

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

**AT ARUSHA**

**ECONOMIC CASE NO. 03 OF 2020**

**REPUBLIC**

*Versus*

- 1. MARWA S/O JOEL MARWA**
- 2. MWIKWABE S/O METE MARWA**
- 3. PAULO S/O RYوبا MWITA**
- 4. CHACHA S/O MARWA MACHAGI**
- 5. SAMWEL S/O NAMBA BALIGARI**
- 6. MALISERY S/O CHARLES MALISERY**

**JUDGMENT**

The accused persons: Marwa Joel Marwa (first accused), Mwikwabe Mete Marwa (second accused), Paulo Ryoba Mwita (third accused), Chacha Marwa Machagi (fourth accused), Samwel Namba Baligari (fifth accused) and Malisery Charles Malisery (sixth accused) are indicted for unlawful possession of government trophy contrary to section 86(1) and (2)(c)(iii) of the Wildlife Conservation Act, No. 5 of 2009 read together with paragraph 14 of the First Schedule to, and sections 57(1) and

60(2) of the Economic and Organized Crimes Control Act, Cap 200 R.E. 2002 as amended by sections 16(a) and 13(b) of the Written Laws (Miscellaneous Amendment) Act No. 3 of 2016 (being first to eighth counts) and unlawful possession of weapons in certain circumstances contrary to section 103 of Act No. 5 of 2009 (supra) read together with paragraph 14 of the First Schedule to, and sections 57(1) and 60(2) Cap 200 R.E. 2002 (supra) as amended by sections 16(a) and 13(b) of Act No. 3 of 2016 (supra) (ninth count).

It is alleged in the particulars of offence that, on 6.4.2019 at Loliondo Game controlled area within Ngorongoro district in Arusha region, the six accused persons were jointly and together found in unlawful possession of twenty five (25) wildebeest skins which is equivalent to 25 killed wildebeests valued Tsh 37,389,625 (first count); twenty seven (27) skin of zebra which is equivalent to 27 killed zebra valued Tsh. 74,549,160; two skins of topi which is equivalent to two killed topi valued Tsh 3,681,440 (third count); two skins of hartbeest which is equivalent to two killed hartbeest valued Tsh 1,495,585 (fourth count); three skins of thomson gazelle equivalent to three killed thomson gazelle valued Tsh 3,451,350 (fifth count); one skin of warthog which is equivalent to one killed warthog valued Tsh. 901,755 (sixth

count); one skin of eland which is equivalent to one killed eland valued Tsh 3,406,630 (seventh count); six skins of impala which is equivalent to six killed impala valued Tsh 5,384,106 (eighth count), all being the property of the Government of the United Republic of Tanzania without a permit from the Director of Wildlife; two machetes, one sword, one knife, eighty-nine wire snare (ninth count).

The first accused, second accused, third accused, fourth accused, fifth accused and sixth accused denied all nine counts to the information.

It was the evidence of prosecution witnesses in particular PW3 that on 6.4.2019 in the morning while on patrol with his colleagues' game wardens namely George Mwangu, Goodluck Lister and Abdallah Kijavalla at Olorkiku Loliondo Game controlled area, they saw birds called griffon vultures landed on trees and others surrounding on air, which to them was an indicator that there might be carcass of killed animal or poachers in that area/place. They made follow up attentively, where they saw a camp of people, others were cooking and others sat. They set a strategy to apprehend them. They planned and proceeded there by a style of enclosing that camp, approached them, where those people started to run away, only one Paulo Ryoba Mwita stood,

