



**Musau v Republic (Criminal Revision E272 of 2023)  
[2024] KEHC 17191 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 17191 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CRIMINAL REVISION E272 OF 2023**

**TM MATHEKA, J**

**JULY 26, 2024**

**BETWEEN**

**MARY MWIKALI MUSAU ..... APPLICANT**

**AND**

**THE REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. Kyalo and Mary were jointly charged with Daniel Kioko Katua in Makindu MCCC 860 of 2019 with the offence of being in possession of Wildlife trophy contrary to section 92(4) of the [Wildlife Conservation and Management Act](#) 2013. It was alleged that on 12/10/2017 at Kyumani area in Kibwezi sub county within Makueni county were jointly found being in possession of Wildlife trophy namely 6 pieces of elephant tusks weighing 32 kg with an approximate value of FKshs.2 million without authority from the Director General of the Kenya Wildlife Service.
2. Upon a full trial- the accused persons were found guilty and convicted – and on diverse dates were sentenced to terms of imprisonment:-

Daniel – On 29/8/2022 to 10 years imprisonment, Mary – On 17/12/2021 to fine of Kshs.3 million fine in default 5 years imprisonment.

1. Daniel filed HCCRA No. E103 of 2022.
2. Upon hearing the appeal I arrived at the conclusion that the prosecution had not established the case against Daniel to warrant his being convicted. I allowed the appeal and acquitted him on 5/7/2023.
3. His co-accused have now come before me – Kyalo on appeal and Mary, on Revision of sentence

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4. In the interests of justice I have consolidated the two matters because the facts of the case were exactly the same.
5. In HCCRA E103 of 2022 I found that the State had relied on the evidence of PW1 – where he stated;

“I am KWS No. [particulars withheld] CPL Nicholas Munene attached at KWS headquarter doing investigations. On 12/10/2017 while at KWS headquarters Langata when at midday I got information from members of public that Chumani in Machinery at Makueni county there were three people being in possession of elephant tusks and wanted to sell the same. I informed my superiors and they gave me a go ahead to plan a recovery operation. I left Nairobi and on the way I called a colleague from Tsavo West National Park being Ranger Isdory Mwandau and ranger Waweru. Waweru who was to provide re enforcement. I arrived at Machinery where I met my colleagues. I met my two colleagues. They entered our unmarked vehicle and we headed to Chumani while I was directed by one of the accused person. On arrival at Chumani my colleague alighted to provide surveillance. I met two men whom we discussed for a while on the deal and we agreed that the same would be finalized upon seeing the ivory. They informed me that a 3<sup>rd</sup> person being a lady was guarding the ivory. We left Chumani market and at about one kilometer they asked me to stop the vehicle. He two men alighted, entered a bush near the road. Asked that we proceed by foot. Inside the bush we measured ivory being 32 kg. We carried the said ivory which was in 2 sacks. They were six pieces packed in two sacks. The two men and a lady then entered the vehicle with the two sacks also inside. I drove back to Chumani market and after a short distance I saw my colleagues by road side whom I signaled and they approached the vehicle while I had stopped. My colleagues and I identified ourselves as KWS officers. We asked for certificate of ownership for the 3 but none provided any. We arrested them and took them to Mtito Andei police station. We booked at the occurrence book and the three people were charged with the offence herein. The two sacks which the ivory was packed are in court. They are white nylon sacks. The 6 pieces of ivory are also in court. The 6 pieces were tied in a rubber band. 2 sacks MFI 4(a) – (b), rubber band – MFI 5 – black. I do not know the accused. I met them on the day I arrested them. I was communicating with accused 1. When I arrived he introduced to me as Katua. He informed me that he was the one I was communicating with. I found accused 1 with accused 2 at Chumani town. The lady colleague was accused 3 who was guarding the ivory where they had hidden them. On 12/10/2017 I went to Chumani area and we reached at 7:30 pm. I found accused 1 and accused 2 standing outside the shop at the market.”



