

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

CORRUPTION AND ECONOMIC CRIMES DIVISION

AT MOSHI SUB-REGISTRY

ECONOMIC CASE NO. 14 OF 2021

THE REPUBLIC

VERSUS

1. NICOLAUS MLAKONI KIMARIO

2. CHRISPIN EMMANUEL TARIMO

JUDGMENT

30th November & 1st December, 2021

BANZI, J.:

In this case, Nicolaus Mlakoni Kimario and Chrispin Emmanuel Tarimo, the first and second accused person respectively, are indicted with two counts, unlawful possession of government trophies and unlawful dealing in government trophies contrary to section 86 (1) (2) (b) 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. 2019] ("the EOCCA").

Both offences were committed on 25th November, 2020 at Kikelelwa Village, within Rombo District in Kilimanjaro Region. In the first count, they

are alleged to be found in unlawful possession of government trophies to wit ten (10) pieces of elephant tusks equivalent to four killed elephants valued at Tshs.138,000,000/=, the property of the Government of the United Republic of Tanzania. In respect of the second count, they are alleged to be found in unlawfully dealing in government trophies to wit ten (10) pieces of elephant tusks equivalent to four killed elephants valued at Tshs.138,000,000/=, the property of the Government of the United Republic of Tanzania. Both accused persons pleaded not guilty to both counts.

In a bid to prove the case against the accused persons, the prosecution side under the services of Mr. Isack Mangunu, learned State Attorney lined up seven (7) witnesses namely, Nyamoronga Gamwara Sumra (PW1), Ismail Walele Auliai (PW2), G.2503 CPL Kadri (PW3), Inspector Best Eliasafi Pesa (PW4), Titus Venance Mwambene (PW5), Paulo Loserian Siara (PW6) and Mary George Kazungu (PW7). In addition, they tendered nine (9) exhibits, which were admitted, thus: Exhibit P1, ten pieces of elephant tusks with its packages; Exhibit P2, Handing over certificate dated 26/11/2020; Exhibit P3, Trophy Valuation certificate; Exhibit P4, Exhibits Register; Exhibit P5, two mobile phones make Nokia; Exhibit P6, motorcycle with Registration No. T682 AEE; Exhibit P7, Handing over certificate dated 25/11/2018; Exhibit

P8, Certificate of Seizure and Exhibit P9, Extra-judicial statement of the first accused person.

On the other hand, the first accused person under the services of Ms. Jane James, learned Advocate testified under oath as DW1 and did not tender any exhibit. On his side, the second accused person under representation of Mr. Baraka Tenga, learned Advocate, testified under oath as DW2. Also, he did not tender any exhibit. I must sincerely thank the Counsel of both sides and everyone who took part in the proceedings of this case for their tireless efforts towards determination of this case.

Briefly, prosecution evidence reveals that, prior to 24th November, 2020, PW4, an Inspector of Police received a tip from his informant that, there are persons who were looking for purchasers of elephant tusks. After giving his number to those persons through the informant, he began to communicate with those persons pretending to be a businessman and intended vendor. On 24th November, 2020, he went to Rombo District for purpose of meeting them. He managed to meet with two persons (the first and second accused person) at Tarakea area and after conversation, they agreed to meet on 25th November, 2020 at 10:00 am at Kikelelwa Juu area.

On the fateful day, PW4 met with his team, PW5 and John Masanja for purpose of planning to execute the arrest whereby, PW4 instructed them to hide at the back of their motor vehicle make pickup which is covered by canvass until at the point of weighing the tusks. Around 10:00 am, PW4 with his team drove off up to the meeting point and on arrival, he called the accused persons to let them know about his arrival. 15 minutes later, the first and second accused person arrived at the scene with a motorcycle driven by the second accused person. On arrival, and after short conversation, the first accused person got off the motorcycle and took the green sulphate bag which was tied at the back seat. He opened it and PW4 saw elephant tusks. After seeing that, they weighed the tusks and got 23 kilograms whereby the first accused person told PW4 to pay Tshs.6,000,000/=. In the course of payment, PW5 and his colleague came out of the hideout, joined PW4 and managed to arrest accused persons. After the arrest, PW4 unveiled himself and informed them their allegation.

