REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL CASE NO. 179, 180, 181, 182 OF 2019

FRANCIS KIOI KARANJA.....1ST APPELLANT

STEPHEN CHEGE NGAWAI.....2ND APPELLANT

MARTIN MWITI MARANGU.....3RD APPELLANT

PETER KURIA KIMUNYU.....4TH APPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

(Being an appeal from the Judgment, conviction and sentence of the Senior Resident Magistrate

(Hon. Kamau) on 20.8.2019 in Kibera Chief Magistrate's court, Criminal Case Number 994 of 2016)

JUDGMENT

The 4 appellants, *FRANCIS KIOI KARANJA, STEPHEN CHEGE NGAWAI, MARTIN MWITI MARANGU* and *PETER KURIA KIMUNYU*, were jointly charged with 2 counts in the above mentioned case. On count I, they faced a charge of Being in possession of Wildlife Trophy contrary to section 95 as read with section 92 of the Wildlife Conservation and Management Act, 2013. The particulars of the charge were that on 29.2.2016 at around 1430hours at Nairobi West Shopping Centre within Nairobi County, they were jointly found in possession of a Wildlife trophy namely 1 piece of raw elephant tusks weighing 5 kilograms on board a grey Toyota Prado motor vehicle registration No. KAV 858F, with a street value of Ksh.500,000/= without a permit.

On count II, they jointly faced a charge of dealing in wildlife trophy contrary to section 84(1) as read with section 92 of the Wildlife Conversation and Management Act, 2013. The particulars were that on the 29.2.2016 at around 1430 hours at Nairobi West Shopping Centre within Nairobi County, they were jointly found dealing in Wildlife trophy namely, 1 piece of raw elephant tusk weighing 5 kilograms on board a grey Toyota Prado motor vehicle Registration No. KAV 858F, with a street value of Ksh.500,000/= without a licence.

After the full hearing of the case, all the appellants were convicted on both counts. On count I, each of the appellants was sentenced to pay a fine of Ksh.20,000,000/= or in default to serve life imprisonment. On count II, they were each convicted of the offence but were acquitted under section 35 of the Penal Code.

Aggrieved, the appellants filed their appeals against the sentence. The appellants initially filed separate petitions of appeal which basically challenged the trial court's finding that the prosecution had proved its case against all the appellants beyond any reasonable doubt. The petitions were subsequently consolidated. A comprehensive amended petition of Appeal was later on 30.1.2020 filed by the advocate for the 3rd appellant. The other appellants did not file any amended petitions. In the amended petition of appeal filed by the 3rd Appellant, and which also raises issues of proof contained in the petitions earlier filed by each of the appellants, a total of 11 grounds have been listed. These grounds are as follows:

1.) That the learned trial magistrate erred in both law and fact by holding that the evidence adduced against the appellant was sufficient to support the conviction yet the said evidence was manifestly contradictory, inconsistent, fabricated and improbable.

2.) That the learned trial magistrate erred in both law and fact by failing to draw an adverse reference on the inconsistencies and contradictions of the testimony by the prosecution witnesses.

3.) That the learned trial magistrate erred in both law and fact in failing to draw an adverse reference on the testimony of the prosecution witnesses which were not in their respective witness statements.

4.) That the learned trial magistrate erred in both law and fact by making a factual finding that the appellant was in possession of the recovered wildlife trophy.

5.) That the learned trial magistrate erred both in law and fact by misdirecting herself on the ingredients of possession as defined by section 4 of the penal code by including physical control as one of the ingredients and proceedings to misapply the said impugned interpretation to the facts of the case against the appellant.

6.) That the learned trial magistrate erred in both law and fact by disregarding the fact that the prosecution failed to prove that the appellant had knowledge and consent of the alleged elephant trophy in the custody and possession of 1 st accused, and which are the requisite ingredients for possession as provided for under section 4 of the Penal Code.

7.) That the learned trial magistrate erred in both law and fact by making a finding that the appellant was dealing with wildlife trophy (ivory) contrary to section 84(1) of the Act.

8.) That the learned trial magistrate erred in both law and fact by replying on the wrong principles, failing to exercise discretion as well as disregarding the appellant's mitigations and proceedings to wrongfully sentence the accused to life imprisonment under count I on the basis that section 92 of the Act provides a mandatory sentence upon conviction.

