IN THE HIGH COURT OF TANZANIA

CORRUPTION AND ECONOMIC CRIMES DIVISION

AT ARUSHA SUB REGISTRY

ECONOMIC CASE NO. 15 OF 2020

THE REPUBLIC

Versus

1. **LENGAWO MOISARI KITESHO @ LEKENI**
2. **NAMAYAI MELUBO MOISARI @ NICODEM @ ROSIEKUU**
3. **JONATHAN WILLIAM SILANGEI @ JENAA**
4. **DAVID STEPHANO FUPE @ JEREMIAH**
5. **DAVID GABRIEL MATURO**
6. **KALANGA MELUBO**
7. **KOROMO NDALO LAIZA @ BAHATI NDALO**
8. **ABRAHAM HAIYO SIRIA**

JUDGMENT

8/07/2022 & 14/07/2022

E.B. LUVANDA, J.

The eight accused persons namely Lengawo Moisari Kitesho @ Lekeni (first accused), Namayai Melubo Moisari @ Nicodem @ Rosiekuu (second accused), Jonathan William Silangei @ Jenaa (third accused), David Stephano Fupe @ Jeremiah (fourth accused), David Gabriel Maturo (fifth accused), Kalanga Melubo (sixth accused), Koromo Ndalo Laiza @ Bahati Ndalo (seventh accused), Abraham Haiyo Siria (eighth accused) stand charged with seven different counts as follows: count number one, unlawful hunting of scheduled animals without permit, contrary to section 47(a) and (aa) 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) both 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 (for the 1st, 2nd, 3rd,4th,7th and 8th); count number two, unlawful dealing in government trophy, contrary to section 86(1) and (2)(b) of, 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 Act No. 3 of 2016 (supra) (for the 3rd accused person); count number three, unlawful dealing in 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) (for the 5th accused person); count number four, unlawful possession of fire arms, contrary to sections 20(1)(b) and (2) of the Firearms and Ammunitions Control Act No. 2 of 2015 read together with Paragraph 31 of the First Schedule to and, sections 57(1) and 60(2) Cap. 200 R.E. 2002 (supra), as amended by section 16(b) and 13(b) of Act No. 3 of 2016 (supra) (for the 2nd and 6th accused persons); count number five, unlawful possession of ammunition, contrary to sections 21(b) of Act No. 2 of 2015 (supra) read together with Paragraph 31 of the First Schedule to and, sections 57 (1) and 60(2) Cap. 200 R.E 2002], as amended by section 16(b) and 13(b) of Act No. 3 of 2016 (supra) (for the 2nd and 6th accused persons); count number six, unlawful possession of fire arms, contrary to sections 20(1)(b) and 2 of Act No. 2 of 2015 read together with Paragraph 31 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 (for the 1st, 2nd, 3rd, 4th, 7th and 8th accused persons); count number seven, unlawful possession of ammunition contrary to section 21(b) of Act No. 2 of 2015 (supra) read together with Paragraph 31 of the First Schedule to and, sections 57(1) and 60(2) Cap. 200 R.E. 2002 (supra), as amended by section 16(b) and 13(b) respectively of Act No. 3 of 2016 (supra) (for the 8th accused person).

The accused persons denied the information.

The question for determination is whether the prosecution have proved their case on the standard.

Essentially there were three categories of evidence presented by the prosecution to prove the information leveled against the eight accused persons, which are direct evidence; confession by way of oral, caution statements and extrajudicial statements; expert opinion the chemist and ballistic.

I will start with direct evidence. There are three scenario in relation to direct evidence. The first event, on 21/5/2018 the first accused led D/S.Sgt Vendelinus (PW4), DC Donald (PW5) and Jackson Amny Tango (PW3) the latter is a village executive officer at Lositete Village, to a valley of Olerien forest, up to a destination on the trees, where the first accused climbed on

