Irungu v Republic (Criminal Appeal 132 of 2019)
[2020] KEHC 10485 (KLR) (29 July 2020) (Judgment)

Neutral citation: [2020] KEHC 10485 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL 132 OF 2019

A. ONG'INJO, J

JULY 29, 2020

BETWEEN

JOHN IRUNGU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the conviction and sentence delivered on 9th August 2019 by Hon.Oscar Wanyaga (Mr) SRM in Maua CMC CR No.946 of 2018)

JUDGMENT

1. The Appellant was jointly charges with three others with the offence of killing an animal within a protected area contrary to Section 77(2) as read with Section 92 of the *Wildlife Conservation and Management Act* 2013.

2. The particulars were that Lmuate Lenguro, Jphn Irungu Murefu, Benson Njagi Muthengi and Jacob Muthuri alia Simba Kajiita on the second day of May 2018 at Meru National Park in Igembe Central Sub County jointly with others not before court killed a species namely three black rhinos by shooting.

3. The Appellant was also jointly charged with one other in a second count with the offence of failing to prevent the commission of a felony contrary to Section 392 as read with Section 36 of the *Penal Code*.

4. The particulars of the 2nd Count were that Lmuate Lenguro and John Irungu Murefu on the 2nd day of May 2018 at Meru National Park in Igembe Central Sub county of Meru County while being the warden in charge and Second In Charge of the said park respectively and while knowing that a person was designing to commit a felony namely the killing of three black rhinos jointly failed to use all reasonable means to prevent the commission of the said offence.

5. The Prosecution's case was supported by the evidence of 14 witnesses, however from the ruling on a case to answer the trial Magistrate alluded to have considered the evidence of 7 Prosecution witnesses

and he was satisfied that a prima facie case had been established against each of the accused persons in the respective counts and they were placed on defence.

6. The Appellant and his co accused persons gave sworn statements and called a total of 9 witnesses in their defence. Upon consideration of the prosecution and the defence evidence the trial Magistrate found the accused persons not guilty for the offence in the 1st count as there was no direct evidence linking them to the killing of the 3 rhinos.

7. The 1st accused person was also acquitted of the 2nd count and the Appellant was convicted and in the words of the trial Magistrate, "The Prosecution has been able to prove that being aware of the intention to commit the offence he failed to prevent the same and further that he allowed its completion and facilitated the poachers successful exit from the rhino sanctuary and eventually out of the park."

8. At page 31 of the judgement the trial Magistrate had this to say about the 2nd Accused (the Appellant herein),"At around 3p.m on 2nd May 2018 he was on patrol with Corporal Kosgey going base to base , he was therefore on patrol when he learnt about the gunshots. Evidence before the court from both the Prosecution and the Defence is that accused 2 was on top of things and is the one who coordinated the laying of ambushes and deployment. This fact was also confirmed by his witness Corporal Daniel Kokubu (DW10) who testified that he laid ambushes under the directions of Accused 2. He also informed the court that the point where he spent the night in ambush, no other team was there before him."

9. According to the trial Magistrate the Appellants culpability was evidenced by the calling of all those who had laid ambushes in the morning of 3rd May 2018. He said that this could have paved the way for the poachers to escape. He further said that the Appellant's complacency is seen in his evidence that on his way back the same night after failing to find anything unusual he picked the corporal and officers he had left to man possible escape routes for poachers.

10. In the trial Magistrate words, "Being the person in charge he failed to deploy his officers in a manner that would ensure the sanctuary was secure. The court is satisfied that as the person in charge Accused 2 failed to discharge his duty and allowed poachers to access the rhino sanctuary through deliberate poor deployment and further responded to the gunshots in a manner that left loopholes for the poachers to successfully get out of the rhino sanctuary and eventually out of the park."

11. The trial Magistrate suspected that there must have been collusion between the poachers and the officers working within the park to commit the offence successfully.

