

**THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**THE CORRUPTION AND ECONOMIC CRIMES DIVISION**

**AT ARUSHA - SUB REGISTRY**

**ECONOMIC CASE NO. 30 OF 2019**

**REPUBLIC**

**VERSUS**

**SAIDI IDDI SAIDI @ GIZA**

*15<sup>th</sup> & 24<sup>th</sup> July, 2020*

**JUDGMENT**

**BANZI, J.:**

The accused person, Saidi Iddi Said @ Giza stands charged with two counts of unlawful hunting of scheduled animals contrary to section 47 (a) (aa) 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) of the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016.

It is alleged in both counts that, on 8<sup>th</sup> September, 2017 at Makame Wildlife Management Area, within Kiteto District in Manyara Region, the accused person hunted and killed one elephant valued at USD 15,000 equivalent to Tshs.33,735,000/=, and nine buffalo with a total value of USD

17,100 equivalent to Tshs.38,457,900/= the properties of the Government of the United Republic of Tanzania without permit from the Director of Wildlife.

At the Preliminary Hearing, the parties agreed to the following facts to be not in dispute, that is, firstly, the names, age and address of the accused person and secondly, the accused person was arrested in Babati. Apart from that, the accused person through his counsel issued a notice of defence of *alibi* according to section 42 of the EOCCA and section 194 (4) of the Criminal Procedure Act [Cap. 20 R.E. 2002] ("the CPA").

At the trial, Ms. Sabina Silayo, learned Senior State Attorney assisted by Ms. Cecilia Foka and Ms. Blandina Msawa, learned State Attorneys represented the Republic, whereas Mr. Lengai Nelson Merinyo, learned Advocate appeared for the accused person.

To establish the case against the accused person, the prosecution side called in seven witnesses to testify, namely, James Kugusa (PW1), Jesca Robert Christopher (PW2), Solomon Jeremiah (PW3), Richard Masanja Shilunga (PW4), Yohana Mtegeki Mgalula (PW5), Prosper William Kihunrwa (PW6) and Assistant Inspector Kaitira Machunde (PW7). They also tendered nine exhibits, which were admitted, thus: Exhibit P1, Handing Over Certificate between Prosper William Kihunrwa and James Kugusa; Exhibit P2, Handing Over Certificate between James Kugusa and Jesca Robert; Exhibit P3, Handing Over Certificate between Jesca Robert and James Kugusa; Exhibit P4, two Elephant tusks; Exhibit P5, two Machetes; Exhibit P6, Trophy Valuation Certificate; Exhibit P7, Inventory form; Exhibit P8, certificate of seizure and Exhibit P9, cautioned statement of the accused person. On the other hand, the accused person testified under oath as (DW1) and called

three witnesses namely, Musa Athuman Lugegesa (DW2), Amina Mohamed (DW3) and Muya Khassim Luhizo (DW4). They also tendered one exhibit, Burial permit No. 0620394 of Halima Mohamed Malekela, which was admitted as Exhibit D1.

In the main, the prosecution's body of evidence presented a case that, on 8<sup>th</sup> September, 2017, PW6 together with his colleagues, PW5, Jesca Riwa and Maneno Mynga were conducting patrol within Makame Wildlife Management Area. In the course of patrolling, PW6 was tipped off by their informant that some people at Ndedo area had hunted and were ferrying meat to their Village. On the basis of that information, they went to the crime scene but before reaching, they got off the vehicle and began to walk. 100 metres away, they heard a sound of people cutting things. They went closer while hiding in the shrub. According to PW5, the said area is surrounded by shrubs and few trees including acacia. At a distance of 40 metres away, they saw seven people and four motorcycles. Among them were cutting meat and others ferrying the same to their motorcycles. According to PW6 and PW5, they managed to identify four persons including the accused person because they used to be their informers. They decided to surround the area and after seeing them, those persons escaped with their motorcycles. They tried to chase then in vain. At the crime scene, beside the dam, they found nine heads of buffalo with bullet holes, one carcass of elephant with its tusks and two Machetes.

