REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 63 OF 2017

ABDI IBRAHIM HARUN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from Original Conviction and Sentence in Kyuso Principal Magistrate's Court Criminal Case No. 97 of 2017 by Hon. John Aringo R M on 30/11/17).

J U D G M E N T

1. **Abdi Ibrahim Harun**, the Appellant, was charged as follows:

Count I – Being in Possession of Wildlife Trophy contrary to **Section 95** of the **Wildlife Conservation and Management Act, 2013 (Act).** Particulars of the offence being that on the **28th** day of **April, 2017** around **0500 Hours** at **Usueni Sub-Location** in **Tseikuru Sub-County** within **Kitui County** were jointly found in possession of wildlife trophies namely **twelve (12) Elephant Tusks** weighing **120 Kilogrammes** ferrying using motorcycle registration number **KMDU 905P** make **Captain** green in colour with street value of **Kshs. 12 million** without a permit.

Count II – Dealing with Government Trophies contrary to **Section 84(1)** as read with **Section 92** of the **Wildlife Conservation and Management Act, 2013.** Particulars of the offence being that on the **28th** day of **April, 2017** around **0500 Hours** at **Usueni Sub-Location** in **Tseikuru Sub-County** within **Kitui County** were jointly found dealing with wildlife trophies namely **twelve (12) Elephant Tusks** weighing **120 Kilogrammes** with street value of **Kshs. 12 million** without a permit.

2. Facts of the case were that on the **27th** day of **April, 2017,** PW1 **No. 8915 Ranger Nicholas Munene,** PW2 **No. 7971 Ranger Christopher Odhiambo** and PW3 **No. 8695 Ranger David Aluoch,** officers attached to **KWS** acting on information received went to **Usueni Area** where they met PW1's informer. They communicated with the person who was to sell ivory. They agreed on **Kshs. 1,700,000/=** per kilogram. The ivory was delivered by a motorcycle. The Appellant and his Co-Accused were arrested taken to the **Tseikuru Police Station** and subsequently charged.

3. The learned Magistrate considered evidence adduced and acquitted the Appellant and his Co-Accused on the 2nd Count under **Section 210** of the **Criminal Procedure Code.**

4. When put on his defence on the 1st Count, the Appellant in particular stated that he is a herdsman and a pastoralist who moves with their livestock, mainly within **Kaningo, Boka Area.** That on the **26th April, 2017** he went after his goats, on foot until he reached **Tseikuru** where he slept. On the **27th April, 2017** he went to the market where he boarded a "bodaboda" that his Co-Accused was in control of. While on the way to **Kaningo** they were stopped by five (5) people and after they were taken to the police station only four (4) of them were placed in custody. The two of the persons were released. Denying having been in possession of the ivory, he stated that the two (2) other persons were not called to testify in Court. His Co-Accused had testified that he was a passenger.

5. The learned trial Magistrate considered evidence adduced and was of the view that the allegation that **KWS Rangers** came from **Nairobi** and pounced on a 'bodaboda' rider and a pillion passenger did not make sense. Regarding the defence put up of the presence of some other two (2) people, he found that indeed there was a 4th **KWS** personnel but from the testimony of the Investigation Officer did not play an active role and did not record a statement. Regarding the discrepancy as to the actual time of arrest, he did not find it absurd. He reached a finding that indeed the Appellant's Co-Accused delivered the elephant tusks therefore the Appellant did participate in the delivery. He found them guilty, convicted and sentenced them to pay a fine of **Kshs. 20,000,000/=** or in default to serve **life imprisonment.**

6. Aggrieved by the conviction and sentence the Appellant appeals on grounds as amended that:

· Inconsistencies in evidence of the Prosecution witnesses cast doubt to their credibility.

· Glaring gaps in evidence occasioned by failure to call crucial witnesses was not considered.

· Identification by a single witness at night was wanting.

· Acquitting the Appellant on the 1st Count and convicting him on the 2nd Count was erroneous.

· Charges were duplex.

· The case was not proved beyond reasonable doubt.

· Disregarding the Appellant's defence was erroneous and unjust.

· Mitigating factors were not considered.

7. The Appeal was canvassed by way of written submissions.

8. The Appellant was represented by the firm of **Garane & Somane Advocates.** It was urged on his behalf that the ingredients of possession were not sufficiently demonstrated as the trial Magistrate relied on evidence of PW1, a **KWS Ranger** who testified that he was alone at night when the Appellant was found in possession of ivory without warning himself of the danger of such reliance. That it was not demonstrated that the Appellant was in physical possession of the items or that they were recovered from the Appellant as there was no inventory to that effect which would have helped to establish the chain of recovery. Evidence was tendered by the defence of photographs having been taken that was not adduced in Court. They cited the case of **Peter Mwangi Kariuki vs. Republic Criminal Appeal No. 57 of 2012** where it was stated that:

> ***"Possession includes two elements; namely being in physical control of the item and knowledge of having the item. To be guilty of possession, an accused person must be shown to have knowledge of two things, namely, that the accused knew the item was in his custody and secondly he knew that the item in question was prohibited."***

9. It was pointed out that evidence adduced regarding the recovery of the ivory was contradictory and the alleged informer was not called to testify. This person, it was argued was a relevant witness as stated in the case of **Helkano Mata Bagaja vs. Republic Criminal Appeal No. 2 of 2015.**

