

IN THE SUBORDINAT COURT OF THE FIRST CLASS  
FOR THE LUSAKA DISTRICT

**HOLDEN AT LUSAKA**

*(Criminal jurisdiction)*

**The People v. NELSON TEMBO & DAVID BWALYA**

BEFORE: HON FELIX KAOMA  
FOR THE PEOPLE: M. CHISENGA – PUBLIC PROSECUTOR  
FOR THE ACCUSED: BOTH IN PERSON

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**J U D G M E N T**  
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**Cases referred to**

1. KAPINDA v THE PEOPLE (1977) Z.R. 32 (H.C.)
2. MONGA v THE PEOPLE (1973) Z.R. 188 (H.C.)

**CHARGE**

In count one both accused are jointly charged with the offense of unlawful possession of Government trophy contrary to section 97 (1)(2) and 129(1) Of the Zambia Wildlife Act No. 14 of 2015 of the laws of Zambia. The particulars of the offense allege that both accused on 31<sup>st</sup> August 2016 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia had in possession Government Trophy namely; 1 full carcass of wildebeest weighing 88.7kgs without a certificate of ownership issued by the Director General in respect thereof.

In count two both are jointly charged with the offense of unlawful possession of a ammunition; contrary to section 10(2)(a)(b) of the Firearms Act chapter 110 of the laws of Zambia. The particulars of this offence allege that the accused on the 31<sup>st</sup> August, 2016 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, unlawfully

had in possession 22 ammunitions of shotgun without a firearm license issued by the Minister of Home Affairs in respect thereof.

In count three both accused stand jointly charged with the offense of unlawful possession of a firearm; contrary to section 10(2)(a)(b) of the Firearms Act chapter 110 of the laws of Zambia. The particulars of this offence allege that the accused on the 31<sup>st</sup> August, 2016 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, unlawfully had in possession of a firearm namely shotgun without a firearm license issued by the Minister of Home Affairs in respect thereof. Both accused pleaded not guilty to all the three counts.

### **WARNING**

The burden of proof in criminal proceedings such as the present one lies squarely with the Prosecution. Notwithstanding the defenses available to an accused person, the primary responsibility to prove the allegations against such a person remains with the Prosecution.

The Prosecution in this case is required to prove each ingredient that constitutes the offence of these offences **beyond all reasonable doubt**. I must reiterate that proof **beyond reasonable doubt** is not synonymous with proof beyond any **shadow of doubt**. In the event of reasonable doubt, such doubt must be decided in favour of the accused and a verdict of acquittal returned. I therefore warn myself accordingly.

At this point I propose to analyze the law creating this offence before considering the evidence adduced herein. I must also mention here that since counts two and three are created by the same section they will be analysed concurrently

### **Analysis of the law**

#### **COUNT ONE**

Count one is created by section 97(1) and 129(1) of the Zambia Wildlife Act No. 14 of 2015 of the Laws of Zambia.

Section 97 is enacted as follows

“(1) A person who unlawfully possesses or who purports to buy, sell or otherwise transfer or deal in a Government trophy commits an offence.”

“(2) For the purposes of this section, possession of a trophy by a person without the relevant licence or certificate of ownership in respect of the trophy shall be prima facie evidence of the trophy being a Government trophy and of the unlawful possession of it by the person.”

Section 129(1) is the penal provision and it is couched as follows;

(1) Subject to section one hundred and thirty, a person who is in possession of, sells, buys, imports or exports or attempts to sell, buy, import or export a trophy or meat of a wild animal in contravention of this Act is liable, upon conviction, to a fine of not less than three hundred thousand penalty units but not exceeding six hundred thousand penalty units, or to imprisonment for a term not exceeding seven years, or to both.

I must state here that the principle Act does not define the word “possession” for the purposes of this offense instead it adopts the definition provided in section 4 of the Penal code. The Penal Code ascribes the same meaning to the following phrases; “possession”, “be in possession of” or “have in possession”. They are defined to mean;

- (a) includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to, or occupied by oneself or not) for the use or benefit of oneself or of any other person;
- (b) if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them;

In order to prove the guilty of the accused therefore the prosecution must establish each of the following ingredients beyond all reasonable doubt;

1. That there was a government trophy
2. Identity of the person or persons in whose possession it was found.

3. The possession was unlawful

COUNTS TWO AND THREE

The offence of unlawful possession of ammunition or firearm is created by section 10(2)(a)(b) of the firearms Act chapter 110 of the laws of Zambia which is couched in the following language;

