

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

AT ARUSHA - SUB REGISTRY

ECONOMIC CASE NO. 32 OF 2019

REPUBLIC

VERSUS

1. JEREMIAH MTENGELE SEMBETA @ MUNDETE

2. SAIBULU MELAU SINDAWE @ MOLLEL

JUDGMENT

30th November & 3^d December, 2020

BANZI, J.:

In this case, Jeremiah Mtengele Sembeta @ Mundete and Saibulu Melau Sindawe @ Mollel branded as the first and second accused persons respectively, stand charged with two count of unlawful hunting of specified or scheduled animal and unlawful dealing in government trophy; contrary to sections 47 (a) (aa) and 80 (1), 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.

It is alleged in the first count that, on 20th January, 2018 at Enduiment Wildlife Management Area, within Longido District and Arusha Region, the accused persons hunted and killed one elephant valued at USD 15,000 equivalent to Tshs.33,735,000/=, 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 also alleged that, on 20th January, 2018 at Enduiment Wildlife Management Area, within Longido District and Arusha Region, the accused persons sold two elephant tusks valued at USD 15,000 equivalent to Tshs.33,735,000/=, the property of the Government of the United Republic of Tanzania without a trophy dealer's licence. Accused persons pleaded not guilty to both counts.

At the Preliminary Hearing, both accused persons through their counsel issued a notice of defence of *alibi* under section 42 of the EOCCA claiming that on the date of incident, 20th January, 2018 the first accused person was at Kitengela area in Nairobi Kenya whereas, the second accused person was at his farm located at Kamwanga Village, within Longido District.

To establish the case against the accused person, the prosecution side led by Ms. Riziki Mahanyu, Ms. Mary Lucas and Ms. Janeth Masonu learned State Attorneys called in seven witnesses to testify, namely, James Kugusa (PW1), Assistant Inspector Kaitira Machunde (PW2), Solomon Jeremiah (PW3), Raymond Mdoe (PW4), D.6710 D/CPL Majaliwa (PW5), H.8854 D/C Pius (PW6) and D.7847 D/SSGT Beatus (PW7). They also tendered seven exhibits, which were admitted, thus: Exhibit P1, Handing Over form dated 20/01/2018; Exhibit P2, Handing Over form dated 20/01/2018 between James Kugusa and Solomon Jeremiah; Exhibit P3, Elephant tail; Exhibit P4, one axe; Exhibit P5, one bush knife; Exhibit P6, Certificate of seizure and Exhibit P7, Certificate of Valuation of Trophy.

On the other hand, the first accused person under representation of Mr. Sheck Mfinanga, learned counsel testified under oath as (DW1) and

called two witnesses namely, Joseph Larasha Ole Mutenkere (DW2) and Patrick Parnyompe Papatiti (DW3). The second accused person under representation of Mr. Zuberi Ngawa, learned counsel also testified under oath as (DW4) and called one witness Lucia Rambo (DW5). Both accused persons also tendered seven exhibits, *viz.*, previous statement of PW1, James Kugusa, previous statement of PW2, Assistant Inspector Kaitira Machunde, previous statement of PW3, Solomon Jeremiah, School fees receipt dated 19/01/2018, two bus tickets dated 19/01/2018 and 20/01/2018, medical chit dated 30/05/2020, medical chit dated 20/02/2020, referral form as well as discharge chit and hospital card which were admitted as Exhibits D1, D2, D3, D4, D5, D6, D7, D8 and D9 respectively.