a tree and took four pieces of rhinoceros skin exhibit P4 which were hidden on branches of a tree. Those four pieces of rhinoceros skin were seized via a certificate of seizure dated 21/5/2018 exhibit P13. In a bid to discredit this fact, the team of defence Counsel embarked into a long unsuccessful cross examination which was unable to shake the credibility of PW3, PW4 and PW5, as they stuck to their gun. Basically in the course of cross examination, bob up more incriminating details on how the first accused led and showed those four pieces of rhinoceros skin exhibit P4. I am saying so because on examination in chief PW3 and PW4 were portraying that they arrived and landed by car at the destination where exhibit P4 was retrieved from the branches of a tree. However on cross examination, PW3 and PW4 managed to poke into details that they travelled by car up to a certain point where there are steep slopes impassable by car, and they disembarked and walked on foot for a considerable period of half an hour led by the first accused, where they ascended a valley of Selela on foot as put by PW4. PW3 said when they disembarked it is when he saw the first accused leading the way when heading to a destination where exhibit P4 was retrieved. PW4 added that he even heard a conversation between the first accused and police officers, where the former was informing the later

that they are approaching to a destination where those skin were hidden. As such an evasive denial by the first accused (DW1) that he did not lead police to the forest is unmerited. DW1 disowned a signature in exhibit P13, but PW3 stated that the first accused had signed it and appended a thumb print. Even on cross examination, PW3 insisted that a signature belong to the first accused. To my opinion, PW3 by virtue of his position as a village executive officer, his testimony deserve much credence. And there was no reasons advanced by the first accused (DW1) as to why PW3 should not be believed. A mere defence that PW3 is hailing from a different village or district, is immaterial and an afterthought, as this question was not put to PW3 on cross examination.

The second event of direct evidence pertain to an incident dated 21/7/2018 at between 06.00 and 06.30 hours, where Insp. Kaitira Machunde (PW18) conducted search in a house where the eighth accused was found asleep, and impounded a weapon Rifle 375 number TZCAR 81069 (under his mattress), nine round ammunitions (two of them were soft and seven hard), one spent cartridge 375 diameter (exhibit P9 collectively) and a firearm licence form F CAR 00081069 (exhibit P26) which were seized via a seizure certificate dated 21/7/2018 exhibit P25. This fact was supported by

Juma Nyabaiga Mwita (PW7) who is a game warden and Mary Yustes Chisoji (PW17) who is the Ward Executive Officer at Loibosiriet Ward. On defence, the eighth accused (DW8) dispelled a fact that he is the owner of that house where exhibit P9 and P26 were impounded, on the explanation that according to Masai people tradition and taboos he being an adult and married is eligible/permissible to share and sleep into a house of his senior brother one Lakala Haiyo whom alleged is the proprietor of that house. This fact was supported by PW17 when she was cross examined by Mr. Zuberi Ngawa learned Counsel, where she said a house belongs to Lakala Haiyo Siria. However the said Lakala Haiyo Siria was summoned by the eighth accused person and testified as defence witness number nine (DW9), where he gave a different story that a house in question is co-owned by himself (DW9) and the eighth accused (DW8). DW9 added that on the material date, he was away to Mererani for mining activities where he usually stay for one week and the eighth accused remained solo in occupancy of that house. DW9 further stated that when he travel to Mererani he normally leave a gun exhibit P9 which he own legally via a firearm licence form F CAR 00081069 (exhibit P26), on explanation that it is too heavy, therefore he cannot carry it. This fact implicate the eighth

accused. Indeed PW17 explanation that a house belong to the alleged Lakala Haiyo Siria did not have the effects of recanting her earlier version of story that after knocking the door of that house she saw the eighth accused exited from therein. Again the eighth accused person had confessed before the justice of peace Obadia Mathias Mongi (PW9) who is a primary court magistrate at Ngorongoro, who recorded extrajudicial statement exhibit P19. There was an argument that PW9 had no jurisdiction because the eighth accused was taken from Manyara Police Station. This fact was made clear by PW9 who stated that Manyara Police Station is at Karatu and not Manyara region as was contemplated.

The last event of direct evidence pertain to the incident dated 14/6/2018 where PC Davy (PW6) stated that he witnessed when the sixth accused handed over to the suburb chairman a gun SMG 5628038358 covered in a bag of Marlboro, magazine and nine round ammunition exhibit P6 collectively, which were seized via a seizure certificate dated 14/6/2018 exhibit P17. This fact was supported by Ng'ahari Komba Resei (PW15) who is a pastoralist at Bulati Village. However a story by PW6 that he was told by the sixth accused that his relative Namayai Melubo (second accused) phoned call to the former that there is a weapon hidden at the forest and

asked the sixth accused to surrender it, is bad in law for being tainted by reported speech (hearsay). Equally a story by PW15 that he was told by one Shayo that the later was dialed phone call by Namayai Melubo (second accused) that there is a gun at the forest, is a hearsay. More importantly no witness was summoned to substantiate a fact that the sixth accused procured a gun SMG exhibit P6 from the forest. The argument by PW18 that a gun exhibit P6 which was seized from the sixth accused, was used to guard poachers when a rhinoceros was killed, is a speculation.