Thereafter, PW4 called PW6 who was passing by to witness the search. Then PW4 searched both accused persons on their bodies and found them with two mobile phones. After that, he filled in certificate of seizure and seized ten pieces of elephant tusks in the sulphate bag, two mobile phones and motor cycle makes Suzuki yellow in colour. Then, he signed it together

with PW5, PW6 and first and second accused person. After completion, they took the first and second accused person together with the seized exhibits to Tarakea Police Station.

On arrival, they labelled the pieces of elephant tusks with weight, length and width and marked them 001 to 0010. Then, PW4 handed over the seized exhibits to PW3, the custodian of exhibits via Exhibit P7. Upon receiving, PW3 recorded them in Exhibit P4, labelled the outer bag with case reference number TKE/IR/1366/2020 and Exhibit Register number 47 of 2020. Then he stored them in the strong room. On the same day, the first and second accused persons were taken before a Justice of Peace, PW7 where the first accused person recorded his extra-judicial statement, Exhibit P9.

On 26th November, 2020, PW3 handed ten pieces of elephant tusks in green sulphate bag (Exhibit P1) to PW2 for identification and valuation via Exhibit P4. According to his profession, PW2 identified ten pieces as elephant tusks and after identifying, he carried out valuation by using the Wildlife Conservation Act. According to his testimony, he realised that ten pieces came from four elephants whereby each elephant is valued at USD 15,000 and thus, four elephants valued at USD 60,000 equivalent to Tshs.138,000,000/= at the exchange rate of Tshs. 2,300/=. He completed

his valuation by filling in the certificate of trophy valuation, Exhibit P3. After that, he handed over Exhibit P1 to PW3 via Exhibit P4 who stored the same in strong room until around 4:00 pm on the same day when he handed over to PW1 via Exhibits P2 and P4 so that they could be stored at the head quarter of KINAPA in Marangu. After receiving, PW1 went back to his office at Marangu, where on arrival, he labelled the tusks with case reference TKE/RB/2056/2020. Then he stored them in special room for storage of exhibits until 25th November, 2021 when he brought them before this Court.

In their defence, the accused persons denied to have been found in possession of the elephant tusks in question. It was the defence of the first accused person (DW1) that, on 25th November, 2020 around 8:00 am, while he was at his saloon within his premises, two persons arrived and took him with a view bailing out his wife who was arrested. Then they took him in their car makes Corolla and drove off to forest area instead of police station. When he tried to call his wife, they snatched his phone. On arrival at forest, he found another motor vehicle double cabin with three persons. They gave him several papers and caused him to sign under threat. Then the salon car left and shortly thereafter, someone came with motorcycle and after parking behind the double cabin, he left. Thereafter the salon car returned with DW2 with the aim of bailing him out after hearing his arrest. After that, they took

a green sulphate bag from the double cabin and emptied the same out. They told him that, he was found with government trophy. Then they called a person who was passing by whereby, he signed some papers and continued with his journey. Thereafter, they were taken to Tarakea police station and around 5:30 pm he was taken to the Justice of Peace but not PW7 and forced to sign on a readymade statement. After that, he was taken back to the station where he stayed until the following day when he was brought to Central police station at Moshi. He stayed there until 10th December, 2020 when they were arraigned to Court. He denied to own Exhibit P6 or Exhibit P5. Thus, he prayed to be acquitted.

On the other hand, it was the evidence of the second accused person (DW2) that, on 25th November, 2020 while he was on the way to the hospital, he saw a car whereby, one person got off and went to DW1's saloon. After returning, he got in the car and drove towards him. After reaching him, they stopped and asked him if he knows DW1. After he accepted to know him and since he is his neighbour, he was asked to assist him over his problem. After conversation, DW2 boarded in the car and they drove off up to forest area where on arrival, he found double cabin and motorcycle behind it. He also found four persons with DW1. It was at that point when he was arrested and given some papers which he signed under threat. Thereafter, they took

the sulphate bag from the motor vehicle and informed him that, he is alleged to be found in possession of government trophy, Thereafter, they were taken to police station. He also denied to be the owner of Exhibit P6 but admitted to own one of the phones in Exhibit P5, the black one. Finally, he prayed for his acquittal.

