



REPUBLIC OF KENYA



**John v Republic (Criminal Appeal E023 of 2022)
[2023] KEHC 1512 (KLR) (21 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1512 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL E023 OF 2022
RPV WENDOH, J
FEBRUARY 21, 2023**

BETWEEN

ALEX WAMBURA JOHN APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal arising from the conviction and sentence by Hon.
A. N. Karimi, Resident Magistrate in Kehancha Senior Principal
Magistrate's Criminal Case No. E062 of 2021 delivered on 15/3/2022)*

JUDGMENT

1. Alex Wambura John was charged before the Kehancha Resident Magistrate's Court with two offences namely:-
 1. Dealing with Wildlife Trophy contrary to Section 92(2) as read with Section 105 of the [Wildlife Conservation and Management Act 2013](#).
 2. Possession of Wildlife Trophy contrary to Section 92 (4) as read with Section 105 of the [Wildlife Conservation and Management Act](#).
2. The particulars of the charge are that on 14/1/2021 at Taranganya Area in Kuria West, with another not in court, were found dealing in Wildlife trophy ie 2 elephant tusks, weighing 11Kgs with a street value of Kshs 1.1. Million loaded on Motorcycle KMCH 574J Boxer, without a permit and secondly that they were in possession of the said elephant tusks without a permit. He was convicted on the 2nd charge and acquitted on Count 1. Upon conviction, the appellant was sentenced to a fine of Kshs 3,000,000/= in default five (5) years imprisonment.
3. The appellant is aggrieved by the conviction and sentence and he preferred this appeal based on the following grounds:-



1. That the appellant's right under Article 50(2)(g) and (h) were violated;
 2. That the ingredients of the offence were not proved;
 3. That the Country of origin of the tusks was not proved;
 4. That the appellant's defence was not considered.
4. The appellant filed written submissions on 3/10/2022. He submitted that the court did not advise him of his rights when he first appeared before the court; that having been acquitted of Count 1, it is proof that he was framed; that photos were not taken of the exhibits at the scene of recovery. The appellant urges this court to quash the conviction and acquit him.
 5. Mr. Mulama, the prosecution counsel filed his submissions on 4/10/2022 in which he opposed the appeal.
 6. Counsel submitted that the appellant was informed of his right to counsel. Counsel further argued that an accused person's entitlement to legal representation at State expense is not absolute or automatic but qualified because the accused has to demonstrate that substantial injustice will result; counsel relied on the decision of *David Njoroge Macharia v Republic* (2011)eKLR and *Republic v Karisa Chengo & 2 others* (2017) eKLR on Legal representation at State expense. Counsel argued that the court has to look at the complexity of the case; seriousness of the offence and ability of an accused to conduct his defence. Counsel urged that the appellant has not satisfied the above requirements or that substantial injustice was occasioned to him.
 7. As to whether the offences were proved, counsel urged that the appellant was actually found dealing with the trophies contrary to the trial court's finding because all the State was required to prove was that he was transporting or conveying the trophies. He urged the court to overturn the finding on Count 1 and convict the appellant on it.
 8. On Count 2: Counsel submitted that the appellant was properly convicted of possession; that the defence was considered and properly dismissed because the recovery and processing of the exhibits all pointed to the appellant's guilt; that the inconsistency in PW3, PW5 and PW6's evidence as to the pillion passenger who ran into the bush is not material to the case.
 9. On sentence, counsel submitted that the court considered the appellant's mitigation and arrived at the sentence after considering all the circumstances. Counsel relied on *Kariuki v Republic* (1970) EA 230 where the court held that sentencing is a discretion of the court. Counsel urged the court to maintain the sentence in line with the Convention on International Trade in Endangered Species of Wild Flora and Fauna / Washington Convention (CITES) 1973 to which Kenya is a signatory. Relying on the case of *Simon Kipkurui Kimori v Republic* (2019) eKLR, counsel urged the court to maintain the sentence.
 10. This is a first appeal and it behoves this court to re-examine all the evidence tendered before the trial court afresh, analyze it and arrive at its own findings. This court must however make allowance for the fact that it neither saw nor heard the witnesses testify, an opportunity which the trial court had. I am guided by the decision in *Kiilu v Republic* (2005) eKLR.
 11. In support of their case, the prosecution called a total of six witnesses. PW1 CPL Antony Mbao, investigating officer based at Langata was with his colleagues, Gladys Tanui (PW3) heading to Migori when they received information of people being in possession of elephant tusks in Bukira area and were proceeding to sell in Kehancha. He met Rodrick (PW5) Kimutai in charge Isebania Wildlife Service and one Ranger Mwiti. They were shown a picture of two people standing next to a motor cycle KMCH 574J loaded with sisal reeds. He was also told how the two men were dressed; At 6:00p.m they



