REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL APPEAL NO. 8A AND 8B OF 2018

JULIUS KITUBER SOPIA.....1ST APPELLANT

NDAARE OLE KOSHAL.....2ND APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(*Being an appeal from the original* Judgement*, conviction and sentence of Hon. Juma dated 23rd January 2018 in the Chief Magistrate's Court at Narok in Criminal Case No. 35 of 2015, Republic v Ndaare Ole Koshare and Julius Kituber Sopia).*

J U D G E M E N T

Introduction

The Appellants have appealed against their conviction and sentence of a fine of Kshs 20,000,000/= in default to serve a sentence of life imprisonment, for being in possession of wildlife trophy (two pieces of elephant tusks) contrary 95 as read with section 92 of the Wildlife Conservation and Magement Act 2013, in respect of count II. They were acquitted in count 1, which charged them with dealing in the same two pieces of elephant tusks. The 2nd appellant was acquitted in count III, which charged him with the offence of escape from lawful custody.

The appellants have filed a joint appeal in which they have raised 8 grounds of appeal in their petition and have also raised 11 grounds of appeal in their joint supplementary grounds of appeal.

The state supported both the conviction and sentence.

Grounds of appeal and findings thereon

In ground I the appellants have faulted the trial court for convicting them for being in possession of the two elephant tusks in the absence of proof beyond reasonable doubt. In this regard, the prosecution evidence through Cpl Rashid Isaak Ali (Pw 1) of the Kenya Wildlife Service (abbreviated herein as KWS), was that he received information from an informer. As a result, Pw 1 in company of another officer namely Moses Mugambi Njogu (Pw 2) together with six other officers proceeded to Empiro area to the manyatta to the house of the 2nd appellant being led by the informer. The time was at night at 5.00 am. Upon arrival, they surrounded the house of the 2nd appellant. They identified themselves. The 2nd appellant was ordered to come out of his house. He came out holding a spear in a position to spear PW 1. He threw the spear (exhibit Pexh 1) aiming to spear Pw 1. Pw 1 successfully evaded it. The 2nd appellant then turned and ran away. Pw 1 then fired and he did not know whether he had shot him. Later he learned that he had shot and wounded the 2nd appellant. The 2nd appellant escaped.

Pw 1 in company of the police officers entered the house. After a search they recovered two elephant tusks (exhibit Pexh 2), ten arrows exhibit (Pexh 3), three bows (exhibit Pexh. 4), two spears (exhibit Pexh 5) and two Maasai swords (exhibit Pexh 6). The two elephant tusks were hidden in the bedroom. They arrested the first appellant and took him to the police station and booked him. The 1st appellant was asleep in that house. He was arrested.

It was later learned by No. 83958 PC Ronald Chemosit (Pw 3), that there was a person, who was hospitalized at Narok referral hospital with suspected gunshot wounds. Pw 3 went there and arrested the 2nd appellant. Pw 3 was given the two elephant tusks amongst other exhibits.

The sworn evidence of the 1st appellant in response to the foregoing evidence testified as follows. He testified that he was on a journey and he slept in the home of the 2nd appellant, but not in his house. The owner of the house did not know him. He further testified that while sleeping, he heard the host talk to people outside the house. Those people then entered the house and arrested him. When he was taken to the

police vehicle he saw elephant tusks in that vehicle. He finally testified that two days later, the 2nd appellant was brought to the police cells and that he had not known him.

The second appellant gave sworn evidence and called three witnesses in his defence. He testified as follows. He testified that at 4.00 am he was asleep in his house with his wife. He was ordered to open his house. He opened. He was then shot in the house and the people who shot him closed the door. Those people then closed the door from outside and they were not able to leave. Those people then went away. He was shot in the left ribs. He did not know who shot him. In the morning his wife (Dw 3) screamed and people came to their assistance. The people took him to Narok hospital, where he was treated. Thereafter, he was arrested from that hospital.

Furthermore, he testified that he saw the two elephant tusks in court. They were not in his house. He also did not ran away from his house and he did not leave a spear. He testified that the people who went to his house did not identify themselves. He further testified that his neighbours live within a minute away from his house.

