

**THE UNITED REPUBLIC OF TANZANIA**  
**IN THE HIGH COURT OF TANZANIA**  
**CORRUPTION AND ECONOMIC CRIMES DIVISION**  
**AT ARUSHA**

**ECONOMIC CASE NO. 21 OF 2019**

**REPUBLIC**

***VERSUS***

**1. METAWASI S/O LOMAYAN MESHULAI @ LEYOO**

**2. ELIBARIKI S/O RISHAEL URASA**

**3. FREDY S/O KASAYE @ MOJAH**

**JUDGMENT**

The accused persons Metawasi s/o Lomayan Meshulai @ Leyoo (first accused), Elibariki s/o Rishael Urasa (second accused) and Fredy s/o Kasaye @ Mojah (third accused) are 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, Metawasi s/o Lomayan Meshulai @ Leyoo (first accused), Elibariki s/o Rishael Urasa (second accused) and Fredy s/o Kasaye @ Mojah (third accused) are accused that on 10.9.2016 at Makuyuni area within Monduli District in Arusha region, were found in

unlawful possession of government trophies to wit two elephant tusks weighed at 58.8 kilograms valued USD 32,340 equivalent to Tsh 70,598,000/= . The first, second and third accused denied an information.

It was the prosecution evidence that on 10.9.2016 PW2 Solomon Jeremia Bilozo (game warden) got information from his colleague one Raymond Mdoe that one person had an elephant tusks at Arusha town and was looking for a purchaser. They reported to the head of Anti Poaching Unit (KDU) Arusha, who assigned them to pose as buyer and apprehend that person. Raymond communicated with that person and agreed to meet at Makao Mapya Arusha. On arriving there, that person introduced as Malaki Palangyo and told them that tusks were at Makuyuni. They proceeded at Makuyuni arrived at 11.00 hours, parked a motor vehicle, where Malaki Palangyo communicated with his colleague. While still at the road, came two people who were introduced as Fred Kasaye and Elibariki Rishael who told them that tusks were at interior in the bush. Malaki Palangyo, Fred Kasaye and Elibariki Rishael boarded into PW2's motor vehicle and Fred Kasaye lead them the way, diverted tarmac road at Arusha Babati road and proceeded on the right handside after two kilometers arrived at a bush saw they saw three people Malaki Palangyo, Fred Kasaye and Elibariki Rishael alight and had conversation with those people who were later introduced as Metawasi Lomayan, Papaa Losyeko and Lalashi Mollel. Metawasi Lomayan, Papaa Losyeko and Lalashi Mollel proceeded at a shrub bush and returned with two elephant tusks one weighing 30 kilograms and the other 28.8 kilograms, which were agreed to be sold Tsh 150,000/= per kilogram. The two tusks were loaded into a motor

vehicle and Metawasi Lomayan (first accused) and Elibariki Rishael (second accused) boarded into a motor vehicle in view of receiving payments from PW2 and his colleague, only to be told they were under arrest. After arrest, a certificate of seizure (exhibit P3) was recorded in respect of two elephant tusks (exhibit P2). Thereafter they took the suspect and elephant tusks to KDU Arusha. PW2 explained that Raymond Mdoe handed over two elephant tusks to store keeper James Kugusa PW1 (game warden cum store keeper).

PW1 explained that the handing over were done on 10.6.2016 at KDU via handing over certificate exhibit P1. PW1 labeled the two elephant tusks by recording date of seizure on 10.6.2016, place of seizure at Makuyuni, name of suspects and then preserved. On 11.6.2016 in the morning PW1 handed over the two elephant tusks exhibit P2 to Gilbert Bobewe PW4 (wildlife officer). PW4 conducted identification and valuation of the government trophy as per trophy valuation exhibit P4 and then handed over back two elephant tusks exhibit P2 to PW1. PW1 preserved those two elephant tusks exhibit P2 until when he tendered in court.

It was the testimony of PW2 that on 5.10.2016 they managed to apprehend Fred Kasaye (third accused) at Makuyuni, as also put by PW3.

