

PROSECUTION v. NSENGIYUMVA ET.AL

[Rwanda COURT OF APPEAL– RPA 00074/2018/CA
(Muhumuza, P.J., Kaliwabo and Tugireyezu, J.) 12 July 2019]

Criminal Law – Selling ivory and looking for their clients do not constitute an offence of poaching, killing, injuring or selling elephants and do not also constitute complicity in poaching, killing, injuring or selling elephants, instead, it constitutes an offence of acquiring, having in possession, keeping or concealing, or procuring to be kept or concealed, any goods with knowledge, or ought reasonably to have known, to be prohibited goods or that require to be permitted which have been imported or carried contrary to the conditions regulating such importation – The East African Community Customs Management Act, article 200(d)(i)(ii).

Facts: This case started before the High Court, chamber of Rwamagana where the accused were prosecuted for having been involved in the illegal trade of elephant's ivories from 2012 to 2015 in May, in the beginning, the Prosecution stated that they took part in the killing of elephants in Tanzania, that they used to bring ivories to Rwanda and sought for the clients, the Prosecution added that they shared money from that trade.

That Court held that the offence of killing elephants for which the court was seized, is not a transnational crime since the Prosecution failed to produce evidence of the place where the elephants were killed, therefore, the Court concluded that It lacks the jurisdiction to hear the case for the first instance.

Concerning the competent court to hear the case of trading ivories, that Court found that in Rwanda, there is no law to punish acts of selling ivories and seeking for their clients, thus, the case should not be transferred to any court, the court ordered for the release of Nsengiyumva and Karambizi who were prosecuted being detained.

The Prosecution was not contented with the rulings of the judgment and appealed to the Supreme Court but the appeal was transferred to the Court of Appeal after judicial reform. The Prosecution argues that the Court should hold the accused guilty of killing elephants because ivories are found after elephants are killed or wounded, the Prosecution further states that the accused are also guilty of selling ivories since the accused were brokers of those who kill elephants for taking off ivories and their clients.

The Prosecution also prays to the Court to rectify the ruling of the High Court, chamber of Rwamagana for holding that the accused should not be prosecuted for selling ivories stating that there is no Rwandan law or international conventions to punish those acts because the Court should have relied on East African Community Customs Management Act.

Moreover, in this case, the Court ordered to summon Amicus Curiae, to get from him, clarification on the trading of ivories and their derivatives, for this reason, Rwanda Development Board was summoned as Amicus Curiae, the latter explained that ivories can be found in four distinct ways, first is removing them after an elephant is killed, second is wounding an elephant and taking off its ivories, thirdly, purchasing them from commercial dealings and fourth is to getting them from dead elephant by natural death.

Amicus curiae further state that though, Rwandan criminal laws do not provide sanctions to those in acts of trading elephants ivories and parts of other protected animals, there is an East African Community Customs Management Act which penalizing offences of trading body parts of protected animals and their derivatives for which prior authorization is required.

The accused pleaded not guilty except Nsengiyumva who pleaded admitting the selling of ivories, but he also argues that the East African Community Customs Management Act should not be based on because the Prosecution did not produce it so that they defend themselves. For Vunumwami, he states that he should not be prosecuted for the acts of selling ivories since there is no related criminal law in Rwanda, whereas Semasaka submits that the Prosecution failed to prove his role in the commission of the offence, thus, he should be acquitted, whilst Karambizi pleads stating that the Prosecution brought new claims at the appellate level by accusing the offence of killing elephants instead of selling ivories and looking for the clients, that it should be considered as new claims at the appellate level.

Held: 1. There is no evidence to prove the complicity of the accused in the killings of elephants in Tanzania, the fact that the Prosecution failed to prove that the accused knowingly concealed an object or tools which were used in killing elephants, thus the facts pursued are not those provided by article 98 and 327 of the Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code which was in force at the moment the prosecution was started.

2. Selling ivories and looking for their clients do not constitute an offence of poaching, killing, injuring or selling elephants and do not also constitute complicity in poaching, killing, injuring or

selling elephants, rather, it constitutes an offence of acquiring, having in possession, keeping or concealing, or procuring to be kept or concealed, any goods with knowledge, or ought reasonably to have known, to be prohibited goods or that require to be permitted which have been imported or carried contrary to the conditions regulating such importation.

3. The High Court should not have affirmed that selling ivories is not punishable by any law because the court should have relied on article 200(d)(i)(ii) of the East African Community Customs Management Act

**The appeal has merit in part;
The ruling of the appealed judgment is overruled.**

Statute and statutory instruments referred to:

Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code, article 4 and 78,3°.

Law N° 22/2018 of 29/04/2018 Law relating to the civil, commercial, labour and administrative procedure, article 1 and 154.

Law N° 30/2013 of 24/5/2013 relating to the code of criminal procedure, articles 165 and 190.

