



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

CRIMINAL APPEAL NO. 43 OF 2019

JARHA ADE JOHNAPPELLANT

VERSUS

REPUBLICRESPONDENT

Coram: Hon. Justice R. Nyakundi

The appellant in person

Mr. Mwangi for the state

J U D G E M E N T

The appellant was charged with two counts of the offence being in possession of a wildlife trophy without a permit contrary to section 95 of the Wildlife Conservation and Management Act 2013. In Count 1; the particulars of the offence were that on the 11th off July 2017, at Mlalulu location in Tana River Sub-County within Tana River County, the appellant was found in possession of wildlife trophy namely one egg shell for an ostrich without a permit.

In Count 2; ; the particulars of the offence were that on the 11th off July 2017, at Mlalulu location in Tana River Sub-County within Tana River County, the appellant was found in possession of wildlife trophy namely an elephant tusks without a permit. The appellant denied the offence and the matter proceeded to full trial. He was found guilty as charged, convicted and sentenced to serve 36 months imprisonment and in the alternative pay Kshs. 3,000,000/=.

The appellant was dissatisfied by the decision of the learned trial magistrate, and preferred the instant appeal on the grounds that:

(a). That the Learned trial Magistrate convicted and sentence me without humbly consideration that the prosecution case did not prove its case to the required standard of Law.

(b). That the conviction and sentence of:-

Count I – Fined Three (3) Million in default Serve 36 months imprisonment.

Count II - Fined Three (3) Million in default serve 36 months imprisonment. Imposed on me was too harsh and excessive.

(c). That the Learned trial Magistrate erred in Law and fact when he went ahead to convict and sentenced me, yet witnesses were not all called in Court to testify.

(d). That the Learned trial Magistrate convicted and sentenced me without considering that the prosecution case was governed by mass contradiction and invariances.

(e). That I am a first offender.

Facts

(PW1), Peter Mibei; (PW2), CPL Adan Shurie; and (PW4), Raymond Ngetich arrested the appellant and his colleague on allegations that they had in their possession game trophies namely an ostrich egg shell which was produced as Exhibit No.1 and an elephant tusk P.Exhibit

No.2 which were found in an abandoned motorcycle. A few meters away from the said motor cycle, the appellants are said to have been found with some snares used to trap animals which were produced before court and marked as P.Exhibit No.3. The exhibits were submitted for forensic examination at Voi – Tsavo. **(PW5); Jeremiah Poghon Kiatopole** a wildlife veterinary for KWS confirmed that both P.Exhibit 1 and P. Exhibit 2 were both real Ostrich Egg Shell and Elephant tusks, respectively.

The appellant in his defence stated that he sells firewood. Basically his defence is that he had gone for harvest firewood when he came across the officer aforementioned who later arrested him and his colleague. He suggested that the small sack which contained the exhibits herein was planted on them. DW1, Jonathan Jarha Ade is basically similar to the appellant's testimony. DW4, Maurice Odhiambo Adero, **DW5; Amina Zafarani Baruku** confirmed the averment that the appellant and his colleague had in deed gone into the thicket to harvest firewood. DW4 told the court that the officers revealed to him that the appellant and his colleague had been arrested for hunting.

Findings and Determination

The main issue for determination in this case, having considered all the record of appeal, is whether the prosecution proved its case beyond reasonable doubt. It is incumbent upon the prosecution to prove its case beyond reasonable doubt. Put, differently, onus of proof in criminal matters resides with the prosecution. In the circumstances, such as those in Section 111 of the Evidence Act, where the burden of proof shifts to the defendant/appellant, the standard of proof is the balance of probabilities.

The main ingredients of the offence herein is well summarized in the High Court decision in **Peter Mwangi Kariuki vs Republic (2015) eKLR** as:

(a) Proof of possession without a permit;

(b) Proof that the items in question were game trophies.

On the question of possession, it involves having a degree of physical control over the trophies, with the person in control knowing that the trophies are in his control. In **Warner vs Metropolitan Police Commissioner (1969) AC 256** and **Republic vs Chatwood (1980) 1 ALL ER 567**, it was held possession must include knowledge that the item possessed is in control of the person possessing it. In **Peter Mwangi Kariuki vs Republic (Supra)** where **Justice Mativo** defined possession as follows:

“Possession includes two elements; namely being in physical control of the item and to be guilty of possession, an accused person must be shown to have knowledge of two things, namely that the accused knew the item was in his custody and secondly, he knew that the item in question was prohibited. A person has possession of something if the person knows of the presence and has physical control of it or has power and intention to control it.”

The appellant and his colleague were arrested by Kenya Wildlife Service Officers in connection of having been found in possession of game trophies which were found tied at the back of an abandoned motorcycle. **(PW1), (PW2)** and **(PW4)** found the motorcycle while with the ostrich egg shell and the elephant tusk which were produced before court. The same was confirmed to be wildlife trophy as defined under the Act. DW1 and DW2 were approximately 100 meters from the motorcycle when they find themselves arrested in respect of the game trophies in question. The mere fact that the items were found tied at the back of a motorcycle in a bush whereas the appellant was nabbed by the Kenya Wildlife Services some 100 meters away from the said motorcycle in respect of in possession of the said items. There were no efforts made by the investigating officer to establish whether the motorcycle and the said game trophies tied to it indeed belonged to them. There is a way of ascertaining ownership of a motorcycle which was not utilized in respect of this case. The mere fact that the appellant and his colleague were found in the vicinity of the area the items were found does not put him control of the game trophies and the motorcycle. Neither did the same prove possession. The investigating officer could have dusted the recovered items for fingerprints to establish that indeed the appellant had handled them.

There is no evidence adduced by the prosecution witnesses that the appellant was in actual possession or was the special owner of the motorcycle. The appellant was not alone in the thicket. He had a colleague and if fingerprints had been taken, they could have ascertained which one of them handled the game trophies in question, if at all they handled them. People accompany each other to carry out different tasks in our day to day businesses, but however the fact that one is found in company of a suspect to a crime does not make both of them suspect. In **Charles Mbaabu Mburi v Republic (2018) eKLR** the learned judge held as follows:

“.....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, was not established beyond reasonable doubt against the appellant.”

In the circumstances, I find the prosecution to have failed to prove possession of the wildlife trophies in question. The appeal on both conviction is hereby allowed. I therefore quash the appellant conviction and sentence on the offences of being in possession of a wildlife trophy without a permit contrary to Section 95 of the Wildlife Conservation and Management Act in each of the counts herein.

The appellant is to be set at liberty unless otherwise lawfully held.

It is so ordered!

DATED, SIGNED AND DELIVERED AT MALINDI THIS 29TH DAY OF OCTOBER 2021

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R. NYAKUNDI

JUDGE