



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA. NO. 42 OF 2018

SAMMY KOLO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

INTRODUCTION

1. The Appellant was charged with being in possession of wildlife trophy contrary to Section 95 as read with Section 92 of the Wildlife Conservation and Management Act, 2013.
2. Particulars being that on the 11th November, 2015 at Kibwezi Township within Makueni County, SAMMY KOLO was found in possession of a wildlife trophy namely two pieces of ivory weighing approximately 2.4 kilograms.
3. The Appellant pleaded not guilty and matter went into trial. The Appellant was found guilty, convicted and sentenced to pay a fine of Kshs.1 Million or serve 6 years imprisonment.
4. Being aggrieved by the above decision, the Appellant lodged the appeal and set out 4 grounds namely:-

1) **THAT** the trial court arrest in the law by failing to give any defense adequate consideration.

2) **THAT** the trial court arrest in law and fact by failing to observe that my mode of arrest pointed out that there was a grudge between me and the arresting officers therefore the charges were based on bad faith.

3) **THAT** the trial court arrest in law and the fact by failing to observe, analyze and re-evaluate the entire evidence and find that there was no evidence to convict me.

4) **THAT** the prosecution case was riddled with lote and malaise, contradictions and inconsistency which could have been looked upon before arising the decision to convict me.

5. The parties agreed to canvass appeal by way of written submissions. The Appellant filed submissions and the prosecution submitted briefly orally.

APPELLANT SUBMISSIONS

6. The appellant submits that, the charge as drawn is ambiguous as it is not clear which punishment to apply between section 92 and 95.
7. The prosecution witnesses were at variance from one another on the issue on how the recovery was made. The subject here of the case was the recovery of the tusks.
8. PW1 alleged in his testimony in cross examination in lines 3-4 page 4 that the Appellant came carrying the elephant tusks hence he did not clarify properly how Appellant had carried the tusks. He claims the sack that had the tusks was yellow in colour "exhibits" MF 1-2, while PW2 two contradicted this evidence by saying that he could not remember colour of the sack.
9. It is contended that, there was no inventory prepared and put across as evidence to prove to the court that the items were recovered from

the accused of which he had signed and countersigned by the officers as is stipulated by the rule of law.

10. Another point to be scrutinized by the court is that of purported ivory tusks that were produced before the court as exhibits.

11. They were never examined or rather tested to confirm whether they were counterfeit or genuine, it is therefore accused contention that the exhibits MFI 1-2 would have been taken to the National museum of Kenya for the same to verified and confirmed by government experts and report of the experts be compiled and be presented before the court for production as exhibits so as to confirm if the same were genuine.

12. Appellant submits that the evidence upon which his conviction was based wasn't credible.

13. Appellant invite this Honorable Court to re-analyze and re-evaluate the entire trial record and find that the trial amount to nullity as the investigation and shoddy investigation which didn't warrant conviction.

RESPONDENT SUBMISSIONS

14. The prosecution submitted that, there was prove of the case beyond reasonable doubt. Appellant was caught red handed by 2 eye witnesses who were KWS officers. Possession was proved beyond reasonable doubt.

15. The defense never shook the evidence of prosecution. Defense was mere denial in defense. Appellant said there was grudge as he was an informer meaning he was framed up.

16. During cross examination, issue of informer was never raised. It is an afterthought. The Appellant never in cross examination raised the issue of informer thus it is a completely different defense.

17. The allegations that, officers wanted to get his girlfriend was never raised in defense cross-examination. As to section charged, the Appellant complains that Section 95 and 92 WCMA were set in charge as provisions under which he was charged. The fine was lower in section 95, a lesser sentence than one of 92 thus no prejudice but to his advantage.

ISSUES

18. After going through the evidence on record and the parties submissions, I find the issues were:-

a) Whether the case was proved beyond reasonable doubt to warrant convictions?

b) Was defense considered by the trial court?

ANALYSIS AND DETERMINATION

19. The core issue is; was the accused found in possession of a wildlife trophy? PW1 and PW2 struck the trial court as candid and truthful witness. They corroborated one another almost word for word on what transpired. They were informed that somebody was in possession of ivory tusks. They posed as buyers and parked their car with civilian number plated at the field in Kibwezi.

20. They thereafter lured the accused into the car. The accused's intention was to sell the elephant tusks. The accused in his unsworn statement has said that the tusks were not examined by the National Museums of Kenya and therefore there was no proof that they are elephant tusks.

21. The trial court saw the tusks which were produced in court as exhibit, looked as elephant tusks removed from a juvenile elephant. The trial court held that they were elephant tusks.

22. The rest of the accused's unsworn defense is that the Kenya Wildlife Service personnel had a grudge against him after he stopped giving them intelligence information on poachers. That defense cannot be believed because it was not tested on cross examination.

23. The trial court found and held that from the evidence, the prosecution had proved beyond reasonable doubt that the accused had in his possession two elephant tusks which the Appellant intended to sell to PW1 and PW2.

24. On prove whether exhibits, pw2 stated that he knew they were genuine as he had worked at national park for 2years and he knew them as they are unique. The court observes that, appellant never raised issue in the cross-examination nor sought examination of the same exhibits by the experts.

25. In any event he is the one proved to have been in possession of the same and was selling them as elephant tusks.

26. The appellant also complained of the user of sections 95 and 92 of the WCMA in charge sheet. The appellant was not prejudiced by the same as he was awarded the lesser sentence provided for in s 95 rather than higher one in s 92 of the same act.

27. In sum the court finds no merit in the appeal and makes the following orders;

The appeal is dismissed, the conviction affirmed and sentence confirmed.

SIGNED, DATED AND DELIVERED THIS 30TH DAY OF JANUARAY, 2019 IN OPEN COURT.

.....

HON. C. KARIUKI

JUDGE