REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL APPEAL 37 OF 2019

(CORAM: F.M. GIKONYO J.)

(Being an appeal against the conviction and sentence of Hon.W. Juma

(C.M) in Narok CMCR No.281 of 2017 delivered on 27th

August 2019 and sentenced on 28th august 2019)

KASINGWA DOKONY.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

[1]. The Appellant was charged with the offence of being in possession of government trophy contrary to Section 95 as read together with Section 105 (1) (a) of the Wild Life Conservation and Management Act 2013.

[2]. The particulars of the offence were that on 18/02/2017 at Loita forest in Narok South Sub county within Narok County, the appellant was found in possession of government trophy namely one piece of elephant tusk weighing 4kg with a street value of Kshs. 400,000/= without a permit.

[3]. The Appellant was found guilty of the charge. He was convicted and sentenced to pay a fine of Kshs. 1,000,000/=in default to serve 5 years imprisonment.

[4]. The Appellant has cited five (5) grounds of appeal in his memorandum of appeal. namely;

a) That the learned trial magistrate erred in law and in fact by ignoring the appellant's defence of alibi.

b) That the learned trial magistrate erred in law and in fact the appellant's right to fair trial was violated as the OB of Ewaso Nyiro KWS station and the work ticket and particulars of the motor vehicle used on the 17th February 2017 was not provided by the prosecution in violation of Article 35 of the Constitution of Kenya.

c) That the learned trial magistrate erred in law and in fact in conducting the trial when the appellant's rights under Article 35, Article 49 and Article 50 of the Constitution of Kenya had been violated.

d) That the learned trial magistrate erred in law and in fact in failing to find that the prosecution had not proved its case beyond reasonable doubt coupled any apparent animosity between the trial magistrate and the counsel for the appellant occasioning a miscarriage of justice to the detriment of the appellant.

e) That on 18th June 2019 the learned trial magistrate directed the advocate on record in the open court to write a letter listing and to have all matters that are before her and which his law firm is on record for purposes of re allocation to other courts and that she has since upheld that position on any matter in which his advocate's law firm is on record is presenting a party in the matter before her but selectively retained this file.

Evidence

[5]. The prosecution called four witnesses while the appellant gave sworn defence and called three witnesses.

[6]. The prosecution treated the appellant as a first offender. The appellant then offered his mitigation that he is a first offender and breadwinner to his family, whereupon, the trial court stated that, it had considered the appellant's mitigation. The trial court further noted that the case had been in court for roughly 2 ½ years. That the legal provisions provide for a mandatory minimum sentence. However, the court had not been told why it should deviate from the mandatory provisions and give a different sentence, no special circumstances had been made out. Therefore, the trial court sentenced the appellant to pay a fine of kshs.1 million in default to serve five (5) years imprisonment since the trial magistrate could not see what the reasonable fine would be. Her consideration for the sentence was that she was not going to sentence the appellant to both fine and imprisonment.

[7]. **PW1-** assistant Warden 3 Moses Mugambi. He was working with KWS at Ewaso Ngiro. He testified that on17/2/2017 he went with his colleagues for an operation at 5.50 hours in loita area over poaching activities. They laid an ambush in an area and tracks known for such activities. A person appeared, carrying a sack, it was the appellant. They introduced themselves to him as law enforcement officers and searched the luggage. They found the luggage to contain one elephant tusk. It had no permit allowing him to have the trophy.

[8]. They went to KWS station at Ewaso Nyiro and weighed the tusk. It weighed 4kgs. A weighing certificate was prepared. An inventory was also prepared. He produced them as **P Exh 1,2,3** and **4**

[9]. On cross examination, he denied that they arrested someone else and planted the tusk on him. The officer could not tell how the appellant got the tusk. He could not also tell whether the appellant was a first offender and if they had a land dispute with his brother.

