

THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

THE CORRUPTION AND ECONOMIC CRIMES DIVISION

AT ARUSHA-SUB REGISTRY

ECONOMIC CASE NO. 31 OF 2019

REPUBLIC

VERSUS

LENGUME LENEMAS LESEI

20th and 23rd July, 2020

JUDGMENT

BANZI, J.:

The accused person, Lengume Lenemas Lesei stands charged with two counts; unlawful possession of government trophy and unlawful dealing in government trophy contrary to sections 86 (1) (2) (b) and 80 (1) and 84 (1) respectively, 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. 2002] (the EOCCA) as amended by sections 16 (a) and 13 (b) respectively of the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016.

It is alleged in the first count that, on 28th November, 2017 at Engaruka area, within Monduli District in Arusha Region, the accused person was found in possession of government trophy, to wit, one (1) piece

of elephant tusk equivalent to one killed elephant valued at USD 15,000 equivalent to Tshs.33,660,000/=, the property of the Government of the United Republic of Tanzania without permit from the Director of Wildlife. In respect of the second count, it is also alleged that, on 28th November, 2017 at Engaruka area, within Monduli District in Arusha Region, the accused person was found selling government trophy, to wit, one (1) piece of elephant tusk equivalent to one killed elephant valued at USD 15,000 equivalent to Tshs.33,660,000/=, the property of the Government of the United Republic of Tanzania without permit from the Director of Wildlife.

To establish the case against the accused person, the prosecution side through Ms Sabina Silayo, learned Senior State Attorney and Ms Cecilia Foka, learned State Attorney called in five (5) witnesses to testify, namely, James Anthony Kugusa (PW1), Petro Mwikwabe Owigo (PW2), Novatus Hilary Haule (PW3), Joseph Kashindye Masele (PW4) and Assistant Inspector Kaitira Machunde (PW5). They also tendered five (5) exhibits, which were admitted, thus: Exhibit P1, handing over form between Novatus Hilary Haule and James Kugusa; Exhibit P2, a piece of elephant tusk, Exhibit P3, handing over form between James Kugusa and Petro Owigo; Exhibit P4, certificate of valuation of trophy and Exhibit P5, certificate of seizure. On the other hand, the accused person testified under oath as a sole witness for the defence and did not tender any exhibit.

Briefly, the prosecution's body of evidence presented a case that, on 28th November, 2017, PW3 was tipped off by his informant that about some people with elephant tusks looking for purchasers. Through the informant, they agreed to meet in order to see a sample has they had four tusks. On the basis of that information, he took his colleague, PW4 and headed to

Selela area, at Mto wa Mbu. Upon arrival at Selela area, they were told by the informant to go to Engaruka area. PW3 and PW4 decided to go to a nearby camp owned by Ngorongoro Conservation Area Authority in order to ask for a motor vehicle. They managed to get one and began their journey to Engaruka where they arrived around 2000 hours to 2100 hours. On arrival, they were told to meet at another area along the road to Loliondo because that area was surrounded by many people. Thereafter, they went up to a certain point where they left the motor vehicle and began to walk along the road to Loliondo. While on the way, they saw a signal of a light switched on and off and decided to walk towards it. After they arrived, they found three persons; two were in a motorcycle and another one beside the road. After introduction, they were asked if they had money and PW3 asked them if they have a baggage. After that, the accused person showed them a piece of elephant tusk. After seeing and confirming, PW3 unveil himself and made the arrest. Unfortunately, they managed to arrest only the accused person, while the other two escaped along with a motorcycle. The accused person was asked if he had permit, but he had none. PW3 prepared, filled in certificate of seizure, Exhibit P5 and signed it. The accused person also signed the same by handwritten signature and thumb print. PW4 signed it too.

