

IN THE SUBORDINATE COURT OF THE FIRST CLASS 2SPG/125/2016

FOR THE LUSAKA DISTRICT

HOLDEN AT LUSAKA

(Criminal Jurisdiction)

THE PEOPLE

VS.

EDWARD CHANDA AND 2 OTHERS

FOR THE PEOPLE: MR. KAPASO M

FOR THE ACCUSED: MS B. MUSOWE OF MESSRS LEGAL AID BOARD

JUDGMENT

CASE LAW REFERRED TO:

1. Madubula V. The People (1993/94) ZR.
2. Machipisha Kombe V. The People (2009) ZR.
3. George Musupi V. The People (1978) ZR

LEGISLATION REFERRED TO:

1. Sections 87 (4) and 130 (2) of the Zambia Wildlife Act No. 14 of 2015 of the Laws of Zambia.
2. Section 4 of the Penal Code Cap 87 V. 7 of the Laws of Zambia.

In this case, 3 accused persons initially stood jointly charged with one count of unlawful possession of Prescribed trophy contrary to section 87 (4) and section 130 (2) of the Zambia Wildlife Act No. 14 of 2015 of the Laws of Zambia. The particulars of offence allege that Edward Chanda, John Mushipi and Morgan Banda on 14th October, 2016 at Lusaka in the Lusaka district of the Lusaka Province of the Republic of Zambia jointly and whilst acting together with other persons unknown had in possession of prescribed trophy namely 5 pieces elephant ivory weighing 25Kgs without a certificate of ownership as required by law.

When the matter came up for plea, A3 absconded. A bench warrant was issued to compel him attend. He could not be located. Subsequently the prosecution applied that he be discharged under section 88 (a) of the CPC Cap 88 of the laws of Zambia which I granted. The matter proceeded on the 2 accused. Both A1 and 2 denied the charge.

I warn myself at the outset, that the burden lies with the prosecution to prove the guilt of the accused beyond all reasonable doubt. The accused has no onus to prove his innocence. Any doubt cast upon considering all of the evidence may be treated for his benefit.

In terms of evidence, the prosecution led evidence from a total of 4 witnesses. The evidence in brief is this: PW1 was Steven Zulu a wildlife investigations officer under the department of national parks and wildlife in Chilanga. He testified on oath that on 14/10/2016 he received information that there were people suspected of possession of elephant ivory. A team of investigators was constituted with other officers he went to Makeni shopping mall in Lusaka.

They saw one man who suited the description of their information loitering at the mall. They came to know him as John Mushipi now A2. After an interval of time they saw a white Toyota Corolla Registration No. ALB 1603. In front passenger seat was a man who also suited the description they had. They later came to know him as Edward Chanda now A1.

PW1 recalled that the man came out of the car. He got to the car boot. He removed a sealed cartoon box to the near passenger seat. He then saw Mushipi (referring to A2) come towards the same car. He signalled other officers. They blocked the car with theirs and one officer by the name of Kawala went to the driver's seat side while he went to the front passenger seat. He introduced himself as an officer from wildlife. He said that when Mushipi (A2) heard he wanted to run away. He stopped getting into the taxi. Kakoma one of the wildlife officers grabbed him. He then proceeded to verbally warn the suspects.

They took the suspects to Embassy Police and later to Chilanga wildlife offices.

He further recalled that after further investigations Edward Chanda told them that the one who brought the ivory was at John Mushipi's house. They told him to call him. They told him to tell that person who turned out to be A3 Margan Banda that they sold and were remaining with a part payment and would share the money. Mushipi then led them to John Laing Compound. And found him at Edward Chanda's house who is A1. They apprehended him.

PW1 identified the 2 accused in court and the carton box with 5 pieces of elephant ivory.

Under cross examination by the defence counsel, PW1 told the court that at Makeni mall they saw A2. He walked to the car. He was about to enter. He then introduced himself. He said he did not know if he was scared. He denied that he beat him.

