



**Aiko v Republic (Criminal Appeal E073 of 2021)  
[2022] KEHC 14232 (KLR) (Crim) (21 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14232 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL APPEAL E073 OF 2021  
K KIMONDO, J  
OCTOBER 21, 2022**

**BETWEEN**

**DENIS MOIRO AIKO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from the decision of M. Maroro, Principal Magistrate, in  
Criminal Case No. 808 of 2015 at Kibera dated 9th August 2021)*

**JUDGMENT**

1. The appellant was convicted on three counts of being in possession of a wildlife trophy contrary to section 95 as read with section 105 (1) of the *Wildlife Conservation & Management Act* 2013 (hereafter the Act); dealing in a wildlife trophy contrary to section 84 (1) as read with sections 92 and 105 of the Act; and, obstructing persons in the execution of their powers or duties in breach of section 101 (b) of the Act.
2. He was fined a total of Kshs 4,100,000 and in default to serve three years on Count II; and, one year each on Counts I and III. The sentences were to run consecutively.
3. The particulars of the 1<sup>st</sup> count were that on 24<sup>th</sup> February 2015 at South C Shopping Centre within Nairobi County jointly with others not before court, he was found in possession of one rhino horn weighing 400 grams with a street value of Ksh 800,000 aboard motor vehicle KBP 424D without a permit.
4. The particulars of the 2<sup>nd</sup> count related to dealing with the same trophy at the same place. The particulars of the 3<sup>rd</sup> count were that he obstructed three named officers from the Kenya Wildlife Service (hereafter the KWS) from executing arrest.



5. Being aggrieved, he lodged a petition of appeal dated 17<sup>th</sup> August 2021 raising seventeen grounds. I will compress them into four. Firstly, that there was inconsistent and insufficient evidence to found the charges. Secondly, that the appellant's evidence plus that of his sole witnesses was disregarded. Thirdly, that the trial offended article 50 of *the Constitution* and the tenets of a fair trial. On this aspect, the appellant complains, for instance, that he was not warned in advance of the gravity of the offence and the need to hire counsel; and, also submitted that he was denied the right to recall a witness. Fourthly, that the sentence was harsh considering the mitigation and all the surrounding circumstances.
6. In a synopsis, the appellant contends that the offence was not proved beyond reasonable doubt.
7. The appellant's counsel filed submissions dated August 2, 2020 with annexed precedents. On August 7, 2022, learned counsel informed me that he was relying wholly on those submissions.
8. The appeal is opposed by the respondent through grounds of opposition dated August 30, 2022 and a set of submissions filed on August 31, 2022.
9. This is a first appeal to the High Court. I have re-evaluated the evidence and drawn independent conclusions. I am alive that I neither saw nor heard the witnesses. *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] E. A. 32.
10. I will commence with the appellant's submission that he was not afforded a fair trial. He principally takes cudgels on the failure by the trial court to recall a witness, Denis Gikundi (PW1). When that application was first made, the trial court refused to do so. Following an order of review on June 7, 2017 by (Ngenye-Macharia J), as she then was, the trial court was ordered to recall the witness for further cross examination on June 14, 2017.
11. However, the appellant had jumped bail and a warrant of arrest issued earlier on 17<sup>th</sup> May 2017. After a number of mentions and summons to the investigating officer, the warrant was executed nearly a year later on 7<sup>th</sup> May 2018. The trial resumed on 4<sup>th</sup> August 2018 when PW3 testified.
12. Throughout the remainder of the trial, the appellant did not renew the application for recall. To be fair to him, he asked that the trial start de novo when a new magistrate took over the proceedings on 24<sup>th</sup> October 2019. But this was long after the appellant had been put on his defence. The application was disallowed.
13. The record also reveals a long pattern of delays by the defence. On 2<sup>nd</sup> March 2020, the appellant testified on oath and called one witness. Granted that history, I am unable to blame the trial court for failure to recall the first witness. I also note that the appellant had counsel for part of his trial. Considering the nature of the charge it was not mandatory to warn him of the gravity of the charge or to provide him with pro bono counsel.
14. The appellant was present at all the hearings and cross-examined all witnesses at length including PW1. He was afforded a full opportunity to defend himself and call a witness. He was supplied in advance of the hearing with witness statements or evidence sought to be relied on by the prosecution. I find no evidence on the record to show that the trial court was biased or that the burden of proof was shifted to him. In the end I am unable to say that that there was violation of Article 50 of *the Constitution*.
15. I will now re-appraise the evidence. On 24<sup>th</sup> February 2015, KWS Assistant Warden Denis Gikundi (PW1) received an anonymous tip that there were two persons in motor vehicle KBP 424D parked at South C Shopping Centre who were in possession of a rhino horn. He, Nicholas Munene (PW2) and Shadrack Mwema (PW4) went to the scene. They located the car and PW1 introduced himself to the two occupants.



