

IN THE HIGH COURT OF TANZANIA
CORRUPTION AND ECONOMIC CRIMES DIVISION
AT ARUSHA SUB-REGISTRY
ECONOMIC CASE NO. 11 OF 2020

REPUBLIC
VERSUS

1 KARTIPU MOTAJA @ KILANGI
2 HAMIS MUJUNGU @ KAMBAROT

JUDGMENT

26/10/2021 & 27/10/2021

E.B. LUVANDA, J.

Kartipu Motaja @ Kilangi (first accused) and Hamis Mujungu @ Kambarot (second accused) are indicated for unlawful possession of government trophy contrary to section 86(1) and (2)(b) 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) respectively of the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016.

In the particulars of offence, it is alleged that on 11/05/2019 at Mdori area in Vilima Vitatu Ward within Babati district in Manyara region, the first and second accused jointly and together were found in unlawful possession of government trophy to wit two pieces of elephant tusks equivalent to one killed elephant valued USD 15,000 or equivalent to Tsh. 34,487,550 the property of the Government of the United Republic of Tanzania. The accused persons denied the information.

Ms. Agness Hyera learned Senior State Attorney and Mr. Charles Kagirwa learned State Attorney appeared for republic; Ms. Mariam Saad learned Advocate and Mr. Salvatory Mosha learned Counsel were representing the accused persons.

The issue for determination is whether the prosecution proved the information on the required standard.

It was the evidence of PW3 Yohana Mtegeki Mgalula (who is the game warden) that on 11/5/2019 at 22.00 hours they arrested the first accused who was in possession of two elephant tusks wrapped in a polysack bag. Initially PW3 was tipped by the informant that the first accused was vending elephant tusk and was after purchasers. In that regard PW3 posed as a potential buyer, where they agreed to trade at Mdori Minjingu and they saw the first accused at that particular destination on bush shrubs twenty meters along the road. To distance from the accusation and liability, the first accused (DW1) come up with the defence of *alibi* which was just introduced at defence, to the effects that on the material date he was arrested at the farm at Minjingu and denied categorically having been arrested at Mdori let alone knowing that place or destination. But when he was asked by the learned Senior Prosecuting Officer if at all his lawyer had filed a prior notice that he (DW1) was not arrested at the scene rather somewhere else, the

first accused was evasive. Principally the learned Counsel for first accused did not indicate to the Court the particulars of the *alibi* at the preliminary hearing, nor furnished the prosecution with the particulars of the *alibi* he intend to rely upon as a defence before close of the prosecution case, as provided for under section 42(1) and (2) of The Economic and Organized Crime Control Act, Cap 200 R.E. 2019. Even if I entertain the said *alibi* which is permissible under courts discretion (see **Kubezya John vs Republic**, Criminal Appeal No. 488/2015, Court of Appeal at Tabora (unreported) at page 23, still cannot assist to bail out the first accused. Instance the first accused did not summon the alleged two school kids whom he alleged to had witnessed his arrest at Minjingu on the farm, to support his averments that indeed he was there. During preliminary hearing, the first accused did not bother even to say he will have witnesses to summon on his defence. As such his plea that he could not summon the said schoolchildren because no one had visited him at remand prison for the past one year or that his father passed away, is of no avail to him. More important, the defence Counsel did not marshal that defence to the arresting officer (PW3) on cross examination. As such his *alibi* is discarded on account of being unsupported. I therefore rule that the first accused was arrested at Mdori Kwa Kuchinja on

shrub bush while in possession of two elephant tusks (exhibit P2), which were seized via a certificate of seizure exhibit P5.

There was an argument raised by defence Counsel on cross examination of PW3, that in exhibit P5 there is no independent witness. But PW3 explained that at a destination where exhibit P2 was seized and exhibit P5 recorded to wit at Mdori Kwa Kuchinja area it is on the outskirts of Mdori, is a bush forest and corridor reserved for wild animals to pass to and from Tarangire National Park and Manyara National Park, there is no dwelling houses. To me that explanation is satisfactory to justify as to why PW3 failed to procure an independent witness.

An argument as to whether PW3 was at Makuyuni (as per his testimony) or Arusha (as reflected in his previous statement exhibit D3) when he received intelligentsia information, is immaterial. As that alone was incapable to make a dent in a fact in issue, that PW3 had apprehended the first accused in possession of elephant tusks.

Another aspect is on chain of custody, according to PW3 after seizure, he handed over exhibit P2 to Cpl Evans (PW4) who is the exhibit keeper at Arusha Central Police Station, via handing certificate exhibit P6, which was

done on 12/5/2019 at 01.30 hours. PW4 registered exhibit P2 in exhibit register (PF16) with exhibit register No. 71/2019, then preserved. On 13/5/2019, PW4 handed over exhibit P2 to Emmanuel Daniel Pius (PW2) via exhibit P3, the later conducted identification and valuation then handed over back to PW4 through exhibit P1. On the same date, to wit 13/5/2019 PW4 handed over exhibit P2 to James Kugusa (PW1) at Arusha Central Police Station via a handing over certificate exhibit P1. PW1 preserved them at Anti-Poaching Unit Njiro Arusha (KDU) until when exhibit P2 was tendered in court during trial.

There was an argument by defence Counsel which was introduced during cross examination of PW1 and PW4, that in a previous statement of PW1 that is exhibit D1, it was recorded that PW4 handed over exhibit P2 to PW1 at the store of KDU. Of course, that is what is reflected in exhibit D1, but the discrepancy did amount to brokage of chain of custody which was established by both oral testimony and paper trail as depicted above. Therefore, I rule that chain of custody remained intact.

In view of the testimony of PW2 who proved that exhibit P2 are elephant tusks, valued USD 15,000 equivalent to Tsh 34,487,550 as per exhibit P4. And so far, the first accused had no permit for possessing those elephant

tusks, as per testimony of PW3. Therefore, the first accused is found to have been in unlawful possession of exhibit P2.

Regarding the second accused, essentially there was no direct evidence against him. The evidence of PW3 that during oral interview, the first accused had mentioned one Hamis as his companion, is too scattered and weak to implicate the second accused person.

That said the second accused is acquitted.

The first accused is found guilty and is convicted for unlawful possession of government trophy contrary to section 86(1) and (2)(b) 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) respectively of the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016.



E.B. Luvanda
JUDGE
27/10/2021