REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL APPEAL NO. 35 OF 2017

EVODI NGARKONI MTEI.....APPELLANT

V E R S U S

REPUBLIC.....PROSECUTOR

(Being an appeal from the judgement of the Senior Resident Magistrate Loitoktok (presided over by Hon. Okuche dated 3/11/2017)

JUDGEMENT

Evodi Ngangani the appellant herein guiltily charged, tried, convicted of the offence of being in possession of wildlife trophy contrary to section 95 of the wildlife Conservation and Management Act of 2013. He was sentenced to a fine of one million in default five years imprisonment.

The brief particulars of the charge were that on 15th June 2017 at Illasit area in Loitoktok Sub-county within Kajiado County. The appellant was found in possession of wildlife trophies of 24 pieces of ivory tusks weighing 30kgs in contravention of the said Act.

Being aggrieved with the entire judgement on conviction and sentence. The appellant filed this appeal based on the following grounds.

(1) that the prosecution did not prove the case beyond reasonable doubt

(2) that the conviction was based on evidence improperly admitted

(3) that the accused rights were violated

(4) that the evidence on record was contradicting

(5) that the charge was defective

(6) that the accused was not given a fair trial

The evidence at the trial

According to PW1 Victor Dura attached to KWS, his testimony was to the effect that he received a telephone call from PW2 - CPL Gladys Tanui. That there were people selling ivory at Illasit area. Upon receipt of the information PW1 proceeded to the scene where he liaised with **PW2** and one **Kurera**. Following intelligence report in possession of PW2. they met the two appellants each one of them with packed sack of luggage of ivory tusks. The operation involved the arrest of the accused and the two gunny bags in their possession. According to PW1 and PW2 they escorted the two men to the police station for further interrogation. while at the police station in the presence of the accused they prepared an inventory of the recovered Elephant ivory tusks.

PW1 further told the court below that the 1st accused now convict was found to be in possession of 14 pieces of ivory tusks while the appellant before court had a similar packaging of 10 ivory tusks, in sum totaling to 24 pieces of the alleged ivory.

Further before signing the inventory PW1 and PW2 weighed the ivory in the presence of accused persons. PW1 and PW2 further testified that the 24 pieces of ivory were escorted to the National Museum where **PW3 Esther Ngure** carried out an analysis and identification. The evidence of PW3 shows that the analysis was done and a report to that effect provided in court as exhibit 7.

PW4 Sgt Faiza Jama liaison officer with Safaricom testified on how he was requested by CID Kajiado to extract out data for mobile numbers 0728247785, 0713694373 belonging to the two appellants. the reading of the data extracted revealed that two had communication between 14.6 and 15.6.2017. The inference PW4 drew from the call data was that several calls were made between the two numbers on the above captioned dates. Significantly he noted that both numbers communicated to telephone number 0740669665 32 and 25 times respectively.

The appellant was placed on his defence he denied the offence of being in possession of ivory. According to the appellant he learnt of the ivory when he arrived at Illasit police station.

Submissions on appeal by counsel for the Appellant

On appeal Mr. Itaya Learned Counsel for the appellant submitted that the charge in which the trial magistrate convicted and sentenced the appellant was fatally defective. Learned counsel made reference to the provisions section 136 of the Criminal Procedure Code. Mr. Itaya further submitted that the prosecution failed to proof possession as ingredient of the offence counsel argued and submitted that the failure of the intelligence officer not to testify was fatal to the prosecution case. He urged this court to find that the learned magistrate relied on contradictory and unreliable evidence to establish the case against the appellant.

Submissions on behalf of the Respondent

Mr. Akula Counsel for the state opposed the appeal on grounds that the charge sheet was defective. Secondly, Mr. Akula submitted on the evidence stated that prosecution proved the charge beyond reasonable doubt. Thirdly, Mr. Akula gave a narration of the sequence of events which placed the appellants at the scene and within the scope of the doctrine of possession as defined under section 4 of the Penal Code.

Analysis and Resolution

As always stated and previously held in the case of **Pandya Versus Republic 1957 EA 336 and Ruwalla Versus Republic 1957 570:** ***"it is the duty of the first appellate court to weigh the evidence of the trial court to draw its own inferences and conclusions bearing in mind that it has neither seen nor heard the witnesses and to make due allowances in this respect".*** This is the approach I will apply in determining this appeal.

