

1PA/005/2017

IN THE SUBORDINATE COURT OF THE FIRST CLASS

FOR THE LUSAKA DISTRICT

HOLDEN AT LUSAKA

*(Criminal jurisdiction)*

**The People**

**VS**

**DERRICK CHIBUYE, BEAUTY MWANGALA**

**AND**

**LAZAROUS CHIBALE**

BEFORE: **HER WORSHIP A.N WALUSIKU**

FOR THE PEOPLE: **CHISENGA- PUBLIC PROSECUTOR**

FOR THE ACCUSED: **A1 AND A2 IN PERSON**

**A3-L. SABOI OF KANJA MHANGO & COMPANY**

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**J U D G M E N T**  
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Cases cited;

**KAPINDA v THE PEOPLE (1977) Z.R. 32 (H.C.).**

CHARGE

In this case the accused stood jointly charged with one count of unlawful possession of prescribed trophy contrary to section 130(2)(a) and 87(4) of the Wildlife Act No 14 of 2015

of the Laws of Zambia as read with SI No 61 of the 1993 Wildlife Act of the Laws of Zambia. The particulars of the offence allege the accused persons on 6/01/17 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 their possession a Prescribed Trophy namely Leopard skin without a certificate of ownership issued in respect thereof.

The first, and the third accused persons pleaded not guilty to this charge while A2 pleaded guilty and was accordingly convicted and sentenced.

I warn myself at the outset that the onus to prove the case beyond reasonable doubt lies on the prosecution and there is no onus on the accused to prove his innocence. The accused is entitled to give and call evidence and if he elects to remain silent this does not affect the burden on the prosecution. If, after considering all of the evidence in this case there is any doubt in my mind as to the guilt of the accused, then the accused must be given the benefit of that doubt.

In order to establish the guilt of the accused the prosecution must satisfy me upon each and every ingredient of the offence charged. Turning to the Count Section 130(2) (a) and 87(4) of the Zambia Wildlife Act No 14 of 2015 as read with SI No 61 of the 1993 Wildlife Act of the Laws of Zambia provides that:

***“a person who is in possession of, sells, buys, imports or exports or attempts to sell, buy, import or export a prescribed trophy in contravention of this Act is liable, upon conviction***

***(a) For a first offence, to a term of imprisonment without the option of a fine of not less than five years but not exceeding ten years”***

***Section 87(4) of the same Act provides that:***

***“a person who has in that person’s possession a trophy or prescribed trophy without the certificate of ownership issued in respect of the trophy commits an offence”***

For this purpose the expression the ‘prescribed trophy’ is defined in section 2 of the Principle Act to mean any ivory or rhinoceros horn or any other trophy prescribed by regulation made under section eighty nine.

It is clear from the wording of section 130(2) (a) of the ZAWA Act, what constituted this offence is either possession or selling among other things. It is therefore inevitable to defined ‘possession’ since it is alleged that the accused were found in possession of prescribed trophy.

It is worth stating that the principle Act does not define the word ‘possession’ for the purposes of this offence but uses the word as used in the Penal Code. I therefore find it necessary to use the general definition provided for in the Penal Code. It is defined as follows;

*(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 that is to say;

- ❖ There was prescribed trophy
- ❖ Identity of the person(s) that was in possession of the prescribed trophy.
- ❖ The possession was unlawful.

Having analyzed the law in this case it has now become absolutely necessary to evaluate the evidence adduced herein in order to satisfy myself as to its truth or falsity.

In their endeavor to establish the guilty of the accused the prosecution called to court 3 witnesses while the accused persons opted to give sworn statements and A3 called one witness in his defense of which they are perfectly entitled to do at law.

I will now consider the evidence in this case.

PW1 was PHILIMON KALABA an investigations officer at the Department of National Parks and Wildlife based in Chilanga. According to him on 06/01/17 around 1500hrs he was on duty when his colleague Stephen Zulu briefed him that he had received intelligence report that 3 people were in possession of a Leopard Skin at Cosmopolitan mall in Makeni. Acting on the report a team of officers was made in which he was part. They rushed to the scene and made a surveillance. Officer Zulu told them that he would signal them once he saw the people and that among the suspects were 2 males and 1 female. A few minutes later they were signaled and shown the suspects. They moved closer and he produced his identity card to the suspects. Upon hearing that A3 threw a bag and started running. He gave a chase and

managed to apprehend him while A1 and A2 were held by others. He got the bag and asked them what was inside. They all kept quiet. He insisted and A2 and A3 said that it was a leopard skin while A1 remained quiet. He asked A3 to open the bag which he did and he saw a skin that looked like a skin of a Leopard. He then warned and cautioned them. He took them to Chilanga. He identified the Leopard skin marked P1 and the bag marked P2. He also identified A1 and A3.

