



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

CRIMINAL APPEAL NO. 45 OF 2015

SAMWEL MLANDI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

Coram: Hon. Justice R. Nyakundi

Appellant in person

Mr. Alenga for the state

JUDGMENT

The appellant was initially charged with the offence of being in possession of wildlife trophy contrary to section 95 of the Wildlife Conservation and Management, 2013. The particulars of the offence were that the appellant was found in possession of wildlife trophy namely 66 lion claws, 7 lion teeth canine and poisonous substance 1kg with a street value of Kshs.500, 000/= without permit.

In Count II, the appellant was charged with the offence of dealing with wildlife trophy contrary to section 84 as read with section 92 of the Wildlife Conservation and Management, 2013. In the particulars of the offence, the prosecution alleged that the Appellant the appellant was found dealing in wildlife trophy namely 66 lion claws, 7 lion teeth canine and poisonous substance 1kg with a street value of Kshs.500,000/= without permit.

The appellant was convicted and sentenced to 10 years imprisonment or in the alternative, a fine of 5, 000, 000/= (five million Shillings) in default. The appellant was dissatisfied by the Learned Magistrate's Judgment and lodged the instant appeal on the 15th of October 2015. The grounds of appeal as encapsulated in the petition of appeal are as follows:

- 1. That the Learned trial Magistrate misdirected himself by admitting the charge of being in possession of the wildlife trophy without considering that the same was not proved.***
- 2. That the Learned trial Magistrate did not see that the matter in question was just a made-up case thus the sentence of 10 years was not within the confines of the law.***
- 3. That the Learned trial Magistrate failed to consider glaring contradictions in the prosecution case contrary to 163(1) of the evidence act.***
- 4. That the Learned trial Magistrate failed to consider that the prosecution did not meet the requirements of section 109 of the evidence Act.***
- 5. That the Learned Magistrate failed to consider his defence.***

The prosecution called a total of three witnesses in support of its case. The matter was prosecution by **S. Kasyoka** and the accused called no witnesses. He was also not represented by any legal counsel. PW1, is a KWS Officer attached at **Minjila**. He testified that on the material day, he received intelligence report concerning a vehicle carrying wildlife trophies. PW1 and his colleagues proceeded to lay an ambush, flagged down the said vehicle which was ferrying cattle and passengers. Upon searching the accused and his bag, they recovered 66 claws of lion, 7 teeth and some poisonous substance believed to have been used to kill the lion. The prosecution produced the said items as evidence in support of its case marked as **MF1- MFI- IV**. They arrested him and later charged him with the instant charges.

The evidence of PW2, another KWS Officer basically corroborated the evidence of PW1. PW3 testified that he was handed over the case for further investigations on the 25th of December 2014. He asserted that the accused had been admitted with 7 lion teeth, 66 claws of lion, lion

skin and some poison used to kill the lion. He prepared an exhibit memo and forwarded it to the Government Chemist. A report marked as **MFI-6** was received by PW3 confirming that the substance that was received from the accused was aquatint, which is poison used in arrows and it is capable of causing cardiac arrest.

The appellant in his defence denied having committed the alleged offence. He stated that he was on his way to Garsen when he boarded a probox car which had 3 occupants. Upon reaching a place called **Assa**, the car was stopped by some **Ormas** and he saw certain KWS Officers interacting with the **Ormans**. He asserted that he was told to alight and the car was left to go. The officers asked him if he was the person dealing with wildlife trophies while beating him. He alleged that the officers took money from him to the tune of Kshs.17,000/=. He pressured to mention the names of the people that trade in wildlife trophies. He was subsequently taken to the KWS Officers. He also alleged that the officers planted the claws and the teeth on him. He was then charged with the instant offence.

The jurisdiction of this court in an appeal such as this was well stated in the often-cited case of **Okeno versus Republic [1972] EA.32**; where the predecessor of this Court, pronounced itself as follows: -

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya versus Republic [1957] EA36) and to the appellate Court’s own decision on the evidence (Shantilal M. Ruwala versus Republic [1957] EA 570). It is not the function of a 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 finding and draw its own conclusions. Only then can it decide whether the Magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial Court had the advantage of hearing and seeing the witnesses.”

