GREATERS NYONI

Versus

THE STATE

HIGH COURT OF ZIMBABWE
MUTEVEDZI AND NDLOVU JJ
BULAWAYO, 4 November 2024 and 10 March 2025

Criminal Appeal

G. Katenaire for appellant
T. Muduma for respondent

MUTEVEDZI J: The appellant and a few of his accomplices who were convicted on their own pleas of guilty and jailed were caught up in a rhino horn racket which, despite his furious protestations led to his own imprisonment.

BACKGROUND

[1] When the racketeering was discovered, the accomplices were arrested and taken to court where they readily admitted their crime. They implicated the appellant was also later arrested and tried before the court of a regional magistrate at Beitbridge. He faced a charge of contravening s 45(1)(a) of Parks and Wildlife Act [*Chapter 20:14*] as read with section 128(1)(a) of the same Act as amended by General Laws Amendment No. 5 (Act No. 148/11) that is 'Hunt a Specially protected animal (Rhinoceros).' The allegations by the State were that on 4 July 2022 and at Bubi Valley Conservancy (the conservancy), the appellant unlawfully hunted and killed a black rhinoceros which is a protected animal species.

[2] on that date, so the allegations went, the appellant together with four accomplices namely Prince Mudenda, James Tapoka, Spencer Mharadza and President Oswel Musekiwa who is still at large, conspired to hunt and kill a rhinoceros at Bubi Valley Conservancy, in Beitbridge. They were armed with a .375 riffle. The appellant proceeded to the conservancy with Prince Mudenda and James Tapoka in a car which was being driven by one Tedious Matimbira. The appellant and the driver dropped the Prince Mudenda (Prince) and James Tapoka (James) near the conservancy. The two

entered the game park through an unlocked gate. Prince was familiar with the park and its terrain. A few kilometres into the conservancy the two encountered a black rhinoceros which they immediately shot and killed. They dehorned it and packed the ivory into a satchel. They contacted the appellant who returned to the scene and picked them. He returned once more with Tedious Matimbira (Tedious) driving the vehicle. Later Prince and James surrendered the rhino horns to the appellant who proceeded to sell them in Harare. The offence was discovered by game scouts and a report was made which led to the arrest of the appellant.

[3] In his defence, the appellant refuted the allegations. He said he never connived with Prince or any other person to hunt or kill any rhinoceros. He stated that he had known Tedious since 2021 and that he was a Central Intelligence operative. They became close friends but their relationship became strained when at one time, the appellant had refused to assist Tedious's boss to 'facilitate some legal challenges', whatever that meant. He also admitted being close to Prince and that he would from time to time assist him financially. Their friendship just like with Tedious became weakened when the appellant failed to assist Prince with money to pay his rentals. He added that the allegations against him were motivated by malice and caprice from both the police and his erstwhile friends. He denied ever being at the crime scene or in any way participating in the racket to hunt and kill the rhinoceros.

Proceedings in the court *aquo*

[5] At the trial, the State led evidence from several witnesses who were Munyonga Kuvarega, Tedious Matimbira, Praise Kudzai Dhoro, Prince Mudenda and Honest Zvoushe. To put this appeal into its proper context, we summarise the salient aspects of the witnesses' testimonies.

Munyonga Kuvarega

[6] He is a police officer whose duties included the surveillance and investigation of wildlife crime in the southern region of Zimbabwe. He only knew the appellant in connection with this case. He said on 26 March 2023, together with his colleagues they arrested the appellant in the Central Business District of Bulawayo. The appellant had been implicated in the hunting and killing of a rhinoceros in the conservancy by Prince Mudenda. Their investigations revealed that the appellant was the leader of those

marauders. The officer said they discovered that the appellant, Prince, James, and one Spencer Maradze had on their mission hired a Toyota Wish vehicle from Tedious which he (Tedious) drove to the conservancy. He refuted the allegations by the appellant that he had concocted the allegations out of malice and caprice.