After seeing that, PW6 asked others to remain at the crime scene while going to look for a Magistrate at Orkesumet, Simanjiro in order to procure an order of disposal of exhibits. Unfortunately, he couldn't find one and decided to return. Upon arrival, he prepared, filled in and signed the

certificate of seizure, Exhibit P8 together with his colleagues, PW5 and Jesca Riwa as witnesses. Thereafter, PW5 was instructed to extract the tusks from elephant carcass. PW6 informed other members of the task force including PW3 and PW4 about the incident and the escapees. Then, they gathered the seized exhibits and drove off to Anti-Poaching Unit in Arusha (then KDU). They arrived at KDU Arusha on 9<sup>th</sup> September, 2017 in the morning and, PW6 handed over the seized exhibits to PW1, the custodian of exhibits via Exhibit P1. Thereafter, PW1 weighed Exhibit P4 and labelled it together with Exhibit P5. Then he stored all exhibits in the exhibits room. On 10<sup>th</sup> September, 2017 the accused person was arrested at Babati bus stand by PW3 following a call from PW4 on a disguise to assist him on a certain task. After the arrest, he was taken to KDU Arusha and upon being interviewed by PW7, he confessed to commit the alleged offences. His cautioned statement was admitted as Exhibit P9 following a trial within a trial.

On 2<sup>nd</sup> October, 2017, PW1 handed over Exhibit P4 and buffalo heads to PW2 via Exhibit P2. After identifying and being satisfied that they were indeed buffalo heads and elephant tusks, PW2 carried out valuation by adding value of an elephant, USD 15,000 and nine buffalo, USD 17,100 whereby he got a total of USD 32,100 equivalent to Tshs.72,192,900/= at the prevailing exchange rate of Tshs. 2,249/= of that day. She then completed a valuation certificate, Exhibit P6. Subsequent to that, she handed over Exhibit P4 to PW1 via Exhibit P3 and proceeded with the process of procuring a disposal order of the nine heads of buffalo from the Resident Magistrates' Court of Arusha, at Arusha. To do so, she had prepared an Inventory form, Exhibit P7; and, then went to the court. She then procured the sought order from the Resident Magistrate who issued the order after

seeing the trophy. Having procured the order, PW2 took the heads back to her office where she proceeded to dispose of by burying. Thus, she tendered Exhibit P7 in lieu of the impounded buffalo heads.

In his defence, the accused person categorically refuted to have committed both offences. As stated herein above, he raised a defence of alibi claiming that, on the date of the incident, he was in Songe, Kilindi attending burial ceremony of his grandmother on Halima Mohamed Malekela. He also denied to be involved in any mini proceedings before the Resident Magistrate at Arusha on 2<sup>th</sup> October, 2017 for the alleged order purportedly sought for purposes of disposing the heads of buffalo.

It was the defence evidence that, on 7<sup>th</sup> September, 2017 at about 1700 hours, the accused person received the information that his grandmother passed away at Kiteto District Hospital. Upon such information, DW3 and other went to hospital and took the body home. At home, the meeting was convened comprising relatives and neighbours. In the meeting, the accused person was assigned a duty of organising transport because the burial was planned to take place in Songe, Kilindi while DW2 was assigned to follow up the burial permit. The accused person managed to hire two Noah from DW4. On the other hand, DW2 managed to procure the burial permit, Exhibit D1. On 8<sup>th</sup> September, 2017 at about 0800 hours, they left Kibaya, Kiteto to Songe, Kilindi where they arrived at 1000 hours. According to DW3, she boarded a Noah carrying the body together with other women while the accused person, DW2 and other men were in a Noah driven by DW4. Before the burial, the accused person received a call from PW4 who asked him where he was and he told him that he was at Songe for his grandmother's burial. After hearing that, PW4 gave him his condolence. The

burial took place at 1300 hours and at 1600 hours they started to return to Kiteto where they arrived at 1800 hours. On 9<sup>th</sup> September, 2017, PW4 called him once again and asked him to go to Babati for a certain task. Since the accused person had a plan of going to Arusha, he asked PW4 to send him fare so that he can pass through Babati. PW4 agreed and sent him Tshs.20,000/=. On 10<sup>th</sup> September, 2017 the accused person left Kiteto and upon arrival, he was arrested at Ango bar. The accused person insisted to be innocent and thus prayed for his release by order of the court.

In a nutshell, that was the evidence of the prosecution and defence side. The counsel for the defence complied with the Court's order and filed final submissions. However, the prosecution side failed to meet the deadline and filed their final submission without leave of this Court. Hence, the same will not be considered.

