REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NUMBER 14 OF 2018

DANSON MAINA KIIRU.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal against the original conviction and sentence from Criminal Case Number 3445 of 2015

by the J. M. Omido (Principal Magistrate) at Nakuru Chief Magistrate's Court)

J U D G M E N T

1. **Danson Maina Kiiru** and **Lydia Muthoni Maina** were jointly charged with two(2) counts:-

i. Being in Possession of Wildlife Trophy Contrary to Section 95 of the Wildlife Conservation and Management Act 2013.

It was alleged that on 27th November, 2015 at Signature Restaurant, Nakuru town within Nakuru County they were jointly found in possession of wildlife trophy of endangered species namely 2 pieces of elephant tusks weighing 2 kg valued at Kshs.0.5 million without a permit.

ii. Dealing in Wildlife Trophy Contrary to Section 84 (1) as read with Section 92 of the Wildlife Conservation and Management Act, 2013.

Particulars were the same save that it was alleged they were found dealing in the said trophy without a permit.

2. The prosecution called four witnesses. The case for the prosecution was that on 27th November, 2016 PW1 No.7546 Cpl. Cyprian Kangeri and his colleague Pessy Amoth both of Kenya Wildlife Services (KWS) received a tip off from a member of the public that two (2) persons; male and female had boarded a Mololine Matatu and were headed to Nakuru with elephant tusks for sale. The informer described the bag in which the consignment was carried, black bag with green patches. They were told that the two had boarded a matatu at 12.30p.m at Nairobi.

3. The two officers went to wait at Mololine offices and at 3.30 p.m. a Mololine Matatu arrived. A lady and a man alighted. He was carrying the bag with the said description. The two walked together chatting. The two KWS officers followed them. The two entered Signature Restaurant and sat. The two officers joined them. Since they were in civilian, they showed them identity cards and asked them what was in the bag. The man said it was his luggage. When he opened it, they were clothes and two tusks. The KWS officers arrested them and took them to their office, where the tusks were weighed in the presence of the two and a weighing certificate made. Both refused to sign the inventory. Both were escorted to the police station for further processing including the escorting of the exhibit to government expert for analysis.

4. PW2 Ogeto Mwebi was the expert with a PhD in animal remains modification processes. He received the two tusks from PC Kennedy Otieno who was the investigating officer at the material time. He examined the pieces and formed the opinion that they were elephant tusks. He did a report which he produced.

5. By the time of hearing P.C. Otieno had been transferred and the case taken over by No.91473 P.C. Juma Mwanjama. He re interviewed Corporal Cyprian and Pessy and visited the scene of arrest. He took over the exhibits; green bag with patches, two Mololine Matatu tickets, assorted clothes, the inventory, the weighing certificate. He produced them as exhibits.

6. In his defence, the 1st accused made unsworn statement of defence. He said he was travelling to Ndundori from Nairobi, where he was to lease land. When he alighted at Nakuru, he went to have tea at Signature Restaurant. As he was taking tea, three men came to his table, and there were two other men there, including the 2nd accused and another man. The three men who came in had a black bag with green patches. They arrested him together with the other occupant of the table and took them to a place where there were skulls, bones and skeletons of animals. He said the other man was released on giving the arresting officers 4,000/=.

7. On 30th November 2015 he was brought to court and charged. He denied the charges. He said he had travelled in 2NK and not Mololine and the ticket was not his.

8. DW2 said she was a bar lady in Nairobi and had travelled to Nakuru. When she alighted she went to the restaurant to have a meal. A man came and asked where the washrooms were, three men came and stood next to her table and asked her to stand; one took her hand and told her to follow him.

9. Outside the hotel she was ordered to get into a motor vehicle and taken to a place where there were wild animals. She was told she had tusks which she denied.

10. In his judgment delivered on 17th January, 2018, the trial court found the 1st accused person guilty as charged and convicted him accordingly.

11. For the 2nd accused the trial court found that she was not in possession of the tusks, and was not aware of their existence. The 2nd accused was given the benefit of doubt and acquitted under **section 215 of the Criminal Procedure Code.**

12.The 1st accused was sentenced on 18th January, 2018; on 1st count to fine of Kshs.1 million in default 5 years imprisonment. The 2nd count to a fine of Kshs.20 million in default 20 years imprisonment. Sentences to run consecutively.