[7] Under cross examination, he revealed that Prince had accompanied the police to make indications at the crime scene. He conceded that no documentary exhibits were tendered to support the allegations against the appellant. He admitted that the recovered skull and lower jaw of the rhinoceros were also not tendered in court. He further admitted that the State papers showed that Tedious could have been an accomplice though he was never arrested but denied that the failure to charge Tedious was because the police were bend on getting the appellant incarcerated.

Tedious Matimbira

[8] He said he had first come to know the appellant between August and November 2021 when the appellant consulted him on spiritual matters. The two of them became friends and conducted bible study together. The friendship mutated into a business partnership. Sometime in 2022, the appellant introduced to him another man called Prince whom he said was his (appellant's) younger brother. Tedious said at the time the offence allegedly occurred, the appellant had approached him and requested to hire his vehicle to go to some place that he said was his rural home in an area called Mataga. They agreed that the hire fees would be USD$140.00. The appellant then paid him USD$70.00. The two of them the drove into Bulawayo town. The appellant was driving the car. They parked opposite a building called Tredgold where they picked Prince and another man. With those passengers on board the appellant drove the vehicle from Bulawayo to Zvishavane from where Tedious took over. He said he drove up to their destination. When they arrived, Prince and the other man disembarked with their bags and a sack. He said he neither checked nor asked what the sack contained. After dropping the two, Tedious said he and the appellant drove back to Bulawayo where the following morning the appellant asked him to accompany him back to where they had left Prince and his colleague. They went but used a different road. They arrived and picked the duo.

[9] When they arrived in Bulawayo, Prince and the other man remained at Tedious's house. The appellant came and picked them the following morning. The appellant requested Tedious to accompany him to Harare on the promise of payment of yet another USD$140.00. In Harare, they met a man called JB at some hotel. They later proceeded to a place called Mereki, in the suburb of Warren Park where to his surprise, they met Prince and the other man. The appellant took Prince and the other man aside and they had a conversation. Prince and the other man remained in Harare while he and the appellant returned to Bulawayo. The appellant had not paid him the balance of the vehicle hire up to the time he was arrested. Tedious denied being an operative in the CIO. He denied even being employed by the government and maintained that he was a clergy with a denomination known as the Angels of God Apostolic Church.

[10] Under cross examination, he was adamant that he was not aware of the hunting expedition in Bubi Conservancy. He also confirmed that he was not aware of the contents of the portfolio the appellant was in possession of when they travelled to Harare. He denied being arrested by police at any time but admitted being summoned thrice for interrogations at some police station. He maintained that he dropped only two people at Bubi Valley Conservancy and that on their return those two had slept at his house.

Praise Kudzai Dhoro

[11] She is the wife of Prince. She said the appellant had been introduced to her by Prince sometime in 2022 as a brother. The appellant had before his and her husband's arrest visited them several times. Her evidence was that on some occasions, the appellant and Prince would go on missions unknown to her. They would only return after two or so days. She said the appellant drove two vehicles, either a white BMW or a Toyota Runx. She added that it was the appellant who had encouraged them to be united in holy matrimony and assisted them financially. She was not aware of any grudge or bad blood between the appellant and her husband.

[12] Under cross examination, she indicated that if any bad blood later arose between her husband and the appellant she was not aware of it as she did not spend time with them. She mentioned seeing bread, maheu and water in a satchel when James and

Spencer came over to their house for three days. The three left their home for two days and on their return the appellant was not amongst them.

Prince Mudenda

[13] Right from the onset, the State advised the court that Prince was an accomplice in the commission of the crime that the appellant faced. The court duly warned Prince of the requirement and expectation for him to tell the court the truth and that since he had already been convicted of and sentenced for the crime, he would not benefit anything from either falsely incriminating the appellant if he did not commit the crime in question or exonerating him if indeed he committed the crime.