In his final submission, Mr. Merinyo, learned counsel for the accused person, attacked the prosecution's case for being insufficient to prove that, it was the accused person who actually hunted and killed the animals in question. He challenged Exhibit P8 for want of signature of the accused person and hence, Exhibits P1, P2 and P3 lack validity to establish that trophies in question were actually seized from the accused person. He cited the case of **David Athanas @ Makasi and Another v. Republic**, Criminal Appeal No. 168 of 2017 CAT (unreported) to support his argument. Furthermore, the identification of the accused person at the crime scene was also challenged as it was conducted in unfavourable conditions and therefore requires corroboration. To buttress his argument, he cited the case of **Mohamed Bakari and 7 Others v. Republic** [1989] TLR 134. On the issue of disposal of the exhibits prior to the institution of the proceedings he

was of the view that, the same is tainted and flawed section 353 (1) (2) of the CPA and sections 101 (1) and 106 (3) of the Wildlife Conservation Act because the accused person was never involved in the process. According to him, the accused person was denied a right to a fair trial. He further challenged the information for being defective and according to his submission, the particulars in both counts concerning hunting and killing are too general thus, prevented the accused persons from defending himself properly. He referred the case of **Mussa Mwaikunda v. Republic** [2006] TLR 387 to support his submission about the denial of a right to a fair trial against the accused person. Therefore, the learned counsel concluded that, the accused person should be acquitted as the prosecution failed to prove the case to the required standard.

Having considered the evidence on record and the submission by the counsel for the accused, 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 worthwhile 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. That is to say, the guilt of the accused person must be established beyond reasonable doubt as it was stated in the case of **Mohamed Said Matula v. Republic** [1995] TLR 3. Generally, and always, such duty lies with the prosecution except where any other law expressly provides otherwise. One of such exceptions is section 100 (1) of the Wildlife Conservation Act. The provisions of this section are very clear that, the

burden to prove that the animal was hunted or killed pursuant to the terms of the issued licence issued or permit shall lie on the accused person.

However, it is a settled principle that, when the burden proof shifts to the accused person, the standard of proof is not as higher as that of the prosecution. This was 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 under the charging section, it is the duty of the prosecution to prove beyond reasonable doubt that that the accused person hunted and killed the animals in question. Likewise, it is the duty of the accused person to prove on balance of probabilities that, the hunting or killing of the said animals was lawful; that is, with the licence permit issued in accordance to the Wildlife Conservation Act.

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**, *accused person actually hunted and killed nine buffalo and one elephant* and **two**, *whether nine heads of buffalo were properly disposed*.

In answering the issue at hand, I will consider the testimony of PW5 and PW6, together with Exhibits P4, P5, P6, P7 and P8. According to the testimony of PW5 and PW6 upon reaching at the crime scene, they managed



to see seven people, whereby, some were cutting meat and others were ferrying meat to their motorcycles. This evidence in itself reveals that, the animals in question were already killed by the time PW5 and PW6 arrived at the crime scene. In that view, there is a possibility that, those animals were hunted and killed by the same persons or by someone else because nobody was caught in the actual act of hunting or killing.

Nevertheless, it is the evidence of PW5 and PW6 that, among seven persons, they managed to recognise four namely, Mcharo Mokiwa, Omary Salimu, Masoud Hemed and the accused person, Saidi Iddi Saidi @ Giza. According to them, these four used to be their informants and hence, they knew them very well. It was also their evidence that, they recognised them at a distance of 40 metres away while they were hiding in the shrubs. Apart from shrubs, that area had few trees. According to PW5, he recognised the accused person because he has a defect eye and "sigida" on his fore head and his colour is "maji ya kunde" (brown skinned). In addition, PW6 described the accused person as brown skinned, average tall and has a defect eye. However, it was stated in the case of **Shamir John v. Republic**, Criminal Appeal No. 166 of 2004 CAT (unreported) that;

*"... recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the court should always be aware that **mistakes in recognition of close relatives and friends are sometimes made.**"* (emphasis supplied).

In another case of **Philimon Jumanne Agala @ J4 v. Republic**, Criminal Appeal No. 187 of 2015 CAT (unreported) it was stated that;

*"We have already sufficiently demonstrated that visual identification and/or recognition evidence should be cautiously acted upon as it is prone to fabrication or being based on honest mistakes. **It has been repeatedly held that eyewitness testimony can be devastating when false witness identification is made due to honest confusion or outright lying.**"* (emphasis is mine).

Also, in the cases of **Issa Mgara @ Shuka v. Republic**, Criminal appeal No. 37 of 2005 CAT (unreported) and **Masolwa Samwel v. Republic**, Criminal Appeal No. 348 of 2016 [2020] TZCA 24 at [www.tanzlii.org](http://www.tanzlii.org) the issue of mistaken in recognition was emphasised.

It must be recalled that, the accused in this case raised a defence of *alibi* and he brought three witnesses who claimed that, on the date of the incident, they were with the accused person at Songe in Kilindi attending burial ceremony of his grandmother. They even tendered burial permit, Exhibit D1 to prove the same. It is the position of the law that the accused is not have to prove his *alibi* to be true. He only needed to raise the slightest doubt on the prosecution case that he was not at the scene of crime. See the case of **Abas Matatala v. Republic**, Criminal Appeal No. 331 of 2008 CAT (unreported).

