Muthui v Republic (Criminal Appeal E011 of 2023)
[2024] KEHC 13264 (KLR) (29 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13264 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITUI

CRIMINAL APPEAL E011 OF 2023

FR OLEL, J

OCTOBER 29, 2024

BETWEEN

LARS MWANGANGI MUTHUI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from conviction & Sentence of the Principal Magistrate Court at Mutomo (Hon. P.M Mayova- Principal Magistrate) dated 12th April 2023 in Mutomo Criminal Case no. 157 of 2020)

JUDGMENT

A. Introduction

1. The Appellant was charged with the offence of being in possession of Wildlife Trophy contrary to Section 95(d) of the Wildlife Conservation & Management Act 2013. The particulars were that on 29th July 2020 at about 09.40 am at Kona Kaliti area of South Kitui National Reserve, Mutha location in Mutomo sub county within Kitui County, jointly with others not before court, he was found in possession of Wildlife Trophy namely twelve pieces of Elephant tusks to wit 93.4kilograms with a street value of Ksh.9.3 million without a permit issued or exemption granted by Kenya Wildlife services in contravention of the said Act.

2. On count II the appellant was charged with the offence of being in possession of suspected stolen property contrary to Section 323 of the Penal code. The particulars were that on the 29th day of July 2020 at about 9.40am at Kona Kaliti area of South Kitui National Reserve Mutha location in Mutomo Sub County within Kitui county, jointly with others not before court having been detained by No.72xxx Sgt Richard Nyakundi as a result of exercise of the powers confirmed by Section 26 of the Criminal Procedure Code he was found in possession of one motor cycle make Bajaj registration

no. KMDP xxx A valued at kshs.60,000/= reasonably suspected to have been stolen or unlawfully obtained.

3. The Appellant pleaded not guilty and the case proceeded to full trial. The prosecution called a total of four (4) witnesses and on being placed on his defence the appellant too gave sworn testimony and called one witness. The trial court considered all the evidence tendered and proceeded to convict the appellant on count I. He was sentenced to pay a fine of Three Million (ksh. 3,000,000/=) and in default to serve six years imprisonment. The appellant being dissatisfied with the said verdict filed this instant Appeal challenging both conviction and sentence.

B. Evidence at Trial

4. PW1 Simon Munene Njeru testified that he was a KWS officer based at Kitui National Reserve for the past eleven (11) years. On 29.07.2020 he received information while at Kalalani Camp that some people were selling elephant tusks. Together with his colleague Albashir, they went to kona kalita area where they found three (3) people next to a motorcycle that had luggage. They posed as prospective buyers of the Elephant tusks and told them to offload the luggage to enable them see the tusks before they could then agree on the price. After confirming the said persons had elephant tusks, they identified themselves as KWS officers and proceeded to arrest the appellant and his co-accused Ismael while the third suspect managed to escape and ran away.

5. Inside the white sack, they found 4 elephant tusks and on following the motorcycle tracks, they found eight (8) other tusks under a tree about 100 meters away. In total, they recovered twelve (12) tusks and detained the recovered motorcycle registration Number KMDP xxxA. PW1 identified the elephant tusks and motorcycle before the court and confirmed that it was the appellant and his co-accused Ismael whom they arrested and were the accused before the court. Upon cross-examination, PW1 stated they acted on intelligence received and reinstated his earlier evidence of how they arrested the appellant and recovered the elephant tusks presented before the court.

6. PW2 Ranger Ali Bashir Abdisaliman also confirmed and reiterated the evidence of PW1 and explained how based on the intelligent report, they went to Kona Kaliti posing as prospective purchasers of elephant tusk and upon confirming that the appellant and his co-accused had the said tusks proceeded to arrest them, though one of their co-conspirators fled and was not arrested. He also confirmed that the appellant was amongst the arrested persons.