Law N°72/2008 of 31/12/2008 determining the entry into force of the East African Community Customs Management Act of 1st January 2005.

Law N° 15/2004 of 12/06/2004 relating to evidence and its production, article 110.

East African Community Customs Management Act, article 200(d)(i)(ii).

Convention on International Trade in Endangered Species of Wild Fauna and Flora Signed at Washington, D.C., on 3 March 1973, article 1,2 and 3.

Ministerial order N°007/2008 of 15/08/2008 instituting the list of protected animal and plant species.

Case laws referred to:

Prosecution vs Uwamurengeye, RPAA 0110/10/CS rendered by the Supreme Court, Rwanda Law Report, V1, July 2014, P.133-140.

Prosecution vs CPL Ngabonziza and SGT Biziyaremye, RPAA 0117/07/CS rendered by the Supreme Court, Rwanda Law Report, V2,2011, P.57-62

Prosecution vs Mukashema and Bihimana, RPA 0176/11/CS by the Supreme Court, Rwanda Law Report, V1,2017, P.147-160.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] This case started before the High Court, chamber of Rwamagana where the Prosecution accused Nsengiyumva Vincent, Vunumwami Egide, Semasaka Silas and Karambizi Alphonse for having been involved in the illegal trade of elephant's ivories from 2012 to 2015 in May, in the beginning, the Prosecution stated that they took part in the killing of elephants in Tanzania, that they used to bring elephant's ivories to Rwanda and sought for customers, the Prosecution added that they shared money from that trade.

[2] On 06/10/2016, the High Court, chamber of Rwamagana rendered the judgment RP 0013/15/HC/RWG holding that the offence of killing elephants for which the court was seized, is not a transnational crime since the Prosecution admitted that It does not possess evidence of where the elephants were killed, therefore, the Court concluded that It lacks the jurisdiction to hear the case for the first instance. Concerning the competent court for trying the case of trading elephant's ivories, the High Court, chamber of Rwamagana found that in Rwanda, there is no law to punish acts of selling elephant's ivories and seeking for their clients, thus, the case should not be transferred to any court, the court ordered for the release of Nsengiyumva Vincent and Karambizi Alphonse who were prosecuted being detained.

[3] The Prosecution was not contented with the rulings of the judgment and appealed to the Supreme Court stating that the previous court stated that the Prosecution failed to prove the role of the accused in killing elephants, that it disregarded that ivories are found after elephants are killed or wounded, therefore, the High Court, chamber of Rwamagana disregarded that those acts are punishable by article 417 of the organic law N° 01/2012 mentioned above.

[4] In the appeal, the Prosecution states that in deciding that the accused are not entitled to prosecution, the High Court, chamber of Rwamagana decided that there is no criminal law sanctioning acts of trading ivories, the court disregarded the provisions of the East African Community Customs Management Act in its article 200(d)(i).

[5] The Prosecution prays to the court to hold that the accused are guilty of the ideal concurrence of offences of killing elephants and taking their ivories for trade, it also argues that

each of them is sentenced to 10 years of imprisonment and a fine between 500,000Frw and 5,000,000Frw pursuant to article 417 of penal code.

[6] After judicial reform, the Prosecution's appeal was transferred to the Court of Appeal basing on article 52 and 105 of Law N°30/2018 of 02/06/2018 determining the jurisdiction of courts¹, the appeal was recorded on N° RPA 00074/2018/CA.

[7] The hearing was held in public on 24/06/2018, Nsengiyumva Vincent was assisted by Counsel Mujawamaliya Immaculée, Vunumwami Egide being assisted by Counsel Kampire Claudine, Semasaka Silas being assisted by Counsel Sebasinga Hélène, Karambizi Alphonse being assisted by Counsel Mukesha David while the Prosecution was represented by Habineza Jean Damascene, the National Prosecutor, the Court stated that the case will be pronounced on 26/07/2019. On that day, the Court rendered interlocutory judgment deciding to re-open the case and summons amicus curiae for clarification of trading elephant's ivories in relation to Rwandan criminal laws, laws for protecting the environment as well as international and regional conventions ratified by Rwanda. In the meanwhile, the President of the Court decided to expand the bench.

[8] The case hearing was again conducted on 09/09/2019, the parties appeared before the Court, being assisted as before,

¹ Article 52 provides that The Court of Appeal has jurisdiction to hear at the first level of appeal cases tried at first instance by the High Court, the Commercial High Court and the Military High Court, whereas article 105 paragraph one provides that from the day this Law comes into force, except cases already under trial, all cases that are no longer in the jurisdiction of the court seized are transferred to the court with jurisdiction in accordance with the provisions of this Law.

the Prosecution was assisted by Rudatinya Gaspard, the National Prosecutor, Amicus Curiae RDB was represented by Richard Muvunyi, the head of the environmental protection unit.