In XXN by A1 he told the court that accused was walking when they found him.

In XXN by A3 he told the court that he saw accused with his eyes carrying the bag. Accused was walking. The bag was in the hands of accused. Accused threw the bag immediately PW1 introduced himself. He did not get the picture of the bag. He apprehended accused when accused ran dropping the bag. He caught accused closer to the entrance of the shopping mall. PW2 was MUCHAO MUCHAO an Investigations officer at the Department of National Parks and Wildlife. ON 06/01/17 he was on duty when intelligence report was received that some people had a Leopard skin at Cosmopolitan mall. A team was formed and rushed to the scene. The three people were identified and were approached. Upon introduction, all wanted to escape. One of them had a bag and threw it down. Upon search of the bag a Leopard skin was found. They were asked if they had a permit but they all denied. They were taken to Chilanga where he seized the Leopard skin and a bag. He handed over the matter to the Arresting officer. He identified A1, and A3. A3 was the one that carried the bag. He identified P1 and P2 and also identified the seizure notice marked P3.

In XXN by A1 he told the court that there were three accused persons on apprehension. 3 of them were apprehended. Accused was walking.

In XXN by A3 he told the court that he did not know that they were the four of them. Accused had the bag. What he saw was that accused had a bag. He did not know that A2 just called him to help collect money for rentals. He did not know if there was a relationship with A2. HE did not get a picture of accused with a bag. The bag was with accused and not A1. He did not know that A1 was a boyfriend to A2.

PW3 was MELINA MAANJE the Investigations officer. On 06/01/17 she was on duty when she was handed over P3, P1 and P2 with three suspects. She took the skin for identification and it was found in the affirmative. She then interviewed the suspects under warn and caution statements. They did not give her a permit to own the skin. Under warn and caution statement for A1 in Bemba, A2 and A3 in Nyanja they all gave free and voluntary replies. A1 and 3 denied the charge while A2 admitted. She then made up her mind to jointly charge and arrest them for Unlawful possession of Prescribed trophy c/s 130(2) of Act No 14 of 2015. She identified A1 and A3. She identified P1, P2 and P3. There was an identification of trophy certificate which she identified marked P4.

There was no XXN by A1.

In XXN by A3 she told the court that accused was jointly charged because he acted together with A2. IT was not true that PW3 told accused that accused was not in the case. A2 did not tell her that accused knew nothing. A2 did say that A1 was her husband.

The accused were put on their defence. They chose to give sworn evidence. A3 called one witness A2.

According to DW1 on 06/01/17 he had a program with his boss Mrs. Kaunda who told him to meet at Makeni Mall so that he could go and do measurements. As he entered the shopping



mall he met A3 and they greeted each other. They were going to the same direction. As they were going ZAWA Officers came and produced their identity cards and stopped them. A3 was with other people and among them was a lady A2. They were all taken to Chilanga. A3 had a bag and when opened a Leopard skin was found. Upon being asked A2 answered that it was her bag. Accused was asked how he found himself there and said that he met them on the way and did not know what they were carrying. A3 refused to be the owner.

In XXN by Counsel for A3 he told the court that there was no relationship between accused and A2. He denied to be the boyfriend to A2. IT was the son to A2 who signed police bond for him. The son signed because they said accused was innocent. Prior to that he knew accused. A3 was a land agent. It was not true that accused and A2 met A3 because they wanted to buy a house in Chazanga. He denied to have gone to see a house in Matero. A2 was not his witness because she was not with him. He was able to call Mrs. Kunda to support his evidence. He did not make a story because he did not have money to buy the house. He was not the one found with the bag. It was A3 who was found with the bag. He did jump Police bond. He did not know John Mulenga who ran away.

In XXN by the state he told the court that he was a bricklayer. He worked for Mrs. Kunda for the first time. He was meeting her at Cosmopolitan mall for him to be shown the house<sup>9</sup> he did not know the place. It was true that on 06/01/17 he was with A2 and A3. There was no introduction as he only knew A3. He knew the names of A2 and A3 after apprehension. There was a bag at Cosmopolitan mall. It was with A3. He saw the contents of the bag at ZAWA offices. In the bag was a Leopard skin.

