



**Lekarokia v Republic (Criminal Appeal E36 of 2021)
[2022] KEHC 15084 (KLR) (25 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 15084 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CRIMINAL APPEAL E36 OF 2021
SN MUTUKU, J
JULY 25, 2022**

BETWEEN

GEDION KUYA LEKAROKIA APPELLANT

AND

REPUBLIC RESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 16 of 2020 in the Magistrates court at Loitoktok delivered by Hon. Caroline Ndumia (RM) AON 17TH May, 2020)

JUDGMENT

Background

1. Through a Petition of Appeal dated May 24, 2021 and filed on May 13, 2022, Dedion Kuya Lekarokia, the Appellant, has raised seven (7) grounds of appeal as follows:
 - i. The learned magistrate misdirected herself in fact and law by failing to interrogate the inconsistencies in the testimony of the prosecution witnesses.
 - ii. The learned magistrate failed to accord the accused sufficient time to produce his advocate despite him making such applications.
 - iii. The learned magistrate misdirected herself by failing to consider the gaps in the prosecution's case.
 - iv. The learned magistrate misdirected herself in fact and law by not appreciating that the investigating officer did not disclose the identity of the owner of the compound the elephant tusks were found.



- v. The learned magistrate misdirected herself in fact and law by not appreciating that PW4 (scenes of crime officer) did not visit the scene but only relied on the contents of the compact disk marked D.
 - vi. The learned magistrate misdirected herself in fact and law by failing to consider the inaccuracies exhibited by PW5 in terms of the number of tusks.
 - vii. The learned magistrate misdirected herself in fact and law by failing to create a nexus between the offence and the evidence tabled by the investigating officer, who confessed to have relied on hearsay as he did not visit the scene of crime.
2. The appellant faced two counts in the lower court. The first charge is dealing with wildlife trophies contrary to section 92(2) of the *Wildlife Conservation and Management Act*. The facts of this charge are that on January 6, 2020 at 11.00am at National Oil Petrol Station in Loitoktok Sub-County, Kajiado County he was found dealing in wildlife trophies namely 6 pieces of elephant tusks being an endangered species weighing approximately 43.6kg with an estimated street value of Kshs 4360,000 without a permit contrary to section 92 (2) of the *Wildlife Conservation and Management Act* 2013.
 3. The appellant was accused of being in possession of wildlife trophies contrary to section 92(4) of the *Wildlife Conservation and Management Act*. The facts of this charge are that on January 6, 2020 at 11.00am at National Oil Petrol Station in Loitoktok Sub-County, Kajiado County he was found in possession of wildlife trophies namely 6 pieces of elephant tusks being an endangered species weighing approximately 43.6kg with an estimated street value of Kshs 4360,000 without a permit contrary to section 92 (2) of the *Wildlife Conservation and Management Act, 2013*.
 4. The appellant was tried for the two offences. He was found guilty in count one and sentenced to serve ten (10) years imprisonment. It is this conviction and sentence that the accused is aggrieved with and the reason this appeal was filed.

The evidence

5. A first appeal is akin to a re-trial. The first appellate court is duty bound to re-consider all the evidence adduced in the trial court and re-evaluate it with a view to reaching an independent conclusion. I caution myself that I did not have the opportunity of observing the witness as they testified and therefore allowance is given for that.
6. I have read the record of the lower court file. The prosecution called six (6) witnesses in support of the case. Godfrey Onkoba, an officer with Kenya Wildlife Services testified. He told the court that he received information about a man with elephant tusks on January 5, 2020 at 9pm. On the following day he informed Sgt Daudi and Ranger Ngumi. The three of them went to Loitoktok National Oil Petrol Station and waited there. Sgt Daudi was posing as the buyer of the tusks. At 10am the Appellant came on a motor cycle. PW1 alighted from the motor vehicle to talk to the accused. He told the accused to get into the car. He did so and he negotiated the price of the tusks with Sgt Daudi. The Appellant told them they got to get the tusks at Rombo Road at his home. PW1 and the accused went to retrieve the tusks. The Appellant entered inside the compound and came out carrying a gunny bag on his shoulders. They went to the place they had left Sgt Daudi, who entered the vehicle together with Ranger Ngumi. Sgt Daudi and Ranger Ngumi opened the gunny bag and found elephant tusks. The accused became violent but he was arrested and taken to Loitoktok Police Station where he was placed in custody.
7. Six pieces of elephant tusks were found inside the gunny bag. The Appellant was detained at the police station and charged with the offences now before the court.