16. According to the three witnesses, the accused was seated on the driver's seat. He tried to start the car or escape. A commotion ensued but the three officers managed to arrest and hand-cuff him. The other suspect who was in the passenger's seat escaped.
17. PW1 and PW2 claimed that in the course of the arrest, they were pushed by the accused. PW1 said that he was thrown to the ground and suffered slight injuries. In cross-examination however, PW2 conceded that in his statement, he merely said the accused "resisted arrest; I did not say that he pushed".
18. A search in the car revealed a rhino horn wrapped in a black paper bag stored in the compartment between the driver and front passenger seats. Upon enquiring from the accused, he was unable to show a licence. An inventory (including an unrelated laptop and title deed) was taken and the car towed to KWS headquarters. The appellant in his defence said he is a car dealer and that the title deed belonged to him.
19. PW5, Police Constable Kitur, is a scene of crime officer. He recorded photographs of the crime motor vehicle and its chassis (exhibits 2A & B). Following the arrest, the appellant was handed over for interrogation to PW6, Chief Inspector Inoti of the Directorate of Criminal Investigations but attached to the KWS.
20. From the evidence so far, I entertain no doubt that PW1, PW2 and PW4 positively identified the appellant. It was also in broad daylight and the arrest took quite a while. See *Wamunga v Republic* [1989] KLR 424. But doubt is completely removed because the appellant (DW1) in his defence accepted that he was arrested by the three officers on the material day.
21. PW1 weighed the rhino horn at 400 grams. According to his evidence, it had a black-market value of Kshs 800,000. There is then the evidence of Esther Nguta (PW3), a research scientist at the National Museums of Kenya who carried out scientific tests or analysis on the horn. She established that it was a rhino horn. Her report was produced as exhibit 10. Under the Act and the Sixth Schedule, a rhino is an endangered wildlife species.
22. The appellant (DW1) testified that he sells cars. That fact was confirmed by his witness, Sylvester Otanga (DW2). The motor vehicle KBP 424D was under the appellant's control save that he claims he was meeting a potential buyer for it at the time of the arrest.
23. Section 3 of the Act defines trophy to include-

Any bone, claw, egg, feather, hair, hoof, skin, tooth or tusk of an animal, and for any species of plant, any bark, branch, leaf, log, sip or extract and includes any other durable portion whatsoever of that animal or plant whether processed, added to or changed by the work of man or not, which is recognizable as such.
15. Section 95 of the Act provides as follows-

Any person who, without a permit or exemption granted under this Act in relation to a species not specified under section 92—

  - a. kills or injures, tortures or molests, or attempts to kill or injure, any wildlife species;
  - b. deals in a wildlife trophy;
  - c. deals in a live wildlife species;
  - d. is in possession of a wildlife trophy or live wildlife species; or



- e. manufactures an item from a wildlife trophy, commits an offence and shall be liable on conviction to a fine of not less than one million shillings or a term of imprisonment of not less than twelve months or to both such fine and imprisonment.