As stated in the cited case above that, recognition may be reliable than identification of a stranger, but mistake in recognition may sometimes be made even to a close relative or friend. The condition and environment of recognition as stated above, to the considered view of this court were not favourable. A distance of 40 metres away surrounded by shrubs and trees cannot be favourable condition for proper recognition or identification. I

wonder how is it plausible for a witness to see someone's "sigida" at a distance of 40 metres away in the area surrounded by shrubs and trees. In addition, both witnesses described the accused as brown skinned person but the accused in the dock is black skinned to the extent of his "sigida" being invisible even at a distance of 10 meters away. In that regard, it is the considered view of this court that, there is a possibility that the accused person was actually not present at the crime scene and PW5 and PW6 made mistake in recognising him. For that reason, I agree with Mr. Merinyo that, since the condition for recognition was unfavourable, their evidence need corroboration before relied upon. Looking closely at the evidence on record, the only evidence that could be used to corroborate the evidence of PW5 and PW6 was the cautioned statement of the accused person. However, the same was admitted after being retracted by the accused person, hence, it requires corroboration before acting on it. See the cases of **Masolwa Samwel v. Republic** (supra) and **Wandelin John Luoga v. Republic**, Criminal Appeal No. 235 of 2004 CAT (unreported). Since it requires corroboration, it cannot be used to corroborate the evidence of PW5 and PW6 as it was stated in the case of **Mkubwa Said Omar v. S.M.Z.** [1992] TLR 365. Thus, the defence of *alibi* raised by the accused person, raises doubt on prosecution case that if at all the accused person was at the crime scene and actually recognised by PW5 and PW6. In that regard, the first specific issue is answered negatively.

Reverting to the second issue, for purposes of proving the said animals were actually killed, PW6 seized nine heads of buffalo and two elephant tusks which were extracted from elephant carcass by PW5. In addition, two elephant tusks were brought in court and tendered in lieu of elephant carcass

left at the crime scene and Exhibit P7 was tendered in lieu of nine heads of buffalo that were disposed of before institution of the proceedings. The question that follows is whether such disposal was conducted in accordance with the law.

Starting with elephant carcass, it is undisputed that, tusks are part of the elephant just like horns to buffalo. PW6 in his evidence did not explain why they decided to extract tusks from the elephant in question while actually the whole elephant was expected to be an exhibit. Did he follow the procedure to dispose the intended exhibit? Definitely, NO. The tusks in question, cannot be a conclusive proof that, they were extracted from the same elephant purportedly to be killed at the crime scene. So far as Exhibit P7 is concerned, there is no evidence from PW2 that when she went before the Magistrate to seek an order of disposal, the accused person was present and heard before the disposal order was issued. The accused person when responding to the question from the Court, he stated not to be present when the said order was sought and procured. Exhibit P7 itself does not show whether the accused was present and heard before the Magistrate issued the order of disposal of the buffalo heads. This was done in contravention of the cardinal law that; the accused person must be present and be heard before the court issues an order to dispose of perishable exhibit as it was stated by the Court of Appeal of Tanzania in the cases of **Mohamed Juma @ Mpakama v. Republic**, Criminal Appeal No. 385 of 2017 [2019] TZCA 518 at [www.tanzlii.org](http://www.tanzlii.org) and **Matheo Ngua and Three Others v. The DPP**, Criminal Appeal No. 452 of 2017 [2020] TZCA 153 at [www.tanzlii.org](http://www.tanzlii.org) and **Emmanuel Saguda @ Sulukuka and Another v. Republic**, Criminal Appeal No. 422 "B" of 2013 CAT (unreported). Thus, it is the finding of this

Court that, in the absence of direct evidence, Exhibit P7 which was tendered in lieu of physical exhibit, nine heads of buffalo cannot be relied upon to prove the offence of unlawful hunting mentioned in the second count of information against the accused person. Likewise, the tusks in question, Exhibit P4 cannot be a conclusive proof that, they were extracted from the same elephant purportedly to be killed at the crime scene. Thus, the second specific issue is also answered negatively.

Since both specific issues were answered negatively, it is the firm view of this Court that, the prosecution side has failed to prove beyond reasonable doubt that the accused person actually hunted and killed nine buffalo and one elephant. Hence, the main issue is answered in the negative.

In the upshot, and since the prosecution has failed to prove the case on the required standard, the accused person is hereby acquitted on both counts of unlawful hunting of a scheduled animal and is accordingly set free.

It is so ordered.



**I. K. BANZI**  
**JUDGE**  
**24/07/2020**