

**IN THE HIGH COURT OF TANZANIA
TABORA DISTRICT REGISTRY
AT TABORA**

DC CRIMINAL APPEAL NO. 35 CF 36 CF 37 OF 2019

*(From Original Economic Case No. 35 of 2017 of the Resident
Magistrate's Court of Tabora – J. Rushwela, RM)*

KASESA LUHENDE1ST APPELLANT
MBOTELA NHAUSIGAYE 2ND APPELLANT
JACKSON ONESMO 3RD APPELLANT
VERSUS
REPUBLIC RESPONDENT

JUDGMENT

Date of Last Order: 9/08/2021

Date of Delivery: 13/08/2021

AMOUR S. KHAMIS, J.

Kasesa Luhende, Idd Ramadhani, Mbotela Nhausigaye and Jackson Onesmo were arraigned in the Resident Magistrate Court of Tabora with three counts of unlawful entry into a game reserve, unlawful possession of Government Trophies and Unlawful Possession of weapon into a game reserve.

In the first count, the prosecution alleged that contrary to Section 15(1) and (2) of the Wildlife Conservation Act, No. 5 of 2009, on 14th day of July 2017 during morning hours, the four accused jointly and unlawfully entered at Golwe area within Kigosi

Game Reserve, Kaliua District, Tabora Region, without a permit from the Director of Wildlife.

In the second count, it was alleged that contrary to Section 86(1) and (2) (b) of the Wildlife Conservation Act No. 5 of 2009 read together with Paragraph 14(d) of the First Schedule to and Sections 57 (1) and (2) of the Economic and Organised Crimes Control Act, Cap. 200, R.E. 2002, on 14th day of July 2017 during morning hours at Golwe area Kigosi Game Reserve, Kaliua District, the four accused jointly and together were found in possession of Government Trophy to wit one piece of bush pig and one piece of spotted hyena (ngozi ya fisi) both valued at Tshs. 2, 170, 084.00, property of the Government of the United Republic of Tanzania without a permit from the Director of Wildlife.

The third count was unlawful possession of weapon into a game reserve contrary to Section 17(1) and (2) of the Wildlife Conservation Act, No. 5 of 2009.

Particulars of the offence were that on 14th day of July 2017 during morning hours at Golwe area within Kigosi Game Reserve, Kaliua District in Tabora Region, the accused were found in possession of weapons to wit: three (3) axes and two hundred (200) fishing hooks without a permit from the Director of Wildlife.

A plea of not guilty was entered in respect of all the accused and the case proceeded to trial.

Satisfied that the prosecution case was proved beyond reasonable doubts, the trial magistrate convicted all accused for the three counts.

Upon mitigation, each accused was sentenced to pay Tshs. 100,000/= as fine or one year imprisonment on default for the first



count, twenty (20) years imprisonment for the second count and twenty (20) years imprisonment for the third count. The sentences were to run concurrently.

The trial Court's records show that Iddi Ramadhan was convicted and sentenced in absentia as he jumped bail in the course of trial.

Aggrieved by the conviction and sentence, Kasesa Luhende, Jackson Onesmo and Mbotela Nhausigaye lodged in this Court DC Criminal Appeal No. 35 of 2019, DC Criminal Appeal No. 37 of 2019 and DC Criminal Appeal No. 36 of 2019 respectively with similar grounds of appeal, namely:

1. That the trial magistrate erred when found that the prosecution proved its case against the appellants beyond reasonable doubts while the case left a lot of doubts.
2. That the trophy valuation certificate (Exh. P. 1) which is a basis for the appellant's conviction had no evidential value for it was not preceded by any chemist report to establish the so called pieces of bush pig and spotted hyena were examined by any scientific method and found to be so.
3. That the trial magistrate erred when held that the items tendered in Court as Exhibit P. 2 were the same as those found in possession of the appellants despite of failure by the prosecution to prove the chain of custody.
4. That the trial magistrate erred when held that the appellants were found and arrested in a game reserve without any proof.
5. That the trophy valuation certificate (Exh. P. 1) was wrongly acted upon as its author (PW 2) did not lay down his

qualifications to enable him make conclusions and did not take part in identification of the trophies in Court.