- proceeded to Taranganya with the intention of intercepting the people before they got to Kehancha. They saw the suspect motor cycle heading to Kehancha from Sirare, and Gladys (PW3) flagged it down, it stopped a short distance from them and two men on the motor cycle fled on foot leaving the motor cycle on the road; that the rider wore yellow shorts and red trousers while the passenger wore bluish jacket. They pursued the people and caught the passenger but the rider fled into a maize plantation. They went back where motor cycle was and found two pieces of suspected elephant tusks hidden in the sisal reeds. The suspect failed to produce a licence. The suspect was arrested and they took possession of the motor cycle and the load. The items recovered were produced as exhibits.
12. PW2 Veronica Onduso of Kenya National Museums received two exhibits from one Samson Mwiti (PW6) the investigating officer, for purposes of examining and identifying the exhibits. On examination, she concluded that exhibits A1 and A2 were elephant tusks and she prepared a report to that effect.
 13. PW3 Gladys Tanui was with PW1 and driver Cpl Antony Ndungu when they got information of two people who were in possession of elephant tusks. The informer showed PW1 and PW3 the suspects a video on phone with tusks on a motor cycle. They planned to intercept the suspects i.e. PW1 Kimutai Antony Mbao, Mwiti and Kiswi Dishon(driver) at Taranganya Area . When they sighted the suspects, they stopped them, the rider fled into the bush but they managed to arrest the passenger. They found two elephant tusks concealed in sisal reeds; that he did not have a permit allowing him to possess the tusks. At the police station, she took photographs of the motor cycle and exhibits while Antony took an inventory of the exhibits and they took the suspect to Kehancha police Station where he was charged. The exhibits were weighed in the appellant's presence.
 14. PW4 CPL Joyce Muthoni of Kenya Wildlife Service Headquarters investigation section recalled that on 17/1/2021, she was given photographs allegedly taken at Taranganya road in Migori where the suspect was arrested. PW4 documented the photographs which she produced as PEX 13.
 15. PW5 CPL Rodrick Kimutai was with the other officers who arrested the appellant after they were stopped while on a motor cycle and arrested the appellant while the other rider escaped. He said that he had received photos of the suspects and the motor cycle loaded with the tusks. They weighed the recovered tusks in the presence of the Appellant.
 16. PW6 CPL Samson Mwiti was in the group that intercepted the appellant on a motor cycle while in company of CPL Rodrick Kimutai and CPL Gladys Tanui and Mbao; that the investigating officer forwarded the recovered items to Government analyst and got a report confirming that the items were elephant Tusks. He produced all the exhibits and report as exhibits.
 17. The Appellant was called upon to defend himself. He gave unsworn evidence. He stated that he is a motor cycle transporter and on 14/1/2021 about 7:00p.m he got a client to transport to Kurutyange. At the junction of Ikerenge and Masangora road, he met a police vehicle, was stopped and a lady alighted from the vehicle by name Lucy with whom they have a case 346/2017; that the lady asked the police in the vehicle to arrest her. He was handcuffed and brought a bundle of sisal to his motor cycle which he was forced to tie on the motor cycle. The passenger escaped. He was beaten up and taken to Kehancha police Station and next day he was charged with this offence he did not know about; that the said lady Lucy framed him with an assault case for which he was imprisoned; that they want him imprisoned so that they can take his land.
 18. I have considered all the evidence tendered before the trial court, grounds of appeal and the rival submissions.



19. The first ground of appeal is that the trial court failed to comply with Article 50(2)(g) and (h) of the Constitution and therefore the appellant's right to fair hearing was violated.

20. Article 50 of the Constitution guarantees an accused persons right to hearing. It provides as follows: Article 50(2)(g) and (h)

“ 50(2) Every accused person has the right to a fair trial, which includes the right-

(g) to choose, and be represented by an advocate, and to be informed of this right promptly.

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of his right promptly.

21. Sub Article 2 (g) requires that an accused be informed of this right to legal representation promptly. The courts have dealt with this issue in various cases. In Karisa Chengo v Republic Criminal Appeal 44 of 2019 of the court said:-

“ the right to legal representation.....under the said article, is a fundamental ingredient of the right to a fair trial and is to be enjoyed pursuant to the constitutional edict without more.

22. In Pett v Greyhound Racing Association (1968) 2 All ER 545 the Court said:-

It is not every man who has the ability to represent himself on his own. He cannot bring out the point in his own favour or the weakness in the other side. He may be tongue-tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A Magistrate says to a man; 'you can ask any questions you like;' whereupon 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 trained for the task.

23. Justice Mrima dealt with a similar issue in NMT alias Aunty v Republic and Chacha Mwita v Republic Criminal Appeal No 33 of 2019 the court come to their conclusion that failure to comply with the said provision renders the proceedings a nullity. To confirm whether the court has complied with the said provisions, one has to look at the proceedings to ascertain whether the court informed the accused of his right; then being a court of record. In this case before plea was taken the court informed the appellant of his right to counsel. The court is required to inform the accused promptly which should be before plea or soon thereafter to enable the accused prepare his defence.

