Ndeka v Republic (Criminal Appeal E007 of 2021) [2022] KEHC 3 (KLR) (19 January 2022) (Judgment)

Neutral citation: [2022] KEHC 3 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

CRIMINAL APPEAL E007 OF 2021

JM MATIVO, J

JANUARY 19, 2022

BETWEEN

JUMAA MWANGUNDU NDEKA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal against Conviction and Sentence in Criminal Case Number 51 of 2020, R v Jumaa Mwagundu Ndeka at Voi SRM's Court, delivered by F.M. Nyakundi (SRM) on 26.01.2021)

JUDGMENT

1. On 22[nd]January 2020, the appellant was arraigned before the Senior Resident Magistrate's Court at Voi charged with the offence of dealing in wildlife trophy, contrary to section 92(2) of the *Wildlife Conservation and Management Act*.[1]The Particulars of the offence were that on the 21st day of January 2020, at around 16:30 hours at Mwakwasinyi area of Kasigau Ward within Taita Taveta County, he was jointly found with another not before the court dealing in wildlife trophy, namely; eight pieces of elephant tusks weighing 38kgs without a permit.

2. The prosecution case rested on the testimony of 6 witnesses while the defence rested on his own unsworn evidence. PW1 testified that acting on information provided by an informer, they went to Maungu and divided themselves into groups, with one of them posing as a potential buyer. The appellant and another person brought a sack containing the ivory and as the suspects were taking the luggage to the car, they managed to arrest the appellant but his accomplice ran away. PW1's testimony was collaborated by PW2, who attached to the intelligence unit at Voi narrated how together with PW1 they arrested the appellant. PW3, attached to the Tsavo East National Park Investigations Unit narrated how he assisted in arresting the appellant but the other suspect ran away. He identified the sack in which the ivory was put and the inventory prepared in court. PW4 was the investigating officer. He

[1] Act No 47 of 2013.

narrated how the suspects brought the sack containing the ivory and how they arrested the appellant. He identified photographs of the sack filled with charcoal and also revealing the ivory. He recorded the weighing certificate which showed the ivory weighed 38 kgs. Also on record is the testimony on PW5, a Veterinary Doctor at KWS stationed at Tsavo East National Park, a graduate in Veterinary Medicine. He examined the items presented to him and certified that they were genuine elephant tusks. He produced his report to that effect. Last, is the evidence of PW6, the scene of crime officer. He confirmed he took the photographs which he produced as exhibits together with the certificate.

3. At the close of the prosecution case the learned Magistrate concluded that a prima facie case had been established and put the appellant on his defence. The court complied with the provisions of section 211 of the *Criminal Procedure Code*[2] and the accused elected to give unsworn defence.

4. His testimony was that he had a motor cycle and he carried one person and took him to Mwembeni. He said that he did not know who he was coming with. He said that the person told him he had a vehicle and he asked him to follow them. He said that the person told him to go and carry the luggage. He said that they put the luggage in a Probox, but he was later arrested and charged. He said that he thought it was charcoal. He also said that the people wanted one million.

5. After analysing the prosecution and defence evidence, the trial Magistrate distilled one issue for determination, that is, whether the appellant was found jointly with others not before the court, dealing in wildlife trophy, namely 8 pieces of ivory tusks weighing 38kgs without a permit. He found that the prosecution evidence was consistent and collaborative. He observed that the witnesses were at the scene and they are the ones who arrested the appellant. He convicted the appellant and sentenced him to serve 10 years imprisonment.

6. Aggrieved by the verdict, the appellant through his advocates seeks to overturn both the conviction and sentence citing 6 grounds which can be condensed into two, namely, whether the prosecution proved its case and whether the sentence is excessive.