He said it's A1 who said the box was for the person not before court referring to A3 who absconded. He admitted that it's a taxi driver who was driving the car in which the ivory was found.

PW2 was Mukendwa Kakoma an investigations officer also from the department of National Parks and wildlife. His evidence is essentially the same as that of PW1. He corroborated the assertion that on 14/10/2016 around 10 hours Zambia Wildlife officers

apprehended the 2 accused persons. This was at Makeni mall in Lusaka. They first saw A1 come out of a Corrolla Car. He opened the boat and took a carton box to the back seat. He next sat on the front passenger seat. Moments later A2 came on the scene. He tried to open the back door. They approached him. They drove their car and blocked the taxi. He saw A2 escaping from the vehicle but got hold of him.

He said they had no certificate of ownership of the elephant ivory they were found with in a carton box. PW2 identified the 2 accused, the carton box and the 5 pieces of ivory.

Under cross examination, PW2 admitted that A1 and 2 live within the same neighbourhood. He maintained that at the time, A2 tried to ran away. He however said he mentioned that the ivory belonged to A3. He too disputed that the accused were beaten.

PW3 was Mr. David Squarre a wildlife veterinary surgeon. He testified on oath that he holds a bachelor's degree in Veterinary Medicine and surgery from the University of Zambia. He worked since 11/1/2016. On 14/10/2016 he was presented with specimens to identify by Philimon Kawala. It was a box of 5 pieces of suspected ivory.

He recalled that he did a physical examination. He checked by what he called cross section of the cut pieces. He saw shereger lines which he said are unique to elephant ivory. He stated that ivory has a shape consistence with elephant ivory. It has a route which joins the ivory to the gums of elephants. Based on these observations he concluded the specimen were elephant ivory. He identified the report he authored and caused it to be produced. It is now exhibit P2 on record.

PW4 was Philimon Kawala an investigations officer- department of National Parks and Wildlife Chilanga who was also the arresting officer. He testified on oath that on 14/10/2016 he received a docket of 3 male suspects and 5 pieces of suspected ivory. He received an intelligent report that 2 people were in possession of elephant ivory at Cosmopolitan mall in Makeni. A team of officers was organized. During the operation,

the 2 accused were apprehended. His assertion was equally essentially same as that of PW1 and 2 his colleagues all from wildlife.

In addition, he stated that the 5 pieces of suspected ivory were handed over to an expert to identify them. He confirmed vide a report and brought them back. He identified the seizure form, the 5 pieces of ivory and the carton box in which they were found, the identification certificate or report and the 2 accused. the exhibits in issue are herein marked P1, 2, 3, 4, 5 and 6 as per record.

PW4 further deposed that he interviewed the accused persons during investigations. Under warn and caution statements in Nyanja they appeared to understand, he claimed to say that they each admitted the charge. The purported admission was however dispensed with by the prosecution after an objection by the defence which I sustained. Based on findings he made, he found justification to arrest and charge the accused with the subject offence.

Under cross examination by the defence counsel, PW4 admitted that the carton box in which the elephant ivory was found was sealed, as such no one would see what was inside. He said the taxi driver of the car in which the ivory was found was also apprehended. But the car was not seized. But that the accused did not implicate him. He said even the behavior of the taxi driver portrayed that he did not know anything in the matter. He wanted to make him a witness but could not come.

This is all from the prosecution in brief.

At the close of the prosecution case, both accused were found with a first case to answer and placed on defence. They elected to speak on oath. Their evidence in brief is this: A1 testified on oath that on 12/10/2016 he received a visitor from John Mushipi his co accused. He came to know him as Morgan Banda referring to A3 who absconded. He asked for a place to sleep and gave him a room. He was told he would leave after 2 days to Livingstone. He explained that John Mushipi is his neighbour who lives about 5 houses in between.