On cross examination by Mr. Mfinanga learned Counsel, PW6 said the second accused who is a relative of the sixth accused did not surrender a gun exhibit P6 because he (second accused) was already under arrest. This is a phantom argument which surely cannot be defended in a meaningful way. Because it defy logic to say that someone who is under police arrest is unable or impeded to surrender a gun.

On further cross examination by Mr. Ngeseiyan learned Counsel, PW6 said the sixth accused was arrested because he went to pick a gun from the forest. But as I have said above, there is no evidence to vindicate that fact.

The second category of evidence presented by the prosecution is confession by way of oral, caution statements and extrajudicial statements.

To this end D/S.Sgt Vendelinus (PW4) tendered a caution statement for the fourth accused exhibit P14 and caution statement for the seventh accused exhibit P15. There was an argument by the defence that exhibit P14 was recorded out of the prescribed time of four hours. It is true that exhibit P14 was recorded beyond the stipulated time available for commencement of interview in respect of a suspect who is under restrain. However the delay was justifiable, in sense that the fourth accused was arrested on 8/6/2018 at Nzasa Village, Usingwe Ward, Kaliua District in Tabora, then transported to Karatu Police Station (arrived on 10/6/2018) via Tabora, Manyoni and Singida, as put by A/Insp. Marsel Joseph Badude (PW16). As such the time for which the accused was on transit is excluded and excusable as was stated in a case of **Yusuph Masalu @ Jiduvi and Three Others vs Republic**, Criminal Appeal No. 163 of 2017 Court of Appeal, page 16, the Apex Court had ruled that the time when the suspect move from one destination to another, is exempted for purpose of computation of available time for interview.

There was an argument that exhibits P14 and P15 were not properly certified by the fourth accused and seventh accused did not certify at all; a date and time at a caution part are missing. It is a requirement of law for a

record of interview by police officer to indicate time of caution when it was given also must be certified by the maker or accused person, as provided under section 57(2)(d) and (3) of the Criminal Procedure Act, Cap 20 R.E. 2019. Non compliance is fatal and the effects is that such a confession cannot be acted upon.

Regarding the extrajudicial statement of the seventh accused exhibit P20 which was recorded by Gasper Malisa (PW10) who is a primary court magistrate at Ngorongoro Primary Court, on cross examination by Mr. Mfinanga learned Counsel, PW10 conceded that at the last page signature of the seventh accused is missing. According to a standard form appended in A Guide for Justice of the Peace found in A hand Book for Primary Court Magistrate which was reproduced in **Hatibu Gandi & Others vs Republic** [1996] TLR 12, require the suspect or maker to append a signature or right thumb print at the end of the extrajudicial statement. In the case of **Petro Teophan vs Republic**, Criminal Appeal No. 58 of 2012, Court of Appeal of Tanzania at Dodoma (unreported), at page 7 the Apex Court cited **Japhet Thadei Msigwa v Republic**, Criminal Appeal No. 367 of 2008 (unreported) where it was established, I quote

'So, when Justices of the Peace are recording confessions of persons in the custody of the police, they must follow the Chief Justices's Instructions to the letter. The section is couched in mandatory terms'

In other words the instructions are cumulative and does not apply in isolation.

