

THE UNITED REPUBLIC OF TANZANIA

IN THE HIGH COURT OF TANZANIA

CORRUPTION AND ECONOMIC CRIMES DIVISION

AT ARUSHA

ECONOMIC CASE NO. 20 OF 2019

REPUBLIC

VERSUS

1. BULUKA LEKEN OLE NDIDAI

2. LEKITONYI S/O KAIKA LENDIARE

JUDGMENT

Buluka Leken Ole Ndidai (the first accused) and Lekitonyi s/o Kaika Lendiare (the second accused) are indicted 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. It is alleged in the particulars of offence, on 22.10.2018 at Makati Village-Lake Natron

area within Longido district and region of Arusha, the first and second accused were jointly and together found in unlawful possession of government trophies to wit giraffe's meat and head which is equivalent to one killed giraffe valued USD 15,000 which is equivalent to Tsh 34,017,900/= the property of the government of United Republic of Tanzania. The accused persons denied an information.

Prosecution witnesses' presented evidence as summarized hereunder:

It was a testimony of PW1 Anthony Ntoros Peria (game warden) that on 22.10.2018 he was on patrol at Pori Tengefu of Lake Natron, with his colleague Emanuel Mponji (PW4), George Mangu and Hamis Mandai, where his informant told them that poachers are poaching at Makati area at the edge of Lake Natron. They made follow up and proceeded at Makati area, a little far saw people poaching wild animals. They crept up to those two people who were at the scene, sneak along and saw them with a giraffe meat and arrested them. It was the evidence of PW1, that those two people were in possession of a giraffe meat cut with skin and a head, two double edged knives and a matchet, which were seized via certificate of seizure exhibit P1. A matchet and two double edged knives were admitted in evidence as exhibit P2 collectively.

This version of fact was also supported by Emmanuel Alexander Mponji PW4 (game warden), who explained that they saw the accused at the scene cutting into pieces a giraffe meat.

After arrest and seizure, PW1 took the two suspects (accused's), giraffe meat skin and head including a machet and two double edged knives to the office of Anti-Poaching Unit (KDU) Njiro Arusha. PW1 handed over a giraffe meat cut with skin and head, one machet (bush knife) and two double edged knives to the exhibit keeper KDU one James Kugusa PW2 on 23.10.2018, via handing over certificate exhibit P3. On 24.10.2018 PW2 handed over an exhibit of giraffe meat cut with skin and head to Emmanuel Pius PW3, via handing over certificate exhibit P3. PW3 conducted identification and revealed it was a giraffe meat, as had skin which had brown dots which are irregular spots or patches surrounded by white or cream strips; a head had horn called prominent horn like ossicones which are found to a giraffe alone. PW3 conducted valuation in respect of a giraffe meat and a head which formed one giraffe, valued USD 15,000 equivalent to Tsh 34,017,900/= as per trophy valuation certificate exhibit P4. Thereafter he filled an inventory form, where the Magistrate ordered disposal of exhibit of giraffe meat and head, as per inventory exhibit P5.

On defence, Buluka Leken DW1, stated that on a date he don't know, he was arrested at home while sitting and looking his cows at about 19.00 hours. He was severely beaten and taken to Ngareselo detained into a room. The following day he was beaten and taken to Ngaruka where he was beaten and forced to sign somewhere. Thereafter he was taken to Arusha. He stated that it is a tradition for Masai to walk with double edged knife. That one Liamboyi had a quarrel with the second accused, the former took the latter's wife and after the second accused had taken back his wife, it is when they were arrested. That he don't know giraffe meat or skin, just heard it in court.

The second accused Lekitonyi Kaika Lendiare (DW2), stated that he was arrested with the first accused at his home while sitting. That he was beaten and taken to Ngareselo where he was detained. The following day he was beaten and taken to Ngaruka where they were beaten and forced to sign papers. Thereafter they were taken to Arusha. He stated that it is a tradition for Masai to walk with a stick and double edged knife. That he don't know giraffe meat, only heard it in court. That he had a quarrel with his colleague boy one Liamboyi who eloped his wife and after he took back his wife, it is when he was arrested.

In this matter Ms. Rose Sulle learned Senior State Attorney, Ms. Rizik Mahay learned Senior State Attorney and Ms. Naomi Mollel learned State Attorney appeared for the republic (prosecutor) and the accused persons were under representation of Mr. Anold Ojare learned Advocate and Mr. Deogratius Melkior Njau learned Counsel.