*(1) Subject to the provisions of this Act, no person shall purchase, acquire or have in his possession any firearm or ammunition unless he holds a firearm license in respect thereof.*

***(2) If any person-***

*(a) purchases, acquires or has in his possession any firearm or ammunition without holding a firearm license in respect thereof or otherwise than as authorised by such licence, or, in the case of ammunition, in quantities in excess of those so authorised; or*

*(b) fails to comply with any condition subject to which a firearm license is held by him; he shall, subject to the provisions of this Act, be guilty of an offence and liable on conviction to a fine not exceeding one hundred and twelve thousand five hundred penalty units or to imprisonment for a term not exceeding fifteen years, or to both.*

For this purpose, the expression ammunition is defined by section 2 of the supra Act to mean any of the following;

(a) ammunition for any firearm, including explosives, cartridges, balls, caps, and any other material for loading into or discharging from a firearm;

(b) any material or thing containing or producing, or adapted to contain or produce, any noxious gas, liquid or other thing for the purpose of being discharged from a firearm;

(c) grenades, bombs and other similar missiles, whether or not capable of use with a firearm; but does not include ammunition for air guns or blank cartridges;

In the light of the foregoing therefore it means that if the prosecutions are to succeed in their case they must prove each of the following ingredients of this offense beyond all reasonable doubt that is to say they must prove that;

- There were ammunitions and a firearm
- The identity of the person who had possession of them
- The accused had no lawful authority to possess it

Having analyzed the law in this matter it has become absolutely necessary to analyze the evidence adduced in this matter.

In their endeavor to establish the guilty of the accused in this case the prosecutions called to court 4 witnesses. At the close of their case I put both accused on their defense in all the three counts. After the charge and the rights of the accused were explained to them in Nyanja both opted to give sworn statements and to call one witness but later dispensed away with him of which they are perfectly entitled to do at law.

The evidence of both parties is as per case record suffice to say that I have closely considered the evidence in totality from which it seems clear to me that some facts are in dispute while other facts are not

#### **FACTS NOT IN DISPUTE**

It seems from the evidence that both accused do not dispute that on 31<sup>st</sup> day of August, 2016, Stephen Zulu PW1, and other officer went to Chazanga compound at a house where they found both accused inside the house. A2 was found eating fresh roasted meat while in the sitting room on a plate. There was also a full carcass of wilderbeast meat which was cut in big pieces which was displayed on a sack in the sitting room. After a further search, a firearm and 22 ammunitions were found in the bedroom. The two accused were picked and the meat was seized and later disposed off by the court. The two accused were subsequently charged with the offenses they are now charged with which they denied. I therefore find these to be facts in this case.

## **DISPUTED FACTS**

What seems to be in dispute to me is whether the carcass, ammunitions and firearm were in possession of the accused or not. These are the facts in issue I have to resolve in this matter and propose to resolve them concurrently with the application of the law in the proceeding paragraphs.

## **APPLICATION OF THE LAW**

### **a) Government Trophy**

The first question to be decided in this case is whether there was a government trophy within the meaning of the law.

For the purposes of this offense the word "trophy" has been defined by section 2 of the Principle Act to mean;

"a horn, tooth, tusk, bone, claw, hoof, skin, hair, egg, feather or other durable part of a game animal or protected animal, whether added to or changed by the work of a human being or not, that is in such form as to be recognisable as a durable part of a game animal or protected animal, and includes meat;"

In the same vein the phrase government trophy has meaning assigned to it by section 95 of the Principle Act as follows;

"A trophy to which absolute ownership has not passed to any person under section three, or under any other provision of this Act, shall be a Government trophy for the purposes of this Act."

It follows therefore that any of the parts mention in section in relation to the meaning of trophy where ownership has not passed as by law established is a government trophy within the meaning of the law.

Turning to the evidence in this case it is a fact that a carcass of a wildebeest was found in the house which was properly identified as such and a certificate of identification issued in respect thereof which animal has been described by IS No. 10 of 2015 to a game animal. In

absence of any evidence of transfer of ownership to any person I am inclined to find that there was a government trophy within the meaning of the law.

b) Identity of the offender

The crucial question to be decided at this point is whether the government trophy herein was in possession of the accused or not

Before answering this question I have found it inevitable to refer to the decision of the High Court in KAPINDA v THE PEOPLE (1977) Z.R. 32 (H.C.) which I find to be more helpful. The brief facts of that case were that the appellant was apprehended by game guards and questioned about elephant tusks he led the game guards to a river where he said he had dropped the two tusks. The tusks were retrieved by the game guards from that place. The appellant appealed on among other grounds that as he was not found in physical possession of the tusks, he could not legally be said to be in possession of them within the meaning of the Act.