With the foregoing parameters in mind, I have identified the issues that fall for my determination in this appeal. One is as regards whether the prosecution proved its case beyond reasonable doubt. The appellant was charged with the offence of being in possession of wildlife trophy contrary to Section 95 of the Wildlife Conservation and Management Act 2013 provides:

“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.”

The following three elements must be proved for a case of this nature to suffice: -

- 1. Proof that the accused was in possession of a trophy;**
- 2. Proof that the items in question are game trophies; and**
- 3. Proof that the accused lacked a certificate of ownership.**

The foregoing section of the law provides for the sentence or a fine of not less than one million shillings or imprisonment for a term of not less than five years or both. On the question of possession, PW1 and PW2 in their respective testimonies averred that they acted on a tip off from an informer, flagged down the vehicle that was ferrying him which was also carrying cattle and other passengers. They identified the accused as per the descriptions they had been given by the informer and took him out of the vehicle and searched him. They recovered a bag from the appellant which contained 7 lion teeth, 66 claws of lion, lion skin and some poison used to kill the lion. I place reliance on the case of **Jean Wanjala Songoi and Patrick Manyola Versus Republic Criminal Appeal No. 100 of 2014** where the judge stated as follows:

“.....possession would involve an element of control of the thing a person is said to have. It is in effect the act of having and controlling property. The right under which a person can exercise control over something to the exclusion of all others. In this case, that aspect of the offences was not established beyond reasonable doubt against the appellant.”

From the evidence I have laid above, PW1 and PW2 claims that they extracted the appellant from the car he was travelling in and proceeded to search him. PW1 and PW2 told the trial court that they extracted him from the car in which he was not the only passenger but did not mention if he alighted with his personal properties. The prosecution witnesses were not put to task to explain how they managed to identify which bags which belonged to the appellant and not to other passengers. There element of constructive possession is also neither here nor there because the circumstances under which the trophies were found and recovered was ambiguous and there is nothing before me capable to credibly ascertain that the same was either in actual or constructive possession of the said trophies. In that regard I find useful guidance in the case of **Obeng Comfort v Public Prosecutor (2017) 1 SLR 1 633**, where **Menon, CJ** held that in order to prove the fact of possession, the prosecution has to prove beyond reasonable doubt, that the accused person did not only have physical control over the item, but the accused person also knew or aware that the was a controlled wildlife trophy. The prosecution evidence ought to have shown that the appellant was allowed to pick his luggage, search it and arrest him thereafter. In that regard, I find that the prosecution failed to prove the element of possession to the required threshold of proof beyond reasonable doubt.

The next issue as to whether the items in question were wildlife trophy. Section 2 of the Act defines a “trophy” as follows:

“means any wild species alive or dead and any bone, claw, egg, feather, hair, hoof, skin, tooth, tusk or other durable portion whatsoever of that animal whether processed, added to or changed by the work of man or not, which is recognizable as such.”

The evidence of the investigating officer suggest that the exhibits were handed over to the Government Chemist to find out that the items allegedly found with the appellant were wildlife trophy. From the evidence available on record, it seems that the Government only examined

and confirmed the substance they received to aquatint, which is poison used in arrows and that it can cause cardio arrest. There is no report from the Government Chemist which shows that the other items were confirmed to be wildlife trophy. There is no evidence placed before me, whether direct or circumstantial which seeks to show that the said substance was used to kill a lion. This, to my mind, left a lot to be desired from the prosecution. I am therefore convinced that the prosecution proved its case beyond reasonable doubt.

I therefore associate myself with the Court of Appeal guidance in the case of **Pius Arap Maina v Republic (2013) eKLR;**

“the prosecution must prove a criminal charge beyond reasonable doubt and, as a corollary, any evidential gaps in the prosecution’s case raising material doubts must be in favour of the accused.”

In the same spirit, and for the reasons aforementioned, it is my considered view that the prosecution failed to prove its case beyond reasonable doubt. The essential elements of an offence of this nature, to wit, possession and proof that the items were indeed wildlife trophy, and that he knew that the luggage contained the prohibited items have not been proved. Any reasonable doubt gives the appellant a benefit of doubt.

In the upshot, the appeal is hereby allowed, conviction quashed and the sentence set aside. The appellant is hereby set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 23RD DAY OF OCTOBER, 2020.

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R. NYAKUNDI

JUDGE

In the presence of:

1. Mr. Alenga for the state
2. The appellant