The first complaint raised by the appellant was that of failure by the prosecution not **to proof the case beyond reasonable doubt.**

The offence appellant was charged with involved possession of wildlife trophy positively identified as 24 pieces of ivory tusks. The legal concept of possession is defined under section 4 of the penal code as: **(a) be in possession of or to have possession includes having in one's own personal possession but also knowingly having anything in the actual possession custody of any other person or having anything in any place whether belonging to or recapped by oneself or of any other person. (b) if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody of possession it shall be denied and taken to be in the custody and possession of each and all of them.**

Under this section the definition of possession connotes two elements being in physical control of the items of the offence and it includes joint control with another. Secondly, knowledge or intention of having the article, instruments, thing or items constituting the offence.

In my view when one talks of physical control it will be essentially the place, location of access where the defendant has the personal knowledge and ability of the existence of the substance or item, contents of the alleged offence. In the context of section 4 of the Penal Code the doctrine of possession should not be confused with that of one's ownership.

This definition has been clearly illustrated in the court of appeal cases of **Gacheru Versus Republic 2005 IKLR 688 and Joseph Wafula Mubeya Versus Republic CR. Appeal No. 9 of 2005**.

When considering the evidence of PW1 and PW2 it demonstrates as a fact that two accused persons were involved in the crime. There is no doubt that when PW1 and PW2 arrested the duo each one of them was in possession of a gunny bag with luggage confirmed by PW3 to be ivory tusks. (2) The two accused persons could not possibly be found together unless with prior knowledge. According to the appellant he did not know about the contents on the gunny bag because it was a fabrication when the police arrested apprehended them at Loitokitok.

The trial court reviewed the evidence of PW1 and PW2 who stated how they trailed the accused persons from Nairobi up to lllasit Centre. The intention and description of the two accused had been given in advance to PW2. On arrival at llasit the positive identifying features and what they were carrying fixed the appellant and accused. Such evidence is generally watertight in favour of the prosecution unless an explanation in rebuttal is adduced by the defence.

The onus was now on the accused to disapprove possession of ivory tusks as stated under section 111 of the Evidence Act. ***"When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exception from or qualification to, the operation of the law creating the offence with which he is charged and the burden proving any fact especially within the knowledge of such person is upon him. Provided that such burden shall be discerned to be discharged if the evidence given by the provision, whether in cross-examination or otherwise, that since circumstances of facts exists".***

The appellant was arrested at Illasit in Loitokitok in company with another already convicted of the same offence. The prosecution evidence established that firmly each one of them was guilty of being in possession of ivory a prohibited wildlife trophy. With that evidence the appellant had the burden to rebut the evidence on joint enterprise and how he came into possession of the ivory tusks. From the defence at the trial court the appellant gave no explanation to controvert cogent and credible evidence by the prosecution.

The appellant in this case was in possession of the ivory as contemplated in section 95 of the Act. These kinds of offences are regarded as continuing and evidence to effect as to time of arrest and seizure of the ivory was in physical control of the appellant and his accomplice.

In my view the *mens rea* and *actus reus* of the offence are present in the case tried by the learned trial magistrate in the following format. The prosecution established acquisition of the criminal property being the ivory tusks, the appellant was found in possession of the ivory having been concealed in gunny bag and at a location where the only inference to be drawn was either to convey or transfer the criminal property for use by a third party. The appellant and another not before court under the intelligence surveillance and the destination of the transfer of the property was to take place at Loitokitok Sub-county.

The mental element of the offence under section 95 of the penal code includes the knowledge on the part of the appellant that the ivory tusks the question is criminal and prohibited property under the Kenya Wildlife Management and Conservation Act. The trial court was therefore right to hold that the prosecution discharged the burden of proof beyond reasonable doubt on possession.

What is the relevance of the testimony by the Liaison Officer from Safaricom Call data Centre? Did the evidence on the sum total of the calls made between the appellants with or without a third-party account considerate a common enterprise to facilitate, retention, control or transfer of the property in question?

In the view of this court the nature of the criminal property is such that it is not one that quickly moves from one person to another. The mobile telephone calls seem to be one element of an integral facilitation to acquire, convey and transfer the property for use by a third party.

Mr. Itaya learned counsel submitted on the issue of discrepancy that no probative evidence was presented from safaricom call data. I hold that the evidence by the safaricom liaison officer PW4 did not any way water down the prosecution case. If anything, it embodied the prosecution version that the appellant and the other co-accused acted in common concert as supported from the many calls made to the number 0740669665. The evidence as a whole not controverted by the appellant.

