REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

CRIMINAL APPEAL NO. 6 OF 2018

MATUKU KILONZO NZOKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence of Hon. A. Ndungu (SRM) in Makindu

Principal Magistrate's Court Criminal Case No. 1043 of 2015 delivered on 8th March, 2018)

JUDGMENT

1. **Matuku Kilonzo Nzoka** the Appellant was charged and convicted of the following offences: -

Count I: Being in possession of wildlife trophy contrary to Section 95 of Wildlife Conservation and Management Act, 2013. **The particulars** were that the Appellant on the 9th day of July 2013, at Kayasani area of Makueni county was found in possession of wildlife trophy namely four (4) pieces of elephant tusks weighing sixteen (16) kilos with a street value of one million shillings (1,000,000) without a permit.

Count II: Dealing in wildlife trophy contrary to Section 95 of the Wildlife Conservation and Management Act, 2013. **The particulars** were that on the 9th day of July 2015 at Kayasani area within Makueni county was found dealing in a wildlife trophy namely four (4) pieces of elephant tusks weighing sixteen (16) kilos without a permit.

2. Upon conviction, the Appellant was fined Kshs.1,000,000/= in default, five (5) years imprisonment on each count.

3. He was aggrieved by the judgment and filed this appeal raising the following grounds:

> **i. That,** the learned Magistrate A. Ndung'u erred in law and in fact when he failed to consider the Appellant's mitigation that he is disabled and had pleaded for leniency thereby convicting him to five years' imprisonment without an option of fine.
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> **ii. That,** the learned Magistrate erred in law and in fact for failing to consider the Appellant's evidence that he was not in possession of the wildlife trophy as alleged by the prosecution witness.
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> **iii. That,** the learned Magistrate erred in law by convicting the Appellant without considering that the prosecution did not have exhibits right from the beginning of the case. The case could not proceed for lack of exhibit which was brought before the court during the tenth (10) hearing.

4. The prosecution presented three (3) witnesses. **Pw1 No. 8847 CPL Kiplagat Talam** works at Tsavo West National Park as an investigator. Together with two other officers **Gabriel Makala** and **Timothy Kipruto** they received information of a person in Kisayani area who had elephant tusks and was looking for a buyer. This was on 9th July, 2015 12:30 am. They organized themselves at 1:00 am and went to the place. With the person's permission they searched his two bedroomed house and found four pieces of elephant tusks, with a weighing machine in a sack. They took possession of them and arrested the person who is the Appellant. They took him and the recovered items to Mtito Andei police station where he was booked in the cells.

5. He identified the four pieces of elephant tusks (EXB1a – d), plus a blunder (EXB2) which was used to tie them. He also identified the sack (EXB3) in which the tusks had been placed. He said an exhibit memo was prepared (EXB4) for purposes of taking the tusks to the national museum of Kenya for examination. A report confirming the said tusks to be elephant tusks was forwarded to them (EXB5). When

he testified the allegedly recovered weighing machine was not in court, and so he did not therefore identify them.

6. **Pw2 Ongeto Mwebi** is a senior research scientist at the national museums of Kenya. He produced the report by his colleague **Esther Nguta** who had been requested to identify the animal the four pieces of tusks belonged to. The said Esther Nguta found the tusks to belong to an elephant. Pw2 produced the report as (EXB6) since the Appellant had no objection to its production.

7. **Pw3 No. 38221 PC Edward Mariga** received the Appellant at Mtito Andei police station on 9th July 2015 from Pw1 and another. They also brought two elephant tusks cut into four pieces, plus a weighing scale. The report was that the Appellant was involved in selling elephant tusks. He received exhibits and had the tusk specimens sent for examination through an exhibit memo (EXB4). He produced the tusks, blunder and sack as EXB 1a – d, 2 and 3 respectively. He also produced a weighing machine (EXB6) which he was told was being used by the Appellant to weigh the elephant tusks.

8. In his defence which was unsworn, the Appellant denied the charges. He stated that on 7th July, 2015 7:00 pm two people came to his home wanting to know how he had built his home and he told them. He refused to move aside as demanded by them and that's when they handcuffed him. They retrieved a torch, mobile phone and identity card from his pockets and asked him to accompany them. He was taken away in their vehicle upto Komkoyo KWS offices. He was detained until the next day when he was taken to Mtito Andei police station and ordered to alight with elephant tusks he knew nothing about.

9. He was received by the OCS who was given the tusks and some documents. He was arraigned in court the next day having been charged with the two counts. He stated that Pw1 did not have anything in writing when he recovered the tusks.

10. **Dw2 Mbula Mutuko** is the Appellant's wife. She testified of being in the kitchen on 8th July, 2015 when she heard the Appellant speaking to some people. She followed them and found two people talking to him. When they left with him, she screamed and people responded. She denied the Appellant having had any elephant tusks. She did not hear the conversation the Appellant had with the two men.

11. When the appeal came for hearing the Appellant relied on his grounds of appeal and the written submissions. He faults Pw1 and his colleagues for not calling the area chief to inform him about his arrest. He said the reason for their refusal was that they had not found him with any elephant tusks. He also faults the prosecution for failing to call two crucial witnesses namely Rangers Gabriel Mukala and Timothy Kipruto. He submits that there were no elephant tusks in the first place, and hence the delay in hearing the case. The Appellant submits that his submission on disability was never considered by the learned trial Magistrate.

12. Mrs. Owenga for the Respondent opposed the appeal on conviction. She asked the court to exercise discretion as far as the sentence is concerned. It is her view that the fine was excessive.

