



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CRIMINAL APPEAL NO. E030 OF 2021

SILAS ODHIAMBO JAMES.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal case No. 5 of 2018 of the Senior Resident Magistrate's Court at Mbita by Hon. J.C. Bii--Senior Resident Magistrate)

JUDGMENT

1. Silas Odhiambo James, the appellant, was convicted of the offence of possession of wildlife trophy contrary to section 95 of the Wildlife Conservation and Management Act, 2013.
2. The particulars of the offence were that on the 4th January, 2018 at Got Nyadundo, Rangwe East sub location of Suba Sub County within Homa Bay County jointly with others not before court were found in possession of two leopard skins of street value of Kshs. 80,000/= without a permit from the director of Kenya Wildlife Services.
3. The appellant was sentenced to serve twelve months' imprisonment. He was dissatisfied and has appealed against both conviction and sentence. He was in person and raised grounds of appeal as follows:
 - a. The learned trial magistrate erred in law and fact in convicting the appellant whereas the prosecution had not proved its case to the required standard of beyond any reasonable doubt.
 - b. That the learned trial magistrate erred in law and fact by convicting the appellant as the prosecution failed to avail any crucial witnesses who gave them tip off concerning the game trophy to attend court and shed light of the people they had heard of their involvement with the said game trophy and identify them to court either physically or by name calling.
 - c. That the learned magistrate erred in law and fact in that even as the prosecution witness had told court that only the appellants cows were collected by his father and not the donkeys, he still linked the appellant with the donkeys whose owners ran away and convicted him whereas the appellant had no business to do with the donkeys neither did he know the content of the sacks on the donkey's back.
 - d. That the learned trial magistrate erred in law and fact by failing to appreciate the fact that it is normal to drive animals together when going to the same direction peacefully without any illegality suspicion or interference with other road users whatsoever.
 - e. That the learned trial magistrate misdirected himself in law and fact in finding that the appellant was an accomplice of the people who were transporting game trophy whereas the appellant was an innocent road user who found himself in the mess as a result of cows mixing with donkeys walking towards the same directions as his cows.
 - f. The learned trial magistrate erred in law and fact in wrongfully finding and/or making false assumptions that the appellant had knowledge of what the donkeys were carrying on their backs whereas there was no proper description and/or evidence in support of the same.
 - g. The learned trial magistrate erred in law and fact when relying on a mere circumstantial, falsified and incriminating evidence and erroneously arriving at the finding that the appellant was in possession of the game trophy or had knowledge of the same and that he was part and parcel of the deal whereas there was no direct evidence linking him to the donkeys, course of the game trophy and origin.

h. The trial magistrate erred in law and fact in convicting the appellant relying on uncorroborated evidence as PW1 indicated that they were acting on a tipoff leopard skin were being sold at Sindo market whereas PW2 indicated that they got a tipoff of a person transporting game trophy.

i. The trial magistrate erred in law and fact in convicting the appellant using incriminating evidence against the appellant and/or by not appreciating that the onus of proof in criminal cases does not shift at any time from the prosecution's side to the accused.

j. Be it as it may, the learned trial magistrate erred in law and fact in convicting the accused whereas the prosecution had not proved that the appellant had any knowledge of being in possession of or the source of the game trophy or of what was in the sack the donkeys were transporting and that the prosecution mainly pressed the charge on the accused as a gamble as the offenders had escaped arrest.

k. The learned trial magistrate erred in law and fact by sentencing the appellant to twelve (12) months imprisonment without an option of fine which sentence was harsh, excessing, callous and capricious under the circumstances.

4.The state conceded the appeal through Mr. Ochengo, the learned counsel.

5. The trial court did not accord the appellant a fair trial. When the defence advocate raised an issue having lost his voice, he ought to have granted an adjournment unless he was not convinced that the advocate was unwell. If he was not so convinced, then he ought to have recorded his opinion and reasons for the same. He never recorded anything to support the order to hear the case in spite of what the advocate had said. Article 50 of the Constitution of Kenya was breached. This amounted to a mistrial.

6. I therefore quash the conviction and set aside the sentence. The appellant be escorted to Mbita Court for retrial before any other magistrate other than Hon. J.C. Bii.

7. Should the retrial result in a conviction, the period already served should be factored in sentencing him.

DELIVERED AND SIGNED AT HOMA BAY THIS 28TH DAY OF FEBRUARY, 2022

KIARIE WAWERU KIARIE

JUDGE