3. The learned trial court accepted the case for the prosecution and according to the judgment, found that the defence case was like a “telenovela movie ... nothing short of a script”.
4. Mary’s application for revision was for the court to allow her serve the remainder of her sentence as a non-custodial sentence. She did this after she withdrew her appeal HCCRA E120/2021 on 13/6/2022 – to file the revision on 13/9/2023. There is nothing in the earlier file to show whether or not she was aware of Daniel’s appeal. The same applies to Kyalo.
5. The grounds of appeal for Kyalo were mainly that the learned trial court did not consider the evidence in total as the case for the prosecution was not proved beyond a reasonable doubt. In his submissions he relies on the judgment I delivered with respect to the Daniel.
6. He submits – first that he was not accorded his right to legal representation and cites – *Pett v Greyhound Racing Association* 4 [19681 2 All E.R. 545, 549 the famous words of Lord Denning on the complexity of a criminal trial and how tongue-tied a lay person may become;

“It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weaknesses in the other side. He may be tongue-tied or nervous, confused or wanting in intelligence. He cannot examine or cross examine witnesses. A magistrate says to a man: "You can ask any questions you like"; where upon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him; and who better than a lawyer who has been trained for the task? I should have thought, therefore, that when a man's reputation or livelihood is at stake, he not only has a right to speak by his own mouth. He has also a right to speak by counsel or solicitor.”

1. On the sentence, he submits that the sentence was harsh and relies on the [Judiciary Sentencing Policy Guidelines](#).
2. In her statement of defence Mary told the court how she was arrested while in the homestead of one Mau Ndiu – by officers who were looking for people they claimed had escaped. When she was arrested the motor vehicle that came into that homestead and the two other accused persons and she was shown the elephant tusks. She denied being in possession of the same.
3. For Kyalo – he told the court that his defence was the same as that of Daniel as they were together that day looking for a shamba at Kibwezi to do irrigation farming. They boarded a Probox which was stopped by KWS officers who led them to a home – where they wanted them to pose as people who wanted a meet some people in the home. As their Probox entered the homestead, some people ran away – the officers gave chase but failed to catch them. They arrested the accused and the three of them were taken to the police station.
4. In analyzing the evidence in HCCRA 103 of 2022 I stated inter alia:

PW2 told the court that he received intelligence on 12/10/2017 that there were three people at Chumani Machinery, Makindu in possession of elephant tusks. He was in Nairobi. He left Nairobi and called a colleague from Tsavo West – and went to Chumani in unmarked car. His evidence begins to get vague when he states that he headed to Chumani while directed by one of the accused persons he says while I was directed by one of the accused



person – which one of the accused persons was this? Under cross examination he says it is the first accused person, how did this accused person direct him to the venue? He does not state how this happened in his evidence in chief and it only comes out while on cross examination that the direction was via mobile phone. He can recall the mobile phone number he was using but did not consider it important, he or the I.O to retain the number of the accused person who was directing him or produce the call data to establish this fact without a doubt.

6. According to PW2 him three persons were involved in this tusk heist – a criminal activity – one of them allegedly gave him directions to the meeting point through a phone conversation. . The prosecution had the obligation to prove this fact beyond any reasonable doubt. They ought to have done so by producing the name of that accused or specific person and the means by which he was directing PW2 because the witness was allegedly driving and taking directions. He stated that he met his two colleagues. They entered our unmarked vehicle and we headed to Chumani while I was directed by one of the accused person. Clearly the accused who was directing him was not in the motor vehicle with him and his two colleagues. It can safely be presumed then that the direction was by mobile phone, then he ought to have given the phone numbers they were using and to produce the phone records. The phone particulars would have been used to forensically specifically fix the location where the alleged directing accused person was at the time of the alleged call. KWS has the capacity to give GPS coordinates of persons found within park without authority. Since every aspect of the charge was denied by the accused persons, the I.O could easily have obtained the requisite data from the mobile phone of the appellant to place him where PW2 claimed he was and to prove that there was communication between his phone and that of PW2. In fact, it is the lack of proof of these initial facts in the case for the prosecution that, to quote the words of the learned trial magistrate, begin to read like a novel.
7. According to the witness he met two men – one of whom must have been the one giving directions. No name is given.
8. Allegedly the deal was discussed on the roadside and the ivory was weighed in the bush. Now so many questions arise. These persons were doing something criminal. They did not know the alleged buyer, they had never met him, there is nothing in the evidence of the PW2 to indicate how he got the phone number of the accused person who was directing him so as to enable all these.
9. There is no supporting evidence of the alleged weighing of the tusks. What was used to weigh? Whose weighing machine was it? Why was it not produced as evidence?
10. It is noteworthy that there is contradictory evidence to the issue of weighing the evidence. Though on the cross examination he said they weighed the tusks with a weighing machine belonging to the KWS, that weighing machine that was allegedly used to weigh the ivory in the bush was not produced as exhibit.
11. The witness in his evidence in chief produced two sacks and a rubber band. There nothing on record to show that the tusks were marked for identification in evidence in chief by PW2. It is in cross examination as that the ivory is marked as MFI 1(a) to 1(f).
12. It is also not clear at what point the accused persons were notified that they were under arrest and their rights of the arrested persons explained to them. The witness simply states that after the weighing of the tusks, the three got into the motor vehicle and they headed back to Chumani market, from there