6. That the guilty of the appellants was not proved beyond reasonable doubts.

Before me, the three appellants were unrepresented. Ms. Juliana Moka, learned Senior State Attorney, appeared for the Republic.

Hearing was viva voce and the appellants opted to respond to submissions by the learned State Attorney.

Ms Juliana Moka supported the appeal as regards to the second and third counts asserting that there was no sufficient evidence to entitle conviction.

On the first count, She submitted that the charge was proved beyond reasonable doubts and invited this Court to uphold the appellants' conviction and sentence.

The learned Senior State Attorney submitted on wanting areas of the case regardless of the grounds of appeal and contended that exhibits tendered in Court did not abide by the legal requirements.

She explained that despite of objection by the appellants, the trial magistrate admitted such exhibits without recording reasons for overruling the objections.

Further, she contended that the trial magistrate did not record the accused's grounds of objections.

Ms. Moka asserted presence of apparent contradictions in the evidence of PW 1 and PW 3 who arrested the appellants.

She explained that when PW 2 and PW 3 were questioned by the first accused, both replied there was no weapon seized from the

appellants and that the accused were arrested in possession of wild meat.

She contended that the charge sheet showed appellants to have been found in possession of three (3) axes whereas the prosecution tendered three (3) machetes as seized weapons.

She submitted that such doubts should be interpreted in favour of the appellants.

As regards to the first count, Ms. Moka asserted that the evidence of PW 1 and PW 3 was sufficient to prove that the appellants had unlawfully entered into a game reserve.

Responding, Kasesa Luhende, Mbotela Nhausigaye and Jackson Onesmo submitted that the prosecution failed to prove a charge in respect of unlawful entry into a game reserve and that the trial magistrate misdirected himself on the issue.

The appellants contended that they were arrested at different areas and time on 14/07/2021 thereby negating the prosecution allegation of being found at Golwe area, Kigosi Game Reserve.

Explaining, the appellants said Kasase Luhende was a resident of Upele Village, Kaliua District and was arrested on the way from Upele village to Mtakuja Village.

As for Jackson Onesmo, it was averred that he was arrested on 14/07/2017 around 3.00 pm at Bustani Village.

The appellants contended that Mbotela Nhausigaye was arrested around 11.00 a.m. on 14/07/2017 at Matejo Village.

Insisting on innocence, the appellants said they did not know each other prior the arrest and that were not related.

I have considered the record in light of the above rival submissions advanced by the learned Senior State Attorney and the appellants in respect of this appeal.

The issues that fall for my consideration are the same as pointed out by Ms. Juliana Moka, learned State Attorney for the Republic.

I find it prudent to address peculiar issues and particularly those related to the first count of which parties were in disagreement.

On the first count, the issue is whether the appellants were found in a game reserve.

PW 1 MAPUNDU HANGI KILEO, a game warder, testified that he was in patrol at Moyowosi Game Reserve, Golwe area during night hours on 14/07/2017 when found the four accused in a camp.

On examination in chief, he said the four accused were found asleep in a camp and in possession of Kambale and Kamongo fish, 200 fish hooks, spotted hyena, four (4) legs of bush pig and (3) machetes.

He testified that the accused (appellants) were also found in possession of four (4) bicycles and did not have a permit from the relevant authority.

On cross examination by Kasase Luhende, PW 1 said the appellants were only found in possession of wild meat without weapons.

On cross examination by Mbotela Nhausigaye, PW 1 said the appellants were found in possession of trophies.

PW 2 LINUS CHUWA, a game warder, said he was not present when the appellants were arrested.

PW 3 JOSHUA HUSSEIN LOMERO, a game warder, said while in patrol at Moyowosi Kigosi on 19/07/2021 around 2.00 hours (night), his patrol team invaded a camp and arrested the accused (now appellants).

DW 1 KASASE LUHENDE testified to have been arrested on 14/07/2017 around 9.00 hours on the way to a nearby village to meet one Joseph.