[14] Prince said he had in the past, been employed by Zimbabwe National Parks and Wildlife Authority. He had worked in areas such as Hwange National Park, Bubi Valley Conservancy and Sabi. He worked as a game ranger and was involved in investigations. He had resigned in 2021 after eight years of service. At the time he testified he said he was serving time at Khami Prison. He testified further that he befriended the appellant sometime in 2018. Later in 2022 he at some point received a call from the appellant who stated that he wanted to meet him, James and Spencer in person. He contacted James who boarded a bus and came to Bulawayo. When he arrived, James had slept over at the witness's house. The following morning, they had met with Tedious. They agreed to use Tedious's Toyota Wish on their mission. They proceeded to Bubi Valley Conservancy. Upon arrival he and James had disembarked the vehicle whilst Tedious and the appellant returned to Bulawayo. The two of them were carrying a satchel with food and a .375 riffle.

[14] Inside the Conservancy, they saw a rhinoceros. James shot it dead. He called the appellant who returned with Tedious to pick them up. James left a container and a pair of socks at the crime scene. They all proceeded to Tedious's house. Upon arrival the appellant removed a knife and showed them how to process the rhino horn. The appellant took the horn to his house and the following morning he returned with Tedious and gave them USD$30 to travel to Harare by bus. The appellant and Tedious used a BMW belonging to the appellant to travel to Harare. The witness travelled to Harare with James. There they met the appellant, another man called JB and Tedious. The appellant informed him that he had sold the rhino horn to a Chinese national who

was yet to pay. James was supposed to return to work so he was given money for bus fare. The following day Prince said he travelled to Bulawayo with the appellant and Tedious in the appellant's car.

[15] A day after their return to Bulawayo, he said he was directed to attend at Tedious's house where he found the appellant already there with Tedious. The USD $5000 which was payment for the rhino horn had arrived after it had been send by bus from JB. The appellant subtracted his money for food while Tedious took his for the car hire. The balance was shared amongst them. He was given James and Spencer's shares. He went to Gweru where he gave Spencer his USD$500 share. He slept over in Gweru. He concluded by stating that when the appellant introduced them to Tedious he had advised them that Tedious was a CIO operative.

[16] Under cross examination, the witness remained steadfast that the appellant wasn't only part of the scheme but was actually the leader of the gang.

Honest Zvoushe

[17] He is a member of ZRP and stationed at CID Flora and Fauna, Bulawayo. He was the Investigating Officer in the case and only knew the appellant in connection with the crime in issue. His evidence was that sometime in July 2022 a case of rhino poaching was reported at Makhado Police Station. The matter was referred to Beitbridge ZRP Flora and Fauna where he was stationed at the time. Upon arrest of one Prince in Bulawayo they learnt of the involvement of the appellant in the hunting and killing of the same rhino. The witness denied that there was bad blood between Tedious and the appellant but admitted that Tedious had assisted the appellant spiritually as he was a bishop or some prophet.

[18] Under cross examination, he confirmed that there was an ecologist report though it was not produced in court out of error. He also mentioned that the rhino horn was in Harare because the person who had been found in its possession was under trial in Harare. It was established that no DNA tests had been conducted to show that the rhino horn in Harare was that of the rhino killed in Bubi Valley Conservancy. Again, he admitted that the link between the appellant and the rhino horn recovered in Harare was through his implication by Prince. He was however adamant that those issues could not

in any way detract from his conclusion that the appellant had committed the offence with his accomplices.

[19] At the close of the State case, the appellant applied for his discharge at that stage in terms of s 198 of the Criminal Procedure and Evidence Act [Chapter 9:07]. Given the evidence recited above, it was a futile exercise and possibly made because such applications appear fashionable with legal practitioners.

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[20] To rebut the State case, the appellant maintained his defence and asserted that the evidence of the three witnesses Praise Kudzai Dhoro, Tedious Matimbira and Prince Mudenda was false and designed to falsely incriminate him. He said that the evidence was malicious and an act of revenge.

