

THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

THE CORRUPTION AND ECONOMIC CRIMES DIVISION

AT ARUSHA - SUB REGISTRY

ECONOMIC CASE NO. 15 OF 2019

REPUBLIC

VERSUS

FREDY KASAYE @ MOJAH

22/11/2019 and 13/12/2019

JUDGMENT

BANZI, J.:

The accused person, Fredy Kasaye @ Mojah stands charged with the offence of unlawful possession of government trophy contrary to section 86 (1) (2) (b) of the Wildlife Conservation Act, No. 5 of 2009 (then the WCA) read together with paragraph 14 of the First Schedule to, and sections 57 (1) and 60 (2) of the Economic and Organised Crime Control Act [Cap 200 R.E. 2002] (the EOCCA).

It is alleged that, on 16th December, 2014 at Samunge area in Loliondo, within Ngorongoro District in Arusha Region, the accused person was found in possession of government trophies, to wit, two (2) whole and six (6) pieces of elephant tusks equivalent to two killed elephants valued at USD 30,000 equivalent to Tshs.50,868,900/=, the property of the

Government of the United Republic of Tanzania without permit from the Director of Wildlife.

At the Preliminary Hearing, the parties agreed to the following facts to be not in dispute, that is, firstly, the names, age, tribe, religion and address of the accused person and secondly, the accused person was arrested and charged with the present offence.

At the trial, Ms. Janeth Sekule, learned Senior State Attorney assisted by Mr. Timotheo Mmari, learned State Attorney represented the Republic, whereas Mr. Ephraim Koisenge, learned Advocate appeared for the accused person.

To establish the case against the accused person, the prosecution side called in three (3) witnesses to testify, namely, James Kugusa (PW1), Mfaume Shaban (PW2) and Magesa Mathari (PW3). They also tendered four (4) exhibits, which were admitted, thus: Exhibit P1, Trophy Valuation Certificate; Exhibit P2, two whole and six pieces of Elephant tusks, Exhibit P3, Handing Over Certificate and Exhibit P4, certificate of seizure. On the other hand, the accused person testified under oath as a sole witness for the defence and did not tender any exhibit.

Briefly, the prosecution's body of evidence presented a case that, on 15th December, 2014, PW2 together with his colleagues, Emmanuel Banal, Ibrahim Mwika and PW3 were conducting patrol at MtowaMbu and Serera areas. In the course of patrolling, they received information from their informant about dealers of elephant tusk at Samunge area, Loliondo. On the basis of that information, they made a trap by disguising themselves as buyers and began the journey to Samunge area by using their motor vehicle.

All the way, they were directed by the said informant. They arrived at Samunge around 04:00 hours on 16th December, 2014. According to PW3, at first, they wanted to do the deal in a certain house but since it was illegal business, they both agreed to do the same in the bush far from people's residence. Therefore, upon arrival, they went straight to the bush where they found three persons with elephant tusks. There were two whole and six pieces of elephant tusks. After seeing the tusks and confirming them, they unveil themselves and made the arrest. Unfortunately, they managed to arrest only the accused person, while the other two escaped. The accused person was asked if he had permit, but he had none. PW2 prepared, filled in certificate of seizure and signed it. The accused person also signed the same by handwritten signature and thumb print. PW3 together with Emmanuel Banal and Ibrahim Mwika also signed it as witnesses to the seizure.

After the seizure exercise, they took the accused person together with the seized trophies and began the journey to Anti-Poaching Unit (then KDU) in Arusha. As per the testimony of PW3, they arrived at KDU Arusha on 16th December, 2016 at night whereby, PW2 handed over the seized trophies to PW1, the custodian of exhibits. Nevertheless, according to PW1, the handing over exercise was conducted on 17th December, 2014 at about 15:00 hours when PW2 came with the accused person together with the trophies in question. It was conducted through Exhibit P3 which was prepared and filled in by PW2 and signed by PW1 together with the accused person who witnessed the exercise. Thereafter, he weighed the trophies and started the labelling exercise. PW1 labelled the tusks by writing date of seizure (16/12/2014), place of seizure (Samunge), weight, measurement and registration number. The Registration numbers recorded in each piece were

642, 643, 644, 645, 646, 647, 648 and 649. After the labelling exercise, he took the tusks to exhibits room. In the morning of 18th December, 2014, PW1 was instructed to conduct valuation of the tusks in question. He went to the store room and took them. There were two whole tusks and six pieces, which, if put together make two complete tusks. According to his profession and experience, he identified them as Elephant tusks basing on the following features, which are only found in Elephant tusks: they have Schreger lines; in the inner part, they have open space from the base to the middle part, but from the middle part to the tip the space is cemented. After confirming they were Elephant tusks, he took and filled in Exhibit P1, the certificate of valuation, which valued the trophies at USD 30,000 equivalent to Tshs.50,868,900/= as per exchange rate of the said date.