[9] After he was presenting himself, his responsibilities and his expertise in the conservation of the environment, Richard Muvunyi stated that there is a convention of Washington in the United States of America relating to the trade between countries, that agreement refers to the endangered wild animals and plants, that it was ratified by Rwanda, however, it does not provide sanctions to those trading animals or parts of protected animals, that's why any of the party states, has to put in place laws incriminating illegal trade.

[10] He explains to the court that RDB assessed Organic Law N° 04/2005 of 08/04/2005 determining the modalities of protection, conservation and promotion of environment in Rwanda and other related criminal laws and found that laws did not provide sanctions to those involved in trading of body parts of protected animals, consequently, to cover the gap, RDB initiated a draft law and submitted it to the government.

[11] Amicus curiae further state that though, Rwandan criminal laws do not provide sanctions to those in acts of trading elephants ivories and parts of other protected animals, there is an East African Community Customs Management Act which penalizing offences of trading body parts of protected animals and their derivatives for which prior authorization is required, and that these include elephant's ivories.

[12] Amicus curiae also stated that elephant's ivories can be found in four distinct ways, first is removing them after an

elephant is killed, second is wounding an elephant and taking off its ivories, thirdly, purchasing them from commercial dealings and fourth is to getting them from dead elephant by natural death, he adds that any kind of acquisition of ivories has to be explained and that the trade of ivories is banned all around the world, whether it's ivories or their derivatives, except in case of authorisation.

[13] In his pleading, Nsengiyumva Vincent confessing to having been trading of ivories, he seeks for forgiveness, whereas Vunumwami Egide states that he kept elephant's ivories for Nsengiyumva Vincent knowing that they were cow horns, Semasaka and Karambazi plead not guilty while the Prosecution states that there are incriminating elements of evidence against Nsengiyumva Vincent and Vunumwami Egide and that It has no sufficient elements of evidence against Semasaka and Karambizi Alphonse.

[14] Legal issues to be analysed in the present case are to know whether acts for which the accused are charged with can be an offence and to know applicable law and if there are incriminating elements of evidence.

II. ANALYSIS OF LEGAL ISSUE

II.1. Whether acts for which the accused are charged with can be an offence and to know applicable law.

[15] The Prosecution states that acts of trading elephant's ivories constitute an offence of killing elephants, selling ivories and looking for their clients, It criticizes the High Court, chamber of Rwamagana for having decided that those acts do

not constitute an offense, that the Court disregarded article 417 of the law instituting penal code which was in force at the moment of the commission of the offence which penalizes poaching, selling and killing endangered animal species.

[16] It further prays to the Court to hold that the accused are accomplices in the killing of elephants because they would not have got ivories without killing or wounding them, it adds that they are also guilty of selling ivories since it is obvious that the accused were brokers of those who kill elephants for taking off ivories and their clients. The Prosecution also prays to the Court to refer to the similar case RPA ECON 0001/2018/CA rendered on 06/12/2018 by the Court of Appeal.

[17] The Prosecution seeks to rectify the decision of the High Court, chamber of Rwamagana for holding that the accused should not be prosecuted for selling ivories stating that though it is banned, it is not penalized by any Rwandan law or international conventions because the Prosecution is of the view that in sanctioning that offence, the High Court, chamber of Rwamagana should have based on East African Community Customs Management Act in article 200.

[18] Nsengiyumva Vincent and Counsel Mujawamaliya Immaculée assisting him, state that before the Court of Appeal, the Prosecution filed a new claim because, before the previous court, the accused were only prosecuted for selling ivories, but this time, the Prosecution also accuses them of killing elephants, he requests to the Court to examine whether the claim which was heard before the High Court is the same with the one brought before the Court of Appeal, he further seeks to examine whether being in possession of ivories means to have killed elephants because one can get them from the sale as stated by

Amicus Curiae. He also states that the Prosecution did not produce a list of endangered animal species to prove that it includes elephants.

[19] With regard to the East African Community Customs Management Act, Counsel Mujawamaliya Immaculée assisting Nsengiyumva Vincent states, that act should not be relied on in rendering the judgment because the Prosecution failed to produce that act so that they defend themselves against it before the Court of Appeal.

[20] Vunumwami Egide and Counsel Kampire Claudine assisting him, state that article 417 of the penal code for which the Prosecution relies on, should not be based on in this case because it has no link with selling ivories, that her client should not be prosecuted. She further stated as indicated on page 5, page 7 and page 10 of the appealed judgment, the Prosecution stated before the High Court that it does not possess evidence proving that elephants were killed in Tanzania, that it charged them for selling and looking where ivories are to be sold and that these acts took place in Rwanda, therefore, Vunumwami Egide should not be prosecuted for those acts because there is no law incriminating it.

[21] Semasaka Silas and Counsel Nyirabasinga Helène assisting him, state that the Prosecution failed to prove Semasaka Silas's role in the commission of the offence, that consequently, he should be found not guilty.