9.) That the learned trial magistrate erred in both law and fact by sentencing the appellant in count I based on the sentence provided in section 92 and disregarding the sentence provided for in section 95 of the Acts is that the said section 92 is ambiguous as it does not state which specific offences apply to endangered species and thus incapable as the penal section.

10.) That the learned trial magistrate erred in both law and fact by failing to confer to the appellant the benefit of the least severe punishment as both section 92 and 95 of the Act under which the appellant was charged on count I and II provide for different sentences contrary to the provisions of Article 50(2)(p) of the constitution.

11.) That the learned trial magistrate erred in law and fact by convicting the appellant on both counts despite the prosecution failing to discharge their burden of proof beyond any reasonable doubt thereby occasioning a miscarriage of Justice.

The appellants have pleaded hat their appeals be allowed, convictions on Count 1 quashed and sentences thereof set aside. The Respondent/state, on the other hand opposed this appeal. By agreement of the parties, this appeal has been canvassed by way of written submissions. All the appellants have accordingly filed their submissions through their respective advocates. The state Respondent has similarly filed their submissions.

For the 1st appellant, ***Francis Kioi Karanja***, the issues were condensed into 3 issues, being whether the trial court shifted the burden of proof to the appellant, whether the case was proved beyond any reasonable doubt and the issue of sentence being excessive and unlawful.

It was submitted by counsel that the burden of proof in criminal cases rests on the shoulders of the prosecution and that it is one of beyond any reasonable doubt. Counsel relied on the finding of Mativo J. in ***Peter Mwangi Kariuki Versus Republic (2015eKLR*****,** that;

"If at the conclusion of the trial, the prosecution has failed to establish the burden to the appropriate standard, the prosecution will lose. It is clear the legal burden of proof in Criminal cases is only one and rests on the shoulders of the prosecution. The burden of the prosecution in Criminal cases is to establish its case beyond any reasonable doubt…."

Also, another decision of the Hon. Mativo J. in ***Philip Muiruri Ndaruga Versus Republic (2016)eKLR*** that;

"It is trite law that an accused person should only be convicted on the strength of the prosecution case and not on the weakness of his defences."

That it is better to acquit 10 guilty persons than convict 1 innocent person (Mrima J., in ***J. O. O. Versus Republic (2015 eKLR).***

On the issue of shifting the burden of proof to the appellant, counsel cited the evidence of PW6 that she drove to the Kenya Wildlife Services (KWS) Headquarters in the company PW2 and 3 of the appellants while 3rd appellant drove motor vehicle KAV 858F, contrary to the evidence of PW3 that the 4 appellants went in the KWS vehicle while his colleague Nicholas Munene drove the Prado vehicle. He relied, on ***Martipei Parmaya Versus Republic (2017)eKLR,*** that it was illogical that 3 witnesses allegedly present at the time of arrest give contradicting versions…".

Counsel went further that there was no evidence to prove that the appellant and the other appellants (co-accuseds) had been in any telephone communication and agreed to meet at the scene to sell the ivory. No phone records had been produced. That in the end, the learned trial magistrate failed to appreciate that it is the duty of the prosecution to prove the case.

Counsel also submitted on other contradictions in the prosecution's case. That PW3 stated that the 4th appellant walked to him carrying the ivory in a white bag only to later talk of a black bag. That PW3 claimed the investigating officer did the inventory, while PW5 said it was Joyce Muthoni. And that PW5 contradicted himself on whether he wrote the inventory or only signed the same. And that no fingerprints

were taken, and that the photographs produced did not include those of the appellants.

It was further submitted that the samples were not analysed. Counsel also challenged the chain of custody of the exhibits with a possibility that the exhibits were planted in the car.

On sentence, counsel for the 1st appellant submitted that the learned trial magistrate not only handed a sentence that was harsh and excessive, but also unlawful in law. In his submissions, section 92 of the Act, that the court relied on in sentencing was non-existent.

