



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO 87 OF 2016

FEISAL MOHAMED ALI ALIAS FEISAL SHAHBAL.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment and sentence made by the Principal Magistrate's court at Shanzu (Hon. D Mochache) on 22nd day of July, 2016 in Mombasa Chief Magistrate's criminal case No 1098 of 2014, Republic Versus Abdul Halim Sadiq Omar & 5 Others)

JUDGMENT

1. The Appellant herein FEISAL MOHAMED ALI Alias FEISAL SHAHBAL and five others were charged with offences under the Wildlife Conservation and Management Act, 2013 comprising of two (2) counts namely;

In Count I, they were charged with possession of wildlife trophies contrary to section 95 as read with section 92 of the Wildlife and Management Act, No 47 of 2013 of the Laws of Kenya.

The particulars were that;

“On the 5th day of June, 2014 at the business premises of Fuji Motors East Africa Limited, situated along Tom Mboya Avenue Tudor Estate, Mombasa, the appellant jointly with others were found in possession of wildlife trophies of and endangered species namely 314 pieces of elephant tusks weighing 2152.45 kg without a permit”.

In count II, they were charged with dealing in Wildlife trophies contrary to section 84 (1) as read together with section 92 of the Wildlife Conservation and Management Act No. 47 of 2013 of the Laws of Kenya.

The facts were that;

“ On the 5th day of June, 2014 at the business premises of Fuji Motors East Africa Limited situated along Tom Mboya Avenue, Tudor Estate, Mombasa, the appellant jointly with others were found dealing in wildlife trophies of an endangered species namely 314 pieces of elephant tusks weighing 2152. 45 kgs without a permit.”

2. The case proceeded for hearing before the trial court which rendered its judgment on 22nd July, 2016, whereby the appellant was convicted of the offence of being in possession of trophies of an endangered species and convicted to serve twenty (20) years imprisonment and in addition pay a fine of Ksh 20,000,000/- (Twenty Million shillings).

3. The appellant was aggrieved and dissatisfied with the judgment, conviction and sentence, hence filed an appeal in this court citing the following grounds in his petition of appeal dated 2nd August, 2016:

(a) That trial court erred in law and in fact in that contrary to the provisions of Article 50 (2) of the Constitution as read with Section 70 and 178 of the Criminal Procedure Code, the trial court should have delivered its judgment in the Shanzu law Courts but strangely and without any involvement of the parties, the trial court delivered its judgment in the said matter on 22.7.2016 in a compound belonging to the complainant to wit Kenya Wildlife Services at Marine park ,Bamburi. This was despite an objection against such a delivery of judgment in the said venue by accused No 1 and the appellant. Consequently, it clearly appeared that the trial court was simply out to favour the complainant. In the result justice was not done and was not seen to have been done in the case. (As such, the complainant was a judge in its on case).

(b) That the trial court erred in law and in fact in that the entire judgment lacks logic, reason or rhyme as there is no consistency in the manner that the trial court handled what the court described as puzzles in the prosecutions' case. In the result the trial court erred

in that the said judgment failed to unravel the said puzzles with any degree of certainty which thereby means that the conviction of the Appellant for the offence of possession of wildlife trophies is not safe and reliable.

(c) That the trial court erred in law and in fact in that it failed to determine with any degree of care the inter play of the following facts;

(i) Upon the alleged discovery of the ivory at the premises of **Fuji Motors East Africa Ltd in Tudor, Mombasa** no photographs were produced in proof of that fact nor was any inventory made of the said discovery.

(ii) immediately upon the said alleged discovery four people namely a watchman, two young Asian men and a cleaner were in the said compound. At least the watchman and the said young men knew who had the keys to the store where the contraband goods were kept. Strangely none of the said four people participated in the said trial either as witnesses or as accused persons.

(iii) The facts surrounding the alleged removal of the said ivory from the premises of **Fuji Motors East Africa Ltd** was not proved at all. In other words the motor vehicle that was used and the people involved in the loading and off-lading were not called as witnesses.

(iv) Severally the trial court went as far as to say that the police officers who visited the scene of the alleged discovery were not trustworthy or credible witnesses.

Accordingly, it is highly doubtful whether indeed any ivory was found in the premise of **Fuji Motors East Africa Ltd** and that doubt should have been returned in favour of the appellant.

(d) That the trial court erred in law and in fact in that the final determination of the matter is completely at variance with a number of fundamental holdings that the trial court made. These are:-

(i) At page 58 of the said judgment, the trial court stated: “.....I hasten to add that if this court (trial court) would acquit the accused persons then there would be outrage from the public, who have been whipped emotionally to believe that the accused persons are guilty.....”

(ii) At page 60 of the said judgment, the trial court stated “...the case as presented before me is a puzzle...the investigating officer simply scattered flowers (evidence) without his involvement.....”

(iii) At page 63 of the said judgment, the trial court stated: “....accused No. 6 (appellant) was aware that the ivory had been recoveredhis errand boy had been arrested.....”

(iv) At page 64 of the said judgment, the trial court stated: “...this is a glaring contradiction that creates dents in the prosecution’s case

(v) At page 73 of the said judgment, the trial court stated:”....the people who could have explained to this court who brought the ivory into the premises were the night guard, the two young men and the cleaner but the prosecution did not find it fit to call them as witnesseshaving failed to call these crucial witnesses, the prosecution failed to discharge that burden.”

(vi) Also at page 73 of the said judgment, the trial court stated:”...the evidence of accused No 2 was not rebutted....”

(vii) At page 67 of the said judgment, the trial court stated:”.... the six million dollar question that begs for an answer is, were the police officers trying to protect someone?

(viii) Between pages 66 and 67 of the said judgment, the trial court found that the police officers who allegedly pounced on the ivory in question were not reliable.

(ix) At page 68 of the said judgment, the trial court held that Mr Tom Juma, a police officer who appeared as prosecution’s witness No 21 was not a credible witness.

The sum total of the said fundamental holdings is that there were glaring doubts that had been created and as such the trial court should have given the benefit of those glaring contradictions (doubts) in favour of the appellant hence acquit him of the offence.

(e) That the trial court erred in law and in fact in that arising from what is stated in paragraph 3, the trial court manifestly contradicted itself for it was not possible to acquit accused 1 and 2 and at the same time convict the appellant as the primary evidence against the three was co- joined.

(f) That the trial court erred in law and in fact in that having expressly found out that the people who could have told the court the identity of the owner of the ivory therein did not testify, it was manifestly unjust for the trial court to, only in the case of the appellant, assume that the very same ivory (which the court did not know who was the owner) miraculously belonged to the appellant.

(g) That the trial court erred in law and in fact in that arising from the contents of paragraph 3-6 herein the trial court failed to make determinations on a number of crucial issues that had been left to the court for determination. Consequently, the judgment of the court is incomplete and not reliable.

(h) That the trial court erred in law and in fact in that it applied double standards in its consideration- a very understanding and fair consideration for accused No .1-5. **BUT** a very unreasonable and harsh consideration against the Appellant. Indeed, bearing in mind that trial court's holding on the issue of the expectation of the public, the court erred in that it arrived at a decision which was meant to appease the public.

(i) That the trial court erred in law and in fact in that the circumstances surrounding the case failed to establish how the ivory landed at the scene and how the same was removed. As such, the trial court erred in that it failed to realize that the said two crucial facts rendered the purported chain of evidence against the appellant totally unreliable. In other words the chain had no beginning and the same crumbled right from the start.

(j) That the trial court erred in law and in fact in that it blamed the advocates involved in the case for having dragged the proceedings when the very court had at the conclusion of the case commended the advocates for their proper conduct. Herein, it is quite clear that the trial court is inconsistent and is therefore unreliable.

(k) That the trial court erred in law and in fact in that it convicted the appellant on the basis of mere suspicion and to the extent that the trial court acquitted accused No. 1-5 of the said offence which persons, according to the incredible story presented by the prosecution had a lot to do with the alleged offence, it was not open to the said court in the said breath to convict the appellant of the appellant's alleged profile in the entire episode was of a much lower scale than that of accused No 1-5.

(l) That the trial court erred in law and in fact in that it relied on its own theory of evidence when it held that motor vehicle KAM 197 F was the same as KAM 832W and that therefore exhibit 19 was either entered falsely or that the motor vehicle had a fake registration number. Such a finding is not supported by any evidence whatsoever.