[22] Karambizi Alphonse and Counsel Mukesha David assisting him, argue that the Prosecution brought new claims at the appellate level by accusing the offence of killing elephants instead of selling ivories and looking for the clients, that it

should be considered as new claims which cannot be based on for the first time at the appellate level.

[23] Concerning the East African Community Customs Management Act, Counsel Mukesha David assisting Karambizi Alphonse states, that act should not be relied on since the Prosecution did not bring that act for discussion before the previous court and that ivories are not commercial goods, he adds that in case the court finds necessary to use that act, the court would ascertain whether it was ratified by Rwanda.

DETERMINATION OF THE COURT

[24] The documents of the case file demonstrate that the accused are prosecuted for killing elephants, complicity in the killing of elephants because they would not have got ivories without killing elephants, the case file also demonstrates the accused were also prosecuted for selling ivories and looking for their clients, but the High Court, chamber of Rwamagana hold that there are not elements of evidence proving the role of the accused in killing elephants and that selling ivories and looking for their clients should not be considered as an offence punished under article 417 of the law instituting the penal code or Organic Law N° 04/2005 of 08/04/2005 determining the modalities of protection, conservation and promotion of environment in Rwanda.

[25] Concerning the offence of killing elephants, the Prosecution relies on article 417 of the Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code which was in force at the beginning of prosecuting Nsengiyumva Vincent and his co-accused which provides that any person who

poaches, sells, injures or kills a gorilla or any other protected endangered animal species shall be liable to a term of imprisonment of more than five (5) years to ten (10) years and a fine of five hundred thousand (500,000) to five million (5,000,000) Rwandan francs.

[26] The Court finds that even though elephants are among protected animal and plant species provided in Ministerial order N°007/2008 of 15/08/2008² instituting the list of protected animal and plant species, article 417 of the Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code cannot apply in the present case contrary to the Prosecution's view because It fails to produce enough evidence before the Court of Appeal proving that the accused would have committed acts of killing elephants, especially that before the High Court, the Prosecution stated that it had no tangible evidence to prove the role of the accused in the killing of elephants in Tanzania.

[27] Basing on above motivations, the High Court finds that as found by the High Court, chamber of Rwamagana, the Prosecution's claim for the acts of killing elephants cannot be linked to those provided by article 417 of the Organic Law N°01/2012/OL of 02/05/2012 mentioned above, the article which penalizes poaching, selling, injuring or killing a gorilla or any other protected endangered animal species that was in force

² Ministerial order N°007/2008 of 15/08/2008 published in official gazette N° 22 of 15/11/2008 instituting the list of protected animal and plant species was promulgated pursuant to article 45 of the Organic Law N° 04/2005 of 08/04/2005 determining the modalities of protection, conservation and promotion of the environment in Rwanda, in appendix 1 of that Ministerial order, it provides Gorilla, Chimpanzee, Black rhinoceros, Elephant, Roan antelope, etc,...it is obvious that elephant is listed among protected animal species stated in article 417 mentioned above.

at the moment the prosecution of Nsengiyumva Vincent and his co-accused was started.

[28] Concerning the complicity in the killings of elephants in Tanzania, since accessing ivories requires first to killing elephants, the Court of Appeal further finds that considering article 98 of the Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code mentioned above³, the Prosecution does not produce any proof that the accused were accomplices in killing elephants in Tanzania in accordance with provisions of this article. And also, the Prosecution failed to prove that those found with ivories in Rwanda, would have knowingly concealed an object or tools which were used in killing elephants, tools or documents obtained from the offence of killing elephants as understood in article 327 of the Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code.

[29] The Court finds, the Prosecution's statements to be speculation that the accused were accomplices of those who killed elephants because ivories would not have found without first killing elephants since those ivories may be found from a dead elephant, by wounding an elephant and taking off its ivories, finding or purchasing them from illegal commercial dealings as stated by Amicus Curiae Richard Muvunyi, the head of the environmental protection unit in RDB.

³ Accomplice: a person knowingly aids or abets the offender in preparing, facilitating or committing the offence, or a person who incites the offender. He/She is also an accomplice, a person who incites or conceals offenders or aiding them to conceal pursuant to article 327 of the Organic Law mentioned in this paragraph

[30] Basing on the motivation above, the Court of Appeal finds that the facts presented by the Prosecution are not among those provided by article 98 and article 327 of the Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code that was in force at the moment the prosecution of Nsengiyumva Vincent and his co-accused was started, because the Prosecution failed to produce elements of evidence to be based on in finding the accused guilty of being accomplices of hunters who might have killed elephants in Tanzania.

[31] Concerning the issue of selling specifically, the Court is of the view that the acts penalized by article 417 of the penal code of selling protected animal species including elephants, those acts did not occur, instead, selling ivories is what happened and not elephants. Selling elephants and selling ivories should not be confused in terms of laws because article 417 implies that the act of selling relates to selling the real animal and not to its body parts or derivatives.