For the 2nd appellant, Stephen Chege Ngawai, it was submitted the main ground of appeal is that the trial magistrate shifted the burden of proof to the appellant. That the evidence on record shows that the 2nd appellant was mere passenger seated next to the driver, while the exhibit was recovered at the back. That there was no evidence that he was seen handling the said exhibit. The counsel concurred with the finding in ***Peter Mwangi Kariuki Versus Republic (2015)eKLR***, that there are 2 kinds of possession, being in physical possession of the item, and knowledge of having the item.

Counsel also submitted on the alleged contradictions in the prosecution's case. That PW3 talked of a white bag, while PW5 stated that the same was black. And that no photographs of the ivory inside the car were taken, nor the same with the appellant. In the submissions for the 2nd appellant, the issue of possession was not proved beyond any reasonable doubt as against the 2nd appellant.

The 2nd appellant also submitted on lack of evidence to show any communication between the 2nd appellant and the other appellants or proof of any common intentions.

The 3rd appellant, Martin Mwiti Marangu, also filed submissions. The same were to the effect that the prosecution's case was riddled with contradictions and inconsistencies. Counsel gave the example of PW3 and PW5 on the number of officers involved in the arrest. Also on the number of vehicles involved (PW3 and PW6). And on the movement from the scene. It was submitted that these contradictions were material.

On the issue of possession, counsel relied on section 4 of the Penal Code and that the trial court misdirected itself on this by ignoring the issue of knowledge and consent of the presence of an item. It was not disputed that there was a bag at the back seat of the vehicle as stated by PW9. It was not in dispute that the 3rd appellant was well known to 1st appellant, both being police officers residing at Uhuru camp.

It was the contention of the 3rd appellant that it was not strange that appellant drove to Nairobi West for lunch, and that along the way, accused 1 had flagged the 3rd appellant down for a lift. It was further admitted that 1st appellant sat behind the 3rd appellant in the car and placed the bag at his feet, but that at no point were the contents of the bag disclosed to the 3rd appellant. That he therefore had no knowledge of the contents of the bag, neither did he have physical control thereof. He relied on ***Abdi Ibrahim Harun Versus republic (2018)eKLR.***

In the submissions of the 3rd appellant, since the contents were in a concealed bag, he could not have knowledge of its contents. And that there was no evidence of communication between 3rd appellant and the others.

On the next issue of sentence, it was submitted that section 92 of the Act is a punishment section, but does not make provisions for the circumstances under which a person is deemed to have committed the offence. He cited ***Zhang Chunsheng versus republic, Criminal Revision No. 19/2014(NAI),*** in which the Hon. Mbogholi Msagha held that the section is ambiguous. Also the case of ***Mutisya Kiema Versus Republic Voi HCCR No. 7/2014***. In which Justice Kasango in a similar situation, held that the suspect should have been charged only under section 95 of the Act.

The submissions were that the sentence under section 92 of the Act was unconstitutional. And the court ought to have sentenced under section 95 of the Act, which is the lesser sentence of a fine of not less than 1 million or to imprisonment for a term of not less than 5 years or to both. He relied on ***Feisal Mohamed Versus Republic, Msa HCCR Appeal No. 87/2016***, in which Judge D. Chepkwony, upheld the rights of an appellant under Article 50(2) of the least severe of the punishment prescribed.

Counsel also relied on the case of ***Francis Karioko Muruatetu and another versus republic (2017)eKLR*** on the fact that the trial court did not consider the mitigation of the appellants, and also on the mandatory nature of prescribed sentence ***(Dennis Kibaara Versus Republic (2019)eKLR.*** Also ***Jared Koita Injiri Versus Republic (2019)eKLR*** in which the Court of Appeal substituted a life sentence with a 30 years' imprisonment term. Counsel prayed that this appeal be allowed or that in the alternative, the sentence be substituted to that under section 95 of the Act.

The 4th appellant, Peter Kuria also filed submissions same were the case was never proved beyond any reasonable ***doubt (Peter Mwangi Kariuki Versus republic (2015)eKLR***, ***Philip Muiruri Ndaruga Versus republic (2016)eKLR)***

It was submitted that the prosecution's case was full of inconsistencies. Examples given included who made the inventory, the number of officers and vehicles involved in the operation and who boarded and drove each from the scene of arrest. He cited the case of ***Martipei Parmaya Versus Republic (2017)eKLR***, already considered above.