7. The appellant's counsel submitted that the evidence tendered was insufficient; and that it was a fabrication. He relied on *Philip Nzaka Waiu v Republic*[3] and argued that the similarity in the prosecution evidence reflects a fabrication and the conviction founded on it was not safe. Additionally, counsel submitted that the evidence tendered was about possession under section 95 and not dealing with world life trophy under section 92, so the prosecution abandoned the charge sheet and proceeded to prove a different offence. He argued that there is no clarity on who the KWS officers were communicating with and the extent of the appellant's participation. He also submitted that there is no evidence to show that the appellant knew about the luggage.

8. Counsel recalled the appellant's defence that he was hired as a boda boda to ferry the person who allegedly ran away. He submitted that it was he duty of the prosecution to call evidence to disapprove his defence and show that the motor cycle was being used for illegal business. He submitted that there is no section 92 (2) in the *Wildlife Conservation and Management Act*, 2013 and therefore the charge sheet was defective. He relied on *Yongo v Republic*[4] which held that a charge that is not disclosed by evidence is defective. He argued that the charge sheet was in total variance with evidence. Lastly, he submitted that the appellant's defence was ignored.

[2] Cap 75, Laws of Kenya.

[3] {2016} e KLR.

[4] {1983} KLR 319.

9. The Respondent's counsel submitted that the submission on a defective charge sheet is not one of the grounds of appeal, and, in any event, the charge sheet is not defective. He submitted that the elements of the offence are dealing in wild life trophy, of any critically endangered species, and without a permit or exemption issued under the act. He also cited section 3 of the Act which defines the word deal and submitted that an elephant tusk is a wild life trophy as contemplated under the act. He submitted that the prosecution evidence proved the case beyond reasonable doubt, so, the conviction is sound. He submitted that the prosecution witnesses never contradicted themselves. He submitted that the evidence proved the offence under section 92 (2) and not 95 in that the appellant sought to sell the elephant tusks to the witnesses. He reproduced section 92(2) and argued that contrary to the appellant's counsel's submissions, the said section exists. Lastly, he submitted that the trial court did not ignore the appellant's defence.

10. First, I will address the submission that the appellant's defence was not considered. Whatever is thought to be the purpose of criminal punishment, one fundamental principle seems to have evolved in the jurisprudence of the common law legal tradition; that is, before an accused person can be convicted of a crime, his/her guilt must be proved beyond reasonable doubt. The Supreme Court of Nigeria in *Ozaki and another v The State*[5] stated that for a defence to be rejected it must be incredible and that the defence must be weighed against the evidence offered by the prosecution. In *Uganda v Sebyala& Others*[6] the court stated: -

> " The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts."

11. The accused has only what is referred to as the evidential burden which means the duty of adducing evidence or raising the defence of alibi.[7] Once an accused person discharges the evidential burden of adducing evidence of alibi, it is the duty of the prosecution to disprove it. The duty of the court is to test the evidence of alibi against the evidence adduced by the prosecution and if there is doubt in the mind of the court, the same is resolved in favour of the accused.

12. A trial Court has a duty to weigh the evidence adduced in court by all the parties in totality and make a finding on the culpability or otherwise of the accused. Choosing to analyse the prosecution evidence and leave out that of the accused is a fatal mistake. It's a duty bestowed in every Court to weigh one set of evidence (prosecution) against another (defence) before arriving at a conclusion. This is the basic calling of every Court without exception.[8] The evidence must be considered in its totality. In order to convict there must be no reasonable doubt that the evidence implicating the accused 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 and improbabilities.

13. The court is required to take 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.

[5] Case No. 130 of 1988.

[6] {1969} EA 204.

[7] See *OrteseYanor& Others vs The State* {1965} N.M.L.R. 337.

[8] *John Matiko & Another vs Republic*, Criminal Appeal No. 218 of 2012.

14. Reasonable doubt is not mere possible doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.[9] Our system of justice is deeply concerned that no person who is innocent of a crime ought to be convicted of it. In order to avoid that, a court must consider all the evidence with great care, especially when it is the only evidence because the law is not so much concerned with the number of witnesses called as with the quality of the testimony given. A guilty verdict is permitted, however, only if the evidence is of sufficient quality to convince the court beyond a reasonable doubt that all the elements of the charged crime have been proven, that the evidence irresistibly points to the accused, and that the evidence is both truthful and accurate.