[32] The Court finds that confusing acts of selling elephants and selling ivories would be interpreting criminal laws extensively, whereas it is prohibited in criminal matters as provided by article 4 of the Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code which provides that criminal laws shall not be interpreted to extensively, they must be construed strictly.⁴

[33] In light of the above motivations, the Court of Appeal finds that what happened is to keep and sell ivories awaiting the

⁴ This is also what provided by article 4 of the law N°68/2018 of 30/08/2018 determining offences and penalties in general which provides that criminal laws cannot be interpreted broadly, they must be construed strictly

clients because Nsengiyumva Vincent admitted having been given ivories by hunters from Tanzania and he entrusted them to Vunumwami Egide as they looked for the clients, and Vunumwami Egide accepted to conceal them, besides, they were arrested on their way to the client.

[34] Article 1,2 and 3 of the Convention on International Trade in Endangered Species of Wild Fauna and Flora Signed at Washington, D.C., on 3 March 1973 which ratified by Presidential decree N°211 of 25/08/1980, the provisions of those articles imply that elephants are listed under Annex I of that convention and that selling endangered animal species concerns living animals, dead ones, animal body parts or their derivatives, and that their trade should comply with the provisions of this convention, this includes trade permit issued by the competent authority.⁵

⁵ For the purpose of the present Convention, unless the context otherwise requires:

(a) “Species” means any species, subspecies, or geographically separate population thereof;

(b) “Specimen” means:

(i) any animal or plant, whether alive or dead;

(ii) in the case of an animal: for species included in Appendices I and II, any readily recognizable part or a derivative thereof; and for species included in Appendix III, any readily recognizable part or derivative thereof specified in Appendix III in relation to the species(...)

Article II. Appendix I shall include all species threatened with extinction which are or may be affected by trade. Trade in specimens of these species must be subject to particularly strict regulation in order not to endanger further their survival and must only be authorized in exceptional circumstances.

Article III. 1. All trade in specimens of species included in Appendix I shall be in accordance with the provisions of this Article.2(...),3. The import of any specimen of a species included in Appendix I shall require the prior grant and

[35] Article 200(d)(i)(ii) of the East African Community Customs Management Act also states that a person who acquires, has in his or her possession, keeps or conceals, or procures to be kept or concealed, any goods which he or she knows, or ought reasonably to have known, to be prohibited goods or restricted goods which have been imported or carried coastwise contrary to any condition regulating such importation or carriage coastwise shall be liable on conviction to imprisonment for a term not exceeding five years or to a fine equal to fifty percent of the dutiable value of the goods involved, or both⁶.whereas appendix 2,B of that act, litera 8 places ivories in goods which require to be authorized before they are sold.⁷

[36] Since the accused failed to prove that they were permitted for selling ivories brought from Tanzania as required so by East African Community Customs Management Act as well as Convention on International Trade in Endangered Species of Wild Fauna and Flora Signed at Washington, D.C., on 3 March 1973, and they also carried those ivories contrary to

presentation of an import permit and either an export permit or a re-export certificate. An import permit shall only be granted when the following conditions have been met:

(a) a Scientific Authority of the State of import has advised that the import will be for purposes which are not detrimental to the survival of the species involved;

(b) a Scientific Authority of the State of import is satisfied that the proposed recipient of a living specimen is suitably equipped to house and care for it; and

(c) a Management Authority of the State of import is satisfied that the specimen is not to be used for primarily commercial purposes

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⁷ Ivory, elephant unworked or simply prepared but not cut to shape, worked ivory and articles of ivory

conditions regulating such importation, the Court finds, acts for which the defendants are accused, constitute an offence of selling ivories provided by article 200 (d)(i)(ii) of East African Community Customs Management Act which penalizes acquiring, having in possession, keeping or concealing, or procuring to be kept or concealed, any goods with knowledge, or ought reasonably to have known, to be prohibited goods or restricted goods which have been imported or carried contrary to the conditions regulating such importation, therefore, the Court finds without merit the rulings of the High Court, chamber of Rwamagana that selling ivories does not constitute an offence.

[37] The fact that Counsel Mujawamaliya Immaculée assisting Nsengiyumva Vincent requests for not considering East African Community Customs Management Act because the Prosecution did not produce it so that they defend themselves, the Court finds it without merit because this act should be treated as other laws, it was published in the official gazette, special number of 26/06/2009, it is not necessary that all laws be presented by parties to be based on by the court. But whoever in need of Law may get it from official gazette without the necessity for the Prosecution to produce it to lawyers. It is sufficient that a party to the case states the Law and its number and this what the Prosecution did.