The other issues raised in the submissions were the lack of proof of any phone communication between the appellants, or photographs of the scene, the recording of the inventory, lack of the taking of fingerprints, and chain of custody of exhibits.

The 4th appellant made the same submissions with respect to the issue of sentence as the other appellants (above and prayed that this appeal be allowed and that both the conviction and sentence be quashed.

The respondent/state, on the other hand, submitted that the exhibits were clearly identified as elephant tusks. And that evidence was laid proving that the appellants were in physical control of the same. And that they had no licence to deal in the same. In summary, it was maintained that the prosecution had proved the guilt of the appellants' beyond any reasonable doubt, and that the conviction were safe. However, it was submitted that the sentence were harsh.

I have considered the petitions of appeal filed herein by the appellants. I have also considered the submissions filed by both the appellants and the Respondent sides. This court is seized of this matter as an appeal court of the first instance. As an appeal court of the first instance, this court is bound by the direction given by the court variously on its jurisdiction. In ***David Njuguna Kariuki Versus Republic (2010)eKLR***, the Court of Appeal held;

> ***"The duty of the 1st appellate court is to analyse and re-evaluate the evidence which was before the trial court, and itself come to its own conclusions."***

It is therefore the duty of this court to analyse and re-evaluate the evidence that was produced before the trial court in toto and to come up with its own decisions on the same. From the proceedings and record of the trial court, the case of the prosecution commenced with the testimony of PW1, Clement Nyaliwa, a senior Superintendent of the police based at security of Government Buildings Unit, in charge of deployment unit. He is the one who assigned the appellants duties, they were officers working under him. And PW2 sergeant. Ibrahim Malaba, also of the same unit, is the one who issued 2nd and 4th appellants with firearms and ammunitions, which 2 pistols the 2 appellants did not return.

Pw3, Richard Kiplagat Chebii, a KWS officer, gave evidence that on 29.2.2016, he was with his colleagues Nicholas Munene, Joyce Muthoni and Said Kuvera when they got information that someone was looking for a buyer of a trophy. He was given the number of the seller as 0716-830978. He called the number and they agreed to meet at Nairobi West on 29.2.2016. 7 of them, Nicholus Munene, Joyce Muthoni, Said Kurera, John Chelebo, Kibet and Joyce Ekurui got into 2 unmarked cars. He drove alone in 1 of the cars. A Chevrolet, and calling the number, the man came and they met at the parking of Barclays Bank. The man was Peter Kuria, 4th appellant. That the 4th appellant said he would sell the elephant tusks at 14,000 per kilo.

He went on that 4th appellant called another person to bring the ivory as they stood waiting. Then a motor vehicle KAV 858F approached, a Prado. That 4th appellant told him the ivory was in the vehicle. He saw the tusks in the Prado, parked at National Oil. A few meters away. That 4th appellant opened the rear right door. The vehicle had 3 people inside, the driver and 1 passenger at the front and 1 passenger at the back. It was the man seated at the back who showed him the ivory in a white paper bag placed on the floor near his legs on the floor. They then agreed that they drive the tusks to where he had parked his car at Barclays Bank. The vehicle was accordingly driven to next to his car after the 4h accused also got into the car and showed where the car of PW3 was. PW3 walked this distance.

That once outside Barclays bank, the 4th appellant brought the white paper bag to his car as he gave a signal to his colleagues. 4th appellant was already in his car. He had opened the passenger front door and placed the paper bag, but before he could come in the other KWS officers pounced on him. Other officers had in the meantime gone round to arrest the others in the other car. That all the 4 men were arrested and put in their car and driven to KWS headquarters. That in the process, 2 of them produced guns but later surrendered. It was accuseds 4 and 2 who had guns. That it was Nicholas Munene who drove the Prado to the KWS offices. They were interviewed at the offices and found to be Administration police officers, and that the Prado was a Government car. They had no licence and none explained how they got the ivory. To him, the tusks were in a white paper bag which made it black/green bag. A white polythene bag, a luminous green backpack and bag were produced as exhibits.

On cross-examination, the witness stated that the 1st appellant was the passenger at the back who showed him the contents of the bag, after the 4th accused took him to the vehicle. To him, it was the investigating officer who wrote the inventory. They had used 2 vehicles, a Chevrolet and Pajero.

pW4, Dr. Ogeto Mwebi, an expert scientist, only confirmed that the exhibits recovered were in fact elephant tusks.