8. The evidence of PW1 is confirmed by Sgt Daudi Mohamed (PW2) and Zakayo Zacharia Ngumi (PW3) both working with KWS together with PW1.
9. Chief Inspector James Kiprotich Chepchieng, a scene of crime officer from DCI Headquarters received a CD containing photographs of the tusks from PC Rono (PW6) the investigating officer. He processed them and produced them as exhibits in court.
10. There is also evidence from Dr. Ogeto Mwebi (PW5) examined the tusks on January 16, 2020 and confirmed that they are elephant tusks.
11. The Appellant did not give evidence. He told the court that he would not defend himself and opted to remain silent deciding to leave the matter to the court to determine.
12. The appeal was canvassed through oral submissions. Mr. Marete appeared for the Appellant. He submitted that the Appellant was sentenced to serve 10 years imprisonment for the offence of dealing with wildlife trophies contrary to section 92 (2) of the *Wildlife Conservation and Management Act*. Counsel highlighted three issues that the Appellant was not represented in the lower court because the lower court denied him another chance to engage an advocate after he told the court that his lawyer was sick.
13. It was submitted, secondly, that the charge sheet is defective; that it had two counts, one count for dealing and the second for being in possession both under the same section (92). Counsel submitted that due to lack of legal representation, the Appellant failed to point out this anomaly to the trial court and took a plea on a faulty charge sheet.
14. It was submitted, thirdly, that there were various inaccuracies in prosecution case in that the driver of the KWS vehicle did not enter the compound where the tusks were said to have been but remained outside and that when the Appellant went inside the compound and came out with a bag, the driver did not inspect the contents. It was submitted that the contents were inspected 30 Km away from the compound; that PW1 and PW2 told the court that they found the bag in the police vehicle and that the prosecution was not able to prove if the Appellant was in possession or was dealing with the trophies. Counsel concluded his submissions by stating that the prosecution did not prove its case to the required standards.
15. The Appeal is opposed. On the issue of representation, Mr. Mang'are for the Respondent submitted that the record of the lower court shows that the trial court allowed the Appellant the chance to engage counsel and adjourned the matter on several occasions but he failed to do so. The trial court ordered the trial to proceed nevertheless.
16. On the defective charge sheet, Mr. Mang'are submitted that the charge is correct in both counts.
17. On the issue of lack of proof, it was submitted that the prosecution evidence is consistent, cogent and without contradictions and that the case against the Appellant was proved. It was submitted that there was no need to visit the scene where tusks were found since the Appellant is the one who retrieved the tusks and that the driver was left in the vehicle as the Appellant went to collect the tusks.
18. Mr. Mang'are urged that the appeal be dismissed and the conviction and sentence be upheld.

Determination

19. I have read the entire evidence adduced in the trial court. I have considered that evidence and the submissions made orally in court. On the first ground of appeal, I find no inconsistencies in prosecution evidence. The evidence shows that after receiving information that there was a suspect