From my assessment of the evidence the circumstances of this case fall within the scope of the doctrine on common intention as defined under section 21 of the Penal Code as provided for herein:

> **"When two or more persons from a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."**

The provision squares well with the following passage in the case of Njoroge in the case of **Njoroge Versus Republic 1983 KLR 197 and Solomon Munga Versus Republic 1965 EA 363** where both courts held as to the elements on the principle of common intention thus. ***"If several persons combine for an unlawful purpose and one of them kills a man, it is murder in all who are present whether they actually aided or abated or not, provided that the death was caused by act of someone of the party in the course of the endevours to effect the common object of the assembly."***

In addition, the court is satisfied of the evidence against the appellants that their defence is regarded as being dislodged in line with the principles in the case of **Republic Versus Cheya case 1973 EA**. ***"The existence of common intention being the sole test of total responsibility it must be proved that the common intention was and that the common Act for which the accused were to be made responsible was acted upon in furtherance of that common intention. The presumption of constructive intention must not be too readily applied or pushed too far. The mere fact that a man may think a thing likely to happen is vastly different from his intending that that thing should happen. The latter ingredient is necessary under the section. It is only when a court can with some judicial certitude hold that a particular accused must have pre-conceived or premeditated the result which ensued or acted in concert with others in order to bring about that result that this section can be applied."*** As correctly pointed out these decisions on common intention may be inferred from facts and or any circumstances of the particular case.

In the instant appeal, the appellant apparently travelled together to the destination where they were eventually arrested. The Safaricom liaison officer confirmed a joint communication between the two appellants at the time when their movement was being tracked. They were later arrested being in possession of ivory packed in the gunny bags. The 24 pieces of ivory was packaged into portions of 14 and 10 respectively in two separate gunny bags. Each one of their luggage was identical in substance and packaging. They were in a location far away from their fixed abode. The circumstances surrounding the arrest as to the location time and movement is relevant in my view that the two were not strangers who just met at Illasit Centre.

In my judgement the legal principle in the case of **Republic Versus Kipkering and another 16 EACA 135** is applicable in the instant appeal where it was held that ***"in order to justify on circumstantial evidence the inference of guilt the inculpatory facts must be comparable with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of guilt and the burden of proving facts which justify the drawing of the inference from the exclusion of any reasonable hypotheses of innocence is always the prosecution and never shifts to the accused". (See also TEPER Versus the Queen 1952 AC 480).***

This court is quite satisfied from the record that there is no ground to qualify the definition of the word possession further than it's under section 4 of the Penal Code and the interpretation given in the various caselaw decisions. It is sufficient that the prosecution establishes that the person from whom the property was found with had the knowledge of its existence at the time and was in fact in possession and or control in of it.

The explanation by the appellant never impeached any of the circumstantial evidence adduced by the prosecution in support of the charge.

Ground on defective on a charge

Mr. Itaya Learned Counsel for the appellant invited this court to consider the provisions of section 136 of the Criminal Procedure Code to the effect that the charge as framed before the trial court was defective. To start with let me state the provisions of section 136 of the code it provides as follows: **"The following persons may be found in one charge or information and may be tried together": (a) Persons accused of the same offence committed in the course of the same transaction (b) Persons accused of an offence and persons accused of abetment or of an attempt to commit the offence (c) Persons accused of more than one of the same kind (that is to say, offences punishable with the same amount of punishment under the same section of the Penal Code or of any other Act of law) committed by them jointly within a period of twelve months (d) Persons accused of different offences committed in the course of the same transaction**

In so far as framing a charge or information is concerned the court of appeal in the case of **Sigilani Versus Republic Versus Republic 2004 2KLR** has set the pace as stated in the following passage: ***"The principle of law governing charge sheets is that an accused person should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defense".***

It is against this legal background I will consider whether a violation occurred in the drafting of the charge against the appellant when tested with the provisions of section 134 and 136 of the CPC Cap 75 of the Laws of Kenya.

It is evident from the charge sheet that the appellant was charged jointly with another not before this appeal. The charge particulars indicated the time, place, date proximity and complicity and elements of the joint possession of the ivory tusks. The arrest of the two offenders was through mobile phone tracking and other intelligence information which showed that the two offenders were not in their usual fixed abode.

The owner of property rights of the criminal property found with the applicant was stated to be Kenya wildlife services. The evidence tendered by the preservation identified in clear terms what each of the offender was found in possession with at the time of the arrest.