He recalled that the following morning on 13/10/2016 he left for work. In the morning on 14/10/2016 he did not find him in the house when he woke up. He came back around 8 hours when he was preparing for work. He allegedly asked if he could go with a taxi driver to Makeni mall with the luggage he was with. And that he would find John Mushipi at Makeni mall who would get the luggage. He was told Morgan Banda had other luggage at city market as such it would be expensive to go with the same taxi to city market to pick the other luggage.

He got into the said taxi. At Makeni mall the taxi parked. He got his phone to try to phone Mushipi. While checking the phone he heard someone getting read with a gun. He saw people with guns on sides. He was told not to move. He said those people were ZAWA officers. They commanded the driver to open the boot. When he opened the boot one took out a box. When asked what he was carrying he said he didn't know. He told him that the owner of the box was coming. They then put the box on the back seat. He allegedly said what he saw is just a box. He did not know what was inside, implying clearly that at the time he got into the said taxi at his house in John pound Laing compound he saw the luggage in form of a single box which he had to deliver to John Mushipi A2. This is just one portable box in which 5 pieces of elephant ivory were found.

A1 further stated that when PW4 opened it, it was found that there was ivory. They then started beating him and took him to embassy police. Before that while at Makeni mall he saw Mushipi (A2) coming. He asked what was happening. PW1 then commanded others to arrest him also. They were beaten and taken to Chilanga. While in police cells Mushipi took them where the alleged owner of the contraband was referring to A3 who was subsequently apprehended.

On Tuesday the 2 of them with Mushipi were released leaving Morgan Banda in custody. Days later he was also released.

Under cross examination by the prosecutor A1 told the court that he saw the officers who confronted him for the first time. He denied that he told the officers there was ivory before the box was opened.

When asked why he did not ask about what was in the luggage he said he did not because that person was a visitor. He said he was told there was a bag and a box. Now I will pause here and state that it is quite puzzling that A1 said he could not ask about what was in the box because that person was his visitor. I wonder if there is a practice in our communities that a visitor cannot be asked. Secondly, assuming he was told there was a bag and a box, one wonders why no explanation was made about the bag, as no evidence has been led to discuss the question of the purported bag. The only thing found in the taxi with the accused was a single box.

Anyhow, A1 further stated that on cross examination that he was going to deliver the things only. He was helping a visitor to leave. He denied that he tried to run away.

A2 testified on oath that on 14/10/2016 he was at Makeni Mall where he has a stand for doors. He received a phone call from Morgan Banda (referring to A3) who was his visitor from Lundazi district. He has asked for a place to sleep in Edward Chanda's house his co accused. He said he normally comes because he gets groceries from Malawi to Livingstone.

He was called to say a taxi was coming to the mall to bring luggage as he was coming from city market with more luggage on a bus. He saw a taxi come and parked. He saw Edward Chanda in the passenger seat (referring to A1). He then saw 3 people go to the taxi, 2 had A47 guns with one armed with a pistol. And that PW4 went to open the boot to take out a box while the others went on the side of the driver. He was going towards the vehicle. He saw that those inside were beaten. He wanted to see why they were being beaten by getting close.

He heard PW4 saying arrest even that man. PW2 allegedly pointed a gun on him to sit down. He denied that he wanted to run away.

He said they told them that the owner was on the way coming. And that he did not know anything. They argued and later got him to escort them to that person (referring to A3). Adding that they got Morgan Banda so that they could be set free. He said he asked the officers to give him back the phone they got so that they could call to find out where he was (A3). He claimed that A3 admitted to be the owner of the luggage in issue at wildlife officers.

Under cross examination by the learned Public prosecutor, he told the court that A3 Morgan Banda was at his house. And that on the material date he was coming from city market to the station at the mall. He admitted when it was put to him by the public prosecutor that it was surprising that a person going to the station was found at home. This is in relation to the fact that when the arresting officer and others followed A3 with the help of A2, they found him at A1's house. There was nothing found with him such as groceries he was allegedly transacting in from Malawi to Livingstone.