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

Issue for determination is whether the accused persons were found in unlawful possession of government trophy. Secondly, whether chain of custody was maintained.

A narration by prosecution witnesses in particular PW1 and PW4, discoursed that they saw the duo accused at the scene (Makati area at the edge of Lake Natron) poaching wild life animal, to wit cutting giraffe meat into pieces. It was stated by both PW1 and PW4 that on seeing the game warden, the accused abandoned a matchet on the carcass meat of giraffe and attempted to run away with their double edged knives, where they were instantly subdued. In view of this watertight evidence, a defence by the accused that they were arrested at home is a concoct to distance from the accusation. I

say so, as during cross examination that fact was not tested to PW1 and PW4. The said defence was unreliable, as on cross examination DW1 said he was arrested while with his children, later changed a story said he was with the second accused. There was no explanation from either of the two accused if the second accused is among the children of the first accused. I say so because, on defence the second accused referred to the first accused by saying this old man. In a similar vein, each accused contended to have been arrested at home, but all maintained that they were arrested while sitting together. In absence of plausible explanation whether the duo accused are living on the same house, their defence raise doubt and confusion. Also a defence by the first and second accused that there was a quarrel between the second accused and one Liamboyi who allegedly eloped the second accused's wife, had no bearing or connection with their subsequent arrest at the scene poaching giraffe.

There was some inconsistency pointed out by the learned defence Counsel on closing submission. First, while PW1 stated that he recorded in his statement that the accused were skinning giraffe, PW4 put that they saw the accused cutting giraffe meat into pieces. For another, PW1 said the game warden are the one who cut pieces of giraffe meat which were taken for

exhibit, while PW4 said they took an exhibit from among the pieces of giraffe meat cut by the culprits. But the said discrepancy is minor and cannot negate a fact that the first and second accused were seen at Makati area poaching (killed) giraffe. An argument that PW4 did not remember the number of pieces of meat of giraffe they took at the scene or that PW2 and PW3 did not know the number of pieces of meat of giraffe handed over to them neither recorded weight, is immaterial. Actually this argument cannot benumb prosecution evidence that the first and second accused were apprehended at the scene with a giraffe's carcass. Finally, PW1 explained that he communicated with the informant viva-voce, while PW4 said the informant had phoned a call to PW1. But the same cannot be ruled to have eroded a fact that PW1 was tipped by the informant that the accused were poaching giraffe at Makati area.

It is true that a matchet and two double edged knives (exhibit P2 collectively) were not listed during committal proceedings and preliminary hearing as argued by the learned defence Counsel. However, the said comment is an afterthought, as when the same were tendered, there was no objection raised by the defence Counsel. Be as it may, in the certificate of seizure (exhibit P1 and handing over exhibit P3) the said matchet and two double

edged knives were mentioned. Again on defence (at cross examination by the learned Senior State Attorney) DW1 said that the game warden seized their (accused) double edged knives. Therefore, an argument by defence Counsel that the accused were taken by surprise cannot stand.

There was an argument raised by the defence Counsel regarding exhibit P5. It is true that exhibit P5 was not named as an inventory as the learned Senior State Attorney wished the court to believe, although it contains all information, description and format of an inventory. The learned defence Counsel had argued that, according to section 101(1) of the Wildlife Conservation Act No. 5 of 2009, require trophy to be tendered or put in evidence. He attacked exhibit P5 that being court order, ought to be written in the format and content acceptable by the court. The learned defence Counsel was not elaborate on his argument. Basically an argument of the defence Counsel that the trophy ought to be tendered or put in evidence, is no longer a requirement of the law. The said provision of section 101(1) of Act No. 5 of 2009 was amended by section 37 of the Written Laws (Miscellaneous Amendments) Act No. 2 of 2017 which deleted the whole provision of subsection (1) and substituted by splitting subsection (1) into two paragraphs (a) for disposal of trophies before and (b) for disposal of

trophies after commencement of proceedings. Of interest here is subsections (1) (a) and (2), I quote,

'The Court shall, on its own motion or upon application made by the prosecution in that behalf-

*(a) **prior to commencement of proceedings,**
order that-*

*(i) **any animal or trophy which is
subject to speedy decay; or***

*(ii) **any weapon, vehicle vessel or
other article which is subject of
destruction or depreciation,***