12. The Appellant was sentenced to serve 2 years' imprisonment and being aggrieved by the conviction and sentence he filed the appeal herein based on the following grounds:

    a. The learned Magistrate erred in law and in fact in holding that the prosecution had proved its case beyond reasonable doubt.

    b. The learned Magistrate erred in law and fact in blaming the Appellant in failing to prevent killing of the rhinos when he was not the overall in charge.

    c. The learned trial Magistrate erred in law and fact in finding the Appellant guilty when he had responded to the gunshots immediately he had been informed of them.

    d. The learned trial Magistrate erred in law and in fact in blaming the Appellant in killing of the rhino while he had deployed over 50 security officers who had been on duty and the machinery in the camp.

e. The learned trial Magistrate erred in law and fact in failing to appreciate that the Appellant had utilised all the resources at his disposal and even went a step further to request for support from other camps.

f. The learned trial Magistrate erred in law and in fact in disregarding the Appellant's evidence in his defence without any sound basis.

g. The learned trial Magistrate erred in law and in fact in failing to appropriately apply the provisions of Section 392 of the penal code.

h. The learned trial Magistrate erred in law and in fact in arriving at a decision wholly against the weight of the evidence before the court and the applicable law.

13. The Appellant proposed to seek from this court orders that the conviction and sentence of the Appellant in Maua CMC CR 946 of 2018 be set aside and replaced with an order acquitting the Appellant.

14. The appeal herein was canvassed by way of written submissions.

15. The Respondents in their submissions said that the Appellant having received information that gunshots had been reported inside the park became aware that there might be a person or people inside the park with ill intentions.As to whether the Appellant failed to use all reasonable means to prevent the completion of the felony the Respondents submitted that it was his duty to ensure he deployed all necessary efforts in his power to ensure that the felony was not fulfilled or completed and in the best case scenario have the perpetrators arrested. It was submitted that the actions taken by the Appellant were unsubstantial and did not come even close to either locating the killed animals or finding the poachers. It was submitted that the Appellant was a ranger and that whether it was dark and the grass was tall this was their daily work environment and he must have had protocol and skilled personnel to track poachers even at night.

16. The Respondents questioned why the Appellant stopped the search and preferred to rely on ambush. It was further submitted that the officers on duty was dismal and without any plan and it did not matter how many officers were deployed on duty on that particular date.

17. The Respondents prayed that the appeal be dismissed and the conviction and sentence be upheld.

18. The Appellant's counsel in his submissions said that none of the ingredients of the offence under Section 392 was proved by the Prosecution.

19. It was submitted that the Appellant could not be said to have known of the intention to commit a felony or that a felony was being committed and that when he learnt of the gunshots at the rhino sanctuary he immediately deployed rangers to the satisfaction of his superiors and that he employed reasonable measures in the circumstances. It was submitted that both PW7 and PW8 confirmed that the Appellant had worked at the Rhino Sanctuary for 5 years and that his work was exemplary.

20. It was also submitted that when gunshots were heard at the Rhino Sanctuary and reported to the Appellant he in turn informed Mr.Munene who had been left in charge by the 1st Accused and that Mr.Munene relayed the information to the 1st accused who was the overall in charge and that the 1st accused gave instructions on the measures to be taken and when he arrived at the park he confirmed that the deployment was proper.

21. The Appellant's Counsel submitted that there was no iota of evidence tendered to show that the Appellant was aware of the offence during its design or planning stage or when it was in progress. That

it was therefore unfair to convict an officer who knew nothing about the offence and who did all that was reasonably possible to contain the situation.

22. It was also submitted that the gunshots which were heard were the ones that killed the rhinos and that there was no felony to prevent and that the best the officers could have done was to arrest the offenders.

23. The Appellant relied on the case of *APC Rashid and Another v Republic* [2012]eKLR where the court held :

> " A construction of Section 392 of the Penal Code however shows that it is not sufficient for the prosecution to prove that ambit of felonious offences, occurred. The more important question is whether any of the two appellants knew that this felony was going to occur, hence at the design stage or witnessed it in progress. It is this limb of the offence which provides the mens rea even as the third limb failure to take reasonable measures to stop the commission of the felony provides the actus reus."