13. This is a first appeal and this court has a duty to reconsider and re-evaluate the evidence and arrive at its own conclusion. See **Okeno – vs- R (1972) E.A 32.** In **Kiilu and Anor –vs- R (2005) IKLR 174** where the Court of Appeal stated thus: -

> ***(1) An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the Appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.***
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> ***(2) 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 findings 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 has had the advantage of hearing and seeing the witnesses.***

14. The same was reiterated in the case of **David Njuguna Wairimu –vs- R (2010) eKLR** where the Court of Appeal stated:

> ***"The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."***

15. Upon a careful reconsideration and evaluation of the evidence on record, the grounds of appeal, the submissions by both parties and the law, I find the following to be the issues falling for determination:

> **(i) Whether the prosecution's failure to call the two Rangers Gabriel Mukala and Timothy Kipruto was fatal to its case.**
>
> **(ii) Whether in the final analysis the prosecution proved the case against the Appellant on both counts.**
>
> **(iii) Whether the sentence was harsh and excessive.**

Issue (i) Whether the prosecution's failure to call the two Rangers Gabriel Mukala and Timothy Kipruto was fatal to its case.

16. In regard to the choice of witnesses, the Court of Appeal in the case of **Sahali Omar –vs- R (2017) eKLR** stated thus:

Section 143 of the Evidence Act provides that: -

> **"No particular number of witnesses shall in the absence of any provision of law to the contrary be required for the proof of the fact. The principle used to determine the consequences of failure to call witnesses was succinctly stated in Bukenya & Others –vs- Uganda (1972) E.A 549; where the court held that: -**
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> "**(i)** ***The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.***
>
> ***(ii) That the court has the right and duty to call witnesses whose evidence appears essential to the just decision of the case.***
>
> ***(iii) Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."***

17. The prosecution reserves the right to decide which witness to call. Should it fail to call witnesses otherwise crucial to the case, then the court has the mandate to summon those witnesses. But should the said witnesses fail to testify and the hitherto adduced evidence turns out to be insufficient, only then shall the court draw an adverse inference against the prosecution. This is because the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt. **See Keter vs- R (2007) I E.A 135.**

18. The charges against the Appellant relate to possession of and dealing with wildlife trophy namely four (4) pieces of elephant tusks. The national museum of Kenya only received specimens from Pw3 which they acted on in carrying out the identification. Their evidence and report was given by Pw2. Pw3 only received the Appellant and EXB 1a – d, 2,3 and 6 from Pw1 and others. How the Appellant was arrested and the exhibits recovered was only within the knowledge of Pw1 and the other KWS Rangers.

19. Pw1 testified that the information they received was that there was a person in Kasayani who was in possession of elephant tusks and he was looking for a buyer for the said tusks. They left for the assignment slightly after 1:00 am of 9th July, 2015. He further stated that on arrival they knocked the door and the Appellant opened without any resistance. They introduced themselves and requested to search his house and he allowed them. With the kind of information they allegedly had, one would have expected them to pose as buyers of the commodity, but they did not do that.

20. Upon search EXB1a – d were recovered in a sack (EXB3) while tied up with a blunder EXB2. This is evidence that was heavily contested by the Appellant and his wife Dw2. In cross examination, of Pw1, the Appellant asked him if there was a torch in his house. The answer was in the negative. The question that begs for an answer is what the officers used to carry out their search. It was well past 1:00 am when they arrived at the Appellant's house. How were they able to search the house in the dark? Pw1 does not mention anything about any form of light.

21. Pw3 testified that he was told by Pw1 and the others that the weighing machine was being used by the Appellant to weigh the elephant tusks. It is a fact that Pw3 was not at the scene where the weighing machine was allegedly recovered. The said machine was not identified by Pw1 as it was not in court when he testified. Pw3 could not therefore purport to identify and produce the weighing machine when those who recovered it did not identify it.

22. Had the other two Rangers testified they may have filled the gaping holes in the evidence of Pw1. The recovery of the elephant tusks was a serious assignment which was not to be taken lightly. One can't claim to go knocking at another's door past 1:00 am and the door is just opened mechanically like that. Secondly, the search could not have been carried out in the dark as it purports to appear. There is no reason given for the prosecution's failure to call one or both of the Rangers who were with Pw1 on the night of the alleged search and recovery.

23. I find that the evidence of Pw1 in the face of the evidence by the Appellant and Dw2 was not sufficient to prove the possession and dealing. The dealing was pegged on the weighing machine (EXB6) which was never identified. The court should have called both or one of the two other Rangers as their evidence was key.

Issue (ii) Whether in the final analysis the prosecution proved the case against the Appellant on both counts.

24. After weighing the evidence on record, I find a short fall in the prosecution evidence of Pw1 in as far as possession of and dealing with the elephant tusks was concerned. Pw1 and his colleagues knew exactly what they were looking for. They had all the tools and the information, Pw1 being a police investigator. He just did not co-ordinate the Rangers well to make the assignment a success.

25. Besides what I have pointed out, there was no inventory of the recoveries prepared for the Appellant's signature even if he could have failed to sign. In as much as Pw2 proved that the tusks were elephant ones, there was the need to sufficiently establish how the recovery was done inorder to prove that indeed the Appellant was the one in possession of the said elephant tusks.

26. What is on record amounts to Pw1's word against that of the Appellant. Every criminal case must be proved beyond reasonable doubt and nothing less. The present case falls short of that requirement on both counts.

27. Having come to the above conclusion, on issue no. **(ii),** I find no need to discuss the issue of sentence which was in any event the mandatory minimum sentence. **The upshot is that the appeal has merit and is allowed. The conviction in both counts is quashed and the sentence imposed on each count is set aside.**

Orders accordingly.

Delivered, signed & dated this 24th day of October 2019, in open court at Makueni.

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H. I. Ong'udi

Judge