REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO. 38 & 39 OF 2019

MADI ATHMAN MADI

HARUN SAEF KALE.....APPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from Original Conviction and Sentence in Criminal Case No. 185 B of 2018

of the Principal Magistrate's Court at Lamu Law Court-T. A Sitati, PM dated 25th September, 2019)

Coram: Hon. Justice R. Nyakundi

The appellants in person

Mwangi for the State

JUDGMENT

The Appellants were charged with being in possession of wildlife trophy contrary to Section 95 of the Wildlife Conservation and Management Act No.376 of 2013. The particulars of the offence were that on 27th June, 2018 at Kui Island, Mambore Sublocation, Kiunga Location in Lamu East Sub County within Lamu County jointly were found in possession of Wildlife trophy namely turtle shell without the authority of the director of Kenya Wildlife Service.

Aggrieved by the sentence and the conviction of the trial court, the Appellant lodged an appeal on the following grounds:

1) ***That the Learned Trial Magistrate erred in both law and facts in failing to consider that the case was no proved beyond reasonable doubt contrary to section 109 and 110 of the Evidence Act.***

2) That the Learned Trial Magistrate erred in both law and fact by failing to consider that the prosecution case evidence was highly inconsistent and contradictory.

3) That the Learned Trial Magistrate erred both in law and fact by convicting the appellant based on a defective charge sheet that did not disclose the offence with which the appellants were charged with.

4) That the Learned Trial Magistrate erred both in law and fact by failing to consider the circumstantial evidence as he did not site a single corroborative evidence to support his finding.

5) That the learned Trial Magistrate erred in law and fact by violating Article 50 of the Constitution of fair trial when he procedurally allowed the recall of the Investigating officer to produce the Exhibit Memo Forms which had not been supplied to the Appellants as required.

6) ***That the Learned Trial Magistrate erred in fact and law by putting the Appellants on their defence without giving proper reasons.***

7) That the learned trial magistrate erred in law and fact by relying on the evidence of single witnesses from the prosecution

which was insufficient to sustain a conviction.

8) That the learned trial magistrate erred in law and fact by discounting and not considering in detail their defensive evidence.

9) That the learned trial Magistrate erred in law by giving an illegal, harsh and excessive sentence in the circumstances of this case.

10) That the learned trial Magistrate erred in law and fact by failing to consider that the prosecution witnesses failed to discharge the burden of proof to their case as required by the law.

Background

PW 1 Corporal Ismail Mohamed stationed at KWS Mokowe Station. he stated that on 27th June, 2018 while at Kiunga KWS Marine Reserve Camp they received an alert from Kiunga Community Conservancy that there were some fishermen poaching turtles around Mwambore on Kui Island.he said that they went via the station vehicle at Kiunga and went to Kiunga Beach and later took a boat to Mwambore. Upon arrival, they found a makuti shed by the beach at Mwambore and inside were 2men resting after their activities. He also informed court that they searched inside the shed but found no suspicious items. He said that a search outside the shed led to the discovery of a fresh turtle shell that had been killed. He confirmed that this was about 5 to 10 metres from the shed. He further stated that they picked it up and went back to the shed and arrested the 2 men whom they took to Kiunga Police Station. He confirmed that the turtle shell was in court and that it was about 5kgs and measuring about 90 cm from head to tail.

On Cross Examination by Appellant 1 PW1 stated that he had interviewed him and that the shell was not found with him. That it was 5metres away from the Appellant. He also said that there were no people living around that area as it was an isolated island.

On cross examination by the 2nd Appellant, PW1 stated the reason he had brought him to court was that he was staying next to a location where the turtle shell had been found. He also stated that there was no possibility that he had eaten up a turtle in 1 day.

PW2 Ranger Benjamin Kipkogei Rutto based at Mokowe KWS Station informed court that on 27th June, 2018 a report came from Kiunga Community Conservation that some fishermen on Kui Island at Mwambore beach were illegally trapping and killing turtles. They proceeded to the location and arrived there at around 1pm. He said that on arrival, they went to 2 makuti sheds and in one of them were 2 men resting. They conducted a search and found nothing suspicious inside. He further stated that outside the shed about 5-10 meters, was a freshly removed turtle shell. In his opinion the shell could have been removed from a live turtle. They recovered the shell and it was still fresh. They later arrested the 2 men and seized the fresh shell.

On Cross examination by the 1st Appellant, PW2 stated that there was no other person at Mwambore apart from him and the 2nd Appellant. He also confirmed that there is a large forest on Kui Island and that he did not find in their possession any weapon or equipment for trapping turtles. He further confirmed that the only thing he saw were some old fishing nets nearby.PW 2 also said that he deduced that they were poachers because of the close proximity of the spot of dumping the shell and where they were camping.