According to DW2 on 06/01/17 he was at his place of work in 10 miles when someone called John Mulenga came to look for a house. Later John came with his elder brother A1 and A2.

A1 paid viewing fees of K150 and was taken to Chazanga and Matero and liked the Chazanga house. A1 asked him if they could go together and get money at Cosmopolitan mall. They entered the premises and after walking about 50metres someone hit him with a fist. He moved about 5 meters and saw A1 on the ground with a bag. The brother to A1 John Mulenga ran away. They were apprehended. Accused refused to be taken and was put in the vehicle. In the vehicle A1 was asked as to what he had in the bag and said it was a skin. A1 told A2 not to say anything. They were charged for possession of a skin. He was an estate agent and had a certificate of incorporation which he identified DDP1.

In XXN by A1 he told the court that he did not bring the receipt that accused paid from. In the presence of ZAWA officers accused told A2 not to mention him.

In XXN by the state he told the court that he was an estate agent. He was not in the habit of following clients to get money. He told the officers that he was not the one that had the bag. He was with A1 and A2 at the mall. A1 told him that he was going to pick money. He was selling a house to A1.

IN REXN he told the Court that he did not sale the house.

According to DW3 on 06/01/17 she was called by A1. A1 was her man friend and had been in a relationship with her for 4 years now. She even knew some of A1's relatives. A1 told her to go to 15 miles were he was going to buy a house. She found him with another person. A1 had a bag and she asked him as to what was in it and he said it was a trousers he wanted to adjust. They went to 10 miles and found the person who was selling the house. He was A3. A3 said one house was in Chazanga and another in Matero. They viewed the houses and



A1 liked the Chazanga house and agreed at K150, 000. A1 said that he was going to get money from Mrs. Kunda so that he could pay. They went to Cosmopolitan mall. On their way A1 was kicked and he fell down and the bag fell. A3 started arguing with ZAWA officers. They were taken to Chilanga. In the vehicle A1 was asked what he was carrying and said it was a Leopard skin. A1 told her not to disclose that it was A1's skin. She identified A1. A1 was a bricklayer and poacher.

In XXN by A1 she told the court that she did not see any money that accused gave to A3. They left 10 miles around 1600hrs. Accused was the one that told her to say that the gun that killed the animal was for her brother. A3 was present when accused said that. In the vehicle they were the three of them. It was 3 or 4 officers in the vehicle. Accused fell down. Accused was her man friend. No one told her to say what she said. She did not reveal to court because accused threatened to burn her house.

In XXN by the state she told the court that on 06/01/17 she was with A1 and A3. A1 was a bricklayer. They were in a relationship for 4 years. She did not know John Mulenga. She told the court that the skin was hers. A1 threatened with the burning of her house. They were apprehended together with a bag. They were going to collect money.

This is what I received.

### **FACTS NOT IN DISPUTE**

It seems clear to me from the evidence that A1 and A3 do not dispute that on the 06/01/17 they were together at Cosmopolitan Mall in the company of two others that included A2 and another. It is also not in dispute that at the Mall they were all apprehended.

They took them to office where they interviewed them in connection with a leopard skin. It is also not in dispute that there was a leopard skin which was in possession of the A1. It is not in dispute that A1, A2 and A3 were jointly charged with this offense which A1 and A3 denied while A2 admitted and she was accordingly convicted. I therefore find these to be facts in this case.

### **FACTS IN DISPUTE**

What seems to be in dispute to me is whether the leopard skin was in joint possession of A1 and A3. These are the facts in issue I have to resolve in this matter and I propose to resolve them concurrently with the application of the law.

### **APPLICATION OF THE LAW**

#### **a. Prescribed Trophy**

The first question to be decided at this point is whether or not there was a prescribed trophy within the meaning of the law.

For the avoidance of doubt I wish to restate the definition the expression 'prescribed trophy'. It is defined in section 2 of the Principle Act to mean any ivory or rhinoceros horn or any other trophy prescribed by regulation made under section eighty six.

It is plain from this definition that besides the two nominate trophies ivory and rhinoceros horn, other trophies may be prescribed by regulation made under section 86 of the Principle Act. This section is couched as follows;

"Subject to the provisions of subsection (2), the Minister may, on the advice of the Authority, by statutory instrument, prescribe any trophy or class of trophy as being

“prescribed trophy” for the purposes of controlling, prohibiting or limiting any dealings in such trophy or class of trophy, except in accordance with the provisions of this Act.”

