

**THE UNITED REPUBLIC OF TANZANIA**  
**IN THE HIGH COURT OF TANZANIA**  
**CORRUPTION AND ECONOMIC CRIMES DIVISION**  
**AT ARUSHA**  
**ECONOMIC CASE NO. 17 OF 2019**  
**REPUBLIC**  
***VERSUS***  
**SIMON SHAURI AWAKI @ DAWI**

**JUDGMENT**

The accused person abovementioned, is indicated for unlawful possession of government trophy contrary to section 86(1) and (2)(b) of the Wildlife Conservation Act, No. 5 of 2009 read together with paragraph 14 of the First Schedule to, and sections 57(1) and 60(2) of the Economic and Organized Crimes Control Act, Cap 200 R.E. 2002 as amended by sections 16(a) and 13(b) respectively of the Written Laws (Miscellaneous Amendment) Act No. 3 of 2016. In the particulars of offence, Simon s/o Shauri Awaki @ Dawi is accused that on 1.12.2016 at Majengo Mto wa Mbu within Monduli District in Arusha region, was found in unlawful possession of government trophies to wit seven pieces of elephant tusks which is equivalent to one killed elephant valued USD 15,000, equivalent to Tsh 32,910,000/=. The accused denied a charge.

Prosecution witnesses' presented evidence as summarized hereunder:

It was a testimony of PW5 that on 30.11.2016 he was informed by his informant that there was someone with government trophy looking for buyers. On 1.12.2016 PW5 and PW6 commenced a journey and were received by the accused at Mto wa Mbu where they had a short conversation with the accused, who told them that the luggage was at the forest. Later the accused took them outside Mto wa Mbu township, at the forest somewhere at Majengo where they saw accused companion who were introduced as Jinaa, Abed and Ngereza. It was the evidence of PW5 that the accused assigned Abed and Ngereza to collect a luggage at the forest where it was hide. After a luggage was brought, the accused and Janaa opened it, where PW5 illuminated with a torch. After PW5 and PW6 had confirmed it being government trophy seven pieces of elephant tusk and while the accused and the said Janaa were on process of measuring it is weight, they were put under arrest, where the three managed to escape, only the accused was apprehended. Thereafter a certificate of seizure (exhibit P8) was prepared by PW5.

The accused and an exhibit of seven pieces of elephant tusk (exhibit P2) were taken to Ngorongoro Police Station, where PW6

handed over the exhibit of seven elephant tusks contained into white sulfate bag to PW2 D/SSG Yohana (exhibit keeper thereat) via handing over certificate exhibit P3, for safe custody. On 2.12.2016 PW2 handed back the seven pieces of elephant tusks exhibit P2 to PW6 via a handing over certificate exhibit P4. On the same date to wit 2.12.2016, PW6 handed over the seven pieces of elephant tusks exhibit P2 to the exhibit keeper at Anti-Poaching Unit Zone offices at Arusha Njiro one Buchard Mkandara PW4, via handing over certificate exhibit P7. On the same date PW4 handed over the seven pieces of elephant tusks exhibit P2 to Godfrey Shechambo PW3 through a handing over certificate exhibit P6. PW3 conducted identification and valuation of the government trophy as per trophy valuation exhibit P5 and then handed back exhibit P2 via the same handing over certificate exhibit P6. On 31.1.2018 PW4 handed over the seven pieces of elephant tusks to James Kugusa PW1, via handing over certificate exhibit P1, the later take over the role of exhibit keeper at KDU Arusha after the former went for compulsory retirement. PW1 preserved the seven pieces of elephant tusks exhibit P2 until when he tendered it in court.

