

IN THE HIGH COURT OF TANZANIA

AT MTWARA

CONS. ECONOMIC CRIMINAL APPEAL NOS. 2 & 3 OF 2007

~~ORIGINAL MTWARA DISTRICT COURT~~

ECONOMIC CRIMINAL CASE NO. 1 OF 2005

Before: M.C. Mteite, Esq: RM

1st FAHIDA MINJA KABARABARA } APPELLANTS
2nd MOHAMED THOMAS }

VERSUS

THE REPUBLIC RESPONDENT

Date of Last Order: 01/12/2008

Date of Judgment: 16/03/2009

JUDGMENT

MIPAWA, J.

The appellants namely Fahida Minja Kabarabara and Mohamed Thomas hereinafter in this judgment referred to as the first and second appellants appeared before the District Court of Mtwara charged on two counts: *Videlis:*

- (i) Being in unlawful possession of Government trophies c/s 67(1)(2)(b) and (2A) of the Wildlife Conservation Act 1974 as amended by Act No.10 of 1989 read together with paragraph 15(d) of the First Schedule to an section 59 of the Economic and Organized Crime Control Act 1984 as Amended by Act 10 or 1989.
- (ii) Unlawful Hunting of scheduled Animal Contrary to section 31 a, b(iii)(b) and 70(1) of

the Wildlife Conservation Act, 1984 read together with paragraph 15(a) of the First Schedule to and section 59 of the Economic and Organised Crime Control Act, 1984.

It was contended by the prosecution and controverted by the appellants in the lower court that they were found jointly and together in possession of Government Trophies to wit, 140 kilogrammes of Buffalo meat valued at 500,000/= the animals which they killed on 7 day of September, 2005 are scheduled animals as per the Wildlife Conservation Act read together with the Economic and Organized Crime control act, 1984. The appellants were both convicted and reaped a sentence of five years imprisonment at the end of the day.

In order to comprehend what had transpired in the lower court the following is the brief account of the prosecution case. PW.1 Thobias Sedoyeke the Police OC-CID of Mtwara District got information from an informer that at Kilomba chini village, there were two persons seen with buffalo meat and a gun make rifle. He arranged six policemen who went with him [PW.1] to Kilomba chini village. Upon arrival they proceeded to the suspected house which belonged to one Ismail Mohamed who showed them the room in which the suspects had slept. PW.1 told the court that they knocked at the door and when the first appellant opened he was immediately arrested, when asked about the meat found the first appellant told them that he did not have any licence for hunting. On the gun the first appellant told the police that he got it from Charles of Kitama moja and that Charles got the gun from one said Manzi of Mchichira

, andahimba they traced Saidi Manzi whom PW.1 alleged was found with two licence books, one of the shotgun and the other of the rifle gun which was found in the possession of the first appellant.

~~The meat which was alleged to be found in the possession of~~ the appellants was identified as Buffalo meat by PW.2 Timoth Peter a game officer who issued a certificate of identification which was admitted as exhibit in court. PW.3 C.6939 D/Sgt. Selemani testified more or less like PW.1 but added that the first accused had told them that he was a stranger or a guest at the home of Yusufu and that when they searched in the room where the first accused had slept, Buffalo meat and empty cartridges were found. PW.4 E.8771 CPL. Issa and PW.5 A/Inspector Methos recorded the caution statements of the second and first appellants respectively.

The appellants denied in their defence all the allegations laid under their beds. They told the court that on the material date while going at Kilomba chini people told them on the way that it was unsafe for them to proceed to Kilomba chini that evening because lions were spotted by villagers in the vicinity hence they slept at the home/house of one Ismail who had welcomed them voluntarily. At midnight while asleep some people knocked the door of their room entered and put the appellants under arrest. After identifying themselves as policemen a search was conducted in the rooms and some meat was found. According to the appellants when the Landlord was asked about the meat by the police he said that he got the said meat in Mozambique territory. The first appellant told the court that the

landlord was not connected with the offence because the police had demanded bribe from him which he complied and coughed 150,000/= as bribe to the police. The testimony of the second appellant was more or less the same, he stated:

they [the police] said they needed to search. They entered into the room where they were shown meat... the landlord said he got it [meat] from Mozambique...

The learned State Attorney who appeared for the Republic declined to support the conviction submitting that there were no other independent witnesses like Village authorities, [the Village Chairman, Ten Cell Leader, Village Executive Officer e.t.c] who were called to witness the search. He said that in the circumstances of the search itself it was prudent for other independent witnesses to testify, apart from the police themselves i.e PW.1 – PW.5 hence there were a lot of doubts. Further even the owner of the house in which the meat was discovered did not testify in court.