I have perused the charge sheet *viz aviz* the provisions of section 34 and 136 of the Criminal Procedure Code, if there are any irregularities. They are of a kind I consider curable under section 382 of the Code there is no variance between the particulars of the offence as framed and the evidence by the prosecution witnesses. This is not a case where the appellant was charged and tried with a non-existent offence to occasion prejudicial or a failure of justice as the defence wants this court to belief. This is no misjoinder of parties or defect in the charge-sheet to warrant this court to set it aside. This ground on a charge being defective is dismissed.

That was also the position taken by the court in the case of **Isaac Omambia Versus Republic 1995 EKLR** as follows: ***"In the regard it is pertinent to draw attention to the following provisions of 134 of the Criminal Procedure Code which makes particulars of the charges. Every charge or information shall contain and shall be supportive if it contains a statute of the specific offence or offences with which the accused person is charged together with such particulars on may be necessary for giving reasonable information as to the nature of the offence".*** In the instant case, I associate myself with the above principles.

Ground 4: That the appellant was not accorded a fair trial

In this appeal Mr. Itaya for the appellant submitted that the appellants right to a fair trial under Article 50 of our Constitution were violated. In the Republic Constitution 2010 various rights to a fair hearing are explicitly espoused and provided for under Article 50. The key provisions secured matter to the request for one dispute to be decided before a court or an independent and impartial tribunal or body 2(a) Every accused person is to be presumed innocent until the contrary is proved. (b) the right to be informed of the charge with sufficient detail to answer it, to have adequate time and facilities to prepare a defence to have a public trial before a court established under this constitution, to have the trial begin and conclude without unreasonable delay, the right to remain silent and not to give self-incriminating evidence and also right to legal representation if substantial injustice would result in the administration of justice. These provisions have been subject of significance interpretation in our courts.

In the case of **Peter Kaimenyi Versus Republic 3 2012 EKLR** the court held that Article 50 (2) (c) of the constitution had been violated where the trial magistrate failed to give the appellant adequate time and facilities to prepare his defence". The law regarding Article 50 2 (b) and (c) of the constitution is well set out in the case of Thomas **Patrick Gilbert Cholmondely Versus Republic 14 2008 EKLR** where the court held:

"We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under our constitution, the prosecution now under a duty to provide an accused person with and to do so in advance of the trial, all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items".

In this appeal learned counsel for the appellant submitted the the violation of section 136 in a way prejudiced the appellant and as a consequence fairness of the trial was compromised. When considering the concept of a fair hearing **Black's Law dictionary 5th Edition** defined it in the following language:

"One in which authority is fairly exercised that is consistently when the fundamental embraced within the conception of due process of law contemplated in a fair hearing is the right to present evidence, to cross-examine and to have findings supported by evidence."

I have reviewed the evidence and the record of the trial court from inception to judgement of the appellant case. The notion of a fair hearing as contained in Article 50 of the constitution has very clear specified rights which require one before seeking a declaration to state the nature or the right and the manner of infringement. Fairness from the point of view of the appellant must be viewed from the perspective set out under Article 50 (1), 2 (a) – (g) (3), (4), (5) (a), (b), (6) (a), (b) (7) of the constitution. The relevant facts constituting a violation of any of the

articles of under article 50 of the constitution must be clearly spelt out.

As can be seen from the lower court record the duty imposed upon the court under Article 50(1) of the constitution to adjudicate the dispute in a fair and independent manner has not been challenged by the appellant. This court has already made a finding on the application of section 136 of the Criminal Procedure code in respect to this appeal. I find no reason to say more on this ground. I find no measure of injustice to the appellant.

The key provision is under Article 50 (1) which provides that everyone is entitled to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or if appropriate another independent and impartial tribunal or body. The rights to a fair trial as set out in the constitution. They are meant to safeguard and protect the accused person and the court to reach a fair verdict. The rights ensure that the equality principle that every one is equal before the law is protected.

Having given the matter due consideration I can say without hesitation that the learned counsel did not set with precision which right to a fair trial was violated by the trial court. In absence of any particular irregularity referred to be of such a nature that amount to constitutional infringement this court has nothing to go by to issue any declarations under the constitution.

Sentence

Reverting to the issue on sentence, in the instant case in my own evaluation the sentence was by no means excessive for the serious crime of being in possession of wildlife trophy namely ivory tusks. I accordingly dismiss the appeal against sentence. Accordingly, this appeal stands dismissed on both conviction and sentence for lack of merit.

Dated, delivered and signed on 20th April 2018

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R. NYAKUNDI

JUDGE

Representation

Mr. Itaya for the appellant

Mr. Akula for the State

Mr. Mateli - Court Assistant