



REPUBLIC OF KENYA



**Ali v Republic (Criminal Appeal 10 of 2022)
[2023] KEHC 23608 (KLR) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 23608 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL APPEAL 10 OF 2022
JN ONYIEGO, J
SEPTEMBER 29, 2023**

BETWEEN

ABDINASIR ABDIKADIR ALI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the conviction and sentence of Hon. Mugendi Nyaga (S.R.M.)
delivered on 28.02.2022 in Criminal Case No. E463 of 2021 PM's Court at Wajir)*

JUDGMENT

1. The brief background of the appeal herein is that the appellant was charged together with 2 others not before the court with the following offences:
2. Count I: Being in possession of wild trophy without certificate of ownership contrary to section 95(d) of the *Wildlife Conservation and Management Act* of 2013. Particulars being that Adan Mohamud Isaack, Abdinasir Abdikadir Ali and Hassan Ibrahim Haji on 11.09.2021 at Dabley in Habaswein Sub county within Wajir County were found in possession of wildlife trophy namely Giraffe meat without certificate of ownership.
3. Count II: Dealing in wildlife trophy without certificate of ownership contrary to section 95(b) of the *Wildlife Conservation and Management Act* No 47 of 2013 with particulars being that Abdinasir Abdikadir Ali on 11.09.2021 at Dabley in Habaswein Sub county within Wajir County with another not before the court were found transporting wildlife trophy namely giraffe meat without certificate of ownership using motor vehicle registration number KBU 753 Toyota Noah.
4. Count III: Dealing in wildlife trophy without certificate of ownership contrary to section 95(b) of the *Wildlife Conservation and Management Act* No 47 of 2013 with particulars being that Adan Mohamud Isaack and Hassan Ibrahim Haji were on 11.09.2021 at Dabley in Habaswein Sub County



- within Wajir County found transporting wildlife trophy namely giraffe meat without certificate of ownership using motor vehicle registration number KCP 267R Toyota Succeed.
5. Having entered a plea on not guilty, the matter proceeded to full trial. Upon conviction, the appellant was aggrieved by his conviction and sentence hence the filing of this appeal.
 6. The appellant filed an amended petition of appeal dated 09.03.2022 whereby he listed grounds as summarized here below:
 - i. That the trial court erred in law and fact by holding and finding that the prosecution proved its case without tangible evidence to support the same.
 - ii. That the learned trial magistrate erred in law by not making a finding that the prosecution's evidence was at variance with the charge.
 - iii. That the trial court erred in law by misinterpreting section 179 of the CPC which proved that an accused could be convicted on a minor charge that is not pleaded by convicting the appellants on an unpleaded charge that carries a more severe sentence.
 - iv. That the learned trial magistrate erred in law and fact by meting out an excessive and harsh sentence.
 7. During the hearing, parties agreed to file submissions to dispose of the matter. Consequently, each party filed his/its submissions.
 8. The appellant represented by the firm of Mugwe Advocates submitted that the trial court ought to have considered the mitigation by the appellant to wit that he was the sole bread winner as he had a young family. A clear look at the said submissions reveals that, the appellant dwelt substantially on the sentence meted out as that which was harsh and given that the appellant had allegedly already served a period of one year and three months, this court was called upon to vacate the rest of the term and set the appellant free. Reliance was placed on the Judiciary Sentencing and Policy Guidelines to express the position that before sentencing an accused person the court has to consider various factors interalia; gravity of the offence and previous antecedents. Further reliance was placed in the case of *Tonny Kiprono Ngetich v Republic* [2019] eKLR where the court held that a person convicted of the offence of stealing was liable upon conviction to a sentence of three years which is provided by law although a court could as well exercise its discretion to mete out a lesser sentence than the one prescribed.
 9. Learned counsel, Mr. Bidan Kihara for the respondent on his part submitted that the respondent proved all the elements required in the respective offences beyond any reasonable doubt. That in considering the overwhelming evidence adduced against the appellant, the trial court reached a determination supported by the facts of the case and also the law. On sentence, Mr. Kihara submitted that the same was not only legal but also appropriate bearing in mind the circumstances of the case and therefore the same in his view, ought to be upheld.
 10. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and re-analyse it and come to its own conclusion. Further, the court has to caution itself that unlike the trial court, it did not have the benefit of seeing the demeanour of the witnesses and the Appellant during the trial and can therefore only rely on the evidence that is on record. See *Okeno v R* (1972) EA 32 as well as *Eric Onyango Odeng' v R* [2014] eKLR.
 11. PW1, Ali Mohamed Shefat a resident of Dabley and a National Police Reservist attached to Biyamathow stated that on 10.09.2021 at around 8.00pm, while at Dabley water point, with a tipoff from Ssgt Abdimahat, they laid an ambush. At about 11pm, a vehicle with plate number KBU 735C