(m) That the trial court erred in law and in fact in that it assumed, without any evidence, that the telephone calls were in respect of the communication relating to the discovery of the ivory. The court also wrongly assumed that the appellant ran away to Tanzania. Indeed, the trial court erred in that the trial court was heavily influenced by the adverse media reports that had been circulating ever since the discovery of the contraband and which the complainant was the prime author of, for the sole purpose of prejudicing the appellant, who was thereby denied justice. Hereby the trial court utterly contradicted itself. As such its decision is unreliable and ought not to be allowed.

(n) That the trial court erred in law and in fact in that it generally found out a number of crucial witnesses for the prosecution were shaky and not believable and thereby used that reason to acquit accused 1-5 but strangely used the same shaky and incredible evidence to convict the appellant.

(o) That the trial court erred in law and in fact in that the sentence imposed by the trial court against the appellant of imprisonment for a term of 20 years plus the imposition of a fine of Kenya shillings Twenty Million (Ksh. 20,000,000/=) is illegal for and imposition of a fine must, *per force*, have a default clause for a prison term in default of payment of such a fine.

(p) That the trial court erred in law and in fact in that the aforesaid sentence was wholly unjustified and totally unwarranted. The trial court flippantly dismissed the strong mitigating circumstances and proceeded to make its own political views which clearly showed that the court was more interested in pleasing the political class as opposed to doing justice to the parties that were before it.

(q) That that the trial court erred in law and in fact in that the conviction and sentencing imposed was totally against the weight of evidence that had been presented before the court of law.

Further, the appellant on 2nd January, 2018 filed supplementary grounds of appeal. They are as follows;

(a) The learned magistrate erred both in fact and in law by the reprehensible, wonton and illogical act of unlawfully, illegally and un-procedurally destroying the earlier record of the trial and proceedings conducted by other magistrates and particularly since no party to the proceedings had applied for or requested for or called for any such destruction of any of the proceedings of the court;

(b) The learned magistrate erred both in fact and in law by unlawfully, illegally and un-procedurally destroying the earlier (and alleged) record of the proceedings that led to the issuance of alleged warrant of arrest executed against the appellant in Tanzania and or failing to make the said record a part of the proceedings before the court;

(c) The learned magistrate erred in fact and in law in arriving at the decision to convict the appellant and thereafter subjecting him to a 20 years sentence delivered in the shortest 2 pages judgment devoid of any analysis, logic or reasoning based on any evidence placed before the court;

(d) The leaned magistrate erred in law in failing to discharge the appellant after arriving at findings of the court, which she recorded and which she ought not have ignored, that left the learned trial magistrate with no option but to return a finding of not- guilty as relates to the appellant;

(e) The learned magistrate erred in fact and in law in as much as she failed to ensure that her judgment must qualify as such under the law and flow from an address of the correct issues, or be quashed;

- (f) The learned magistrate erred in fact and in law by failing to conduct the hearing in accordance with the law;
- (g) The learned magistrate erred in fact and in law by turning a blind eye to the failure by the prosecution to produce crucial witnesses and evidence and adopting the presumptions in law favourable to the appellant;
- (h) The learned magistrate erred in law for failing to consider evidence actually produced before the court;
- (i) The learned magistrate erred both in fact and in law in her failure to ensure that the court remained independent and impartial during the course of the entire proceedings and judgment;
- (j) The learned magistrate erred in law by accepting, considering and acting upon hearsay evidence and several untested theories under the pretext and or label of being ‘circumstantial evidence’;
- (k) The learned magistrate erred in law by allowing herself to be driven by suspicion and or motivated by suspicion and or basing her considerations on suspicion, which can never in law form the basis of any conviction;
- (l) The learned magistrate erred in law in as much as she failed, refused and or neglected to consider the exact extent of the burden of proof required of the prosecution in the test of “beyond any reasonable doubt” and the prosecution’s failure to achieve it;
- (m) The learned magistrate erred in law by failing, refusing and or neglecting to make the presumption required of her in law, that the failure by the prosecution to produce evidence means that such evidence is unfavorable to the prosecution’s case.
- (n) The learned magistrate erred both in fact and in law in as much as she completely abdicated the court’s lawfully mandated role in a criminal trial;
- (o) The learned magistrate erred both in fact and in law in as much as she placed reliance by her court on matters not presented before the court as evidence;
- (p) The learned magistrate erred both in fact and in law in as much as she placed reliance by her court on matters not on the court’s record at all;
- (q) The learned magistrate erred both in fact and in law in as much a she placed reliance by her court and gave consideration and relied upon illegally obtained evidence;
- (r) The sum total of the foregoing is that inevitably, the learned magistrate erred in law and in fact by convicting the appellant when the prosecution did not prove their case to the required standard thereby occasioning the appellant a miscarriage of justice.
- (s) The learned trial magistrate erred in law and in fact in convicting the appellant where the essential ingredients of the charge of **POSSESSION OF WILDLIFE TROPHIES CONTRARY TO SECTION 95 A READ TOGETHER WITH SECTION 92 OF THE WILDLIFE CONSERVATION AND MANAGEMENT ACT, NO. 47 OF 2013 OF THE LAWS OF KENYA**, had not been proved by the prosecution;
- (t) The learned magistrate erred in law and in fact by drawing adverse inferences against the appellant thus shifting the burden of proof contrary to the law of evidence;
- (u) The learned magistrate erred in law and in fact by failing to consider the defence put forward and submissions by the appellant;
- (v) The judgment is not well reasoned and is based on suspicion, guess work, speculation and the summation of alleged facts whose process, logic and reasoning are not explained;
- (w) The learned trial magistrate erred in law and in fact by basing her judgment on inconsistent, incredible, contradictory and unreliable evidence of the prosecution witnesses;
- (x) The learned magistrate erred in law and in fact by basing her judgment on assumptions, theories and suspicion thus arriving at a finding which was incapable of support by and contrary to evidence on record;
- (y) The evidence on record was not sufficient to sustain a conviction;
- (z) The learned magistrate erred in law in as much as she allowed or ignored or neglected the clear and systematic violation of the appellant’s constitutional rights and particularly his rights under **Article 27 (Equality and Freedom from discrimination), Article 28 (Human Dignity), Article 29 (Freedom and Security of the person,) Article 31 (Privacy), Article 39 (Freedom of Movement and residence), Article 47 (Fair Administrative action), Article 48 (Access to Justice), Article 49 (Rights of persons arrested), Article 50 (Fair Hearing), Article 51 (Rights of persons detained, held in custody or imprisoned), Article 50, Article 50 (2) (b), Article 50 (2) (c), Article 50 (2) (g), Article 50 (2) (h), Article 50 (2) (i), Article 50 (2) (i), Article 50 (4),and Article 31 of the Constitution of Kenya;**

4. The appeal was admitted for hearing before a one judge bench and directions taken to the effect that the hearing would be by way of

written submissions.

The appellant's counsel filed their written submissions on 22nd January, 2018 while the Respondent's counsel filed theirs on 29th December, 2017.

5. The appeal proceeded for hearing on 18th April, 2018 where the counsel for the parties highlighted their submissions.

6. Mr Magolo, one of the appellant's counsel began by submitting on the manner in which the proceedings from which the appellant was convicted and sentenced were conducted before the trial court. He stated that it was their argument that the same called for the nullification and setting aside of the entire proceedings, conviction and sentence based on the same.

7. He submitted that the trial, for the appellant who was charged with five others not before court in this appeal commenced with the plea, applications for bond, rulings and testimony of four witnesses before Mr Karani (SRM) who ceased to have jurisdiction and it was then taken over by Hon D. Mochache (SPM) who started the matter de novo, by consent of the advocates on record then. He stated that the said proceedings were missing from the record of appeal hence the court and all the parties involved have been denied the use and benefit of them. He argued that an order for a trial to start de novo is not equivalent to a retrial as ordered by the High court so that the proceedings before the preceding magistrate ought not be expunged or destroyed or hidden or kept away. He submitted that this alone renders the trial, conviction and sentence against the appellant a nullity.

8. According to Mr Magolo, the absence of these initial proceedings denied the appellant the right to test the credibility of the witnesses and an opportunity to demonstrate to the court that there was a difference between what had been said either before another court and what was being said in the current court. He pointed out that this happened when Pw6, CIP Peter Mbuu was being cross examined by Mr Mwakisha, counsel for 1st accused at page 32 of the proceedings and the prosecution objected because he did not want the preceding proceedings to be referred to.