PW5, Nicholas Munene, a ranger, testified that he had been with PW1 and Joyce Muthoni at Nairobi West, following on an information. PW1 was to pose as a buyer as the rest did surveillance. He saw a man alight from a Prado KAV 858F and approach where Chebii (PW1) had parked, before the 2 of them proceeded to the Prado. The rear passenger door was opened, then closed. He then saw PW3 and the man walk back to Chebii's car, with the man carrying a black bag. Then PW3 signaled them. They proceeded to the Prado, introduced themselves and arrested the occupants, the 2 cars being about 4 meters part. That 2 of the men attempted to resist arrest by drawing firearms but later surrendered and were disarmed. He then drove the Prado to KWS Headquarters, while 3 other officers were in the other car with the arrested. And that once at their offices, an inventory was prepared, which all the appellants signed. None contested the same.

In his evidence, it is 1st appellant who had been seated at the rear of the Prado. 2nd appellant was seated at the from while 3rd appellant was the driver. And 4th appellant is the one PW3 communicated with; and it was 2nd and 4th appellants who had guns.

PW6, another ranger Said Kurera was also with the other officers Chebii, Joyce Muthoni and Munene during the operations, and his evidence was generally same as that of PW3 and PW5. And PW7, IP Kenneth Chomba of the DCI, produced the firearms, ammunition and the ballistics report as exhibits.

Ranger Joyce Muthoni was PW8. She had also proceeded with her colleagues to Nairobi West for this operation. She gave same evidence as PW3, PW5 and PW6. She confirmed that once at their offices, she prepared the inventory of exhibits which all the appellants and 3 KWS officers signed. And Kennedy Kihara, PW9, a civil servant at Harambee House, on his part, gave evidence that he had been driven to work that morning by driver Kimani in KAV 858F, Toyota Prado. That while going for another assignment, Kimani had left the car keys for a reliever driver, Martin Mwiti. He was only to be told later that his vehicle, and the driver had been arrested with ivory in the car. He denied

authorizing the Nairobi West journey nor signing the work ticket. He produced the work ticket showing he had only signed for Kahawa Sukari – Nairobi Town in the morning. He denied being told of the Nairobi West Journey.

It is the 3rd appellant who was his driver, while 2nd appellant was his security guard. And the last prosecution witness Chief Inspector Inoti, PW10, formally produced the exhibits in court.

The 1st appellant, gave a sworn defence in which he testified that on 29.2.2016, he was to report to duty at 6pm. That while at Kobil station, Uhuru Highway, waiting for means to Nairobi West, he saw a Prado with his colleagues. He stopped the vehicle where he found the 2nd and 3rd appellants, with 3rd appellant driving. They then fueled at Shell Petrol station, Lusaka Road, before proceeding to Nairobi West for lunch. That at the parking at Barclays Bank, they bumped ono the 4th appellant before they were surrounded and arrested and taken to KWS Headquarters where they were told the reason for the arrest. That a bag was produced and a bag removed whose contents they were questioned on. He denied knowledge of any ivory, nor seeing 4th appellant coming into their car to take a bag. He confirmed he knows the other appellants as colleagues stationed at the same camp.

The 2nd appellant also gave a sworn defence that he was a body guard to PW9. That on the on the material date, at about 1pm, he had accompanied 3rd appellant to fuel the car, when at Kobil, Haile Selasie Avenue, they picked 1st appellant. He sat next to the driver. After fueling, they drove to Nairobi West for lunch. That while at the parking near Barclays Bank, 4th appellant appeared, greeted them and left. Then suddenly, someone put his hand on the ignition keys. As he got out to confront he man, he was arrested and disarmed. He denied that they had any elephant tusks in the car, not a bag. He only saw the same at Langata. He denied signing the inventory, nor that any recovery was done at Nairobi West. He also disputed that he needed permission to go for lunch. On cross-examination, he stated that when the permanent secretary left the back, there was no bags. He however, did not know the KWS officers, nor of any grudges with them.

