



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 79 OF 2019

(An Appeal arising out of the conviction and sentence of Hon. Gandani - CM delivered on 19th June 2018 in Kibera CMC. CR. Case No.363 of 2015)

PAUL NJOGU MUTHONI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Paul Njogu Muthoni was charged alongside others with the offence of being in possession of wildlife trophy contrary to Section 95 as read with Section 105 of the Wildlife Conservation and Management Act. The particulars of the offence were that, on 23rd January 2015 between 1200 hours and 2300 hours within Nairobi County, the Appellant alongside others, was found in possession of wildlife trophies namely worked elephant tusks weighing 155 kgs, with a street value of Ksh.15,500,000/- in a grey motor vehicle make Spacio registration number KBH 057, without a permit. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, the Appellant was convicted as charged. He was sentenced to imprisonment for a term of eight (8) years.

In his petition of Appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He faulted the trial court for failing to find that the prosecution failed to avail crucial witnesses to adduce evidence during trial. He was aggrieved that the trial court convicted him despite glaring contradictions and inconsistencies in the prosecution's case. He was of the view that the prosecution failed to establish its case against the Appellant to the required standard of proof beyond any reasonable doubt. He was further aggrieved that the trial court failed to consider his mitigation when passing the sentence against him. In the premises, the Appellant urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, this court heard oral submissions made by Mr. Bosire for the Appellant and Ms. Kimaru for the State. Counsel for the Appellant submitted that the trial court misconstrued the evidence on record and relied on extraneous factors in convicting the Appellant. He stated that the police failed to carry out investigations to determine who had leased the house that the elephant tusks was recovered. He asserted that the prosecution had earlier charged the Appellant in a previous case but withdrew the charges. He was of the view that the Appellant was being framed of the present charges. He stated that the police did not take photographs of the motor vehicle or the house where the elephant tusks were allegedly recovered. He submitted that the agent of the owners of the house in Syokimau testified that he never issued a receipt to the lessee of the said house.

Mr. Bosire argued that the receipt of lease produced in evidence by the prosecution was not genuine. He stated that when the Appellant was arrested in his house, nothing that connects him with the case was recovered from him. He pointed out that the prosecution failed to establish that the Appellant leased the premises where the elephant tusks were recovered. He asserted that the prosecution failed to establish its case against the Appellant to the required standard of proof beyond any reasonable doubt. In the premises, he urged this court to allow the Appellant's appeal.

Ms. Kimaru for the State opposed the appeal. She submitted that an informer alerted PW1 that there were people in possession of elephant tusks at Tena Estate. PW1 went to the said house and found the 1st Accused in the trial court. They searched the house but did not recover any elephant tusks. They searched a motor vehicle that was in the compound and recovered 6kgs of elephant tusks. Upon inquiry, PW1 discovered that the elephant tusks belonged to the Appellant. The said 1st Accused also led them to another house in Syokimau where they recovered 149.5 kgs of elephant tusks. A charge sheet bearing the name of the Appellant was also recovered from the house in Syokimau. Learned State Counsel stated that the evidence by the prosecution witnesses was corroborated and the same implicated the Appellant in the present case. She asserted that the prosecution discharged its burden of proof to the required standard beyond any reasonable doubt. She therefore urged the court to dismiss the appeal.