In the main, the prosecution's body of evidence presented a case that, on 20th January, 2018, PW2 together with his colleagues including PW4, were conducting patrol. In the course of patrolling, around 1530 hours, PW2 was tipped off by their informant that an elephant was killed at Sinya area, within Enduiment Wildlife Management Area (WMA). On the basis of such information, they went to the crime scene but before reaching, they got off the vehicle and began to walk in the shrubs. According to their testimonies, the said area is surrounded by scattered shrubs and trees. At a distance of 100 metres away, they saw three persons and two motorcycles beside them but, those persons escaped with their motorcycles before the arrest. However, PW2 and PW4 claimed to identify the accused persons at the crime scene as they had their photos given to them by the informant prior to the incident. At the crime scene, they found one carcass of elephant without its tusks, one axe and one bush knife. PW2 cut the tail from elephant carcass. Then he prepared, filled in and signed the certificate of seizure, Exhibit P6

together with PW4 as witness. Thereafter, they gathered the seized exhibits and drove off to Anti-Poaching Unit in Arusha (then KDU). They arrived at KDU Arusha on the same day around 2200 hours and, PW2 handed over the seized exhibits to PW1, the custodian of exhibits via Exhibit P1. On the same night, PW1 handed over elephant tail, Exhibit P3 to PW3 for identification and valuation via Exhibit P2. After identification, PW3 did not conduct valuation and handed over Exhibit P3 to PW1 who stored all exhibits in the exhibits room until he brought them before this Court.

On 2nd February, 2018, PW3 carried out valuation of the tail in question by equating to a value of an elephant which is USD 15,000 equivalent to Tshs. 33,735,000/= at the prevailing exchange rate of Tshs. 2,249/= of that day. He then completed a valuation certificate, Exhibit P7. The tail, Exhibit P3 was tendered in lieu of the elephant carcass. On 1st February, 2018 the accused persons were arrested at Kijiweni area following a tip from the informer. According to the testimony of PW2 and PW4, after the arrest, they led PW2 and his colleagues up to the crime scene where they found the remains of elephant carcass. Then they were taken to KDU Arusha. During cross examination of PW1, PW2 and PW3, the defence side tendered their previously recorded statements, Exhibits D1, D2 and D3 respectively, in a bid to impeach their credibility. Basically, this is all about the prosecution's case.

In their defence, the accused persons categorically refuted to have committed both offences. As stated herein above, they raised the defence of alibi claiming that, on the date of the incident, they were not at the crime scene Enduiment WMA. Both accused persons denied to know each other and claimed to meet on 1st February, 2018 at Engutoto Police post. The first

accused person is a Kenyan national residing at Imisigio village within Kajiado County while the second is a Tanzanian residing at Kamwanga Village within Longido District in Arusha Region.

It was the defence of the first accused person that, on 19th January, 2018 he went to Ngong area to take his child to school who is sponsored by a certain NGO located at Kitengela area. After finishing everything including payment of school fees, he went to his brother, DW2 who is working in the said NGO to return the receipt as a proof for the money he received from the NGO. According to them, the first accused person spent the night at the house of DW2 at Kitengela area. On 20th January, 2018, he left Kitengela around 1000 hours and headed to Nairobi to see DW3 who had some parcels to be taken to his family living at Imisigio village. Around 1430 hours, DW3 met with the first accused person at Kimana bus stand and gave him his parcels. At 1500 hours, the first accused person, left Nairobi to Imisigio village where he arrived at 1900 hours. According to DW3, around 2000 hours, he received a call from his wife informing him that, she has received the parcels from the first accused persons.

On 1st February, 2018, around 1300 hours while he was with his wife and daughter at the auction took place at Kijiweni area, he was arrested by unknown persons in a white motor vehicle. After the arrest, they passed at West Kilimanjaro where he was tortured and later, he was taken to KDU Arusha. At KDU, he was tortured in attempt to procure his confession and on 4th February, 2018, he was forced to append his thumb print in a paper which he didn't know its contents. According to the testimony of DW3, after a long search for the first accused person from Kamwanga Police Station, Tarakea Police Station and Longido Police Station, they finally found him at

KDU Arusha. They found him with swell on the forehead and legs; he was unable to walk. On 5th February, 2018, the first accused was taken to Longido Police station and on 6th February, 2016 he was arraigned before Longido District Court charged with the present offences together with the second accused person who he didn't know. The first accused person denied to be involved in hunting the elephant in question or selling the alleged two tusks. He insisted that, on the date and time of incident, he was in Nairobi and not at the crime scene as alleged by PW2 and PW4.