9. Mr Magolo also submitted that this court, contrary to what is expected of it as a first appellate court, has been denied an opportunity to ever see, read, or analyse the evidence that was adduced before Mr Karani with regard to what transpired in the case during plea-taking, the bond applications, rulings, pre-trial and evidence of the first four (4) witnesses.

10. Mr Magolo still arguing on the effects of the missing proceedings, stated that additional five (5) witnesses and their statements, who had not been available before, were available and testified as Pw1 to Pw5. He urged the court to treat the evidence of these five witnesses with suspicion.

11. Mr Magolo further submitted on how the trial magistrate surprised them by moving the court to the Kenya Wildlife services premises where the ivory and appellant and his co-accused persons were displayed to the press as the judgment is pronounced. He stated that such scenario did not guarantee the appellant any justice.

12. Finally, Mr Magolo submitted against a re-trial being ordered in the event the court found some evidence because the appellant who was denied release on bond, and having been in custody since 2014.

13. Mr Taib, also counsel for the appellant, in submitting on the missing record stated that it was because;

(a) the record and its contents were relied upon by the trial magistrate to secure the conviction of the appellant.

(b) the said record would have confirmed their contention that the entire evidence and proceedings were premised on an illegality and in contravention of the construction which is irredeemable and incurable.

14. According to Mr Taib, the appellant was a subject of a rendition. That he was kidnapped in Tanzania and illegally brought back to Kenya. Also, that all the evidence that was adduced against the appellant was illegally obtained, which is inadmissible under our Constitution, particularly under Article 50 of the same.

15. Mr Taib went on to submit that why he refers to the arrest of the appellant in Tanzania as "being kidnapped", it is because they failed, refused or neglected to produce him before a court there as required so that he is either charged with any offence they wish and let him have his day in court to defend himself or open extradition proceedings against him based on any warrants that may have been issued against him. That instead, the prosecution came up with a hypothesis which the trial magistrate believed that the appellant ran away from Kenya.

16. Mr. Taib also contended that the grounds upon which the trial magistrate relied on to return verdict of conviction against the appellant were innocent acts that were incapable of having any "mensrea" or actus reus" of any crime read into them (ref to pages J 76 lines 18-27 and J77 lines 1 to 8 of the record of appeal as referred to at page 49 of the appellant's written submissions). For a conviction to be sustained, a court has to link the appellant to the crime he is alleged to have committed. He submitted that Pw6, the O.C.S testified that he received a tip off on the existence of ivory at Fuji Motors from an informer but he never gave evidence of the identity of the owner of the ivory and neither did he mention the appellant.

17. In submitting that the prosecution failed to link the appellant to the crime he was convicted of, Mr Taib stated that there was no evidence that;

(a) the appellant was never seen loading any ivory on any vehicle;

- (b) the appellant was seen driving any vehicle loaded with ivory;
- (c) the appellant was a passenger in any vehicle carrying the ivory;
- (d) the appellant arrived at the premise in question with any vehicle containing any ivory
- (e) the appellant was never seen off-loading any ivory from a vehicle to the wooden premises where they were found ;
- (f) the appellant ever brought, or sold or dealt in ivory with anybody.

18. Mr Taib further submitted that the appellant was charged, convicted and sentenced with an offence of dealing with wildlife trophies in respect to endangered species and yet no evidence was adduced to confirm this as per the schedule to the Act. That the expert witness who was called to testify admitted that he did not conduct any scientific tests but only observed the trophies and gave his professional opinion.

19. Also submitted is that the prosecution failed to provide evidence of Wildlife trophies and ivory on the site at the time of the alleged discovery (photographic), to call any of the members of public they alleged loaded the ivory onto their police lorry, or an inventory of what was recorded. He submitted that the reason for this was because the evidence must have been prejudicial to their case.

20. Mr. Taib submitted that the prosecution failed to call the two Indian persons they found at the premises where the ivory was found and the security guards who were looking after the premises as witnesses. That the prosecution even produced a register of vehicles movement to the premises but failed to call its maker.

21. On the other hand, Mr. Muteti, leading counsel for the respondent, opposed the appeal on both conviction and sentence by relying on their written submissions dated 27. 12 2017 and filed on 29.12.2017, together with the two bundles of authorities filed on 16.4.2018 and 17.4.2018 respectively.

22. On the issue of the missing record, Mr Muteti cited decision of the Supreme Court of Ghana in the case of **KWAME NKURUMA VRS REPUBLIC**, that an appellant is not entitled to an acquittal on the basis of loss or destruction of records. And that if there is such allegation, "the court hearing the appeal should inquire into the veracity of the claim, the magnitude of the list missing, or destroyed record and the relevance thereto the determination of the appeal". 23. He submitted that the material before court was sufficient to determine the appeal before it since all the evidence that was taken by the trial court has been captured in the record of appeal. He also cited the case of **JOSEPH MAINA KARIUKI VRS REPUBLIC (2011) eKLR** on the last paragraph at page 4 and **PIUS MUKAPE MULEWA AND ANOTHER VRS. REPUBLIC e KLR** at page 2 which held that without evidence over the active participation of the disappearance of the record, a magistrate should not be held at fault and that loss of a record cannot be a ground for one to be acquitted respectively.

24. On the effect of an order for a trial to start de novo it was Mr Muteti's contention is that contrary to the submissions by the appellant's counsel that this had everything to do with the disappearance of the missing records, when a matter starts de novo the trial starts a fresh whose effect is to obliterate earlier proceedings but the charge remains the same. He cited the case of **REPUBLIC VRS COMMISSIONER OF POLICE, EX-PARTE SIMON WILLIAM MUREITHI e KLR 2013** at page 3 of the decision.

25. He reiterated that the duty of the first appellate court as being to re-evaluate the evidence and make an independent finding as to whether the conviction is supported by the evidence. He said that he believed that with the material before court, it could undertake this duty and ably decide on whether the conviction was safe.

26. In addressing the issue of perceived bias by the court as against the appellant, Mr Muteti submitted that this is a matter, a party who feels the court is biased against him or her, would raise before the trial court so that it is dealt with at that level. He stated that this was not raised by the appellant during his trial before the said court and not moments before the delivery of judgment as it would amount to scuttling due process.

27. On the issue of the judgment being delivered at the Kenya Wildlife services premise, Mr Muteti submitted that the record would show that proceedings had previously been conducted at the same venue, by the same court, with the same counsel and parties, and yet no objections were raised then.

28. In response to the claim that the appellant was brought into the country illegally and charged, Mr Muteti referred the court to the evidence of Pw14 and Pw18 at pages 97 and 144 of the record of appeal, who testified on the process they employed in bringing him into the country and which process is supported by the decision in the case of **ATTORNEY GENERAL OF THE GOVERNMENT OF ISRAEL VRS AICHMAN**, where the court declined to quash trial of a Nazi war criminal on account of him having been kidnapped and brought to trial".

29 He submitted that the appellant was not kidnapped and that the law was complied with. He summed up by stating that if the appellant was aggrieved by the action of having been brought back to face trial, he had an option to file for damages for violation of his Constitutional rights as was pronounced by the court of appeal in the case of **JULIUS KAMAU MBUGUA VRS REPUBLIC, 2010**.

30. Assisting Mr Muteti, was Mr Wamotsa also counsel for the state (Respondent). He submitted that there was direct evidence of possession of the ivory by the appellant and the co-accused persons which was adduced at the trial. He also submitted that there was circumstantial evidence pointing at the appellant and the co-accused as perpetrators of the crime.

31. Mr Wamotsa also submitted that the evidence of Pw6 and Pw9 was corroborative and consistent that the ivory was received at the premises of the 5th accused person and that the 1st accused person was the manager of the said premises.

32. Further, Mr Wamotsa submitted that Pw13, a phone analyst testified that there were numerous phone conversations between the 1st accused person, 2nd accused person and the appellant which confirm that the appellant was in Kenya between 4th -5th June, 2014, so that this defence of alibi could not stand. He also stated that the conduct of the appellant of fleeing to Tanzania was quite telling.

33. Mr Wamotsa dismissed the defence by the appellants and his co-accused as mere denials.

34. This court being the first appellant court, it is trite law that its duty is to look at the record of evidence that was adduced at the trial afresh, re-evaluate and analyze the same while bearing in mind that it did not have the advantage of observing the demeanor of the witnesses.