The High Court held *inter alia* that the actual physical possession of the trophy was not necessary to constitute the offence. It was sufficient if the trophies were under the control of the appellant.

It follows therefore the accused does not necessarily have to have physical possession of the trophy in question to constitute 'possession' at law but it suffices to prove that he knew where the trophy was and had control of the same.

Reverting to the evidence in this matter both accused found right in the house where the meat was. A2 was in fact found roasting part of the meat after which he went to eat in the sitting room where the whole carcass was. Both accused have denied being in possession of the meat instead gave different stories of how they were found in the house in question which they said belonged to A1's brother. A1 averred that he just came to the house in question the day before at around 18:00hrs to go and get his bag from his elder brother who went out that evening and only came back at about 04:00hrs with 3 others with meat. He added that at the time the ZAWA officers came his brother had gone to buy talk time with his friends. A2 on the other hand deposed that he was going to Kabanana when he met Trywell by the road side. He took him to his place. When he reached his place he found

meat in the house. When he went in the house he found A1. After a few minutes Trywell went to buy talk time. Just after about 5 minutes ZAWA officers came and found this accused roasting meat outside. When he entered with meat the officers found him in the sitting room and asked about the owner. He told them his name. Afterwards they got them. It is clear from this assertion of both accused that they have failed to appreciate the difference between ownership and possession suffice to say that it is difficult to separate both accused from possession of the meat because they were found right in the same sitting room where the meat was thus constructively they were in possession of the government trophy jointly and whilst acting together and I find the same to be a fact and of law.

Further in the absence of any certificate of ownership or justification the possession was therefore unlawful

In the circumstances I am satisfied that the prosecutions have proved count one against both accused for the offense as charged and as such I find both guilty and I accordingly convict them

### **COUNT TWO AND THREE**

a) Ammunitions and a firearm within the meaning of the law.

The first question to be resolved is whether or not there were ammunitions within the meaning of the law.

I wish to state here that going by the definition of ammunition as provided by section 2 of the Firearms Act, in its literal and grammatical meaning it includes ammunition for any firearm with an exception to ammunitions for an air gun. It also extends to explosives, cartridges, balls, caps, and any other material for loading into or discharging from a firearm;

Turning to the evidence in this case it is not in dispute that there were 22 shotgun ammunitions thus I need not stretch my mind in order to satisfy myself that there were ammunitions within the meaning of the law. Further, it is not in dispute that there was a shotgun which without doubt is a firearm within the meaning of the law. I am therefore satisfied beyond all reasonable doubt that there was a firearm



b) Identity of the person or persons who had Possession of the ammunition and the firearm

The question that rises at this point is the identity of the person who had possession of the ammunitions and the firearm in question.

The expression 'in his possession' for the purposes of section 10(1) of the Firearms Act was properly defined by the High Court in the case of MONGA v THE PEOPLE (1973) Z.R. 188 (H.C.) as follows;

The expression "in his possession" as used in section 10 (1) of the Firearms Act, Cap. 111, means in his physical control; the section is aimed at de facto possession in the sense of custody, control or power.

It follows therefore that the accused need not be in physical actual possession of the ammunitions or firearm. But it is sufficient to prove knowledge, physical control or power over the thing even if the accused does not have the ammunitions or firearm in his actual possession.

Reverting to the evidence in this case it is not in dispute the ammunitions and the firearm were found in the bedroom while both accused were found in the sitting room. The question to be decided is whether both accused had knowledge of the firearm and the ammunition and had control or power over them. I must state here that no evidence has been given for the prosecution as to who the owner of the house was. Owner of the house in this context is loosely used to include a Tenant. Notwithstanding, it seems not in dispute to me that the owner of the house in this case was Trywell Lungu, the elder brother to A1. It is therefore difficult to state with reasonable certainty that both accused had knowledge and control of the ammunitions and the firearm in question. In the circumstances a reasonable doubt does exist in my mind as to the guilty of both accused in counts two and three and I resolve the doubt in favor of both accused and I accordingly acquit them.

DELIVERED IN OPEN COURT

DATED THE ..... DAY OF ..... 2017



F. KAOMA