15. On analysis of the evidence and the law so far, I readily find that the rhino horn was a wildlife trophy. It was recovered in a compartment inside the car located between the driver and front passenger seats of the car. The car was at all times in the possession and control of the appellant. There was neither evidence, nor did the appellant allege, that the trophy was placed there by the person who escaped or any other person. The appellant did not also have (and it was not his defence) that he had a permit to possess the trophy.
16. I thus find that Count I and all its principal elements were proved beyond reasonable doubt. I also find that section 95 as read with section 105 (d) provided for a minimum sentence of Kshs 1,000,000 and in default, 1-year imprisonment. The trial court took into account the mitigation tendered and the gravity of the offence. I cannot then say that the learned trial magistrate applied wrong principles in sentencing. I accordingly affirm the conviction and sentence on Count I.
17. I will now turn to Count II. It was framed as dealing in a wildlife trophy contrary to section 84 (1) as read with sections 92 and 105 of the Act. The particulars were the same as those in count I save for the word license at the end. I must point out that I am skeptical that granted all the circumstances, a different count could be maintained on the same set of particulars.
18. That said, section 84 (1) of the Act provides that “no person shall operate as a trophy dealer without a licence issued by the service”. section 92 (4) then 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.

29. Section 105 of the Act which is referred to in Count II relates to forfeiture and could have applied to the crime vehicle. On re-evaluation of the evidence, I find that it is only the undisclosed informant who claimed that there were two people in a vehicle at South C Shopping Centre trying to sell a rhino horn. That is classic hearsay.
30. As I held earlier, there is no doubt that the appellant was in possession of the trophy and had no permit or dealership licence. But there was no concrete evidence that he was operating as a trophy dealer or was arrested when trying to deal in the trophy as defined in section 84 (1).
31. I cannot then say that the prosecution discharged the legal burden on Count II. *Woolmington v DPP* [1935] AC 462, *Bhatt v Republic* [1957] E.A. 332. I thus find that the conviction and resultant sentence on Count II was unsafe and are hereby set aside.
32. Regarding Count III on obstruction, at least three officers (PW1, PW2 and PW4) approached the appellant’s vehicle. He was in the driver’s seat. After PW1 identified himself, they claimed he tried to start the vehicle or escape. But according to the appellant, he saw “four men” approach the car. He rolled down the window to make enquiries. He said: “I tried to get out of the car and they wrestled me and handcuffed me”.
33. I stated earlier that PW2 conceded in his written statement, that he merely said the accused “resisted arrest; I did not say that he pushed”. PW1 and PW2 said that they sustained minor injuries in the



confrontation. PW1 testified that “we fell to the ground with [sic] the struggle”. In further cross-examination PW2 stated-

Denis [PW1] knocked on the driver [sic] window. We had blocked the door; two of us. We were standing strategically at the doors of the car. Accused tried to ignite the car. Denis went for the keys.....

34. So here were three or four plain-clothed KWS officers who ambushed the appellant in his vehicle. He may have attempted to start the engine but he was restrained by the officers. That explains the broken car key in the ignition. I accept that there was a scuffle but the appellant was finally handcuffed. I cannot then say for sure that the appellant threw PW1 to the ground.
35. Doubt is further engendered by failure to adduce medical evidence. Even the learned trial magistrate concluded that “P3 Form was not produced to enable the court convict or find it worth convicting....though the evidence as to the injuries was adduced by [PW1] and [PW2]”.
36. Granted that state of the evidence, I am hard pressed to say that the prosecution proved Count III beyond reasonable doubt. I will thus set aside the conviction and sentence on Count III.
37. The upshot is that the appeal partially succeeds. The conviction and sentence on Counts II and III are hereby set aside. The appeal against Count I is dismissed. Accordingly, the conviction and sentence on Count I is upheld. For the avoidance of doubt, the appellant is fined on Count I Kshs 1,000,000 and in default to serve 1-year imprisonment. The sentence shall run from August 9, 2021, the date of his original conviction.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF OCTOBER 2022.**

**KANYI KIMONDO**

**JUDGE**

**Judgment read virtually on Microsoft Teams in the presence of-**

The appellant.

Mr. Momanyi for the appellant instructed by Momanyi Magare Advocate.

Mr. Kiragu for the respondent instructed by the Office of the Director of Public Prosecutions.

**Mr. Edwin Ombuna, Court Assistant.**

