

THE UNITED REPUBLIC OF TANZANIA
IN THE HIGH COURT OF TANZANIA
CORRUPTION AND ECONOMIC CRIMES DIVISION
AT IRINGA
ECONOMIC CASE NO. 1 OF 2020
REPUBLIC
VERSUS
FOCUS S/O AIDAN @ HONDE

JUDGMENT

The accused person Focus s/o Aidan @ Honde is indicated for unlawful possession of government trophy contrary to section 86(1)(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(1)&(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, Focus s/o Aidan @ Honde is accused that on 23rd January, 2019 at Nyololo Village within Mufindi District in Iringa Region, was found in possession of government trophies to wit eleven (11) pieces of elephant tusks valued at Tsh. 173,797,500/=, the property of the government of the United Republic of Tanzania

without any permit or licence thereof. The accused denied an information.

It was the testimony of Obadia Jama Kamoli PW2, game warden Anti Poaching Unit (KDU) Iringa, that on 23.1.2019 got information from his informant that there was a person vending elephant tusks at Nyololo Mafinga, where he informed his in-charge Paulo Simango the later directed them to make follow up on that information. On the same date at about 15.00 hours PW2 with his colleague one David Msovella PW1 (also game warden grade two, Anti Poaching Unit Northern Highland Zone) commenced a journey to Nyololo via Mafinga Police Station, where they were given three police officers. Meanwhile PW2 who was communicating with the informant, took a lead alone to Nyololo for purpose of knowing his informant so that he could direct PW2 as to where Focus (vendor of elephant tusks) was. PW2 was told by the informant that Focus was at room number six Mseto guesthouse owned by one Meriko. PW2 went thereat, entered in room number six, where he saw Focus alone inside that room. After introduction to each other, PW2 told Focus that he went there to purchase elephant tusks, where Focus took four whole elephant tusks from ceiling on a toilet as a sample to negotiate sell price. They reached an agreement of a price of Tsh.

120,000 per each kilogram. Amid conversation and hustle to look for a weighing scale, PW2 was texting message to PW1 and police officers that they were about to transact business with that man and already they had teeth inside room number six and asked PW2 and police officers to proceed there to effect arrest. Meanwhile PW2 and police officers who were nearby there, procured the Village Executive Officer one Shangwe Philipo Mgovano PW3, proceeded at room number six including guest attendant. On arriving there, they knocked a door, where Focus opened for them, entered inside and put under arrest and handcuffed Focus (accused herein). The accused was asked to whereabouts of other elephant tusks, the accused showed police officer on ceiling. Police officer pulled down seven pieces of elephant tusks from ceiling making a total of eleven elephant tusks including four whole elephant tusks which were seen on the bed. PW1 recorded a certificate of search/seizure exhibit P1, in respect of four whole elephant tusks marked "M" with label 1/4 to 4/4 inclusive and seven pieces of elephant tusks marked "PCS" with label 1/7 to 7/7 inclusive. This facts was supported by PW4. The eleven elephant tusks were received as exhibit P2 collectively. Thereafter the eleven elephant tusks and the accused were taken up to Mafinga Police Post, where PW1 handed over the eleven elephant tusks (four whole elephant tusks marked "M"

with label 1/4 to 4/4 inclusive and seven pieces of elephant tusks marked "PCS" with label 1/7 to 7/7 inclusive) to Cpl Epipodius PW4. On the same date at 21.30 hours PW4 handed over the eleven elephant tusks (four whole elephant tusks marked "M" with label 1/4 to 4/4 inclusive and seven pieces of elephant tusks marked "PCS" with label 1/7 to 7/7 inclusive) to PC Dismas PW5 who is an exhibit keeper at Mafinga Police Post and preserved them. On 25.1.2019 Rachel Nhamba PW7 (game officer) conducted identification and valuation in respect of eleven elephant tusks (four whole elephant tusks marked "M" with label 1/4 to 4/4 inclusive and seven pieces of elephant tusks marked "PCS" with label 1/7 to 7/7 inclusive). PW7 certified that the eleven pieces of teeth were elephant tusks which formed five elephants valued Tsh. 173,797,500/= as per trophy valuation certificate exhibit P4. On 6.3.2019 at 09.00 hours PW5 handed over all eleven elephant tusks (four whole elephant tusks marked "M" with label 1/4 to 4/4 inclusive and seven pieces of elephant tusks marked "PCS" with label 1/7 to 7/7 inclusive) to DSSgt Joseph PW6. On the same date to wit 6.3.2019 at 10.00 hours PW6 handed over all eleven elephant tusks (four whole elephant tusks marked "M" with label 1/4 to 4/4 inclusive and seven pieces of elephant tusks marked "PCS" with label 1/7 to 7/7 inclusive) to exhibit keeper at KDU Iringa one Mtamwa who preserved until on

3.8.2020 when the eleven elephant tusks (four whole elephant tusks marked "M" with label 1/4 to 4/4 inclusive and seven pieces of elephant tusks marked "PCS" with label 1/7 to 7/7 inclusive) were brought in court for trial.

