

THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

THE CORRUPTION AND ECONOMIC CRIMES DIVISION

AT ARUSHA - SUB REGISTRY

ECONOMIC CASE NO. 16 OF 2019

REPUBLIC

VERSUS

1. PETRO BURA TLEHHEMA

2. JULIUS LEKEYA SABORE

3. LEKENI MBARYO PELENGONG'O @ SAMWEL

4. LOSORUWA LETURA LOCHUMALI

4th and 11th May, 2020

JUDGMENT

BANZI, J.:

Petro Bura Tlehhema, Julius Lekeya Sabore, Lekení Mbaryo Pelengong'o @ Samwel and Losoruwa Letura Lochumali, the first, second, third and fourth accused persons respectively, stand charged with two counts of unlawful hunting in a game controlled area and unlawful possession of government trophy contrary to sections 19 (1) (2) (a) and 86 (1) (2) (b) respectively, of the Wildlife Conservation Act, No. 5 of 2009 (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) as amended by sections 16 (a) and 13 (b) respectively of the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016.

It is alleged in the first count that, on 8th August, 2017 at Sero – Ololosokwan, in Loliondo Game Controlled Area, within Ngorongoro District and Arusha Region, the accused persons hunted and killed one giraffe valued at USD 15,000 equivalent to Tshs.33,637,500/=, the property of the Government of the United Republic of Tanzania without a permit from the Director of Wildlife. In respect of the second count, they were also alleged to have been found in possession of giraffe meat and head valued at USD 15,000 equivalent to Tshs.33,637,500/=, the property of the Government of the United Republic of Tanzania without a permit from the Director of Wildlife.

At the trial, Ms. Adelaide Kassala, learned Senior State Attorney and Ms. Janeth Masonu, learned State Attorney represented the Republic, whereas Messrs. Kapimpiti Mgagula, Denis Moria, Sheck Mfinanga and Said Said, learned Advocates represented the first, second, third and fourth accused persons respectively. Since the third and fourth accused persons do not understand Kiswahili language, they enjoy the services of Mr. Irema Meijaru Kivuyo who interpreted the proceedings from Kiswahili to Maasai language and the vice versa. I sincerely thank the Counsel of both parties, the interpreter and everyone who took part in the proceedings of this case for their tireless efforts, especially at this challenging time when the whole World is fighting against spread of Covid-19.

To establish the case against the accused persons, the Prosecution called in four witnesses to testify, namely, James Kugusa (PW1), Simon Maswe Barnabas (PW2), Chacha Manamba (PW3) and Michael Melakiti

(PW4). Besides, they tendered six exhibits, which were all admitted, thus: Exhibit P1, handing over form between Simon Barnabas and James Kugusa; Exhibit P2, handing over form between James Kugusa and Chacha Manamba; Exhibit P3, two double-edged knives and one bow; Exhibit P4, Certificate of seizure; Exhibit P5, Certificate of Valuation of Trophy and Exhibit P6, Inventory form. On the other hand, during defence, the first accused person (DW1) and second accused person (DW2) testified under oath, while the third accused person (DW3) and the fourth accused person (DW4) testified on affirmation. DW3 also tendered the statement of PW4 which was admitted as Exhibit D1.

In the main, the body of evidence by the Prosecution presents a case that, on 8th August, 2018, in the morning, PW2 with his colleagues, including PW4 and one Eric Kamasian were conducting routine patrol within the Loliondo Game Controlled Area. In the course of patrol, they were tipped off by their informant that some people had killed a giraffe at Sero area, within Loliondo Game Controlled Area. At about 10:30 am, while on their way to the directed area, they met five persons carrying meat. They decided to arrest them. In the course of the arrest, they managed to apprehend only three persons, as the other two managed to slip away leaving behind parts of the meat they were carrying. Upon the arrest, they inspected the meat and found it to be of a giraffe, together with its head. What's more, the three suspects, they managed to apprehend, had a bow and two double-edged knives. The meat and Exhibit P3 were accordingly seized via Exhibit P4.

