



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIVASHA
CORAM: R. MWONGO, J.
CRIMINAL APPEAL NO. 5 OF 2018
MARTIN KAMAU NYAGA.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

(Being an appeal against the judgment, conviction and sentence dated 31st May, 2018, of Hon. Z. Abdul, Resident Magistrate, in Naivasha CMCCR No. 237 of 2017)

JUDGMENT

1. The appellant and one Joseph Wambogo Kagiri were charged jointly with others not before the court, with engaging in hunting and possession of carcass of wildlife species, namely zebra, contrary to section 98 of the Wildlife Conservation and Management Act, 2013. The particulars were that on the 12th day of February 2017 at around 1130hours at Crater Lake area of North Lake within Naivasha Sub-County, jointly with others not before the court, they were found to have killed and in possession of approximately 410kgs carcass of Zebra by use of snares, a spear, a panga and two knives. The second accused pleaded guilty and was sentenced separately.

2. After hearing 4 prosecution witnesses and the defendant/appellant, the trial court convicted him and sentenced him to pay a fine of Kshs 120,000/= or to serve a one year term of imprisonment. He appeals against the conviction and sentence.

3. The grounds of appeal are that:

- The evidence was contradictory and incredible
- That the appellant was not correctly connected to the alleged offence
- That the evidence was insufficient to support the charge; and
- That the trial magistrate failed to analyse both prosecution and defence evidence on merit

4. Counsel for the appellant argued all grounds, briefly, globally.

5. The appellant argues that the evidence of PW3 contradicted that of PW2. PW2 stated in cross examination that when they went to the scene they found the accused person slaughtering the zebra; cutting the neck and skinning it. PW3 on his part stated that a zebra had been trapped and could not move. See line 13 page 6 of proceedings. That therefore the two witnesses observed different things or were lying.

6. I have looked at the evidence of the two witnesses PW2 and PW3. PW2's evidence which is referred to, concerns what he saw when he was at the scene. The evidence by PW3 referred to by the counsel (line 13 page 6 proceedings) concerns the time when PW3 received a phone call and what he was told. In line 15 page 6 PW3 then says what he saw when he actually went to the scene:

“We went to Crater Lake area, we found two people skinning the animal. The legs had been trapped by snares.”

7. From the above, there is no contradiction between the evidence of what both PW2 and PW3 saw at the scene.

8. PW2 also stated that when they got to the scene, they found the accused were cutting zebra's the neck and skinning it. Yet according to the appellant, PW3 said the zebra was still alive. As earlier stated, the evidence of PW3 in lines 11-13 of the proceedings concerns what he was informed in a phone call before he went to the scene. The evidence of what he saw at the scene is at lines 15 -18 and it does not

contradict PW2's evidence.

9. The accused also complains about PW3 evidence at page 7 lines 4 and 5. He says that PW3 contradicts himself by saying that he did not know the informer yet asserts that the appellant could not be the informer because he knows the informer. That he is therefore unreliable witness bent on tailoring evidence.

10. It is true that PW3 said:

“A member of the public whom I do not know informed me about the zebra. Accused cannot be the one who called me. I know the informer.”

In re-examination he said that a member of the public, his informer, informed him about the zebra.

11. The question is whether this contradiction goes to the core of case. The offence in **Section 98 of Environmental Management and Coordination Act** requires proof of the following elements: that the accused person was engaged in hunting or that he was found in possession of a carcass of wildlife species; and evidence that what was in his possession was wildlife. In my view, whether or not the informer was known or not known to the veterinary, PW3, is immaterial to the fundamental issues for determination of proof of the offence. The contradiction is a minor and excusable contradiction. That did not go to the root of the issues for determination in the case nor does it occasion a failure of justice. See: **Section 382 of the Criminal Procedure Code**.

12. It was also contended by the appellant that the chain of custody of what was recovered at site and what was produced in court was unreliable. That concerns the exhibit to which I will revert below.

13. Finally the appellant impugns the trial court as having failed to carefully consider the defence evidence.

14. As regards the exhibits, PW1 produced them as follows: Zebra carcass Exhibit 1, Zebra meat in gunny bags Exhibit 2, Snares Exhibit 3, Spear Exhibit 4, two knives Exhibit 5 and Panga Exhibit 6. PW1 said in cross-examination that he did not visit the scene and did not know where the exhibits were recovered from. He said the information he got from his colleagues was that the exhibits were obtained from the 2nd Accused's house.

15. PW2, a Ranger with Kenya Wildlife Service testified that he went to the scene with PW3. PW1 was not with them. They collected the carcass and escorted the suspects to Naivasha Police Station. The zebra was a full carcass, and no meat had been cut off. He said he did not know about the 15 Kilograms of meat in a gunny bag as he only found the suspects with a full zebra carcass and not the 15 Kilograms bags of meat.

16. PW3 corroborated PW2's evidence: The zebra carcass was full and no meat had been removed. He also did not know about Exhibit 2, namely, the meat in a gunny bag.

17. PW1 was recalled to explain Exhibit 2 which he produced. He said he found it in the vehicle. He said it was recovered by the arresting officer, PW3, from accused's house. In cross-examination he said only his colleague who was sent to get the exhibits could explain the origin of Exhibit 2. He further stated that Sylvester Sigilai Kibet had told him Exhibit 2 was recovered from the Accused's house.

18. I find that Exhibit 2, the meat in a gunny bag was not part of the items collected from the accused at the scene of crime. The evidence around its production in court is also hearsay evidence, as there was no basis for its production. Despite the exclusion of Exhibit 2, nothing turns on the probity, relevance or probative value of the evidence concerning the offence or the other exhibits.

19. The final issue concerns the complaint that the trial magistrate did not consider his, the accused's, sworn evidence.

20. The accused gave evidence that he lives in Crater area in Naivasha and is a farmer; and that he was with the 2nd Accused who he got to know that day. That he went to his farm and found a zebra, alive but trapped, and went to call officers at Crater Sanctuary. On his return, he found Accused had killed the zebra, and when officers arrived the accused fled. The officers then came to his house and arrested him but nothing was found in his house since the arrest.

21. In cross-examination, he said that Accused 2 was found with game meat in his house, that he did not know accused prior to the incident; and that accused 2 used to hunt game meat.

22. Page 18 of the record of appeal shows that the trial court took into account the evidence of appellant. The court noted that both accused persons were arrested at the scene and that no one escaped, contrary to the accused's evidence. The trial court stated that it believed the evidence of PW2 and PW3, and stated that it found it strange that accused alleged in his defence that he reported to an officer at Crater Sanctuary who in turn called other officers. That if indeed PW3 had been called by an officer from Crater Sanctuary the officer (PW3) would have said as much.

23. My perusal of the judgment and assessment of the evidence, shows that the evidence of the accused was taken into account and not dismissed off hand.

Disposition

24. The upshot is that I find there is no merit on all the kernel issues complained of, and I determine that there is no basis for overturning the

trial court's determination and conviction.

25. Accordingly the appeal fails on all grounds and is hereby dismissed.

26. Orders accordingly.

Dated and Delivered at Naivasha this 10th Day of March, 2020

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Mr. P. K. Njuguna for the Appellant
2. Ms Maingi for the State
3. Appellant - absent
4. Court Clerk - Quinter Ogutu