After the seizure exercise, they took the accused person together with the seized trophy and began the journey to Mto wa Mbu police station where they stayed for two hours while waiting for their motor vehicle from Arusha. When their motor vehicle arrived, they took the accused and headed to Anti-Poaching Unit (then KDU) in Arusha. They arrived at KDU Arusha around 0200 hours. PW3 handed over the seized trophy to PW1, the custodian of exhibits in the presence of the accused person via Exhibit P1. Then he took

the accused person to Central Police Arusha. After receiving the tusk, Exhibit P2, PW1 weighed and measured it. Then he labelled and stored it in the exhibits room. In the morning, PW1 handed over Exhibit P2 to PW2 via exhibit P3 for identification and valuation. According to his profession and experience, he identified it as Elephant tusk basing on the following features, which are only found in Elephant tusks: it has Schreger lines and curved shape. Normally, the base part has a hole which is attached to the jaw but it is cemented at the end of the root. According to him, the tusk in question was cut at the end of the root where the cemented part towards the tip begins. After identifying and being satisfied that it was indeed the elephant tusk, PW2 carried out valuation by equating value of an elephant, which is USD 15,000 equivalent to Tshs.33,660,000/= at the prevailing exchange rate of Tshs. 2,244/= of that day. He then completed the valuation certificate, Exhibit P4. After that, he handed over the trophy to PW1 who stored the same.

In his defence, the accused testified under oath and stated that, he lives at Nadangare Village and he has studied up to Standard Seven. On 28/11/2017 he left home to Engaruka area for purpose of purchasing cattle in the auction that was going to take place on 29/11/2017. On the way, he met with two persons in a motorcycle whom he knew by the names of Shongoni and Lemali whereby he requested for and given a lift. He sat on a seat which had baggage on it. They proceeded with their journey and upon reaching at Engaruka, they met with two persons who stopped them and introduced themselves as game wardens. Following the introduction, Shongoni and Lemali escaped leaving behind their motorcycle. The game wardens arrested him and opened the said baggage whereby they found elephant tusk. Then one of them brought him a paper and forced him to

endorse his thumb print. Thereafter, they took him to their vehicle and began to beat him on his buttocks, elbows, knees and footprints. They went up to Mto wa Mbu police station, where he was kept in a lock for a short time and later, he was taken to KDU Arusha. While on their way, they kept on beating him as he was alleged to be found in possession of government trophy. Upon arrival, at KDU, they kept on beating him and around 0400 hours, he was taken to Central Police Arusha. In the morning, he was taken back to KDU where he met with a person by the name of Kaitira who forced him to endorse his thumb print in a written paper.

In a nutshell, that was the evidence of the prosecution and defence side. Having considered the evidence for the prosecution and defence, there are three issues for determination, **one**, *whether the accused person was actually found in possession of the elephant tusk in question*; **two**, *whether he was found selling it* and **three**, *whether chain of custody was maintained*.

It is worthwhile to underscore that, according to section 3 (2) (a) of the Evidence Act [Cap. 6 R.E. 2019], 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 as it was stated in the case of **Mohamed Said Matula v. Republic** [1995] TLR 3. Generally, and always, such duty lies upon the prosecution except where any other law expressly provides otherwise. Section 100 (3) (a) (b) of the Wildlife Conservation Act is one of such exceptions. The provisions of this section are very clear that, the accused person has the duty to prove that the possession or selling of the government trophy is lawful.

However, it is a settled principle that, when the burden proof shifts to the accused person, the standard of proof is not as higher as that of the prosecution. This was stated by the Court of Appeal of Tanzania in the case of **Said Hemed v. Republic** [1987] TLR 117, thus:

"In criminal cases the standard of proof is beyond reasonable doubt. Where the onus shifts to the accused it is on a balance of probabilities."

In the light of the principles underscored above, and considering the ingredients of offence under the charging sections, it is the duty of the prosecution to prove beyond reasonable doubt that that trophy in question is the government trophy and it is the accused person was found in possession and selling of that government trophy. Likewise, it is the duty of the accused person to prove on balance of probabilities that, the possession and selling of the said trophy was lawful; that is, with the permit of the Director of Wildlife.