On inquiry, the three accused persons mentioned names of their fellow suspects who escaped, as Peter Bura and Leken Lotikeni. Upon being asked further, the second, third and fourth accused persons led the patrol team to the area where they killed the giraffe. On reaching there, they found remains of giraffe and so decided to bury them. Following that, PW2 called his colleague at Loliondo and asked him to pursue the two escapees. Then the second, third and the fourth accused persons together with the seized exhibits were taken to Arusha at Anti-poaching Unit's offices (KDU). On arrival, PW2 handed over the exhibits to exhibits keeper, PW1 via a handing over certificate, Exhibit P1 in the presence of the second, third and fourth accused persons. Upon receiving the said exhibits, PW1 labelled Exhibit P3 and stored the same in the exhibits room. He also stored the meat in a freezer. After the handing over exercise, PW2 took the second, third and fourth accused persons to Arusha Police Station. Later, PW1 handed over the meat to PW3 via Exhibit P2. After identifying and being satisfying that it was indeed giraffe's meat, PW3 carried out valuation by equating value of a giraffe, which is USD 15,000 equivalent to Tshs.33,637,500/= at the prevailing exchange rate of Tshs. 2,242/50 of that day. He then completed a valuation certificate, Exhibit P5.

Subsequent to that, PW3 sought to procure a disposal order of the trophy impounded from the Resident Magistrates' Court of Arusha, at Arusha. To do so, he had prepared an Inventory form, Exhibit P6; and, then called one police officer, whom he did not mention his name, to bring the second, third and fourth accused persons before the court. According to him, the said police officer certainly brought the accused persons to court. He

then procured the sought order from a Resident Magistrate whom, again, he does not remember, but still believe that he was one because he went into a chamber of a Resident Magistrate. Having procured the order, PW3 took the meat back to his office where he proceeded to dispose of by burying. Thus, he tendered Exhibit P6 in lieu of the impounded giraffe meat.

In their defence, the accused persons categorically refuted to have committed both offences. They also denied to have been arrested at the alleged crime scene on 8th August, 2017; and to be involved in any mini proceedings before a Resident Magistrate at Arusha on 9th August, 2017 for the alleged order purportedly sought for purposes of disposing the trophy in question. According to the first accused person (DW1), on 8th August, 2017 he was home at Ololosokwan Village with his family. He was arrested on 21st August, 2017 by some people in civilian clothes, who threatened him with a handgun and took him to their vehicle. During the arrest, he was not found with any trophy or weapon whatsoever. On 4th September, 2017 he was arraigned before the Resident Magistrates' Court of Arusha at Arusha where he met with his co-accused persons for the first time. He also denied to have been present or involved in any court proceedings where PW3 allegedly sought an order of dispose of the meat in question. He further testified that, none among the persons who arrested him appeared before this Court to testify. As for PW2 and PW4, he claimed to see them for the first time on the date they appeared before this Court to testify. It was his plea that, his name is Petro Bura Tlehhema and not Peter Bura.

On the other hand, it was the evidence of the second accused person (DW2) that, he lives in Kimba area within Ngorongoro. On 5th August, 2017, while grazing, he was arrested and taken to KDU offices at Arusha. The third and fourth accused persons found him at KDU. On 4th September, 2017 he was arraigned to court where he met the first accused for the first time. He further denied to be found with any trophy or Exhibit P3. According to him, when he was arrested, he was holding a stick he usually uses for grazing. Just like the first accused, he also denies to have been involved in any court process to seek the disposal order of the trophy in question. He also disputed to have signed Exhibit P1.

