

TANZANIA / JUDGMENT

Siima Gabriel and Two Others v Republic

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE SUB-REGISTRY OF MANYARA AT BABATI CRIMINAL APPEAL NO. 19240 OF 2024 (Originating from Economic Case No. 04 of 2021 of the Court of Resident Magistrate of Manyara)

1. SUMA GABRIEL.....
2. YUSTI HHARI..... I APPELLANTS
3. PIRI AMSI a//as HAMISI..... VERSUS THE
REPUBLIC..... RESPONDENT

JUDGMENT

25 September and 7th November, 2024 MIRINDO, J.: Siima Gabriel, Yusti Hhari and Piri Amsi alias Hamisi were convicted by the Court of Resident Magistrate of Manyara of unlawful possession of Government trophy. They were charged with unlawful possession of Zebra meat and two hind limbs of Zebra valued at 1,200 United States Dollars equivalent to 2,796,000/= TZS. The offence was charged under section subsections (1) and (2) (b) of section 86 of the Wildlife Conservation Act, 5 of 2009 as amended and read together with Paragraph 14 of the First Schedule to the Economic and Organised Crime Control Act [Cap. 200 R.E. 2019] and sections 57 (1) and 60 (2) of the latter Act. 1 In the beginning they were convicted on a plea of guilty arising from a preliminary hearing but that conviction was subsequently quashed on appeal to the High Court in Consolidated Criminal Appeals No. 3 of 2022 and No. 7 of 2023. Instead, a retrial was ordered. They have now appealed against the conviction and sentence- imposed on retrial- to the High Court after obtaining leave of the High Court to appeal out of time. Before this Court the appellants, Siima Gabriel, Yusti Hhari and Piri Amsi alias Hamisi have raised seven grounds of appeal. The major complaints in the grounds of appeal are procedural irregularities in connection with the certificate of seizure, want of prosecutorial consent and disposal of exhibits. There are other two complaints: the case against them was framed and their conviction arise from the weaknesses in their defence and not the strength of the prosecution case. At the hearing of the appeal the appellants appeared in person while the respondent Republic was represented by Mr. Raphael Rwezahula, learned State Attorney. The appellants had nothing to elaborate on their grounds of appeal and left it to the Court to rule on them. The issue of want of prosecutorial consent from the Director of Public Prosecution has been raised in the fifth ground of appeal. As

this is a jurisdictional issue, it will first be dealt with. There is no doubt that the prosecutorial consent was issued under section 26 (1) of the Economic and Organised Control Act [Cap. 200 R.E. 2022] by Manyara Regional Prosecutions Officer, One Shaban Salehe Mwengole. It was the argument of Mr. Rwezahula that there was prosecutorial consent filed along with the certificate conferring jurisdiction to the Court of Resident of Manyara. He contended 2 that there was nothing wrong with the consent issued under section 26 (1) in view of the decision of the Court of Appeal in Nassib Abubakar Mwazyega v R Criminal Appeal 146 of 2021 [2024] TZCA 576. The learned State Attorney pointed out that in this case it was held that for cases requiring consent what matters is the presentation of the consent before commencement of trial. Once the DPP has done so, his role ends. If there was no objection, it is taken that the accused accepted that the consent was given. In view of the decision of the Court of Appeal in Nassib Abubakar Mwazyega v R Criminal Appeal 146 of 2021 [2024] TZCA 576 I hold that the prosecutorial consent was validly issued. Having held that there was due prosecutorial consent, I move to consider the substantive grounds of appeal. This is a first appeal and it is the duty of this court to review at large the evidence adduced before the trial court. The prosecution case relied on the testimonies of six witnesses and six exhibits. The direct evidence of unlawful possession of the government trophy came from two prosecution eye-witnesses who were wildlife officers, namely, Reuben Mazengo and Joseph Japhet Pwiti. They testified that on 22 December 2021 they were in patrol with other two wildlife officers and they were informed about persons in possession of Government trophy at Basoda Kitongoji in Ayamango Village within Babati District. Acting on that tip they went to the suspected location and noticed that it was a forest area. After discovering that there were four people in the forest, they surrounded them and put them under arrest. Reuben Mazengo, the second prosecution witness added that: ...we did search the area and found two buckets that were hanged on the tree one being of 20 litres capacity and the other 10 litres capacity, three bush knives with 3 black handle 20 litre buckets [sic] was white and the 10 litre was blue, so after taking them down we found raw meat in the 20 litre bucket and in the white we found limbs of zebra. The third prosecution witness, Joseph Japhet Pwiti said that in the forest they saw people seating under a tree and beside those people there were bush knives and two buckets were hanging on the tree. They asked the appellants about three blood-stained knives found on the ground. They brought down the buckets. Inside the buckets was Zebra meat with skin remains. The second prosecution witness summoned the Kitongoji Chairman to be an independent witness to the seizure of the items found with the appellants. The Kitongoji Chairman, Saitoto Omboy, testified as the fourth prosecution witness and confirmed seeing the appellants at the scene with the two buckets containing raw meat and signing as a witness in the certificate of seizure. It was the appellants' defence that they were arrested by wildlife officers on their way to the farm of the second appellant, Yusti Hhari and brought to a location where the Zebra meat was found. The appellants differently stated that the wildlife officers beat "Banka" and ordered him to climb the tree and bring down two plastic buckets. "Banka" appears in exhibit P.3, the Certificate of Seizure, as Banka Marmu being among the three persons arrested on 22 December 2021. The prosecution and defence accounts give rise to the following question: Where did the wildlife officers first met the appellants? The prosecution account is that they were found seating down a tree on which two plastic buckets were hanging and three bush knives were beside them. The defence account