On defence, Simon Shauri Awaki DW1, stated to have been arrested on 1.12.2016 at about 1600 hours by PW5 and PW6 at

Majengo, on a way from Hamza Ally Mkonwa (DW2) where he went there to ask for stalk of maize and one sack of maize. That while at the road at Majengo, he saw a motor vehicle make Land cruiser XL, someone was pointing a finger through a window spotting him, where Japhet Maro and Isack nanyaro descended, arrested and handcuffed him alleging he was involved in poaching. This story was corroborated by DW2. It was a story of DW1 that after he entered into a motor vehicle he saw other four people and a sulfate bag which he was told had elephant tusks which belong to him, where he was severely beaten forced to admit. That a motor vehicle left on high speed towards Ngorongoro forest, where he was humiliated, put off clothes and itching plant were spread into his body. Thereafter he was taken to Ngorongoro Police where he was detained until the following day at 10.00 hours he was taken to Minjingu Police where he was tortured until the 4<sup>th</sup>. On 5<sup>th</sup> he was taken to Talangire National Park where he was tortured and threatened to shot him and forced to sign. That he was taken back to Minjingu police then transferred to Njiro Police where he stayed up to the 6<sup>th</sup> and his condition was worse. He was taken to court on 8.12.2016, where the magistrate ordered him to be taken to hospital via a PF3 exhibit D1. At hospital it was discovered that he sustained injuries and wounds and obtained treatment. That

Japhet said they meet with him and proceeded to forest to accused's companion, which is a lie. That Isack said accused's companion were inside a house. That he was forced to sign exhibits tendered in court. That the evidence of seizure certificate is not true as no trophy was seized in his possession. He asked the court to believe his explanation and evidence and acquit him.

In this matter Ms Janeth Sekule learned Senior State Attorney, Felix Kwetukia learned State Attorney, Mmary learned State Attorney and Ms Naomi Mollel learned State Attorney appeared for the republic (prosecutor) and the accused was under representation of Mr. Daud Haraka learned Advocate.

Both defence and prosecution had filed closing submission which will be considered and referred in the course of making findings as the need will arise.

Issues for determination: first, whether the seven pieces of elephant tusks were seized from the accused; secondly whether the chain of custody was properly maintained.

For the first issue, there are two different version of story from the prosecution and defence, regarding a destination where the accused was arrested. According to the evidence presented by prosecution in particular PW5 and PW6 arresting officers,

maintained that the accused was arrested at Majengo area at the forest outside Mto wa Mbu, where it is alleged that the accused had taken them for accomplishment of a deal for sale and buy of luggage of elephant tusks. This fact was vehemently disputed by the accused at defence, who come with his different version of a story that he was arrested at Mto wa Mbu aside the road where he was looking for transport. According to DW1 (the accused), PW5 and PW6 spotted him, descended into a motor vehicle make land cruiser and arrested him. This story was supported by DW2. However, there was some inconsistency between DW1 and DW2, first DW1 said PW5 and PW6 descended into land cruiser XL, while DW2 said it was land cruiser box. DW1 said PW5 was pointing a finger through a window, while DW2 said they did not point a finger while in a motor vehicle, only pointed a finger after descending down. Another thing, while DW1 said they were three at the scene where he was arrested including one Mzee Mhoja and other passerby, DW2's evidence portray that they were with Mzee Mhoja at DW2 home for lunch, then DW2 alone escorted the accused. DW1 said he obeyed to be put under arrest and was beaten and was arrested by two pistol. DW2 was silent on this aspect. DW1 said the two men told DW2 that they are arresting him because he is involving in poaching, while DW2 said they told him that they are

taking him to police post, and if he wants to know details he should go there.