On his side, the third accused person claimed to have been arrested on 7th August, 2017 along the road at Arash Village by KDU officers, who were in green uniforms, while others in civilian clothes. On the arrest, they told him that, he had run away from evacuation exercise executed in that area. After the arrest, he was beaten and taken to a camp owned by one "Mwarabu", a person of Arabian ancestry. According to him, the said Mwarabu is involved in hunting activities. On the same day, he was taken to KDU offices at Arusha where he found the second accused person. They were then taken to Arusha police station and returned back to KDU offices. While at KDU offices, he was again beaten and forced to append his thumb print on a paper but they did not tell him what is it exactly that he was signing; bearing in mind also the fact of language barrier, as he can only communicate in Maasai language. Just like his fellow co-accused persons, he defended himself that, he had never gone before any court prior to 4th September, 2017, when he was officially arraigned.

On his party, the fourth accused person, (DW4) claimed to have been arrested on 9th August, 2017 at his home, at Ololosokwan Village while he was taking out the goats for grazing. He was arrested by persons living at the camp of Mwarabu on the reason that, he refused to evacuate from Ololosokwan Village. He was later taken to Wasso area, where he handed over to KDU officers. They then drove off to KDU offices at Arusha, where they arrived on 10th August, 2017 and met the second and third accused persons. As for the first accused person, he met with him for the first time on 4th September, 2017 when they were taken to court. According to him, on different days between 10th August and 4th September, of the same year, they were taken to Arusha police station and KDU offices back and forth, severally. He also claimed to have been assaulted and forced to sign a document which he did not know. He denied to have been found with meat or a bow. Just like his fellows, he denied to have been involved in any court proceedings prior to 4th September, 2017 when he was officially arraigned.

In a nutshell, that was the evidence of the Prosecution and Defence. Having considered the evidence on record, the main issue before the Court for determination is whether the Prosecution side has proved the case against the accused persons beyond reasonable doubt.

It is vital to underscore that, according to section 3 (2) (a) of the Evidence Act [Cap. 6 R.E. 2019], 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. On this, see also the case of **Nathaniel Alphonse Mapunda & Benjamini Alphonse Mapunda v. 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 side except where any statute expressly provides otherwise. One of such exceptions is section 100 (1) and (3) (a) of the WCA. The provisions of this section are very clear that, the accused has the duty to prove that the hunting of an animal is in accordance with a licence issued or permit given and possession of a government trophy is lawful.

Nevertheless, it is also a settled principle of law that, when the burden of proof shifts to the accused person, the standard of proof is not as higher as that of the prosecution. This was clearly 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 or probabilities."

In the light of these principles, and considering the ingredients of the offences charged, it is the duty of the Prosecution side to prove beyond reasonable doubt that the accused persons hunted the animal in a Game Controlled Area and, indeed they were found in possession of the said government trophy. Likewise, it is the duty of the accused person to prove on balance of probabilities that, the hunting was in accordance with a licence or permit issued and possession of the said trophy was lawful; that is, with a permit of the Director of Wildlife.

As I have already highlighted above, there is one main issue to be determined by this Court, that is, whether the Prosecution side has proved

the case beyond reasonable doubt. However, the determination of this issue rests on other two other specific issues, namely, **one**, *whether the accused person hunted the alleged giraffe*; and **two**, *whether they were found in possession of giraffe meat*.

Although the evidence on record shows that PW2 and PW4 identified all accused persons as the ones who were found in possession of the alleged giraffe meat on 8th August, 2017, but all accused persons denied to have been arrested on that date. They also denied to have hunted the said giraffe. Apparently, looking closely at their defence, the accused persons were attempting to introduce and rely on the defence of *alibi*, because all of them claimed not to have been at scene of crime on 8th August, 2017. The second and third accused persons claimed that, they were arrested prior to the date of alleged incidence, and therefore, on the date alleged to be the date of the commission of the offence, they were already under custody in Arusha. On the other hand, the first and fourth accused persons claimed that, on 8th August, 2017 they were at their respective homes. However, their defence of *alibi* flawed the procedure laid down under section 42 (1) and (2) of the EOCCA. According to this section, the accused persons ought to have notified the Court of their intention to rely on the defence of *alibi* during the preliminary hearing. They did not do so. Besides, they did not furnish the Prosecution side with particulars of their *alibi* before the closure of prosecution's case as required under subsection (2). However, be it as it may, the weakness of the defence's cannot be used as the basis for their conviction.