7. PW3 Esther Nguta stated that she worked for the National Museum of Kenya as a Research scientist and had 20 years of experience in her line of work. On 14.08.2020, while on duty, she received certain exhibits marked (A)(1) to (A) (12) and was requested to examine them to confirm if they were elephant tusks. She examined them separately, identified the morphology, and shapes of the granules, and confirmed that indeed they were elephant ivory. She further compared the ivories with what they had in the museum repository and the exhibits indeed matched with the elephant ivory they had in their custody. She prepared her report dated 14.08.2020 which she presented before court as Exhibit 5. Under cross-examination she confirmed that she examined the tusks, the very day they were presented to her and also made her report on the same day. She also confirmed that she did not know the value of the said tusks as it was not part of her job description.

8. PW4 Sgt Richard Nyakundi confirmed that he was the investigating officer and recalled that on 29.07.2020 at about 18.43hrs he was at Mutomo police station when the accused persons were brought in by a team of policemen and KWS officers based in Kalalani Camp on allegations of being in possession of 12 pieces of Elephant tusks which were handed over to him and he made an inventory of the same indicating that they weighed about 93.3kgs. He was informed that KWS officers acting on

an intelligence report had laid a trap and arrested the appellant and his co-accused. They recovered the twelve (12) tusks that the accused had in their possession and also recovered the motorcycle KMDP 380A they were using.

9. Thereafter he prepared an exhibit memo and took the Elephant tusks to the National Museum for verification. PW6 produced all the tusks, exhibit memo form, inventory, and sacks containing the tusks as Exhibits. Upon cross-examination, he confirmed that he was the investigation officer and after arrest by PW1, PW2, and other police officers, the appellant and his co-accused were brought to the police station and investigations were handed over to him. He also confirmed that the accused were arrested at Kona Kaliti and not at Waldena as alleged.

10. The appellant was placed on his defence with respect to count I. He gave sworn evidence and testified that on 28.07.2020 he was at Waldena at the border of Tana River and Kitui counties and was there to buy cows. At about 10.00 am a police officer in plain clothes came to the hotel where they were and asked him what he was doing within the said area, to which he replied that he was a livestock trader. The said officer, then requested him to accompany him to the local police station for further investigations and later he was locked up as they were not satisfied with his personal information, he had given them. The following day he was brought to Mutomo police station in a KWS land cruiser, which had the motorcycle and ivory presented before court. It is on this trip that he saw his co-accused Ismael for the first time and he was a person not previously known to him.

11. The appellant denied ever being involved in Elephant ivory trade nor had he been to Kona Kaliti before. He also urged the trial court to note that he signed the inventory under duress at Mutomo police station. Upon cross-examination, the appellant confirmed that he signed the inventory without reading the same and had no control over the events that occurred.

12. DW2 Nashon Malombe Mulwa testified that he was a livestock trader and had been in that business since 2011. He had known the appellant since 2018 and they had engaged in livestock trade at Nguni and Mwingi livestock markets. On 28.07.2020, they were at Kamene's hotel waiting for a client, when a police officer called Kamenya from Waldena police station came and arrested the appellant without informing them of the reason for his arrest. On the following day, he was informed that the appellant had been arrested for being in possession of Wildlife trophy which allegation was not true as he had been with the accused and did not have possession of any wildlife trophy at the time of the arrest. DW2 also confirmed that the appellant was arrested at Waldena and not kona kaliti which was 50 km away.

13. Accused 2, Ismael Dame Dado also gave sworn evidence and stated that he too was a livestock trader at Waldena situated within Tana River County. He had never crossed over to Kitui as he had no business on that end. Further, he had not been found with Elephant tusks as alleged. On 29.07.2020 at about 9.30 am he had taken his animals to go drink water and met three (3) persons who had parked their motorcycle beside the road. They greeted him and asked for directions. while still talking to them, a Toyota Probox car came towards them and stopped where they were. Two (2) people alighted, greeted them, and immediately proceeded to arrest him. The two of the persons he found by the motorcycle fled despite bullets being fired to scare them to stop.

14. He was not informed of the reason for his arrest and was placed inside the Probox which had four (4) other occupants, taken to Kona Kaliti and later to Kalalani KWS camp. Later in the day a KWS vehicle/ land cruiser came loaded with the motorcycle and Elephant tusks, they were photographed and taken to Mutomo police station. Accused two maintained he was innocent and did not know his co-accused-the appellant herein.