In a nutshell, that was the evidence of the prosecution and defence side. Final submission was made orally. Ms. James and Mr. Tenga, learned counsel for first and second accused person respectively raised various issues including; burden of proof; validity of Exhibit P8 because the search was conducted under section 42 the Criminal Procedure Act [Cap. 20 R.E. 2019] ("the CPA") instead of section 38 of the CPA, it does not show where the search was conducted, there is no name of second accused person and PW6 did not witness the weighing exercise but he signed in a document which shows weight of tusks; weight of Exhibit P9 as it doesn't contain ingredients of offence; lack of proof on how ten pieces of tusk were equated to four killed elephants and chain of custody. The case of **Shabani Said Kindamba v. Republic**, Criminal Appeal No. 390 of 2019 CAT (unreported) was cited to support their argument on search.

On his side, Mr. Mangunu, learned State Attorney treated the anomalies in the search as minor and the case of **Jumanne Mpini @**

Kimbilombilo and Another v. Republic, Criminal Appeal No. 195 of 2020

CAT (unreported) was cited to support his view. To him, the chain of custody was well maintained and Exhibit P9 is a confession in the eyes of law.

Having considered the evidence for the prosecution and defence, the main issue before the Court for determination is whether the prosecution has proved the case against both 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] ("the Evidence Act"), 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 statute or other law provides otherwise.

Reverting to the issue at hand, I will begin with the concern by the defence that, there is no evidence to establish how ten pieces of elephant tusks were equated to four killed elephants. It is a trite law that, the prosecution side is required to prove every detail that was stated in the particulars of offence. In the matter at hand, the relevant part of particulars of offence in first count reads:

*"...were found in unlawful possession of Government trophies to wit **ten (10) pieces of elephant tusks equivalent to four killed elephants** valued at one hundred thirty eight million Tanzanian shillings (Tshs 138,000,000/=)..."* (Emphasis supplied).

It is apparent from the extract above that, those ten pieces alleged to be found with the accused persons are equivalent to four killed elephants valued at Tshs.138,000,000/=. These details were expected to be proved by the person who conducted valuation on the trophies in question. However, the evidence of PW2, wildlife officer is wanting. In his chief testimony, among other things, PW2 stated as follows and I quote:

"I realised that the pieces come from four elephants. By the look, the tusks were from four elephants. I got the value from Regulations. One elephant is valued at USD 15,000. At that time the exchange rate was Tshs. 2,300/= per one USD. All four elephants valued at USD 60,000. The total value was Tshs 138,000,000/=."

It is apparent from the extract above that, PW2 did not adduce evidence to establish how ten pieces were equivalent to four elephants. When this witness was cross-examined by Ms. James, he admitted that, one elephant has two tusks. PW2 just said that he realised that by a mere look. However, there is nowhere he explained how he arrived at that conclusion.

According to PW4 out of ten pieces, four pieces had hole which shows were from the base part; two pieces were of the middle part of the tusks and four pieces were of the tip part. Surprisingly, PW2 who is an expert on that field did not explain whether those pieces if joined together make a complete tusk or not in order to arrive into his conclusion of four elephant. Without such evidence, it cannot be said that the available evidence proved what was stated in the information. Apart from that, PW2 did not explain the source of exchange rate prevailed on that particular day. Was it from the Bank of Tanzania or from which bank? Without such information, it is doubtful if Tshs.2,300/= was really the exchange rate that prevailed on that day. Without such evidence, even the total value of Tshs.138,000,000/= becomes doubtful. On this, I am constrained to agree with Ms. James that, the prosecution has failed to prove that those ten pieces are equivalent to four killed elephants. In respect of the second count, apart from lack of evidence concerning how ten pieces were compared to four killed elephant tusks, the particulars of offence do not disclose the nature of unlawful dealing in government trophy for which they were charged. In the considered view of this Court, failure to disclose the nature of dealing is fatal and that makes the second count to be defective.