Starting with the first issue, it clear from evidence on record that, neither PW2 nor PW4 saw the accused persons hunting the giraffe in question. It was rather their evidence that, after the arrest of the second, third and fourth accused persons with some giraffe meat together with a bow and two double-edged knives; they asked them where they killed the giraffe from. Allegedly, it was the accused persons who led them to the said area, where, they found other remains of a giraffe, which they buried. On cross-examination, by the Counsel for the third accused person, PW2 claimed to have found the remains like bones and entrails, but they did not take the same as part of the giraffe found with the accused person. He further admitted to have destroyed the same without following the procedure. Nonetheless, the fact that, they found the remains of giraffe at that area is not conclusive proof that, it was the accused persons who hunted and killed the said giraffe. If at all there were other remains like bones and entrails, PW2 was supposed to seize the same to support their evidence to that effect. Short of that, this Court cannot reach a conclusion that, it was the accused persons who hunted and killed the giraffe at the said area where they claimed to find the remains. Apart from that, the fact that the accused persons were found with double edged-knives and bow is neither conclusive proof that the same were used in hunting. After all, when PW2 was cross-examined by the Counsel for the fourth accused person, he admitted that, one cannot hunt with a bow without an arrow. The accused persons were not found with arrow and no arrow or other weapon was found at the place where they claimed to find the remains. In that regard, it is the considered view of this Court that, the available evidence failed to prove beyond

reasonable doubt that, it was the accused persons who hunted and killed the said giraffe. Thus, the first specific issue is answered in the negative.

Now, reverting to the second issue, it is well known that, the salient ingredient of the offence of unlawful possession of a government trophy is "the government trophy", which according to the second count in the amended information is "the giraffe meat and head". In order to prove this ingredient, the government trophy must be physically tendered as evidence in court. However, ordinarily, there are two types of exhibits; perishable and imperishable. For perishable exhibits like meat, they are normally disposed of at the earliest stage either prior to, or during the proceedings.

Fortunately, issues of disposal of perishable exhibits are not novel in our criminal jurisprudence. There are various laws, in the meaning of principal and subsidiary legislation, which provide for legal processes and procedure to be followed in disposing of exhibits of such nature. Among them are; section 353 (2) of the Criminal Procedure Act [Cap. 20 R.E. 2019], section 23 (1) of the EOCCA, section 101 of the WCA, section 36 of the Drug Control and Enforcement Act [Cap. 95 R.E. 2019], paragraph 25 of Police General Orders (PGO) No. 229, just to mention a few. Of these laws, some provide for powers to order disposal of exhibits, others provide for powers as well as procedure, while others just for the procedure, like in the case of the PGO.

No doubt, the exhibit in this matter, some meat and head of a giraffe is perishable. Section 101 (1) of the WCA provides for powers of the court

to order the disposal of perishable exhibits. Before that section was amended in 2017, it read as follows:

"Subject to section 99(2), at any stage of the proceedings under this Act, the court may on its own motion or on an application made by the prosecution in that behalf order that any animal, trophy, weapon, vehicle, vessel or other article which has been tendered or put in evidence before it and which is subject to speedy decay, destruction or depreciation be placed at the disposal of the Director."

This section had already been tested in our courts. The Court of Appeal of Tanzania, in the case of **Emmanuel Saguda @ Sulukuka and Another v. Republic**, Criminal appeal No. 422 "B" of 2013 (unreported) provided a guidance on how to admit perishable exhibits in evidence. In that case, the government trophies in question were zebra and warthog meat. In lieu of physical exhibits, the prosecution had instead tendered a certificate of valuation and inventory form to prove the offence of unlawful possession of government trophy. On appeal to the Court of Appeal, after making reference to provisions concerning disposal of such exhibits in the CPA and WCA, the Court faulted the prosecution for failing to follow the correct procedure by stating that:

*"It is evident from the provisions of section 101 of the Wildlife Conservation Act, **the Government trophies found in possession of the appellants were required to be tendered in Court as exhibits. This was not done. Instead a certificate of valuation and an inventory form***

were tendered and admitted in court. The appellants did not have any opportunity to raise an objection. It is well established practice in cases where witnesses are required to testify on a document or object which would subsequently be tendered as Exhibit that the procedure is not simply to refer to it theoretically as was the case here, but to have it physically produced and referred to by the witness before the court either by display or describing it and then have it admitted as an exhibit. The court treated the reports produced by PW1 as conclusive. Given the position, the requirements under the law have not been met.”(Emphasis supplied).

From this extract, the Court of Appeal set a rule that, the accused person must be present and be heard before the court issues an order to dispose of perishable exhibit.

In February, 2017, section 101 of the WCA was amended by section 37 of the Written Laws (Miscellaneous Amendments) Act, No. 2 of 2017 to the extent that the powers of the court to issue an order to dispose of perishable exhibits were then on extended to ***prior to the commencement of the proceedings***. The new section now reads as follows:

*“(1) 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; or*
(b) *at any stage of proceedings, order that –*
(i) *any animal or trophy which is subject of speedy decay; or*
(ii) *any weapon, vehicle, vessel or other article which is subject to destruction or depreciation, which has been tendered or put in evidence before it, be disposed of by the Director.”* (Emphasis supplied).

This amendment was about the substantive part where the court is now vested with the power to order disposal of perishable exhibits *prior to commencement of the proceedings*. However, I keenly note that, what the Parliament did was to amend the substantive portion of the law and **not** the procedural rule as it set down by the Court of Appeal in **Emmanuel Saguda @ Sulukuka and Another v. Republic**, *supra* cited, that, the accused person must be present and be heard before the magistrate issues the disposal order of perishable exhibit.

As it is obvious from the foregoing, on this issue of disposal of perishable exhibits prior to commencement of proceedings, I am not travelling in a virgin land, as there are other laws which provide guidance on how the procedure should be, and following closely the import of the decision

of the Court of Appeal I have just cited above. For instance, Section 23 (1) of the EOCCA, empowers the police while carrying out investigation before commencement of proceedings, to seek a disposal order from the court on perishable exhibits. In so doing, the police are guided by the procedure provided under the PGO, in particular Paragraph 25 of PGO No. 229 which provides that:

"Perishable exhibits which cannot easily be preserved until the case is heard, shall be brought before the Magistrate, together with the prisoner (if any) so that the Magistrate may note the exhibits and order immediate disposal. Where possible, such exhibits should be photographed before disposal." (Emphasis supplied).

The procedure provided under the PGO was also discussed and approved by the Court of Appeal of Tanzania in the case of **Mohamed Juma @ Mpakama v. Republic**, Criminal Appeal No. 385 of 2017 (unreported). In that case, the trophies involved were one warthog, seven rock hyrax, two mongooses and one African hare. The police sought and procured a disposal order prior to commencement of proceedings. The Court of Appeal, after referring to the procedure provided under paragraph 25 of PGO No. 229, stated that:

*"The above paragraph 25 envisages any nearest Magistrate, who may issue an order to dispose of perishable exhibit. **This paragraph 25 in addition emphasizes the mandatory right of an accused (if he is in custody or out on police bail) to be present before the Magistrate and be heard.***

In the instant appeal, the appellant was not taken before the primary court magistrate and be heard before the magistrate issued the disposal order (exhibit PE3). While the police investigator, Detective Corporal Saimon (PW4), was fully entitled to seek the disposal order from the primary court magistrate, the resulting Inventory Form (exhibit PE3) cannot be proved against the appellant because he was not given the opportunity to be heard by the primary court Magistrate.” (Emphasis is mine).