15. Accused Two also called one witness Musa Osman Dado, who confirmed that he was a pastoralist, and Accused Two was his neighbor. On 29.07.2020 he had seen him graze his animals at about 10.00

am and shortly thereafter heard gunshots. He went to see what was happening and found that the 2nd accused person had been arrested and put at the boot of the Probox. Upon cross-examination, he confirmed that he was not related to the 2nd accused person and he did not see any ivory at the scene where the accused two was arrested.

16. At the close of defence case, the trial magistrate did consider all the evidence tendered, the parties' submissions and proceeded to convict the appellant and his co-accused on count I of being in possession of wildlife trophy contrary to provisions of Section 95(d) of the *Wildlife Conservation and Management Act* 2023. He sentenced them to a fine of ksh.3,000,000/= and in default they were to serve six (6) years in jail. Right of Appeal was granted within 14 days.

C. The Appeal

17. The appellant relied on his amended petition of Appeal dated 5th February 2024 where he raised the following grounds of Appeal.

    a. The learned magistrate erred in law and in fact in convicting the Appellant based on fatally defective charge sheet whose particulars of offence did not disclose one offence in line with Section of the law under which the Appellant was charged.

    b. The learned magistrate erred in law and misdirected himself in fact in failing to analyze all the recorded evidence and testimonials of the witness.

    c. The learned magistrate erred in law and misdirected himself in fact in relying on contradictory testimony of prosecution witness to convict the appellant.

    d. The learned magistrate erred in law and in fact in failing to appreciate and analyze the law and principles applicable to an alibi defence and thereby arrived at a wrong conviction.

    e. The judgment of the learned magistrate is not supported by the weight of the evidence on record.

    f. The magistrate erred in law and in fact in imposing a sentence that was manifesting excessive in the circumstances of the case.

18. The appellant urged the court to allow this appeal, set aside conviction and sentence, and be pleased to free the appellant.

D. Parties Submissions

Appellants Submissions

19. The Appellant submitted that the prosecution's right to amend the charge sheet could only be exercised before the close of the prosecution case. In this case the Appellant was charged with the offence of "Being in possession of wildlife trophy contrary to Section 95(d) of the Wildlife Conversation and Management Act 2023" and the particulars stated were that he was found in possession of Wildlife trophy namely 12 pieces of elephant tusks to wit 93.4kilograms with a street value of ksh.9.3million without a permit issued or exemption granted by Kenya Wildlife Service in contradiction of the said Act. PW3 Esther Nguta also confirmed that the 12 tusks recovered were indeed Elephant ivory and produced her report as Exhibit 5 to confirm the same.

20. Section 95 of the *Wildlife Conservation and Management Act* 2023 was to be read with Section 92 thereof which listed endangered species as those specified in the sixth schedule or listed under CITES Appendix I of the said Act. The said sixth schedule only protected " Loxadante Africana" whose

common name is " African Elephant" under the endangered species category and it therefore followed that Section 95(d) of the said Act, did not apply to African Elephants. To that extent the charge sheet was defective on its face and the appellant urged the court to so hold. Reliance was placed on Jason Akumu Yongo versus Republic (1983) eKLR.

21. The appellant further submitted that the trial magistrate misdirected himself and relied on contradictory evidence to convict him, which went against the weight of the evidence tendered. He cited several instances of contradiction between the evidence of PW1 and PW2 and the fact that their recorded statements were similar in content. This he submitted led to the irresistible conclusion that he had been framed. Reliance was placed on Elijah Seka Ochito vrs Republic 2009 eKLR and Michael Nthambura Mugambi and another versus Republic (2012) eKLR to buttress/support his contention that the trial court should not rely on contradicting evidence to convict an accused person.

22. The appellant also faulted the trial court for failing to appreciate his alibi defence, despite the same being raised at the earliest opportunity. Further, he also faulted the trial magistrate for shifting the burden of proof on him while considering his Alibi defence, yet the law was settled that he had no duty to prove his innocence. Reliance was placed on Wambia vrs Republic 1985 eKLR, Enock Otieno Meda versus Republic (2019) eKLR, Karanja vrs Republic (1983) eKLR and Victor Mwendwa Mulinge versus Republci (2014)eKLR to buttress this issue.

