REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEALNO 43 OF 2017

SCAVER MWAKESI MATATA...........................APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(**From original conviction and sentence in Criminal Case Number 534 OF 2016 in the Senior Principal Magistrate's Court at Voi delivered by Hon M. Onkoba (SRM) on 24th May 2017)**

JUDGMENT

1. The Appellant herein, Scaver Mwakesi Matata, was charged with the offence of being in possession of wildlife trophy without a permit contrary to Section 95 of the Wildlife Conservation and Management Act, 2013.The particulars of the charge were that on the2nd day of July 2016 at around 0130hrs at Jora area in Kasighau within Taita Taveta County, jointly with others not before court, he was found in possession of wildlife trophies namely two (2) elephant tusks weighing 2kgs and one (1) skin of leopard without a permit.

2. The Learned Trial Magistrate Hon. M. Onkoba, Senior Resident Magistrate convicted him of the offence and fined him Kshs1,000,000/= or in default to serve five (5) years imprisonment.

3. Being dissatisfied with the said judgment, on 2nd June 2017, the Appellant filed his Petition of Appeal wherein he relied on five (5) Grounds of Appeal. He filed his Written Submissions on 18th August 2017.On its part, the Respondent filed its Written Submissions dated 13th November 2017 on 14th November 2017.

4. When the matter came up on 13th December2017, both the Appellant and the State asked the court to deliver its judgment based on their respective written submissions. The judgment is therefore based on the said written submissions.

LEGAL ANALYSIS

5. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

> "**On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".**

6. After perusing the Appellant's and the State's Written Submissions, this court was of the view that the issues that had been placed before it for determination were as follows;

> **1. Whether or not the Prosecution proved its case beyond reasonable doubt; and**
>
> **2. Whether or not the sentence was harsh, severe and manifestly excessive in the circumstances of the case herein.**
>
> **I. PROOF OF THE PROSECUTION'S CASE**

7. Grounds of Appeal Nos (2), (3), (4), (5) and (6) were dealt with under this head.

8. The Appellant submitted that the Prosecution failed to summon Corporal Lydia, Corporal Jackline, Ranger Kitur, Ranger Ndungu and Eric Mwaura who had been mentioned by No 8713 CPL Edwin Mwasi (hereinafter referred to as "PW 1") and Ranger 8246 Dickson Kisui

(hereinafter referred to as “PW 3”) in their testimonies and in the circumstance, the Learned Trial Magistrate ought to have decided the case herein in his favour.

9. In response thereto, the State submitted that Section 143 of the Evidence Act Cap 80 (Laws of Kenya) empowered the Prosecution to determine the number of witnesses to call to prove its case. It contended that it was not necessary to call all the officers mentioned as their testimony would have been repetitive. It stated that PW 1 and PW 3 were the main officers in charge of the investigations and the others merely helped them execute the arrest of the Appellant.

10. It relied on the case of **Peter Mwangi Kariuki vs Republic [2015] eKLR** where the court therein observed that the prosecution’s case was not prejudiced by failing to call certain witnesses.

11. Section 143 of Evidence Act Cap 80 (Laws of Kenya) provides:-

> **“No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact”**

12. In the case of **Ketervs Republic [2007] 1 EA 135,** the court therein held that:-

> **“The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt.”**

13. It was therefore evident that there was no legal requirement on the number of witnesses the prosecution needs to call to prove a fact. The Appellant’s arguments on this point thus failed.

14. Turning to the evidence that was adduced by the Prosecution witnesses, the Appellant contended that PW 1’s testimony that his colleague received a tip off from an informant to the effect that there were some people in Jora Village in possession of elephant tusks and leopard skin contradicted the charge sheet. He pointed out that PW 3also testified that he met with him on 28th July 2016 at Sussana club in Maungu but which time he was already in remand and consequently, it was not possible that they could have met.

15. He argued that the Trial Court failed to take his defence into consideration while arriving at its decision to convict him. He stated that the trial court dismissed his entire defence yet in the case of **Oketh Okale vs Republic (1965) EA,** the Court of Appeal held that however weak a defence is, the same ought to be considered.

16. It was his contention that the Respondent failed to prove the element of possession beyond reasonable doubt. He contended that Respondent’s case was inconsistent as no proper investigations were carried out.

17. The State submitted that the Appellant admitted in his defence that he met with PW3 on 28th July 2016 and he could not therefore argue that he was in remand on that day, a fact that this court confirmed from his sworn evidence. The proceedings show that the Appellant testified as follows:-

> **“On 27th June 2016, Mr Tsuma called me. He informed me that I was required in Maungu township to give a full report to the officers. On 28th June 2016 he sent fare to me. I went to Maungu and at around 10 am I met with Mr. Tsuma. He explained to me that we were to meet with the KWS officers.**
>
> **At around 3 pm, one officer called Dison Kisui arrived. He introduced himself as a KWS ranger. We sat at Jordan Restaurant in Maungu town. We were on the table. I gave to Kisui the report. We sat for around two hours. The officer told me that he was to meet with his collegues to strategise.”**

18. It submitted that the ingredients necessary to prove possession were stated in the case of **Peter Mwangi Kariuki vs Republic**(Supra)that the accused person had to be found to have been to be physically in control of the item and having had knowledge of having the item in his or her possession.

