



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT VOI**  
**CRIMINAL APPEAL NO 47 OF 2017**

**STEPHEN MUKALA JOHN.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(From original conviction and sentence in Criminal Case Number 409 of 2015 in the Principal Magistrate's Court at Taveta delivered by Hon W.K. Kitur (RM) on 14<sup>th</sup> September 2016)**

**JUDGMENT**

**INTRODUCTION**

1. The Appellant herein, Stephen Mkala John, was jointly charged with Ismael Macharo Idi (hereinafter referred to as "his Co-Accused") on two (2) Counts. Count I was dealing in wildlife trophy contrary to Section 84(i) as read with Section 92 of the Wildlife Conservation and Management Act, 2013 (hereinafter referred to as "the Act.") The particulars of this charge were that on 11<sup>th</sup> September 2015 at about 1100 hours at Taveta Town within Taita Taveta County, they were found dealing in wildlife trophy namely two (2) pieces of elephant tusk (**sic**) to wit 7 kgs without a permit.
2. In Count II, they were charged that on the aforesaid date time and place, they were found in possession of wildlife trophy contrary to Section 95 of the Act.
3. The Learned Trial Magistrate Hon W.K. Kitur, Resident Magistrate, acquitted the Appellant and his Co-Accused on Count I as the Charge Sheet was defective and the Prosecution failed to take advantage of Section 214(1) of the Criminal Procedure Act Cap 75 (Laws of Kenya) to amend the Charge Sheet. He acquitted the Appellant's Co-Accused on Count II but convicted the Appellant. As the Learned Trial Magistrate had been transferred from Taveta Law Court, Hon G. Kimanga (RM) fined the Appellant Kshs 1,000,000/= or in default to serve five (5) years imprisonment.
4. Being dissatisfied with the said judgment, on 29<sup>th</sup> June 2017, the Appellant filed a Notice of Motion application seeking leave to have his Appeal heard out of time, which application was allowed and his Appeal was deemed to have been duly filed and served. He relied on six (6) Grounds of Appeal. The issue he had placed before this court was whether or not the Prosecution proved its cases beyond reasonable doubt.
5. When the matter came up on 19<sup>th</sup> December 2017, the State informed this court that it would not be filing its Written Submissions because it was conceding to the Appeal herein.

**LEGAL ANALYSIS**

6. Despite the State conceding to the Appeal herein, this court found it prudent to consider if the reasons it gave for conceding to the appeal were fair and reasonable. Appreciably, an appellate court should consider the facts of a case even where the State has conceded to an appeal to establish if such a concession should be granted.

7. In the case of Mwanguo Gwede Mwarua vs Republic [2015] eKLR, the Court of Appeal made a similar observation when it stated as follows:-

**“The concession notwithstanding, it is still our duty as a second appellate Court to consider the issues of law raised by the respondent as grounds for conceding the appeal in order to determine whether the said concession is merited.”**(See

17. Notably PW 3 was the Investigation Officer. It was his responsibility to present a cogent case without contradictions. He did not even know the circumstances relating to how the Appellant and his Co-Accused were arrested. He also made reference to a third person who was arrested, a fact that was never alluded to by PW 1 and PW 2 as they had only made reference to the Appellant and his Co-Accused.

18. These contradictions raised doubt in the mind of this court leading to ask itself as to what really transpired on the material date and time. As was rightly pointed out by the State, it was the KWS officers' word against that of the Appellant. As PW 1, PW 2 and PW 3 did not see the Appellant load the elephant tusks in the said Motor Vehicle, it was risky to convict him as they relied on hearsay evidence of the informer who was never called to testify in court.

19. Appreciably, the Prosecution was entitled to protect the identity of the informer due to the serious nature of the offence. The fact that he became physically known to the Appellant and his Co-Accused on the material date and time, they did not necessarily know that he was an informer. The driver of the Motor Vehicle may have been called as a witness herein. However, save for confirming that he had carried the Appellant and the informer, it could not have proved to whom the elephant tusks belonged. The elephant tusks could have belonged to the informer but were loaded in the said Motor Vehicle by the Appellant.

20. Further, PW 1 stated that the driver of the said Motor Vehicle was known as Jones. On the other hand, PW 2 stated that the said driver was called Samuel James. These contradictions made this court hesitate in finding that the Prosecution proved its case beyond reasonable doubt,

21. Notably, inconsistencies and/or contradictions in testimonies in a trial are expected because each witness will normally testify as to what he perceived and/or observed at any given time. However, these inconsistencies and/or contradictions must not be so glaring as to lead a trial court to entertain doubt as to what really transpired at any given time. The version of unfolding events must more or else be similar so as to render the inconsistencies and/or contradictions immaterial and irrelevant.

## **DISPOSITION**

22. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 29<sup>th</sup> July 2017 was successful and there was merit in the State conceding to the said Appeal. The same is hereby allowed.

23. Doubts were raised in the mind of this court lending it to give the Appellant benefit of doubt. This court therefore hereby quashes the conviction and sets aside the sentence that was meted upon him by the Trial Court as it would be clearly unsafe to confirm the same. The court hereby orders that the Appellant be set free forthwith unless held or detained for any other lawful reason.

24. It is so ordered.

**DATED and DELIVERED at VOI this 17<sup>th</sup> day of January 2018**

**J. KAMAU**

**JUDGE**

In the presence of:-

Stephen Mukala John - Appellant

Miss Anyumba - for State

Susan Sarikoki- Court Clerk