

**THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
THE CORRUPTION AND ECONOMIC CRIMES DIVISION
AT ARUSHA-SUB REGISTRY**

ECONOMIC CASE NO. 28 OF 2019

REPUBLIC

VERSUS

- 1. NASSORO MESHACK DAUDI @ BABA DAUDI @
NASSORO JUMA KILIMILWA**
- 2. NEEMA ALLY JUUYAWATU @ MAMA MUSTAFA**
- 3. MARTIN SILVANO KIANGO**

8th & 20th July, 2020

JUDGMENT

BANZI, J.:

Nassoro Meshack Daudi @ Baba Daudi @ Nassoro Juma Kalimilwa, Neema Ally Juuyawatu @ Mama Mustafa and Martin Silvano Kiango (the first, second and third accused persons respectively), are jointly and severally charged with three counts namely, unlawful possession of government trophy and unlawful dealing in trophies contrary to sections 86 (1) (2) (b) and 84 (1) respectively, of the Wildlife Conservation Act, No. 5 of 2009 ("the Wildlife Conservation Act") 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 13th October, 2017 at Mti Mmoja Oljoro area within the City, District and Region of Arusha, the accused

persons were found in possession of government trophies, to wit; six (6) claws of lion valued at USD 4,900 equivalent to Tshs.11,020,100/= 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, it is alleged that, on 13th October, 2017 at Mti Mmoja Oljoro area within the City, District and Region of Arusha, the first and third accused persons were found selling six (6) claws of lion valued at USD 4,900 equivalent to Tshs.11,020,100/= the property of the Government of the United Republic of Tanzania without a permit from the Director of Wildlife. In the last count, it is alleged that, on 13th October, 2017 at Mti Mmoja Oljoro area within the City, District and Region of Arusha, the second accused person transferred to the first accused person six (6) claws of lion valued at USD 4,900 equivalent to Tshs.11,020,100/= the property of the Government of the United Republic of Tanzania without a permit from the Director of Wildlife.

To establish the case against the accused persons, the prosecution side led by Ms. Adelaide Kassala, learned Senior State Attorney and Ms. Upendo Shemkole, learned State Attorney called in six (6) witnesses to testify, namely, James Kugusa (PW1), Kudra Abdallah (PW2), Goodluck Nnko (PW3), Solomon Jeremiah (PW4), Happiness Matondane (PW5) and Assistant Inspector Kaitira Machunde (PW6). They also tendered five (5) exhibits, which were admitted, thus: Exhibit P1, handing over certificate dated 13/10/2017; Exhibit P2, handing over certificate dated 16/10/2017; Exhibit P3, six claws of lion, Exhibit P4, Trophy Valuation Certificate and Exhibit P5, Certificate of seizure. On the other hand, the first accused person (DW1), second accused person (DW2) and the third accused person (DW3) under the representation of learned Advocates Mr. Andrew Maganga, Mr.

John Mseu and Mr. Paul Elias respectively, testified under oath and did not tender any exhibit.

The prosecution's body of evidence presented a case that, on 13th October, 2017, PW4 and his colleague, one Raymond Mdoe were assigned a task by the head of Anti-poaching Unit Northern Zone Arusha ("KDU") following a tip from the informant that, there are persons with government trophy looking for purchasers. It was Raymond Mdoe who was communicating with the said informant. Around evening hours, Raymond Mdoe told PW4 that those persons have lion's claws and were ready for the deal. At first, they agreed to meet at Kwa Mrombo area but later they were told to meet at Mti Mmoja, Oljoro area. On arrival at Mti Mmoja area, they saw two persons, one white and the other one black. They got off the vehicle and Raymond Mdoe asked them who was Nassoro whom they communicated. The white guy replied he was the one. After that, those persons introduced themselves as Nassoro and Martin. According to PW4, it was the first accused who showed them the claws wrapped in a piece of newspaper after taking them from his right pocket of his trousers. After satisfying they are real lion's claws and in the course of bargaining about price, Raymond Mdoe put the first and third accused persons under arrest. However, in the course of arrest, the third accused person managed to escape. After the arrest, Raymond Mdoe and PW4 introduced themselves and asked the first accused person if he has any permit but he had none. The claws in question were seized by Raymond Mdoe via Exhibit P5 and then the first accused person and the seized claws were taken to KDU offices. On arrival, Raymond Mdoe handed over the tusks to exhibit keeper, PW1 via Exhibit P1 whereby PW1 labelled them and stored in the exhibits room.