*and is **intended to be used as evidence,***

***be disposed of by the Director.** Emphasis added*

Subsection (2) provide for the effects of an order for disposal. Basically it dispenses with the requirement of tendering in court animal or trophy subject to speedy decay and which are subject for an order of disposal. For clarity, I reproduce it as hereunder,

*'The order of disposal under this section shall be sufficient
proof of the matter in dispute before any court during trial'*

I am aware of the decision of this Court in **Thomas Kimaro @ Mngoni v Republic**, Criminal Appeal No. 45 of 2018 (unreported), cited the case of

Emmanuel Saguda and Another v R, Criminal Appeal No. 422"B" of 2013 Court of Appeal (unreported). In **Thomas** (supra) this Court faulted the trial court decision on the ground that the trophy was not tendered and that an inventory is not a court order. It is to be noted that Emmanuel (supra) was decided by the Court of Appeal before the amendment introduced by section 37 of Act No 2 of 2017(supra).

Unfortunate the provision of section 101(1) of Act No. 5 of 2009 as amended, is not elaborate on the form of an order on how ought to be sought and made. The said section is also silent to the issue of inventory. Presumably the game warden borrowed a practice of inventory for disposal of perishable trophy from the Police Force and Auxiliary Services Act, Cap 322 R.E. 2002, in particular section 47(1) and (5) regarding disposal of perishable goods, the said provision provides, I quote,

(1) It shall be the duty of every police officer to take charge of all unclaimed movable property and to furnish an inventory or description thereof to a magistrate.

(5) If the magistrate is of the opinion that such property is subject to speedy or natural decay...or, if he thinks it advisable to do so, he may order it to be destroyed...

But this provision is not exhaustive on a form of an order and content of an inventory and on how to go about (nature of proceedings). However, the Police General Order (P.G.O.) 304 prescribe an inventory as a Police Form (PF) No. 12 with the following information: found property register number, date property found, description of property found, estimate value, condition and (magistrate order).

On how to go about with the inventory, an answer is found in the same P.G.O. 304 which goes as follows, I quote a relevant passage for appreciation,

*Prepare, at once, a duplicate special inventory (PF.12) of any perishable property or other property,... and forward same to the local Magistrate recommending the immediate sale of the property. **On return of the duplicate copy from the Magistrate the property shall be return of the duplicate copy from the Magistrate...*** emphasis added

It is clear from the above passage that what is forwarded to and returned from the Magistrate is the same inventory and neither more nor less. As much, both the provision of section 101(1) (a) Act No. 5 of 2009, section 47(1) and (5) of Cap 322 and P.G.O. 304 presupposes issuance of an order.

As much, what the Magistrate ought to return to the police is the same inventory containing the above named description including method of disposal. And so far according to the above provision the property subject to disposal shall be return of the duplicate inventory from the magistrate. It follows that an inventory endorsed by the Magistrate ordering disposal of trophy (property) will suffice to serve the intended purpose. For clarity, it can be said that the order of the Magistrate ought to be endorsed within the inventory for convenient accounting property subject for disposal as envisaged in P.G.O. 304, easy referencing of the detailed report/inventory in the subsequent proceedings and expediting investigation process without defeating the purpose of quick disposal of perishable property.

Herein, exhibit P5 contained the following information: serial number, name and address of accused/suspects, item seized from the accused/suspects, complainant/founder name, conditions of item seized, remarks. Exhibit P5 at a column of item seized, the game warden requested the court to give an order for disposal of seized meat of giraffe cut with skin and head proved to decay, where the resident magistrate endorsed to have seen and remarked it to be disposed. To me this suffice to serve a purpose. Therefor a question

calling for physical exhibit of giraffe meat to be tendered cannot be entertained.

Therefore, the first issue is ruled in affirmative.

The second proposition, whether the chain of custody was properly maintained. It is in record that after seizure, giraffe meat cut with skin and head, together with one matchet (bush knife) and two double edged knives were handed over by PW1 to the exhibit keeper one James Kugusa PW2 on 23.10.2018 via handing over certificate exhibit P3. PW2 preserved until the following day on 24.10.2018 where he handed over an exhibit of giraffe meat cut with skin and head to Emmanuel Pius PW3, via handing over certificate exhibit P3. PW3 conducted identification and valuation in respect of a giraffe meat cut with skin and head. Thereafter he filled an inventory form, where the Magistrate ordered disposal of exhibit of giraffe meat and head, as per exhibit P5. Meanwhile, one matchet (bush knife) and two double edged knives Exhibit P2 were preserved by PW2 who later tendered them in Court.