On defence, Focus Aidan Honde DW1, stated that on 21.1.2019 he travelled from Mlooti District Songwe Region to Nyololo via Makambako where he slept and arrived at Nyololo on 22.1.2019 looking for tea leaves to buy. It was a story of DW1 that while at Nyololo stand awaiting one Kevin Sanga to bring tea leaves, he received a phone call from Frendi Olesafi Mbaabu who asked DW1 to look for customer for a luggage of elephant tusks which he had hidden at Nyololo sometimes back when he had a case of a gun. DW1 refused. Thereafter while at food kiosk having fries, DW1 received a phone call from Sekalinga asked the former if he had a conversation with Frendi, where Sekalinga promised to visit DW1 at a food kiosk. Thereafter resurfaced a youth who took DW1 to a guesthouse on explanation that DW1 was summoned by somebody. On arriving there, while DW1 was anticipating to meet the one he placed an order for tea leaves, surprisingly saw elephant tusks on the bed. While DW1 was at the verge of refuting that business and asking that boy to open a door for the former to exit that place, over sudden a door was

knocked and he was surprised to be ambushed, dragged, thrown on the bed and handcuffed alone, on explanation that he is the one who rented that room. That he was forced to sign paper for search conducted in respect of elephant tusk. DW1 defended that he did not rent room number six at Mseto guesthouse, on explanation that he was just taken there only to be ambushed. DW1 stated that he is not the owner of elephant tusks and denied to had pointed and removed elephant tusks from the ceiling. DW1 disowned a caution statement exhibit P3 on explanation that does not belong to him, he was asked his name, tribe and residence, the rest story was recorded by Joseph and thereafter he was forced to sign, threatened to be tortured.

In this matter Ms. Veneranda Masai learned State Attorney and Ms. Jackline Nungu learned State Attorney appeared for the republic (prosecutor) and the accused was under representation of Mr. Jally Mongo learned Advocate.

Both parties made oral closing submission, which will be considered and referred in the course of making findings as the need will arise.

The facts of this case as depicted above are simple, that PW2 who posed as a purchaser of elephant tusk, took a lead and visited room number six in Mseto guesthouse at Nyololo junction

village within Mufindi District in Iringa Region, where he saw the accused therein. It was the story of PW2 that the accused took four whole elephant tusks from ceiling as sample for negotiating price. Meanwhile, PW2 signaled his colleague PW1 (game warden) and PW4 (police officer) who were accompanied by PW3 (Village Executive Officer) and guest attendant, who entered into that room and apprehended the accused and seized a total of eleven elephant tusks including four whole elephant tusks and seven pieces of elephant tusks exhibit P2. However, a tell-tale story by prosecution witnesses fall short as was entangled with discrepancies and gaps as depicted hereunder.

For one thing, PW1, PW3 and PW4 said they knocked a door of room number six at Mseto guesthouse which was opened from the inside and they saw the accused and PW2 sat on the bed, while PW2 who was alleged to be inside, said after a door was knocked the accused stood for purpose of opening it, but PW2 restrained him, where those who were outside pushed the door, entered inside where they ambushed and pushed the accused up to the bed.

Secondly, the oral testimony of PW1, PW2, PW3, PW4 shows that exhibit P2 was seized in room number six inside Mseto guesthouse at Nyololo junction. But a seizure certificate exhibit P1

which was alleged to have been recorded at the scene, is silent as to the place and destination where elephant tusks were seized. It only mention to have been seized to one Mericko who was not summoned as a prosecution witness and his name is missing even in a list of prosecution witnesses. Even the guest attendant who was alleged to have witnessed search and seizure was not summoned to prove as to who actually, made booking/reservation of room number six, who paid, rented and occupied the same. The learned State Attorney submitted that portion of accused evidence support their case. It is true that the accused's defence bring him closer to the scene of incident. During cross examination the accused (DW1) admitted that a form (presumably certificate of seizure) was recorded at room number six and he admitted to had signed it. But to me that cannot be said to had filled gaps and lacuna into seizure certificate and loophole of the guest attendant. Above all, it cannot be said that the evidence of DW1 had cured the gaps, while he refutes ownership of elephant tusks, denied to had showed or took elephant tusks on ceiling, denied to had made booking/reservation, rented or paid room number six. According to his defence, he was taken therein under mistaken belief that he was going to see one Kevin Sanga whom had promised to bring tea leaves. Under the circumstances, it was still a duty of

the prosecution to prove their case on the standard required under the provision of section 3(2)(a) Tanzania Evidence Act, Cap 6 R.E. 2002, which was cited by the learned State Attorney. The said law provides that a fact is said to be proved in criminal when the court is satisfied by the prosecution beyond reasonable doubt that the fact exists.