[38] The fact that Counsel Mukesha David assisting Karambizi Alphonse asks that for not relying on East African Community Customs Management Act stating that the Prosecution did not use that act before the High Court, the Court of Appeal finds that what is important is that the acts of selling ivories were pointed out in the indictment and the parties to the

case responded on those acts, the Court has to link them to the laws whether those produced by parties or those found necessary by the Court since it is in judge's duties to give right qualification to the facts pursued when he/she finds that qualification given is contrary to the facts, this was also decided so by the Supreme Court in different cases.⁸

[39] Moreover, article 1 and 154 of the Law N° 22/2018 of 29/04/2018 Law relating to the civil, commercial, labour and administrative procedure, the law which governs the procedure applicable to other cases in the event such procedure is not governed by any other specific law, that article 154 provides that it is not prohibited to submit in appeal new arguments or elements of evidence that was not heard at the first level, therefore the Court finds no irregularities for the Prosecution to use other law at the appellate level, what matters is that the Prosecution did not submit new facts rather than those of selling ivories and looking for the clients.

[40] Concerning the statement of Mukesha David assisting Karambizi Alphonse that ivories are not goods, the Court finds that the East African Community Customs Management Act provides that goods include all kinds of articles, wares, merchandise, livestock,(...)⁹, thus, ivories are also considered as goods especially that ivories are listed on appendix 2, B of that act in part 8.

⁸ Judgment RPAA 0110/10/CS, the Prosecution vs Uwamurengeye Venant, Rwanda Law Report, V1, July 2014,p 133-140, judgment RPAA 0117/07/CS, the Prosecution vs CPL Ngabonziza Faustin and SGT Biziyaremye Jean Baptiste, Rwanda Law Report, V2,2011, P.57-62

⁹ See East African Community Customs Management Act, Preliminary provisions, 2.(1)

[41] Concerning the issue raised by Counsel Mukesha David assisting Karambizi Alphonse that the Court examines whether East African Community Customs Management Act was ratified by Rwanda, the Court finds that the ratification was done in Law N°72/2008 of 31/12/2008 determining the entry into force of the East African Community Customs Management Act of 1st January 2005 published in the official gazette, special number of 26/06/2009.

[42] The Court of Appeal finds the High Court should not have affirmed that selling ivories is not punishable by any law because the court should have relied on article 200(d)(i)(ii) of East African Community Customs Management Act as motivated above.

[43] Article 190 of the Law N° 30/2013 of 24/5/2013 relating to the code of criminal procedure provides that When the court seized of the appeal considers it appropriate to alter a decision subjected to appeal, it shall try the case on its merits unless it nullifies the decision on the ground of non-observance of the required case filing procedure or lack of jurisdiction. Hence, the Court finds it appropriate to hear the case.

II.2. Whether they are incriminating evidence against the accused.

A. Nsengiyumva Vincent and Vunumwami Egide.

[44] The Prosecution states that the accused are prosecuted for killing elephants, complicity in killing elephants and selling ivories, elements of evidence for which the Prosecution relies on include Nsengiyumva Vincent's statement of his admission of 22/05/2015 when he was interrogated where he get ivories from, he replied that he got them from a fisherman from

Tanzania called Nyabyenda, the latter also got those ivories from hunters he transported in crossing the lake from Tanzania, It further states that it was the second time for Nsengiyumva to be involved in such trade, that he has sold 13 kilos so far. The Prosecution prays to the Court not to reduce his penalty because he does not completely explain the commission of the offence and that he conceals some of the facts.

[45] Nsengiyumva Vincent admits the offence and seeks for forgiveness, he explains that he was together with Vunumwami Egide and the latter sent him at his home to get for him ivories, he adds that when they were about to hand them over to the client, the soldiers came and arrested them. He further states that he did not state that he was given ivories by a hunter from Tanzania and that he doesn't even know how Semasaka and Karambizi came to be involved in the case because he did not know them before, and did not accuse them.

[46] Counsel Mujawamaliya Immaculée assisting Nsengiyumva Vincent states that her client was sent by Vunumwami Egide who was his boss to get for him a bag containing ivories, she further states, that service rendered to his boss does not constitute an offence provided by article 417 of the penal code. She also states that nothing proves that there was killing of elephants from which ivories were taken off since one may cut them as affirmed by *Amicus Curiae*.

[47] Concerning Vunumwami Egide, the Prosecution states that in his interrogation of 28/05/2015, he confessed for having kept those ivories brought by Nsengiyumva Vincent and that the latter accuses him of collaborating in trading of ivories.

[48] Vunumwami Egide pleads not guilty of killing elephants, he only admits for having kept ivories for Nsengiyumva Vincent knowing that they were cow horns. He adds that he got to know Nsengiyumva Vincent because they worked together in the trade of fish. He states that they have never been together in the trade of fish. He contends that the statements of the Prosecution are wrong, for accusing him in being an accomplice in the commission of the offence because he had never crossed the border, and that he has disabilities on the arm which cannot allow him being involved in such activities, he concludes by praying to the Court to give him justice.