one of them (Malisery Charles Malisery) stumbled on stump, fall down and was unable to move further. They proceeded to pursue and chase others, where they managed to apprehend Marwa Joel Marwa, Mwikwabe Mete Marwa, Samwel Namba Baligari and Chacha Marwa Machagi, making a total of six people who were arrested inside the controlled area at Olorkiku. At a camp where the accused persons were arrested, they (PW3 and colleague) saw and seized twenty seven skins of zebra, twenty five skins of wildebeest, six skins of impala, two skin of hartbeest, two skins of topi, three skins of thomson gazelle, one skin of eland, one skin of warthog, which were admitted collectively as exhibit P2; seven used pots, six torches, two bush knives, one knife, one long double edged knife, eighty nine wire snare which were admitted collectively as exhibit P4; sixty pieces of meat of zebra, seventy pieces of meat of wildebeest, twenty pieces of meat of impala, ten pieces of meat of hartbeest, ten pieces of meat of topi, ten pieces of meat of thomson gazelle, five pieces of meat of eland, five pieces of meat of warthog (herein after to be referred as pieces of meat). Those skins, pieces of meat and equipment's were seized via certificate of seizure exhibit P6. It was the evidence of PW3 that the accused persons had no permit for hunting and camping within a controlled area.

After arrest and seizure, exhibit 2 collectively, exhibit P4 collectively and pieces of meat including the accused persons were taken to Arusha Central Police Station, where they arrived on 7/4/2019 at 21.00 hours. PW3 handed over exhibit P2, exhibit P4 and pieces of meat to PC Evance (PW2) via a handing over certificate exhibit P3. On 8/4/2019 at 10.00 hours, PW2 handed exhibit P2 and pieces of meat to Emmanuel Daniel Pius (PW4). The handing over was done via a handing over certificate exhibit P5. PW4 conducted identification and valuation in respect of exhibit P2 and pieces of meat. PW4 stated that in identification and valuation he got the following: twenty-five species of wildebeest; twenty-seven species of zebra; two species of topi; two species of hartebeest; three species of thomson gazelle; one species of warthog; one species of eland and six species of impala, all trophies valued 57,450 USD equivalent to Tsh 132,393,786 as per trophy valuation certificate exhibit P7. Shortly thereafter, PW4 sought and obtained court order (as per inventory exhibit P8) to dispose pieces of meat. After disposal proceedings, PW4 handed over exhibit P2 to James Kugusa (PW1) who is an exhibit keeper at Anti Poaching Unit (KDU) Njiro Arusha, via a chain of custody exhibit P1. PW1 preserved exhibit P2 until when were brought and tendered to the Court.

At defence, all six accused persons relied on defence of *alibi*, they denied to have been arrested by the game warden on 6/4/2019 at Olorkiku Loliondo, they denied to have been arrested in possession of exhibit P2 and exhibit P4, they denied knowing each other. Marwa Joel Marwa DW1 (first accused), stated that he was arrested by police officers on 3.4.2019 at Mbaribali on the road, over an episode with one Mwita Peter. Mwikwabe Marwa DW2 (second accused) explained that he was arrested by police officers on 4/4/2019 in the midnight at his home village Tamkeli. Paulo Ryoba Mwita DW3 (third accused) stated that he was arrested by police officers on 7/4/2019 at 14.00 hours while grazing cattle near his home at Masebe Mbalibali Serengeti. Chacha Marwa Machagi DW4 (fourth accused) stated that he was arrested on 10/4/2019 at 16.00 hours on the way to his home, at Mbirikili village. Samwel Namba Baligari DW5 (fifth accused) stated that he was arrested by police officers on 13/4/2019 at 1700 hours at Mugumu Serengeti. Malisery Charles DW6 (sixth accused) stated that he was arrested on 5/4/2019 at his home village Nyamoko Serengeti, where he was beaten by a piece of timber on a head at a crown, he felt down unconscious and gained conscious only to be told by nurses that he was at Mount

Meru Hospital. He was surprised to see a P.O.P. on his left leg. He tendered a medical chit exhibit D1.

In this matter Mr. Felix Kwetukia learned State Attorney, Ms. Grace Madikenya learned State Attorney and Ms. Naomi Mollel learned State Attorney appeared for the republic and the first accused was represented by Mr. Lecktoly Ngeseyan learned Advocate, the second accused was under representation of Mr. Peresi Parpai learned Advocate, third accused was represented by Ms. Joshua Mambo learned Advocate assisted by Social Welfare Mr. Tazamael Mbise, the forth accused was under representation of Ms. Upendo Merinyo learned Counsel, the fifth accused was represented by Ms. Anna Ngoti learned Advocate and Mr. Alpha Ng'ondya learned Counsel was for the sixth accused.

