



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 57 OF 2019

KAZUNGU KARISA YERI..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the Judgment of the Chief Magistrate's Court at Malindi by Hon. Dr. Julie Oseko (CM) delivered on 30th May, 2019 in CMCR Case No. 661 of 2018)

CORAM: Hon. Justice Reuben Nyakundi

The Appellant in person

Mr. Mwangi for the State

J U D G M E N T

Background

1. The appellant Kazungu Karisa Yeri was charged with the offence of being in possession of a Wildlife Trophy Contrary to Section 95 of the Wildlife Conservation and Management Act, 2013 Laws of Kenya.
2. The particulars of the offence are that on the 30th day of June, 2018 at around 1210 hrs at Kombeni, Lango Baya area within Kilifi County the appellant was found in possession of eight pieces of elephant tusks weighing 8.5 kilograms with a street value of Kshs.850,000/=. Without permit from the Director General of Kenya Wildlife Service.
3. The prosecution called four (11) witnesses in support of its case. The appellant gave a sworn testimony in his defence and did not call any witness. After considering the evidence, the trial Court convicted the appellant on the count as charged. Consequently, the appellant was sentenced to three (3) years imprisonment.
4. Dissatisfied with the trial Court's findings, the appellant appealed against both the conviction and sentence.
5. The prosecution's case was set out as per the evidence of **(PW1), (PW2), (PW3)** and **(PW4)** being Kenya Wildlife Service Rangers attached to the Malindi Marine Park.
6. The prosecution's case was opened by **Ranger Evans Kibet (PW1)** who testified that on 30.6.2018 they were at their offices when **Sergeant Maiyo** informed them that there was intelligence that at Kombeni in Lango Baya a man had elephant tusks he wanted to sell. That they took their vehicles on the road and he was the driver. He was with **Sergeant Maiyo** and **Ranger Nyabola** when they arrived at PCEA Church, Lango Baya **Sergeant Maiyo** telephoned the contact sealed to find out where he was and he was told that the man was at the junction of Kombeni and Lango Baya. That they proceeded to the junction where they found a man standing wearing jeans trousers and a white shirt. That the man was alone. The man approached them, greeted them and entered the car. That the man directed them to Ngomeni center and upon arrival he alighted and instructed them to wait for a few minutes and five (5) minutes later he came back carrying a sack on his back creamish in colour which was produced as exhibit **MFI – 1**. That in his hands he had a contact book produced as exhibit **MFI -2**.
7. That the man entered the car and they turned to return to Ngomeni where they stopped and **Corporal Nyabola** entered the car. They then identified themselves and told the man to open the luggage. That the man agreed and they saw those elephant tusks inside the cement bag. That inside the cement bag there was another bag produced as **MFI-3** which had 1 more tusk and 8 more tusks produced as exhibit **MFI-4**.

8. That they arrested the appellant who had no permit. An inventory produced as **MFI-5** was prepared which they all signed and the appellant too endorsed it with thumb print. They prepared a charged sheet produced as exhibit **MFI-6** and the tusks taken for analysis. The analysis report was produced as exhibit **MFI-7** confirming that they are elephant tusks. On cross-examination (**PW1**) admitted that they did not take any photographs at the time of arrest.

9. (**PW2**) **Jeremiah Poghon Kaito** a veterinary doctor by profession testified that he was for KWS, Tsavo East National Park. That he is a registered member of the Kenya Veterinary Board, Registration Number 1965. That on 11.10.2018 he was at his office when he was visited by **Ranger Isaac Nyabola** who came with exhibit marked as **MFI 1-4** to analyze if they were elephant tusks. That he made the same **B1-B8**.

10. That he proceeded to examine them and they were white edged due to curves and cracking. This was due to storage in dehydrating environment. That he examined them individually and his findings were that **B1-B8** were all genuine elephant tusks. That he wrote and signed the report produced as exhibit **MFI-7**.