PW3 Ranger No. 7292R Kassim Athman Bunu working with Kiunga Community Conservancy as an Assistant Warden. He stated that on the 27th day of June, 2018, one of their informers alerted them about an incident at Kui Island. He told the court that a joint patrol was organized between themselves and Kenya Wildlife Services aboard their vessel. The team composed of 5 KWS officers and 3 conservancy rangers. That on arrival at Kui Island, they found one makuti shed which was about 50 meters from the shoreline. He further stated that they introduced themselves and proceeded to search the shed but found nothing to do with turtle meat. They searched around the shed and found a turtle shell about 5 meters from the shed. They later arrested the 2men and took them to Kiunga Police Station.

On Cross examination by the 1st Appellant, Pw 3 confirmed that they found them in the makuti shed and no turtle meat was found inside the makuti shed. That they found the fresh turtle shell 5 meters from the shed.

On Cross examination by the 2nd Appellant, PW3 confirmed that he believed that they were the culprits since they were the only ones there. That the shell was at most 2 days old and it was still fresh. He also confirmed that the informant did not disclose the names of the Appellants and that he only said some people without giving their names.

PW4 Corporal Bwanaheri Omar Siraji was a police reservist and had worked at Kikoko for 9 years. He stated that on the 27th day of June, 2018, he received a call from his boss alerting him of an urgent mission. He joined other KWS officers and 4 of his colleagues to respond to the situation. The information in their possession was that some turtle hunters had been seen at Kui Island. He further stated that on arrival, they came across a makuti shed where they found 2 men by the shed. They identified themselves and asked to search the shed. He confirmed that inside the shed was a bottle of cooking oil but it was not turtle oil. They later asked them to accompany them for a further search around the area. He told the court that they found the shell about 5 meters from the shed. They arrested the 2 and took them to Kiunga Police Station.

On cross examination by the 2nd Appellant, PW4 confirmed that the informant said some people but did not give particular names. He also confirmed that he found both the Appellants inside the shed. He also stated that it was only the Appellants that were present at island when they got there.

PW5 No. 113673 PC Richard Rutto based at Kiunga Police Station was the Investigating Officer. He told the court that on 27th June, 2018 at about 4:35 pm, KSW rangers and police reservists from Kikoko Community Conservancy came to their station escorting 2 men whom they later rearrested. The 2 men were fishermen and were arrested at Kui Island after one freshly killed turtle shell was discovered. He

further stated that it was believed that the meat was already eaten and that only two people were at the island when the arrest took place. He informed court that the shell was recovered at a distance of 5 to 10 meters from their shed. He recorded the statements and received the turtle shell exhibits.

He also informed court that he did not visit the crime scene for lack of boat transport since their station does not have a boat. That they took a part of the shell to the National Museum for analysis and that he was still waiting for the report.

On cross examination by the 1st Appellant, PW 5 confirmed that there was no inventory that had been prepared in their case. On cross examination by the 2nd Appellant, PW5 confirmed that he did not know who had visited the island on 25th June,2018 and 26th June, 2018. He also said that that it was the obligation of the Appellant to inform them who had killed the turtle since it was found near them.

On **6th of August, 2019**, PW 5 was recalled and informed court that he had Dr. Ogetto's report who had analyzed the sample. That Dr. Ogetto could not attend court due to an extremely tight schedule, court allowed PW5 to produce the report under Section 77 and 33 of the Evidence Act. PW5 confirmed that the report confirmed that the shell belonged to a sea turtle-green turtle and that the Doctor did the test by comparison process using the shell sample and known turtle samples. The Report was dated 31st May, 2019.

At the close of the prosecution case, the trial court found that a prima facie case had been established and the Appellants were placed on their defence and they elected to give a sworn statement.

The 1st Appellant informed court that he is a fisherman who uses nets on fishing boats. He said that the arresting team found him asleep, that they checked around the place but did not find anything. He later asked them what they wanted and they later forced him to go with them. He informed court that he was forced to carry the shell but he refused and that he only accompanied them because one of them cocked his rifle. That he was arrested in the company of his friend and taken to Kiunga Police Station and thrown into the cells.

The 2nd Appellant informed court that when the KWS team found them at the island, they introduced themselves and asked if they anyone who had left the island. That they told them that he did not know their names or the names of the vessels they were using. He informed court that there had been 8 boats ashore but they had left that morning at 7 am. That they allowed them to search the shed and they found nothing suspicious.

On cross examination, he confirmed to court that the team only found cooking oil and a sufuria in the shed.

Analysis and Determination.

The jurisdiction of this court in an appeal such as this was well stated in the often-cited case of **Okeno versus Republic [1972] EA.32**; where the predecessor of this Court, pronounced itself as follows: -

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya versus Republic [1957] EA36) and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own decision on the evidence (Shantilal M. Ruwala versus Republic [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings, and conclusions. It must make its own finding and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court had the advantage of hearing and seeing the witnesses."***

When the question turns on the manner and demeanor the appellate court must be guided by the impression made by the trial court by virtue of its advantage of observing and seeking witnesses. These principles were as earlier followed in the case of **(Pandya v Republic 1957 EA 336)** as mentioned above.