15. In determining whether the appellant's defence was considered, this court has a legal duty to re-analyse, re-evaluate and assess the evidence adduced in the lower court so as to come up with its own conclusions bearing in mind that it did not have the benefit of seeing the witnesses testify.[10] An appellate court will not interfere with or temper with the trial court's judgment or decision regarding either conviction or sentence unless it finds that the trial court misdirected itself as regards its findings of facts or the law.[11] However, if the trial court misdirected itself either on the facts or the law, an appellate court will interfere and deal with the matter as it deems fit, including substituting its own order or decision for that of the trial court, which may include an order setting aside the conviction or altering the sentence.

16. The facts found to be proven and the reasons for the judgment of the trial court must appear in the judgment of the trial court. If there was evidence led during the trial, but such evidence is not referred to in any way in the judgment, it is safe for a court of appeal to assume that such evidence was either disregarded or not properly weighed or even forgotten about at the time of delivering the judgment. The best indication that a court has applied its mind in the proper manner is to be found in its reasons for judgment including its reasons for the acceptance and the rejection of the respective witnesses.[12]

17. I must, however, make it clear that by requiring the trial court to consider and weigh all evidence is not meant that the judgment of the trial court must also include a complete embodiment of all evidence led, as if it comprises a transcript of the proceedings. All it means is that the summary of the evidence led must indeed entail a complete embodiment of all the material evidence led.[13]

18. This court must determine, what the evidence of the state witnesses was, as understood within the totality of the evidence, including evidence led on the part of the accused or defence, and compare it to the factual findings made by the trial court in relation to that evidence, and then determine whether the trial court applied the law or applicable legal principles correctly to the facts in coming to its decisions / findings or judgment.[14]

[9] Duhaime, Lloyd, *Legal Definition of Balance of Probabilities*, Duhaime's Criminal Law Dictionary.

[10] See *Okeno vs Republic* {1972) E.A, 32at page 36, *Pandya vs Republic* {1957} EA 336, *Shantilal M. Ruwala vs Republic* {1957} EA 570 & *Peter vs Sunday Post* {1958}EA 424.

[11] See *R vs Dhlumayo & Another* 1948 (2) SA 677 (A). The principle was also restated in *S v Mlumbi* 1991 (1) SACR 235(SCA) at 247g.

[12] As was stated in *S vs Singh* 1975 (1) SA 227 (N) at 228.

[13] *Mofokeng vs S* (A170/2013) [2015] ZAFSHC 13 (5 February 2015).

[14] Ibid.

19. In other words, this court must consider whether the Magistrate considered all the evidence, that is, the prosecution and defence evidence, and whether it weighed it correctly and correctly applied the law or legal principles to it in arriving at his judgment in respect of both the conviction and sentence. This exercise necessarily entails a scrutiny of the evidence of each witness within the context of the totality of evidence, and, what the trial court's findings were in relation to such evidence.[15]

20. Stated differently, in order to determine whether there is any merit in any of the submissions made by the respective parties in this appeal, including whether the appellants defence was considered, this court must consider the evidence led in the trial court, juxtapose it against the judgment by the trial court, and finally determine whether there is any basis for interfering with the judgment.[16]

21. This means that if this court is of the view that a particular fact is so material that it should have been dealt with in the judgment, but such fact is completely absent from the judgment or merely referred to without being dealt with when it should have, this will amount to a misdirection on the part of the trial court. This court must then consider whether the said misdirection, viewed either on its own or cumulatively together with any other misdirections, is so material as to affect the judgment, in the sense that it justifies interference by the court of appeal.[17]

22. Turning to the facts of this case, the crux of the prosecution evidence is that acting on information from an informer, they maintained communication with the suspects and on the material day they met the appellant and his accomplice and the appellant and his accomplice went to bring the ivory but as they were loading in the vehicle, they arrested the appellant but his accomplice managed to escape. On the other hand, the appellant states that he was hired by the person who escaped to carry some luggage, that he did not know the luggage was ivory and his role was simply that of a hired boda boda rider.