- make Toyota Noah approached and while undertaking a search, the driver of the vehicle escaped. Unskinned meat belonging to a giraffe was thus recovered.
12. He proceeded that at about 11:30pm, the second motor vehicle KCP 267R Toyota succeed arrived and it had a driver and a passenger named Abdi Hassan. That upon searching the said vehicle, giraffe meat was also recovered. It was his evidence that the police officers from Biyamathow police post Ssgt Abdimahat with Mukitar and Simiyu arrived at about 1am and carried away the meat in the motor vehicle registration number KCP 267R while the Toyota Noah was towed the following day. The witness testified that they arrested 3 people; Abdinasir (2nd Accused) also owner of the Toyota Noah, Adan (1st Accused) and the 3rd accused who was a Somali national.
 13. PW2, Adan Ali Hussein, a national police reservist attached to Biyamathow stated that on 10.09.2021 at around 8.00pm while at Dabley water point in the company of Abdinoor Khalif, Sgt. Abdmahat called and informed him of what was happening. That together with PW1, they laid an ambush and consequently impounded two vehicles with reg. no. KBU 735C and KCP 267R. He stated that the two vehicles were carrying giraffe meat which could easily be identified since it had not been skinned. That it was the Noah motor vehicle which arrived first and that the driver of the vehicle escaped with car keys; That the owner of the vehicle the appellant herein whom he knew before as a villager was left in the vehicle.
 14. That the 2nd vehicle a Toyota arrived and it had a driver by the name Adan and a passenger whom he didn't know (the 3rd accused). He further confirmed that he called Sgt. Abdimahat who sent six officers for reinforcement. He said that he didn't have issues with the 1st accused while the 2nd accused had threatened him when he beseeched him to stop poaching. He went ahead to say that he never arrested him for poaching, but he used to hear that he was a poacher. He also said that he knew the Toyota Noah belonged to him, but he didn't know the number of vehicles the 2nd accused (appellant) owned and that he only impounded 2 motor vehicles.
 15. PW3, Edward Keingoni, an examiner at KWS forensic laboratory, recalled that on 16.09.2021 they received exhibits of bush meat labelled B and skin labelled A with an exhibit memo form from DCI Wajir East. That upon examining the 2 exhibits, the same corresponded to a reticulated giraffe.
 16. PW4, KWS No 8893, Cpl. Muhsin Mowlid recalled that on 11.09.2021, he received a call from Sgt Mahat of Biyamathow police station that he had 3 suspects who had been arrested for being in possession of giraffe meat. That before he could get to Biyamathow they found a motor vehicle Reg. No KBU 735Y Toyota Noah at Dabley area with NPR officers guarding the vehicle. He stated that the said vehicle had mechanical problem and so, they repaired it and thereafter proceeded with it to Biyamathow police station. He further noted that they found the suspects and another motor vehicle (KCP 267R) at the police station.
 17. PW5, No117324 PC. Shadrack Simiyu Wanyama testified that on 11.09.2021 at around midnight while shopping with Sgt. Mahat, he told him he had received information from NPR officers that they had arrested some suspects in possession of game meat. In the company of Sgt. Mahat, Muktar Issa and two others headed to the scene where they found the NPR officers with 3 suspects and 2 motor vehicles. The vehicles were loaded with game meat. They also took possession of mobile phones and car keys recovered from the suspects.
 18. PW6, Muktar Issa testified that on the material day, Sgt. Mahat informed him that NPR officers had impounded some motor vehicles carrying game meat. In company of Sgt. Mahat, they proceeded to the scene where they found the two motor vehicles. That one was a Toyota Succeed and the other Toyota Noah. It was his case that they recovered three mobile phones and a car key. Further, he testified that



