REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

HIGH COURT CRIMINAL APPEAL NO 14 OF 2020

STEPHEN KATANA NGALA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from original conviction and sentence in Lower Court Criminal Case No. 921 of 2018 in the Chief Magistrates Court at Malindi before Hon Dr. Julie Oseko, Chief magistrate in court dated 31st July 19)

Coram: Hon. R. Nyakundi

Mr. Otara for the Appellant

Mr. V. Alenga for State

RULING

Appeal from the original conviction and sentence in lower court criminal case file no 921 of 2018 in the chief magistrate court at Malindi before **HON DR JULIE OSEKO (CM)** in chamber dated and delivered on 31st July 2019.

The appellant was charged, tried and convicted for the offence of wildlife trophy c/s 95 of new wildlife conservation and management Act 2013. The gist of the prosecution case has alleged and proven at the trial court was that on the 28th Sep 2018 around 00:30 hrs. at Matsangoni area the appellant jointly and another were jointly found to be in possession of six pieces of elephant tusks weighing 10 kilos with a street value of one million without a permit from the Director General Kenya Wildlife Service. At the end of that trial on conviction the appellant was sentenced to five years' imprisonment.

Being aggrieved with both conviction and sentence the appellant lodged an appeal through learned counsel Mr Otara on two main grounds

a) ***Whether or not the evidence of pw1 and pw3 established any case against the appellant***

b) ***Whether or not the appellant was caught being in possession of elephant tusks as alleged by the prosecution***

Learned Counsel entirely relied on his written submissions dated 9th March 2021.

Background

The case for the prosecution was dependent on the testimony of the four witnesses these were pw1, KWS Ranger NO. 8931 Paul Ouma who testified that on 28th Sep 2018 he was instructed by his boss Sergeant Maiyo (pw3) to travel to Matsangoni with a mission to arrest the person said to be in possession of elephant tusks. That the said person is offering them for sale to a third party. According to Pw1 in company of their driver Ranger Evans Kibet (pw4) the set out for an operation with an intention to arrest the suspect. On arrival at the scene pw4 posed as the bona-fide of the tusks from the suspect who later happened to be the appellant. At that moment the appellant was asked to come up with the tusks so that the negotiation can commence for a possible bid on offer and acceptance. Further pw4 testified that with the appellant on board his motor vehicle the tusks to be sold to him they proceeded with the journey until pw1 and pw3 stopped them to conduct a search. As this was a predesigned plan to effect arrest against the appellant involuntarily agreed for pw1 and pw3 to conduct the necessary of the motor vehicle. It was at that juncture as alluded to pw1 and pw3 that they recovered a blue sack containing six elephant tusks. It so happened that they had to introduce themselves as Rangers from KWS on duty and they did effect an arrest against the appellant. Pw1, pw3

and pw4 gave evidence to the effect that after a few minutes of inquiry the appellant offered to show them the real owner of the tusks by the name Mele Katana. It was at that home the acquitted suspect Mele Katana admitted that the tusks in question were from his brother who had given instruction that he looks for a buyer. It therefore followed that he had given the appellant the tusks to sell to any interested buyer. Thereafter pw1, pw3 and pw4 prepared an inventory of the exhibits recovered and subsequently arrested the appellant and Mele Katana. The tusks recovered were subjected to an analysis by an expert pw2 – Dr Poghoni. According to Pw2 he testified as a holder of BSc and Master of Science in veterinary medicine from the university of Nairobi and well versed with technical skills and expertise in wildlife species identification. Pw2 added that on the receipt of the elephant tusks on pw4 he subjected them to scientific analysis which established they were genuine as defined in the wildlife and management Act 2013. In support of his findings pw2 produced the analysis report as exhibit 5-

At the close of the prosecution case the appellant in his defense denied the offence that he only came to be arrested because he gave a lift to an old man who had carried with him a luggage in a sack. In the course of driving to a destination they came in contact with KWS officers who effected an arrest for an offence he did not commit. On cross examination the appellant told the court that the exhibit in court belonged to Mele Katana and as for him he had no knowledge of the content in the sack.

The learned trial magistrate considered the above scenario and came to a conclusion that appellant was in possession of the wildlife trophy without a permit from the KWS. She rejected the appellant defense that the tusks belonged to another person while his role was to ferry that person as a passenger with his motorcycle. With that background in mind under section 107 (1) of the evidence Act the prosecution obtained judgement in its on conviction and sentence. That is the trigger of the instant appeal.

Determination

In this appeal the appellant mainly challenges the findings of the trial magistrate on the ingredient of possession. As a first appellate court the principles outlined in ***Okeno Vs Republic (1972)*** EA forms the foundation of the jurisdiction to be exercised in determining the appeal. As such I am obliged to Analyze and re-evaluate the evidence adduced before the trial court, to independently draw my own conclusions, of course without overlooking or disregarding the findings of the trial court and to bear in mind that unlike the trial court, I did not have the opportunity of hearing and seeing witnesses testify.