24. As respects Article 50(2) (h), the court is required to inform an accused person of his right to counsel assigned at the State expenses if substantial injustice will be result. The right is not automatic because it must be established that substantive injustice will result . In Republic v Karisa Chengo (2017)eKLR, the Supreme Court discussed the above rights when it said:-

“In the above context, it is obvious to us that in criminal proceedings legal representation is important. However, a distinction must always be drawn between the right to representation per se and the right to representation at State expenses specifically. Inevitably, there will be instances in which legal representation at the expenses of the State will not be accorded in criminal proceedings. Consequently, in view of the principles already expounded above, it is clear that with regard to criminal matters, in determining whether



substantial injustice will be suffered, a Court ought to consider, in addition to the relevant provisions of the Legal Aid Act, various other factors which include:-

- i) the seriousness of the offence;
- ii) the severity of the sentence;
- iii) the ability of the accused person to pay for his own legal representation;
- iv) whether the accused is a minor;
- v) the literacy of the accused; and
- vi) the complexity of the charge against the accused”.

25. In David Njoroge Macharia v Republic (2011) eKLR, the Court of Appeal said:-

Article 50 of the Constitution sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interests of ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a State appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defence owing to disabilities or; language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence.... We are of the considered view that in addition to situations where ‘substantial injustice would otherwise result’, persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense.”

26. In this case, apart from saying that the said right was infringed, the appellant did not demonstrate that he suffered or was likely to suffer any substantial injustice. I find that the appellants rights under Article 50 2 (g) and (h) were not violated .

Whether the ingredients of the offence were proved?

27. On the first charge, the prosecution need to prove that the exhibits were indeed Wildlife trophies and, secondly, whether the appellant was ‘dealing’ in them.
28. PW2 a researcher from National Museums of Kenya confirmed that the exhibits that were referred to him for analysis were indeed elephant tusks.

Whether the appellant was found dealing in the trophies, ‘Deal’ is defined in Section 3 (1) (c) as

- “ a) to sell, purchase, distribute, barter, give, receive, administer, supply, or otherwise in any manner deal with a trophy or live species;
- b) to cut, carve, polish, preserve, clean, mount or otherwise prepare a trophy or live species;
- c) to transport or convey a trophy or live species;

29. According to the testimonies of PW1, PW3 and PW5, they found the appellant and another transporting the trophies on a motor cycle and indeed the circumstances under which they were arrested aptly fits in the definition under Section 3 (1) of the Act. I agree that once found conveying or transporting, that amounts to ‘dealing’ as defined in the Act. The trial court therefore erred in finding



- that Count 1 had not been proved. However, since the prosecution did not file a cross appeal or put the appellant on notice, this court will not interfere with the trial court's finding on Count 1.
30. On Count II, I am satisfied that the trial court correctly found that the appellant was found in possession of the trophies. The court relied on the definition of the ward possession in Section 4 of the *Penal Code* and Blacks Law Dictionary 11th Edition, Thomson Reuters which defined possession as “the fact of having or holding property in one’s power, exercise of dominion over property.”
 31. PW1, PW3 and PW5’s testimonies were consistent, that they intercepted the appellant after being informed that two people were transporting trophies. The suspects had been described to the witnesses i.e. dress code. The trophies had been concealed in sisal reeds. The appellant’s defence was that he was framed by one Lucy with whom they had a case but he raised that alleged frame up for the first time in his defence. He had an opportunity to cross examine the witnesses but he never raised those allegations. The defence was an afterthought and cannot be believed in light of the overwhelming evidence adduced by PW1, PW3 and PW5. I find that the trial court arrived at the correct finding that the appellant was found in possession of the trophies produced in court as exhibits.
 32. As to whether the appellant’s defence was considered, the trial court did consider it and observed that it was raised as an afterthought, that though the appellant had an opportunity to cross examine the witnesses, he did not mention such allegation. The conviction was well founded and I hereby affirm it.
 33. The appellant also complained that the sentence meted on him is harsh and excessive. As held in *Kariuki v Republic* (1970) EA 230, sentencing is a discretion of the court. In exercise of its discretion the court is guided by the law, Judiciary sentencing guidelines, the circumstances of the case and the appellants mitigation. Under Section 92 of the *Wildlife Conservation and Management Act*, upon conviction one is liable to seven (7) years imprisonment. Elephants are endangered species as they are killed for their trophies. They are a very important and contribute greatly to our economy and such offences attract a deterrent sentence.
 34. In the circumstances, I find that the sentence meted by the trial court is quite lenient and there is totally no reason to interfere with it. The appeal lacks merit and is hereby dismissed.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 21ST DAY OF FEBRUARY, 2023.

R. WENDOH

JUDGE

Judgment delivered in the presence of

Mr. Owuor, for the State.

Appellant present in person.

Evelyne Nyauke – Court Assistant

