

THE PEOPLE v MUKANGA AND OTHERS (1967) ZR 59 (HC)

HIGH COURT

WHELAN J

10th 5 APRIL 1967

Flynote and Headnote

[1] Animals - Hunting illegally - Forfeiture as penalty - Section 39 (3) of Fauna Conservation Ordinance construed.

Forfeiture of the weapons used in hunting in violation of the Fauna Conservation Ordinance is a discretionary penalty, and in any 10 event the property of any person other than those guilty of the offence cannot be made forfeit pursuant to section 39 (3) of the Fauna Conservation Ordinance.

[2] Criminal law - Hunting illegally - Punishment - Forfeiture of weapons.

See [1] above. 15

Cases cited:

(1) *The People v Golayi and Mulambo* 1965/HP/370 (*unreported*).

Statute construed:

Fauna Conservation Ordinance (1955, Cap. 241), s.39 (3), as amended.

Judgment

Whelan J: On the 9th January, 1987, before the subordinate court 20 of the first class for the Samfya District, holden at Samfya, the first second and fourth accused were convicted of hunting, contrary to the provisions of the Fauna Conservation Ordinance, and on the 16th January, 1967, pursuant to section 39 (3) of the Ordinance, the court ordered the forfeiture of three guns which had been used by the convicts in the course 25 of their illegal hunting, which guns were the property of Nason Mkalula, Vincent Mumba and Makonta Kasoma, respectively.

Prior to making the order of forfeiture the learned resident magistrate said in relation to the wording of section 39 (3) of the Fauna Conservation Ordinance: "The provisions of the subsection are mandatory; in 30 other words the court has no option but to make the order for forfeiture no matter what the true owners have to say." In considering that the provisions of the subsection were mandatory the learned resident magistrate was obviously unaware of the decision of this court in the case of *The People v Golayi and Mulambo* [1] which was pronounced by a 35 Divisional Court in January, 1966, and in which it was held that section 39 (3) of the Fauna Conservation Ordinance confers a discretionary power to make orders for forfeiture and that in any event the subsection does not empower a court to forfeit any property in which any person, other than one punished for an offence under the Ordinance or for a breach of any 40 rule or regulation made thereunder, has any legal rights or ownership.

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WHELAN J

Nason Mkalula, Vincent Mumba, and Makonta Kasoma were not involved in the offence of illegal hunting, and I therefore set aside the order forfeiting their guns to Government. The said guns are to be returned to the respective owners. 5

Order set aside