Prosecution and defence side, filed closing submission which shall be deliberated in the due course.

A sole issue for determination is whether the prosecution has managed to prove an information to the required standard.

Evidence presented by prosecution abound on how the six accused persons were apprehended at the scene at Olorkiku Loliondo. It was the testimony of PW3 that all accused persons were seen at a camp within a controlled area, where game

wardens made a dash for them, the accused person on seeing so, run away towards the same direction, except the third accused who recapitulated to a call for surrender. The sixth accused person was arrested after he had stumbled on stump, fall down and was unable to move anymore. The second accused was apprehended by PW3 after the later had overwhelmed race. The first accused was apprehended by one Abdallah Kijavala. The fourth and fifth accused persons were arrested by other game wardens. It was the evidence of PW3 that he participated to handcuff the first accused and then proceeded to assist his colleague to apprehend the fourth and fifth accused persons.

The defence of *alibi* relied by the accused persons and which its notice was issued at the earliest opportune before commencement of hearing, was not tested to PW3 during cross examination. No question was asked by any defence Counsel to controvert a fact that all six accused persons were arrested on 6/4/2019 at the scene of incident at Olorkiku Loliondo within a controlled area, where they had established a camp and found in constructive possession of skins exhibit P2 collective and equipments exhibit P4 collective. No question was put to PW3 intimating to introduce an *alibi* by DW1 (first accused) that he was arrested at Mbaribali on the road, DW2 (second accused) at



his home village Tamkeli, DW3 (third accused) at his home Masebe Mbalibali Serengeti, DW4 (fourth accused) at his home Mbirikili village, DW5 (fifth accused) at Mugumu Serengeti, DW6 (sixth accused) at his home village Nyamoko Serengeti. In law, a fact not controverted is as good one as having been accepted. In **Hamis Mohamed vs R**, Cr. App. No. 297/2012 CAT at Arusha (unreported), cited by the learned State Attorney, where the Court of Appeal cited with approval a position in the leading case of House of Lords in **Brown vs Dunn** (1893) 6R. 67, the House of Lord had this to say, I quote,

*"the decision not to cross examine the witness at all or on a particular point is tantamount to an acceptance of the unchallenged evidence as accurate, unless the testimony of the witness is incredible or there has been a clear prior notice of the intention to impeach the relevant testimony"*

Herein credibility of PW3 was not shaken neither was an attempt to impeach his testimony on any fact or point. As I have said above, defence Counsel had made a notice of intention to rely on *alibi* in respect of all six accused persons. Surprisingly after PW3 had gave his testimony implicating all six accused person to have been arrested at Olorkiku Loliondo in possession of skins exhibit

P2 collective and equipments exhibit P4 collective, he was allowed to leave the witness box and go off duty without putting him to task in respect of *alibi* raised. In **Felix Paulo and another vs R**, Cr. App. No. 35/1992 CAT (unreported), the Court of Appeal had this to say, I quote,

*"...the weakness in the alibi is that neither the first appellant nor the second accused cross examined any of the prosecution witnesses particularly PW1 and PW2 regarding the alibi. Had it been true the appellants were not at the scene of the crime but were at their homes sleeping at the material times, PW1 and PW2 would have been put to task under cross examination...we concur with the trial Judge in rejecting the alibi"*

Failure by the defence Counsel to cross examine PW3 on that particular aspect, accredit more credence on his testimony. In **Edger Kayumba vs DPP**, Cr. App. No. 498/2017, the Court of Appeal underscored what was stated in the case of **Abdallah Hamis @ Simba vs R**, Cr. App. No. 68/2008, where the Court of Appeal established, I quote,

*"It follows that the trial High Court having believed PW1 and PW2 on the evidence of identification of the appellant the defence of alibi died a natural death"*

In the matter before hand, the defence side having failed to prosecute properly their defence of *alibi*, as depicted above, the same cannot be accorded any weight.