[10]. **PW2** – ranger Evans Odhiambo. He testified that on 18/2/2017 he received a call from his boss (pw1) that a suspect had been arrested with an elephant task. He received the tusk at the KWS station. He weighed the tusk. It weighed 4kgs. An inventory was drawn **P Exh 1.** He prepared a weighing certificate which was signed by PW1, PW2 but the appellant refused to sign. He also prepared a chain of custody form which contained details of the place of recovery, officers involved, time of arrest and the suspect. **P Exh 5.**

[11]. **PW2** stated that the appellant was not arrested from a home but in the forest,

[12]. **PW3**- senior sergeant Daniel sampelu. He testified that he received information from his boss kailungush that there was elephant poaching activities in loita. They proceeded to the forest with other officers. They were 6 officers. They went to lay ambush. In the morning of 18/2/2017 at 5:20 am they saw a man walk towards them carrying a white sack. The officers move out and arrested the suspect. The suspect was taken to Ewaso Nyiro. The tusk weighed 4kgs. The appellant did not have a permit. He was brought to Narok police station.

[13]. On cross examination, he stated that they left Ewaso Nyiro for loita on 17/2/2017 at **5**.00 p.m. and arrived at 9.00 p.m. They lay in wait in the forest the whole night. It was not till the following morning that the accused came walking by.

[14]. The appellant had a sword. The appellant did not explain where he got the tusk or how he got it. The carcass of the elephant was not seen. The tusk was not freshly removed. He stated that he knows an elephant tusk though he does not have a certificate to prove that it was an elephant tusk. He denied that he arrested the appellant at his home in Magadi. He denied having caned the appellant in front of his children. The officer denied having arrested the appellant while herding his cattle. He denied that they kept the appellant the whole night from 17 th to 18th February 2017. That the appellant was taken to the camp then to Narok police station.

[15]. On reexamination he clarified that the accused never complained that he was caned.

[16]. **PW4-** PC Norman Mwakawa of DCI Narok. He testified that he was instructed by his boss to prepare the case for court. He received a file of evidence and exhibits and a charge sheet. He could not communicate well with the appellant on interrogation due to language barrier. He registered the case for trial. The KWS officers marked the tusk. He also received other exhibits; inventory, weighing certificate, tusk. He denied that reason for the arrest was burning charcoal or as a result of disagreements with a neighbor over shamba.

[17]. DW1-He was held at some place over night. He named one Samuel Dokony now deceased but was present at the time. He was then taken to Ngong then Ewaso Nyiro at KWS. He declined to sign against any document. He recorded his statement and produced it. He stated that it was Samuel Dokony who told the officers who to arrest and he died before the issue could be sorted.

[18]. On cross examination he stated that Samuel Dokony was spying on him. He had cut a tree which had fallen on the road. They had a land dispute. He corrected his statement that the correct date of arrest was from 17 to 18th /2/2017. He stated that the KWS were bosses for his spy.

[19]. **DW2-** Naantoyie Kasingwa a wife to the appellant. She stated that her husband was arrested on 17/2/2017. 6 people came to her home that evening and three of them proceeded to search her house. They took her husband's knife and as they met the accused and arrested him she stated that she was told to make tea for Olekuro. Which she did and the person appeared to be in a hurry. She did not know Samuel. She had no shamba dispute with anybody but her husband had dispute with lukoror. She was at home when people came to arrest her husband.

[20]. **DW3-** Moses Ole Tunga. He spent the day with the appellant grazing cattle. They returned home at 6p.m when they found KWS officers at the home of the appellant. They chose the appellant over another and arrested him. He was taken away

[21]. On cross examination, he stated that the appellant was arrested by 6 people. He lives with his father who had a land dispute with an askari who is deceased. He did not know the name of the askari. He was present with his mother and children when he was arrested.

[22]. **DW4 -**Saringe Rimpaine. On 17/2/107 he was at home of the appellant. He stayed there since 2016 having run away from drought.

[23]. He stated that the appellant with his son loitanga had gone to graze DW4's cattle that day. KWS officers came and arrested the accused.

He stated that the askari went to search on a separate house. He met askari who asked him where is mzee. DW4 stated that mzee was out grazing. The KWS officer was called Samuel. He knew him before. The shamba of Samuel borders that of the appellant.