Findings by the court aquo

[21 In its analysis of the evidence, the court *aquo* made several findings leading to its conclusion that the State had managed to prove the guilt of the appellant beyond reasonable doubt. It appreciated that the appellant had challenged that in the absence of an ecologist report there was no proof that it was a rhinoceros that had been killed on the day in question. The appellant contended that no exhibits of whatever nature were produced to prove that indeed a rhino was killed. In that regard, the court's findings were that:

> "It is now common cause that on the 14th of July 2022 a rhino was killed and dehorned at Bubi Valley Conservancy. I say it can not be disputed that a rhino was killed and dehorned at Bubi Valley Conservancy because the 4th state witness Prince Mudenda who is serving a jail term for the same offence after pleading Guilty confirmed killing the said rhino and dehorning it. This witness was once employed by the National Parks and Wildlife Authority as a game ranger for 8 years. According to his testimony, he once worked at Hwange National Parks, Save and Bubi Valley Conservancy. This then fortifies this court to be convinced that indeed a rhino was killed at Bubi as it would defy logic to think that Prince Mudenda with his experience as a game ranger would know that the animal they killed is a rhino or not. He also once worked at Bubi Valley Conservancy as a game ranger and as such his testimony that they killed the rhino at Bubi cannot in any way be doubted." (Sic)

[22] Having satisfied itself that it was a rhinoceros that was killed, the court aquo went on to consider whether the appellant acted in connivance with his convicted accomplices to kill the same rhinoceros. The trial magistrate also cautioned himself on the need to tread carefully when he dealt with the evidence of Prince as an accomplice to the crime. Thereafter, he held that contrary to the appellant's contention, the

allegations were not fabricated. Rather it found that the appellant had actively participated in the hunting and killing of the rhinoceros. It stated that:

> "With the above remarks, the court is fortified in its finding that the accused participated in the commission of this offence. Tedious Matimbira and Prince Mudenda clearly put him at the scene. There is nothing that has been placed before this court to show any pre-planned arrangement between the police, Tedious Matimbira and Prince Mudenda to nail the accused. There is no solid reason for this court to suspect any ground for such fabrication. What is very clear is that the accused actively participated in the commission of this offence."

[23] The trial court then proceeded to convict the appellant and sentenced him accordingly.

Proceedings before this court

[24] The appellant was displeased with the decision of the court *aquo.* He filed an appeal against the entire judgment on 12 April 2024. He raised two grounds of appeal against conviction which were couched as follows:

> "**Ad conviction**
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> 1. The court *aquo* fundamentally erred and misdirected itself in fact and in law in that it reached its conclusion without assessing the credibility of witnesses and without weighing such evidence regardless of the nature and character of the witnesses, the glaring disparities, inconsistencies, and mutually destructive contradictions apparent from the witnesses' testimonies. (sic)
> 2. The court *aquo* erred and misdirected itself at law by relying on extraneous evidence not placed before the court. (sic)"

[25] The Appellant prayed for the setting aside of his conviction and that it be substituted with the verdict of not guilty and acquitted. At the end of the hearing of the appeal, we dismissed the appeal. Our reasons for it were extempore. After being requested to provide the fuller reasons we set them in this judgment.

[26] The respondent opposed the appeal and argued that the conviction of the appellant was unassailable.

Issues for determination

[26] This appeal, as highlighted in the notice, turned on two issues namely whether the court aquo did not assess the credibility of witnesses and whether it convicted the appellant on extraneous evidence.

Whether the court *aquo* did not assess the credibility of witnesses.

[27] In his submissions at the hearing and in his heads of argument, the appellant submitted that the court *aquo* did not assess the credibility of the witnesses who gave evidence for the state and the appellant. That, so the argument went, resulted in the trial court falling into the error of convicting him on the basis of unreliable and conflicting evidence. The appellant went further and said the court *aquo* merely outlined the evidence of State witnesses and failed to analyze the quality of that evidence. It never related to the credibility of the State witnesses.

