

IN THE HIGH COURT OF SWAZILAND

REVIEW CASE NO. 15/09

In the matter between:

REX

VS

MFANZILE SENGWAYO

**JUDGEMENT 18th
MARCH, 2009**

[1] The Accused appeared at Simunye Magistrate's Court on a charge of

"...contravening section 8 (4) as read with sub-section 5 of the Game Act number 51 of 1953 (as amended by Act 4 of 1991 and order number 12 of 1993."

The particulars of the charge sheet were that the accused had on the 17th October 2008 been found in unlawful possession of a trophy of an inyala which is, in terms of the said Act, royal game. The offence is said to have occurred at Mbuluzi Game Reserve.

[2] His first appearance in court was on the 10th November, 2008 and he had his rights to legal representation explained to him by the presiding officer. The accused indicated to the court that he would

conduct his own defence. He was immediately arraigned and he pleaded guilty to the charge. The crown's application to have the matter postponed to the 20th November, 2008 to enable it to procure the attendance of its witnesses was successful.

[3] Albert Ngilandi Tsabedze, the senior security officer at Tabankulu Estate testified that he together with his colleague Vusi Dlamini had found the accused in possession of "a head of an inyala and some hooves inside the bag" he was carrying. (I can only assume that these hooves were for an inyala as well).

[4] Apart from suggesting that he had told Tsabedze that he had found these portions at the local dumpsite, the accused did not deny that he had been found in possession of these and that he did not have a permit or license to possess them.

[5] On being advised of his rights at the close of the case for the crown, the accused chose to remain silent. He did not call any witnesses either. He was at the end found guilty as charged and sentenced to pay a fine of E4000.00 failing which to undergo a term of imprisonment for a period of 1 year. His rights to appeal and review were explained to him and that was the end of the criminal proceedings.

[6] I recap to say that the accused was found guilty of a contravention of section 8 (4) as read with section 8 (5) of the Game Act. The latter subsection stipulates that:

"(5) Any person who contravenes the provisions of subsection (4) shall be guilty of an offence and liable on conviction to a fine of less than four thousand Emalangenani but not exceeding thirty thousand Emalangenani or, in default of payment, to imprisonment for a term of not less than one year but not exceeding five years:..."

These provisions have to be read together with the compensation or replacement provisions of ss 6 which provides that

"(6) Any person found guilty of an offence under subsection (1), (3) or (4) shall be required by the court in addition to any penalty imposed under that subsection, to either

replace the game or compensate fully for its replacement value, failing which such person shall be liable to a further period of imprisonment of not less than two years but not exceeding six years."

(The underlining is mine. The notion of replacement perhaps derives its force from Swazi Customary law whereby if one's livestock is killed or slaughtered, the wrongdoer, on conviction is ordered to "resurrect" it by providing its replacement - *kuyivusa* or *kuyimisa*.) The learned trial magistrate herein did not consider or deal with these provisions. He was, however, following the conviction of the accused, enjoined in law, to deal with the issue of compensation and its related consequences. The provisions of ss6 make it plain that in every case following a conviction for a contravention of the three stated subsections, this exercise or inquiry has to be undertaken. The Criminal proceedings are thus technically incomplete without a consideration and or determination of such inquiry.

[7] The wording of ss6 do not appear to me to require the setting in motion thereof, an application (for compensation), by the public prosecutor or the person to whom the compensation is due or is to be made as is the case under section 321 of the Criminal Procedure and

Evidence Act 67 of 1938. (Vide **Alpheous Sikelela Matsenjwa v R Criminal Appeal 20/08 (unreported) (judgement delivered on 19/2/09)**). Reference is also made to the judgement by Sapire CJ (as he then was) in R v Peter McIntyre and 5 others, Criminal trial 43/2001, delivered on 11th March 2002 (unreported) on the issues raised by section 8 (6) of the Game Act.

[8] For the foregoing, the matter is remitted to the trial magistrate for him to deal or address the dictates of ss6 of section 8 of the Game Act. Thereafter the court record is to be resubmitted to the Registrar on review in the normal way.

MAMBA J