Before determining the first issue, according to the testimony of PW2, there is no doubt that, Exhibit P2 is elephant tusk and thus government trophy. According to his profession and experience, he identified it as elephant tusk basing on the following features which are only found in elephant tusk; it has Schreger lines and curved shape. Normally, the base part has a hole which is attached to the jaw but it is cemented at the end of the root. According to him, the tusk in question was cut at the end of the root where the cemented part towards the tip begins. It was also the evidence of PW2 that after satisfying it was elephant tusk; he went on to evaluate it basing on the value of the elephant prescribed in the Regulations via GN No. 207 of 2012 which is USD 15,000 equivalent to

Tshs.33,660,000/= at the exchange rate of Tshs.2,244/= prevailing on that date, because one tusk is equal to one elephant killed. His testimony is supported by Exhibit P4, Trophy Valuation Certificate. It is therefore the considered view of this court that, basing on the descriptions stated by PW2 there is no doubt that Exhibit P2 is elephant tusk whose value is Tshs.33,660,000/=. In that regard, Exhibit P2 is a trophy in accordance with section 3 of the Wildlife Conservation Act. Besides, there was no evidence from the defence to prove otherwise considering the fact that, they had a duty under section 100 (3) (d) of the Wildlife Conservation Act to prove that, tusks in question are not government trophy.

Returning to the first and second issues, the prosecution evidence shows that, the accused person and his colleagues were looking for purchasers of elephant tusk. Through the informer, PW3 and PW4 went up to Selela area where they agreed to meet. But upon reaching there, they were told to go to Engaruka area. On arrival, it was the accused and his colleagues through the informer who asked the intended purchasers to leave that area because was surrounded by many people. PW3 and PW4 complied with their demands. Upon reaching at the crime scene, they found a motorcycle with two persons and the third person was beside the road. Upon being asked, the accused introduced himself by one name, Lengume. The one beside the road asked if they have money and PW3 also asked them if they have tusk. Following such conversation, it was the accused person who showed them the tusk in question. After confirming it was elephant tusk, PW3 unveil their identities and made the arrest. In the course of arrest, PW4 managed to catch the accused person while the second person in a motorcycle escaped with his motorcycle and the one beside the road also escaped. PW3 managed to chase him in vain but later the accused person

mentioned him by the name as Shongoni. After PW3 seized the trophy in question, the accused person signed in the certificate of seizure by his handwritten signature and thumb print.

From the evidence above, it is clear that the accused person was arrested by PW3 and PW4 at the crime scene in the course of selling the tusk in question. They both identified the accused person at the dock as the one they arrested with the tusk in question on 28th November, 2017 by pointing at him. Apart from that, PW1 also identified the accused person as the ones he saw on 29th November, 2017 at KDU office at Njiro Arusha when he received Exhibit P2 from PW3 in his presence. In the main, the accused person did not dispute about being arrested with the tusk in question along Loliondo road. However, it was his defence that, he was just given a favour of lift to Engaruka by Shongoni and Lemali whereby, he sat on the baggage containing the said tusk. It can be recalled that, according to PW3's testimony, the accused person mentioned the name of Shongoni as among the escapees. The accused person also admitted to sign a document after the seizure but claimed to append his thumb print after being forced. Nevertheless, questions pertaining to how the accused signed in Exhibit P5 were not asked on cross examination to the author, PW3. In other words, the defence did not cross examine PW3 in this aspect. This connotes that, they were comfortable with the contents of testimony of PW3 in respect of signing the certificate of seizure.

It is a settled principle that, failure to cross-examine a witness on a vital point, ordinarily implies the acceptance of veracity of the testimony and anything raised thereafter to the contrary is taken as an afterthought. There are mammoth of authorities on this point such as **Cyprian A. Kibogoyo v.**

Republic, Criminal Appeal No. 88 of 1992 CAT (unreported), **Damian Ruhele v. Republic**, Criminal Appeal No. 501 of 2007 CAT (unreported), **Nyerere Nyague v. Republic**, Criminal Appeal No. 67 of 2010 CAT (unreported), **Issa Hassan Uki v. Republic**, Criminal Appeal No. 129 of 2017 [2018] TZCA 361 at www.tanzlii.org and **Haruna Mtasiwa v. Republic**, Criminal Appeal No. 206 of 2018 [2020] TZCA 230 at www.tanzlii.org. In **Damian Ruhele** (supra) it was held that;

"It is trite law that failure to cross-examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness evidence."