On defence, Metawasi Lomayani DW1, stated that on 10.9.2016 one person asked DW1 to shuttle him with a motorcycle (bodaboda) to Simangoni. Upon arriving there, alight and hold conversation with some people. While DW1 was still awaiting for him, DW1 was ambushed, arrested and taken into a car which had parked there where he saw other people and tusks therein. On the same date, they were (four people) taken to KDU Arusha

for accusation of selling elephant tusks. That he denied those allegation, as he is not involved. He denied to have committed this offence. DW2 Nembris Lomayan (second accused's wife), stated that the allegation against the first accused are false, as he is not involved in that business.

Ndelelio Rishael Urassa DW3 (second accused) stated that his name is Ndelelio Rishael Urassa (as per voting card exhibit D1) and not Elibariki Rishael Urassa as appearing in the information. That on 11.9.2016 he was at Dar es Salaam and came back to Arusha on 12.9.2016 as per a ticket exhibit D2. That he was arrested on 13.9.2016 at Sanawari Chini while coming from Sanawari Juu where he was estimating timber for roofing a house of Maxwell (DW4). A last version of a story was supported by Maxwell George DW4, who stated that he was in company of the second accused when he was arrested. DW4 stated that Ndelilio Rishael Urassa is a craftsman who was estimating nails, iron sheet and timber for roofing DW4 house.

Fred Kasaye DW5 denied allegation that he run at the scene, on the explanation that on the alleged material date on 10.9.2016 he was on his routine pastoralist activities from morning to evening. That he was arrested by police officers who were accompanied by his neighbor one Pili Asbert (DW6), on 5.10.2016 at 21.00 hours while at home Makuyuni. That they conducted search and took seven pieces of metal pipes, alleging stolen property. This story was supported by Pili Asbert DW6.

In this matter Ms Talisila Gervas learned Senior State Attorney, Felix Kwetukia learned State Attorney, Mr. Charles Kagirwa learned State Attorney, Ms. Tusaje Samwel learned State Attorney and Ms Upendo Shenkole learned State Attorney appeared for the republic (prosecutor) on divert dates and the first accused was under representation of Mr. Fredrick Musiba learned Advocate, Mr. Ombeni Kimaro learned Advocate appeared for the second accused and Ms. Magdalena Sylister learned Counsel was for advocating for the third accused.

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 two elephant tusks were seized from the accused persons; secondly whether the chain of custody was properly maintained.

Principally the evidence of PW2 implicate Metawasi Lomayani and Elibariki Rishael who easily fall into a trap and boarded a motor vehicle to conclude a deal of payment. This was done after loading the two elephant tusks, the first had 30 kilograms and the other 28.8 kilograms exhibit P2. Having boarded into a station wagon hardtop car with only two front doors and a rear door, and on being told were under arrest, the duo waged a commotion and fight with PW2 and colleague but were ultimately subdued. It was the exposition of PW2 that on seeing that mess, the rest four suspects who were outside a car, disappeared. It was the story of PW2 that after arrest, the duo signed a seizure certificate exhibit P3 where PW3 signed as a witness. A defence by the first accused that he was arrested at a different location somewhere at Simangoni where he was shuttling a passenger, is unfounded. As such fact was not posed to PW2 on cross examination,

that the first accused was not at the scene at Makyuni shrub bush on the material date, rather was at Simangoni as alleged by DW1.

Indeed Metawasi Lomayan (first accused) had played a double role including bringing a luggage from shrub bush with his fellow Papaa Lusyeku and Lalashi Mollel (at large). The evidence in records suggest Metawasi as a key player (mastermind). In other words, the first accused was in actual possession of the two elephant tusks.

However, the defence by the second accused raises serious doubt to the prosecution evidence: for one thing the second accused disowned the name Elibariki Rishael Urasa being not his name. At defence, the second accused (DW3) introduced himself as Ndelelio Rishael Urasa and tendered a voter's card No. T-1006-5683-778-5 (exhibit D1) issued by the National Electoral Commission bearing a name Ndelelio R Urasa and his photograph. This piece of evidence was not rebated by the prosecution. Nevertheless, the evidence of DW4 who alleged to know the second accused by his three names Ndelelio Rishael Urasa while they had just mate at once on a single day, when it is allegedly they just mate for estimating cost of roofing materials, is highly suspect. As it is quite unusual to know three names of craftsman who is a stranger. For another, the second accused introduced a defence of *alibi*, that on a date alleged he committed this offence at Makuyuni area Monduli district on 10.9.2016 he was not at the scene, rather he was on safari to Dar es Salaam. He tendered a travelling ticket, which shows that he travelled to Arusha on 12.9.2017 as per a ticket exhibit D2. But this defence had some query, the second accused did not tender a ticket for travelling to Dar es Salaam on the alleged 5.9.2016. DW4 who alleged to be in company with the accused on 13.9.2016 at Sanya

Chini (allegedly at a destination where the second accused was arrested), did not say if at all on 9.9.2016 when he alleged to have communicated with the second accused if he was told that the latter was in Dar es Salaam.