35. I will set out the evidence that was tendered in court by the parties in support of their respective cases in summary to enable this court decipher the relevant issues.

THE EVIDENCE:

36. The prosecution called twenty (23) witnesses.

Pw1, ABDULAHALIM ABAS AHMED told the court that he owns a canter which he uses to transport goods. He testified that in the month of May, 2014, he received a call from the appellant, FEISAL, in which he told him that he needed to transport goods from Tudor using his canter. He said that he had some work but he told the appellant that he would get him one. He then called one KASSIM (herein referred to as Pw2) and asked him to get a canter for Feisal, the appellant so he could shift his things. That Kassim (Pw2) got the canter and Pw1 sent him the appellants phone so he could call him and sent the canter to Tudor.

36. **PW 2 KASSIM HASSAN SHUGULI** who introduced himself as a broker who also works as a loader, recalled that in the month of May, 2014, he received a call from Abdul Halim (Pw1) who told him that there was a customer who needed to move house from Tudor to Tudor. He then asked Pw1 to send him the customers number and he did Pw2 then called the customer who told him that he was at Sparki Estate Total Petrol station and that they should meet there. He then called Ali (herein referred to as Pw3) who owns a motor vehicle and he told him that his vehicle was with the driver and that they should meet at the market. Pw2 went on to state that he met the said customer who he identified as the appellant and on showing him the vehicle, the appellant told him that he wanted a covered vehicle for transporting his goods. Pw2 identified the vehicle as registration No KAT 629 S. Upon the appellant indicating that he did not like the canter they had brought, Pw2 called one Abdi who he said had a covered vehicle. He then asked the appellant to give him transport for going to the market and he gave him Ksh 300. He also said that the appellant was driving a black vehicle with Tanzanian registration numbers.

37. **Pw3, ABED AWADH**, a transporter and he told court that he received a call from KASSIM HASSAN (PW2) informing that there was someone who wanted to move within Tudor. He called his driver SEIF AHMED and asked him to proceed and meet Pw2 at the market so he could get instructions. That the driver called him after 20 minutes and told him that the customer had rejected his vehicle because it was open and he wanted a covered one. He confirmed that his vehicle was registration No KAT 629 make Mazda.

38. **PW 4, SEIF AHMED MOHAMED**, a light transport driver told court that in the month of May, 2014, he received a call from his boss, ALI ABED (Pw3) who asked him to go and shift a customer within Tudor and then proceeded to Nyali to collect garbage for off loading at the market. That, he, Abdul and Kassim proceeded to Sparki at a petrol station where a small vehicle came and the person in it viewed their vehicle and told him he would have preferred a covered motor vehicle. He asked for transport charges and was given Ksh 300/= by a person he identified as the appellant in court. He also identified the 1st accused person as the person who was with the appellant in the small vehicle.

40. **PW5, ABDULRAZAK OMAR ABDALLA** introduced himself as a vegetable vendor cum transporter. He said he owns motor vehicle registration No. KAM 832 W, Mitsubishi canter. He said that CID officers called and asked him to go where his vehicle was parked so he could do some work for them at T.S. office. He rushed there and found 3 people whereby one of them identified the others. These people then asked him to go with them to urban and on the way, they told him to go to Urban CID office where he was asked if he knew Feisal. He confirmed that he knew Feisal and that he had been introduced to him by a broker called Kassim (Pw2) in May, 2014. He went onto state that he had met Feisal, who he identified as 6th accused person (herein referred to as the appellant) with the 1st accused person at a petrol station where they came in a black Vitz. Pw5 exchanged telephone numbers with the appellant who he said he knew very well as they had been meeting at the mosque next to GPO where they pray. They agreed and the appellant hired his vehicle for a day at Ksh 4,000/=. That the appellant called him the following day and they met. The appellant gave him Ksh 8000/=. He then told him that the vehicle was okay and it was at a go down and would return it the following day. Pw5 said that they agreed that the appellant uses the vehicle and return it when he was through with the work he was doing. The appellant called him after three days and asked him to go and collect the vehicle at the petrol station at Sparki. When he got there, he found no one in the vehicle and he called the appellant who in turn called one Kaka. That Kaka emerged, opened the vehicle and on checking Pw5, confirmed it was ok. He drove off and did not see the appellant after this, until he read in the papers that he had escaped to Tanzania. He said that he never owned up to the police because he was not sure that they used his vehicle to transport the tusks. He also said that he did not hide the vehicle or change its registration number.

41. At the time of the offences the appellant and the co-accused persons are charged with are alleged to have been committed, **PW 6, No 232106 CIP PETER MBUA** was the O.C.S at Makupa police station. He told the court that on 4th June, 2014, he was at the station when he was informed on a tip off that there was ivory hidden at some premises somewhere at Tudor. He mobilized the officers who were under his command such as Corporal KOSGEY and Corporal AGGREY WAKOLI and the team proceeded to the place where they had been

told the ivory was hidden. He said that the scene was a yard of Fuji Motors East Africa Ltd and they found the gates to the premise locked. He also said that the watchman told them that he must get permission to open the gate and went to call his bosses. The watchman took about two hours to open the gate but he did so after having several calls. Pw6 said that he sought reinforcement from the Administration police and sent corporal Aggrey Wakoli to alert the KWS personnel to assist them with sniffer dogs and taken part in the operations. And after they gained entry into the premises. Pw6 said they found two minors of Asian origin whom he concluded knew nothing about the ivory. He asked them where the boss was and was told he was not around. They then went to a wooden store and demanded to see the manager. Pw6 said that the said manager, who was identified as the 1st accused person came there at about 10.00 am and he introduced himself as the manager, ABDUL HALIM SADIK. He then asked him to open the wooden store where they suspected the ivory was kept but he told him that he had left the key in the house. Pw6, who said he knew what he wanted broke the store and recovered the elephant tusks that were hidden and in manila sacks which were 72 in number and covered with red canvass. He then ordered the manager to be arrested and they requested members of public to help them load the tusks into the AP service lorry which had joined them since the ivory was heavy. Pw6 said that they took the tusks to Makupa police station where identification and markings were done. Pw6 handed over the investigations to KWS, CID personnel and the scenes of crime personnel who photographed the ivory.

42. **PW 7, CORPORAL JOEL KOSGEY**, was also attached to Makupa police station and he testified that he accompanied the OCS, (Pw6) to the scene of crime where they broke into a wooden store, entered and recovered the ivory. He said that they saw a consignment covered by a red turbine and on opening it, he saw tusks in manilla sacks. In cross examination, Pw7 said that while at the scene of crime, he heard the OCS (Pw6) asking the 2nd accused person to open the store and that the 2nd accused person told him that he was trying to contact the manager. He, therefore, exonerated the 1st accused person from the claim that he had introduced himself as the manager.

43. **PW8, NO 7406 – AW (II) ASSISTANT WARDEN III, ADEN ABASI JULLE**, the officer in charge of investigations in Mombasa Marine Park told court that he was called by the area Director and informed that a consignment of ivory had been recovered and was at Makupa Police Station. And in the company of CORPORAL KADENGE and RANGER KHALIF NASSIR, proceeded to the said station upon being instructed to do so. He was met by the OCS (Pw6) at Makupa police station and he saw the consignment of ivory which was displayed. Pw6 then had then led them to the scene of crime a Fuji Motors in Tudor where he was shown the wooden structure from where the consignment was said to have been recovered. He was also informed that two suspects namely Abdul Halim said and Ghalib Sandik had been arrested. They went back to the station where together with a team from the CID, LINGO and MARTIN, started counting and labelling the consignment. They found they were 314 pieces and marked them A1- A 314 with a red pen. They also categorized them into whole and cut pieces and separated them from new numbers starting with alphabet B for the small pieces. They weighed the identified their types and explained the process of charge of ownership.