23. On sentencing, the appellant submitted that Section 95(2) of the *Wildlife Conservation and Management Act* 2013, provided for a sentence of 12 months and in the alternative a fine of Kenya shillings one million or both. The appellant was a first offender and the trial court had erred in fining him three times more than the amount prescribed and a jail term too that was six times more than what was provided by law. The sentence was thus manifestly excessive and he urged this court to review the same downwards.

Respondent's Submissions

24. The Respondent through the Principle prosecuting counsel submitted that her witnesses conclusively proved that the Appellant was found in possession of Wildlife trophies confirmed by PW3 to be Elephant tusk. PW1 and PW2 were the arresting officers and vividly recalled in detail how acting on an intelligence report they laid a trap and proceeded to arrest the appellant and his co-accused. They recovered 12 pieces of elephant tusks and their motorcycle. This evidence was not impeached by the Appellant's alibi defence, which came as an afterthought and was not supported by concrete evidence presented. The Appellant's witness also produced Animal movement permits that were outdated and had no relevance to the period under inquiry.

25. The Respondent further submitted that the contradictions and inconsistencies pointed out by the prosecution were not of material relevance and related to minor issues that did not go to the root of the prosecution case. Finally, Section 95 of the *Wildlife Conservation and Management Act* 2013 provided for a fine of not less than one million shillings or imprisonment for a term of not less than five years or both such imprisonment and fine. The sentence handed down was thus lenient and lawful thus should not be disturbed.

26. The Respondent thus urged the court to dismiss this Appeal in its entirety and uphold both conviction and sentence.

E. Analysis And Determination

27. On the first appeal, this court is expected to re-evaluate the evidence tendered before the trial court and to come up with its own logical conclusion by taking into account the fact that it did not have

the advantage of seeing and hearing the witnesses and their evidence and/or see their demeanor. The Court of Appeal in Kiilu & Another V Republic, [2005] 1 KLR 174, stated thus:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.
>
> It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

28. Also in Peter's vs Sunday Post(1958) E.A. 424 it was said that it is not the function of the first appellant court merely to scrutinize the evidence to see if there was some evidence to support the lower court finding and conclusion: it must make its own findings and draw its own conclusions. Only then can it be decided whether the magistrate's findings should be supported. In doing so it should make allowance for the fact that the trial court had the advantage of hearing and seeing witnesses.

29. The Appellants main grounds for challenging his conviction and sentence was that the charge sheet was defective, the evidence adduced was inconsistent and contradictory and finally, he further alleged that the trial court failed to properly evaluate the defence offered and wrongly shifted the burden of proof on him which was un-procedural.

Burden of Proof.

30. It is trite law that all criminal offenses require proof beyond reasonable doubt to prove the accused culpability. Lord Denning in Miller vs. Ministry of Pensions (1947) 2 All ER, 372 stated as follows;

> " That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is beyond reasonable doubt, but nothing short of that will suffice."

31. The conceptual framework for the burden of proof to be discharged by the prosecutor consists of two components i.e the burden of proof and evidential burden which duty is enunciated by Fidelis in his book Modern Nigerian Law of Evidence, University of Lagos Press, Lagos (1999) 379 when he stated that;

> " The term burden of proof is used in two different sense. In the first sense, it means the burden or obligation to establish a case. This is the obligation which lies on a party to persuade court either by preponderance of evidence or beyond reasonable doubt, that the material facts which constitutes his whole case are true, and consequently to have the case established and judgment given in his favour. The other meaning of the expression burden of proof is the obligation to adduce evidence on a particular fact of issue. This evidence in some cases, must be sufficient to prove the fact or issue to justify a finding on that fact or

issue, in favour of the party on whom the burden lies. It is called the evidential burden. This is the sense in which the expression is more generally used.

32. PW1 and PW2 explained at length in evidence in their evidence in chief and under intense cross-examination by the appellant's counsel how acting on intelligence report, they did approach the Appellant and his co-accused and posed as prospective buyers of Elephant Ivory/tusks. The Appellant opened the sack that was on the motorcycle and therein they saw the Elephant tusks. They thereafter proceeded to arrest the Appellant and his co-accused in the primary suit, while their third Accomplice ran away.