What I gather here is that, despite the amendment of section 101 of the WCA, where the disposal order may be made ***prior to, or after commencement of proceedings***, the requirement of the accused person to be present before the Magistrate and be heard is still there. In another case of **Matheo Ngua and Three Others v. The DPP**, Criminal Appeal No. 452 of 2017 CAT (unreported), the Court of Appeal emphasised on the need to adhere to the requirements of the law when dealing with disposal of perishable exhibits.

One may ask why perishable exhibits are subjected to judicial scrutiny before being disposed. The reason is not far-fetched; *one*, is meant to protect and preserve the exhibit in question; *two*, to protect the integrity of exhibit intended to be tendered later in evidence; and, *three*, to ensure fair trial by according accused persons the right to be present and be heard.

Now, coming back to the matter at hand, it will be recalled that, all accused persons denied to have been present when PW3 sought and

procured the disposal order of the giraffe head and meat, which ought to be physically tendered in evidence. On the other hand, PW3 claimed that, after he conducted valuation, he prepared and completed the inventory form, Exhibit P6. According to his testimony, he took the accused persons' names from the handing over certificate prepared by the custodian of exhibits and filled them in Exhibit P6. After preparing Exhibit P6, he went to the head of their Zone and asked about the accused persons' whereabouts; he was told that they were at Police Station. He then called the Central Police Station and he was told that he will find the accused persons in court. According to him, on reaching in the Resident Magistrates' Court of Arusha, he found a police officer with the accused persons. After confirming their names, they entered in the chambers of a Resident Magistrate; he showed him the meat and accused persons.

From the testimony of PW3, it is not clear whether the second, third and fourth accused persons were present before the Magistrate on 9th August, 2017. The purported police officer who is alleged to have brought the accused persons to court from the Central Police Station was not called in to testify. PW3 did not even mention his name. He could not even mention the name of the Resident Magistrate who issued the disposal order. Unfortunately, in Exhibit P6 the name of the Magistrate is not disclosed as he only appended his signature on it. Apart from that, this witness was not sure where the Magistrate saw the meat in question. At first, he said that, after entering into the Magistrate's office, they showed the meat and accused persons, where the Magistrate issued the disposal order. But on cross-examination he admitted that, the Magistrate saw the meat in the vehicle

together with the accused persons and made the order of disposal. This is utter contradiction, which touches the core of the issue. In addition, Exhibit P6 itself does not show the presence of the accused persons in the whole process of procuring the disposal order. Moreover, Exhibit P6 does not even show that the accused persons were brought and heard before the Magistrate issued the disposal order. Had it been that their signatures were on the said Exhibit P6, maybe this could have led us to a different conclusion that, they were perhaps present and were heard.

In that regard, it is the considered view of this Court that, the evidence of PW3 and Exhibit P6 failed to establish that, the accused persons were present before the Resident Magistrate and were heard before the disposal order was issued. It is therefore the firm view of this Court that, the procedure for the disposal of the meat in question was flawed. In **Mohamed Juma @ Mpakama**'s case, the Court concluded that:

"Our conclusion on evidential probity of exhibit PE3 ultimately coincides with that of the learned counsel for the respondent. Exhibit PE3 cannot be relied on to prove that the appellant was found in unlawful possession of Government trophies mentioned in the charge sheet."

Likewise, in the instant matter, the inventory form, Exhibit P6 that was tendered in lieu of the physical exhibit, the giraffe meat and head cannot be relied upon to prove the offence of unlawful possession of government trophy mentioned in the second count of amended information against all

accused persons. Hence, the second specific issue is answered in the negative.

Therefore, since both issues have been answered in the negative, apparently, the Prosecution side failed to prove their case against the accused persons beyond reasonable doubt. Thus, the main issue is also answered in the negative.

In the upshot, therefore, the accused persons, Petro Bura Tlehhema, Julius Lekeya Sabore, Lekení Mbaryo Pelengong'o @ Samwel and Losoruwa Letura Lochumali are found not guilty and thereby acquitted of the charged offences of unlawful hunting in a Game Controlled Area and unlawful possession of government trophy and are accordingly set free.



I. K. BANZI
JUDGE

11/05/2020