



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAJIADO**

**CRIMINAL APPEAL NO. 8 OF 2020**

**PETER SILA .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Consolidated with Criminal Appeal Nos.9 OF 2020 and 12 of 2020, Onesmus Kyalo and**

**Joachim Mbinda appellants respectively versus Republic .....Respondent)**

**JUDGMENT**

1. These are consolidated appeals. The appellants were charged with being in possession of wild life species contrary to section 95 of the wildlife Conservation and Management Act of 2013. Particulars were that on the 1<sup>st</sup> day of February, 2019 at Loitokitok Township in Loitokitok Sub county within Kajiado County, they were jointly found in possession of a wildlife species, namely Pangolin without a permit.

2. They denied the charge and after a trial in which the prosecution called 5 witnesses, they were convicted and fined Kenya Shillings one million each, in default, to serve five years imprisonment each. They were all aggrieved with both conviction and sentence and lodged separate appeals which were later consolidated.

3. The first appellant raised the following grounds of appeal:

- 1. That the trial magistrate erred in law and fact by failing to take into account that he pleaded not guilty;***
- 2. That the trial court erred in law by failing to consider that no single witness linked him with the offence.***
- 3. That the trial magistrate failed to consider the evidence of the 3<sup>rd</sup> accused that he was a customer at the 3<sup>rd</sup> accused's garage;***
- 4. That the trial magistrate erred in law and fact by failing to take into account that the Pangolin was not found in his possession;***
- 5. That the trial magistrate erred in law and fact by failing to consider his cross-examination thus held the trial in favour of the prosecution.***

4. **Onesmus Kyalo** filed a memorandum of appeal raising the following grounds:

- 1. That the learned trial magistrate erred in law and fact by not taking into consideration that he pleaded not guilty.***
- 2. That the trial magistrate erred in law and fact by not considering that he informed court the owner of the Pangolin;***
- 3. That the trial magistrate erred in law and fact by failing to take into consideration that PW1 testified that it was the 1<sup>st</sup> and 2<sup>nd</sup> accused who ferried the bucket containing the Pangolin while evidence of PW2 was that accused 2 and 3 ferried the Pangolin;***
- 4. That the trial magistrate erred by convicting him on dubious allegations after the investigating officers failed to get the real owner of the bucket;***
- 5. That the sentence imposed on him was harsh and excessive.***

5. **Joachim Mbinda** raised the following grounds in his appeal;

1. *That the trial court failed to consider that he pleaded not guilty to the charge;*
2. *That the trial court failed to take into account what the 2<sup>nd</sup> accused told the court that he was a visitor at his place of work.*
3. *That the trial court failed to take into account that no witness linked him with the offence;*
4. *That the trial magistrate erred in law and fact by failing to consider that the Pangolin was not found in his possession.*

6. According to the evidence that led to the appellants' conviction, PW1 testified that, on 1<sup>st</sup> February, 2018 he was at Loitokitok station when he got information his intelligence colleagues, that there was a wildlife that was being sold at Loitokitok township by three people. The intelligence officers had talked to the 3<sup>rd</sup> accused at about 7 p.m., and after discussion, two of the men went for the animal while the 3<sup>rd</sup> appellant remained behind. Later the 2<sup>nd</sup> accused came carrying the bucket. He was with first accused and took the bucket to an unmarked car in which was their car.

7. The 2<sup>nd</sup> appellant attempted to run away but he was arrested and placed him in custody together with the other two men. They took the men to Loitokitok Police station. They photographed the bucket and the Pangolin. They prepared an inventory which he and his colleague as well as the appellants signed. He identified the photographs, the Pangolin and inventory in court. He also identified the people they arrested in court.

8. **PW2** also a ranger with KWS, testified that he was with PW1 on 1<sup>st</sup> February, 2018 when they got information that some people were intending to sell Pangolin to their intelligence officers within Loitokitok township. Two of the men left the hotel and went for the Pangolin. They came back with a bucket containing the Pangolin. The 3<sup>rd</sup> appellant was carrying the bucket. He was with the 2<sup>nd</sup> appellant. They came to their vehicle and they were arrested. They took the men to the station, interrogated them and later handed them over to Loitokitok Police station together with the Pangolin and the bucket. An inventory was prepared which they signed as well as the appellant/accused.