11. **PW3 Sergeant Geoffrey Kimaiyo** testified that on 30.5.2018 he was on duty when he received information that one **Kazungu Yeri** had elephant tusks and he was looking for a market. That they proceeded to Lango Baya area as he had spoken with on phone leading them to where he was. That they met him near PEFA church where he brought luggage in the car and upon inspection of the said luggage **Ranger Nyabola** found that they were elephant tusks. The same were recovered and marked as exhibit **MFI 1-4**. That they had agreed to buy the tusks for Kshs.2,000,000/=. That they prepared an inventory marked as exhibit **MFI-3** and the exhibits were taken for analysis and a reported was prepared and produced as exhibit MFI-7. On cross-examination (**PW3**) admitted that he did not take the appellants picture at the time of arrest.

12. **PW4 Ranger Isaac Nyabola** testified that on 30.6.2018 he was on duty when their in-charge told them that there was someone at Lango Baya selling elephant tusks. That they organized an operation and on board was **Sergeant Maiyo, Ranger Kibet** and **Ranger Nyabola**. That upon arrival at Ngomeni PEFA Church (**PW4**) alighted and his colleagues went ahead to meet the seller. That after some time the vehicle returned and in it was the appellant. That (**PW4**) opened the said vehicle's boot where he found items produced as exhibit **MFI 1-4**. That (**PW4**) identified himself and asked the appellant whether he had a permit. The appellant did not have a permit. That (**PW4**) arrested and charged and the tusks were taken for expert analysis and their result returned positive as shown by exhibit produced as **MFI-7**. On cross-examination (**PW4**) admitted that he was not at the scene of arrest.

13. The appellant denied committing the offence alleged. In his sworn testimony in Court, he stated that on the material date he went to work and met a stranger who asked him where he was headed. That he informed the stranger that he was going to work and the stranger informed him that he had a luggage he had hidden somewhere he wanted the appellant to help him carry to the road. That the appellant accompanied him to where the luggage was hidden and he showed him a sack that the appellant did not know of its contents. That the appellant touched it and it felt like cassava. That the appellant and the stranger agreed and the appellant carries the luggage to the road. That 2km or so the appellant asked the stranger to pay him Kshs.400/= and he was instructed to wait that a vehicle was coming to collect the luggage.

14. That the appellant waited and a probox came with three people inside and the appellant loaded the luggage in the boot. That the occupants of the said vehicle spoke with stranger who produced money and later showed the appellant Kshs.1,000/= and asked him to wait for change. That the appellant agreed and entered the said vehicle. That the vehicle was driven towards shops and the owner of the luggage alighted. That when the appellant wanted to alight the people in the vehicle produced guns and ordered him not to move. That they ordered the appellant to close his eyes or otherwise he would be killed. That when the appellant opened his eyes they were at the marine park and the luggage was removed and inside were elephant tusks. That the appellant was informed he would be charged and was compelled to take photos with the tusks. That the appellant was further coerced into signing the occurrence book at the police station. The appellant denied knowing the luggage was tusks.

15. This is a first appeal and this Court has a duty to re-consider a re-evaluate the evidence afresh and arrive at its own independent conclusion. An allowance must always be made since this Court did not, unlike the trial Court see and hear the witnesses.

16. See **Okeno v R {1972} EA 32** and **Joseph Njuguna Mwaura & Others v R eKLR, Criminal Appeal No. 5 of 2008**.

17. The Court of Appeal in the case of **Patrick & Another v Republic {2005} 2 KLR 162** stated thus:

“3. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court’s won decision on the evidence. It is not the function of 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 findings and draw its own conclusion.”

18. I have considered the evidence on record and the only issue I find needs to be determined is;

(i). Whether this was a case of entrapment?

19. What is entrapment? The dictionary defines “entrapment” as;

“The action of tricking someone into committing a crime in order to secure their prosecution.”

The Black’s Law Dictionary Ninth Edition at page 612 defines it as follows:

“1. A law-enforcement officers or government agent’s inducement of a person to commit a crime, by means of fraud or undue persuasion, in an attempt to later bring a criminal prosecution against that person.

2. The affirmative defence of having been so induced. To establish entrapment (in most states) the defendant must show that he or she would not have not committed the crime but for the fraud or undue persuasion.....”