[49] Counsel Kampire Claudine assisting Vunumwami Egide argues that the Prosecution should produce elements of evidence for the offence pursued against Vunumwami Egide because he affirms that he kept horns of cows and not elephants.

DETERMINATION OF THE COURT

[50] Article 86 of the Law N° 30/2013 of 24/5/2013 relating to the code of criminal procedure provides that Evidence shall be based on all the facts and legal considerations provided that parties are allowed to present adversary arguments. The court shall decide at its sole discretion on the veracity and admissibility of incriminating or exculpatory evidence.

[51] The documents in the case file demonstrate that the High Court, chamber of Rwamagana held that acts for which Nsengiyumva Vincent and his co-accused are charged, that those acts do not constitute a transnational crime and are not punishable under Rwandan law, whereas in his interrogation

before investigators, he explained that ivories for which he was found with, he got them in 2013 from a fisherman from Tanzania called Nyabyenda, the latter also got those ivories from hunters living in Tanzania when he transported them in crossing the lake because they had no money, Nyabyenda entrusted those ivories to him seeking to look for the client.

[52] Those documents also demonstrate that Nsengiyumva Vincent confessed to having started selling ivories in 2012, that he used to get them from someone called Joachim who lives in Tanzania, the latter sold them to him for 20,000Frw per kilogram and in return, Nsengiyumva sold them to 50,000Frw per kilogram, the case file also demonstrates that he jointly conducted his activities with Vunumwami Egide and Semasaka Silas. Before the Prosecution, the High Court as well as before this Court, Nsengiyumva Vincent keeps admitting and accuses Vunumwami Egide of collaborating with him, however, he denies knowing Semasaka Silas and that they have never been together in such business.

[53] These documents indicate that in his interrogation before the investigators, Vunumwami Egide confessed that a hunter brought to him ivories stating that they belong to Nsengiyumva Vincent and that he will come to collect them. The documents show that Vunumwami kept those ivories for a whole year (identification mark 8-11), he also confessed it before the Prosecution (identification mark 53-58), moreover, he admitted it before the Court though he stated that he knew that they were cow horns.

[54] The Court of Appeal finds Nsengiyumva Vincent's statement to be incriminating evidence whereby he admitted for having got ivories and handed them to be concealed, this is an

element of evidence to prove that he sold ivories as it is provided by article 110 of the Law N° 15/2004 of 12/06/2004 relating to evidence and its production which provides that a judicial admission refers to the statements the accused or his or her representative makes before the court by confessing on some matters, such statements shall lead him/her to lose the case.

[55] The fact that Nsengiyumva Vincent denies for having been given those ivories by a hunter from Tanzania, the Court finds it without merit because, in the investigation bureau, he has completely explained that he was given them by a fisherman called Nyabyenda from Tanzania the latter also got those ivories from hunters he transported in crossing the lake from Tanzania because they had no money, also, he admitted to having started selling ivories in 2012 when he was given them by someone called Joachim who lives in Tanzania.

[56] With regard to Vunumwami Egide, the Court finds, though he pleads not guilty for selling ivories, Nsengiyumva Vincent's statement denouncing to have entrusted him those ivories for a whole year, and that they have been together in such business, they were also arrested when offering ivories to the client, therefore, these are elements of evidence to prove his role in selling ivories whereas it is prohibited when it was not authorized. Finding someone guilty based on his/her co-accused's statement was also the opinion of the Court in the case RPA 0176/11/CS rendered on 16/10/2015 by the Supreme

Court, the case of the Prosecution vs Mukashema and Bihimana.¹⁰

[57] The Court of Appeal finds without merit the statements of Vunumwami Egide and his counsel that he knew that what he kept were cow horns, rather, he wants to evade his role in the commission of the offence because his co-accused Nsengiyumva Vincent who pleads guilty, accuses him to have worked jointly in the selling of ivories as mentioned above.

[58] Concerning sentences, article 200(d)(i)(ii) of the East African Community Customs Management Act provides that a person who acquires, has in his or her possession, keeps or conceals, or procures to be kept or concealed, any goods which he or she knows, or ought reasonably to have known, to be prohibited goods or restricted goods which have been imported or carried coastwise contrary to any condition regulating such importation or carriage coastwise shall be liable on conviction to imprisonment for a term not exceeding five years or to a fine equal to fifty percent of the dutiable value of the goods involved, or both.

[59] The fact that Nsengiyumva Vincent and Vunumwami Egide are guilty of selling ivories, an offence which was committed when the accused acquired and concealed ivories with the intent of selling them knowing that it is prohibited, the Court finds, each one has to be sentenced to 3 years of imprisonment pursuant to article 200(d)(i)(ii) of the East African Community Customs Management Act.