To crown it all, the caution statements exhibits P14 and P15 for the fourth and seventh accused respectively, and extrajudicial statement exhibit P20 for the seventh accused, were all retracted. In the case of **Festo Mwanyangila vs Republic**, Criminal Appeal No. 255 of 2012 Court of Appeal of Tanzania at Iringa (unreported) at page 9, the Apex Court cited **Tuwamoi v Uganda** [1967] EA 84, quoted the following pertinent observation,

'The present rule then as applied in East Africa, in regard to retracted confession, Is that as a matter of practice or prudence the trial court should direct itself that it is dangerous to act upon a statement which has been retracted in the absence of corroboration in some material particular, but that the court might do so if it is fully satisfied in the circumstances of the case that the confession must be true'

The apex Court went on to make the following obiter, I quote,

> *"So, on the authority of **TUWAMOI'S** case, a court may convict on a retracted/repudiated confession even without corroboration'*

However, herein exhibit P14, P15 and P20 were tainted with illegality as pointed above. As such it is unsafe to mount conviction based on them.

Coming to the caution statement of the second accused exhibit P16 and extrajudicial statement of the second accused exhibit P24, were both cleared for admission without any reservation. In other words they can be relied or acted upon by operation of the rule in **TUWAMOI'S** case (supra).

In **Hatibu Gandhi & Others vs Republic** (1996) TLR 12

> *'In our considered opinion, the issue whether or not the particular appellants presented to be free agents before the magistrates, cannot be resolved in a court of law by other means except by reference to the conduct and physical appearance of the persons concerned. Only the Almighty God, or perhaps those who claim to have what is known in psychology as Extra Sensory Perception (ESP), can tell directly what goes on in another person's mind without reference to the conduct or physical appearance of that other person. For most humans, including this Court,*

what goes on in the minds of another person can reasonably be ascertained only by reference to the conduct or physical appearance of that person.

In the present case, since the appellants who made the extra-judicial statements made it known to the magistrates that they were free agents, no reasonable tribunal can find otherwise, unless there was something in their physical appearance or conduct which was inconsistent with being a free agent; or unless there is cogent evidence to show that they had been tortured while in custody before being taken to the magistrates'

Herein, the second accused pleaded torture to have been inflicted upon him at the time of arrest, while in police custody, including before the magistrate/justice of peace (PW12), whom the second accused heaped blame against PW12 to have picked a club and hit him (second accused) when he was taking hide/cover under PW12's table to eschew beating from police officers. These serious allegations, made PW12 to make the following remarks at a trial within trial, I quote,

'For the time I have worked for seven years, I never threatened or beat anybody, as is against rules and ethics of magistrate and is against my oath I have taken as magistrate and justice of peace, as such I never

threatened or beat anybody. I insist I have no interest to beat someone, I am not a prosecutor and a case will not be presided over by me, I have no need to do that. On 23/6/2018, the court should know that the suspect Namayai Melubo Moisari Losiekuu, who I recorded his statement on 23/06/2018, I saw him for the first time on 23/5/2018 when recording extrajudicial statement, thereafter I handed over him back to police and I never saw him again, may be if he was beaten by another Shirima but not me. For proper records, this suspect I recorded his extrajudicial, looking at him is like my parent by his age, to say I could stretch my hand and beat him or scold or use harsh language cannot happen, as is against ethics of my work and our traditions generally'

At the end of a trial within trial, I did not see any reason to fault or misbelieve PW12, because it was a novel idea to say PW12 dared to hit the second accused using a club inside a chamber of a magistrate. Therefore, ruled that when the second accused appeared before PW12 was a free agent.

It is a trite principal of law that a confession voluntarily made to a police officer by a person accused of an offence or freely and voluntarily made by a person accused for an offence in the immediate presence of a magistrate

or justice of peace, may be proved as against that person. See sections 27(1) and 28 of The Evience Act, Cap 6 R.E. 2019. In that regard, the confession by the second accused to the effect that he was among people who participated to kill the rhinoceros, is found to be true hence bind him. Therefore the second accused cannot exonerate himself from the accusation of killing rhinoceros.

The last aspect of category of evidence by prosecution is expert opinion. According to Mulungwana Mchomvu (PW11) who is a warden officer at Ngorongoro Conservation Area Authority, he conducted physical identification in respect of four pieces of skins exhibit P4 and a skull exhibit P1 and opined that it appertain to a rhinoceros and valued it equivalent to a whole animal a sum of Tsh 86,521,060, as per trophy valuation certificate exhibit P21. The physical identification by PW11 was supported by the findings of the chemist Kaijunga Triphon Brassy (PW8) who conducted analysis of sample of a piece of skull (marked 'A') and two pieces of skin suspected to be rhino (marked C1 and C4, analysed and concluded that it belongs to rhinoceros as per a report exhibit P18. In this context, the first accused who lead to a destination where four pieces of

skin were hidden on the branches of a tree in the forest, cannot escape the liability of participating in killing the rhinoceros.