[28] Clearly, counsel for the appellant attacked the credibility findings of the court aquo on the premises that some of the witnesses were or must have been deemed accomplices witnesses and that the evidence of some of them was afflicted with material inconstancies and was mutually destructive.

[29] The starting point in dealing with this ground of appeal is the dicta in the case of *S v Mlambo* 1994 (2) ZLR 410 (S) at 413 C where the Supreme court held as follows:-

> "The assessment of the credibility of a witness is par excellence the province of the trial court and ought not to be disregarded by an appellate court unless satisfied that it defies reason and common sense. A careful reading of Ndlovu's evidence, to which no accompanying adverse demeanour finding was made, does not persuade me that the magistrate's assessment was erroneous."

[30] Similarly in the case of *Beckford v Beckford* 2009 (1) ZLR 271 (S), was held that:

> "It is quite clear that the learned Judge made specific findings of fact with regard to the credibility of the parties and their witnesses. As has been stated in a number of cases, an appellate court would not readily interfere with such findings. That is so because the advantage enjoyed by a trial court of observing the manner and demeanour of witnesses is very great. See *Arter v Burt* 1922 AD 303 at 306; *National Employers Mutual General Insurance Association v Gany* 1931 AD 187 at 199; and *Germani v Herf and Anor* 1975 (4) SA 887 (AD) at 903 A-D." In *Gumbura v The State* SC 78-14, this Court said:
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> > "As regards the credibility of witnesses, the general rule is that an appellate court should ordinarily be loath to disturb findings which depend on credibility. However, as was observed in *Santam BPK v Biddulph* (2004) 2 All SA 23 (SCA), a court of appeal will interfere where such findings are plainly wrong. Thus, the advantages which a trial court enjoys should not be overemphasised. Moreover, findings of credibility must be considered in the light of proven facts and probabilities."

[31] I understood the above holdings to mean that an appellate court can only interfere with a trial court's findings of credibility where they do not make sense; where they are plainly wrong or where such findings are contrary to the evidence led at trial. The circumstances under which such findings can be overturned by an appellate court are therefore exceptional. They must be such as was described in the case of *Gaillah*

Muroyi v The State SC 111/20 where UCHENA JA cited with approval the remarks in the case of *S v Robinson & Others* 1968 (1) SA 666 (AD) at 675 G-H where HOLMES JA said:

> "A Court of Appeal, not having had the advantage of seeing and hearing the witnesses, is of necessity largely influenced by the trial court's impressions of them. Having regard to the re-hearing aspects of an appeal, this Court can interfere with a trial judge's appraisal of oral testimony, but only in exceptional cases, as aptly summarised in a Privy Council decision quoted in *Parkes v Parkes* 1921 AD 69 at p 77: 'Of course, it may be that in deciding between witnesses, he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or has given credence to testimony, perhaps plausibly put forward, which turns out on more careful analysis to be substantially inconsistent with itself, or with indisputable fact; but except in rare cases of that character, cases which are susceptible of being dealt with wholly by argument, a Court of Appeal will hesitate long before it disturbs the findings of a trial judge based on verbal testimony.'"

[32] It was in light of the above legal principles that we assessed the appellant's misgivings with the court aquo's findings of credibility the first of which was that it completely failed to assess such credibility. That assertion appears to insinuate that the court aquo totally failed to deal with the credibility of witnesses. We were not sure of the import of that line of argument because it was not supported by the record of proceedings. At pp 19-21 of the consolidated record of proceedings the trial court was at pains in dealing with the credibility of witnesses Tedious Matimbira and Prince Mudenda. It started off by rejecting the notion that Tedious was an accomplice witness. It held that because he had no charge hanging over him, that the police had confirmed that they did not intend to charge him with any offence and that he seemed to have just been hired to transport the conspirators for a fee without knowing that they were committing an offence he therefore could not be regarded as an accomplice. It concluded that he was telling the truth because he had nothing to gain or to lose by testifying in the case and that his evidence was merely a narration of the journeys from Bulawayo to Bubi and back. The trial magistrate then turned to the evidence of Prince Mudenda whom it acknowledged from the onset was an accomplice witness. After observing the rituals associated with accomplice evidence the court aquo analyzed the same and drew several conclusions of credibility.