Even a chain of custody did not make prosecution case settled. PW1 alleged to have handed over exhibit P2 collectively to PW4 at Mafinga Police Station, on the same date at night. It is to be noted that PW4 had escorted PW1 and participated in arrest and seizure. There was no tenable explanation as to why exhibit P2 was handed over to PW4 who is not an exhibit keeper and who shortly thereafter at 21.30 handed over to PW5 and escorted PW1 to Mgololo junction to apprehend a certain suspect at Avike guest house. This probably was a source of confusion to PW5 who in examination in chief said he was phoned a call and received exhibits from PW4, but when he was put to task during cross examination he fumbled, as in his previous statement made at police suggest that he (PW5) was phoned a call and received exhibit from an officer of KDU. Also it might have been a cause of confusion in exhibit D1 which shows a handing over to PW4 was done when the exhibit was taken straightaway from the scene,

which fact contradict with the testimony of PW1 and PW4 who stated that the handingover was done at Mafinga Police Station, after PW1 had transported an exhibit P2 from the scene to Mafinga Police Station.

The testimony of PW1 and PW4 contradict with the testimony of PW2 who said at Mafinga exhibit P2 was handed over to Joseph. Joseph who had testified as PW6 did not say to have received exhibit from PW1.

Secondly, while PW1 on cross examination said he did not know as to when exhibit P2 was removed from Mafinga Police Post to KDU Iringa, but PW2 on cross examination said exhibit P2 was removed from Mafinga on 25th after they had recorded their statement, where Joseph handed over to PW1 in the presence of PW2, and the later escorted PW1 who had received exhibit P2 up to KDU Iringa. This fact also contradicts with PW5 who alleged to had handedover exhibit P2 to PW6 on 6.3.2019 for the later to submit the exhibit to KDU Iringa.

Above all PW6 stated that on 25.1.2019 he phoned call Rachel Nhambu PW7 who is a game officer cum valuer, to conduct valuation of government trophy. PW6 stated that according to information he received from PW7, exhibit P2 was handed over to the later for that purpose. Indeed PW7 stated that she dealt with

exhibit P2 when she was conducting identification and valuation at the store room. PW5 an exhibit keeper was silent on this aspect. And this transaction does not feature anywhere in exhibit D1.

An argument by the learned State Attorney that a chain was not broken because PW7 conducted valuation inside exhibit room and did not take exhibit, is unmerited. Rules of chain of custody requires any transaction, dealing, movement of the exhibit to be explained. PW7 was not an office bearer at exhibit room, as such she could not just enter and start dealing with an exhibit unceremoniously, without abiding to rules of chain of custody. More important, PW5 who is the exhibit keeper did not explain at all for PW7 to have dealt with exhibit P2.

A purported chain of custody exhibit D1 had a lot to be desired. For one thing, handing over between PW1 and PW4 was wrongly entered, as it suggests handingover was done on 11.8.2019, while PW1 and PW4 alleged it was done on 23.1.2019. It also reflects to had been handed over from the scene to Mafinga Police Post, while PW1 said he handed over to PW4 after arriving at Mafinga Police Post. Again a form doesnot assist to know who was a handing over and receiving officer. It is just typed name of an officer and signature without clarification whether is a handing

over or receiving officer. Basically this forms create more confusion to readers, as it entails all officers who handed over and received exhibits to appear before the court to supplement it with oral evidence. Therefore, an argument that there was a typing error on a date, cannot be entertained where the whole entry is problematic.

Another thing, exhibit D1 which was received as a photocopy, reflect an entry dated 11.8.2019 (which PW4 and PW5 said it was a typing error, as according to them it ought to be dated 23.1.2019), PW1 handed over to PW4 at 21.40 hours and PW4 handed over to PW5 at 22.00 hours which were done at Mafinga Police Station; entry dated 6.3.2019 PW5 handed over to PW6 at 09.00 hours at Mafinga Police Station and PW6 handed over to Mtanawa at 10.00 hours at KDU Iringa. It was unexplained as at what time exhibit D1 was typed. It is unknown as to whether at the time of handing over which was done on different occasion and destinations, if entry in exhibit D1 were already typed and officers were asked to append signature or it was typed post handing over and officers were asked to sign thereafter. Either of the two attract a query as to whether exhibit P2 was there when they were signing.