44 **PW9, NO. 47447 CORPORAL AGGREY WAKOLI** also attached to Makupa police station, he told court that he was on SPIU patrol when the O.C.S called him. He explained that SPIU team works under cover. He also said that he was in charge of P. C. JUMA and P.C.GITAU and they returned to the police station where they joined the O.C.S CORPORAL KOSKEI and driver. They were brief on the information the O.C.S led received and they accompanied him to the scene of crime in Tudor opposite St Augustine school. His evidence was that the watchman refused to open for them saying he had been given instructions not to open. The OCS left and returned in uniform. That he also called for reinforcement from the Administration police led by IP GABBOW. Pw 9 went on to state that eventually they managed to enter the compound and the O.C.S, who appeared to have information where the said tusks went straight to a timber house which was locked. There they found two young men praying and a watchman. Pw6 then asked them to open the door and they told him that there was a manager who they called Pw9 said the manager came but when asked to open the house, he said that he wanted to talk to the O.C.S, (Pw6) on the side. Pw9 identified the 1st accused person as this manager who he said he had no keys. They broke into the store which had two rooms. They found the tusks wrapped in polythene bags and covered with a red canvas. He said that there was also a male African who was sleeping and introduced himself as a cleaner. He finally said that the 2nd accused person was arrested on the instructions of the CCIO. In re- examination, PW9 concluded that to date the bosses remain at large.

45 **PW 10, JOSEPH THUITA KITUE**, introduced himself as an employee of the National Transport and Safety Authority (NTSA) and seconded to KRA. His evidence was limited to identifying the vehicles to the respective ownership. He said HUSEIN had ¼ share, NAHID ZAHAF GEOFFREY had ¼ share and entry No 2 confirm Dr. BULITS HASSAN has ½ the divided there being transferred to both ALI and NAHID. This showed that the second accused was the lessee for a period of 5 years 3 months on 810-820.

46. **PW11, SILA MUZUNGU KITOLE**, a Registrar of persons said that he takes finger prints and issues ID cards. He testified that he received a request on 6.6.2014 from the D.C.I.O Mombasa, requesting that he identifies the details of ID No. 08524707 belonging to the appellants and the results were positive.

47. **PW12, HASHIM GOT SAT**, a land Registrar at Mombasa told court that on 25.6.2014, he received a letter under No ...CID EC/4/4/7/VOL.XI B 121 dated 9.6.2014 requesting for verification of property title number Mombasa BLOCK XI/8/12/8200(original No 810) and provide details of the owners and then place a caveat on the title during the pendency of this case. He said he confirmed ownership of the titles and identified certified copies of the green card. He stated that out of the subdivision, there was 812-820 whereby 812 is a subdivision of 810 opened on 9.9.1993 as entry No. He also confirmed that Dr. BILKIS HASSAN had 1.2 undivided title, ALI SRAF consignment and found it was 2152.45 kgs.

48. **PW 13, NO 233328 CIP JAPHET GEKONGE ARUMIA**, a CID officer seconded to KRA, and formerly worked with the Interpol narrated how the appellants was arrested and brought back to Kenya by Zanzibar police.

49. **PW14, NO 6347 CAC JOSEPH KWECE** of CID Pangani in Nairobi told court that he was previously attached to CID, Urban and that on 29.12.2014, he and two others were dispatched by S.P THANGALANI NDUMBA to collect the appellants from Lunga lunga from Tanzanian authorities. He explained that the appellants was wanted by the Kenyan authorities in connection with government trophies that had been recovered from Tudor. They proceeded to Lunga lunga and on arrival the appellants was handed over to them by the two Interpol officers who had arrested him, for questioning by the Provincial CID Headquarters in Mombasa.

50. **PW 15, PETERSON WACHIRA** of the Registrar of companies in Nairobi testified and gave details of ownership of FUJI

MOTORS E. A LTD as follows;

1. GHALIB KARA – (Accused 2)
2. NOOR MOHAMED
3. ABDULMAJEED IBRAHIM

All Kenyan nationalities of P.O. Box 81794- 800200, with 5000 total share registered on Plot No. 812/XI of tom Mboya, Mombasa.

51. **PW 16 NO 232493CIP MOMO SHAMALLA**, a liason officer at Safricom stated that her duties include servicing request from the police or security agencies or for judicial proceedings. The request include seeking call data records and M-pesa statements.

She confirmed that on the 24.6.2014 she received a request from the D.C.IO. Mombasa (Exhibit P11) for dates in respect of the following numbers

0722(Particulars Withheld)

0725(Particulars Withheld)

0724(Particulars Withheld)

0722(Particulars Withheld)

For communication between 1st May, 2014 to 24June, 2014.

Further subscribe details were;

1. 0722(Particulars Withheld)
2. 0722(Particulars Withheld)
3. 0727(Particulars Withheld)
4. 0723(Particulars Withheld)
5. 0723(Particulars Withheld)
6. 0724(Particulars Withheld)

She said she extracted call records of the said numbers and provide the names registered und eth numbers she however, when cross examined said that she was not asked to analyze communication among the numbers.

52. **PW 17. DAVID KIBOI**, a data records analyst explained to court that his work entails criminal intelligence analysis with specialization of call data evidence .He stated that he was given call data of a number 0722(Particulars Withheld) registered in the name of Feisal Mohamed of ID /No. (Particulars Withheld), the appellant herein. He said the inner No. is (Particulars Withheld). He also said that he was requested to analyze these record on this number between 29.5.2014 and 5.6.20114. He was to establish whether there had been communication between the No. 750 and other 6 numbers being 0725(Particulars Withheld), 0724(Particulars Withheld), 0723(Particulars Withheld),0722(Particulars Withheld),0722(Particulars Withheld), 0727(Particulars Withheld). His findings against the central No. for Feisal came up with a chart showing the links between the above mentioned numbers.

FAISAL'S NO.		TIMES	OUT	IN
0722(Particulars Withheld)	0725(Particulars Withheld)	90	78	12

	0722(Particulars Withheld)	16	10	6
	0723(Particulars Withheld)	7	6	1
	0722(Particulars Withheld)	3	2	1
	0722(Particulars Withheld)	19	13	6
	0727(Particulars Withheld)	10	7	3

And when cross examined Pw17 admitted that his data was incomplete as it did not have the content of the transcript of the conversation.

53. **PW18, CHARLES OMOLLO OURE**, a Chief Immigration officer based at Lunga Lunga Border Control gave evidence that on 24.12.2014 at 11.00am he was on duty when he received the appellant, Mohamed who had a prohibits immigration notice having arrived from Tanzania underarmed escort by three Interpol officers namely Japheth Gekonga and Andrew, from Nairobi and Joel from Dar es salaam. He said that the notice had been issued by Tanga immigration office in Dar-es salaam on 24.12.2014 and he received and stamped it. He said that the appellant was released after they had entered his details in the system and escorted to Mombasa. He said that the appellant was deported from Tanzania but the reasons for his deportation were not stated.

54. **PW19 NO 231371 MR JOHN MUINDE**, a Forensic Document examiner told court that he received a signature specimen from the DCI, Mombasa on 20.7.2015 with a request that he determines the author . It was a gate pass book containing a questioned (disputed) signature which was pointed at by an arrow in red ink and a date indicated as 31.5.2014, a column, on the same row for make/model written Mitsubishi Canter with chasis No written KAM 197 F and for colour white. There was a column for colour indicated as white, a column for name indicated as Feisal and another for signature with a signature entered. He was also presented with two specimen documents labelled Feisal Mohamed Ali signature specimen. These documents were presented with an exhibit Memo Form. Pw 19 was requested to compare the signature in the gate pass book which was pointed with an arrow with the specimen signature of Feisal Mohamed Ali to ascertain whether they had been made by the same person. He under took a forensic analysis and examination of the disputed signature and specimen signatures and confirmed that the entries in gate pass book had been made by the appellant. However, he admitted that he did not have known fresh signatures of the appellant.

55. **PW 20, NO 83004 P.C ANTONY KINYANJUI**, gazetted scenes of crime officer No. 217/11/01/2013 gave evidence to confirm the photographs that were taken of the scene of crime and the exhibits at Makupa police station. He further certified that the trophies were tusks from the elephant. He also told the court that the canter which was parked was empty.

56. **PW21, NO 65596 P.C TOM JUMA** from CID, Mombasa told court that on 4.6.2014, he and his colleagues were briefed by the OCS, Makupa police station (Pw6) that there was a consignment of ivory at Tudor and they proceeded to the venue. Their entry to the venue was delayed by the watchman they found there for want of instructions from the employers. Pw21 said that after an hour they called for reinforcement from the Administration police who came and they all gained entry in to the premises, where they found two more people, being minors of Asian origin who could not tell them whether they were minors or not. They went to the place where they had been tipped the tusks were kept and demanded that the store be opened but the watchman and two people told them that the key was with the manager. The manager was called but when they demanded he opens the door to the said store, he said he had no keys for they were with the owner of the premises one Mr Ghalib. The said Ghalib, (herein referred to as the 2nd accused person) came but he also said he had no keys to the store. They then decided to break into the store and there they found pieces of ivory in Manilla bags and covered with canvas. They arrested the manager (the 1st accused person) who Pw21 booked in the OB.

