

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CR 05/2014

In the matter between:

THE STATE

and

MUSONGO MOSES

ACCUSED 1

SAKAMBA ANDREAS

ACCUSED 2

Neutral citation: *S v Moses* (CR 05/2014) [2014] NAHCMD 37 (06 February 2014)

Coram: SIBOLEKA J and CHEDA J

Delivered: 06 FEBRUARY 2014

Flynote: Criminal law: In a criminal trial the conviction of the accused on a particular offence has to be established by the prosecution witnesses beyond reasonable doubt.

Summary: Accused 2 found the carcass of a kudu near the road as he took his employers herd of cattle to a water point. He alerted accused 1 and they pulled the

carcass away to a spot where they skinned it and took the meat home. Accused 1 was later arrested at Mururani Check Point as he was on board a vehicle taking his share of the meat to his children in Rundu.

Held: The prosecution witnesses have not placed evidence before the trial court sustaining a conviction of hunting five kudus without a permit.

Held: Both conviction and sentence are set aside and substituted accordingly.

ORDER

In respect of accused 1: both conviction and sentence are set aside and replaced with the following:

Guilty of contravening section 50(1) of the Nature Conservation Ordinance 4 of 1975 as amended: Removal of game found dead.

Sentence: N\$500 or in default of payment Three (3) months imprisonment.

In respect of accused 2: both conviction and sentence are set aside and substituted with the following:

Guilty of contravening section 50(1) of the Nature Conservation Ordinance 4 of 1975 as amended: Removal of game found dead.

Sentence: N\$500 or in default of paying Three (3) months imprisonment.

Guilty of contravening section 48(1) of the Nature Conservation Ordinance 4 of 1975 as amended: Unauthorized transportation of game meat.

Sentence: N\$600 or in default of payment Four (4) months imprisonment.

The above sentences are antedated to 17 October 2013.

REVIEW JUDGMENT

SIBOLEKA J (CHEDA J concurring):

[1] The two undefended accused appeared before the Magistrates Court, Rundu on a charge of hunting five kudus valued at N\$20.000 without a permit.

[2] They all pleaded not guilty and after trial they were convicted as charged.

[3] The facts of the matter are that accused 1 was on board a vehicle from Mangetti that was stopped and searched at Mururani Check Point, game meat was found in his plastic bag. On being asked to account therefore he told Nature Conservation officials that it was kudu meat. He further told the officials that it was accused 2 who came across the carcass of the kudu near the road suspecting that the two bulls must have been engaged in a fight resulting in one dying and the other kudu appeared to have jumped over the fence and disappeared. Accused 2 alerted him and they dragged the carcass away to a safe place where they skinned it. With the assistance of children they took the meat home. They cut it in small pieces to dry up, he decided to take his share to his children in Rundu but was caught at Mururani Check Point. Accused 1 and 2 remained firm on this evidence, they repeated it under oath and they did not deviate from it during cross-examination. Logically and from the facts of the matter both accused were supposed to be convicted for removing a dead animal and in addition to that accused 1 should have been convicted for transporting meat without a permit or authorization. This conclusion is in accord with the evidence placed before the trial court.

[4] The first prosecution witness, Hakusembe Marcho Kandjimi is a watchman at Mururani Check Point. His evidence corroborates the two accused regarding the carcass of the kudu. This watchman testified that at the scene he saw blood along the dragging marks of the kudu carcass from the spot near the road to where it was skinned in the bushes. From this point Hakusembe's evidence is no longer credible because it becomes so vague such that he testified that the value of the kudu the accused found dead is N\$16.000 yet the total value of five kudus reflected on the charge sheet is N\$20.000. It is obvious this evidence cannot be truthful at all. Hakusembe testified under oath that at the scene where the kudu was skinned he found the head and skin, an observation that confirms the evidence of accused 1 and 2 in all material respects.

[4.1] Hakusembe's further evidence was to the fact that from the scene the two accused took the investigation team to the place where a snare in the form of wire is situated. At that spot he saw some poles erected in the form of a kraal and some

snare in between them. He testified that they pursued investigations in two groups one group comprised police officers and the other group were nature conservation officials. His group handled accused 2. They visited and searched his homestead but found nothing. Suddenly and inexplicably he testified about his group collecting '...a skin and horns'. His evidence does not shed light on the type of game the horns belonged. He testified that the group that dealt with accused 1 came back with bags of biltong, fresh meat, skins and old horns. According to him the two accused first attracted kudu with salt which they are fond of before erecting the kraal with poles. He also said they removed wires at two separate spots.