24. The case of *Joseph Muriithi Nyaga and 2 Others v Republic* [2013] was also relied upon where the court held as follows:

> " In order to sustain a conviction, the prosecution must prove "knowledge" of the design to commit or commission of the felony. Thus, the test is not akin to one in negligence cases; it is not enough to show that the accused, 'ought to have known'. But that the person actually knew of the design to commit a felony and failed to prevent it. The fact of knowledge is a question of fact."

25. As this is the Appellant's first appeal, the role of an appellate court of first instance is well settled. It was held in the case of *Okeno v. R* (1977) EALR 32 that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.

26. Having considered the evidence and submissions in the trial court as well as the judgement of the trial Magistrate and having considered the grounds of appeal and respective submissions for the Appellant and the Respondent I have come to the conclusion that the conviction of the Appellant is based on suspicion, presumptions and generalized possibilities. The ingredients of the offence Under Section 392 of the *Penal Code* were not satisfied by the Prosecution.

27. PW1 Warden Muraya Muriithi the Deputy Park Warden/Administration Officer confirmed with the Appellant that he was deploying rangers to the exit point and also narrowing down to the area gunshots had been heard to verify if there had been an incident.PW1 also started mobilizing ununiformed personnel to the park and reinforce the team that was responding to the gunshots.

28. PW1 also called the 1st accused who was the overall in charge of security and he confirmed he was away on official duties in Garbatulla but was on the way back to reinforce the team.When he called Mr.Munene who was holding brief for the 1st accused Mr.Munene informed him that he was deploying men outside the Rhino Sanctuary.

29. PW1 took position at one of the suspected exit points and confirmed with the Appellant and Mr.Munene that they had deployed rangers within the rhino sanctuary .That by night fall they had not established where the gunshots had been or any incident. That when the first accused arrived at 9.00 p.m. he briefed him on the measures that had been put in place and tasked him to go and confirm that the men deployed within the rhino sanctuary were in position.

30. That the 1st accused called and confirmed that they were in position and they maintained their positions until morning. It is in the morning that PW1 tasked accused 1 to get into their aircraft and patrol the rhino sanctuary and at 7.00 a.m. accused 1 called and informed them that from the air they had spotted two rhino carcasses and he gave them directions to where they were. The same information was shared with the Appellant.

31. From the evidence of PW1 who was more senior to the Appellant and from the evidence of the Appellant and raised company headquarters and requested for reinforcement and fact that there was an ambush laid the whole night is proof that the Appellant in consultation with senior officials at the national park, did all that was within their ability to respond to the gunshots that had been reported to them but their efforts were impeded by the night fall and the rains that made them get stuck in the mud during the operations.

32. There is no evidence to prove that the Appellant was supposed to take some action which he failed to take and which led to the poachers escaping after committing the felony. According to PW9 and PW10 who were at Block 10 they heard gunshot sounds towards the direction of Block 7 where PW3 and PW4 were guarding. If there was anyone to be charged with the offence that was preferred against the Appellant herein then PW3 and PW4 should have been the prime suspects as the trial Magistrate found out.

33. As it stands it is clear that the Appellant was on top of things and is the one who coordinated the laying of ambushes and deployment and cannot be said to have neglected his duties. The best witness who should have proved that the Appellant committed this offence was PW1 but they were together during the entire period of operations and even laid ambush throughout the night. The fact that it took aerial patrol to locate the exact site of the killing of the rhinos means that it required more than mere deployment of personnel and foot patrol in consideration of the expansive Rhino Sanctuary which PW1 said was 47 KM2.

34. I do find that his appeal has merit and the same is allowed. The conviction of the Appellant is quashed and the sentence set aside. The Appellant shall be set at liberty forthwith unless otherwise lawfully detained.

HON.ANNE ADWERA ONG'INJO

JUDGE

DATED AND DELIVERED AT MERU ON THIS 29TH DAY OF JULY 2020.

HON.ANNE ADWERA ONG'INJO

JUDGE