57. **PW 22, OGETO MWEBI**, a research scientist with the National Museums, Kenya told court that he is specialized in animal skeletons. He said that on 4.8.2014, he was brought exhibits memos requesting that he travels to Mombasa to examine suspected animal trophies to establish which animal they belonged to. He did so and at the marine park, he examined the exhibits and confirmed that they belonged to elephant. He compiled a report dated 18.8.2014. He also noted that the said trophies were found to have come from 106 different individuals.

58. **PW23, NO 68373, SERGEANT JACKSON GUYO** of Fraud investigations Unit at CID Headquarters is the investigating officer who was requested by DCIO, SP NYARA to take the case of wildlife trophies which had been recovered from Fuji motors from Makupa police station on 5.6.2014, he and another proceeded to Makupa police station where they met the OCS (Pw6), a contingent of police officers and

KWS personnel among them ADAM JELLE. They were shown the recovered wild life trophies which were elephant tusks, 72 manilla sacks, a red canvas and rubber bands; which were displayed at the said police station.

59. He commenced investigations whereby the OCS, (Pw6), led them to the scene of crime at Fuji Motors Ltd in Tudor, where the trophies were alleged to have been recovered from the premises belonging to the 5th accused person. He was taken round and was shown a wooden store and one room with spare parts. He also saw sacks which resembled the ones on display at Makupa police station but were empty. They took possession of them and then proceeded to KWS. He was informed by (PW6 (OCS) that he had arrested two suspects in connection with the recovery, being the 1st accused Abdul Ali Sadik Omar and the 2nd accused person, Ghalib Kara. Pw 23 then called for the scenes of crime personnel who came and photographed the scene. They counted the recovered tusks and found they were 314 in number, with 198 complete and 116 cut into pieces. After the labelling cut pieces as B1 and found them to be 116, they weighed the whole consignment and found it to weight approximately 2152 keys. They then prepared an inventory which the officers from KWS signed but the arrested suspects refused to sign it. They then escorted the ivory to the Marine Park where it was handed over to Sergeant Adan Jelle.

60. Pw 23 produced the recovered ivory as exhibit 1A and 1B, the sacks as Exhibit P2, the red canvas as Exhibit 3 and rubber bands as exhibit P4.

When the inventory was complete, they picked the 2nd accused person, a director of Fuji Motors Ltd and proceeded to his premises for further investigations. The 2nd accused person handed over to them the VAT registration dated 10.9.2009 (Exhibit 41), a single Business permit from the Municipal Council (Exhibit 42), dated 31.12.2013, a title deed for Mombasa Block 11/8/(ORT 810) registered in the name of Bilgus Atasen and 2 others dated 9.9.1993, Exhibit 43 (a) and Exhibit P3, Exhibit 43 (c) and Exhibit P3, sale agreement (Exhibit 44), Gate pass (Exhibit P19) and cash payment (Exhibit P46).

61. Pw 23 recorded the statement from the 1st accused person while Sergeant Nzuki did for 2nd accused person. Pw23 said that he conducted further investigations to establish the ownership of motor vehicle registration No KAM 197F and KAM 187 F and established they belonged to Veterinary san Frontiers and Pauline Kimulu. He then tracked down the number of motor vehicle registration No. KAM832 whom the appellant was said to have hired a vehicle from. That he gave evidence as regards the two vehicles and admitted that motor vehicle KAM 832W which the appellant hired had no dispute and no entry was made at Fuji Motors E A Ltd. Further, PW23 told the court that the reason why the people in the premises were not arrested is because the police had information who the owner of the premises and ivory was. He also admitted that data collected at Safaricom did not contain what was said between the parties.

62. The prosecution closed their case on 29.3.2016. The parties, through their counsel filed written submissions which they highlighted on 7.4.2016. The appellant and his co-accused person were placed on their defence. The 1st and 6th accused person opted to give unsworn defence while the 2nd, 3rd, 4th and 5th gave sworn evidence in their defence.

63. The 1st accused **ABDUL HALIM SADIK** testified as DW1 and in his unsworn statement told court that his role was to find a canter for the appellant and drove it to the destination he was directed. He said that the appellant did not like the first canter he obtained for him and so another was found and it belonged to Pw3. He went on to state that on 4.6.2014, he received a phone call from Feisal, the appellant whereby he instructed him to solve a problem for someone who had a problem with a vehicle on transit. He went to Fuji motors and found a contingent of police men who demanded for the key to the store. He informed them that he had gone there to assist a person who had a problem with a vehicle on transit. He also informed court that he offered to lead the police to the applicant's home but they refused.

64. The 2nd accused person, **GHALIB SADIQ KARA** (Dw2), a Managing Director of Fuji Motors E .A Ltd told court that he was an importer and dealer in motor vehicles; which business he had been running for 15 years. He testified to court that he was the one who authorized for the gate to be opened and later went to the said premises where he found police men demanding that the gate be opened. He said he found they had already arrested the 1st accused person. According to the 2nd accused person, there are 3 stores at the premises and the same are exclusively used by the servants and he had no control over them. He also said that he had never accessed the stores because the servants used to sleep there. He further stated that he left the premises as the interrogations of the 1st accused person, who he had never seen, was going on. He then said it was not the company's practice to inspect vehicles that went into the premises for parking.

65. The 3rd accused person **PRAVENS NOOR MOHAMED**, a Director and Head of Sales at Fuji Motors E.A Ltd told court that he is related to the 2nd accused person and that when the instant incident happened, he was out of town. That he only learnt of the same after the events at the premises. He also confirmed to court that he did not know the 1st accused person.

66. The 4th accused person, **ABDUL MAJID** told the court that he is a mechanic and also a Director at Fuji Motors E A Ltd. He testified that on the fateful night on 4th -5th June, 2014 he was out of town and that he never knew that there was ivory on the said premises. He obeyed court summons which were served upon him and appeared before court.

67. The 6th accused, **FEISAL MOHAMED ALI**, who is the appellant herein, also gave sworn evidence in his defence and told court that he hails from Lamu but stays in Mombasa. He also told court that he has an aunt in Dar es salaam whom he often visits. He even disclosed that in the year 2010, he stayed in Dar es salaam, Tanzania for five (5) months. He then denied having been in possession of any ivory. He admitted that he knew the 1st accused person who is his cousin and at times worked for him on commission. The appellant denied that he would be able to drive a canter and told court that after he hired the vehicle, he went to Lamu to bring his furniture. He went on to state that after delivery of the same, he called the 1st accused person to return the vehicle to the owner. He also testified to court that he was told by the 2nd accused person that there were police men in the premises who were claiming that a Toyota Premio had been stolen and that he sends someone with the log book. That this is when he sent the 1st accused person with the bill of lading. The appellant denied that he drove the canter in question and also disowned the signature in the entry book terming it as perjury by a person who wanted to fix him. He told the court that he was arrested in Dar es salaam on the 22nd December, 2014 by the Interpol.

68. In convicting the appellant, the trial magistrate had this to say;

“The case presented by the prosecution against accused 6 as very complex. The court linked the evidence against the accused person to a jigsaw puzzle with scattered pieces of different shapes of puzzles. These pieces have already been analyzed under paragraph as above. He analysis lead to the following conclusion;

- (a) accused 6 hired a canter;***
- (b) He engaged accused 1 to drive it to total Petrol Station;***
- (c) he took control of the said canter from Total petrol station;***
- (d) He parked a Mitsubish canter KAM 197 F at Fuji Motors between 30th May, 2014 to 3rd June, 2014;***
- (e) On 3rd of June 2014, he re engaged accused 1 to go to total petrol station and hand over the canter to the owner;***
- (f) It was established that the registration number of the said canter (KAM 197 F) was fake;***
- (g) The document examiner confirmed the signature on the register (Exhibit P19) to be that of accused 6;***
- (h) On 4th June, 2014 the police recover ivory from Fuji Motors***
(Accused 1 is arrested on the night of 4th/5th June, 2014;
- (j) Frantic and unexplained calls are made by accused 1 and Pw21 respectively to accused 6’***
- (k) accused 2 is arrested on the morning of June 2014;***
- (l) Accused 6 sneaks (eraporagtes) from Kenya***
- (m) accused 6 is arrest in Dar es salaam after 6 months by the Interpol***

I have considered the prosecution evidence and it is manifestly clear that a combination of the chain of events narrated above, when considered as a whole, point irresistibly at the accused person, as the owner of the ivory that was recovered at Fuji Motors. I am satisfied that the prosecution has adduced all circumstantial evidence available in support of its case against the accused person”.