- they later booked the suspects at Wajir Police Station. On cross examination, he stated that they did not see anything else in the motor vehicles apart from the meat.
19. PW7, Vyland Walabusi stated that he was the investigating officer in this case and that he recorded the statements from the witnesses stating that some people had killed a giraffe. He reiterated the evidence of the prosecution witnesses and further stated that the 2nd accused admitted having participated in the commission of the crime herein but the same was as a result of help received from the NPR officers as his work was mainly to sell the meat. In the same breadth, the 1st accused from his statement noted that he did business with the 2nd accused and he was responsible for introducing the 3rd accused as the conductor of the motor vehicle registration number KCP 267R.
 20. He went further to state that thorough investigations revealed that the motor vehicles herein were of fake number plates and were meant to be used to commit crime. He stated that after investigations he established that the motor vehicles belonged to the 2nd accused and that the 1st accused was a driver.
 21. The appellant was placed on his defence upon the trial court reaching a determination that a prima facie case had been established against him.
 22. DW1, Aden Mohamed Isaack in his testimony denied the charges stating that he operated the said car as a taxi. He stated that he was from supplying fuel to Hadado when he met the officers who tried to load the game meat into his vehicle, a request which he turned down. In other words, he contended that he was framed for having turned down the officers loading the game meat in his car.
 23. DW2, Abdinasir Abdikadir (appellant herein) testified that he was equally framed after his driver was coerced to carry game meat in his vehicle. That there was no evidence linking him to killing giraffe. On cross examination, he stated that the motor vehicle registration number KBU 753C was his in as much as he did not have any document to prove so. He conceded that its number plate was fake as the said plate, KBU 753C belonged to another vehicle.
 24. DW3, Hassan Ibrahim Hajj testified that on the very day that he was arrested, he had gone to Dabley where he asked the 1st accused for lift to Garissa. That after about 5km enroute to Garissa, they found a road barrier and so they were signaled to alight. He corroborated the fact that the officers offloaded the meat from Toyota Noah into the motor vehicle they were driving as they said that their intention was only to ferry the meat to Biyamathow. On cross examination, he stated that the meat was in the vehicle of the 2nd accused while he was simply a passenger.
 25. DW4, Mohammed Hossein, a witness of the 3rd accused stated that on 09.09.2021, he was with the 1st and 2nd accused persons at his home given that the 1st accused had brought him fuel while the 2nd accused had brought him sugar and so the duo slept in his house during the day. It was his testimony that the 1st accused left his home at 6.40 p.m while the 2nd accused left at 4.00 p.m.
 26. DW5, Mohamed Abdullahi, a witness to the 1st accused stated that on the day the 1st accused was arrested, he was driving a motor vehicle which was loaded with 3 empty drums. That he learnt of his arrest in the morning of the following day. On cross examination, he stated that he learnt that the 1st accused had drums given that he had seen him remove them from the motor vehicle.
 27. I have considered the grounds of appeal, the respective submissions, and the record of appeal. The only issue for determination is whether the trial court erred in convicting the appellant of a lesser charge which he was never charged with and whether the sentence imposed on the appellant was manifestly excessive and unwarranted.



28. From the record, I note that the trial magistrate acquitted the appellant herein of Count 1 and given that the respondent did not contest the same, I will therefore let the same be.

29. The appellant contended that the trial magistrate erred in interpreting section 179 of the Criminal Procedure Code by convicting the appellant on an un-pleaded charge that carries more severe sentence.

30. Section 179 of the Criminal Procedure Code provides that:

179

(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

31. Section 191 of the Criminal Procedure Code provides that: -

“The provisions of Sections 179 to 190, both inclusive, shall be construed as in addition to, and not in derogation of, the provisions of any other Act and the other provisions of this Code, and the provisions of Sections 180 to 190, both inclusive, shall be construed as being without prejudice to the generality of the provisions of Section 179.”