With the foregoing parameters in mind, I have identified the issues that fall for my determination in this appeal. One is as regards whether the prosecution proved its case beyond reasonable doubt. The appellant was charged with the offence of being in possession of wildlife trophy contrary to Section 95 of the Wildlife Conservation 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 one million shillings or imprisonment for a term of not less than five years or to both such imprisonment and fine."***

The following three elements must be proved for a case of this nature to suffice: -

> ***1. Proof that the accused was in possession of a trophy;***
>
> ***2. Proof that the items in question are game trophies; and***
>
> ***3. Proof that the accused lacked a certificate of ownership.***

The foregoing section of the law provides for the sentence or a fine of not less than one million shillings or imprisonment for a term of not less than five years or both.

On the question of possession, PW1, PW2, PW3 and PW4 in their respective testimonies averred that they acted on a tip off from an informant and after they arrived at the scene, they found both Appellants asleep in a makuti shed, they introduced themselves and requested to search the shed, a request that was allowed by the Appellants. PW1, PW2, PW3and PW4 all testified to the effect that they did not recover anything suspicious from the shed.

According to the case of **Jean Wanjala Songoi and Patrick Manyola versus Republic Criminal Appeal No 100 of 2014** possession would involve an element of control of the thing a person is said to have. It is in effect the act of having and controlling property. The right under which a person can exercise control over something to the exclusion of all others. It is important to note that none of the prosecution witnesses actually testified to having found the Appellants in possession of the shell. All the prosecution witnesses averred to the fact that they searched outside the Appellant's shed and recovered the turtle shell about 5 to 10 meters from where the Appellants were resting. It was also the prosecution's evidence that they only arrested the Appellants because they were the only persons around that area. The element of constructive possession is also neither here nor there because the circumstances under which the shell was found and recovered was ambiguous and there is nothing before me capable to credibly ascertain that the same was either in actual or constructive possession of the said trophies. In that regard I find useful guidance in the case of **Obeng Comfort v Public Prosecutor (2017) 1 SLR 1 633**, where **Menon, CJ** held that in order to prove the fact of possession, the prosecution has to prove beyond reasonable doubt, that the accused person did not only have physical control over the item, but the accused person also knew or aware that the was a controlled wildlife trophy. The prosecution evidence ought to have shown that the appellants were in possession of the shell or meat from the said turtle, and arrest them thereafter. In that regard, I find that the prosecution failed to prove the element of possession to the required threshold of proof beyond reasonable doubt.

The next issue as to whether the items in question were wildlife trophy. Section 2 of the Act defines a "trophy" as follows:

> ***"means any wild species alive or dead and any bone, claw, egg, feather, hair, hoof, skin, tooth, tusk or other durable portion whatsoever of that animal whether processed, added to or changed by the work of man or not, which is recognizable as such."***

PW5 informed the court that he handed over to the Analyst a hard shell for examination. There is no mention in his testimony that he extracted any other part of the shell for examination and it raises a lot of concern where the other items were found. The report has mention of two pieces of broken ribs, two periosteal tissues and five parts of vertebrae but PW5, the Investigating officer did not mention that these other items in his testimony. This, to my mind, left a lot to be desired from the prosecution. I am therefore convinced that the prosecution did not prove its case beyond reasonable doubt.

I therefore associate myself with the Court of Appeal guidance in the case of **Pius Arap Maina v Republic (2013) eKLR;**

> ***"the prosecution must prove a criminal charge beyond reasonable doubt and, as a corollary, any evidential gaps in the prosecution's case raising material doubts must be in favour of the accused."***

In the same spirit, and for the reasons aforementioned, it is my considered view that the prosecution failed to prove its case beyond reasonable doubt. The essential elements of an offence of this nature, to wit, possession and proof that the items were indeed wildlife trophy have not been proved. Any reasonable doubt gives the appellants a benefit of doubt.

The trial court misdirected itself in its judgment when it stated that the Appellants could have been the only persons who could have committed the offence since the KWS team did not find anyone else on the Island at the time of the arrest. I am inclined to believe the evidence of the 2nd Appellant who informed court that there were other persons and 8 other boats that had left the island that morning at around 7a.m. The fact that the Appellants were on the island at the time of arrest does not squarely mean that they could be the only suspects. The evidence of prosecution was shaky and I find that the first two elements for this offence were no adequately proved. I have no option but to resolve the issue in favor of the Appellants. In the final analysis, I find that the appeal is merited and thereby quash the conviction and set aside the sentence of the trial court.

As a consequence, the Appellants are set free unless otherwise lawfully held.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT GARSEN THIS 29TH DAY OF APRIL, 2021.

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R. NYAKUNDI

JUDGE

In the presence of:

1. The Appellant present

2. Mr. Mwangi for the state

NB:

In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 by Her Ladyship, The Acting Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules. (dpp@odpp.go.ke)