The 2nd appellant's wife testified as DW 3. She testified that the two elephant tusks were not recovered from their house. The 2nd appellant then called his brother namely Dalmas Murake Koshal (DW 4). Dw 4 took the appellant to hospital, but he himself did witness the shooting. The 2nd appellant then called his other brother namely Maiga Koshal (DW 5). Dw 5 testified that the 2nd appellant is his brother. He further testified that the 1st appellant slept in his house. He did not know how the 1st appellant was arrested. He also testified that he is the one who led police to the house of his brother. It was his evidence that when he heard gun shots he ran away and escaped. He also testified the 1st appellant slept in his mother's house and that he did not see those who arrested the 1st appellant.

This is a first appeal. As a first appeal court, I am required to independently re-assess the entire evidence produced at trial and make my findings based on that evidence. I have done so.

The 1st appellant's Appeal-Julius Kituber Sopia

I find as a result of the re-assessment of the entire evidence that the 1st appellant was arrested in the house of the 2nd appellant. I also find that the 1st appellant was not known in that manyatta. Villagers according to Pw 1 saw the 1st appellant going to that manyatta in the company of 2nd appellant. It was his evidence that he did not sleep in the house of the 2nd appellant. In this regard, his evidence was supported by DW 5. Dw 5 first testified that the 1st appellant slept in his house. He then proceeded to testify that that the 1st appellant slept in the house of his mother. Dw 5 contradicted himself materially. After considering the entire evidence, I find that the prosecution has not proved beyond reasonable doubt the case against the 1st appellant. The defence evidence of the 1st appellant was contradictory, but a conviction cannot be based on the weakness or on the contradictions of the defence evidence. It is possible that the 1st appellant was an ordinary visitor of the 2nd appellant. This was not disproved by the prosecution.

1st appellant might not have known that the elephant tusks were hidden in the bedroom of the house of the 2nd appellant.

In the light of the foregoing considerations, I find that the 1st appellant appeal succeeds with the result that the conviction and sentence recorded against him is hereby quashed.

The 1st appellant is hereby set free unless he is held on other lawful warrants.

The appeal of the 2nd appellant-Ndaare Ole Koshal

After re-assessing the entire evidence, I find that the prosecution proved beyond reasonable doubt the case against the 2nd appellant. The 1st ground of appeal of the appellant is hereby dismissed for lacking in merit.

In grounds 2, 6 and 7, the appellant has faulted the trial court in failing to find that KWS was actuated by malice and the case against 2nd appellant was framed up by planting the ivory tusks upon him. Grounds 6 and 7 depends on the credibility of the both the prosecution and defence witnesses; since they allege malice on the part of the prosecution. The prosecution gave cogent and consistent evidence. The 2nd appellant and his witnesses gave sworn evidence. The trial court heard and saw all the witnesses testify, before it, which advantage I do not have. It believed the prosecution witnesses and disbelieved the defence. I find no basis for interfering with the findings of the trial court, which were based on the evidence produced at trial. I therefore dismiss this ground of appeal for lacking in merit.

In grounds 3 and 4 the appellant has faulted the trial court in failing to find that there was no evidence that an elephant was killed and its tusks removed. The evidence of Pw 1 in this regard was that: "*The tusks are here. The two were for the same elephant. We went to the scene of poaching and saw the carcass of the elephant……"* There was credible evidence which was believed that the tusks were recovered in the house of the 2nd appellant. The recovery of the tusks is circumstantial evidence that the 2nd appellant killed the elephant and removed its tusks. In going to search the house of the 2nd appellant, Pw 1 and Pw 2 acted on the information of the informer. Theses grounds lack merit and are hereby dismissed.

In ground 5 the appellant has faulted the trial court in failing to find that the 2nd appellant was the person who ran away from his house, since he was not visually identified. The short answer to this ground is that the conviction of the appellant was not based on identification of the 2nd appellant. This ground lacks merit and is hereby dismissed.