The 3rd appellant also gave a sworn defence that he had gone to fuel the vehicle and also for lunch with 2nd appellant. On the way they picked 1st appellant. On the way they picked 1st appellant. That at the parking at Barclays, Nairobi West, 4th appellant appeared, greeted them and left when suddenly his ignition keys were grabbed. He denied selling any ivory. He identified a detailed order (DME1-2) which was not produced by the maker. On cross-examination, he denied knowing the 4th appellant, though he used to see him and know him as PK.

And lastly, the 4th appellant, in his sworn defence, testified that he knew the co-appellants as colleagues. He saw them in Barclays Bank Nairobi West, said hello and left. When about 5 steps away, he heard a commotion. He was arrested and put in a waiting car. He denied ever speaking to PW3 on phone, not collecting a bag from the car as alleged. He also denied having a bag, only seeing the same at KWS Headquarters.

I have considered the evidence on record as produced by both parties before the trial court. I have also considered the judgment of the trial court, the petitions of appeal filed by the 4 appellants and the submissions filed by both the counsel for the 4 appellants and the state Respondent. In my view the following issues come up for determination of this appeal;

i) Which between the prosecution and defence sides produced a credible case

ii) The issues of possession.

iii) Whether the prosecution managed and discharged it burden of proof against the appellants i.e whether the ease was proved beyond any reasonable doubt.

iv) The issue of sentence.

On the first issue, I must state that the trial court, and indeed this court has been given 2 sets of evidence directly opposing of each other. This court is in that event obligated to discern both the evidence of the prosecution and that of the defence, and to determine which side gave credible evidence. There is no doubt, and it is not in dispute, the exhibits produced in court were trophy, being elephant tusks. Evidence was tendered to this effect by PW4, Dr. Ogeto Mwebi, and the appellants have not challenged the same. The prosecutions case, as stated by PW3, PW5, PW6 and PW8 was simply that PW3 received information from an informer of someone looking for buyer of elephant tusks. That having got the number of the said seller, PW3 communicated with the man while masquerading as the buyer. It was agreed that they meet on the material date on 29.2.2016 at Nairobi West Shopping centre. That on the material date, PW3 together with his colleagues, in 2 motor vehicle proceeded to Nairobi West to lay ambush. That once at Nairobi West PW3 called the same number. A motor vehicle, Prado KAV 858F appeared and stopped at the nearby National oil station, just a few meters from where PW3 had parked next to Barclays Bank. That it was the 4th appellant who responded to the call of PW3. He approached PW3. The 2 spoke before the 4th appellant lead PW3 to the Prado vehicle. In the vehicle he found 3 men, the driver, passenger and 1 man in the back seat. That the 1st appellant was the one seated at the rear, 2nd appellant was the passenger in the front seat, which 3rd appellant was the driver. That on reaching the vehicle, the rear door was opened, and the one seated at the back showed the witness the tusks in a bag on the floor of the rear seat. On his request, the Prado was driven to where the car of PW3 was parked. Then just as the 4th appellant was about to enter the car of PW3 with the exhibits, the other rangers ambushed and arrested he appellants despite attempts to resist with the 4th and 2nd appellants drawing their firearms. They were driven to the KWS Headquarters where an inventory of the recovered items was prepared by PW8 and duly signed by the rangers and the 4 appellants. They were then charged.

The 4 appellants gave more or less the same evidence that the 2nd and 3rd appellants being driver and guard of PW9 had left to fuel the Prado car when on their way to Mombasa Road, the 1st appellant was picked. After fueling, they decided to go for lunch at Nairobi West, where at the parking at Barclays Bank, 4th appellant, a fellow police officer, appeared and greeted them before starting to walk away. That they were then ambushed arrested and taken to KWS offices. They denied that the said tusks were found in the Prado vehicle. Nor that they signed the inventory produced as exhibits.

The one thing that came out from the case is that the prosecution witnesses who were part of the arresting team were not known to the appellants, a fact they admit. To me, this rules out any possibility of a grudge between the 2 sets of officers that could lead to the prosecution witnesses lying against the appellants. And the evidence of the prosecution was that the rangers acted on information got by PW3 from an informer.