When cross examined by the defence Counsel, PW2 admitted to have filled in both Exhibits P3 and P4 by his own handwriting and has never imitated the handwriting of any other person. He also admitted to have one handwriting which appears in both Exhibits P3 and P4. It was him who inserted the word "AND" appearing before the name of Mathari Magesa and corrected other errors appeared therein after involving his fellows at the scene. He further stated that, after arriving at KDU Arusha, he stayed with the accused person for 30 minutes before handing him over for interrogation. He also admitted that, after arrival, he did not stay long with the trophies before handing over. At first PW2 admitted that, he has never testified before any other court in respect of Exhibit P4. But later, he admitted to have once testified before the court on the same exhibit which was admitted by the said court. When he was answering the question from the court, he stated that, his former testimony in respect of Exhibit P4 was at the Resident

Magistrate's Court of Arusha. The same exhibit was objected when he prayed to tender it before the court and he left the same with the counsel for the Republic in a case that involved the same accused person before this court. He also stated that, it took them 45 minutes driving from the people's residence to the crime scene.

On the other hand, when PW3 was cross examined by the defence Counsel, he stated that they arrived at KDU Arusha on 16th December, 2014 at night. After arrival, the accused person was taken to Central Police Station while the seized trophies were handed over to the exhibit keeper. He further admitted that, the distance between people's residence and crime scene was about half a kilometre and it took them five minutes to reach there. He also admitted neither to have seen any error on exhibit P4 nor to be told by PW2 about such errors. When he was questioned by the court, he confirmed to have witnessed PW2 filling in Exhibit P4 with his own handwriting and they arrived at Arusha before 00:00 hours.

In his defence, the accused testified under oath and denied to have been found in possession of the elephant tusks in question. He further stated that, on 15th December, 2014, he went to Loliondo to see his parent who live at Digodigo Village within Ngorongoro District. During the night, some people arrived at his parent's house and arrested him. After the arrest, they took him to their motor vehicle where he found two other people and they drove away to their camp located at Ngorongoro. Among the arresting officers were PW2 and PW3. They kept him for three days there and on 19th December, 2014, they took him to MtowaMbu Police Station together with other two persons he found in the vehicle on the day of arrest. On 20th December, 2014, he was taken to KDU Arusha whereby after arrival, they

began to interrogate him concerning elephant tusks which he was not aware of. In the course of interrogation, they showed him the tusks and said those were the tusks for the case he is going to face. After that, they took him to Police Station and two days later, he was taken to Arumeru District Court.

Two years later, upon completion of investigation, he was transferred to the Resident Magistrate's Court and the case proceeded with hearing. In the course of hearing, Exhibit P4 was rejected by court when PW2 in the matter at hand prayed to tender it as exhibit, and it was at that juncture, when he was set free. However, he was re-arrested just outside the court room. He denied to have signed exhibit P3 and P4 and insisted to be innocent and thus prayed for his release by order of the court.

In a nutshell, that was the evidence of the prosecution and defence side. The counsel for the defence complied with the Court's order and filed final submissions. However, the prosecution side failed to file their final submission as per the Court order.

In his final submission, Mr. Koisenge, learned counsel for the accused person, attacked the prosecution's case for being insufficient to prove the accused person guilty as charged. He began his submission by challenging the evidence of PW2 on how he rectified the errors in Exhibit P4. He added that, there is inconsistency between PW2 and PW3 on how the former alleged to have involved the latter in rectifying some errors in Exhibit P4. On this, PW3 denied either to see such errors or to be involved in their rectification. He cited the case of **Jeremiah Shemweta v. Republic** [1985] TLR 228 to support his argument on inconsistency in the prosecution's evidence. He further challenged the authenticity of Exhibit P4. According to

his submission, PW2 admitted to write both Exhibits P3 and P4. PW2 also admitted that he has never imitated the handwriting of any other person. He further insisted that, even without assistance from an expert, the handwriting in two exhibits is not one and the same.