The first accused person was interrogated about the escapee and where he got the claws. He told them that, the escapee is his co-worker at Tanzania Game Tracker (TGT) and he got the claws from the second accused person who is living at FFU street, Oljoro. Thereafter, Raymond Mdoe, PW2, PW4 and the first accused person went to the second accused person's house and managed to arrest her. Upon inquiry, the first accused person confirmed that she was the one who gave him the lion claws. Then they took her and returned to their office, KDU Arusha. On 16th October, 2017, PW1 handed over the claws to PW3 via Exhibit P2. After being satisfied that they were lion's claws, PW3 conducted valuation by equating to a value of a lion which is USD 4,900 equivalent to Tshs.11,020,100/= at the exchange rate of Tshs.2,249/= prevailing over that day. He then filled in valuation certificate, Exhibit P4 and handed over back the claws to PW1 who stored the same until the day he came to testified before this Court. On the same date, 16th October, 2017 in the afternoon, Raymond Mdoe and PW4 arrested the third accused person in his offence at TGT.

In their defence, the accused persons refuted to have been found in possession of the lion claws in question. According to the first accused, (DW1), this case was concocted by Raymond Mdoe because of a woman named Rose Tesha, a maid at Via Via bar who was their lover. It was his defence that, on several occasions especially at the end of the week, he visited Via Via bar where he met the said Rose Tesha and the duo developed an affair. He came to know Raymond Mdoe via his girlfriend Rose Tesha but later he realised that, they were also in a relationship. It was further his testimony that, on 13th October, 2017 at about 1600 hours, he was at Via Via where Raymond Mdoe and his colleagues arrived and took him to their vehicle with the aim of talking to him. However, they covered his face and

drove up to a certain area in a house that he didn't recognise. They uncovered his face and Raymond Mdoe told him about his involvement with the said woman as he pretends to have more money. After that, he asked him to call his business partner in order to come there to resolve the matter. Before calling the second accused, they asked him to take them to her house.

Before he took them to the second accused, two among Raymond's colleagues got off the vehicle and another woman got in. Then he headed them up to the second accused's house and upon arrival, a female officer and two men got off the vehicle. They once again covered his face. After taking the second accused, and when they began to move, they uncovered his face and asked the second accused if she knows him. Thereafter they headed to Njiro and after a while, they were taken to Central Police Arusha where they stayed for one week. On 19th October, 2017, they took them back to Njiro and stayed there for the whole day. On 20th October, 2017, they were taken to court. He denied to have ever signed in Exhibit P5 or P1 and claimed to see them for the first time when they were produced before this Court. He also denied to be the co-worker of the third accused person at TGT and he claimed to be a businessman dealing in crops together with the second accused person. He further denied to have been arrested in possession of or dealing with the alleged claws which he claimed to know nothing about them. It was also his testimony that, he has never met with PW1 and PW4 prior to the dates they came to testify before this court.

On the other hand, it was the evidence of the second accused (DW2) that, on 13th October, 2017 around 2000 hours she was in her house. A woman came and introduced herself by the name of Kudra (PW2). She asked her to go outside her house for a talk. After reaching outside, she saw a motor vehicle and two young men standing beside. They opened a door and

ordered her to get inside the vehicle. DW2 pleaded to call her street leader but was not allowed. While on their way, they told her to look back where she saw and recognised the first accused. They went up to a certain house and after a while, they were taken to Central Police where they stayed for a week. On 19th October, 2017, they were taken back to the same house and in the afternoon when they were returned to Central. On 20th October, 2017, they were taken to court. She refuted to be found in possession or to transfer the claws in question on the alleged date and place. She also denied to be at the crime scene on the alleged date.

On his side, the third accused testified that, on 13th October, 2017 around 0800 hours he reported at work, Tanzania Game Trackers Safaris (TGTS) and worked until 1730 hours when he went back home at Sakina Kwa Iddi area. He further testified that, on 16th October, 2017 at about 1300 hours while in the office, Some KDU officers, one introduced himself as Raymond Mdoe took him to their office in order to solve some office issues. Upon arrival, they told him that, he is required to sign some documents. He tried to refuse and they began to beat him on his back. Then he accepted and they took him to another room where he found another person. After a while he was forced to sign some documents. Thereafter, he was taken to Njiro Police post where he stayed until 20th October, 2017 when he was taken to court. In the court, he was joined with the first and second accused persons who were strangers to him. He further claimed that, he has never been to Mti Mmoja, Oljoro area and never conducted business of lion claws with the first accused. All accused persons pleaded on their innocence and thus prayed for their acquittal.

In a nutshell, that was the evidence of the prosecution and defence side. Counsel of both sides, complied with the Court's order and filed their final submissions.