Actually the elephant tusks exhibit P2 were mishandled from the stage of seizure, where a seizure certificate did not capture features of the seized elephant tusks only mention number of seized whole tusks and pieces; exhibit keeper did not mark the elephant tusks with exhibit register, handing over was problematic and contradictory, some transaction or dealings were not explained by the exhibit keeper, transportation was contradictory, exhibit keeper of KDU Iringa did not appear to testify, chain of custody exhibit D1 is confusing and some events were not captured.

In the circumstances, an argument by the learned State Attorney that chain of custody was well established by prosecution, is misplaced. As circumstances above show that the prosecution side failed miserably to establish a chronological events in respect of elephant tusks exhibit P2, both paper trail and oral testimony.

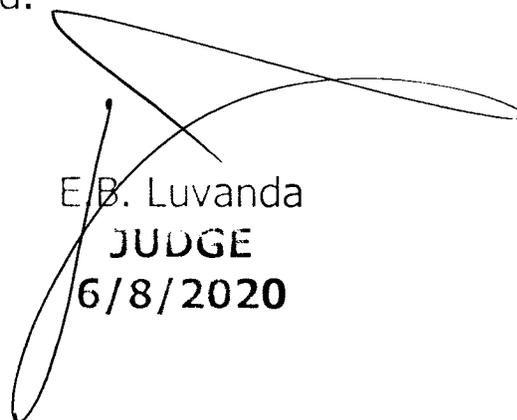
Regarding a caution statement exhibit P3. It is true that PW1, PW2, PW4 and PW6 explained reasons for delay to record a caution statement being due to prolonged investigation when they were searching for other suspects in assistance of the accused's phone. The other suspects were alleged to have been traced at Nvike guest house Mgololo junction Mafinga and thereafter to Iringa where they stayed up to 24.1.2019 at 17.00

hours and resumed back to Mafinga Police Post on the same date at 20 00 hours. This delay was justifiable. However, there were no tenable explanation as to the subsequent delay from 20.00 hours on 24.1.2019 to 08.50 hours on 25.1.2019 when PW6 commenced recording a caution statement exhibit P3. An argument by PW6 that he delayed because he was not yet assigned to execute that duty, for reason that the OCCID was out of office on other official duties, cannot be taken as a justification and excuse for delay. As much PW6 was there when the accused was brought at Mafinga Police Station at 20.00 hours, the delay amount to inaction and therefore inexcusable. As alluded by the learned defence Counsel, PW6 is experienced investigator, have been a police officer for over twenty-five years. As such, he could had rescued a situation. An inordinate delay of ten hours, cannot fall under the exemption provided for in **Yusuph Masalu@ Jiduvu & 3 others**, Criminal Appeal No. 163 of 2017 C.A.T. at Dodoma (unreported) and **Saganda Saganda Kasanzu vs Republic**, Criminal Appeal No. 53 of 2019 C.A.T. at Dodoma (unreported), cited by the learned State Attorney. In the circumstances, a caution statement exhibit P3, is taken to have been illegally obtained and therefore cannot be relied upon.

Having adumbrated as above, I nod with the argument of the defence Counsel that prosecution has failed to prove an information leveled to the accused.

I therefore enter a verdict of not guilty against the accused in respect of an offence of unlawful possession of government trophy contrary to section 86(1)(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(1)&(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.

The accused is acquitted.



E.B. Luvanda
JUDGE
6/8/2020

Coram: E.B. Luvanda, Judge

For Republic: Ms. Veneranda Masai State Attorney assisted by Ms.
Jackline Nungu State Attorney

For accused: Mr. Jally Mongo, Counsel for the Accused

Accused: Present

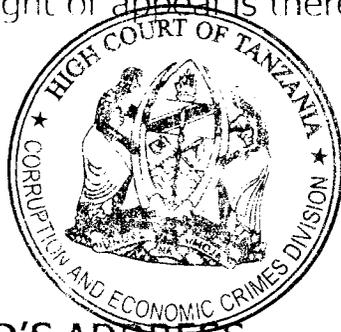
B/Clerck: Ms. Immaculata Makene

Court: Judgment delivered at open court.

Order:

Elephant tusks (four whole elephant tusks and seven pieces of elephant tusks) are forfeited.

Court: Right of appeal is there.



E.B. Luvanda
Judge
6/8/2020

ACCUSED'S ADDRESS

Physical address: Mloo street, Mbozi District, Songwe Region

Suburb chairman: Yohana

Mobile phone: 0758 971 238; accused's wife: 0756 207 112; accused's son
(Felis Focus Honda): 0744 370 055.