32. As regards the power of the Court to convict the appellant of the cognate offence without affording the appellant an opportunity to address the issue, the Court of Appeal in the case of Kalu v Republic (2010) 1 KLR observed as follows: -

“With the greatest respect to the learned Judge there was no law which would authorize a judge on appeal to convict a person with an offence with which that person was never charged. All the provisions of the Criminal Procedure Code which are under the heading: -“Convictions for Offences Other than Those Charged” and beginning with Section 179 up to Section 190 deal with situations in which a court is entitled to convict on a minor and cognate offence where a person is charged with a more serious offence. Thus it is permissible to convict a person charged with capital robbery under Section 296(2) of the Penal Code for the offence of simple robbery contrary to Section 296(1) of the Code. It is also permissible to convict a person charged with murder under Section 203 of the Penal Code with manslaughter under Section 202 as read with Section 205 of the Penal Code. That is because the offence of manslaughter, for instance, is minor and cognate to that of murder. But where there is no charge of murder at all, and the only charge available on the record is that of manslaughter, it would be courageous for a trial court to convert that charge into murder simply because the evidence on record proves murder.”

33. Similarly, in the case of Robert Mutungi Muumbi v Republic [2015] eKLR the court expressed itself as hereunder:

“The third issue in this appeal relates to appellant’s alleged lack of opportunity to plead before he was convicted of the offence of indecent act with a child. If we understood the appellant right, his contention is that he should not have been convicted of the offence of indecent act with a child, which he was not charged with, before he was afforded an opportunity to plead



to that offence. Mr. Monda's response was that the appellant could be properly convicted under section 179 of the *Criminal Procedure Code* without having to plead to the offence, so long as it was a minor and cognate offence to that charged. Section 179 of the *Criminal Procedure Code* provides as follows:

179.

- (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.
- (2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

As is apparently clear, section 179 of the *Criminal Procedure Code* empowers a court, in some particular special circumstances, to convict an accused person of an offence, even though he was not charged with that offence. The court contemplated by section 179 can be either the trial court or the appellate court.....The question is whether the special circumstances contemplated by section 179 were in existence to enable the court convict the appellant of an offence with which he was not charged. An accused person charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate; that is to say, both are offences that are related or alike; of the same genus or species. To sustain such a conviction, the court must be satisfied on two things. First, that the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by the charge, constitute the minor offence. Secondly, that the major charge has given the accused person notice of all the circumstances constituting the minor offence of which he is to be convicted. (See *Robert Ndecho & another v Rex* (1950-51) EA 171 and *Wachira S/O Njenga v Regina* (1954) EA 398). Spry, J. explained the essence of the first consideration as follows in *Ali Mohammed Hassani Mpanda v Republic* [1963] EA 294, while construing the provision of the Tanzania Criminal Procedure Code equivalent to section 179 of the Kenya Criminal Procedure Code:

“Subsection (1) envisages a process of subtraction: the court considers all the essential ingredients of the offence charged, finds one or more not to have been proved, finds that the remaining ingredients include all the essential ingredients of a minor, cognate, offence (proved) and may then, in its discretion, convict of that offence.”

That conclusion is reached at the stage of judgment when it is not practical to require the accused person to plead afresh to the minor offence. It is a decision premised on the discretion of the court based on the evidence adduced at the end of the trial.” [Underlining mine].



34. The Court proceeded to state that:

“The second consideration arises, of necessity, precisely because the accused person is not charged with, and has not pleaded to, the minor cognate offence. The purpose of delving into this consideration is to satisfy the court that the accused person was not prejudiced, and that by being charged with the major offence, he had sufficient notice of all the elements that constitute the minor offence. (See *Republic v Cheya & another* [1973] EA 500). In this case we are satisfied that committing an indecent act with a child is a minor and cognate offence of defilement with which the appellant was charged. The elements of the offence of committing an indecent act with a child are ingrained or subsumed in the elements of the offence of defilement. The former attracts a comparatively lesser sentence than the latter. Accordingly, we find that the appellant was properly convicted of indecent act with a child under section 179 of the *Criminal Procedure Code* even though he was not charged with that offence and had not pleaded to it. The requirements of section 179 were satisfied.”