DW 3 MBOTELA NHAUSIGAYE, said he was arrested on 14/7/2017 around 9.00 a.m. while on the way to irrigate tomatoes in a farm.

On cross examination by a public prosecutor, DW 3 said the arrest was on 14/7/2017 at Matoja area.

DW 4 JACKSON ONESMO testified he was arrested on 14/7/2017 around 13.00 hours in a farm at Matozya area.

Upon close scrutiny of this evidence on record, it is clear that the prosecution evidence contradicted the charge sheet and testimonies of two key witnesses, PW 1 and PW 3 varied.

According to PW 3, the appellants were arrested at midnight on 19/7/2017. This testimony sharply contradicted the charge sheet and the evidence of PW 1.

Whereas particulars of offence in respect of the first count showed the appellants were arrested during morning hours on 14th July 2017 at Golwe area, Kigosi Game Reserve, PW 1 and PW 3 said the accused were found sleeping in a camp during night hours.

In the case of **NGUZA VIKINGS @ BABU SEYA AND 3 OTHERS V REPUBLIC, CRIMINAL APPEAL NO 56 OF 2005** (unreported),

the Court of Appeal held that when the evidence on record contradicts the charge, the offence is not proved.

In that case, the appellants were acquitted on the first count, because the prosecution evidence on date of the commission of offence was a Saturday, a non-working day, while PW 12 said the offences were committed on working days.

Fortified by the Court of Appeal stance in the case of **NGUZA VIKINGS @ BABU SEYA & 3 OTHERS V REPUBLIC** (supra) and for the reasons given above, I find the prosecution did not successfully prove the first count, unlawful entry into a game reserve.

Having scanned the records, I am in total agreement with Ms. Juliana Moka that the trial magistrate failed to record reasons given by the appellant for resisting admissibility of Exhibits P. 2 collectively.

Related to that, the trial magistrate omitted to compose a ruling that would have outlined reasons for admitting the disputed exhibits which omission prejudiced the appellants.

In my view, the trial magistrate's failure to record grounds of objection advanced by the appellants in respect of Exhibit P. 2 and omission to compose a ruling in admitting those exhibits, negated the minimum standards for fair trial that were well explained by the Court of Appeal in **MUSA MWAIKUNDA V REPUBLIC (2006) TLR 387**.

Besides, the prosecution tendered three (3) matchettes as Exhibit P. 2 (collectively) geared to show that such were weapons seized from the appellants whereas the charge sheet showed the appellants were arrested in possession of three (3) axes.

Additionally, on cross examination, PW 1 and PW 3 said no weapon was seized and or found in possession of the appellants and persisted that it was meat only found at the time of arrest.

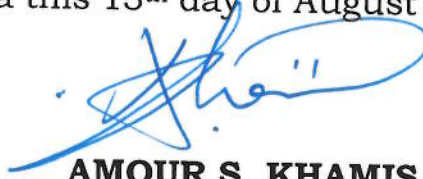
In **LUCAS KAPINGA AND 2 OTHERS V REPUBLIC (2006) TLR 374** the Court of Appeal held that a prosecution witness who changes his story on an important aspect of the case is not a credible and truthful witness.

The upshot of the above assessment and reasoning is that charges on unlawful possession of Government trophies and unlawful possession of weapon in a game reserve were not sufficiently proved.

It follows therefore the appeal is meritorious and thus allowed.

Let the appellants be released from prison forthwith unless held for other lawful cause(s). It is so ordered.

Dated at Tabora this 13th day of August 2021.



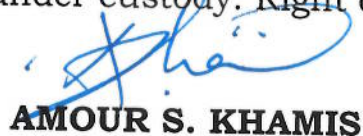
AMOUR S. KHAMIS

JUDGE

13/8/2021

ORDER:

Judgment delivered in chambers in presence of Mr. Miraji Kajiru, Senior State Attorney for the Republic and the three appellants in person under custody. Right of Appeal explained.



AMOUR S. KHAMIS

JUDGE

13/8/2021