The facts of the case according to the prosecution are as follows: PW1, Abdullahi Abdi and PW3 Joyce Muthoni were Kenya Wildlife Service (KWS) officers based at the headquarters at Langata. On 23rd January 2015, they received information from PW5, who was the Chief Investigating Officer at KWS in charge of Wildlife Conservation, that there were people at Tena Estate house No.73 in Nairobi who were in possession of elephant tusks. PW5 got the tip from an informer. PW1, PW3 and PW5 went to the said house and met Isaack Mbugua (DW1). They searched the house but did not find any elephant tusks. There was a grey Toyota Spacio registration number KBH 057T parked in front of the house. The vehicle belonged to the Appellant. When they searched it, they recovered a brown suitcase containing elephant tusks. DW1 informed them that the tusks belonged to the Appellant and Abdul Malik (DW3). DW1 stated that he was only hired by the Appellant and DW3 to transport the said elephant tusks to a house in Syokimau. They searched DW1's pockets and recovered a receipt of a recently rented house in Syokimau as well as a key. The receipt was for the sum of Ksh.80,000/- being payment of one month deposit and one month rent for the said house, paid by the Appellant. It was dated 22nd January 2015. The receipt also contained the contacts of the agent who leased the premises to the Appellant. PW1, PW3 and PW5 called the agent and arranged to meet him at Mlolongo. They also called for backup from KWS headquarters. The agent took them to the said house in Syokimau. They searched the house and recovered 3 weighing machines and another machine known as Masika which is normally used to cut elephant tusks. They also found 2 sacks of chopped elephant tusks weighing 149.5 kgs.

PW1, PW3, PW5 and the other officers afterwards went back to DW1's house. They conducted another search where they recovered aluminum foils, cello-tapes and cartons which they suspected was to be used to package the tusks. They also found a charge sheet containing the name of the Appellant, where the Appellant had been charged of being in possession of wildlife trophy in a previous case in CR. Case No.4789 of 2014. The case had been withdrawn under Section 87(a) of the Criminal Procedure Code. DW1 took them to the Appellant's house in Donholm Estate where they managed to arrest the Appellant. They also arrested DW3 at K1 Club House in Parklands. They escorted the three suspects to KWS headquarters in Langata. The suspects were later taken to Langata Police Station.

PW2, Esther Nguta was a Research Scientist based at the National Museums of Kenya. She received several exhibits from the police on 4th May 2016. Her instructions were to examine the same and determine whether the exhibits were elephant tusks. Upon analysis, she concluded that the exhibits were indeed elephant tusks. She stated that they were cuttings from at least 30 pieces of different elephant tusks. She produced a report of her findings into evidence.

PW4, Justus Stephen Ngulo was the real estate agent who leased the house in Syokimau to the Appellant. He stated that he took PW1 and PW3 to view the said house on 23rd January 2015. They were accompanied by DW1 who had a key to the house. When they entered the house, they found painted elephant tusks, weighing machines and boxes. He signed the inventory prepared by KWS officers. The officers weighed the tusks which were found to be 149.9 kgs. PW4 stated that he had leased the house to the Appellant who paid the deposit and rent for a month. The Appellant was in the company of DW1 and a third man when he came in search for a house to lease. He issued the Appellant with a receipt (PEX26) for amount Ksh.70,000/- dated 22nd January 2015. He stated that he did not issue the receipt produced in court for amount Ksh.80,000/-. He gave a copy of the receipt for the amount paid by the Appellant as the tenant, as well as a copy of the Appellant's identity card. PW6, PC Bernard Serem was a Scene of Crimes officer based at KWS headquarters. On 12th January 2016, PW5 instructed him to take photographs of a motor vehicle which was at the KWS offices. The motor vehicle was a silver Toyota Spacio registration number KBM 057T. He took photographs of the said vehicle and produced the same into evidence.

PW7, Chief Inspector Charles Inoti, stationed at the DCI headquarters, was the investigating officer in the present case. He was also attached to KWS Investigation Department. He was at KWS offices on 24th January 2015 when KWS officers brought in three suspects who had been arrested for possession of the elephant tusks. The Appellant was one of them. He interrogated the suspects. They stated that they did not have licence allowing them to be in possession of the tusks. They however declined to state where they got their said tusks from. He received several exhibits listed earlier in the judgment which had been recovered from a house in Tena Estate belonging to DW1, as well a house in Syokimau Estate and in Donholm Estate rented by the Appellant. The arresting officers had prepared an inventory reports for the recovered items.