- with elephant tusks, PW1, PW2 and PW3, all officers with Kenya Wildlife Services, mounted an operation. They got in touch with the suspect, who is the Appellant and one of them, PW2, posed as a buyer. Evidence shows that the information received indicated that the suspect was to meet a potential buyer, a man of Somali origin. PW2 was said to resemble a man of Somali origin.
20. Evidence shows that the suspect, Appellant, arrived and upon confirming the witnesses were interested in buying the tusks he agreed to show them where the tusks were kept. PW1 accompanied the Appellant to the location the Appellant had identified. It is the Appellant who led PW1 to the place. PW1 did not enter the compound. The Appellant went in and came out with a gunny bag with contents. When this gunny bag was opened, 6 elephant tusks were found inside. The alleged inconsistencies have not been identified and I find none in the prosecution case.
 21. During oral submission, Mr. Marete pointed out to the evidence of the Investigation Officer that the police visited the compound where the tusks were but PW1 told the court that he did not go into the compound and that all PW1 indicated was that the Appellant entered the compound and came out with a bag which was opened about 30 km from the compound. I have considered this evidence. I find no inconsistency. It is true PW1 did not enter the compound. But the Appellant entered and came out carrying a gunny bag which was found to contain 6 elephant tusks. This ground of appeal has no merit.
 22. I have considered the issue of failure to accord the Appellant sufficient time to produce his advocate. I have confirmed from the record that the Appellant was arraigned in court to take the plea on January 7, 2020. He did not have legal counsel on that day. He took the plea and the case was adjourned to January 23, 2020 for pre-trial, on which date the issue of an advocate did not arise. On February 4, 2020, the prosecutor applied to amend the charge sheet to introduce a second charge. The Appellant took the plea afresh to the two charges. There was no advocate at the time.
 23. From the record, the issue of the advocate arose on February 27, 2020 when the trial was to commence. The prosecutor was ready for the trial but the Appellant told the court that he was not ready to proceed because his advocate was bereaved. Hearing did not take place on that account. It was adjourned to March 26, 2020 but for reasons not indicated, hearing did not take place on that day. It is important to note that the year 2020 was a Covid 19 Pandemic year and court proceedings were affected. This explains some of the happenings at that time. The next time the matter came up was June 18, 2020 for mention. It was given another date, 1st July 2020 for mention. On July 1, 2020, the proceedings were done through virtual link. The Appellant told the court that his advocate was not present but he had told the Appellant to take a date. Hearing date was fixed for July 21, 2020.
 24. On July 21, 2020, the prosecutor was ready with witnesses but the Appellant told the court that he was not ready to proceed because his advocate was not present because he was in quarantine. Hearing was adjourned on that account to September 10, 2020. On September 10, 2020, the prosecutor was ready with witnesses for hearing. The Appellant was not. The prosecutor told the court that he had received a call from the Appellant's counsel saying that he was unwell. The court allowed an adjournment on that account but cautioned that she was giving a last adjournment to the Appellant. The case was fixed for hearing on November 3, 2020.
 25. On November 3, 2020, trial magistrate was away from the station on official duties and the case did not take off. It was fixed for hearing on December 19, 2020. The Appellant applied for an adjournment to look for his lawyer. The court reminded him of the number of times the matter had been adjourned on account of non-attendance of the defence counsel. She declined to allow a further adjournment and confirmed the hearing at 2.00pm. Hearing commenced at 3.00pm on that day.
 26. I have considered this issue. Article 50 of *the Constitution, 2010* guarantees an accused person the right to a fair trial which includes, *inter alia*, the right to have adequate time and facilities to prepare



his defence; the right to have the trial begin and conclude without unreasonable delay and the right to choose and be represented by an advocate or to have an advocate assigned to him by the state if substantial injustice would otherwise result and to be informed of such right promptly.

27. It is my considered view that during a criminal trial the rights of an accused persons must be balanced with the rights of the victim of the crime. The law is vocal about the rights of an accused. However, this does not mean that the courts should trample on the rights of the victims of a crime. To do this would be to go against the very law that guarantees every one equal protection under the very same law. Therefore, when the constitution demands that the rights of an accused person be respected, I want to believe that the law does not intent to have the rights of any other party affected by the acts of the accused under trial should be neglected.
28. The trial court in this case was very patient. It accorded the Appellant all the opportunity possible to bring his lawyer to court. He did not do so. The trial court adjourned the matter four times on account of failure by the accused to bring his advocate. This generosity of the court, which was exercised in line with the demands of the law, had to come to an end because the trial had to proceed. The actions of the court were meant to ensure that the Appellant's right were protected, and indeed these rights were protected but then to continue allowing more time for the Appellant to bring his lawyer when no lawyer was turning up was turning out to be an injustice to the victims of the crime, the very people of Kenya who are the complainants through the State. This ground has not merit and must fail.
29. I did not find any gaps in the prosecution case as claimed by the Appellant in ground three of appeal. I have considered submissions by Mr. Marete that the evidence of PW1 and PW2 had inaccuracies where they stated that they found the bag in police motor vehicle and that the prosecution was not able to prove that the Appellant was in possession of the tusks or was dealing with them. He also submitted that the police did not produce the motor cycle mentioned and that the prosecution did not prove this case beyond reasonable doubt.
30. I have considered this issue; the Appellant is the one who went into a compound and came out carrying a gunny bag. Inside the bag were 6 elephant tusks. I note that it is the Appellant who told PW1 and PW2 where the tusks were. He led PW1 to the compound, entered and came out with the tusks. That the bag was opened at a different place is not detrimental to the appellant's case. The bag remained next to the Appellant until its contents were confirmed. The Appellant did not at any time claim that the bag was exchanged with another. It is the same bag. The matter in issue is not the compound or the owner of the compound but the tusks which the Appellant had. The appellant identified himself as the person who was selling the tusks when asked by PW1 and his fellow officers. The appellant believed them to be potential buyers. I do not find merit in ground number four of the appeal.
31. The evidence of PC Rono (PW6) the Investigating Officer is that he visited the scene where the arrest took place. He did not clarify where that was. He did not mention whether he went to the compound where the tusks were recovered. However, failure to do so did not occasion injustice on the Appellant.
32. I have noted that the officer who took photographs contained in the disk marked D was not disclosed. PC Rono took the CD to CIP Chepchieng (PW4) who processed the photographs. These photos show the gunny bag and the elephant tusks as well as the Appellant. The tusks were exhibited in court and produced as exhibits C1 to C6 all inclusive. Even if this court were to ignore the evidence of the photographs for lack of evidence as to who took those photographs as the law of evidence requires, the record shows that the tusks were exhibited in court and produced as exhibits.
33. The Appellant claims there are inaccuracies in the evidence of PW5 on the number of tusks. I do not think so. PW5, Dr. Ogeto Mwebi, examined the tusks to confirm that they are tusks. He confirmed that indeed the 6 pieces were elephant tusks from three elephants. Two of the pieces, C1 and C2 were