In ground 8 the appellant has faulted the trial court that the weapons namely the spears, bows and arrows found in the possession of the 2nd appellant were normal considering that the ethnic group (the Maasai) from which the appellant comes from, lives among dangerous animals,

and this should not have formed the basis of the conviction. I find that the weapons were put in evidence as the ones which might have been used to kill the elephant. The conviction recorded is one of possession of tusks. The weapons that might have been used are not material to the conviction that was recorded. This ground lacks merit and is hereby dismissed

I now turn to the grounds raised in the supplementary grounds of appeal. In ground 1 the appellant has faulted the trial court or failing to analyze the evidence to the prejudice of the 2nd appellant. I find that the trial court set out the evidence for the prosecution and for the defence. It then proceeded to frame the issues for determination and then made findings based on that evidence. It then found that the offence against the 2nd appellant was proved beyond reasonable doubt. I find no merit in this ground of appeal and I hereby dismissed.

In grounds 2 and 5 the appellant has faulted the trial court for failing to find that the charge as framed was defective. The charge sheet alleges that the penal provisions that were infringed were section 95 as read with section 92 of the Wildlife Conservation and Management Act of 2013. The particulars allege possession of two elephant tusks. I find that the defect in the charge sheet consists in the reference to section 92 of the act, which is superfluous and this court has previously held this to be the position: see ***Tiapukel Kuyoni & Another v Republic [2017] eKLR.*** It therefore follows that the said defect is curable in terms of section 382 of the Criminal Procedure Code (Cap 75) Laws of Kenya. These grounds lack merit and are hereby dismissed.

In ground 4 the appellant has faulted the trial court for failing to conduct the trial in accordance with the law. I find that the trial was conducted in accordance with the law; since the 2nd appellant was accorded all his fair trial rights including the right to cross examination and interpretation. This ground lacks merit and is hereby dismissed.

In ground 6 the 2nd appellant has faulted the trial court for failing to find that the 1st appellant was a stranger to the 2nd appellant. I have already found that the 2nd appellant hosted the 1st appellant in his house. He was not therefore a stranger to the 1st appellant. This ground lacks merit and is hereby dismissed.

In ground 7 the appellant has faulted the trial court for convicting the appellant when the prosecution evidence was riddled with discrepancies and contradictions. I have perused the evidence of the prosecution and I find that there were minor contradictions and discrepancies, which are not material. This grounds lacks merit and is hereby dismissed.

In grounds 8 and 9 the appellant has faulted the trial court for failing to find that the alibi defence of the appellant was not disproved and that he was not positively identified. The evidence of Pw 1 and Pw 2 is that this appellant violently escaped from the scene of crime; when he aimed to spear Pw 1 with a spear, but he managed to escape. His incredible defence was not that of an alibi. He gave sworn evidence that he was in his house, when he opened for people during that night. He did not know those people. After he was shot, those people closed the door and locked them inside the house. This evidence lacks a ring of truth. These grounds lack merit and are hereby dismissed.

In ground 11 the appellant has faulted the trial court for failing to consider the defence evidence. The defence was fully considered and rightly rejected for being incredible as I have pointed elsewhere in this judgement. This ground lacks merit and is hereby dismissed.

2nd appellant's appeal against sentence- Ndaare Ole Koshal

Finally, in grounds 3 and 10 the appellant has faulted the trial court for imposing a manifestly excessive sentence. The 2nd appellant should have been sentenced under section 95 of the Wildlife Management and Conservation Act, which provides for a sentence of a fine of not less than one million shillings or imprisonment for a term of not less than five years' imprisonment or to both such imprisonment and a fine.

I find that the trial court failed to exercise its discretion properly by finding that it was required to impose the minimum sentence. The Supreme Court decision in ***Francis Karioko Muruatetu and Another v. Republic [2017] Eklr*** gave discretion to the trial courts to impose an appropriate sentence. The trial court failed to exercise its discretion properly. I am therefore entitled to interfere with it.

In re-assessing the appropriate sentence, I am required to take into account the mitigating and aggravating factors.

The mitigating factors are as follows. The appellant was a first offender. He has been in custody for about two years now. He also is the breadwinner of his family.

The aggravating factors include the following. He is convicted of a serious offence that threatens wildlife tourism in Kenya by killing an elephant. He used violence in the course of being arrested.

After taking all these factors into account I hereby impose a sentence of a fine of two hundred and fifty thousand (Kshs 250,000/=) in default to serve eighteen months (18) imprisonment.

Judgement signed, dated and delivered in open court at Narok this 23rd day of October, 2019 in the presence of Ms. Karia for the appellants and Mr. Mwangi for the state.

J. M. Bwonwong'a

Judge

23/10/2019