The 4 KWS rangers who gave evidence a well corroborated evidence on how the information was got and how they executed the arrest and recovery of the exhibits. Their evidence clearly showed that it was the 4th appellant who negotiated with PW3 on the sale agreement (at 14,000/= per kilogram). He is the one who took PW3 to the Prado vehicle where the other appellants were. And the door was opened, it is the 1st appellant who opened the bag and showed the ivory to the witness (PW3). And on request by PW3 that the Prado be parked near where he had parked his car next to Barclays Bank, the 3rd appellant, the driver of the Prado, drove the same and parked as asked.

It is clear from the prosecution's evidence that the 4th appellant is the one who had negotiated the same with PW3. He took PW3 to the vehicle where the 2nd, 3rd and 4th appellants were with the ivory. The Prado was even driven and parked next to the car of PW3. The 4 appellants are colleagues who all used to stay at the same Uhuru Camp. 2 of them, 2nd and 4th appellants were armed. There is even evidence that they drew their guns but were only overpowered by the sheer numbers of the KWS officers.

All these factors put together convinces this court, that the 4 appellants were involved and jointly acted in this illicit affair of sale of ivory. Otherwise, how could the 4th appellant have led the arresting officers to the Prado? And how come the door was opened by the police officers inside? And how come it was 1st appellant who showed the ivory in the bag to PW3?

And why did the 3rd appellant accede to the request of PW3 to park next to Barclays Bank? To me, the answer to all these questions is that all the 4 appellants acted together and had common intentions.

Further, the inventory produced in evidence is clearly signed by the appellants. Yes, they have denied signing same. But the circumstances show otherwise. These were 4 police officers. I do not believe the KWS officers would have framed these officers to the extent of falsifying their signatures, at the KWS headquarters. And even worse, under the supervision of the Head of the KWS. The inventory even contains details of the firearms and ammunition recovered from both 2nd and 4th appellants, and other personal documents of the appellants. The inventory must surely have been of all the items recovered. The appellants must have signed the same. This is buttressed by the fact that nowhere during the trial is it on record that the appellants were coerced into signing same.

As already postulated above, the appellants gave more or less the same defence. I have considered the same. Respectfully, I do not find the defences of the appellants with any merit at all. 3rd appellant, the driver did not show any work permit allowing him to drive off with the motor vehicle. He also did not show any record from the petrol station to confirm that indeed he had left to fuel the vehicle. Also it is worth noting that the 2nd appellant confirmed that the bag with the ivory had not been in the motor vehicle when PW9 was dropped in the office in the morning. The 2nd appellant even attempted to suggest that he did not know the 4th appellant, only to later change his testimony.

I sincerely do not find any truth in the defences of the appellants. There are however other issues that the appellants have raised in their defences and submissions that need to be considered. All the appellants have challenged the prosecution's case on grounds that the prosecution did not produce any phone records to prove communication between them and between PW3 and the 4th appellant. It is true that no such phone records were produced. I otherwise do not think this would be fatal to the prosecution's case in view of the overwhelming evidence produced against them. The lack of the phone records would not deflate the well corroborated evidence of the prosecution.

The appellants have also pointed out on alleged inconsistencies in the case of the prosecution. The inconsistencies pointed out were in regard to the number of KWS officers involved in the operation, who was in which vehicle, and who drove which on the way to the KWS Headquarters after arrest. That may be true and the proceedings are not clear on these details. The issue is however, whether these inconsistencies, if at all, were material enough as to raise any doubts as to the prosecution's case. I think not. Not all inconsistences are material enough as to alter the case as presented by the prosecution.

In the case of ***Joseph Maina Mwangi Versus Republic (200)eKLR,*** the court considered this issue and held;

> ***"In any trial, there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of the Criminal Procedure Code whether such discrepancies are such as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence".***

I align myself with the above finding and find that the alleged inconsistencies are not material in nature.

The other issue in this appeal is that of possession. On this, the appellants submissions were rather incoherent. Whereas at one point, the 1st appellant confirmed that indeed the bag was in the car, he did not know of its contents having only been given a lift. The 2nd appellant talked of the bag but said it was not in the vehicle when PW9 was dropped. At other times, they all denied ever seeing the bag at the scene, only seeing it later at the KWS Headquarters. As observed above, this court is convinced that this bag had been in the Motor vehicle KAV 858F in which the 4 appellants were or had driven in.