Be as it may, there be no strong opposition from the prosecution to counter the said *alibi*, it therefore goes without saying that, the alibi introduced and relied by the second accused cast doubt on a prosecution evidence.

Regarding the evidence presented by the prosecution witnesses against the third accused. I shake hands with the learned Advocate for the third accused that there was no direct evidence linking the third accused who was arrested on 5.10.2016 after elapse of 25 days counting from the date of incident on 10.9.2016. An explanation by PW2 that he identified the third accused because had mark, is unsatisfactory. PW2 did not give a detailed account of the said mark, nor exhibited it in court to the third accused at a dock. Again there was a serious contradiction regarding to who actually had arrested the third accused on 5.10.2016. On cross examination, PW2 stated that the third accused was arrested by Gabriel Charles (PW3). When PW3 was put to task at cross examination, he said PW2 and one Raymond Mdoe was there, when he arrested the third accused on 5.10.2016. I therefore note with an argument of the learned defence Counsel for third accused that the contradiction raises doubt on the credibility of prosecution evidence.

There was an argument raised by the defence Counsel for the third accused regarding admission of statement of Raymond Mdoe exhibit P5. Unfortunately the learned Counsel did not cite any law to her complain that prosecution did not go further beyond to trace the said witness. Apart from a fact that this complain is misplaced for being taken to a

wrong forum, it appears also the learned Counsel was under impression that once a notice of objection is taken under section 34B(2)(e) of the Tanzania Evidence Act, Cap 6 R.E. 2002, automatically it renders the impugned statement inadmissible. To my understanding, a notice of objection under paragraph (2) of subsection (2) to section 34B Cap 6 (supra) must be determined by the court to ascertain it is relevancy to a case. This position was introduced by section 34 of the Written Laws (Miscellaneous Amendments) No. 6 of 2012 which amended section 34B (2) (e) by adding the following proviso, I quote,

*'Provided that the court **shall determine the relevancy of any objection**'* emphasis added

The learned Counsel for the third accused also raised an argument that the statement of Raymond Mdoe exhibit P5 had dissimilarity in handwriting (and the same issue was raised by DW5 (third accused). The learned defence Counsel and DW5 was not particular and specific to the said dissimilarity, apart from that general comment. It is true that the statement of Raymond Mdoe made on 10.9.2016 exhibit P5 is two-fold, a first statement was recorded from 16.15 hours ended at 17.30 hours. A second part titled supplementary statement was recorded on the same date at 18.00 hours. A quick look or check of the slant stroke of letters, example "s", "y", "z" and capital "M" they appear to be similar in both statement. The only difference is that the first statement was in small font, and the supplementary statement is in large font. But there is no notable difference on graphology. Also the signature is the same, there is no any clue to suggest that someone was attempting to imitate a signature. Therefore this complaint is baseless. Be as it may,



the first limb of the statement which the maker had signed and appended a closing line, is faulted for contravening the provision of paragraph © of subsection (2) to section 34B Tanzania Evidence Act, Cap 6 R.E. 2002, for the maker did not make a declaration. A declaration appended in the supplementary statement cannot be taken to cure the omission in the first statement. As much in law these are two separate statements, I will spare the supplementary statement. The first statement is expunged.

Therefore the first issue is answered in the affirmative save for the second and third accused persons.