Apart from that, Mr. Koisenge faulted the chain of custody of the seized trophy on account that same was broken. According to him there is discrepancy between Exhibit P3 and the evidence of PW1, PW2 and PW3 in respect of the date of handing over the trophies in question. PW1 stated to have received Exhibit P2 on 17/12/2014 at 15:00 hours, as it is shown in Exhibit P3. On the other hand, according to PW2, they left Samunge in the morning of 16/12/2014 and spent seven hours up to Anti-poaching office in Arusha, whereby after 30 minutes, he handed over the exhibit to PW1. This shows that, he handed over the exhibit on 16/12/2014. The evidence of PW2 is supported by PW3 who insisted to have arrived on 16/12/2014 whereby soon upon arrival, they handed over the accused person and PW2 handed over the Exhibit to PW1. To him, these are clear contradictions which go to the root of the case. He cited the case of **Mohamed Said Matula v. Republic** [1995] TLR 3 and submitted that, when there are inconsistencies on prosecution's evidence which go to the root of the matter, then the accused person should be given benefit of doubt. With the broken chain of custody, the learned counsel concluded that, the prosecution failed to prove the case to the required standard. Thus, the accused person should be acquitted.

Having considered the evidence on record and the submission by the counsel for the accused, there are two issue for determination, **one**, *whether*

*the accused person was actually found in possession of the Elephant tusks in question and **two**, whether the chain of custody was unbroken.*

It is worthwhile to underscore that, according to section 3 (2) (a) of the Evidence Act [Cap. 6 R.E. 2002], in criminal matters, a fact is said to be proved when the court is satisfied by the prosecution beyond reasonable doubt that such fact exists. See also the case of **Nathaniel Alphonse Mapunda & Benjamini Alphonse Mapunda vs Republic** [2006] TLR 395. That is to say, the guilt of the accused person must be established beyond reasonable doubt. Generally, and always, such duty lies with the prosecution except where any other law expressly provides otherwise. One of such exceptions is section 100 (3) (a) of the WCA. The provisions of this section are very clear that, the accused person has the duty to prove that the possession of government trophy is lawful.

However, it is a settled principle that, when the burden proof shifts to the accused person, the standard of proof is not as higher as that of the prosecution. This was stated by the Court of Appeal of Tanzania in the case of **Said Hemed v. Republic**, [1987] TLR 117, thus:

"In criminal cases the standard of proof is beyond reasonable doubt. Where the onus shifts to the accused it is on a balance of probabilities."

In the light of the principles underscored above, and considering the ingredients of offence under the charging section, it is the duty of the prosecution to prove beyond reasonable doubt that that trophy in question is the government trophy and it is the accused person was found in possession of that government trophy. Likewise, it is the duty of the accused

person to prove on balance of probabilities that, the possession of the said trophy was lawful; that is, with the permit of the Director of Wildlife.

Before determining the first issue, according to the testimony of PW1, there is no doubt that, the tusks in questions are elephant tusks and thus government trophy. According to his profession and experience, he identified them as elephant tusks basing on the following features which are only found in Elephant tusk; they have Schreger lines; in the inner part, they have open space from the base to the middle part, but from the middle part to the tip the space is cemented. Apart from that, PW1 in his testimony stated that, the six pieces were cut from two complete tusks. In other words, exhibit P2 is equivalent to two killed elephants whereby, each valued at USD 15,000. In that view, the total amount of two killed elephants is USD 30,000 equivalent to Tshs. 50,868,900/= according to the exchange rate on the date of valuation. His testimony is supported by Exhibit P1, Trophy Valuation Certificate. In that view, there is no doubt that Exhibit P2 is the government trophy whose value is Tshs. 50,868,900/=.

I now turn to the first issue. Basing on the evidence on record, the answer to this issue depends solely on the evidence of PW2, PW3 and Exhibit P4, the certificate of seizure. The accused person in his defence, categorically denied to have been arrested with the tusks in question. He also denied to have signed exhibits P3 or P4. It is therefore upon the prosecution to prove beyond reasonable doubt that, Exhibit P2 was actually seized from the accused person.

Both PW2 and PW3 claimed to have arrested the accused person in possession of Exhibit P2. According to PW2 and PW3, after receiving the

information for their informant, they headed to Samunge area where they reached at around 04:00 hours. Although this was not disclosed by PW2 but according to PW3, at first, they wanted to do the business in a certain house, but later they all agreed to go in the bush since that was illegal business. According to PW2 it took them 45 minutes from peoples' residence to the crime scene but according to PW3 it took them less than five minutes because it was a half kilometre away. Upon arriving at the crime scene and after satisfying themselves that those were elephant tusks, they unveil themselves and arrested the accused person while the other two suspects managed to escape. After that, PW2 filled in Exhibit P4 which was signed by himself, PW3 and the accused person. In that view, it was Exhibit P4 that proves what transpired during the seizure exercise. Now the next thing to be determined is the weight as well as evidential value of Exhibit P4.