[24]. The appellant submitted that the court dismissed his alibi defence was factual and had not been rebutted. The appellant gave an account of his whereabouts on 17th February 2017 and how he was arrested and remained incarcerated until he was arraigned in court on 20th February 2017. He could not have been at Loita forest in Narok County on 28th February 2017. He cited the cases of ***Uganda Vs Sebyala & Others, Victor Mwendwa Mulinge Vs Republic [2014] Eklr, Kiarie Vs Republic [1984] eKLR***

[25]. The appellant submitted that the failure to provide the OB number that booked the appellant at Ewaso Ngiro KWS station failure to provide the work ticket of the motor vehicle used and its registration fatally weakened the prosecution case and is in law entitled to draw an inference that the information contained in the document requested would have been adverse to the prosecution case. He cited the cases of ***Natasha Singh V CBI [2013] 5 SCC 741, Bukenya & Other Vs Uganda [1972] EA 549, Terekerali S/O Korongozi & 4 Other V Republic [1952] 19 EACA 259.***

[26]. The appellant submitted that his rights as an arrested person guaranteed under article 49 were violated by the police. The investigating officer indicated that he did not inform the accused person the reasons for his arrest, the right to remain silent and the consequences thereof. The statement of the accused was not recorded. Therefore, there was no proper investigations conducted. He cited the case of ***R V Attorney General Ex Parte Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001, Joseph Ndungu Kagiri V Republic [2016] eKLR, Rattiram V State Of M.P, Joel Saiyanga Ole Mwaniki & Another V Republic, Nairobi Criminal Appeal No. 229 Of 2003, Raphael Kibui Wanyoike V Republic [2003] eKLR***

[27]. The appellant submitted that there was a miscarriage of justice on the ground that were personal and irreconcilable difference between the counsel for the appellant and the trial magistrate. All matters before the trial magistrate in which the appellant's advocate was on record were transferred but she selectively retained this file. In Narok Misc. Criminal Application No. 52 of 2019 the trial magistrate refused to hear an application for her recusal by the appellant's advocate due to the said differences. The learned justice R. Mwongo on 20th November 2019 ordered her to hear the application for her recusal or have the file re-allocated to another. He cited the case of ***Re Winship, Republic V David Kibet Kiplagat [2014] eKLR, R Vs Gough [1993] 2 ALL ER724 [1993 that] AC 646.***

[28]. The appellant submitted that the prosecution did not prove its case beyond reasonable doubt that the appellant was at Loita forest on the fateful 18th February 2017.That the conviction and sentence was not safe and that it should be quashed and set aside.

[29]. The respondent submitted that the appellant defence of alibi was filled with inconsistencies and not truthful. The prosecution witnesses were consistent that the appellant was arrested in Loita forest with the elephant tusk. The inconsistencies pointed out in the defence case rule out the fact that the appellant was arrested in Magadi.

[30]. The respondent submitted that a motor vehicle work ticket was not produced but the prosecutions overwhelming evidence is that there could not have been an arrest in Magadi. Failure to produce the work ticket was not fatal as evidence of the prosecution is consistent on the fact of the arrest.

[31]. The respondent submitted that the trial was conducted in accordance with the rights of an accused person, right to fair trial and that appellant's right to access of information according to the constitution was adhered to. He was supplied with all documents that the prosecution relied in order to prepare for his defence and was ably represented by his advocate.

[32]. The respondent submitted that it proved its case beyond reasonable doubt. The appellant did put up a defence which was not credible.

[33]. The respondent submitted that there is nothing in the court proceedings that shows any animosity between the trial magistrate and the counsel for the appellant. If it were true the advocate would have moved the court by making application for the court to recuse itself citing the grounds of doing so. Therefore there was no miscarriage of justice and the entire trail followed the due process.

[34]. The respondent submitted that the conviction was safe as against the appellant. Ms. Torosi urged this court to uphold it as well as the sentence.