PW7 stated that he visited house No.73 in Tena Estate where DW1 was arrested. He was shown where the motor vehicle containing the elephant tusks had been parked. The caretaker gave them a copy of a lease (PEX14) which indicated that the said house was leased to the Appellant. The arresting officers had also recovered several receipts for payment of water and electricity for the said house which he produced into evidence. A charge sheet for CR. Case No.4789 of 2014 in the name of the Appellant was also recovered from the said house in Tena Estate. He also visited the house in Syokimau and recorded a statement from the agent who confirmed that the arresting officers recovered elephant tusks and weighing machines from the house in Syokimau which had been leased to the Appellant.

PW7 instructed a scenes of crime officer (PW6) to take photographs of the motor vehicle where the elephants tusks were recovered. He also conducted a search at NTSA to confirm the owner of the said motor vehicle registration number KBM 057T. He discovered that the vehicle was registered to Kenya Power and Lighting Company and one Jane Genga. After conducting his investigations, he decided to charge the Appellant as well as DW1 and DW3 with the present offences.

The Appellant was put on his defence. He gave a sworn statement. He stated that he resided in Donholm Estate House No.7. On 23rd January 2015, police officers came to his house. They beat him up and searched his house. They arrested him and put him in a vehicle. They took him to Langata Police Station and later to K1 Club House where DW3 was arrested. The officers took them to KWS offices in Langata where they found DW1. They were interrogated. The Appellant informed the officers that he operated a taxi business with his wife. He stated that he was never taken to the house at Syokimau neither did the landlord identify him as the tenant. He stated that the receipt (PEX26) was not issued to him. PEX1 was also not recovered from him. He asserted that the brown suitcase and the weighing machines were not recovered while in his possession. He denied the charges against him.

It was the Appellant's testimony that the KWS officers planted the charge sheet at the house in Tena Estate where they claim to have recovered it. This is an account of the fact that they had a copy of the same. He denied signing any inventory. He also denied the assertion that he hired DW1 to transport the tusks from Tena Estate to Syokimau. He stated that he did not know DW3. He however admitted knowing DW1. He told the court that DW1 was a taxi driver whom he occasionally hired since he operated a taxi business. The Appellant admitted that he had earlier been charged in a previous case as stated in the charge sheet produced into evidence

(PEX9). However, the charges against him had been withdrawn. On cross-examination, he stated that the motor vehicle that was recovered from DW1 was registered in his wife's name (Anne Kendi Murungi). He stated that DW1 was in possession of the vehicle since he had hired him as a taxi driver. He stated that he had never lived with DW1 in Tena Estate as alleged by the prosecution.

The Appellant availed his wife DW4, Anne Murungi, to adduce evidence on his behalf. She stated that she owned the motor vehicle KBH 057T and that the same had been given to DW1 since they had employed him as a taxi driver. She testified that she was present when the Appellant was arrested at their home on 23rd January 2015. The police officers searched their house but did not recover anything.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and re-evaluation, before reaching its own independent determination whether or not to uphold the conviction and sentence of the Appellant. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make any comments regarding the demeanor of the witnesses (See David Agwata Achira –vs- Republic [2003] eKLR). In the present appeal, the issue for determination is whether the prosecution established the Appellant's guilt with regard to the charges preferred against him to the required standard of proof beyond any reasonable doubt. This court has re-evaluated the facts of this case. It has also considered rival submission made by the parties to the appeal.

The Appellant was charged of being in possession of wildlife trophies without a certificate of ownership. Section 95 of the Wildlife (Conservation and Management) Act provides that:

“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.”

Therefore, the prosecution was required to establish proof of possession; proof that the items recovered in the Appellant's possession were trophies; and lack of authority on the Appellant's part to be in possession of the same. From the evidence adduced, PW1, PW3 and PW5 were KWS officers. PW5 received information from an informer that there were persons in possession of elephant tusks at Tena Estate House No.73. PW1, PW2 and PW3 went to the said house where they met Isaac Mbugua (DW1). They searched the house but did not find any tusks. They searched a motor vehicle registration number KBH 057T that was parked in the compound and recovered a brown suitcase which contained 6kg of elephant tusks. DW1 informed them that he had been hired by the Appellant to transport the tusks and other items to a house in Syokimau Estate. They also recovered a payment receipt of rent for the said house in Syokimau (PEX 26). The receipt was issued to the Appellant on 22nd January 2015. They proceeded to the house in Syokimau where they recovered more tusks weighing 149.5 kgs as well as grinding and weighing machines.