23. It is this defence the trial Magistrate is being accused of not considering. The trial Magistrate considered both parties evidence and was persuaded that the defence did not raise any doubts on the prosecution case. As stated above, the witnesses posing as customers-maintained communication with the appellant and his accomplice and even scheduled a meeting to seal the deal. However, the appellant was arrested at the scene after they brought the ivory. His defence did not dislodge the version tabled by the prosecution. Confronted with both versions, I find that the trial Magistrate was rightly persuaded that the prosecution had proved its case.

24. The other issue is whether the offence of dealing in wildlife trophy was proved. The starting point is that the circumstances, from which an inference of guilt is sought to be drawn, should be proven beyond reasonable doubt. The circumstances should be definite in pointing towards the guilt of the accused. The circumstance, taken cumulatively should form a chain so complete that there was no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

25. A review of the prosecution evidence leaves no doubt that the above three tests are present. The chain of events places the appellant at the scene. The ingredients of the offence were established. The appellant and his accomplice were selling the trophy to PW1. That is evidence of dealing and proof of possession. There is evidence that the items in question were genuine ivory. There is evidence that the appellant was dealing in wildlife trophies without a dealer's licence, and that he was not excempted or authorized.

15 Ibid.

16 Ibid.

17 Ibid.

26. Dealing includes two elements; namely being in physical control of the item and knowledge of having the item. To be guilty of dealing, an accused person must be shown to have knowledge of two things, namely, that he knew the item was in his custody and secondly, he knew that the item in question was prohibited. The third element is the dealing aspect. There is evidence the appellant was trying to sell the ivory to PW1. A person has possession of something if the person knows of its presence and has physical control of it, or has the power and intention to control it. I am persuaded that the offence of dealing was proved to the required standard.

27. The argument that the appellant was charged under the wrong section is untrue, legal frail and flied on the face of the clear provisions of section 92(2).

28. I now turn to the sentence. Sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles. It must take into account all relevant factors and eschew all extraneous or irrelevant factors. Certainly, the appellate court would be entitled to interfere with the sentence imposed by the trial court if it is demonstrated that the sentence imposed is not legal or is so harsh and excessive as to amount to miscarriage of justice, and or that the court acted upon wrong principle or if the court exercised its discretion capriciously.[18] (See *Shadrack Kipchoge Kogovs Republic*[19]).

29. Section 92 (2) of the Act provides: -

> (2) A person who, without permit or exemption issued under this Act, deals in a wildlife 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 term of imprisonment of not less than seven years.

30. The above section sets the minimum sentence of 7 years. The appellant was sentenced to 10 years. To me, the said sentence is excessive. The appellant in mitigation has pleaded for a non-custodial sentence arguing that his children have dropped out of school. In passing sentence, the court is required to be guided by the sentencing guidelines and also to consider any mitigating factors. To me the hardship now confronting the appellant's children can be avoided by a lesser punitive sentence. I therefore reduce the sentence of 10 years to the 7 years prescribed by the law and order that the appellant shall serve a non-custodia sentence of 7 years under probation. The upshot is that the appeal against conviction is dismissed. However, the sentence of 10 years is reduced to 7 years under probation.

Right of appeal 14 days

SIGNED, DATED AND DELIVERED AT VOI THIS 19TH DAY OF JANUARY 2022

JOHN M. MATIVO

JUDGE

18 See Makhandia J (as he then was in *Simon Ndungu Murage v Republic*, Criminal appeal no. 275 of 2007, Nyeri.

19 Criminal Appeal No. 253 of 2003 (Eldoret), Omolo, O'kubasu&Onyango JJA).