9. **PW3** a Gazetted scenes of crime officer, testified that on 12<sup>th</sup> March, 2018, he received a compact disc together with an exhibit Memo, with a request to process the compact disc. He processed the disc and produced five photographs. He prepared a certificate dated the same day, 12<sup>th</sup> March, 2018, both of which he produced as exhibits.

10. **PW4**, a research scientist at KWS, testified that on 2<sup>nd</sup> February, 2018, an animal was taken to her which she was asked to identify. She identified it as Pangolin through its scales on the body which consisted of 20% of the animal. It also had claws which have characteristics. The animal is found in Savanah Woodland or within Shrubs. It is listed as an endangered species by CITES. She made a report dated 20<sup>th</sup> February, 2018 which she produced as an exhibit.

11. **PW5** a police officer, testified that on 2<sup>nd</sup> February, 2018 he was instructed to investigate the case. The appellants had been arrested for being in possession of Pangolin. He charged them with the offence. The Pangolin was produced in court and later handed over to KWS station in Amboseli. He prepared an exhibit memo which was signed. He produced it as an exhibit.

12. When put on their defence, each testified in defence. The 1<sup>st</sup> appellant testified that he was a businessman at Loitokitok township. On 1<sup>st</sup> February, 2018 he went to the 3<sup>rd</sup> accused's place of work and left his motorbike there. He went back at 6 p.m but did not find the 3<sup>rd</sup> appellant. He called the 3<sup>rd</sup> appellant who told him that he was in a hotel. He went to see him in the hotel and found him with some people. The 3<sup>rd</sup> appellant asked him to wait as he finished with the people he was talking to. He was asked to load the people's luggage into a vehicle. after that, he stayed for a while and then followed the people to the car that was how he was arrested together.

13. The 2<sup>nd</sup> appellant on his part testified that they were taking tea in a hotel but he never saw the 1<sup>st</sup> accused in the hotel. He only saw the 3<sup>rd</sup> accused being arrested and put in the vehicle. When he went out to check, he was arrested. He also denied seeing the 3<sup>rd</sup> accused carrying anything.

14. The 3<sup>rd</sup> appellant testified that he is a mechanic.; that on 1<sup>st</sup> February, 2018, he was at his place of work when customer went to his garage and he sat with three Tanzanians who were carrying a bucket. They sat there for a long time. He asked his worker why they had stayed for so long. One person brought a motor bike for repairs. The man later came for his motor bike and asked him to assist in carrying the bucket to a vehicle parked nearby. When reached the vehicle, he was arrested and forcefully pushed into the vehicle. That was when he saw what was in the bucket.

15. It was on the basis of that evidence that they were convicted and fined Kenya Shillings one million each and in default, five years, prompting this appeal. during the hearing the appellants abandoned their appeal against conviction and urged the court to consider sentence only.

16. The appellants were fined Kshs. 1,000,000 each and in default, to serve five years imprisonment. They have now aske this court to consider sentence having abandoned their appeal against conviction. The 2<sup>nd</sup> appellant stated in his memorandum of appeal that the sentence imposed against him was harsh and excessive.

17. In mitigation, the 1<sup>st</sup> and 3<sup>rd</sup> appellants prayed for forgiveness while the 2<sup>nd</sup> appellant maintained that he was not involved. The offence they were charged with attracts a fine of Kenya Shillings one million, in default five years imprisonment. They failed to raise the fines and

are serving sentence since 12<sup>th</sup> October 2018 when they were sentenced.

18. The sentence imposed against the appellants was lawful. However, considering the purpose of sentencing and the fact that they have served a significant portion of the sentence since 12<sup>th</sup> October 2018 when they were sentenced, the sentence is hereby reduced to three (3) years.

**DATED, SIGNED AND DELIVERED AT KAJIADO THIS 16TH DAY OF APRIL, 2021.**

**E.C. MWITA**

**JUDGE**