The second proposition, whether the chain of custody was properly maintained. It is in records, after seizure the two elephant tusks were transported to KDU Arusha, where Raymond Mdoe handed over two elephant tusks to store keeper James Kugusa PW1 (game warden cum store keeper), as per a handing over exhibit P1, also supported by a supplementary statement exhibit P5. PW1 labeled the two elephant tusks by recording date of seizure on 10.6.2016, place of seizure at Makuyuni, name of suspects and then preserved. On 11.6.2016 in the morning PW1 handed over the two elephant tusks exhibit P2 to Gilbert Bobewe PW4 (wildlife officer). PW4 conducted identification and valuation of the government trophy as per trophy valuation certificate exhibit P4 and then handed over back to PW1 the two elephant tusks exhibit P2. PW1 preserved those two elephant tusks exhibit P2 until when he tendered in court. Therefore, an argument by the defence Counsel who were of anonymous opinion that a chain of custody was broken, for the reason that there was no handing over between James Kugusa PW1 (exhibit keeper) and Gilbert Bobewe PW4 (who conducted identification and valuation in respect of the two

elephant tusks exhibit P2, is unmerited. It is true that a paper trail for handing over exhibit P2, between PW1 and PW4 was not produced. But the same cannot be a sole reason to say the chain of custody was broken. Oral testimony of PW1 and PW4 suffice to establish the handing over. In **Issa Hassan Uki vs The Republic**, Criminal Appeal No. 129 of 2017, Court of Appeal at Mtwara (unreported), had this to say at pages 11 to 12, I quote in extenso,

*'In the instant case, the item under scrutiny are elephant tusks. We are of the considered view that elephant tusks cannot change hands easily and therefore not easy to temper with. In cases relating to chain of custody, it is important to distinguish items which change hands easily in which the principle stated in **Paulo Maduka** and followed in **Makoye Samwel @ Kashinje and Kashindye Bundala** would apply. In cases relating to items which cannot change hands easily and therefore not easy to temper with, the principle laid down in the above case can be relaxed,*

It can be said therefore that, the prosecution had managed to establish a chronological event on sequence of custody in respect of two elephant tusks exhibit P2 collectively.

Finally, whether the act committed by the first 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 PW4 stated that in identification, he observed cross section (shriger lines) downward which are not found in any other animal around the world apart from elephant, a tusk has a hole and an edge, which prove that the two were elephant tusks. PW3 valued the two elephant tusks equal to a live

elephant a sum of USD 32340/= equivalent to Tsh 70,598,220/= (exchange rate on 11.9.2016) as per trophy valuation certificate exhibit P4.

This testimony in a form of opinion did not receive a backlash from the defence. Therefore, the two elephant tusks exhibit P2, seized from the first accused, are government trophy.

In the premises, the first 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 first accused alone. The second accused and third accused are acquitted.

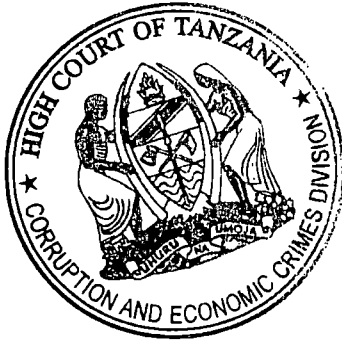
The first accused is convicted for unlawful possession of government trophy contrary to sections 86(1) and (2) (b) of the Wildlife Conservation Act, No. 5 of 2009 read together with paragraph 14 of the First Schedule to, and sections 57(1) and 60(2) of the Economic and Organized Crimes Control Act, Cap 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.

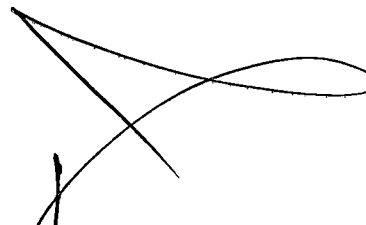


E.B. Luvanda  
**JUDGE**  
**6/3/2020**

### **SENTENCE**

The accused is sentenced to serve either to pay fine Tsh. 705,982,200/= or to a term of twenty years in prison.



  
**E.B. Luvanda**  
**Judge**  
**6.3.2020**

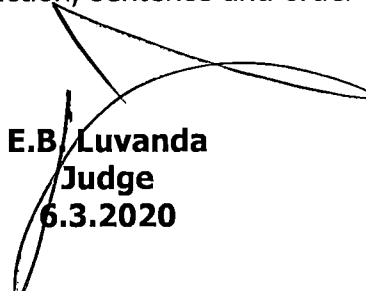
**ORDER**

Elephant tusks exhibit P2 are forfeited to the Republic.

**E.B. Luvanda**  
**Judge**  
**6.3.2020**

**Court:** Right of appeal against conviction, sentence and order for forfeiture is there.



  
**E.B. Luvanda**  
**Judge**  
**6.3.2020**