69. I have carefully considered the evidence that was adduced before the trial court and the judgment of the court in line with the grounds of appeal and the arguments made thereon by the counsel in their submissions. I have also considered the provisions of the law and cited authorities by all counsel.

70. I note that the issues for determination are;

- (a) whether the prosecution adduced sufficient evidence to support the offence the appellant as convicted and sentenced for to the extent that it discharged its burden of proof beyond reasonable doubt as required by law;
- (b) whether the trial magistrate relied on extraneous evidence to arrive at her decision;
- (c) whether the issue of missing or destroyed earlier records of the proceedings erred the court’s integrity;
- (d) whether the sentence imposed against the appellant was illegal.
- (e) whether the trial magistrate condoned the violation of the appellant’s constitutional rights

71. With regard to the first issue, I find that the law establishing the offence the appellant was convicted and sentenced for is set out under the Wildlife conservation and management Act, 2013. At section 92 of the said Act, It states;

offences relating to endangered species and threatened species.

“Any person who commits an offence in respect of an endangered or threatened species or in respect of any trophy of that endangered or threatened species shall be liable upon conviction to a fine of not less than twenty million or imprisonment for life or to both such fine and imprisonment”

Section 95 of the Act states as follows;

Offences relating to trophies and trophy dealing.

***“Any person who keeps or is found in possession of 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 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.*”**

Section 84 under part X of the Act as read with the Eight schedule states as follows;

“dealings in trophies

(1) No person shall operate as a trophy dealer without a licence issued by the service.

(2) The Cabinet secretary may grant a trophy dealer’s licence in accordance with the provision set out in the eighth schedule”

The eighth schedule provides as follows

“wildlife categories in relation to offences and penalties in sport and recreational hunting.

Category A

Critically endangered mammals as set out in the 6th schedule white Rhinoceros, Black Rhinoceros, Africa Elephant

Category B

All other endangered and vulnerable mammals as set out in the 6th schedule. All birds listed in 5th schedule. All reptiles listed in 5th schedule.

Category C

All other mammals, all other bird and sea shells. The laws here have generally covered all living things with blood and extended to the sea shells.

72. The prosecution called a total of twenty three (23) witnesses to prove their case.

The two counts that the appellant and his co-accused persons were charged with were grounded on sections 92 and 95 of the Wildlife conservation and management Act, 2013. The prosecution was intended to establish the offence of being in possession of trophy under section 95 and dealing in trophy under section 92 of the said Act.

The appellant was convicted for the offence of being in possession of wildlife trophies contrary to section 95 of the Wildlife conservation and Management Act. The main issue in this instant case which the prosecution was required to prove was “possession”, that is whether the appellant was found in possession of wildlife trophies of an endangered species...”

73. Pw 6, one of the arresting officers told court that he received a tip-off that ivory was hidden at the premises of Fuji Motors Ltd belonging to the 5th accused person. He mobilized a team from different security agencies and went to the scene of the alleged crime. He took charge of the same and they recovered trophies hidden in manila bags covered by canvas in a store built on the said premises owned by the 5th accused person.

74. The 1st accused person was arrested when he came to the said premises upon being called on allegations that he was the manager of the said premises and hence suspected to be in charge of the same and the store.

75. The 5th accused person also came to the scene upon being called since he was the manager and Director of the said Fuji Motors E.A Ltd. He stated that he did not have control of the stores as the same were used being their workers who used to sleep there.

76. It was Pw6’s evidence that when they gained entry into the premises, they found two minors and a guard in the premise whom he did not arrest as he was convicted that they knew nothing about the store and the presence of the trophy in the premises.

77. The prosecution also lined up the evidence of Pw1 who the appellant contracted with a view to hiring a canter which did not materialize. There was also the evidence of Pw2 who was said to be a broker and whom Pw1 sent to Pw3, who then hired out his vehicle to the appellant. There was then the evidence of Pw4, who was Pw3’s driver and is alleged to have met the appellant and left him with the motor vehicle registration No KAM 832W.

78. In bringing up the evidence by these witnesses, the prosecution intended to support the transportation in this case so as to connect or link the appellant to the premises and store where the ivory was recovered.

There was further evidence of the Registrar of persons, the Registrar of Lands and the Registrar of Motor vehicles. The sum total of their evidence was that it was hoped that the same would link the appellant to the offence of having been found in possession of the alleged ivory or connected him to its storage at Fuji Motors Ltd.

79. PW 10, presented evidence of ownership and confirmed that motor vehicles registration No KAM 197 F and KAM 187 F belonged to two different persons and that they were not Canter in make. In fact, going one more mile required that the owners of these two motor vehicles ought to have been investigated and or interrogated so as to be either treated as suspects or witnesses and assist the court in arriving at the truth in this case.

Pw23, simply adduced his testimony by stating that one vehicle which was entered as a canter was fake and that the offence was committed as the appellant. He did not substantiate this or adduce evidence to explain his connection.

80. The Registrar of companies (Pw15) presented his evidence and named the registered owners of the premises as Ghulab Kara, Noor Mohamed and Abdala Masjid Ibrahim. The appellant's name was not one of these listed as the Director of Fuji Motors E. A Ltd.

81. There was then the evidence of Pw17, DAVID KIBOI who presented a Matrix of communication which the appellant had with his various contacts. This data did give the names of those contacted by the appellant but failed to give the contents of communication. The officer ought to have gone further and availed transcript to confirm the nature of communication between the appellant and his contacts, instead of leaving the court wondering what they could have been discussing and how it related to the case in question.

82 Under chapter II of the Penal Code which deals with interpretation of the terms used therein, possessions defined as;

(a) “ be in possession of “or “have in possession” includes not only having in one’s own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of 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 or possession, it shall be deemed and taken to be in the custody and possession of each and all of them”.

83 This definition is reflected in h approach by Lord Hope in the House of Lords when defining “possession” in LAMBERT (2002) 2 AC 545 stated that;

“there are two elements to possession. There is the physical element , and there is the mental element”.....

The physical element involves proof that the thing is in the custody of the defendant or subject to his control.....”

In the same case Lord Clyde stated;

“The second element involves that the defendant knows that the thing in question is under his control. He need not know what its nature is, but so long as he knows that the thing, whatever it is, is under his control, it is in his possession”.

84 From the evidence that was adduced by the prosecution witnesses, I find none testified that the appellant (a) was found with the alleged Wildlife trophies at anytime or (b) was seen or found ferrying the said Wildlife trophies either into or out of Fuji Motors premises or anywhere else; or (c) was seen loading the wildlife trophies on any vehicle.

Clearly, there was no evidence that he was found at the said premises at any time before, during or after the recovery of the alleged ivory. There was no evidence that the premises and or store where the ivory was recovered belonged to him. There was no evidence that the vehicles mentioned by the witnesses belonged to him. There was no evidence of what his position was at Fuji Motors Ltd or relationship he had with Fuji MotorsLtd and or the owners/Directors.

85 From this analysis, I find that none of the prosecution witnesses was able to demonstrate and prove that the appellant had physical control and knowledge of the alleged ivory recovered in a store at Fuji Motors Ltd.

86. In going through the judgment, I find that the court rendered itself in the most dramatic manner when it termed the evidence that had been adduced before it as a jigsaw puzzle and flowers strawn all over in the field. She made the following observations of the prosecution's conduct at page 60 of the judgment.

“This is the very difficult, the court went through in piecing together the evidence adduced in court. The investigating officer (IO) simply scattered flowers (evidence) in the bush and left it to the court to collect the nectar in order to make honey(Judgment) without his involvement. The court came up with what I would refer to as puzzles”

87. It is my finding that a court either has evidence before it or not does not.

My understanding is that after the court heard the witnesses in the case, it was left with very many unanswered questions. And contrary is expected of a court in and adversarial system, it acted as it would if it were in and inquisitorial system where it would go out and fish for evidence to assist the prosecution.