On the other hand, it was the defence of the second accused person that, on 20th January, 2018, he was with his wife (DW5) working at their farm located near their house at Murfoti hamlet, Kamwanga village within Longido District. According to them, they worked in the said farm for the whole day and returned home in the evening. On 1st February, 2018 while he was working at his farm, one motor vehicle arrived with some persons who were looking for Michael. Despite being told that he was not Michael, they kept on insisting that he was the one and they eventually forced him into their vehicle. After the arrest, they went up to KDU Njiro Arusha where he claimed to be tortured. Thereafter, he was taken to Engutoto Police post where he met the first accused person for the first time. On 4th February, 2018, he was taken back to KDU where he was tortured and forced to append his thumb print in a document which was not read over to him. On 6th February, 2018, he was arraigned in court with the first accused person whom he did not know. He denied to be at the crime scene on date of incident. He also denied to be involved in killing the elephant in question and dealing in government trophy.

In a nutshell, that was the evidence of the prosecution and defence side. Having considered the evidence on record, the main issue before the Court for determination is *whether the prosecution has proved the case against the accused persons beyond reasonable doubt*. However, the determination of this issue rests on another specific issues, *viz., whether the accused persons were properly identified*.

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. Generally, and always, such duty lies with the prosecution except where any other law expressly provides otherwise. Section 100 (1) (3) (b) of the Wildlife Conservation Act is one of such exceptions. 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 or the sale of government trophy was lawful 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 on a balance of probabilities. Refer the case of **Said Hemed v. Republic** [1987] TLR 117.

It is also prudent to note that, evidence of identification is of the weakest kind and most unreliable. Such evidence should be acted upon cautiously after the court is satisfied that the evidence is watertight, and all possibilities of mistaken identity are eliminated. See the cases of **Waziri Amani v. Republic** [1980] TLR 250, **Magwisha Mzee and Another v. Republic**, Criminal Appeals No. 465 and 467 of 2007 (unreported) and

Shamir John v. Republic, Criminal Appeal No. 166 of 2004 CAT (unreported).

Reverting to the matter at hand, the evidence by the prosecution witnesses reveals that the elephant in question was already killed before PW2 and PW4 arrived at the crime scene. But these witnesses insisted that, it was the two accused persons who killed the elephant in question and left with its tusks. Nevertheless, it is the evidence of PW2 and PW4 that, among the persons who were at the scene, they managed to identify the first and second accused persons. According to them, both accused persons were unknown to them but they had their photos given to them by the informant prior to the incident. It was also their evidence that, they identified them at a distance of 100 metres away in the area which is surrounded by scattered shrubs and trees. According to PW4, the shrubs were six metres long. In the case of **Shamir John v. Republic**, (*supra*) it was held that;

*"It is now trite law that the courts should closely examine the circumstances in which the identification by each witness was made. The Court has already prescribed in sufficient details the most salient factors to be considered. These may be summarized as follows: **How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example, by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused?"** (Emphasis supplied).*

It is undisputed that, both accused persons were strangers to PW2 and PW4. I have carefully examined the evidence of PW2 and PW4 especially the condition of identification. The condition and environment of identification stated by PW2 and PW4, to the considered view of this court were not favourable. At distance of 100 metres away surrounded by shrubs of 6 metres long and trees cannot be favourable condition for proper identification or even recognition. This is clearly revealed during cross examination when PW4 admitted that he did not see the accused persons properly due to surrounding environment. He also admitted not see the person who was ridding the motorcycles because of the shrubs. As for PW2, he admitted that, he did not identify the plate number of the motorcycles because of the distance. He further admitted that, he observed them while they were in the process of leaving the crime scene. Taking their evidence all together, it is apparent that, their observation was obstructed by those shrubs and trees.