Briefly, the counsel for the prosecution was affirmative that a case against the accused persons was sufficiently proved and that makes them guilty as charged. She reached at this firm conclusion after she had analysed the evidence on record. In respect of the first count, she was of the view that, all accused persons were found in actual possession of the trophy in question. She cited the case of **Simon Ndikulyaka v. Republic**, Criminal Appeal No. 231 of 2014, CAT (unreported) to support her argument. She also cited the case of **Goodluck Kyando v. Republic** [2003] TLR 363 and emphasised that, their witnesses were reliable and should be believed. She further challenged the defence of *alibi* as introduced in the testimonies of the accused persons. Her contention was on non-compliance with section 194 (4) of the Criminal Procedure Act [Cap.20 R.E. 2002]. In respect of variance between the particulars in the information and evidence, she was of the view that, the same did not prejudice the accused persons.

On their side, counsel for the defence challenged the evidence of the prosecution for being at variance with the information against the accused persons. According to them, the disparity goes to the root of the matter as the prosecution evidence failed to prove what has been alleged in the particulars of the offences. To support their stance, they cited the case of **Stany Loidi v. DPP**, Criminal Appeal No. 466 of 2017 CAT (unreported) and **Justine Kakuru Kasusura @ John Laizer v. Republic**, Criminal Appeal No. 175 of 2010 CAT (unreported) and **Jeremiah Shemweta v. Republic** [1985] TLR 288. The certificate of seizure, Exhibit P5 was also challenged for failure to comply with section 106 of the Wildlife Conservation Act

because the seizing officer, Raymond Mdoe did not indicate his rank. In that view, it is unknown if the said Raymond Mdoe is the authorised officer qualified to search and seize Exhibit P3, considering the fact that, he never appeared to testify before this Court. It was added that, there is no evidence to prove that the said Raymond Mdoe is the authorised officer in the meaning ascribed in the Wildlife Conservation Act. According to their submission, that flaw affect the chain of custody. Thus, it was their prayer that, the accused persons be acquitted because the case against them was not proved beyond reasonable doubt.

Having considered the evidence on record and the submissions by the counsel for both sides, the main issue before the Court for determination is whether the prosecution 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. 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 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 except where any statute expressly provides otherwise. One of such exceptions is section 100 (3) (a) of the Wildlife Conservation Act. The provisions of this section are very clear that, the accused has the duty to prove that the possession or sale of government trophy is lawful.

However, 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 of probabilities."

In the light of the principles underscored above, and considering the ingredients of offence charged, it is the duty of the prosecution to prove beyond reasonable doubt that the trophy in question is the government trophy and the accused persons were found in possession and sale of the said government trophy. Likewise, it is the duty of the accused person to prove on balance of probabilities that, the possession and sale of the said trophy was lawful; that is, with the permit of the Director of Wildlife.

As highlighted above, there is one main issue to be determined by this Court, that is, whether the prosecution has proved the case beyond reasonable doubt. However, the determination of this issue rests on other two specific issues, namely, **one**, *whether the accused persons were found in possession of claws in questions* and **two**, *whether chain of custody was maintained*.

Although the evidence of PW4 shows that the first and third accused persons were at the crime scene 13th October, 2017, but all accused persons denied to have been at the crime scene, Mti Mmoja, Oljoro area on the alleged date. They also denied to be found in possession of the six claws of lion. 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 13th October, 2017 at the time of arrest. According to the first accused, he was at Via Via bar. On her part, the second accused claimed to have never been at the crime scene. On

the other hand, the third accused claimed to be in the office at the time of incident. 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, this Court is not exempted from the requirement to take into account the defence of *alibi* where such defence was raised in contravention of the law. After taking cognizance of such defence, the Court may in its discretion accord no weight of any kind to the defence. Failure to do so results into miscarriage of justice as it was held by the Court of Appeal in the case of **Charles Samson v. Republic** [1990] TLR 39.

Starting with the first issue, according to the particulars of offence in the first count, it is alleged that on 13th October, 2017 at Mti Mmoja Oljoro area, the first, second and the third accused persons were found unlawful possession of six claws of lion. It is also alleged in the second third count that, on the same date and at the same area, the second accused transferred six lion claws to the first accused. However, as submitted by the counsel for accused persons, the particulars in the first and third counts are at variance with the evidence on record as who were found at the crime scene in possession of the claws in question. According to the evidence of PW4, at the crime scene, they found two persons. One of them introduced himself by the name of Nassoro and it was the one who had the claws in question. PW4 in his testimony, did not mention the second accused person as among the person who were at the crime scene. Also, during cross examination, he

admitted that the second accused person was not at the crime scene. In that case, it was two persons who were found in actual possession of the claws in question and not three persons as alleged in the information. In that view, there is no evidence on record to prove about three persons to be found at the crime scene in possession of six lion claws as alleged in the information. Apart from that, there is no evidence to establish constructive possession against the second accused person.