33. They also followed and traced the motorcycle path backward and about 100m away they found eight (8) other Elephant tusks. After that arrest, they took the Appellant and his co-accused to Mutomo police station, where they were processed and charged before the court. The prosecution called PW3 Esther Nguta, a Research Scientist working for the National Museum of Kenya who examined the Elephant tusks and confirmed that indeed they were Elephant tusks and produced her report as Exhibit 5. The prosecution, therefore, did prove that the Appellant was found in possession of Elephant tusks and a prima facie case was made to warrant placing him on his defence.

Whether the charge sheet was defective

34. The appellant submitted that he wrongly charged under provisions of Section 95(d) of the *Wildlife Conservation and Management Act*, 2013, as the specific law that dealt with endangered species/ Elephant (Loxodanta Africana) ivory was Section 92 which specified endangered species as specified in the Sixth schedule or listed under CITIES Appendix I, and further provided under Section 92(4) that any person found guilty of having trophy would be fined not less than three Million shillings or a term of Imprisonment of not less than five years or both such fine and Imprisonment.

35. Section 134 of Criminal Procedure Code provides for what the components/ingredients of the charge sheet constitutes;

> " Every charge sheet of information shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

36. In determining whether a charge sheet is defective or not the court of Appeal in Sigilani versus Republic (2004)eKLR 480 held as follows;

> " The principle of the law governing charge sheet is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clean and unambiguous manner so that the accused maybe be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence."

37. The court of Appeal in Benard ombuna Vs Republic addressed the issue of a defective charge sheet in the following terms;

> " In a nutshell, the test of whether a charge sheet is fatally defective is subjective rather than formalistic. Of relevance is whether a defect on the charge sheet prejudices the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence."

38. In BND Vrs Republic (2017) eklr it was held as follow's

> " our case law has given crucial pointers. Two cases are pertinent: the case of Yosefa vr Uganda (1969) E.A. 236- a decision of the court of Appeal- and sigilani Vrs Republic (2004) 2 KLR 480- A high court decision by Justice Kimaru. Both hold that a charge sheet is fatally defective if it does not allege an essential ingredient of the offence.....The answer from our decisional law is this: The test whether a charge sheet is fatally defective is a substantive one: was the accused person charged with an offence known to law and was it disclosed in a sufficient and accurate fashion to give an accused adequate notice of the charges facing him? If the answer is in the affirmative it cannot be said in any way other than a contrived one that the charges were defective..... The question is did this prejudice the appellant and occasion miscarriage of justice? I do not think so. There is no question in my mind that the accused person clearly understood the charges facing him well enough to understand the ingredients of the crime charged so that he could fashion his defence. In this case, he understood it well enough to offer an explanation when the facts were read out to him."

39. Section 382 of the Criminal Procedure Code also gives guidance on whether even with such a defect, justice could still be met or whether the defect is curable. It provides that;

> " subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be revered or altered on appeal or revision on account of an error, omission, or irregularity in the complaint, summons, warrant, charge proclamations, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under the code unless the error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question of whether the objection could and should have been raised at an earlier stage in the proceedings. It follows therefore that the court in determining whether a defect caused injustice has to have regard whether the objection should have been raised at an earlier stage in the proceedings".

40. Section 95 of the *Wildlife Conservation and Management Act* provides for offenses relating to trophies and trophies dealing, while Section 92 of the said Act deals with offenses relating to endangered and threatened species. The Appellant was found in possession of a wildlife trophy without a permit issued under the said Act and/or exempted in accordance with any provision thereunder. The prosecution had the option to charge the Appellant under either of the aforementioned provisions of the *Wildlife Conservation and Management Act* 2013 and therefore the court cannot fault the prosecution for the decision made to charge him under the former provision, which also disclosed a complete offense.

41. Further, it is clear that the appellant fully participated in the proceedings and cross-examined all the witnesses. This denotes that he understood the particulars of the charge he faced. The appellant also did not raise any objection to the facts raised in the charge sheet during the trial and cannot be said to have been prejudiced in any manner. This ground of appeal therefore cannot hold.