[33] Turning to the appellant himself, the court aquo stated thus: -

> "It seems to the court that when the accused vehemently denied being part of the people who went Bubi on the alleged date, he was just trying to pull some wool [in] the eyes of the court as his colleagues and close friends whom he was with on the day in question clearly placed him on the scene. … when the accused tried to rely heavily on the aspect of fabrication due to his alleged bad blood with Tedious as well as Prince and more so with the police, he was swimming

> against the tide considering how they related prior to the allegations. He was a family friend to Prince and even attended and assisted him on his wedding…It would therefore defy common sense and logical reason to believe that Prince fabricated the allegations against the accused merely because the accused refused to give him money to pay rent when the accused [in] actual fact has no obligation to do so." Sic)

[34] It is because of the above facts apparent from the record of proceedings that we expressed our failure to comprehend the assertion that the court aquo did not deal with the credibility of witnesses at all. That counsel for the appellant may have been unhappy with the conclusions of credibility arrived at by the trial court could not be an equivalent of the court aquo's complete failure to deal with the credibility of the witnesses because for a good measure it did. And in our view satisfactorily so. Judicial officers employ different tactics when writing judgment. If counsel expected to see a subheading in the judgment titled 'credibility of witnesses,' but did not see it, that does not take away the fact that without mentioning it, the trial magistrate indeed discussed the credibility of the evidence of the witnesses as expected. There is therefore no rational basis for the attack on the trial court's judgment in that regard.

[35] The next issue which appears in the same ground of appeal is that the court aquo failed to appreciate that some of the witnesses who testified were accomplice witnesses. There was no need for counsel for the appellant to beat about the bush. There were two witnesses who seemed to have been accomplices in the crime. Those were Prince and Tedious. The court as already stated elsewhere in this judgment was advised that Prince was an accomplice. It duly warned itself of the dangers of his evidence. The same however cannot be said about Tedious. The court in its judgment noted that it was not advised that Tedious was an accomplice. But in his judgment the trial magistrate again dealt with that issue. A court does not record that a witness is an accomplice for the sake of it. It does so for the purposes of warning itself that it will not be able to convict an accused on the basis of the uncorroborated evidence of such a witness. The issue of whether or not a court was alive that it was dealing with the evidence of an accomplice therefore only arises where that testimony is not supported by independent evidence. Where a court is not appraised by the prosecutor, (for it cannot guess on its own) that his witness participated in the commission of the crime, that witness's testimony standing on its own would be inadequate to secure the conviction of an accused. It is then that the court must find other evidence to support such testimony to prevent false

incrimination. In the case of *Davison Charirwe v The State* HB 163/16, MATHONSI J (now JA), quoting author Reid Rowland at 21-5-21-9 with approval pointed out that: -

> "corroboration means evidence, other than that of the complainant, which is consistent with the complainant's version of facts and which tends to show the guilt of the accused. To be of evidential weight, the facts corroborated must be material ones. It is a salutary principle of our law of evidence that a witness cannot corroborate himself."