- the two colleagues who had alighted boarded the motor vehicle and they all proceeded to Mtito Andei police station.
13. PW3 testified that he joined PW2 on an operation – he and his colleague boarded the motor vehicle driven by PW2 on it was back from the bush and he conducted search of the motor vehicle and recovered the two bags of ivory in the back of the motor vehicle – after the three including PW2 had introduced themselves as KWS officers.
  14. It is noteworthy that PW2 said he was driving a Noah PW3 said he would not recall the make – but that it was a small motor vehicle. He said he had not searched the motor vehicle before it went to the bush with PW2. He said he did not know how the ivory got to the back of the motor vehicle- he said he did not have a weighing scale. He said the tusks were weighed at the police station when the accused persons were handed over to the Investigating Officer. He said he did not see PW2 label the tusk that were allegedly found with the accused person.
  15. He also testified on cross examination that the accused persons and PW2 were the only people at the market at that time and that at 50m away he could identify them in the light of the car and passing bodabodas and other motor vehicles as the persons who stood with PW2 on the roadside and also boarded the motor vehicle with him.
  16. The investigating officer was No. [particulars withheld] PC Mwihaki who testified that she took over from the original Investigating Officer PC Kinyua. She established that the matter was reported on 13/10/2017 by PW2 and Others – it is noteworthy that the arrest is said to have happened on 12/10/2017 and the three KWS officers and their catches went straight to the police station. She never visited the scene – there is no evidence that her colleague visited the scene. She simply took over the file from the Investigating Officer on 19/10/2020. It was her testimony on cross examination that she broke into PC Kinyua’s desk to get the police file – that PC Kinyua had not recorded his statement, that there had been an initial Investigating Officer a PC Munyororo who had been transferred and handed over to PC Kinyua – that this PC Munyororo had recorded a statement which she read – that his statement did not have anything about the tusks being weighed, she never received any weighing certificate from the Investigating Officer. She could not tell who had marked the tusks (ivory) yet it was the responsibility of the Investigating Officer to mark the exhibits and escort them for analysis.
  17. I have carefully considered the case for the prosecution. It is evident that other than the production of the exhibits alleged to have been recovered from the appellant and others, and the prosecution did not place before the court sufficient evidence to warrant the conviction of the appellant.
  18. There is no evidence that he was at the scene where the tusks were said to have been hidden and guarded by A3 – DW1 testified where he found A3. It is only PW2 who knows where the ivory was found and with whom and his colleagues could not have collaborated his evidence that the same was found with the appellant and his co accused. This is because his colleagues only got into the m/vehicle after the three accused persons were in the m/vehicle with the PW2. PW2’s colleagues could not say where the ivory came from because they only searched the m/vehicle after the ivory was allegedly recovered. The investigating officer ought to have found this fact curios and conducted thorough investigations.
  19. The big break in the chain of evidence was the missing mobile phone records of the alleged calls between the PW2 and the appellant. These would have identified the appellant as that accused who was discussing with PW1 – the fact that the KWS officer chose not to avail that evidence can only draw the conclusion that it was not there and if it was it would not support the case for the prosecution.
  20. The case was not investigated. The Investigating Officer did not record that he weighed and marked the exhibits – there was no weighing certificate, the alleged weighing scale allegedly used to weigh the



ivory in the bush was not produced. Other than the testimony of PW1 – there was no investigation by the Investigating Officer. He did not see or use the alleged scale and did not testify in court.

21. As was stated in *Bhatt v Republic* had the learned trial magistrate scrutinized the evidence of the prosecution's star witness she would have found that it did not add up and would not have placed the accused on their defence. Having done so, there was no reason for the learned trial court to disbelieve the appellant's defence.
22. Having relooked at the evidence and scrutinized the record, I find that the prosecution laid no connection between the appellants and the tusks that were brought to court.
23. Having found that – I find no reason to deal with the issue of the sentence.
24. The appeal succeeds – the conviction is quashed, the sentence be and is hereby set aside and the appellants be are hereby set at liberty unless otherwise legally held.

**DATED, SIGNED AND DELIVERED 26<sup>TH</sup> DAY OF JULY 2024**

**MUMBUA T MATHEKA.**

**JUDGE**