It can be said therefore that, the prosecution had managed to establish a chronological event on sequence of custody in respect of giraffe meat via an inventory for disposal of exhibit, exhibit P5, including the two double edged

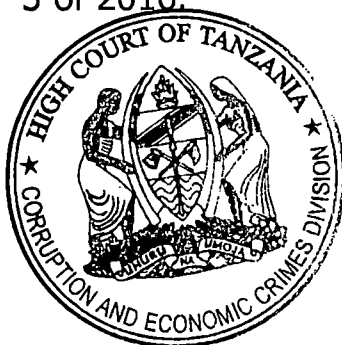
knives and one machet exhibit P2 collectively. Indeed, there was no query from the defence regarding a breakage of chain of custody.

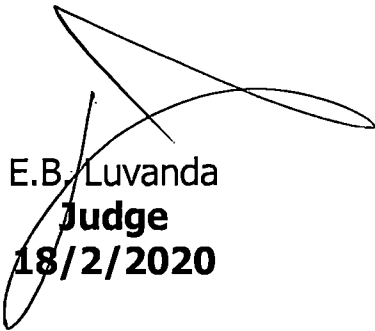
Finally, whether the act committed by the accused person amounted to unlawful possession of government trophy. According to penal provision to wit section 86(1) of the Wildlife Conservation Act, No. 5 of 2009, provide that a person shall not be in possession of or otherwise deal in any government trophy. In this matter, all prosecution witnesses who are wildlife officer (PW3) or game warden (PW1, PW2 and PW4) testified that a meat cut with skin and head found in possession of the first and second accused belonged to a giraffe. That conclusion was inferred on the basis that a meat was not peeled off skin. The evidence of PW3 was more detailed that, he conducted identification and revealed it was a giraffe meat, as was cut with a skin which had brown dots which are irregular spots or patches surrounded by white or cream strips; a head had horn called prominent horn like ossicones, which according to PW3 are found to a giraffe alone. PW3 conducted valuation in respect of a giraffe meat and a head which formed one giraffe, valued USD 15,000 equivalent to Tsh 34,017,900/=, as per trophy valuation certificate exhibit P4.

Therefore, a meat with skin and head seized from the first and second accused belong to a giraffe. And so far the accused persons had no permit for either hunting or possessing a meat of giraffe, as per the testimony of PW1 and PW4. In the premises, the first and second accused are 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 laid against the accused persons.

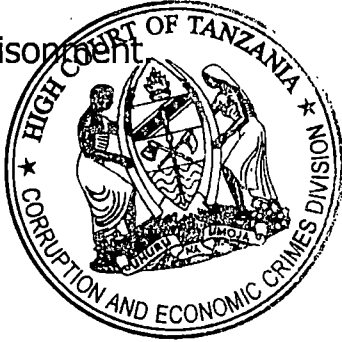
The first and second accused are convicted for unlawful possession of government trophy contrary to sections 86(1) and (2)(b) of the Wildlife Conservation Act, No. 5 of 2009 read together with paragraph 14 of the First Schedule to, and sections 57(1) and 60(2) of the Economic and Organized Crimes Control 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
18/2/2020

SENTENCE

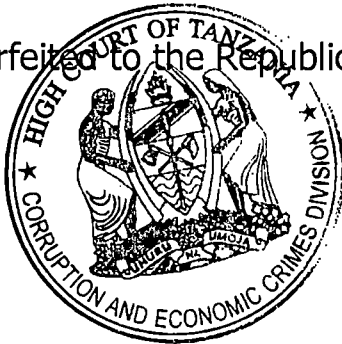
The first and second accused are sentenced to either to pay a fine of Tsh 340,179,000/= or in default each to serve a term of twenty (20) years imprisonment.



E.B. Luvanda
Judge
18/2/2020

ORDER

One machet and two double edged knives exhibit P2 collectively are forfeited to the Republic.



E.B. Luvanda
Judge
18/2/2020

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

E.B. Luvanda
Judge
18/2/2020