Apart from that, before he made dock identification, PW2 described the first accused person by his pierced ear. But, upon responding further to question for the defence counsel, PW2 admitted that, in his statement (Exhibit D2), he did not give such description in respect of the first accused person. If he really saw and identified the first accused at the crime scene, he could not have missed a unique feature like pierced ear. Moreover, there is contradiction between the evidence of PW4 and Exhibit D2. In Exhibit D2, PW2 stated that, the first accused person was wearing blue Masai Shuka while the second accused person was wearing red Masai Shuka. On the other hand, during cross examination PW4 mentioned different thing and I quote;

"The first accused person was wearing Masai Shuka with red and blue colours and the second accused was wearing blue trousers and yellow jacket. If someone says the second accused was wearing red Masai Shuka and first accused wearing blue Masai Shuka will be a liar."

From the extract above, it is clear that although PW2 and PW4 were at the same crime scene but they definitely saw different things. This is a clear indication that, their observation was impeded by those shrubs and trees. Thus, it proves that, the conditions for identification was not favourable. In that regard, it is the considered view of this court that, there is a possibility that the accused persons were actually not present at the crime scene and they were mistakenly identified by PW2 and PW4.

It must be recalled that, both accused persons in this case raised the defence of *alibi* and they brought witnesses to support their whereabouts on the date of the incident. DW2 claimed to be with the first accused person at Kitengela area in Kenya from 19th January, 2018 up to 1000 hours on 20th January, 2018. Also, DW3 claimed to be with the first accused person in Nairobi Kenya at Kimana bus stand on 20th January, 2018 from 1430 hours to 1500 hours when he left for his home village Imisigio. Although they don't bear his name, but the first accused produced two tickets (Exhibit D5) to support their testimonies. On the other hand, DW5 claimed that on 20th January, 2018, she was with the second accused person at their farm from morning to evening. It is the position of the law that the accused person is not required 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 crime scene. See the

case of **Abas Matatala v. Republic**, Criminal Appeal No. 331 of 2008 CAT (unreported).

Since the condition for identification was unfavourable, the evidence of PW2 and PW4 needs corroboration before relied upon. Looking closely at the evidence on record, there is no any other evidence to corroborate the evidence of PW2 and PW4. Thus, the defence of *alibi* raised by the accused person, raises doubt on prosecution case, if at all the accused persons were at the crime scene and actually identified by PW2 and PW4. In that regard, the specific issue is answered negatively.

Since specific issue was negatively answered, it is the firm view of this Court that, the prosecution side has failed to prove beyond reasonable doubt that the accused persons actually hunted and killed the elephant in question. Likewise, there is no scintilla of evidence to establish that, the accused persons were involved in selling two elephant tusks purportedly to be extracted from the elephant in question. Hence, the main issue is also answered in the negative.

In the upshot, and since the prosecution has failed to prove the case on the required standard, the accused persons are hereby acquitted on both counts of unlawful hunting of a scheduled animal and unlawful dealing in government trophy and are accordingly set free.

It is so ordered.



I. K. BANZI

JUDGE

03/12/2020

Delivered this 3rd day of December, 2020 in the presence of accused persons, Ms. Adelaide Kassala, the learned Senior State Attorney for the Republic and Messrs. Sheck Mfinanga and Zuberi Ngawa, learned Advocates for both accused persons. Right of appeal explained.



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I. K. BANZI
JUDGE
03/12/2020

ORDER

Exhibits P3, P4 and P5 are hereby confiscated to the Government of the United Republic of Tanzania through the Director of Wildlife. The same to be disposed of in accordance with section 101 of the Wildlife Conservation Act.



A handwritten signature in black ink, appearing to be "I. K. Banzi".

I. K. BANZI
JUDGE
03/12/2020