Section 4 of the Penal Code defines possession as;

> ***"Be in possession of, or have in possession includes not only having anything in one's own personal possession, but also knowingly having anything in actual possession or custody of any other person, or having anything in place (whether belonging to or occupied by one's self or not) for the use or benefit of oneself or of any other person."***

He trial court relied on the case of ***Stanton Versus Mullis 92NC***, an American case and the local case of ***Peter Mwangi Kariuki Versus Republic (2015)eKLR***, on the elements to be proved of being in physical control and knowledge of having the item.

In our instant case, the ivory was recovered in the vehicle where all the appellants were. The same were not in the vehicle in the morning when PW9 was dropped at his offices. At the time of the recovery, the vehicle was in direct control of the 3rd appellant, the driver, and 2nd appellant the guard of PW9. The 1st appellant seated at the back seat in the one who opened the bag and showed PW3 the contents of the same. All this happened under the watchful eyes of all the appellants. And it was the 4th appellant, who communicated with the witness (PW3) all through from the time the information was received to the time of arrest and recovery. These factors point to one undeniable fact. That all the 4 appellants were in possession of the ivory. They all had it in their control and with full knowledge. I so find.

Lastly, on the issue of sentence. The appellants had been charged under both section 92 and 95 of the Wildlife Conservation and Management Act, 2013. It has been held severally, and I am of the same opinion, that section 92 only stipulates the sentences without creating any offences in the first place, and is therefore bad law.

In Voi ***HCCR Appeal No. 7/2014, Mutisya Kiema Versus Republic***, cited by the appellant's Judge Mary Kassango held;

> ***"Although the appellant was charged with an apparently more serious offence, it is my view that the Act, as it is now, does not clearly create the offence relating to endangered species or their trophies. It only provides for punishment for the same. This court therefore shall invoke section 179 of the Criminal Procedure Code and reduce the offence that the appellant was charged with under both sections 92 and 95 of the Act to offence under section 95 only."***

The same position was upheld in ***Josiah Kivuva Mutinda versus Republic Criminal Appeal No. 64/2015***, in which the Hon Kamau J. held;

> "***It is clear that section 92 of the Act is a totally different offence and is not the penalty clause for section 84 of the Act. There is a clear double jeopardy. Parliament omitted to include the penalty clause for section 84(1) of the Act. It is the view of this court that the appellant could not be charged under the 2 section….."***

And in ***Zhang Chunsheng Versus Republic NAI HCCR Rev. No. 9/2014*** the Hon. Mbogholi Msagha J. summed up that the said section 92 of the Act is to say the least, ambiguous.

I have already stated hereinabove, that I share the same legal positions as expressed in the above decisions. The appellants ought to have been charged, convicted and sentenced under section 95 of the Act. The state has admitted as much in the submissions filed section 95 of the Wildlife Conversation and Management Act 2013 provides:-

> "***Any person who keeps or is found in possession of a wildlife trophy or deals in a wildlife trophy or manufactures any item from a trophy without a permit issued under this Act or exempted in accordance with any other provision of this Act, commits an offence and shall be liable upon conviction to a fine of not less than a 1 million shillings or imprisonment for a term of not less than 5 years or to both such imprisonment and fine."***

The sum total of this is that this court is convinced that the prosecution discharged its burden and proved the case against all the 4 appellants beyond any reasonable doubt. The appellants appeal against the conviction lacks any merit and the same is dismissed. However, under section 354(3) of the Criminal Procedure Code, I hereby alter the finding of the lower court and convict the appellants under section 95 of the Wildlife Conservation and Management Act, 2013. I accordingly therefore sentence each of the appellants herein to pay a fine of Ksh. 1 million. In default each shall serve a term of 5 years imprisonment. The same shall run from the date of sentence before the trial court on 20.8.2019. Right of Appeal 14 days.

D. O OGEMBO

JUDGE

22.3.2021.

Court:

Judgment read out in open court (on-line) in the presence of Mr. Kimaru for the state, Mr. Omari for 1st and 4th appellants (with Mr. Muchiri), Mr. Omwenga for 1st appellant, and Mr. Bosire for 2nd appellant, and all appellants from Kamiti prison.

D. O OGEMBO

JUDGE

22.3.2021.