¹⁰ See the judgment RPA 0176/11/CS rendered on 16/10/2015 by the Supreme Court, the case of the Prosecution vs Mukashema and Bihimana, Rwanda Law Report, V1,2017, P.147-160.

[60] However, the Court finds that Nsengiyumva Vincent deserves the reduction of the penalty basing on mitigating circumstances of pleading guilty since the beginning of the prosecution and before the Court pursuant to article 78 3° of the Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code which provides that if there are mitigating circumstances, a penalty of imprisonment of more than five (5) years, but less than ten (10) years may be reduced up to a term of imprisonment of one (1) year, therefore, he must be sentenced to 2 years of imprisonment.

B. Concerning Semasaka Silas and Karambizi Alphonse

[61] The Prosecution states that the elements of evidence it based on to accuse Semasaka Silas and Karambizi Alphonse, was the statement of Nsengiyumva Vincent who accuses to collaborating with him in sellings of ivories, but the Prosecution adds that those elements of evidence are doubtful.

[62] Semasaka states that he has never been in ivories business because as Nsengiyumva Vincent states, they met at the police, thus he asks the Court to hold that he is innocent, whereas Counsel Nyirabasinga Héléne assisting him, argues that the Prosecution failed to prove his role in the commission of the offence, thus he should be found not guilty.

[63] Karambizi Alphonse states that he is not guilty of the offence of murder, complicity in killing elephants and selling their ivories because his occupation as Executive Secretary of the Sector would not have let him be involved in such business, hence he requests the Court to decide that he is not guilty

because elements of evidence produced by the Prosecution are doubtful, whereas Counsel Mukesha David assisting Karambizi Alphonse states that the Prosecution did not prove the moment when the offence was committed and that on this instance the Prosecution fails to demonstrate imperfections in the ruling of the High Court, chamber of Rwamagana.

DETERMINATION OF THE COURT

[64] Article 165 of the Law N° 30/2013 of 24/5/2013 relating to the code of criminal procedure provides that if the proceedings conducted as completely as possible do not enable judges to find reliable evidence proving beyond a reasonable doubt that the accused committed the offence, the judges shall order his/her acquittal.

[65] The documents of the case file indicate that the Prosecution accuses Semasaka Silas and Karambizi Alphonse using the statement of Nsengiyumva Vincent who accuses them to collaborate with him in sellings of ivories, but before the Court of Appeal, the Prosecution recognizes that there is no reliable evidence proving beyond a reasonable doubt.

[66] The documents of the case file also indicate that when Nsengiyumva Vincent was interrogated in investigation bureau, he confessed for having been in the trade of ivories, he reported that he worked together with Semasaka Silas and Karambizi Alphonse in such business, however, he did not give further information on their collaboration(identification mark 5-7)and in their turn, Semasaka and Karambizi also negated it(identification mark 12-16), before the Prosecution Nsengiyumva Vincent denied to have known Semasaka stating

that he met him when they were detained together, whilst regarding Karambizi Alphonse, Nsengiyumva admits only that they worked together in sellings of the fish, that he declared nothing else, and before this Court, he did not accuse them.

[67] The Court of Appeal finds, as the Prosecution stated, that there is no reliable evidence proving beyond reasonable doubt the role of Semasaka Silas and Karambizi Alphonse in selling ivories which constitutes an offence of acquiring, having in possession, keeping or concealing ivories illegally because though Nsengiyumva Vincent accused them at the stage of investigation, he no longer accuses them before the Prosecution and the Court, in addition, even in Investigation Bureau, he did not provide complete information to prove their role in such business, hence, they should be declared not guilty.

[68] In light of the foregoing, the Court of Appeal finds that pursuant to article 165 of the Law N° 30/2013 of 24/5/2013 mentioned above, there is no reliable evidence proving beyond reasonable doubt that Semasaka Silas and Karambizi Alphonse committed an offence, therefore, they are acquitted.

III. DECISION OF THE COURT

[69] Holds that the appeal of the Prosecution has merit in part;

[70] Overrules the ruling of the judgment RP 0013/15/HC/RWG rendered on 06/10/2016 by the High Court, chamber of Rwamagana;

[71] Finds Nsengiyumva Vincent and Vunumwami Egede guilty of the offence of selling ivories which is composed of

acquiring, having in possession, keeping or concealing, or procuring to be kept or concealed goods illegally.

[72] Holds that Semasaka Silas and Karambizi Alphonse are not guilty of the offence of selling ivories which is composed of acquiring, having in possession, keeping or concealing, or procuring to be kept or concealed goods illegally, therefore they are acquitted;

[73] Sentences Nsengiyumva Vincent to two (2) years of imprisonment;

[74] Sentences Vunumwami Egide to three (3) years of imprisonment;

[75] Orders Nsengiyumva Vincent and Vunumwami Egide to pay court fees worth 50,000Frw.