from one tusk cut into two pieces. They were from one elephant, the remaining four tusks were from two different elephants, two for each. I find no inaccuracies in PW5's evidence.

34. I have considered the issue of defective charge sheet. This is not one of the grounds of appeal but it was argued by counsel for the Appellant. The Appellant was charged and tried for two offences as shown in this Judgment. The first offence is dealing in wildlife trophies while the second is being in possession of wildlife trophies. I have read the particular section of the law creating the two offences.

35. Section 92 (2) of the [Wildlife Conservation and Management Act](#) provides that:

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.

36. While Section 92 (4) of the same 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.

37. The trial court stated as follows in respect of the two charges:

“The accused person never disputed having signed the inventory or even having been coerced to sign it. The evidence of these witnesses is cogent or what transpired leading to the arrest of the accused person- herein and it leaves no doubt in my mind that the 6 elephant tusks were found in custody of the accused person herein. The accused person has not produced any document to show he had a permit to possess elephant tusks. He was prepared to sell the same that is why he was negotiating with officer Daudi and that amounts to dealing in elephant tusks. For the second count of possession I find it improper to charge the accused person with a count of possession and a second count of dealing. It can only be one so I reject count two.”

38. Count two is being in possession of wildlife trophies contrary to section 92(4) of the Act. It is clear, therefore, that the Appellant, though charged with two offences, was not convicted of the two offences. The trial court was alive to that fact and made findings to the effect that the Appellant was guilty of dealing and not being in possession.

39. Section 134 of the [Criminal Procedure Code](#) provides as follows:

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

40. In [Yongo vs Republic](#) [1983] KLR, 319, the Court of Appeal held that a charge that is not disclosed by evidence is defective. The Court stated as follows in this regard:

“In our opinion a charge is defective under Section 214(1) of the [Criminal Procedure Code](#) where:



- (a) it does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge or because it charges offences in the charge not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings discloses; or
- (b) it does not, for such reasons, accord with the evidence given at the trial; or
- (c) it gives a misdescription of the alleged offence in its particulars.”

41. I do not find the charge defective. The only issue with the charge is charging the Appellant with the dealing with wildlife trophies as well as being in possession in possession of wildlife trophies. But as stated in this Judgment the trial court dealt with that issue conclusively. Had the trial court not finalized that issue, there is still reprieve provided by section 382 of the *Criminal Procedure Code*. A defective charge is curable under this section. My view is that no prejudice befell the Appellant.
42. The evidence tabled before the trial court is clear that the Appellant, led KWS officers, posing as potential buyers, to recover the tusks. He is the one who led them to the location, entered inside the compound and came out with the bag containing the tasks. He negotiated the price with officer Daudi (PW2) for Kshs 20,000 per kilogramme of the tusk. Evidence also shows that the tusks all weighed 43.6kg and this is what was entered in the inventory signed by the Appellant.
43. The offence under section 92(2) of the *Wildlife Conservation and Management Act* attracts a minimum sentence of 7 years with no upper limit. The Appellant was sentenced to 10 years imprisonment for dealing with wildlife trophies. I have no reason to interfere with the conviction and the sentence. I find that the Appellant was properly tried and sentenced. He was not prejudiced in any way. I find that this appeal has not merit. It stands dismissed.
44. The conviction and sentence are hereby upheld. The Appellant shall continue to serve the sentence imposed by the trial court.
45. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 25TH DAY OF JULY 2022.

S. N. MUTUKU

JUDGE