35. It is therefore clear that the learned trial magistrate was under no obligation to give either the appellant or the prosecution an opportunity of being heard before convicting the appellant of the cognate offence. However, the issue arises as to whether the offence with which the appellant was convicted was a cognate offence.

36. In the case herein, the trial magistrate noted that in respect to count 2 and 3, the prosecution proved a lesser offence and for that reason, found the appellant herein guilty in dealing in meat of a wildlife species contrary to section 98(1) of the *Wildlife Conservation and Management Act*. The said section stipulates as hereunder:

“Offences relating to hunting for bush-meat trade:

- i. Any person who, without permit or exemption issued under this Act, deals in the carcass or meat of any wildlife species commits an offence and shall be liable on conviction, to imprisonment for a term of not less than three years.

37. Therefore, the next issue that I must determine is whether the offence in respect of which the appellant was convicted is cognate as the lesser offence to the offence under which the appellant was charged? It therefore follows that the main elements of the offence are whether; the accused was in possession of the trophy; proof that the items in question are game trophies and; proof that he lacked certificate of ownership. It is my view that the prosecution proved the two elements to wit possession of the trophy and proof that the items in question were game trophies which are lesser or cognate charges to the main charge.

38. Section 2 of the Wildlife Management and Conservation Act defines a “trophy” as follows: -

“means any wild species alive or dead and any bone, claw, egg, feather, hair, hoof, skin, tooth, tusk or other durable portion whatsoever of that animal whether processed, added to or changed by the work of man or not, which is recognizable as such.”

39. From the explanation above, it follows that indeed the trial magistrate was right to consider the offence under section 98(1) of the *Wildlife Conservation and Management Act* as a cognate offence to that which the appellant was charged with pursuant to section 179 of the *CPC*.



40. The appellant faulted the trial magistrate for assuming that since the motor vehicles allegedly used in the commission of the purported crime had falsified registration numbers, the same was sufficient proof that the appellant had intention to commit the offences in question.
41. The above notwithstanding, the appellant could not explain why a vehicle registered in his name bore a fake number plate; further, the fact that the said game meat was found in his car, was corroborated by the evidence of the 3rd accused who was present at the scene as he stated that the said trophy was found in the vehicle of the appellant. It remained a mystery why the driver of the first vehicle ran away even after allegedly informing his boss, the appellant herein of what befell him at the road block. It therefore follows that the appellant's version of the story that the officers were the ones who loaded the said game meat in his vehicle was misplaced. As a consequence of the same, I humbly find that the conviction by the trial magistrate was safe.
42. The next question is whether the sentence imposed was excessive. The prescribed sentence for both offences in my considered opinion reveal the offence of hunting for bush-meat trade to be minor to that of dealing in wildlife trophy without certificate of ownership contrary to section 95(b) of the *Wildlife Conservation and Management Act* No 47 of 2013. The latter attracts 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 a fine while the former, an imprisonment for a term of not less than three years.
43. It is trite that sentencing is at the discretion of the trial court. See *Wanjema v Republic*, Criminal Appeal No 204 of 1970 (1971) EA 493, 494, where Trevelyan J held as follows: -
- “An appellate Court should not interfere with the discretion which a trial Court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case.”
44. In the instant case, the trial magistrate while sentencing the appellant noted that the appellant herein did not show any remorse and therefore proceeded to sentence him to six years' imprisonment which I find to be excessive in the circumstances given that the minimum sentence provided for in respect of the subject offence is three years.
45. The appellant being a first offender was entitled to the least punitive sentence provided in law. Accordingly, the appeal against conviction is dismissed and that against sentence partially succeeds to the extent that the sentence of six years imprisonment is hereby substituted with that of three years. The same shall start running from the date the impugned sentence was imposed.

ROA 14 days.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 29TH SEPTEMBER 2023

J.N. ONYIEGO

JUDGE