These discrepancies on the part of defence witnesses are vital, render their story that the accused was arrested at Majengo aside the road, to be unworthy of believe. More important, as conceded by DW1 during cross examination, PW5 and PW6 were not put to task, regarding a question that the accused was arrested at Majengo near a residential house of DW2 and not at the forest as stressed by PW5 and PW6. Therefore, that defence is taken as concoct. To this end, I am guided by the decision in the case of **Hamis Mohamed vs Republic**, Criminal Appeal No. 297 of 2012, CAT at Arusha (unreported) at page 8, cited with approval the case of the House of Lords in **Browne v Dunn** (1893) 6R.67, H.L., cited by the learned State Attorney, held, I quote,

*"...a decision not to cross examine a witness at all or on a particular point is tantamount to an acceptance of unchallenged evidence as accurate, unless the testimony of the witness is incredible or there has been a clear prior notice of the intention to impeach the relevant testimony"*

However, there was discrepancy on the prosecution regarding an actual destination where PW5, PW6 and accused meet the other three people alleged companion of the accused, a concern which was also pointed out by the learned defence Counsel in the closing submission. While PW5 said they meet the three people outside township of Mto wa Mbu then proceeded at forest, PW6 suggest that they meet them at a forest. But, principal both PW5 and PW6 stated that after meeting the accused at Mto wa Mbu town they went on the outskirts of Mto wa Mbu town, where they meet those three people, then Abed and Ngereza went into the forest to collect a luggage. In the circumstances, I decline to a suggestion of the learned defence Counsel who argued a discrepancy being fatal. To my view, the discrepancy if any, is taken to be a minor one. That said, I hold that the accused was arrested at the forest Majengo Mto wa Mbu.

The learned defence Counsel also raised an argument that there was a discrepancy on the evidence of PW5 who did not reveal that they had a car rather they were in contact with other officers for backup. That PW6 stated that they had a car the driver who packed not far from the scene. However, both PW5 and PW6 had put in evidence that they had a motor vehicle from Dar es Salaam and dropped at Makuyuni where they picked a bus shuttle to avoid to



be seen by the accused dropping from the state motor vehicle. Again while PW5 stated that they were rescued by the driver less than an hour, PW6 stated that they were rescued by the driver after few minutes. By implication, both PW5 and PW6 were suggesting that the driver after dropping them at Makuyuni, he was tracking them. I therefore rule that the alleged difference in the testimony of PW5 and PW6 even if is there, is taken as a minor one which does not amount to denting prosecution evidence as a whole.

This take me to a next limb of the first issue, as to whether the six pieces of elephant tusks were seized from the accused. The evidence of PW5 and PW6 was to the effect that, after long communication with their informant who later connected them to the accused after they had arrived at Mkuyuni, then they were received by the accused at Mto wa Mbu. The accused took them outside Mto wa Mbu where they met his companion and proceeded to a forest (scene), where PW5 and PW6 posed as potential buyers of a luggage to wit elephant tusks. The accused assigned one Abed and Ngereza to follow and collect a luggage remotely into a forest where it was hidden. After a luggage was brought, and after PW5 and PW6 had confirmed it being elephant tusks, while the accused and one Jinaa were at the verge of

opening and measuring it is weight, PW5 and PW6 managed to subdue and apprehend the accused who predominant proprietor of elephant tusks and master mind of the deal. As such a defence by the accused that he was not arrested in possession of elephant tusks, is unmerited. Equally his argument that he was beaten, tortured, humiliated and forced to sign a certificate of seizure (exhibit P8) is unbearable. After all, a question pertaining to beating, torture, humiliation and forced to sign exhibit P8 were not asked on cross examination to the author that is PW5 and witness to a search PW6. As such, even a PF3 exhibit D1, which the accused tendered to support his explanation that he was tortured and sustained wounds, cannot assist him, for being defeated by a ground of being an afterthought. As much the accused admit ownership of a signature and thumb print appearing in a certificate of seizure exhibit P8. And so far exhibit P8, speak loudly that the seven pieces of elephant tusks exhibit P2, were seized from the accused. It suffices to say that the evidence presented by PW5 and PW6 is watertight that the accused was arrested in possession of elephant tusks. A slight anomaly on exhibit P8 that at a place where it ought to be recorded a name of a witness present at a search, instead it was recorded Mpanda, cannot vitiate the whole certificate of seizure, as the witness to a seizure had recorded his

name at the bottom and signed. More important, both PW5 and PW6 said the error was occasioned after the accused had mentioned being resident of Mpanda. Indeed, at defence the accused had explained to have duo homestead at Mpanda and Karatu. I therefore decline to an invitation by the learned defence Counsel that I should hold that the error amount to no certificate at all. In lieu thereof, I rule the anomaly to have been cured as aforesaid.