I wish to state here that I have not come across any SI made pursuant to this section that prescribes leopard skin to be prescribed trophy. Recourse therefore is in IS Number 61 of 1993 which prescribes leopard skin among others to be prescribed trophy which was made pursuant to section 131 of the repealed National Parks and Wildlife Act cap 201 of the laws of Zambia. The justification to rely on this SI lies in section 15 of the Interpretation of Statutes Act Cap 2 of the Laws of Zambia which states;

“Where any Act, Applied Act or Ordinance or part thereof is repealed, any statutory instrument issued under or made in virtue thereof shall remain in force, so far as it is not inconsistent with the repealing written law, until it has been repealed by a statutory instrument issued or made under the provisions of such repealing written law, and shall be deemed for all purposes to have been made thereunder.”

It follows therefore that the repealing of any Act does not any way repeal SI made there under unless it is repealed by another SI made under the new Act or it is inconsistent with the repealing Act. It is however worth stating here that I have not come across any SI that repeals this SI neither is it inconsistent with the repealing Act thus it is valid for all intents and purposes. It follows therefore that since this SI prescribes leopard skin as prescribed trophy coupled with the fact that there was a leopard skin, I am therefore satisfied beyond all reasonable doubt that there was a prescribed trophy within the meaning of the law namely leopard skin.



**b. Possession of the said prescribed trophy**

The crucial question to be decided at this point is whether or not leopard skin otherwise known as prescribed trophy was in the possession of the accused jointly.

In addition to the definition already referred to as provided by the principle Act I have found aid in the holding of the High Court in the case of KAPINDA v THE PEOPLE (1977) Z.R. 32 (H.C.). The brief facts of that case are 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.

I must interpolate here and state that by case to amount to possession ipso jury the accused does not necessarily have to have physical possession of the trophy in question neither does he need be the owner of the trophy but it suffices to prove that accused knew where the trophy was and had control of the same otherwise referred to as de facto possession.

In the case in casu, the state has alleged that the prescribed trophy was in the possession of the accused jointly and whilst acting together.

In order to prove this allegation three witnesses gave evidence before this court during trial.

I must state here that it is clear from this evidence that A1 was the owner of the prescribed trophy as he had the bag at 10 miles where he met A2 and A3. When asked by A2 as to what was in the bag he stated that there was a trousers which he wanted to have it adjusted. Further at Cosmopolitan mall A2 stated that A1 was kicked and fell to the ground and the bag also fell which shows that the bag was with A1. To the converse PW1 and PW2 testified that A3 was the one that had a bag. I wonder how and why one bag could have found itself in the hands of A3. If it is true then I take it that though A3 carried the bag he did not have knowledge of the contents. Further, it is incredible that A3 who was selling a house to A1 would opt to carry a bag for A1 and if he did he carried it without knowledge of the contents but to help as he was going to be paid the money for the sale of the house. To the contrary there is sufficient evidence of the fact that A1 herein was the owner of the bag and its contents and was going to sell it to Mrs. Kunda. I see no reason why the officers of the state would just pick on A1 and decide to falsely implicate him if he was just walking into the mall to meet someone. A1 was in full control of the prescribed trophy. In the circumstances I find overwhelming of the fact that the skin in question was in the possession of A1.

**c. UNLAWFUL**

The question to be decided at this point is whether the said possession can be said to be unlawful within the meaning of the law.

I must state here that unlawful going by the wording of section 87(4) of the ZAWA Act does not definitely go beyond possession without a certificate of ownership or justification.

Turning to the evidence in this case it is clear to me that A1 had any certificate of ownership neither did he have justification of possessing the prescribed trophy namely leopard skin.

In the circumstances I am satisfied that the prosecutions have proved their case against A1 beyond all reasonable doubt and as such **I find him guilty** of the offence as charged and I according **convict** him.

For A3 I have difficulties to connect him to the offence. In the circumstances I am satisfied that the prosecutions have not proved their case against A3 beyond all reasonable doubt and as such I find him **not guilty** of the offence as charged and **I accordingly Acquit him.**

DELIVERED IN OPEN COURT THIS.....<sup>11<sup>TH</sup></sup>.....DAY OF <sup>SEPT</sup>.....2017.



HON A.N WALUSIKU

MAGISTRATE I