Was the Evidence presented Contradictory and Inconsistent, thus unable to Support the Conviction?

42. The law as regards the issues of contradiction and discrepancies is very clear. It is trite law that inconsistencies unless satisfactorily explained would usually, but not necessarily result in the evidence of a witness being rejected. (see Uganda Vrs Rutaro (1976) HCB ; Uganda Vs George w. Yiga (1979) HCB 217). In trying to shade light as to why there might be minor discrepancies between two witnesses

testifying on the same case, the high court of Kenya in Philip Nzaka watu V Republic (2016) CR APP 29 OF 2015, had this to say:

> "The first question in this appeal is whether the prosecution case was riddled with contradiction and in consistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gain said that the foundation of a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self-contradictory in material particulars or which is a mere amalgam of inconsistent version of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt.

43. Also as was noted in Twehangane Alfred vs. Uganda, Crim App. No. 139 of 2001, [2003] UGCA, 6:

> "With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

44. The question to be addressed is whether the contradictions mentioned are grave and point to deliberate untruthfulness or whether they affect the substance of the charge. While defining contradictions, the Court of Appeal of Nigeria in David Ojeabuo Vs Federal Republic of Nigeria stated that;

> "Now, contradictions means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains."

45. In this case, I have myself subjected the evidence adduced to fresh scrutiny and though there were indeed minor inconsistencies in the evidence of PW1 and PW2, which is common, I am unable to find that the same consisted of deliberate untruthfulness and/or that the inconsistencies in the evidence pointed out were material enough to warrant interference with the trial court's decision.

Alibi Defence

46. The Appellant raised an Alibi defense, that he was a livestock trader and had been arrested at Waldena situated in Tana River county and had put forward this defense at the earliest opportunity during cross-examination of the prosecution witnesses. His co-accused had also confirmed this evidence, especially the fact that he was booked at Waldena police station and faulted the trial Magistrate for shifting the burden of proof when he had no duty to prove his innocence.

47. In the South African case of Ricky Ganda vs. The State, [2012] ZAFSHC 59, the Free State High Court, Bloemfontein held:

> "The acceptance of the evidence on behalf of the state cannot by itself be sufficient basis for rejecting the alibi evidence. Something more is required. The evidence must be considered in its totality. In order to convict there must be no reasonable doubt that the evidence

implicating him is true...the correct approach is to consider the alibi in light of the totality of the evidence in the case and the courts impression of the witnesses...it is acceptable in totality in evaluating the evidence to consider the inherent probabilities...The proper approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weigh so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt."

48. In R v Mahoney {1979} 50 CCC it was held:

> " The governing principle on alibi defence is that a failure to disclose an alibi at a sufficiently early time to permit it to be investigated by the police is a factor which may be considered in determining the weight given to it."

49. In support of this right proposition, the court in R v Sukha Singh S/o Wazer Singh & Others {1939} 6 EACA 145 held:

> " If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards, there is naturally a doubt as to whether he has not been preparing it in the internal and secondly, if he brings it forward at the earliest possible moment it will give the prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness, proceedings will be stopped."

50. To discount, the alibi defence, the entirety of the prosecution evidence, direct or circumstantial evidence must be appraised to establish whether the appellant was elsewhere and not at the scene of the crime. Both PW1 and PW2 were emphatic that based on the intelligence report received, they did go to Kona Kaliti, posing as prospective purchasers of Elephant ivory and once they confirmed that the Appellant had the same in his possession, they proceeded and arrested him. The Appellant's counsel in cross-examination did ask the witnesses if the Appellant was arrested at Waldini, but they were emphatic that he was arrested at Kona Kaliti. PW4 also confirmed in cross-examination that he was not aware if the Appellant had been arrested at Waldini.

51. The Appellant in support of this contention also urged the court to review the evidence of his witness Nason Malombe Mulwa, who confirmed that he was a livestock trader and was arrested at Waldena and also the evidence of his Co-accused, who confirmed that after arrest, he was taken to Waldena police station, but was not booked. While at the station, (Accused 1) was brought from the cells to the vehicle and he was a person not known to him.