When challenged why officers could not wait at the mall if A3 was to come from city market after picking other goods as claimed, he said the officers said could not wait because they had an operation to go and look for a person with a Leopard skin.

He admitted that he saw those officers for the first time. He claimed that he did not go away even if he saw the officers allegedly beating A1. But there is nowhere in evidence where he says he was also beaten as he approached the officers.

He denied that he wanted to open the door of the car where A2 and the driver were, claiming the officers lied. The evidence on record nevertheless show that the wildlife officers only got on the 2 sides of passenger and driver's side after A2 walked towards the car and trying to get in. This is because after he spoke to A1 on phone which he does not deny he saw the car where the friend was. There is nothing to show that the officers created the evidence that A2 tried to open the car but tried to free when they made an introduction.

This is the evidence in brief as a whole.

I had the occasion to examine all the evidence adduced and find the following facts not in dispute: In the morning of 14/10/2016 Zambia Wildlife officers pounced on a Toyota Corolla ALB 1603 at Makeni shopping mall. The first accused Edward Chanda was sitting in front passenger seat. The officers found 5 pieces of elephant ivory. PW3 David Squarre a Veterinary Surgeon confirmed that those were elephant tusks. None of the two accused had a certificate of ownership of the elephant tusks from the director of the National Parks and wildlife.

It is a fact also not in dispute, that the car in which the tusks were found was a hired one. It was hired to take A1 to Makeni mall, so the driver had nothing to do with those tusks. There is nothing linking him to this case and the prosecution were legally entitled not to charge him.

It is not in dispute, that when the wildlife officers pounced on A1, A2 was also apprehended. They were apprehended at the same car, save to state that A2 argues that he confronted the officers shortly after he saw them beating his colleague.

It is not in dispute that A3 Morgan Banda who absconded was found at A1's house the same day. This was after wildlife officers were led to the house by A2. He was not found with any luggage such as groceries A2 claimed used to take to Livingstone from Malawi. Wildlife officers had confiscated the accused's mobile phones. And to track down A3, they allowed the accused to call him. They used a trick to tell him that the ivory was sold. They were remaining with a part payment.

I must also state that there is no dispute that A3 was known to both accused at the time of arrest. He had dealt with the 2 accused persons.

The dispute is essentially on whether or not the 2 accused persons knew what was in the carton box containing the elephant tusks exhibit P1. This actually forms their defence. According to A1, he did not know anything. A3 was brought to his house by A2 his neighbour asking for a place to sleep. He later requested him to help go with the taxi he had come with to deliver some luggage to A2 who was at Makeni mall. He was

allegedly told that he has other luggage to get from city market as such going with the same taxi would be expensive.

I have critically examined this defence. What I find is that the explanation is not satisfactory.

Firstly, it has not been shown why A3 who was scheduled to travel in fact in transit, the same day would just be found at A1's house after the 2 accused were apprehended. Secondly, since the accused had phones, one would have expected constant communication with A3 because he was to meet A2 to get the luggage and travel to Livingstone. Of course I considered what A2 told the court during cross examination that when they told the officers that the owner of the parcel A3 was coming, they could not wait because they had an operation to undertake later. But this cannot hold because the officers still followed that person later to A1's house. Assuming they never wanted to entertain any explanation from the accused, they wouldn't have agreed to follow the third person.

In any event, as the trial court I had the privilege to observe the demeanour of all witnesses when they testified. I have no apology to state that I found all the 4 prosecution witnesses to be credit worthy. PW1, 2 and 4 were consistent on how they dealt with the 2 accused from the time they pounced on the car at the mall. I perceive no malice on their part. They only dealt with them in course of duty.

Further, what betrays A1's story is that firstly, the luggage his colleague claimed would make it expensive if he went with it to city market to collect goods is just a single box of elephant tasks exhibit P1. Secondly, one wonders why A2 found him to be the only one to offer a place to his friend to sleep this time, yet he claimed that the man had been taking groceries to Livingstone, where was he sleeping before.

