Lengalani v Republic (Criminal Appeal 18 of 2020) [2023] KEHC 21257 (KLR) (26 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21257 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL 18 OF 2020

AK NDUNG'U, J

JULY 26, 2023

BETWEEN

SITONI LENGALANI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(From original Conviction and Sentence in Nanyuki CM Criminal Case No 167 of 2019– R.K Koech, PM)

JUDGMENT

1. The Appellant in this appeal, Sitoni Lengalaniwas convicted after trial of being in possession of wildlife trophy contrary to section 92(4) of the *Wildlife Conservation and Management Act*, 2013. The particulars were that on the 29/03/2019 at around 1330hrs at Lkisin area near Wamba township within Samburu County, was found in possession of an endangered wildlife trophy namely three (3) pieces of elephant tusks weighing 13.8 kilograms with a street value of Kshs.1,380,000/- without a permit from the Director General Kenya Wildlife Services.
2. On 06/02/2020, he was sentenced to pay a fine of Kshs.20,000,000/- and in default to serve twenty (20) years imprisonment.
3. The Appellant was aggrieved by the conviction and the sentence hence, his appeal to this court. He filed a petition of appeal challenging the conviction and the sentence on the following grounds;
    i. The learned magistrate erred by relying on uncorroborated evidence to convict the Appellant.
    ii. The learned magistrate erred in relying on circumstantial evidence of the weakest kind to convict the Appellant.
    iii. The Appellant was convicted under the wrong Act.

4. He filed written submissions but only submitted on the appeal against the sentence. He did not submit on conviction despite being given time by this court to do so. His submissions against the sentence were mitigating factors whereby he claimed that the sentence was harsh and excessive.

5. The Respondent's counsel opposed the appeal against the sentence only. She stated that the Appellant abandoned his appeal on conviction when the matter came up for mention on 08/05/2023. The counsel submitted that the sentence was not only legal but also lenient and that the Appellant did not demonstrate that the sentence was excessive, he did not demonstrate that the trial court overlooked some material factor or took into account some wrong material or acted on a wrong principle.

6. Even though the appeal is against the sentence only, my duty as a first appellate court is well spelt out namely to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See *Okeno v Republic* [1972] EA 32.

7. I have in that regard read and considered the evidence as recorded at the trial court with a view to evaluating it and arrive at my own conclusions regarding the same. I have borne in mind, however, that I neither saw nor heard the witnesses myself, and I have given due allowance for that fact.

8. The Appellant was convicted on strong and sound evidence. The evidence was that he was found on the road side by PW1, PW2, PW3 and PW5 in possession of a gunny bag containing elephant tusks. The witnesses had been tipped that there was a person who was in possession of three pieces of elephant tusks at Lkisin area near Wamba town. The informer had informed PW1 that the suspect was standing on the right side of the road heading to Lekuniani Center and he was with a gunny sack. They spotted the person and they opened the gunny sack and three pieces of elephant tusks were recovered.

9. An inventory was prepared which was produced as Pexhibit5. A weighing certificate was produced as Pexhibit6. The elephant tusks were forwarded to National Museum of Kenya for examination and PW4 produced her report as Pexhibit7 which confirmed that the suspected elephant tusks were indeed elephant tusks from two different elephants. The said elephant tusks were produced as Pexhibit1a, b & c.

10. As to the sentence, The Appellant was accused of contravening the provisions of section 92(4) of the *Wildlife Conservation and Management Act* which provides thus;

> "Any person without permit or exemption issued under this Act is in possession of any live wildlife species or trophy of any critically endangered or endangered species as specified in the Sixth Schedule or listed under CITES Appendix I, commits an offence and shall be liable upon conviction to a fine of not less than three million shillings or a term of imprisonment of not less than five years or both such fine and imprisonment."

11. As seen earlier the Appellant was sentenced to a fine of Kshs.20,000,000/- and in default to 20 years imprisonment. It seems that the trial court sentenced the Appellant under section 92 which was amended under Statute Law (Miscellaneous Amendments) Act No.18 of 2018 which came into force on 18th January, 2019. The Appellant was charged when the amended Act was already in force. The earlier section provided that;

> "Any person who commits an offence in respect of an endangered/threatened species or in respect of any trophy of that endangered/threatened species shall be liable upon conviction to a fine not less than 20 million Shillings/imprisonment of life or to both such fine and imprisonment."

12. The trial court thereby erred imposing the sentence under the previous regime since the Appellant was charged in March, 2019 when section 92 had already been amended.

13. As noted above section 92(4) of the *Wildlife Conservation and Management Act* provides that;

> " Any person without permit or exemption issued under this Act is in possession of any live wildlife species or trophy of any critically endangered or endangered species as specified in the Sixth Schedule or listed under CITES Appendix I, commits an offence and shall be liable upon conviction to a fine of not less than three million shillings or a term of imprisonment of not less than five years or both such fine and imprisonment."

14. The lawful sentence for the offence for which the Appellant was convicted was a fine of three million shillings or a term of imprisonment of not less than five years or both such fine and imprisonment.

15. Having found that the sentence by the trial court was based on a repealed law, this court is properly invited to and there exists ground upon which to interfere with the sentence imposed by the trial court. The appeal against sentence succeeds.

16. So, what is the appropriate sentence? No doubt the appellant was convicted of a serious crime. As held in the case of *Republic v Elijah Munene Ndundu and Another* [1978] eKLR,

> " Reformation is a fair enough consideration but not the main object of penalties in criminal cases. One of the aims of punishment is to deter the individual offender and also to deter others who may be tempted to commit similar offences. (see *Samuel v Republic* [1968] EA1). It is an important function of any to state to protect its citizens. This involves protection of society from crime and criminals."

17. In our instant case, the Appellant's act requires a deterrent effect. Our wildlife and the environment are seriously endangered in the face of poaching and environmental degradation. The court must send a clear message that society must shun these harmful practices.

18. With the result that the sentence by the trial court is set aside and substituted thereof with a fine of three million Kenya shilling and a term of 10 years imprisonment. In default of the fine the Appellant shall serve a further 1-year imprisonment.

DATED, SIGNED AND DELIVERED AT NANYUKI THIS 26TH DAY OF JULY 2023

A.K.NDUNG"U

JUDGE