ANALYSIS AND DETERMINATION

Court's duty

[35]. As first appellate court; I should re-evaluate the evidence afresh and arrive at own independent conclusions. I am however reminded to bear in mind that I neither saw nor heard the witnesses and give due allowance for that. See ***Njoroge v Republic (1987) KLR, 19 & Okeno v Republic (1972) E.A, 32.***

Issues

[36]. The ever constant overriding issue for determination by the court in a criminal appeal such as this, is whether the prosecution proved its case against the appellant beyond reasonable doubt. In arriving at the decision thereof, such other specific matters below which have been pleaded will also be resolved;

i. The defence of alibi;

ii. Alleged contradictions, discrepancies, flaws and/or inconsistences in the prosecution's evidence;

iii. Alleged violation of the appellant's right to information.

iv. Alleged injustice arising from irreconcilable differences between the trial magistrate and the defence counsel.

Whether the appellant's right to information was violated

[37]. The appellant made several claims of alleged violation of rights.

[38]. I will start with the appellant's contention that he was not interrogated and his statement was not recorded. Therefore, his constitutional right to be informed of the reason for his arrest, the right to keep quiet and to addressed in a language he understands.

[39]. From the record, it is clear that the KWS Officers who arrested the appellant introduced themselves to the appellant at the time of arrest, carried out a search of the white sack he was carrying and upon realization he had carried an elephant tusk, they interviewed him on the origin and ownership of the tusk. The appellant was taken to PW4; the investigating officer where the file and charge sheet was compiled and prepared respectively. Accordingly, nothing shows breach of right.

[40]. He made further contentions. One, that the prosecution failed to avail the occurrence book of Ewaso Ngiro to prove that the accused was booked there. Two, that the prosecution failed to adduce evidence of work ticket that the vehicle used by the officer. Three, that the investigating officer also did not visit the scene of arrest. An adverse inference on failure to call a witness is viable where the evidence is just barely adequate. This is not the case here as shall be borne out in the evaluation of the evidence herein.

Whether trial court should have recused

[41]. I find not on the record evidence of an application for recusal of the trial magistrate. I therefore dismiss this ground of appeal.

Whether the prosecution proved its case beyond reasonable doubt;

[42]. The ever constant issue is proof of the case against the appellant beyond reasonable doubt. The charge was being in possession of wildlife trophy contrary to Section 95 of the Wildlife Conservation and Management Act 2013 which provides as follows:

> **"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.''**

[43]. Accordingly, the element of the offence to be proved are:

i. Possession of a trophy

ii. Without a permit issued or exemption given under the Act

[44]. Section 105 of the Wildlife Conservation and Management Act 2013 is on forfeiture of the trophy under the Act.

[45]. **PW1** and PW3 were among the 6 officers who on 17/2/2017 went for an operation at 5.50 hours in loita forest following information on poaching activities. They laid an ambush in an area and followed tracks known for such activities. In the morning, a person appeared, carrying a sack. The person they saw is the appellant. These witnesses were categorical that they came out of their positions and introduced themselves to him as law enforcement officers and searched the luggage. They found the luggage to contain one elephant tusk. The appellant could not explain where or how he got the tusk. He did not also have a permit allowing him to have the trophy.

[46]. They took the appellant to KWS station at Ewaso Nyiro. The tusk was also weighed at the station. It weighed 4kgs. A weighing certificate was prepared. An inventory was also prepared. He produced them as **P Exh 1,2,3** and **4**

[47]. **PW2** received the elephant tusk at the KWS station. He weighed the tusk. It weighed 4kgs. An inventory was drawn **P Exh 1.** He prepared a weighing certificate which was signed by PW1, PW2 but the appellant refused to sign. He also prepared a chain of custody form which contained details of the place of recovery, officers involved, time of arrest and the suspect. **P Exh 5.** His evidence was consistent with that of PW1 and PW3. He stated that the appellant was not arrested from a home but in the forest.

[48]. These witnesses are KWS officers and identified the item the appellant carried to be an elephant tusk.

[49]. They were also consistent as to the place of arrest; loita forest. They denied the appellant's claim that he was arrested at his home in Magadi or while grazing cattle. PW3 also denied a claim that he caned the appellant in front of his children.

[50]. At this point let me discuss the defence of alibi and alleged contradictions in the evidence by the prosecution as these feed to the onus and standard of proof by prosecution.

The defence of alibi;

[1]. The alibi defence raised by the appellant was that he was in Magadi grazing cattle and not at Loita Forest at the time of the alleged offence. To bolster his defence, he also stated that he was arrested at home and not Loita Forest.