A defence by the first accused (DW1) that he was arrested because of his tittle-tattle over an episode which led Mwita Peter to be fined Tsh 1,000,000 by peer group, after DW1 had disclosed a fact that one Mwita Peter had steal 50 bags of cement, is unmerited, as his *alibi* that he was arrested at Mbalibali village over the same saga has been rejected.

Equally a defence by the third accused that he was arrested after he refused to cooperate to disclosed as to where about his father, is a mere concoct. As this fact was not put to PW3. In a similar vein, a defence by fourth accused that he was arrested for failure to lead the purported arresting officers, to the alleged Issa Emanuel, is too remote and incredible story.

The six accused had defended that he was beaten by a piece of timber on the head at a crown, where he falls unconscious and

gained conscious only to be told that he was at Mount Meru which was a strange place/location to him. DW6 alleged to have been surprised seeing a P.O.P. on his left leg on explanation that he was not aware on how he sustained injury on his left leg, as he was unconscious. However, a medical examination report exhibit D1, tell a different story. According to exhibit D1 at item (i) nature of complaints: the medical officer recorded that the sixth accused went there with inability to use the left leg. And at item (iv) general medical history: the medical officer recorded that the patient reported to had sustained injury after being shot by the Anti-Poaching Unit Officers. At remarks: the medical practitioner recorded that-it was a gunshot wound of the left leg. Nowhere the medical practitioner recorded that the sixth accused sustained head wound or injury at a crown inflicted by blunt object (timber), as alleged by the sixth accused. Nowhere the medical practitioner recorded that the sixth accused had lost conscious, neither stated that someone was narrating on behalf of the sixth accused. Exhibit D1 depict that the sixth accused was taken to hospital while limping, no evidence that he was unconscious. Actually the information at item (iv) above suggest that the narration was supplied by the sixth accused personally and not a third party as the sixth accused wanted this Court to

believe. As such explanation and defence by the sixth accused is taken as a daylight lies. And therefore it is rejected.

Therefore a defence by the first, second, third, fourth, fifth and accused person is dismissed.

The learned defence Counsels argued that there were discrepancies of colour of a skin of thomson gazelle, wildebeest introduced by PW1. Even if that discrepancy is there, it cannot be taken to have dented the whole testimony of PW1. Equally an argument that PW4 that he gave contradictory testimony regarding colour of skin of hartebeest at first said sand colour and dark grey, later when demonstrating on skins said yellowish to sand colour with light grey. The said discrepancy cannot be taken to have dented the whole testimony of PW4, they are taken as minor discrepancy, which are ignored.

Defence Counsel also raised an argument that exhibit P1 was not recorded by the accused person and that PW2 is not a competent witness. However, explanation was given by PW1 that the accused persons were at police for interrogation. Also an argument that exhibit P3 and P5 were not recorded properly, accused persons did not append signatures. PW2 explained that all six accused persons had appended signatures (thumb print) at

a certification, as indeed reflected in exhibit P3 and P5. As such argument that PW2 is not competent or that there was improper recording of exhibit P3 and P5, is baseless.

There was an argument by defence Counsel that, PW2 failed to identify the fourth accused, instead pointed to the 3<sup>rd</sup> accused. It is true that PW2 failed to identify the 4<sup>th</sup> accused at the dock, but that was a dock identification and indeed PW2 was not an arresting officer. PW2 was a mere storekeeper and saw the accused person at the time of handing over exhibits P2 and P4, which PW2 received from PW3.

Regarding an argument by defence Counsel that, PW3 failed to show bottom food (stiff porridge) crust in pots which form part of exhibit P4 or stiff porridge itself or wooden spoon for cooking stiff porridge. Admittedly those things were not there, but have nothing to do with the central issue that the six accused persons were ambushed, apprehended at the camp/scene in possession of skins exhibit P2 collectively.

