthy and telling the truth, the trial judge/magistrate, is enjoined to correlate the demeanour of the witness, and the statements he/she makes during his/her testimony in court. If they are not consistent, then the credibility of the witness, becomes questionable." To bring home my point, at this moment in time, in the appeal under my consideration, it is pertinent here to look at the testimonies of the respondent's witnesses including the independent witness himself. PW.1 Kelakela testified that: "It was then we hide the Toyota land cruiser at the church compound and remained only with the Toyota Probox car and we picked a civilian who was a resident of that area who introduced himself as Joseph Magesa and we requested him to accompany us to the crime scene and be an independent witness ..., he agreed and entered in our car and we headed to the place where CR II Gershom had agreed to meet the suspect. We picked Joseph Magesa as the independent witness because he was the only person we could find at that area because the area where the suspect agreed to meet CR II Gersom was a place with few

residents and there was no village leaders who we could find around that area considering that the tusk we were going to perform there was an emergency tusk because if we could have delayed any longer to go meet the suspect he could be alerted and escape with the trophies.” PW.2 Gershom avowed that: “... inside the Toyota Probox car whereby we had another person who we picked at Nyamgali village (while another witness said the village is far away) and he was introduced to us by PW1 as Joseph Magesa (if they were moving in the car) and he requested him to be our independent witness during the search we were going to conduct after arresting the suspect, also inside the Toyota Pro box I was with PW1, DC Hadi, DC Ezekiel and Rajabu and together with the said Joseph Magesa.” Page. 3 Hon... JOHN NKWABI PW.3 Joseph Magesa told the trial court that: “... in the evening I was coming from my businesses at Malagalasi river within Nyamgali village and I was returning to the place where I was staying which was at Kikulango Hamlet, it was when I was walking continuing to head to my home I met a Toyota Probox car which parked near me, the people who were inside that call called me and I went near that car to listen to them. They asked me where do I live. ... So, it is not PW2 who introduced PW.3 to the other witnesses. And in cross-examination he revealed that he is not a permanent resident of that area. He did not also know why a non-resident was picked instead of villagers.” PW.7 Adamu Juma gave evidence that: “When we were heading to the crime scene PW1 requested a civilian who we met on the way to go with us to the crime scene so that he could be our independent witness during the arrest and search of the suspects, the said civilian who introduced himself as Joseph Magesa agreed and boarded into our car. ... We decided to request the said civilian and not village leaders because it was an emergency and the place where the incident was taking place was far from the village.” On his side, PW.8 Mgeta stated on oath that: “Before we went to the crime scene we left the Toyota land cruiser which carried undercover officers at the place where there was a FPCT church and headed to the place where PW2 had agreed to meet the suspects using a Toyota Probox. When we were heading to the crime scene PW1 made a communication to village leaders so that they could accompany us to the crime scene but they were all not reachable and it was then PW1 requested a civilian who we met on the way and asked him to go with us to the crime scene so that he could be our independent witness during the arrest and search of the suspects, the said civilian who introduced himself as Joseph Magesa agreed and boarded into our car and accompanied us to the crime scene. We decided to request the said civilian after we failed to get village leaders in time.” PW.1 suggests, about the independent witness, the following:

1. PW.3 is a resident of that area. But PW.3 himself said he is not a permanent resident of the village, but rather a resident of Kasulu.
2. Introduced himself as Joseph Magesa. But, PW.2 said, PW.1 introduced the independent witness.
3. They requested him to accompany them to the crime scene. PW2 said it was PW.1 who asked PW.3 to be independent witness. Page. 4 Hon... JOHN NKWABI

4. The reasons for picking PW3 was he was the only person they could find at that area because the area where the suspect agreed to meet CR II Gersom was a place with few residents and there was no village leaders who we could find around that area considering that the task we were going to perform there was an emergency task. PW.3 himself did not know why he was picked instead of villagers. PW.7 contradicted by saying they picked him because the place is far from the village. PW.8 said PW.1 phoned the local leaders but were not available. It is clear from the contradictions that the respondent's witnesses cannot be reliable. They needed corroboration. One could have expected to get corroboration from the print out of communication, but the prosecution chose not to tender the same, I have to accord an adverse inference as per Emmanuel Senyagwa v. Republic, Criminal Appeal No. 22/2004 (CAT) at Dar-es-Salaam (Unreported) at P.
7. With the status of the evidence, the holding that becomes relevant is found in Hussein Hassan @ Antiti v. Republic, Criminal Appeal No. 541 of 2021, CAT where it was underscored that: "..., the foregoing evidence not only leads to multiple interpretations, but also creates doubts which, in our respect view, should benefit the appellant." The damaging evidence of the acquitted co-accused person cannot corroborate the testimonies of the prosecution witnesses who need corroboration under the authority of John Cherehani and Another v. Republic, Criminal Appeal No. 189 of 1989 (Unreported) (CAT). In the circumstances, the analysis of the trial court regarding the independent witness is faulty. Withal, I conclude by allowing the appeal. I quash conviction and set aside the sentence imposed on the appellant. The appellant is to be released from prison unless held therein for other lawful cause(s). It is so ordered. Dated at KIGOMA this 3rd of April 2025 . J. NKWABI JUDGE OF THE HIGH COURT Page. 5 Hon... JOHN NKWABI

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