20. The High Court in **Mohamed Koriow Nur v Attorney General {2011} eKLR** relying on **R v Mack {1988} 2 S.C.R. 903** dealt with entrapment as follows:

Entrapment occurs when (a) the authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in criminal activity or pursuant to a bona fide inquiry, and (b) although having such a reasonable suspicion or acting in the course of a bona fide inquiry, they go beyond providing an opportunity and include the commission of an offence As far as possible, an objective assessment of the conduct of the police and their agents is required. The predisposition, or the past, present or suspected criminal activity of the accused, is relevant only as part of the determination of whether the provision of an opportunity by the authorities to the accused to commit the offence was justifiable. Further, there must be sufficient connection between the accused’s past conduct and the provision of an opportunity, since otherwise the police suspicion will not be reasonable....

21. Entrapment, therefore, involves a scheme by investigators to induce someone into committing a crime and then use that evidence to prosecute the person. *See Lydia Lubanga v Inspector General of Police & 4 others {2016} eKLR, “where it was stated that Entrapment ought to be distinguished from instances where investigators use legitimate undercover investigation as accepted methods of police investigation.”*

22. The **English House of Lords in R v Loosey {2001} UKHL** distinguished entrapment from the limits of acceptable police conduct and investigations in the following words:-

As already noted, the judicial response to entrapment is based on the need to uphold the rule of law. A defendant is excused, not because he is less culpable, although he may be, but because the police have behaved improperly. Police conduct which brings about, to use the catch-phrase, state-created crime is unacceptable and improper. To prosecute in such circumstances would be an affront to the public conscience, to borrow the language of Lord Steyn in R v Latif {1996} 1 WLR 104, 112. In a very broad sense of word, such a prosecution would not be fair.

But what is meant by ‘state-created crime’? What is the legal concept underlying oft-repeated expressions such as lure, incite, or instigate? What is the distinction, of relevance in the commission of a crime, which these phrases are seeking to draw? If an undercover policeman asks a known drug supplier for drugs, is he ‘luring’ the unsuspecting supplier into committing a crime? If not, why not? What does ‘lure’ mean in this context? By what criteria is a trial judge to distinguish the acceptable from the unacceptable?

Questions such as these have generated extensive overseas judicial utterances and also academic literature, both in this country and abroad. The several suggested answers have different emphases and, to a limited extent, different practical consequences. Underlying some of the learning is the notion that expressions such as state-created crime and lure and incite focus attention on the role played by the police in the formation of the defendant’s intent to commit the crime in question. If the defendant already had the intent to commit a crime of the same or a similar kind, then the police did no more than give him the opportunity to fulfil his existing intent. This is unobjectionable. If the defendant was already presently disposed to commit such a crime, should opportunity arise, that is not entrapment. That is not state-created crime. The matter stands differently if the defendant lacked such a predisposition, and the police were responsible for implanting the necessary intent.

23. The question which now begs to be answered is whether the accused person in this case was coerced or induced in any way by the KWS Rangers to commit the crime. To answer this question, I will look at the conduct of the accused person right from his first encounter with the KWS Rangers.

24. The undisputed facts of the case are that the **(PW1), (PW3) and (PW4)** received an anonymous tip that there was a person about to sell elephants tusks in Kombeni area within Kilifi County. They then proceeded to the said location undercover where they found the accused person with a bag which on inspection, they found that it had elephant tusks. Consequently, they charged the accused with the offence of being in possession of wildlife trophy contrary to Section 95 of the Wildlife Conservation Management Act.

25. In this particular case there is no proof, either explicitly or impliedly that **(PW1), (PW3) and (PW4)** instigated the accused person into committing the offence. **(PW1), (PW3) and (PW4)** were merely working as undercover agents in this case. The use of such investigative techniques is necessary to detect offences of this nature.

26. I find that **(PW1), (PW3) and (PW4)** did not act beyond the mandate that is required in investigating such crimes.

27. The Court having evaluated the precedents from Superior Courts it has equally looked at the evidence on record and noted that there was no evidence to demonstrate the entrapment or encouragement by any of the prosecution witnesses to lure the accused to commit the offence and or how that entrapment was achieved.

28. I find no reason to make me interfere with the decision. The result is that the appeal lacks merit and is dismissed. The conviction and sentence are upheld.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 30TH DAY OF DECEMBER 2021

.....

R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Mwangi for state
2. The appellant