In **Cyprian Kibogoyo** (supra), **Nyerere Nyague** (supra), **Issa Hassan Uki** (supra) and **Haruna Mtasiwa** (supra) it was held that;

"As a matter of principle, a party who fails to cross-examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said."

Since PW3 stated that the accused person signed the certificate of seizure and he was not cross-examined on that aspect, it is the considered view of the court that, accused person signed Exhibit P5 to acknowledge that, Exhibit P2 was actually found in his possession. The fact that he endorsed his thumb print only after being forced is an afterthought. In the case of **Song Lei v. The Director of Public Prosecutions and Others**, Consolidated Criminal Appeals No. 16 A of 2016 & 16 of 2017 [2019] TZCA 265 at www.tanzlii.org the Court of Appeal stated that:

"...having signed the certificate of seizure which is in our considered view valid, he acknowledged that the horns were actually found in his motor vehicle."

Basing on the position of the law above, it is clear that the certificate of seizure, Exhibit P5 is valid, and it proves that the seizure was conducted by PW3 on 28th November, 2017 at Engaruka area where the accused person was arrested with Exhibit P2 in the course of selling it to PW3 and PW4. His defence that, he was just given a list by Shongoni and Lemali who escaped and left their motorcycle behind is not plausible. If what he said was true, PW3 and PW4 could not have left the said motorcycle without seizing the same. Thus, it is the considered view of this court that, accused person was found in possession of elephant tusk, Exhibit P2. In addition, he was found in the course of selling it. Hence, the first and second issues are answered in affirmative.

Now reverting to the third issue whether chain of custody was maintained, it is settled that, in cases involving movement of exhibits from one point to another, the evidence concerning chain of custody is of utmost importance. As a matter of principle, it is well settled that as far as the issue of chain of custody is concerned, it is crucial to follow carefully the handling of what was seized from the accused, is the same which was finally tendered in court. There is a mammoth of authorities giving guidance on chain of custody including the landmark case of **Paulo Maduka and Four Others v. Republic**, Criminal Appeal No. 110 of 2007, CAT (unreported). This case insisted on the proper documentation of the paper trail from the time of seizure up to the stage the exhibit is tendered in court as evidence.

However, in the case of **Chacha Jeremiah Murimi and Three Others v. Republic**, Criminal Appeal No.551 of 2015 [2019] TZCA 52 at www.tanzlii.org it was held and I quote;

*"In establishing chain of custody, we are convinced that the most accurate method is on documentation as stated in Paulo Maduka and Others vs. R., Criminal Appeal No. 110 of 2007 and followed by Makoye Samwel @ Kashinje and Kashindye Bundala, Criminal Appeal No. 32 of 2014 cases (both unreported). However, documentation will not be the only requirement in dealing with exhibits. An exhibit will not fail the test merely because there was no documentation. Other factors have to be looked at depending on the prevailing circumstances in every particular case. For instance, **in cases relating to items which cannot change hands easily and therefore not easy to tamper with, the principle laid down in Paulo Maduka (supra) would be relaxed.**" (Emphasis supplied).*

Yet, in another case of **Issa Hassan Uki v. Republic** (*supra*), the Court of Appeal after discussing the chain of custody in items that could change hands easily and those which could not went on and held that;

*"In the instant case, the items under scrutiny are elephant tusks. **We are of the considered view that elephant tusks cannot change hands easily and therefore not easy to temper with.** In cases relating to chain of custody, it is important to distinguish items which change hands easily in which the principle in Paulo Maduka and followed in Makoye Samwel @ Kashinje and Kashindye Bundala would apply. In*

cases relating to items which cannot change hands easily and therefore not easy to temper with, the principle laid down in the above case can be relaxed.”(Emphasis supplied).

It is apparent from the extract above that, for exhibits which cannot change hands easily like elephant tusks, oral testimony on handling the exhibit suffices to establish the chain of custody. In the matter at hand, the item in question is elephant tusk, which according to the case of **Issa Hassan Uki** cannot change hands easily and therefore not easy to temper with. In that view, even oral testimony on handling the exhibit would suffice to establish the chain of custody. But this is not the case in the matter at hand as there is chronological documentation showing the seizure, transfer and custody of Exhibit P2 until it was finally brought before this court.