Therefore, the first issue is ruled in affirmative.

The second proposition, whether the chain of custody was properly maintained. It is in records, that after seizure of an exhibit of seven pieces of elephant tusk contained into white sulfate bag (exhibit P2) were taken to Ngorongoro Police Station, where PW6 handed over to PW2 D/SSG Yohana (exhibit keeper thereat) via handing over certificate exhibit P3, for temporal safe custody, as PW6 was on transit. On 2.12.2016 PW2 handed back the seven pieces of elephant tusks exhibit P2 to PW6 via a handing over certificate exhibit P4. On the same date to wit 2.12.2016, PW6 handed over the seven pieces of elephant tusks exhibit P2 to the exhibit keeper at Anti-Poaching Unit Zone offices at Arusha Njiro one Buchard Mkandara PW4, via handing over certificate exhibit P7. On the same date, PW4 handed over the seven pieces of elephant tusks

exhibit P2 to Godfrey Shechambo PW3 through a handing over certificate exhibit P6. PW3 conducted identification and valuation of the government trophy then handed back exhibit P2 via the same handing over certificate exhibit P6. On 31.1.2018 PW4 handed over the seven pieces of elephant tusks to James Kugusa PW1, via handing over certificate exhibit P1, the latter take over the role of exhibit keeper at KDU Arusha after the former went for compulsory retirement. PW1 preserved the seven pieces of elephant tusks exhibit P2 until when he tendered it in court.

It can be said therefore that, the prosecution had managed to establish a chronological event on sequence of custody in respect of seven pieces of elephant tusks exhibit P2 collectively. Indeed, there was no query from the defence regarding a breakage of chain of custody.

Finally, whether the act committed by the accused person amounted to unlawful possession of government trophy. The penal provision to wit section 86(1) of the Wildlife Conservation Act, No. 5 of 2009, provide that a person shall not be in possession of or otherwise deal in any government trophy. According to PW3 stated that he joined the seven pieces to get a shape of elephant tusks, where three pieces formed one elephant tusk and the rest four pieces were connected to form another elephant tusk. PW3

observed cross section (shulgoer lines) which are not found in any other animal apart from elephant. It was the evidence of PW3 that, inside a jaw there is a space which occupies half or one third of elephant tusks, thereafter the space disappears on the enamel part, also morphology and curved shape which made him to be satisfied that it was an elephant tusks. PW3 valued the seven pieces of elephant tusks equal to a live elephant a sum of USD 15,000/= equivalent to Tsh 32,910,000/= (exchange rate on 2.12.2016) as per trophy valuation certificate exhibit P5. On the other hand, PW6 explained that he identified the seven pieces as elephant tusks because elephant tusks have a lot of peculiarity, in a root of a tusk there is a hole, they have stripes not found in other horns, they are curved shaped.

This testimony in a form of opinion did not receive a backlash from the defence. Therefore, the seven pieces contained in a white sulfate bag exhibit P2, seized from the accused and his colleague at large, are elephant tusks which are government trophy.

In the premises, the accused is taken to have been in unlawful possession of government trophy.

Having adumbrated as above, I rule that the prosecution has managed to prove an information leveled against the accused.

The accused is convicted for unlawful possession of government trophy contrary to sections 86(1) and (2)(b) of the Wildlife Conservation Act, No. 5 of 2009 read together with paragraph 14 of the First Schedule to, and sections 57(1) and 60(2) of the Economic and Organized Crimes Control Act, Cap 200 R.E. 2002 as amended by sections 16(a) and 13(b) respectively of the Written Laws (Miscellaneous Amendment) Act No. 3 of 2016.



E.B. Luvanda

**JUDGE**

**19/11/2019**