Insp. Paulo Metusela Mugema (PW13) who is a ballistic at forensic bureau stated that he conducted analysis in respect of a gun rifle 5877 TZ CAR 81069 calibre 375 (marked K1) (part of exhibit P9) by shooting two round ammunitions (sample at laboratory that is T1 and T2) part of nine round ammunitions (marked K2 to K10, inclusive), then made comparison between a spent cartridge (marked Q1) found at the scene (exhibit P2) with sample T1, all resembled in terms of pin impression, extractor mark, breech face characteristics. Then compared a spent cartridge (marked Q2) (part of exhibit P9) found to the suspect (eighth accused) with T1 all resembled, thereafter compared Q1 and T2; Q2 and T2; Q2 and T2 all resembled, as per the ballistic report exhibit P22 and a picture book (forensic bureau) exhibit P23.

This conclusion by PW13 means that a spent cartridge for Rifle 375 (exhibit P2) found at the scene at Olerien forest on 10/5/2018 seized via seizure certificate exhibit P12 resemble a spent cartridge and nine round ammunition (part of exhibit P9) seized from the eighth accused person alongside a weapon Rifle 375 milimeter number TZCAR 81069 (part of

exhbit P9), and have connection. And so far the eighth accused was found in actual control of the same, he is found liable for participating into killing the rhinoceros. This is because a spent cartridge for Rifle 375 (exhibit P2) was found a distance of twenty paces from the skull of rhino (exhibit P1) at the scene at Olerien forest, as put by Johnson Cornelius Shayo (PW2) who is a game warden. An argument that a seizure certificate exhibit P12 (which seized exhibit P2) reveal search was conducted at a store or else a word store was not cancelled by the recording officer, is not fatal and does not vitiate the whole exercise of seizure. Equally an argument that in a previous statement exhibit D2, nowhere PW2 said they recorded a seizure certificate exhibit P12, is immaterial. By the way that is not a contradiction per se, as it amount to additional facts, which is permissible. My argument is grounded on the fact that PW2 stated that a seizure was done. The situation could be different if PW2 was silent to a fact regarding to a seizure exercise.

Now, section 47(a) and (aa) of the Wildlife Conservation Act No. 5 of 2009, provide,

'any person who-

(a) Not being a holder of a hunting licence, hunts, kills or wounds any speficied animal or scheduled animal; or

(b) ...NA...

....commits an offence and on conviction-

(aa) in the case where the conviction relates to the hunting

or killing of animal specified in Part I of the First Schedule to this Act...

On the First Schedule Part I, black rhinoceros is mentioned with its scientific name Diceros bicornis (Linnaeus). Therefore, the first, second and eighth accused persons are liable for illegal hunting and killing rhinoceros, which constitute an offence in the first count in the information.

The eighth accused person is also found guilty in respect of the sixth count for unlawful possession of fire arms and seventh count for unlawful possession of ammunition.

That said there is no plausible evidence which implicate the third, fourth, fifth, sixth and seventh accused persons, therefore they are acquitted. Also there was no evidence whatsoever which was tendered by prosecution to prove the second count, therefore it is dismissed and the third accused is acquitted as well.

Appreciation to Ms. Sabina Silayo learned Senior State Attorney & Ms. Amina Kiango learned State Attorney for the republic and Mr. Sheck Mfinanga learned Advocate for the first accused; Mr. Godfrey Melkizedeck Saro learned Advocate for second accused (also filed final submission); Mr. Abdallah Ali learned Advocate for third accused (also filed final submission); Mr. Zuberi Ngawa learned Counsel for fourth accused (also filed final submission); Mr. Fredolin Bwemelo learned Counsel for fifth and seventh accused (also filed final submission); Mr. Lecktony Ngeseiyan learned Advocate for sixth accused; Mr. Anold Ojare who was representing the eighth accused person, (including filing closing submissions), for their commitment and labored efforts in representing the accused persons and assisting the Court throughout the trial.

Therefore the first, second and eighth accused persons are convicted as above.

E.B. Luvanda
Judge
14.07.2022