[4.2] According to Hakusembe the two accused allegedly took the investigators to Mangetti Catering where they worked and the officers showed their employer the wires and the skins. The evidence of this witness does not come out with how a total of five kudus the suspects have been convicted on came about. The two accused denied ever showing any police official or nature conservation official anything apart from the scene next to the road where they found the kudu carcass and skinned it.

[4.3] It is not clear to whom the alleged meat actually belong between the unknown residents of the houses on one side and accused 1 and 2 on the other side. A certain Nghifindaka who is said to have found bags of meat and horns of kudu in the bush was never called to testify. Hakusembe testified about being taken for a long distance to a place where kudus were hunt deep in the bush. According to him when they arrived at the spot they found two wire traps and salt to entice animals to enter the spot surrounded by a thorn fence. A rotten kudu was found lying there. In my view there is no way Hakusembe can testify about being taken for such a long distance deep in the bush where he saw all these things and at the same time say he was tasked to guard accused 1 while other police officers went with accused 2 to the field to search around.

[4.4] In cross-examination both accused challenged Hakusembe's evidence saying the kudu whose meat found in accused 1's luggage at Mururani Check Point was found already dead, they did not hunt the animal at all.

[5] The second prosecution witness is Hambiya Kemanguluko, a police officer also stationed at Mururani Check Point. This officer testified that on 11 May 2012 kudu meat was found in accused 1's bag. He went with accused 2 to the field to search around. According to this officer, Nghifindaka (who never testified) took children to collect the bags of meat. He came back and asked the people who owned the three bags of meat found in the nearby bushes. The people in the houses were not identified to the court below. This officer said the two accused confirmed that the bags of cut pieces of meat and three horns of kudu were theirs which was in fact denied. The court below should not have allowed evidence about Nghifindaka because it is hearsay.

[6] During cross-examination accused 1 severely challenged the evidence that he (accused 1 and 2) told any officer that they attracted the kudu to a specific spot to eat salt, and when that was accomplished they built a kraal and hunted with a snare and wire. Accused 1 also put it to the witness that I was the nature conservation officials who in fact forced him to confess or to say what the officials wanted. According to accused 1 their supervisor at the workplace asked why the officials brought old horns, skins and wires in support of the allegations that the accused were engaged in illegal hunting.

[7] From the above evidence it is very clear that there is no way that the trial court would have convicted the two accused for hunting five kudus let alone, no hunting of any kind has been established by the two prosecution witnesses. There is no evidence related to hunting. The two accused testified and repeated what they told the officers regarding where and how they came into possession of the kudu meat.

[8] On his part, accused 2 testified that on a date he could not remember he was on his way to give water to the cattle he was herding at Mangetti when he found the carcass of a kudu. He went to call accused 1 and some children who helped to take the meat home. Accused 1 decided to take his share of the meat to his children in Rundu but was caught and arrested at Mururani Check Point. The two accused did not deviate from this evidence during cross-examination. They in fact repeated the

same story they told Nature Conservation officials from the beginning. It is my considered view that their side of the story is reasonably possibly true. Therefore the prosecution did not succeed to make out any case related to the unlawful hunting of five kudus.

[9] In view of the above, the conviction and sentence cannot be allowed to stand.

[10] In the result I make the following order:

[10.1] In respect of accused 1: both conviction and sentence are set aside, and replaced with the following:

Guilty of contravening section 50(1) of the Nature Conservation Ordinance 4 of 1975 as amended: Removal of game found dead.

Sentence: N\$500 or in default of payment Three (3) months imprisonment.

[10.2] In respect of accused 2: both conviction and sentence are set aside and substituted with the following:

Guilty of contravening section 50(1) of the Nature Conservation Ordinance 4 of 1975 as amended: Removal of game found dead.

Sentence: N\$500 or in default of payment Three (3) months imprisonment.

Guilty of contravening section 48(1) of the Nature Conservation Ordinance 4 of 1975 as amended: Unauthorized transportation of game meat.

Sentence: N\$600 or in default of payment Four (4) months imprisonment

The above sentences are antedated: 17 October 2013.

It is ordered that any court fine the two accused may already have paid, should immediately be refunded to them.

A M SIBOLEKA
Judge

M CHEDA
Judge