It is on record that, after seizure by PW3 on 28th November, 2017 through Exhibit P5, the tusk in question was in the custody of PW3 until on 29th November, 2017 when he handed over to PW1 through Exhibit P1 in the presence of accused person who signed it. PW1 labelled it by writing name of accused, date of handing over, weight, length and place of seizure and then stored the same until in the morning of the same date, when he handed over to PW2 via exhibit P3 for identification and valuation. It was on the same date when PW2 after completing the valuation process, handed back the tusks to PW1 via exhibit P3 whereby, PW1 stored it until he brought and tendered before this court.

It is the considered view of this Court that, in the case at hand the chain of custody has been established through prosecution evidence from the time the elephant tusk was seized from the accused person until it was brought before this court. This has been established through Exhibits P5, P3

and P1 together with the testimonies of PW3, PW2 and PW1. In that regard, there is no any missing link or possibility of tampering with Exhibit P2 as evidence is very clear how it changed hands from one person to another and how it remained in the custody of PW1 who tendered the same to the court. Thus, the third issue is also affirmatively answered.

Therefore, since all issues were answered in the affirmative, and considering the fact that the accused person did not adduce any evidence to prove the possession and sell of the government trophy was lawful as required under section 100 (3) (a) (b) of the Wildlife Conservation Act, apparently, the prosecutions have managed to prove the case against the accused persons beyond reasonable doubt.

In the upshot, I find the accused person, Lengume Lenemas Lesei, guilty and I hereby convict him with both counts for offence of unlawful possession of government trophy and unlawful dealing in government trophy; contrary to sections 86 (1) (2) (b) and 80 (1) and 84 (1) respectively, of the Wildlife Conservation Act, No. 5 of 2009 read together with Paragraph 14 of the 1st Schedule to and sections 57 (1) and 60 (2) of the Economic and Organised Crime Control Act [Cap. 200 R. E. 2019].



I. K. Banzi
JUDGE
23/07/2020

Date: 23/07/2020

Coram: I. K. Banzi, J.

For the Republic: Ms. Sabina Silayo, Senior State Attorney

For the Accused: Mr. Arnold Ojare, Advocate

Accused person: Present

C/C: L. Ivor

Mr. Silayo, SSA:

The case is for judgment and we are ready to receive it.

Mr. Ojare, Advocate:

We are also ready to receive.

Court:

Judgment delivered in the presence of accused person, his Advocate and Senior State Attorney for the Republic.

Sgd: I. K. Banzi

JUDGE

23/07/2020

Antecedents:

Ms. Foka, State Attorney:

We have no previous records for all accused persons. However, it is our prayer that, the accused persons be sentenced according to the law.

Mitigation:

Mr. Ojare, Advocate:

1. The accused is the first offender.
2. He has two wives and four children who depend on him.
3. He has very old father depending on him. His father is 90 years old.

Therefore, we pray for lenient sentence, as he had already stayed in custody for almost four years.

SENTENCE

I have considered the submission by counsel for accused person. As state by the counsel for Republic, the accused person is a first offender and in normal circumstance would have deserved lenient sentence. However, being the economic offences, section 60 (2) of the Economic and Organised Crime Control Act [Cap. 200 R. E. 2019], imposes a minimum sentence of twenty years and maximum of 30 years imprisonment unless the law creating offence imposes greater penal measure than the one at hand.

In that regard, and considering the fact that he has wives, children and father depending on him, I hereby sentence accused person, Lengume Lenemas Lesei to serve twenty (20) years imprisonment for each count. The sentences shall run concurrently.



I. K. Banzi
JUDGE
23/07/2020

ORDER

Exhibit P2, a piece of elephant tusk is forfeited to the Government of the United Republic of Tanzania through the Director of Wildlife.

I. K. Banzi
JUDGE
23/07/2020

Court:

Right of appeal against conviction, sentence and order of forfeiture is fully explained.



I. K. Banzi
JUDGE
23/07/2020