[2]. In law, the legal burden of proof lies with the prosecution. It is within that overall burden of proof that the prosecution should unravel the defence of alibi pleaded by the accused. Depending on the nature of the alibi, they may do so by checking it out and obtaining evidence relative to the alibi, or call evidence specifically towards the specific alibi or through evidence adduced in court. The prosecution witnesses were consistent that following credible information, they laid an ambush and arrested the appellant with a sack which upon inspection contained an elephant tusk. DW2 and DW3 who are wife and son of the appellant respectively were among witnesses who testified in support of the alibi herein. Dw4 also testified. However, it is surprising that DW2 and DW3 did not mention the presence of DW4 when the appellant was allegedly arrested at home. The alibi is entangled in inconsistencies.

[3]. The appellant made very serious claims especially that he was assaulted in the presence of his family. None of the defence witnesses claimed that they saw the appellant being assaulted by the officers.

[4]. Of DW2 and DW3; the credibility of their story is questionable as they seemed not to know one Samuel – a KWS officer but now deceased- who is their neighbor and with whom the appellant had allegedly a protracted land dispute. The appellant also made very serious allegations; that Samuel planned his arrest due to the said protracted land dispute he has with him. Notably, these two were wife and son of the appellant and from the evidence, they lived with the appellant.

[5]. Contrary to the appellant's submission, his defence of alibi was considered by the trial court and found it was not "true alibi".

[6]. The evidence by PW1, PW2, and PW3 was cogent and placed the appellant at the scene of crime. The prosecution produced an elephant tusk which was recovered from the appellant as **P Exh 3** and the sack he used to carry it as **P Exh 4.** He was arrested in an ambush laid by the officers.

[7]. The prosecution witnesses completely unraveled the alibi; the defence does not hold sway. I dismiss it.

[8]. The prosecution proved that the appellant was found in possession of elephant tusk- a trophy- without a permit thereof.

Alleged contradictions, discrepancies, flaws and/or inconsistences;

[9]. The appellant claimed inconsistencies and contradictions in the testimonies by the prosecution witnesses. PW1 and PW3 were arresting officers and present at the time of the commission of the crime. PW1 and PW3 are consistent that they saw and arrested the appellant at loita forest with an elephant tusk.

[10]. I therefore do not find any inconsistencies in the prosecution's case.

Overall impression

[11]. The evidence by the prosecution proves beyond reasonable doubt that the appellant was found in possession of an elephant tusk without a permit. The appellant stated that the tusk was not subjected to scientific identification. However, PW3 stated that he knew an elephant tusk from experience. Evidence show that the item produced and found in possession of the appellant was an elephant tusk.

[12]. The appellant was convicted on the basis of evidence adduced which met the standard of beyond reasonable doubt.

[13]. The defence herein was an afterthought and it is not believable. The credibility of the defence witnesses has been discussed above.

[14]. The upshot is that, I find the prosecution proved its case beyond reasonable doubt and the appellant was properly convicted. I therefore uphold the conviction.

Of sentence

[15]. As regards the sentence I find that, the trial court found that, the appellant was a first offender. It also considered his mitigation.

[16]. In that regard, I note that the appellant is charged with an offence of being in possession of wildlife trophy contrary to Section 95 of the Wildlife Conservation and Management Act, 2013. The sentence provided for the offence; is a fine of not less than one million shillings (Kshs 1,000,000) or a term of not less than five (5) years or both such fine and imprisonment. The sentence imposed is a fine of Kshs. 1,000,000 in default to serve 5 years imprisonment. I uphold that sentence.

[17]. In respect of Section 333(2) CPC; I note that Appellant was released on a cash bail of kshs.200, 000/=. The section is not applicable. He is however entitled to remission from the prisons authorities.

[18]. I find that the offence is a threat to wildlife tourism in this country and is very serious.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 29TH

DAY OF NOVEMBER, 2021

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F. GIKONYO M.

JUDGE

In the presence of: -

1. Kasaso C/A

2. Appellant

3. Ole Kamwaro advocate for the appellant

4. M/S Torosi for DPP