Thirdly, A1 in examination in chief told the court that he was preparing to go for work when he was requested to take the luggage to A2, now one wonders why he could even abandon going for work for the sake of a person he did not even know much.

From the evidence on record the man was a stranger to him. How would one agree to deliver something unknown from such a person. These are aspersions I tend to cast on his purported defence.

Turning to A2, according to him, he did not equally know anything about the elephant tusks found in the car in which A1 was found. He was just phoned by A3 to meet A1 and collect his luggage at the mall. This is his friend from Lundazi whom he had found a place to sleep at A1's house. He said A3 was in the business of taking groceries from Makeni to Livingstone. And that's where he was going that day.

I have equally critically examined this defence. What I find is that it is also not satisfactory. It is a hollow defence. It is an afterthought carefully couched to mislead this court. Like I indicated earlier, I had the privilege to observe all the witnesses when they testified. I found all the prosecution witnesses to be credit worthy. PW1 Steven Zulu testified that after further investigations, A1 told them that the one who brought the ivory was at John Mushipi (A2)'s house. They told him to call him and tell him to say they had sold the ivory and only remaining with a part payment. So, this assertion tends to make it clear that he was working with his colleague A2. And this is why they were meeting at the mall.

Further as hitherto alluded, there is nothing to show why A2 this time found A1 to be the person to offer accommodation to his friend who had been going to Livingstone taking groceries from Malawi, yet at the time of arrest, A3 did not have any such groceries. Neither is there any reason why a person who was already in transit on 14/10/2016 could be found sitting at A1's house as earlier stated.

There was also this denial by A2 that he was not about to get into the car when wildlife officers intercepted them. He denies that he tried to run away. He claimed that he saw the officers beat his colleague as such he could not fear the guns and decided to approach them. And that's how PW4 said arrest even that man, now how when they did not know him at the time. This argument cannot hold. The evidence from PW1, 2 and 4

is of very strong weight, that they first observed the car in issue. They saw the man who fitted the description come out of the passenger seat to the boot. Took out a box to the back seat of the car. This was after they had seen A2 loitering at the mall. They only went to the car and pounced on the accused after A2 walked to the car. PW1 introduced the team as wildlife officers. This is why A2 wanted to run away. The question is why.

There is another link to A2. He admits that he escorted the officers to where A3 was, this tends to confirm that he knew that A3 was not infact travelling to Livingstone as claimed.

In the light of the foregoing, I will reject the 2 accused's defence.

I will draw an inference that they knew what was in carton box as elephant ivory. I need not belabour the principle that it is within the province of the court to draw inferences from facts established in evidence.

Turning to the law, section 87 (4) read together with 130 (2) of the Zambia wildlife Act No. 14 of 2015 requires 2 essential elements to be proved for the accused to be convicted. These are:

- i) That the accused was in possession of a prescribed trophy in this case elephant ivory.
- ii) That he had no certificate of ownership.

Section 4 of the Penal Code Cap 87 of the laws of the Zambia defines possession as either having anything in the actual possession, custody, or having knowledge of the thing in any place for use of or benefit of oneself or of any other person. This provision poses no ambiguity. In terms of literal construction, a person can be said to be in possession of a thing whether he has physical possession of it or not. Knowledge that another person has control or physical possession of a thing suffices.

In the case of **Madubula V. The People (1)** rightly cited by the prosecution, the Supreme Court of Zambia did allude to the legal definition of possession pursuant to this section. It had this to say in part, "if the driver of a car carries a passenger who to his knowledge is in possession of illegal trophy the driver, by virtue of having the illegal trophy in his car, is jointly in possession of it". The court went on to state that if the appellant was aware of the illegal trophy it matters not whether it belonged to him or to his passengers.

On the matter before me, I have found that both accused must have known that what was in the sealed carton box were elephant tusks (ivory). They had the knowledge. To this effect they were in possession of the ivory in issue.