13. Aggrieved by the conviction and sentence the 1st accused filed this appeal and argued it on the amended grounds of appeal filed on 2nd October, 2019. He faulted the trial court for error in fact and law:

> *1) For convicting him yet the plea recorded was equivocal in that the court failed to comply with Section 207 of the Criminal Procedure Code and Article 50 (2) of the Constitution.*
>
> *2) By ordering that sentence run consecutively failing to comply with Section 38 of the Criminal Procedure Code.*
>
> *3) In convicting him on the unsubstantiated unproved claims of the prosecution.*
>
> *4) By failing to comply with Section 211 of the Criminal Procedure Code.*

14. In arguing the 1st ground the appellant referred the court to the 1st page of the proceedings where the language of interpretation is shown as Chinese:-

> *"The substance of the amended charge and every element thereof has been stated by the court to the accused person in the language he understands (Chinese), who being asked whether he admits or denies the truth of the charge (s):"*

15. Ms. Chelang'at for the state on opposing the appeal did not address this ground. However a perusal of the record shows that on 14th February, 2017 the charges were amended and plea taken afresh: -

> *"Accused both present*
>
> *Ms. Kosgei – I seek to have the charges amended under Section 214 of Criminal Procedure Code.*
>
> *Accused 1 – No objection. I understand Swahili*
>
> *Accused 2 – No objection. I understand Swahili*
>
> *COURT – amended charge read out and explained to accused in Kiswahili who responds in Swahili:-*
>
> *Count 1 - Accused 1 - not true*
>
> *Accused 2 – not true*
>
> *Count II - Accused 1 – not true*
>
> *Accused 2 – not true*

COURT – Plea of not guilty entered on both counts in respect of both accused persons. The earlier bond terms to substitute."

16. Clearly therefore, the amended charge was properly read and explained to the appellant in the language he understood as he clearly told the court he understood Kiswahili.

17. I have no idea why the learned magistrate who took the plea on 30th November, 2015 thought the appellant understood Chinese.

18. The appellant also argued that the prosecution failed to call the informant and hence the charges were unsubstantiated, neither did P.C. Otieno; and that the testimony of PW1 and PW4 were inconsistent.

19. I have looked at the record. While it is true that P.C. Otieno did not testify, his role was minimal and was very well represented by P.C. Wanjama. The PW1 and PW4 testimony corroborated each other and the failure of the informer to testify did not prejudice the appellant, why? Because as per the case for the prosecution he was found red handed in possession of the tusks, the testimony of the informer as a whistle blower was not necessary to prove the case of possession beyond a reasonable doubt. PW1 and PW4 told the Court how they followed the appellant and his co-accused to the restaurant and the table where they sat and how the appellant said the bag was his, only for the tusks to be found in it.

20. There is nothing in his defence that the PW1 and PW4 knew him before and had a reason to plant the bag on him. If as he says there were other people in that hotel, why chose him specifically? It can only be that the PW1 and PW4 followed their tip off to the tee and found him with the trophy.

21. In **Joseph Otieno Juma v Republic [2011] eKLR** the Court of Appeal had this to say about informers:-

> ***"…However we think that of the evidence of the informers was necessary to prove the guilt of the appellant it would have been necessary for them to have testified perhaps outside the glare of the public."***

22. The Court of Appeal cited the words of **Sir John Ainley J and Madan J, Kigecha Njuga v Republic 1965 E.A.773:-**

> ***"Informers play a useful part no doubt in the detection and prevention of crime, and if they become known as informers to that class of society among which they work, their usefulness will diminish and their very lives may be in danger. But if the prosecution desire the courts to hear the details of the information an informer has given to the police then informer must be called as a witness."***

23. The Court cited with approval the case of **Republic v Garofoli [1990] 2 SCR 1421:-**

> ***"Hearsay statements of an informer can provide reasonable and probable grounds to justify a search, but evidence of an informer's tip, by itself is insufficient to establish reasonable and probable grounds. The reliability of a tip is to be assessed by having regard to the totality of the circumstances. The results of the search cannot, et post facto, provide evidence of reliability of the information.***

24. The appellant relied on **Gicheha v Republic [1963] EACA** and quoted:-

> ***"The police informer who led the police to arrest the accused is not called to testify, his evidence should be treated as hearsay evidence and should be disregarded."***

25. From the foregoing authorities it is evident that the informer's testimony will only be required in certain circumstances and the testimony could be taken in camera if necessary. In this case the evidence of the informer was not necessary to establish the guilt or innocence of the appellant.