Turning to the issue of search and seizure. A quick perusal of Exhibit P8 shows that, the search in question was conducted under section 42 (1), (2), (3) of the CPA. This section concerns search under an emergency situation. The evidence of PW4 shows that, he knew about the incident way back before 25th November, 2020. According to his testimony, he was communicating with the intended vendors before 24th November, 2020. On 24th November, 2020, he met with them at Tarakea area and after discussion, they agreed about the meeting place. So, when he went to the crime scene on 25th November, 2020, he knew exactly what was going to happen. With due respect to Mr. Mangunu, the case of **Jumanne Mpini @ Kimbilombilo** is distinguishable with the instant matter, because it was not about whether or not the situation falls under the emergency search. Thus, in the particular circumstances of this case, the situation was not emergence one, as PW4 had information more than two days prior to the incident. Therefore section 38 could cater for the situation instead of section 42.

Moreover, there is another defect in Exhibit P8 which raises serious question about its authenticity. According to PW4, PW5 and PW6 certificate was seizure was filled at the crime scene. Yet, some of the details filled therein is case file reference number TKE/IR/1366/2020. Since there is no explanation from PW4 how such reference ended up in that Exhibit, it means

that, at the time PW4 was seizing those items he had already opened the case at the police station and given that reference number. Otherwise, this document was filled at another place other than at the crime scene which cast doubt on its authenticity. Besides that, PW6 during cross-examination he admitted that he did not witness PW4 weighing the tusks. However, he signed in Exhibit P8 acknowledge that he has witnesses what was listed in that important document. All these cast strong doubt over authenticity of Exhibit P8.

Furthermore, there is contradiction on what transpired at the crime scene. PW4 in his testimony stated that, after PW6 accepted to witness the search, he began to search the accused persons on their bodies where he found two mobile phones. After that, he took the certificate of seizure, filled in all seized exhibits and signed together with PW5, PW6 and both accused persons. On the other hand, PW5 and PW6 stated that, the search began in the sulphate bag then it was proceeded to the accused persons' bodies. Now, did PW4 searched in the sulphate bag which contained the alleged pieces of elephant tusks? If he did so, why he did not testify on that aspect? In addition, while PW4 did not state about asking the accused persons if they had permit, PW5 stated that after search, PW4 asked them if they had permit over those ten pieces of elephant tusks and they replied they had none.

Likewise, PW6 did not state about PW4 asking the accused persons if they had permit. Moreover, while PW4 said it was the first accused person who took the bag in question from the motorcycle and put it down, PW6 stated that, it was PW4's colleagues who did that. These contradictions cast doubt if PW4, PW5 and PW6 were at the same place witnessing the same thing.

I am much aware that, not every discrepancy or contradiction in the prosecution's evidence will cause their case to flop. However, proving possession of government trophy begins at the stage of searching. In addition, search and seizure are the first step in the process of establishing the chain of custody. In that regard, whenever there is inconsistency or contradiction at the stage of search and seizure, that goes to the root of the matter. It is the considered view of this Court that, the contradictions in this go to the root of the matter because they involve search and seizure.

Basing on what I have explained above, the whole search exercise followed by seizure become questionable, because the search in question was conducted under emergence while the situation does not fall under emergence search. Likewise, authenticity of certificate of seizure is also doubtful and the lastly, the whole process is coupled with contradictions. All these invalidate the whole search and seizure including Exhibit P8. Since the search and seizure were not valid which is the first step in establishing chain

of custody, it is obvious that, the chain of custody was broken from the moment of search and seizure. Besides, there is a complaint from the defence that, Exhibit P1 was not the same which was seized from the crime scene and brought before this Court. The record shows that, what was handed over according to handing over certificates are different from what was stated by PW1, PW3 and PW4. While Exhibit P7 and P2 show that what was received by PW1 and PW3 had label 001 to 0010, PW1, PW3 and PW4 in their testimonies stated about handing over or receiving the pieces of tusks with more than one label. Those labels mentioned by PW1, PW3 and PW4 are weight, length and width. However, Exhibit P1 is also labelled with date but none among these witnesses mentioned about labelling the tusks with date.