At page 76 of the judgment, the court singled out the appellant and stated as follows;

“ The case presented by the prosecution against the accused 6 was very complex. The court likened the evidence to a jig -saw puzzle with scattered pieces of with different shapes of puzzles strewn is all over. The puzzles must be fitted together in order to complete the jigsaw puzzle.....”

88. From the above observation the learned magistrate then numbered the pieces of evidence from(a) to (h) and concluded that;

“ I have considered the prosecution’s evidence and it is manifestly clear that a combination of the chain of events narrated above, when considered as a whole points irresistibility at the accused person ,as the owner of the ivory that was recovered from Fuji Motors. I am therefore satisfied that the prosecution has adduced all circumstantial evidence available in support of its case against the accused person.”

I do not think so. For example, the decision that motor vehicle registration No KAM 197 F and KAM 187 F was rendered solely by PW23 when he failed to call the registered owners of these vehicles to shed a light on whether any of those vehicles actually physically exist or were hired or used by the appellant at that time. When cross examined on this, Pw 23 casually declined that this was not necessary. The trial court even admitted that the investigating officer did not assist in putting evidence together, hence took upon itself the job of piecing up evidence for the prosecution so as to arrive at the decision she did.

89. It is in evidence by Pw2,Pw3 and Pw4 that the appellant hired motor vehicle registration No. KAM 832 W which was returned to the owner, Pw3 who confirmed the same.

90. In analyzing the evidence that was adduced, I noted that there were a lot of loose ends and glaring gaps which were left in the prosecution’s evidence hence creating doubts.

For instance, the failure by the prosecution to call the watchman, and the two Asians who were found in the premises where the ivory was recovered, and the cleaner who was also found there. All this left a loose end in their evidence that it is difficult to ascertain the truth about the ownership of the store where the ivory was recovered and who kept the said ivory there.

The failure to avail the content of the transcript from the mobile provider was critical as it would have ascertained what was said between the appellant and those he is alleged to have called during that period.

There was also the issue of the specimen signatures having been examined without a fresh signature and known signature of the appellant being collected so as to make the finding credible.

91. It was the contention of the Respondent that the appellant conviction and subsequent sentence was founded on the circumstantial evidence. The law with regard to circumstantial evidence was stated in the case of **REPUBLIC VERSUS KIPKERIWA ARAP KOSKEI** (1945) 16 EACA 235 as follows;

1 “That in order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of the inference from the facts to the exclusion of any other hypothesis of innocence is always on the prosecution and never shifts to the accused”.

This position has been restated by the High courts and the courts of appeal from time to time.

In the cases of **SAWE VRS REPUBLIC** (2003) KLR 306 and **JACOB MUTHEE & 8 OTHERS** (2013) e KLR, this position was restated and another factor added in the un reported case of **SIMON MUSOKE VRS REPUBLIC** Court of Appeal No 188 of 1956, that ;

“At the same time there must not be any co- existing facts in or circumstance which may weaken or destroy that inference of guilty of the accused person”.

This is in line with the provisions of sections 107 (1) 107 (2), 108, and 109, all of the evidence Act, Cap 80, Laws of Kenya, which deal with the burden and standard of proof.

92. On the issue of relying on extraneous evidence to arrive at its decision, this clearly came out when the “puzzles” were drawn and analysed by the court so as to arrive at a decision . In analyzing these puzzles the trial magistrate brought in evidence and or matters which had not been adduced in evidence. Where witnesses were not called to testify, she appeared to have become a witness, (“mystery of canters”and “store and the manager,”), where a specialist was called but had failed to give conclusive evidence, the trial magistrate became the analyst or specialist (for instance in the puzzle about telecommunication. Call date records and call pattern analysis). Taking into account the irrelevant and extraneous considerations , that did not form part of the evidence tendered before the trial court, I find the decision by the trial court amounted to miscarriage of justice. I find that the principles of circumstantial evidence which the court relied on in arriving at its decision were clearly misconstrued.

What I make of the trial court’s findings with regard to the analysis of the evidence that was adduced before it, is that it is based on observations or assumptions by it which I find speculative. It is clear proof that there were gaps which it tried to fill up for the prosecution. The court forgot that it was an independent arbiter and what the rules of evidence required a court to find where there are gaps in evidence

93. In view of what I have pointed out, I have come to the conclusion that the prosecution failed to discharge its burden of proof in the case against the appellant as required by law and that there were many doubts which were raised by their evidence, the benefit of which should have been awarded to the appellant.

I therefore find that the offence of being in possession of trophy of endangered species was not proved against the appellant, so that he was wrongly convicted and sentenced for the offence of having been found in possession of wildlife trophies (Ivory).

94 With regard to the issue of the sentence which was meted against the appellant being illegal, the relevant provisions of the law in this regard are sections 84, 92 and 95, all of the Wildlife Conservation and Management Act.

I find that the Honorable magistrate correctly quoted section 84 and 92 of wildlife conservation and management Act, 20113 in the determining the case before her. I have also enacted the whole of section 84 of the said Act, which in my opinion, I find that it explains what is meant by “dealing in wildlife trophy without a licence”. I wish to state that the prosecution was silent on this matter. It did not lead any evidence at all to prove that the appellant and or any of the co-accused person were involved in the illegal trade of trophy dealing. There was no evidence of any ornaments having been recovered from the scene or the manufacture of any such thing found in progress at the alleged scene of crime.

95. The trial court’s understanding of section 84 and 94 at pages 69 and 70 of the judgment is correct and I do not wish to disturb the same as I have explained in my judgment the understanding I arrived at from my own independent analysis. (96). However, there is need to add that section 95 creates the offences of possession and prescribes the punishment, which is;

“ Any person who keeps or is found in possession of wildlife trophy or manufactures any item from a trophy without a permit issued under this Act or exempted the accordance with any other provision of this Act, commits an offence and shall be liable upon conviction to a fine of not less than one million shillings or imprisonment or a term of not less than five years or to both such imprisonment and fine”.

In my understanding of the draft’s means language in this provision, what section 92 has done is that it has set the maximum punishment that a court can impose upon an offender who is found guilty of the offence therein whereas section 95 has set the correct limit of sentence that can be meted upon an offender by a court which has convicted him or her.

96. However, this position was obtaining before the enactment and or promulgation of the Constitution of Kenya, 2010, where at Article 50 (2) (p) , it is provided that;

“Every accused person has a right to a fair trial, which includes at (p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of the sentencing”.

The less severe of the sentences in this case, in my view, if the appellant was guilty as the court had found, is the sentence under section 95, which has a fine of one million shillings and a minimum of five years in prison as that is the least of the punishment available in such cases.

97. I find that the ground (c) and (g) as framed by the court succeeds. The sentence that was imposed by the trial court on 22.7.2016 was unconstitutional, and therefore the same is hereby set aside. It will be noted that the appellant has been in custody since the commencement of the trial to conviction. The trial took two years and he has been in prison for 2 years since he was sentenced. Had the court properly applied the law in exercising its discretionary power on sentencing, the appellant would by now served the full prison term.

98. The other issue the court finds necessary to address is the issue of the missing records of proceedings that were taken by another magistrate who previously heard the case. This issue attracted vicious attacks in grounds 1 and 2 of the supplementary submissions.

The allegations of destruction of the court record was blamed on the court. I wish to point out that the custodian of the court records is the archives of each court, which has administrative offices who are answerable to their superiors in each court ending with a Director that is attached to each court and at the apex the chief Registrar of the High court in Nairobi.

99. The record shows that parties agreed for the matter to start “de novo” From the record I have observed a very smooth trial where all parties testified and were cross examined. The missing record is not one which was part of what has informed this court in reaching its decision/verdict. I read through the entire record and formed the opinion that has informed my findings. After a judicial officer, that is to say, Judge or magistrate of either court has dealt with a file, unless it is pending for a ruling or judgment, and the same disappears, there is a chain or system established to trace the same.

In the circumstance, I dismiss the said grounds.

100. In conclusion, I find that the appeal has merit and allowed the same.

I proceed to quash the conviction and set aside the sentence against the appellant; who is hereby set at liberty forthwith unless he is lawfully held.

Judgment read, signed and dated this 3rd day of August, 2018.

LADY JUSTICE D. O. CHEPKWONY

3.8.2018

In the presence of:

Mr Jami Yamina, counsel for the Respondent

Mr Taib, counsel for the Appellant

Mr Kurgat ,counsel for the 2nd to 5th accused

Mr Jim Karani holding/watching brief for the wildlife series

Appellant

C/clerk- Beja