‘Possession’ is defined under Section 4 of the Penal Code to mean:-

“Be in possession of” or “have in possession” includes not only having in own personal possession, but also knowledge having anything in the actual possession or custody of any other person or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of one self or of any other person if there are one 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 of them.....”

In the present appeal, the trial court relied on circumstantial evidence in convicting the Appellant. The elephant tusks in the present appeal were recovered from a motor vehicle and a house belonging to the Appellant. PW1, PW3 and PW5 testified that 6kgs of tusks were recovered from motor vehicle registration number KBH 057T. The Appellant admitted that the vehicle belonged to his wife and that he had given the same to DW1 who he had employed as a taxi driver. It was the evidence of the PW1, PW3 and PW5 that DW1 informed them that the Appellant had hired him to transport the tusks and other items in the house to a house in Syokimau. The house in Syokimau was rented by the Appellant. PW4 who was an agent of the property in Syokimau testified that the Appellant, DW1 and a third unknown man came in search for a house to lease. He stated that the Appellant paid the deposit and rent for the said house amounting to Ksh.70,000/-. He issued the Appellant with a receipt for the said amount which was produced in evidence as **Prosecution's Exhibit 26**. This evidence confirms that the Appellant was indeed the tenant of the house in Syokimau. The KWS officers recovered 149.5 kgs of elephant tusks from the said house. This evidence was corroborated by PW4 who was present when the officers searched the said house.

When the Appellant was arrested, he was unable to explain where he got the elephant tusks from. He did not have any documents to show that he was authorized to possess the same. The Appellant in his defence denies having anything to do with the house in Syokimau. His defence is however displaced by the evidence of PW4 as well as receipt of payment of rent (PEX26) produced into evidence which established that the Appellant was in fact the lessee of the said house. The prosecution established that the Appellant did lease the house in Syokimau the previous day before the recovery was made. The Appellant admitted that he gave the motor vehicle where 6kgs of elephant tusks were recovered to DW1 who was his employee, but states that he was not aware of the presence of tusks that was recovered from the said vehicle. This court is of the view that evidence on record taken in totality, established that the Appellant was aware and was in possession of recovered tusks. **The defence put forward by the Appellant was a mere diversion and did not dent the otherwise strong and cogent evidence that was adduced by the prosecution witnesses.**

The Appellant was therefore in custody and control of the recovered wildlife trophy. This court is convinced that the element of possession was established by the prosecution to the required standard of proof. PW2, an expert in identification of animal remnants, confirmed that the tusks recovered in possession of the Appellant were wildlife trophies specifically within the meaning of Section 2 of the Act. When the Appellant was arrested, he was not able to explain from where he got the said trophies. He did not have any documentation with him to prove that he was authorized to possess the same. This court is of the view that the prosecution established all ingredients with regard to the charge brought against the Appellant to the required standard of proof beyond any reasonable doubt. His conviction by the trial court is hereby

affirmed. The appeal against conviction lacks merit and is hereby dismissed.

With regard to sentence, the Appellant was sentenced to serve a custodial sentence of eight (8) years. **Section 95** of the **Wildlife Conservation and Management Act** provides for a minimum sentence of a fine not less than one million shillings or imprisonment of not less than five (5) years or both. This court is of the view that considering the amount of elephant tusks the Appellant was found in possession of, the sentence meted by the trial court was neither harsh nor excessive in the circumstances. The Appellant was out on bond during the hearing of his trial. His appeal against sentence is similarly dismissed. It is so ordered.

DATED AT NAIROBI THIS 26TH DAY OF FEBRUARY 2020

L. KIMARU

JUDGE