19. It also contended that the trial court considered the Appellant’s defence and found the same to have been unbelievable and a cover up in the face of sufficient evidence by the Prosecution. It pointed out that he did not adduce any proof that he was a KWS informant as he had contended and he failed to call crucial witnesses who would have assisted in his defence.

20. It further submitted that under Section 95 of the Wildlife Conservation and Management Act, the following three (3) elements had to be proved:-

> **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**

21. A perusal of the proceedings from the lower court showed that PW 1 and PW 3’s acted on a tip off from an informer, and met with the

Appellant at a place called Jora on 28th June 2016, where he agreed to sell to them two (2) elephant tusks at Kshs 4,000/= and a leopard skin at Kshs 18,000/=. He brought out a white sack containing two (2) paper bags. The yellow paper bag had been used to wrap the leopard skin while the white paper bag contained the two (2) elephant tusks. They arrested him while his accomplices escaped into the forest.

22. PW 1's and PW 3's evidence was corroborated by that of No 8086 Ranger Henry Karimi (hereinafter referred to as "PW 4"). The Appellant also placed himself at the scene on the material time and in possession of the wildlife trophy when he admitted that he was the one who was acting as an informer for Kenya Wildlife Services (KWS) .

23. PW 1 tendered in evidence a leopard skin and two (2) pieces of elephant tusks, which were the wildlife trophies he was said to have been found in the Appellant's possession. A charge sheet merely contains the offence which is proved by the evidence that is adduced by prosecution witnesses.

24. The Appellant did not demonstrate how PW 1's evidence contradicted the Charge Sheet and consequently, his submissions in this respect fell by the wayside. Similarly, his assertions that he would not have met PW 3 as he was in remand therefore failed as he himself admitted to having met him on 28th June 2016.

25. In his sworn evidence the Appellant asserted that he took KWS officers to the potential sellers of the items, which items he himself confirmed were wildlife trophies. This clearly demonstrated that he had both control and knowledge of the items in question. During trial, it was established that he did not possess a certificate of ownership, a fact he did not dispute. The question as to whether or not the items he was found in possession of were trophies was a different matter altogether.

26. In the case of **<u>Victor Mwendwa Mulinge vs Republic [2014] eKLR</u>, the** Court of Appeal rendered itself thus on the issue of alibi**:-**

> **"It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see KARANJA V R, [1983] KLR 501 … this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought."**

27. In the present appeal, the question was whether the defence raised a reasonable doubt in the prosecution case. From the facts on record it appeared that the Prosecution made a strong and watertight case against him. The evidence by PW 1, PW 2, PW 3 and PW 4 was consistent and corroborate each other to form a clear and logical sequence of events that established his guilt. The Appellant ought to have called Tsuma, his brother- in- law who he alleged was the one who introduced him to KWS officers, eventually making him an informant. His defence of alibi was therefore weak and could not be relied upon.

28. Dr Jeremiah Bogon Kaitobok (hereinafter referred to as "PW 2") confirmed that he was a veterinary doctor having graduated with Bachelors Degree in Veterinary medicine from University of Nairobi and a Masters Degree in Wildlife medicine from University of Pretoria in South Africa. He stated that he examined the morphology of leopard skin and the two (2) elephant tusks and established that the same had been extracted from wildlife species.

29. Section 2 of the Wildlife Management and Conservation 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."**

30. Taking all the facts into consideration, it was this court's opinion that the Appellant's defence did not shake the prosecution's case. Indeed, the Prosecution proved its case beyond reasonable doubt based on overwhelming evidence. The Learned Trial Magistrate could not be faulted for having arrived at the conclusion that the Appellant was properly identified and that the items he was found in possession of were wildlife trophies.

II. <u>SENTENCE</u>

31. The Appellant submitted that sentence of five (5) years imprisonment and a fine of Kshs 1,000,000/= was harsh, erroneous and a nullity, which the State denied.

32. Section 95 of the Wildlife Management and Conservation Act prescribes a mandatory minimum sentence as follows;

> **"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 <u>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</u>." (emphasis mine)**

33. The State submitted that the Learned Trial Magistrate took into account the Appellant's mitigation coupled with the fact that the Appellant was a first time offender, and chose to mete out the minimum sentence prescribed.

34. This court found that it was not open to the Learned Trial Magistrate to impose on the Appellant a term of imprisonment below the minimum term set in the Wildlife Management and Conservation Act. In fact, he meted put a more lenient penalty on him as he also had the

power to fine and sentence him at the same time after convicting him for the offence of being in possession of the wildlife trophy. Consequently, the sentence meted out to the Appellant was not harsh. This court therefore finds no reason to interfere with the conviction and sentencing as the Learned Trial Magistrate did not misdirect himself.

DISPOSITION

35. In the upshot, this court found that the Appellant's Petition of Appeal that was lodged on 2nd June 2017 was not merited and the same is hereby dismissed. Instead, this court hereby upholds the conviction and sentence that was meted upon the Appellant as the same was lawful and fitting in the circumstances of the case.

36. For the avoidance of doubt, the time the Appellant was in custody while awaiting trial from 4th July 2016 when he took plea to be taken into account in computation of his sentence in prison.

37. It is so ordered.

DATED and DELIVERED at VOI this 27th day of February 2018

J. KAMAU

JUDGE

In the presence of:-

Scaver Mwakesi Matata - Appellant

Miss Anyumba - for State

Susan Sarikoki– Court Clerk