52. On review of the evidence presented, PW1, PW2, and Accused 2 before the trial court confirm that the locus in quo, where the accused persons were arrested was at Kona Kaliti of south Kitui National Reserve, in Mui location. The appellant's contention, that Accused Two confirmed that he was at Waldena police station and was brought to join him in the van from the police cell, must be taken with a pinch of salt, as the said second accused person in his evidence in chief stated that;

> " I was leading my animals to a river. That place is in Tana River. I was alone. Before I got to the river on the road to Tana River, I saw 3 people who had parked a motorbike there. There was a junction there. One of them greeted me in Orma I did not know him. He asked me the name of that place. He told me he was waiting for a certain vehicle. They had nothing with them. A probox came and parked near me and 2 people alighted. One of them greeted

me by hand in Somali language. He instead grabbed and held me tightly. The guys with a motorbike, 2 of them fled. The third came and joined the others. The third came and joined the others. These men fired bullets to scare those 2 away. These men did not tell me why they arrested me. Those who came in the Probox were 4. We entered the Probox 6 of us.

53. From the above it can be adduced that at the scene of the incident, there were 4 people including the 2nd accused person. When the police and wildlife officers came in a Probox, 2 officers approached them and when they arrested the 2nd accused person, 2 unknown people, fled the scene and were not arrested. The appellant's co-accused further stated that the Probox had four occupants, but eventually after arrest, they were six persons. This implies that those arrested were two people, and this evidence corroborated the evidence of PW1 and PW2 that they arrested the two in possession of Elephant tusks.

54. The Appellants co-accused also confirmed that they were arrested at Dirbu Diritu, which was about 4km away from Kona Kaliti. This also ties in with the prosecution's evidence as to the general area where the accused persons were arrested. Finally, the Appellant witness did allege that they were with the Appellant at Waldini livestock market on the material day and had gone to take tea at a local hotel when the Appellant was arrested, this evidence on a balance of probability when considered with the evidence of PW1, PW2 and Accused 2 shows that, it is unlikely to be true. The said witness also produced livestock movement permits of a different time frame and had nothing to specifically prove that they were at Waldini.

55. The trial magistrate, therefore, cannot be faulted to having found that the Appellant's Alibi did not displace the cogent evidence present by the prosecution to prove the offense with which the Appellant was charged with and eventually convicted.

Sentencing

56. As regards the sentence, This Court is guided by the principles in the Court of Appeal case of Bernard Kimani Gacheru vs. Republic [2002] eKLR where it was stated as follows:

> " It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

57. The Court of Appeal in Thomas Mwamba Wanyi Vs Republic (2017)eKLR cited the decision of the Supreme Court of India in Alister Antony Pereira Vs The state of Maharastra at paragraph 70 – 71 where the court held;

> " Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate and proportionate sentences commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles; twin objective of sentencing policy is deterrence and correction. What sentence would meet the end of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of crime, motive

for the crime, nature of the offence and all the attendant circumstances. The principle of proportionality by sentencing a crime done is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment must bear relevant influence in determining the sentence of the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence."

58. The Appellant herein was charged with the offence of being in Possession of a wildlife trophy contrary to section 95 of the *Wildlife Conservation and Management Act* 2023, which provides for a sentence of a fine of not less than one million shillings or imprisonment for a term of not less than five years or to both such imprisonment and fine. The Appellant was sentenced to pay a fine of Kshs.3,000,000/= or in default to serve a term of six (6) years imprisonment.

59. It has not been shown that the trial magistrate erred in the manner, in which he exercised his discretion in sentencing the Appellant. The sentence passed was not manifestly excessive in the circumstances of the case, nor did the trial court overlook some material factor, took into account some wrong material, or acted on a wrong principle.

F. Disposition

60. Having considered the entire Appeal I do find and hold that;

    a. The Appeal against conviction and sentence lacks merit and the same is dismissed

    b. Right of Appeal 14 days.

61. It is so ordered.

JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 29TH DAY OF OCTOBER 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 29th day of October 2024.

In the presence of:-

Mr. Muigai for Appellant

Ms Otulo for O.D.P.P

Shirleen/Kanja Court Assistant