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Now, it is pertinent clear from the record of the lower court that, evidence which was placed on the table was that of PW.1 – PW.5 all of them being policemen. As it was rightly pointed out by the learned State Attorney that no independent witness [Civilian] who was called to testify in court apart from the Police Officers PW.1 – PW.5. I entirely and respectfully agree with the learned State Attorney, that as a matter of prudence and in order to remove some clouds of doubt the search which was conducted by the police in the house of

if where the appellants had slept ought to have been involved as witnesses in the search. It is not clear why the police did not involve the village authorities when they arrived at Kilomba chini, the following could have been involved and called thence to testify in court to corroborate the evidence of the Policemen PW 1 - PW 5 the Village Chairman, the Ten Cell Leader of that area the Village Executive Officer or any other Civilian or neighbour or villager whosever. Further even the landlord of the house where the search was conducted did not testify. In my view the owner of the house in which the alleged meat was found had a great role as a witness who could have cemented the prosecution case and cleared the "clouds of doubt" pertaining to the ownership of the meat that was found in the rooms of the Landlord's house. It is in doubt therefore as to whom the Buffalo meat belonged, was it the landlord, who according to the appellants had admitted when interrogated by the police on the meat that he got it in Mozambique and that it belonged to him or was the meat belonged to the appellants who had slept in that house for fear of lions on their way to a certain village. The witness, Landlord could have told the court whether or not the appellants came with buffalo meat and slept in his house. Even if the Landlord was not to be found anywhere, there are procedures to follow if a witness cannot be procured or found the earliest. This was done not by the prosecution and thence it becomes a thorn in the prosecution case so to speak. No adverse inference could be drawn on this regard being had the testimony of the first appellant who told the lower court in his defence

..... the land lord was slept (sic) he was awakened.... They asked him where did he get that meat? He told that he picked them from Mozambique. The Policemen with number 6939 told Ismail [the landlord] to provide some money in order to help him. Ismail asked the amount. He was told 150,000/= Ismail followed it to his mother and... gave policemen. Also I was requested to give money. I denied because I was a stranger.....

Now had there been an involvement of the Village authorities or any other villager as independent witness during the search by the police the above contents in the excerpt could have been disapproved or approved if at all it were true. The lower court also appeared to rely heavily on the caution statements of the appellants. The caution statements were admitted by the court as exhibit that the appellants conceded to have committed the offence. The procedure before statements could be admitted by the court was rightly followed by the learned resident Magistrate. They were read loudly to the appellants who were the makers of the caution statements so that they could understand the contents embodied therein. It is unprocedural for the court to admit such documents and others of the like without first reading the contents to the accused. The trial court should show in the record that the documents were read over to the accused (s) who made it. This should also be in the presence of the maker of the statement unless the maker had absconded and the court deals with the case in absentia.-

I have gone through the two caution statements and the evidence of Police Officers PW.4 E.8771 CPL. Issa and PW.5 A/Inspector Methos who took the caution statements of the 2nd and 1st accused persons respectively and I have discovered that the witnesses did not narrate in court what actually were the rights of the accused [appellants] they purported to have given them before taking their caution statements so that the makers of the caution statements [accuseds] could be in a position to know whether or not they were actually given rights and the court to satisfy itself that the rights were actually given and the witness knows them by elaborating the rights in court. It is not enough for the witness to say only that he gave the accused their rights before taking the statement without elaborating or mentioning the said rights in court when testifying. A good example can be found in this appeal where PW.1 and PW.5 testified in the lower court that they gave the accused persons what the witnesses termed as "judges rule rights" without in fact narrating the rights and what the "judges rule rights" entails. I will quote what PW.4 and PW.5 are recorded to have told the court in their evidence.

PW.4 stated that:

... I am allowed by law to interrogate accused under caution method. Before this process I gave the accused judges rule rights. If the accused admits to give his caution statement, he signs on that sheet....

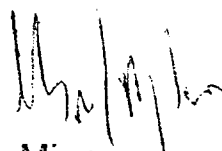
PW.5 who also recorded the statement of the first appellant by and large and more or less testified the same. He told the lower court as follows:

,... in that rank I was allowed to take the caution statement of an accused before taking his caution statement I provide him his judges rule rights. If the suspects admits to give his statement willingly, he signs on that sheet... I pray for the court to ~~receive a caution statement (sic) of the 1st~~ accused Fahida Minja as exhibit....

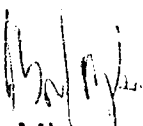
Let me make the *fait accompli* coated as follows, the case for the prosecution in the lower court was fraughted by many irregularities and tainted with doubts as well as faults *par excellence* regard being had the search by the police the unsummoning of witnesses *très important* and what-have-you.

On the foregoing I entirely and respectfully agree with the learned State Attorney Mr. Mkude that the conviction of the appellants was bad in law, it follows therefore that I allow this appeal quash the convictions and set aside the sentences imposed upon the appellants and consequently order their immediate release from prison, unless otherwise held legally in connection with other matters.




I.S. Mipawa,
Judge
16/3/2009

Delivered before the appellant number 2 but in the absence of
appellant number 1. Also in the presence of Mr. Hyera learned State
Attorney.


I.S. Mipawa,
Judge
16/3/2009

Date: 16/3/2009

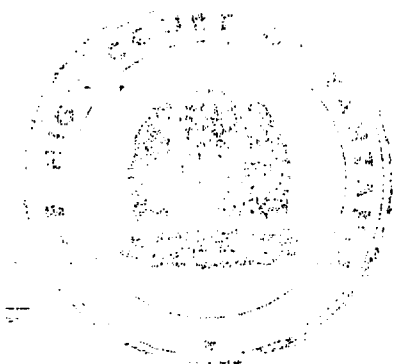
Coram: Hon. I.S. Mipawa, J.

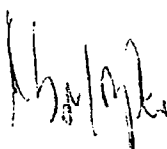
The Republic: Mr. S. Hyera, State Attorney

Appellant: Present

B/C: Namanga, RMA

Court: Judgment delivered today in the presence of 2nd appellant
and Mr. Hyera, State Attorney but in the absence of the 1st
appellant who we are told has been released on Presidential
Clemency.




I.S. Mipawa,
Judge
16/3/2009