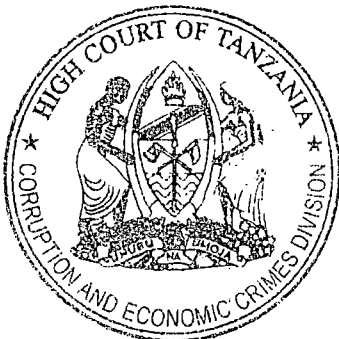
An argument that there was a breakage of chain of custody by PW4. My narration on recap above, show that the prosecution has managed to prove on chain of custody from seizure at the scene up to the last event when the exhibit P2 collectively was

tendered in court, by both oral testimony and paper trail. In short, PW3 (seizing officer) handed over exhibit P2, to PW2 via a handing over certificate exhibit P3; PW2 handed exhibit P2 to PW4, the later handed over to PW1 (exhibit keeper) via a chain of custody exhibit P1. PW1 preserved exhibit P2 until when was brought and tendered to the Court. As such the alleged breakage of chain of custody, is a fallacy concept.

To wind up, it was a testimony of PW3 that at the scene of crime to wit Olorkiku Loliondo where the accused persons had camped, is within a controlled area of Ngorongoro, where human activities are prohibited. PW3 stated that the six accused persons had no permit either to establish a camp there or for possessing government trophies exhibit 2 collectively. PW3 stated that wire snare part of exhibit P4 is used for trapping animals, and knives, bush knives and long double edged knives are using for slaughtering, stripping off skin and chop up pieces of meat.

Having premised as above, I nod with the argument of the learned State Attorney that the prosecution has managed to prove an information (all nine counts) to a required standard against the first, second, third, fourth, fifth and sixth accused.

Therefore, the first, second, third, fourth, fifth and sixth accused person are found guilty and convicted for unlawful possession of government trophy contrary to section 86(1) and (2)(b) of Act, No. 5 of 2009 (supra) read together with paragraph 14 of the First Schedule to, and sections 57(1) and 60(2) Cap 200 R.E. 2002 (supra) as amended by sections 16(a) and 13(b) of Act No. 3 of 2016 (supra) (first to eighth count, inclusive) and unlawful possession of weapons in certain circumstances contrary to section 103 of Act No. 5 of 2009 (supra) read together with paragraph 14 of the First Schedule to, and sections 57(1) and 60(2) Cap 200 R.E. 2002 (supra) as amended by sections 16(a) and 13(b) of Act No. 3 of 2016 (supra) (ninth count).



E.B. Lavanda  
**JUDGE**

**10/11/2020**



## **SENTENCE**

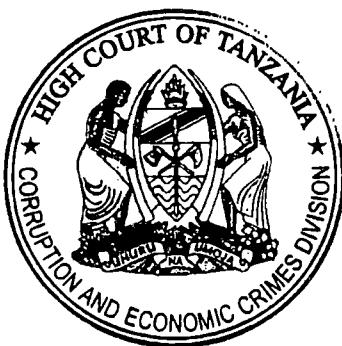
I have heard the argument of the prosecutor, who stressed for a stiff sentence. And I have also heard mitigation for the defence Counsel. However sentence for the offence which the accused persons are convicted, the penal provision prescribe a minimum sentence. That said, I sentence the first, second, fourth, fifth and sixth accused persons as follows:

**First, second, third, fourth, fifth, sixth, seventh and eighth counts:**

Each accused to serve twenty years imprisonment on each count which is the minimum. A sentence shall run concurrently.

**Ninth count:** To pay a fine of Tsh. 200,000/= or to serve a terms of one year in prison, in default.

The third accused Paulo Ryoba Mwita is sentenced to a conditional discharge for a period of six months, for which he will be under a supervision of Social Welfare Officer at Serengeti District, Mara Region.



**E.B. LUVANDA**

**JUDGE**

**10/11/2020**