The evidence in fact tends to consist of something more linking the 2 accused persons.

I observe aspects of odd coincidence which the court in the case of **Machipisha Kombe V. The People (2)** said constitute evidence of something more. They represent an additional piece of something which the court is entitled to take into account. It was said that odd coincidence provide a support of the evidence of a suspect witness or accomplice or any other witness whose evidence requires corroboration. The Supreme courts viewed this as the less technical approach as to what constitutes corroboration in our jurisdiction now.

The odd coincidences I observed as hitherto illustrated are these:

- i) The evidence of the 2 accused in defence is that on the material date, A3 was travelling to Livingstone. He requested A1 to go with the taxi in which the ivory was found and handover the parcel to A2 at Makenii mall. A3 was going to pick other goods at City market. He was to pick the parcel from A2 thereafter and travel to Livingstone. But after the 2 were apprehended, he was found and apprehended from A1's house. A2 led the wildlife officers to A1's house. And this was after they compelled the accused to call and tell him that the items had been sold and only part payment was remaining.

- ii) A3 who was said to be taking groceries from Malawi to Livingstone was not found with such luggage.
- iii) According to A2, when A3 arrived who is his friend, he went to A1 to ask for a place to sleep. Meanwhile he showed an impression that A3 had been in the business of taking groceries to Livingstone and that's where he was going. But it has not been shown why this time only he took him to A1 for a place to sleep. The question is, where was he sleeping before. Why he took him to A1 only this time.
- iv) A1 tends to show that he did not know A3 before. And when he woke up on the material date he did not find him. When he arrived he had a parcel sealed in a carton box. He requested him to deliver it by taxi. And he agreed. I shudder to think how a person in ordinary course of things would accept to deliver something unknown from a stranger. A person with strange behaviour. Strange in the sense that if he was just found a place to sleep, how do you wake up and leave in the morning without the owner of the house knowing.

I have also taken into account that all the prosecution witnesses are employees of one entity, that is the department of National Parks and Wildlife. For this reason, there is a possibility of witnesses having purposes of their own to serve. In the case of *George Musupi V. The People (3)*, it was *inter alia* held that the tendency to use the expression "witness with an interest or group of his own to serve" carries with it the danger of losing sight of the real issue. The critical consideration is not whether the witness does in fact have an interest or a purpose of his own to serve, but whether he is a witness who, because of the category into which he falls or because of the particular circumstances of the case, may have a motive to give false evidence.

On the matter before me, I find that the danger highlighted above do not exist. As earlier indicated, I found all the prosecution witnesses creditworthy. I was satisfied that they had no motive to implicate the accused persons. Further the evidence consists of

odd coincidences which in strict sense constitute the evidence of something more. It is actually corroboration.

All said, the first element has been satisfied both in fact and in terms of the law.

The last element is on the need for any person found in possession of a prescribed trophy to have a certificate of ownership duly issued by the department of National parks and wildlife.

It is in fact not in dispute that they did not have. Further PW3 an expert witness confirmed that what the accused were found with were elephant ivory. Under the interpretation section of the Zambia Wildlife Act, a prescribed trophy means any ivory or rhinoceros horn or any other trophy prescribed by the regulations. It follows therefore that legally the two accused persons were in possession of the prescribed trophy without a certificate of ownership.

All the elements of the subject offence have been satisfied. I perceive no doubt that may be treated in favour of the accused. The evidence is quite overwhelming linking each of them to the commission of this offence.

I thus hold that the prosecution have proved the guilt of the accused beyond all shadow of doubt. I find each one of them guilty of the unlawful possession of prescribed trophy contrary to section 87 (4) and 130 (2) of the Zambia Wildlife Act no. 14 of 2015 of the Laws of Zambia. I convict each one of them accordingly.

DELIVERED IN OPEN COURT AT LUSAKA THIS 9TH DAY OF JUNE, 2017.