I must state at the outset that, Exhibit P4 raises a serious doubt as to whether it was prepared at the crime scene and filled in by PW2. During cross examination, PW2 admitted to have filled in both Exhibits P3 and P4 with his own handwriting. He also admitted that he has never imitated the handwriting of any other person. He further admitted to rectify on errors he committed while filling in the exhibit in question after involving the accused person and his colleagues. However, when PW3 replied to the question from the defence Counsel, during cross examination, he admitted neither to have seen any error on the exhibit in question nor to be told by PW2 about such errors as claimed by PW2. Apart from that, when PW3 was responding to the question from the Court, he insisted to have witnessed PW2 filling in the exhibit in question by his own handwriting.

I have thoroughly examined Exhibit P4 alongside with Exhibit P3 both purported to be written by PW2. It is very unfortunate that, it does not need a handwriting expert to see dissimilarity of the handwriting on these two exhibits. The unlikeness is so obvious to be noticed by an ordinary person who just knows how to read and write. Strange enough, the handwriting on Exhibit P4 looks similar with the one on Exhibit P1, which according to PW1's testimony, it was written by him. If Exhibit P4 was actually filled in at the crime scene by PW2 who also rectified some errors after involving PW3 and the accused person, then how is it possible PW3 did not see those errors and was never told by PW2 about the errors and rectification! This in itself casts strong doubt on whether the said seizure took place on the fateful night and date at the alleged place.

Apart from that, there is another issue which weakens the credibility of PW2. During cross examination, at first PW2 admitted that, he has never testified before any other court in respect of Exhibit P4. But later, he admitted to have once testified before another court on the same exhibit which was tendered and admitted before the said court. Assuming that what was answered by PW2 under oath is the truth, then it would be expected for Exhibit P4 to contain some endorsements of the court to confirm its admission there. But that was not the case. Nevertheless, when he was responding to the question from the court, he abruptly changed his version by stating that, in his former testimony at the Resident Magistrate's Court of Arusha, Exhibit P4 was objected when he prayed to tender it before that court and he left the same with the counsel for the Republic in the case involving the same accused person before this Court. If PW2 was truthful, then why the sudden change of his stories over the same fact! If PW2 lied

on this fact, can he be believable in other things like filling in the certificate of seizure at the crime scene? The answer is definitely NO! It is therefore the considered view of this court that, PW2's behaviour of changing his versions of the same story weakens his credibility.

As explained above, the burden of proof in criminal matters lies upon the prosecution to prove the case beyond reasonable doubt (See also the case of **Mohamed Said Matula v. Republic** [1995] TLR 3). In the instant case, it is the duty of the prosecution to prove beyond reasonable doubt that the trophy in question was actually found and seized from the accused person. In the considered view of this court, proving possession of government trophy begins at the stage of seizure. Since the said seizure is tainted with doubts, it is not with certainty that the trophy in question was found and seized from the accused person.

It is a settled principle that, the accused person has no any duty whatsoever to prove his innocence. The accused person's evidence does not have to be believed but only to raise reasonable doubt. It is also stated in the case of **Christian Kaale and Rwekiza Bernard v. Republic** [1992] TLR 302 that, the accused person ought not to be convicted on the weakness of his defence but on the strength of the prosecution case.

In the matter at hand, the accused person categorically denied to have been found in possession of the trophy in question. According to him, he was arrested at his parents' home on the night of 15th December, 2014 when he went there to see them. He denied to have signed on Exhibits P3 and P4. He further explained how PW2 had once testified before the Resident Magistrate's Court of Arusha in respect of Exhibit P4 which was rejected and

consequently he was discharged but re-arrested just outside the court room. The accused person's defence might not be believable but it raises doubt on the prosecution's case considering the uncertainty circumstances surrounding the seizure as explained herein above.

In that regard, and for the reasons stated above, it is the firm view of this Court that, the prosecution side has failed to prove beyond reasonable doubt that the accused person was actually found in possession of the Elephant tusks in question. Hence, the first issue is answered in the negative. Since the first issue is answered in the negative, I will thus not look into the second issue whose determination depends on the first issue.

In the upshot, and since the prosecution has failed to prove the case on the required standard, the accused person is hereby acquitted of the charged offence of unlawful possession of government trophy and is accordingly set free.

It is so ordered.



**I. K. BANZI
JUDGE**

13/12/2019