[36] Importantly in this case, Tedious' evidence was, in material respects, largely corroborated. We noted that his evidence and that of Prince dovetailed. They both related to the journeys to and from Bubi conservancy. They not only recounted the journeys but also the identities of those who participated in them. They in equal measure, both spoke to the role of the appellant in all what happened. There were very eerie similarities in their testimonies particularly in that it was the appellant who orchestrated the expedition. The two of them described the journey to Harare and the happenings there. Contrary to the appellant's claim that the evidence demonstrated that Tedious knew the criminality of the enterprise, there is nowhere in Prince's testimony where that is apparent. If anything, he said that when the payment was delivered, Tedious just took the money which was due to him for his hire services. What we agreed to was however that although he may not have been fully let into the secret, Tedious must have suspected that something unholy was going on. The appellant's contention was therefore made in the abstract without appreciating why it is necessary for a court to be warned that a witness is an accomplice witness.

[37] In the end, the trial court extensively and exhaustively dealt with the evidence of the two witnesses. It concluded that they both had no reason to lie against the appellant. It remained alive throughout of the need to exercise caution in its analysis of the evidence of Prince Mudenda as an accomplice. It must have sought corroboration of the testimonies of both Prince and Tedious- which it fortunately did. In the end it was satisfied that that the evidence was truthful, and that the two were reliable witnesses.

[38] The last rung of the first ground of appeal related to '*the glaring disparities, inconsistencies, and mutually destructive contradictions'* in the witnesses' testimonies. We hasten to point out that human experience has shown that it is difficult for people to perceive one event and then retell it in exactly the same way. Human beings are not machines and their memories and senses of recollection may never be the same. An accused cannot hang onto little differences in how a story is told by the witnesses. The

discrepancies and or contradictions in witnesses' testimonies must relate to material issues. One of the alleged discrepancies alleged in this appeal was that Tedious said he did not benefit from the proceeds of the deal yet Prince said when the money was counted he had taken his money for the car hire. To us, that does not amount to a benefit because from the start Tedious was clear that his car was being hired for a fee. The next discrepancy was allegedly in relation to the people who participated in the journey to Bubi conservancy. Counsel's view was that Praise, who is Prince's wife was the witness who correctly described who went there. But once again, the evidence shows that she only knew the people who had come to her place of residence and not those who travelled to Bubi. The fact that the appellant did not go to Prince's residence does not mean that he did not go to Bubi.

[39] Critically, the findings which are being criticised by counsel for the appellant are all findings of fact. The law where an appellant wishes an appellate court to upset findings of fact is equally trite. The general rule on whether to interfere or not with the factual findings of a trial court was expressed in *Hama v National Railway of Zimbabwe* 1996 (1) ZLR 664 (S) at 670C-D where the court pronounced thus:

> "The general rule of the law, as regards irrationality, is that the appellate court will not interfere with a decision of a trial court based purely on a finding of fact unless it is satisfied that, having regard to the evidence placed before the trial court, the finding complained of is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at such a conclusion: *Bitcoin v Rosenburg* 1936 AD 380 at 395-7; *Secretary of State for Education & Science v Metropolitan Borough of Tameside* [1976] 3 All ER 665 (CA) at 671 E-H; *PF-ZAPU v Minister of Justice* (2) 1985 (1) ZLR 3065 (S) at 326 E-G"

[40] When following this principle almost two decades later ZIYAMBI JA restated it more emphatically in *ZNWA v Mwoyounotsva* 2015 (1) ZLR 935 (S) at 940 R-F:

> "It is settled that the appellate court will not interfere with factual findings made by a lower court unless these findings were grossly unreasonable in the sense that no reasonable tribunal applying its mind to the same facts would have arrived at the same conclusions; or that the court had taken leave of its senses; or, put otherwise, the decision is so outrageous that its defiance of logic that no sensible person who had applied his mind to the question to be decided could have arrived at it; or that the decision was clearly wrong."

[41] In the instant case, besides the bald allegation, counsel did not point to anything outrageous about the trial court's findings of fact. The appellant simply expressed unhappiness about them. That was unfortunately not enough to allow us to interfere with the magistrate's decision. What clearly stood out was that the appellant was part of the gang that killed or conspired to kill the rhinoceros. Our view is firm that there

was no misdirection on the part of the trial court in its conclusion that the appellant participated in the hunting and killing of the rhinoceros

Whether the court *aquo* convicted the appellant on extraneous evidence.