Moreover, if PW4 admitted that, the second accused was not at the crime scene, how can it be said that, at the same crime scene, she transferred the claws in question to the first accused person as alleged in the third count? In the view, there is a clear variance between the information and the evidence on record as the evidence on record does not prove what has been alleged in the first and third count. Thus, it is the considered view of this Court that, such disparity goes to the weight of the evidence which is not in support of the alleged charge. The learned State Attorney in her submission argued that, the particulars in the charge do not prejudice the accused persons simply because the evidence of PW4 shows the first and third accused were the ones who were arrested at the crime scene. With due respect, that argument is misleading because it is not about the accused being prejudiced or not but it is about proving what has been alleged in those particulars. Since the disparity goes to the root of the matter, it renders the entire first and third counts not to be proved to the required standard.

Furthermore, the issue of possession began at the stage of seizure which is also the first step in establishing the chain of custody. According to PW4's evidence, it was Raymond Mdoe who seized the claws in question from the first accused. After seizure, the same Raymond Mdoe filled in

certificate of seizure, Exhibit 5 whereby, PW4 signed it as a witness. He was also the one who carried the claws from the crime scene until he handed over to PW1. It is a common knowledge that in proving any fact, it is the strength of the evidence that matters and not the number of witnesses as provided under section 143 of the Evidence Act [Cap. 6 R.E. 2019]. Equally, it is a general rule that, the prosecution is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution. See the cases of **Azizi Abdalah v. Republic** [1991] TLR 71 and **Riziki Method @ Myumbo v. Republic**, Criminal Appeal No. 80 of 2008 CAT (unreported).

In the case at hand, the said Raymond Mdoe was to the considered view of this Court, a material witness. This witness was listed as one of the prosecution witnesses but the prosecution opted not to call him without sufficient reason being shown. The materiality of his testimony comes from the fact that, he was the one who seized the claws in question at the crime scene. He was also the one who filled in Exhibit P5. After seizure, the claws in question were under his custody until he handed over to PW1. This witness was the key witness for the prosecutions. Yet still, he was not brought to testify for the reasons known to themselves. As submitted by the defence counsel that, the search in question according to Exhibit P5 was conducted under section 106 of the Wildlife Conservation Act. According to that section, power to search and seize is vested to the authorised officer. Section 3 of the Wildlife Conservation Act defines "authorised officer" to mean;

"the Director of Wildlife, a wildlife officer, wildlife warden, wildlife ranger or police officer, and includes the following-

- (a) an employee of the Forest and Beekeeping Division of, or above the rank of forest ranger;*
- (b) an employee of the national parks of, or above the rank of park ranger;*
- (c) an employee of the Ngorongoro Conservation Area of, or above the rank of ranger;*
- (d) an employee of the Fisheries Division of, or above the rank of fisheries assistant;*
- (e) an employee in a Wildlife Management Area of a designation of a village game scout;*
- (f) an employee of the Marine Parks and Reserve of, or above the rank of marine parks ranger;*
- (g) an employee of the Antiquities Division of, or above the rank of conservator of antiquities; and*
- (h) any other public officer or any person, who shall be appointed in writing by the Director;”*

The persons mentioned in the extract above are the ones vested with power of search and seizure under section 106 of the Wildlife Conservation Act. Exhibit P5 does not show the rank of the said Raymond Mdoe although it shows he is of Anti-Poaching Unit. This witness did not come to testify about his rank or position at Anti-Poaching Unit. There is no evidence from prosecution witnesses which shows the rank of the said Raymond Mdoe. In the absence of such evidence, it is not known if the said Raymond Mdoe is the authorised officer in the meaning of section 3 of the Wildlife Conservation Act to exercise the powers stipulated under section 106. That being the case, validity of Exhibit P5 is also questionable. Thus, certificate of seizure lacks evidential value and I accord no weight to such Exhibit P5.

In the main, Raymond Mdoe was a key witness to testify on material facts in respect of the search, seizure and how he stored the claws in question from the time of seizure to the point when he handed over to PW1. Although the defence of the accused persons may not be plausible but considering the prosecution side failed to call this material witness, it casts strong doubts on prosecution case. Therefore, it is the considered view of this court that, absence of the said witness affects the prosecution evidence from the stage of seizure up to the handing over of exhibit to PW1. Without the evidence of the said Raymond Mdoe, it is doubtful whether the lion's claws in question, Exhibit P3 were actually seized from the first accused person and whether they were the same ones that were handed over to PW1 and eventually tendered before this court. In that view, the chain of custody broke from the stage of seizure. Thus, both the first and second issues are answered negatively.

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, Nassoro Meshack Daudi @ Baba Daudi @ Nassoro Juma Kalimilwa, Neema Ally Juuyawatu @ Mama Mustafa and Martin Silvano Kiango are found not guilty and hereby acquitted in all three counts of unlawful possession of government trophy and unlawful dealing in government trophy. Thus, they are accordingly set free.



I. K. BANZI

JUDGE

20/07/2020