The defence also attacked Exhibit P9 for not being a confession in the eyes of law. Section 3 (c) of the Evidence Act defines a confession as a statement containing an admission of all the ingredients of the offence with which its maker is charged. In discussing what amounts to confession under section 3 (c) of the Evidence Act, the Court of Appeal in the case of **Khalid Mohamed Kiwanga and Another v. Republic** (Criminal Appeal No. 223 of 2019) [2021] TZCA 467 at www.tanzlii.org stated as follows:

"While we acknowledge the fact that there cannot be a standard form of a confessional statement by a criminal suspect, we are of the settled opinion that, apart from all the essential elements of the offence, such a statement must be comprehensive, containing the necessary information and details related to the charged offence such as the name of the place where the offence was committed, the date and time it was committed, against who (if the criminal suspect can name or describe the victim) and in the context of the present case, the items or property stolen, to mention but a few."

In the matter at hand, the so-called confession does not contain either admission of ingredients of the offence or details forming included in the information such as; the name and place where the offence was committed, the date and time it was committed and number of elephant tusks he possessed. Thus, with these shortfalls Exhibit P9 cannot pass the test of being called a confession under section 3 (c) of the Evidence Act. Besides that, reading between the lines, there is contradiction between the contents of Exhibit P9 and the testimony of PW4. Exhibit P9 shows that, the first accused person was meeting with "matajiri" meaning that he met with more than one person. On the other hand, PW4 in his testimony stated that, it was him who was meeting with the purchasers. This casts doubt whether who was mentioned in Exhibit P9 was PW4. With such contradiction and

since the statement in question does not amount to confession, definitely, it cannot be relied upon to convict both accused persons with the alleged offences.

Besides that, both accused persons denied to be the owner of the motorcycle in question (Exhibit P6). However, no evidence was adduced by prosecution witnesses to establish who is the really owner of the motorcycle in question. Such evidence could be useful to connect the accused persons with the incident since both of them denied to arrive at the crime scene with the motorcycle in question.

With all these controversies, I cannot arrive into conclusion that, the case against the accused persons was proved to the required standard. It is a settled law that, the accused person cannot be convicted basing on weakness of his defence but he can only be convicted on the strength of prosecution case. The available evidence leaves a lot to be desired as there are many doubts which as a matter of law should be resolved in favour of the accused persons.

That being said and from the foregoing reasons, it is the finding of this Court that, the prosecution side has failed to prove their case beyond reasonable doubt. Thus, I find the first and second accused person, Nicolaus

Mlakoni Kimario and Chrispin Emmanuel Tarimo not guilty and I hereby acquit them from the charged offences of unlawful possession of government trophy and unlawful dealing in government trophy. They hereby set free. Order accordingly.



I. K. BANZI
JUDGE
01/12/2021

Delivered in open Court in the presence of both accused persons, Mr. Mangunu, learned State Attorney, Ms. James, learned Advocate for 1st accused and Mr. Tenga, learned Advocate for second accused. Right of appeal is fully explained.



I. K. BANZI
JUDGE
01/12/2021

ORDER

Since none between the accused persons claimed to be the owner of the motorcycle with Reg. No. T682 AEE make Suzuki (Exhibit P6), it is hereby forfeited to the Government of the United Republic of Tanzania. Also, Exhibit P1 is confiscated to the Government of the United Republic of Tanzania through the Director of Wildlife. As for black mobile make Nokia, it is hereby restored to second accused. The red Nokia phone is forfeited to the Government of the United Republic of Tanzania.



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

I. K. BANZI
JUDGE
01/12/2021