is that they were brought to the 4 location where the buckets were hanging. The appellants' defence is in essence the alibi defence which was in fact raised by the first appellant during the preliminary hearing. To untangle this question, it is important to revisit the location in which the appellants are said to have been arrested. According to Reuben Majengo the location is outside "a game reserve": ...since it was outside the game reserve I did call a village leader of that area to come and he came. For Joseph Japhet Pwaiti, the area is either near a village or is inside Basoda Forest in the National Park: .So our leader called the Hamlet Chairman one Saitoto Lomboy and he came as the crime scene was near the village... A little while Joseph Japhet Pwiti said (in the handwritten version of the proceeding): .So Reuben Majengo did inquire from the culprit as where they hunted or found the trophy and they said that they hunted in the Tarangire National Park at Basoda Forest which is in the national park so we then arrested all four culprits..[sic] Despite some slight differences both witnesses are consistent that the location is either outside a game reserve or near a village. There is a possibility that it is an area used by the villagers for farming and the appellants were going to the farm. In the sixth ground of appeal, the appellants complain that the disposal of the exhibits was in violation of the Police General Orders. They complain that there was no evidence that the appellants were present during the disposal of the exhibits and appellants' signature in the inventory form was not proof of their presence and being heard by the magistrate before ordering disposal of the exhibit. 5 The significance of this complaint is borne by the fact the Zebra meat was not physically tendered at the trial because it is a perishable item that was destroyed on 24 December 2021 before the commencement of the trial on 29 December 2021. Paragraph 25 of the Police General Orders directs disposal of perishable exhibits upon bringing them before a magistrate along with a suspect. The role of the magistrate is to note the exhibit and order its immediate disposal. If it is practicable the exhibit should be photographed before its disposal. In Mohamed Juma alias Mpakama v R (Criminal Appeal No. 385 of 2017) [2019] TZCA 51, the Court of Appeal held that paragraph 25 creates the accused right to be heard by the Magistrate before the disposal order is made. The accused Mohamed Juma was convicted by Nanyumbu District Court on three counts one being of unlawful possession of government trophies, namely, one warthog, seven rock hyrax, two mongoose and one African hare. His conviction was affirmed on appeal to the High Court and he further appealed to the Court of Appeal. One of the issues that the Court of Appeal was called upon to decide was if the unlawful possession was actually proved at the trial. The inventory form was challenged. The Court of Appeal noted that the items were destroyed two months before the commencement of the trial. The Court of Appeal held that the inventory form could not be relied on because there was no evidence that the accused was taken before the Primary Court Magistrate and being accorded opportunity to be heard prior to the disposal of the exhibits. Besides, photographs of the exhibits were not taken in violation of the provisions of the PGO. In reaching this conclusion, the Court of Appeal applied 6 the principle stated in Emmanuel Saguda alias Sululuka and Another v R, Criminal Appeal 422B of 2023. In the instant case there is no evidence that the appellants were accorded opportunity to be heard before the disposal order was made. The Inventory Form, admitted as exhibit P. 6 contains appellants thumb-prints. Yet there are no remarks in the Inventory Form about their participation. Worse still, the Magistrate who ordered the disposal was not called to testify. Besides, the sixth prosecution witness, WP 7276 D/CPL

Mwanahamisi stated that she brought the appellants and the exhibits to a “District Court”. The Inventory Form however indicates that it was signed at “Babati Primary Court.” The first, second and third grounds of appeal are directed to validity of the certificate of seizure which was tendered by Reuben Mazengo and was admitted at the trial as exhibit P. 3. I find the identification of the exhibit somewhat incomprehensive. He identified persons who witnessed the seizure and signed the certificate of seizure to be the wildlife officers including himself, the village chairman and the four culprits. His reference to the village chairman is incorrect because the one who signed and eventually testified was Basoda Kitongoji Chairman as the fourth prosecution witness. But that is not my concern. In his testimony Reuben Mazengo mentioned the following persons as wildlife officers who were present when the four culprits were arrested: Hassan Hamisi, Joseph Puiti[?], Victor Paul and Loomu Motii and Reuben Mazengo himself. The third prosecution witness, Joseph Japhet Pwaiti also mentions the same persons. So, persons who signed the certificate of seizure were five wildlife officers, Kitongoji Chairman and the four culprits. Apart from these persons, other two 7 signatories appear in the certificate of seizure which the arresting officer, Reuben Mazengo did not mention. These are Omari Mohamed and Adam Shaban. I am unable to understand why Reuben Mazengo could remember these persons and explain their status. This being the case, it is my conviction that the prosecution’s case had no legs to stand on and I allow the appeal. I quash the conviction and set aside the sentence imposed on the appellants. It is ordered that the appellants be immediately set free unless they are otherwise lawfully withheld. As the appellants disowned the buckets and bush knives, I make no order in respect of the forfeiture order made by the trial court. DATED at BABATI this 1st day of November 2024 F.M. MIRINDO JUDGE COURT: Judgment delivered this 7th day of November 2024 in the presence of the appellants in person and Ms Mwanaidi Chuma, State Attorney. B/C: Anna Mathayo (RMA) present. Right of appeal explained. F.M. MIRINDO JUDGE 8

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