REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL APPEAL NO. 75 OF 2016

SAMUEL SANTORE IMO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal from the original conviction and sentence dated 23/12/2016 in the Chief Magistrate's court at Narok in Cr. Case No. 48 of 2014, R. v. Samuel Santore Imo]

JUDGEMENT

1. The appellant has appealed against his conviction and sentence of Shs.20,000,000/= in default life imprisonment in respect of each of the following three counts namely possession of wildlife trophy namely three elephant tusks [Count 1], dealing in wildlife trophy namely three elephant tusks[count II] and keeping wildlife trophy namely three elephant tusks [count III], all contrary to section 95 as read with section 92 of the Wildlife Conservation and Management Act, 2013. Counsel for the appellant has also filed written submissions in support of the appeal.

2. The state has supported both the conviction and sentence in addition to filing written submissions.

3. The appellant was convicted on the direct evidence of two Kenya Wildlife Service [hereinafter referred to KWS] rangers namely Cpl James Kiprono (PW 1) and Cornelius Thomas Ekeya (PW 2).

4. The unsworn defence of the appellant was a bare denial. He additionally explained that he was arrested in a wildlife park for illegally grazing his animals there.

5. In this court the appellant has raised 10 grounds in his petition of appeal.

6. In grounds 1, 3 and 7 in a condensed form, the appellant has faulted the trial court for convicting him in the absence of evidentiary proof beyond reasonable doubt. In this regard, the evidence of the prosecution through PW 1 was that on 10/1/2014, he was at Ewaso Nyiro KWS camp, when they received a report that there was a person who wanted to sell elephant tusks.

7. PW 2 and PW 1 left the station at 7.30 pm and arrived and awaited the person at Naikara. They stayed there for 2 ½ hours. A motor bike arrived carrying 3 people, among them, the seller. Upon request, the seller showed them three pieces of elephant tusks in a green sack, which were produced as prosecution exhibit 1A, B and C. Among those three people on the motor bike, were two KWS informers. I agree with Mr. Kilele for the appellant that the two KWS informers should have been as witnesses since their informer privilege had already been disclosed by PW 1. Furthermore, *Bukenya & others v. Uganda [1972] EA 549*, requires the prosecution to make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent. In the instant appeal, I am unable to find that the failure to call the two informers as witnesses led to a failure of justice.

8. PW 1 and PW 2 introduced themselves as KWS officers. After interrogation PW 1 and 2 found the seller had no permit. They then arrested him, who is now the appellant. Under cross examination, PW 1 testified that they used the motor bike to get the appellant. PW 1 described t he sack as blue in colour. He admitted that they did not photograph the motor bike and did not prepare an inventory of the tusks.

9. The evidence of PW 2 is supported by that of his colleague PW 1. PW 1 described the sack as green, manila bag while PW 2 described it as blue. PW 1 confirmed that the tusks were genuine tusks and not clay.

10. Furthermore, PW 1 testified that they arrived at Naikara at 1.00 a.m., while PW 2 testified that they arrived at 8.50 pm

11. PC Antony Kaburu (PW 3), was the investigating officer. PW 3 took over investigations from PC Onyancha Ontarije. PW 3 testified that the three tusks were in a blue manila sack.

12. The appellant in his unsworn statement testified that he was a pastoralist farmer. During the material date he had taken his cattle to graze in the park for wild animals. At about 2.00 a.m. KWS officers arrived where they were grazing their cows. He ran away but fell down and was then arrested by 10 KWS officers. He was brought to Narok police station and charged with these offences.

13. I have re-assessed the entire as I am required to do according to *Peters v. Sunday Post Ltd (1958) EA 424.* I find from the totality of that evidence that the appellant was convicted on sound evidence in count 1, which charged him with possession of three pieces of elephant tusks. The offence was proved beyond reasonable doubt.

14. I find from the totality of the evidence that count II, which charged the appellant with dealing in three elephant tusks was not proved. The prosecution did not produce evidence that the appellant was a dealer in elephant tusks. The evidence produced indicated was that he was in possession of those three tusks and was willing to sell them to PW 1 and PW 2. There was no evidence of the purchase price. There was no evidence of bargaining between the parties. There was no exchange of money. In short count II was not proved.

15. Furthermore, count III, which charged the appellant with keeping of the three elephant tusks amounts to splitting of charges, which in principle is not acceptable. It is substantially covered by count I. In the circumstances, to convict the appellant in count III will amount to double punishment. Double jeopardy is prohibited by article 50 (2)(0) of the 2010 Constitution. It is also prohibited by section 138 of the Criminal Procedure Code [Cap 75] Laws of Kenya. The case of *Seifuslo Bakari v. R [1960] EA* held that a person shall not be punished twice for the same offence. In the instant appeal, the offence of possession of the three elephant tusks is the same as keeping the three elephant tusks. He is therefore acquitted in count III.

16. Furthermore, I find that count I as drafted is defective according to *Tiapukel Kuyoni & Another v. R (2017) eKLR.* Section 95 of the Wildlife Conservation and Management Act is self regulating for it both creates the offence and provides for its punishment. The punishment provided for a sentence is a fine of one million shillings [Ksh.1,000,000/=] or imprisonment of not less than five years or to both such imprisonment and a fine.

17. In the circumstances, the citation of section 92 of the Wildlife Conservation and Management Act in the statement of the offence is superfluous and irrelevant. However, I find this to be a curable error in terms of section 382 of the Criminal Procedure Code.

18. The upshot of the foregoing is that the appeal against conviction in count I is hereby dismissed. The appeal against sentence is allowed with the result that the sentence of shillings twenty million and life imprisonment in each of the counts I, II and III are hereby quashed.

19. In respect of count I, in the light of the mitigating and aggravating factors, I hereby sentence the appellant to a fine of shillings one million in default 12 months imprisonment. In addition the appellant is hereby sentenced to ten years imprisonment.

Judgment delivered in open court this 16th day of April, 2018 in the presence of Mr. Kilele for the appellant and Mr. Mukofu for the state.

J. M. Bwonwonga

Judge

16/4/2018