[42] The term, "extraneous evidence" in general connotes evidence which is not relevant or which falls outside the realm of the issue under consideration by the court or outside the dispute which must be resolved. Such evidence is regarded as inadmissible because it may not help in the resolution of the case. It simply clouds issues. Usually the word extraneous speaks to evidence which is not linked to the facts of the case being pursued by the parties.

[43] The argument by the appellant in this case is that there was no proof that the animal which was killed on the day in question was a rhinoceros. He said there was no testimony adduced in court to that effect and that no ecologist's report was tendered. To him, those omissions were fatal to the prosecution's case.

[44] In *GML Explosive (Private) Limited v Lackson Gono & 29 Ors* SC 16-21 it was held that:

> "In any event, an appeal court will only interfere with judicial discretion where, first and foremost, it appears in the grounds of appeal that an improper or incorrect exercise of the court's discretion is what is put in issue. See *African Century (Private) Limited v Megalink Investments (Private) Limited & Ors* SC44/18. The often cited case of *Barros and Anor v Chimponda* 1999 (1) ZLR 58 (S) AT 62F-63A is authority for the proposition that the general rule governing an appellate court in an appeal against a judgment of a lower court granted in the exercise of its judicial discretion, is that it is not enough that the appellate court considers that if it had been in the position of the lower court, it would have adopted a different course.
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> For the appellate court to interfere, it must appear that some error has been made in exercising the discretion:
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> > "If the primary court acts upon a wrong principle, if it allowed extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account some relevant consideration, then its determination should be reviewed and the appellate court may exercise its own discretion in substitution…."

[44] In *casu*, the suggestion by the appellant that the court *aquo* convicted the appellant on extraneous evidence as there was no evidence that the animal killed on the day in question was a rhino does not even begin to meet the threshold for this court to interfere with the judicial discretion of the court *aquo* as set out in the authorities. To begin with, the appellant seemed not to appreciate why he was convicted. The evidence which was against him was not that he went into Bubi Conservancy and killed an elephant. Instead,

it was that he orchestrated the killing of that elephant. The people who killed it did so at his instigation. The appellant acted in common purpose with Prince, James and Spencer. If he did, their actions became his actions. Prince, a veteran game ranger admitted that he and his colleague killed the elephant after being send by the appellant. Like the trial court rightly pointed out, if they had not killed a rhino, Prince would not have been so stupid as to plead guilty to the crime and have himself imprisoned for such a long period. Further, the appellant's defence divested him of the opportunity to deny that what was killed was not a rhinoceros. He denied that he was part of the gang. The argument would have been different if he had said he went into the conservancy and what they killed that day was for instance, a hippopotamus and not a rhino. Prosecution proved at the trial that a rhino was killed because the evidence by Prince that they killed a rhino was undisputed.

[45] The appellant was not linked to the killing of the rhino by the horn that was allegedly recovered in Harare. Instead he was linked to the crime by his accomplice in the commission of the crime. That link was permissible because the court sought and obtained corroboration of the accomplice's evidence like we discussed above. More so, the appellant cannot deny that a rhino was killed in the Bubi Conservancy because he said he wasn't there. But as the trial court said in its judgment, his participation in that crime was through the liability of co-perpetrators as stipulated under s 196A of the CODE. As such the ground equally didn't have any merit and we dismissed it.

Disposition

[45] With the above synopsis, there clearly was no basis upon which this Court could interfere with the judgment of the court *aquo*. The appeal was demonstrably devoid of merit. We accordingly that it be dismissed.

MUTEVEDZI J…….

NDLOVU J……Agrees

Mutuso, Taruvinga & Mhiribidi, Appellant's legal practitioners
National Prosecuting Authority, Respondent's legal practitioners