The standard of proof is beyond reasonable doubt as discussed in the case of ***Miller Vs. Minister of Pensions [1997]. All. ER.372 at 373***, wherein **Lord Denning** stated as follows;

> ***"that degree is well settled. It needs to reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility of his favour which can be dismissed with the sentence of course it is doubt but nothing short of what will suffice" [See Woolmington v DPP [1935] AC 462]***

Turning to the ingredient of this case the offense is created under section 95 of the Act which provides that; ***any person who keeps or is found in possession of wildlife trophy or deals in wildlife trophy, or manufactures any item from a trophy without a permit issued under this Act or exempted in accordance with the provisions he commits an offense which if found guilty is to be sentenced to Fine of One Million or five years' imprisonment or both.***

> ***There's ample evidence that the learned trial magistrate upon conviction elected to sentence the appellant to five years' imprisonment. That is also an issue in this appeal. Section 3 of the Act defines wildlife to mean any wild and indigenous animal, plant or micro-organisms or parts thereof within its constituent habitat or ecosystem, on land or in water as well as species that have been introduced into or established in Kenya. Whereas trophy means any wild species alive or dead and any bone, claw, egg, feather, 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.***

The ownership of wildlife is vested in the government of Kenya to be conserved or managed in the trust for the people of Kenya, the Act prohibits any activity, change, sale, or dealings with wildlife products without first obtaining a permit or exemption from the Director of Kenya Wildlife Service. The circumstance thereto as stated by the prosecution witnesses is clear that appellant was found in possession of the elephant tusks. From pw1, pw3, and pw4 on receipt of intelligence information they designed a plan to effect an arrest and that is how PW4 was fronted as a purchaser for value of the tusks from the appellant. This offense falls squarely under the doctrine of possession. To get to the root of the matter one has to take into account the definition of possession under section 4 of the Pinal code which states

> ***a) Be in possession of or have in possession includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person;***
>
> ***b) if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them***
>
> **In jean Wanjala Songoi and Patrick Manyola Vs R CA NO 100 of 2014 the court held that 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. In this case that aspect of the offense has to established beyond reasonable doubt.**

At the outset I believe that the word possession encompasses several combinations such as de-facto possession, legal possession, physical possession, actual possession and constructive possession. To these conceptual frameworks the essential factual elements of the offense as

against the offender must be proved beyond reasonable doubt. In the instance appeal the prosecution evidence came from pw1, pw3 and pw4 which effectively placed the appellant in certain physical relation to the tusks as against the rest of the world. He must have had a certain intent to deal with that property in question. As its seen from the evidence there's was some degree of power over the tusks he was found with when he came into contact with pw4. The power here was the power to enjoy the benefits or use the thing in exclusion of another person from the tusks. The crucial thing here is the emphasis on power and control than just mere physical possession. The prosecution evidence was in a position to account for the plausibility of the ingredients of possession to prove the charge of the appellant being in possession of the wildlife trophy.

The trophies themselves having the features of prohibited wildlife species as defined in the act were isolated by the expert witness pw2. He drew the line that the tusks so recovered by pw4 were in the class of classified trophies only one can be in possession upon receipt of a permit from the Director of KWS. In this case possession is a fact proved at the trial court and not a right. It's what I refer to as infra-jurat and not jurat relation. I am of the considered view that possession being clothed with control can logically be exercised from a distance. Those are the fundamentals distinctions isolated in the law as to actual and constructive possession.

Here in this case as it is seen from the testimonies of witnesses the criminal requirement of mensrea formulated strongly as intent permanently to deprive the KWS the tusks were established by drawing wholly from the conduct of the appellant. Of course it needs to be acknowledged that the tusks were uprooted from the elephants and the taking occurred without the consent of the Director of KWS. The important element of all that is undoubtedly the dishonest appropriation of another person's property. It is therefore only logical to conclude that central elements of the offense required of the prosecution to prof beyond reasonable doubt against the appellant were all discharged in the context of the principles in ***Miller vs minister or pensions*** and ***Woolmington Vs DPP*** (Supra).

In this case the attempts made by the Appellant to highlight that the property belonged to another was only meant to save face but not to create a reasonable doubt to the degree of certainty to benefit with an order of acquittal. Accordingly, I dismiss the appeal on both conviction and sentence for want of merit to say the least.

DATED, SIGNED AND DELIVERED AND SENT TO THE KNOWN EMAIL ADDRESS OF COUNSELS AT MALINDI THIS 29TH DAY OF APRIL, 2021

.....

R. NYAKUNDI

JUDGE

In the presence of :

Mr. Bawasir for the Appellant

The appellant