26. It was the appellant's position that the same evidence that was used to acquit the 2nd accused is the same that was used to convict him and he ought to have been acquitted. However, the record shows that the trial magistrate formed the view that the accused 2 was not aware of the tusks and was not in possession of the same. He was of the view that the prosecution did not prove the charges against her beyond reasonable doubt hence the acquittal .

27. Regarding the appellant's defence the record shows that the trial Court considered the appellant's unsworn statement of defence and rejected it on the same basis that I do, that there was no apparent reason why two strangers KWS officials would plot to fix him.

28. On the sentence the appellant submitted that the trial Court was wrong in making sentences consecutive. He argued that the provisions of **Section 28 (1) (c) (1)** as read with **Section 37** of the **Penal Code** did not allow that. His argument was that the offence was committed in the same transaction and the sentence ought to have been concurrent. The position is clear that default sentences to sentence of fine run consecutively.

29. In this case however the crucial question here is whether, on the evidence before the trial court the appellant was found dealing in trophy.

30. It is important to point out here that between the date the appellant was tried, convicted and sentenced, the **Wildlife Conservation and Management Act** went through some crucial amendments vide the **Statute Law (Miscellaneous Amendments), Act 2018** of 4th January 2019 affecting the provisions under which he was charged. The risk is that using the amended law is that the charge sheet as drawn then

would be rendered defective.

31. **Section 84 (1)** of the **Wildlife Conservation and Management Act** (as at January 2018) simply states**: -**

> ***"No person shall operate as a trophy dealer without a licence issued by the service."***

32. **Section 92** states:-

> ***Any person who commits an offence in respect of an endangered/threatened species or in respect of any trophy of that endangered/threatened species shall be liable upon conviction to a fine not less than 20 million Shillings/imprisonment of life or to both such fine and imprisonment."***

33. **Section 95** provides**: -**

> ***For offence related to trophies or trophy dealing, 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…. Commits an offence and upon conviction, liable to a fine of not less than 1 million or imprisonment for a term of not less than 5 years or to both such fine and imprisonment".***

34. It is noteworthy that **Section 92** does not define the offence that an accused person may commit against an endangered species and that was only corrected by the amendment to the law under **Statute Law (Miscellaneous Amendments) Act No.18 of 2018** which came into force on 18th January, 2019.

35. The new section clearly defines the offence under **Section 92**. The Section as set out as at January, 2018 was only certain as to the penalty, but provided no definition of any offence, how then would an accused person have been able to differentiate the charge under **Section 95**, and that under **Section 92**. **Section 92** as drafted, was opaque, and clearly created only to impose a heavy fine or imprisonment while highly prejudicial to the accused person for not having the same certainty as to the offence that was being punished.

36. When you read the charge sheet and make reference to the provisions of the Act you note that the alleged dealing charge brought *under **Section 84 (1)** as read with **Section 92*** was not provided for under that section either, but clearly set down as one of the offences under **Section 95.** The prosecution in an ingenious way to catch the appellant on two counts split up the offences set out under **Section 95** into two; for one under **Section 92** and the other **Section 95.**

37. **Section 95** provided for several offences, ***keeping, or possessing or dealing or manufacturing***. If the prosecution wanted to charge the appellant with an offence related to endangered wildlife, then charge would have been **Section 92** but if it was just possession or dealing with a trophy, then they had **Section 95,** no way they would deal with both; they would have chosen to define the offence as possession or dealing, but not to bring both charges. By doing so, they violated the appellant's right to a fair trial.

38. The only charge that the prosecution was able to prove was possession of trophy. According to PW1 and PW4, they caught the appellant seated in a restaurant with his luggage. He had travelled from Nairobi with the trophy, the prosecution were expected to make a choice under **Section 95** on what to charge him with.

39. Appellant's argument regarding the charges has merit. Considering the facts as set out one, the prosecution had a choice as to the charge to bring but split the same into two substantive charges. The 'or' could have provided them with an alternative charge.

40. It is my considered view that the appeal succeeds in part.

41. What orders to make?

42. The appellant is entitled to the least punitive of the sentences meted and the very clear offence is that of possession.

43. The conviction and sentence on the **second count** cannot stand. The same is quashed and the sentence set aside.

44. The **conviction and sentence on the first count was merited**. The conviction and sentences are **sustained**.

45. Orders accordingly.

Dated and Signed and Delivered at Nakuru this 3rd day of August, 2020.

Mumbua T. Matheka,

Judge

In the presence of: VIA ZOOM

Martin Court Assistant

For state: Ms Wambui

Appellant: present

Mumbua T. Matheka,

Judge.