10. Regarding the question of identification it was urged that the Appellant was identified as a person of Somali origin and this is what the trial Magistrate relied upon to convict the Appellant yet dock identification that was done seven (7) months later was of little probative value. In this regard they quoted the case of **Kiilu & Ano. vs. Republic (2005) 1 KLR 174** where the Court of Appeal stated thus:

> ***"Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the probability of error."***

11. On the question of the defence put up it was urged that the Appellant's defence that was given on oath that at the time of his arrest there were five (5) people at the scene was supported by his Co-Accused who also gave sworn evidence. That PW4 stated that there were four (4) **KWS Officers,** an informer and the two (2 Accused. While PW1, PW2 stated that there were three officers and two (2) Accused persons which was inconsistent therefore the evidence of the Appellant and his Co-Accused should have been believed.

12. That the learned trial Magistrate applied his own reasoning instead of being guided by actual evidence on record. They cited the case of **Okethi Okale & Others vs. Republic (1965) EA 555** to emphasis this fact where the Court stated that:

> ***"with all due respect to the learned trial Judge, we think that this is a novel proposition, for in every criminal trial a conviction can only be based on the weight of the actual evidence adduced and not on any fanciful theories or attractive reasoning. We think it is dangerous and inadvisable for a trial Judge to put forward a theory of the mode of death not canvassed during the evidence or in counsel's speeches (see R v. Isaac (1965) Crim. L.R. 174. This theory by the learned Judge was inconsistent with the evidence of Joyce that the injury on the head was caused by the second appellant with an axe, neither is it supported by the medical evidence."***

13. That the charge was wrongly framed which was prejudicial to the Appellant. The argument advanced was that when the trial Court acquitted the Appellant and his Co-Accused on Count 2, he effectively discharged them from both **Section 84(1)** and **92** of the **Act** since both sections create two (2) distinct offences. **Section 92** is not a Penalty Section of **Section 84(1)** of the **Act.** The conviction was therefore pursuant to the provisions of **Section 95** and **Section 92** of the **Act** was resurrected for the purposes of sentencing the Appellant which was unlawful. The case of **Josiah Kivuva Mutinda vs. Republic, Criminal Appeal No. 64 of 2015** was cited where **Kamau, J** stated thus:

> ***"39. Perusal of Section 84 of the Wildlife Conservation and Management Act provides that no person shall operate as a trophy dealer without a license issued by KWS. Section 92 of the Act states that any person who commits an offence in respect of an endangered or threatened species or in respect of any trophy of that threatened or endangered species shall be liable for conviction to a fine of not less than Kshs. 20,000,000/= or imprisonment to life or to such fine and imprisonment.***

40. <u>It is clear that Section 92 of the Act is a totally different offence and is not the penalty clause for Section 84 of the Act. There is clearly double jeopardy. Parliament omitted to include the penalty clause for Section 84(1) of the Act. It was the view of this court that the Appellant could not be charged under the two (2) Sections in respect of dealing and preferring of Charges under Count II was superfluous. This is because Section 95 deals with the offence of being in possession and dealing with wildlife trophy and also has the penalty clause."</u>

14. It was urged further that two (2) distinct offences in **Section 84(1)** and **92** were charged in the same Count as inclusion of **Section 92** to be the penalty clause for **Section 84(1)** was prejudicial to the Appellant as he did not know the charge that he was responding to. To reinforce the argument they cited the case of **Kasyoka vs. Republic Criminal Appeal No. 465 of 1999** where **Mbaluto, J.** stated thus:

"……. I would observe that in the end, the court found that both the learned trial magistrate and the High Court dealt with an offence with which the appellant had not been charged…….. there is an obvious duplicity in the latter in that the two offences created by section 32w(2) of the Penal Code are charged in the same count.

In the case of Cherere s/o Gukuli v Republic (1955) 22 EACA 478 the Court of Appeal for Eastern Africa held:- "Where two or more offences are charged to the alternative in one count, the count is bad for duplicity contravening section 135(2) of the Criminal Procedure Code; the defect is no merely formal but substantial. Where an accused is so charged, it cannot be said that he is not prejudiced because he does not know exactly with what he is charged, and if he is convinced he does not know exactly of what he has been convicted."

The same Court went on to state:- "We think it is impossible to say, and certainly no court has so far as we are aware yet said, that an accused person is not prejudiced when offences are charged in one count in the alternative; he does not know precisely with what he is charged, nor of what offence he has been convicted. It is, indeed, very difficult to say that a breach of an elementary principle or criminal procedure has not occasioned a failure of justice."

15. On sentencing the learned trial Magistrate was faulted for failure to exercise discretion as addressed in the case of **Francis Karioko Muruatetu & Another vs. Republic Petition No. 15 of 2015** where the Supreme Court held that:

"(59) We now lay to rest the quagmire that has plagued the courts with regard to the mandatory nature of Section 204 of the Penal Code. We do this by determining that any court dealing with the offence of murder is allowed to exercise judicial discretion by considering any mitigating factors, in sentencing an accused person charged with and found guilty of that offence. To do otherwise will render a trial, with the resulting sentence under Section 204 of the Penal Code, unfair thereby conflicting with Articles 25(c), 28, 48 and 50(1) and (2)(q) of the Constitution."

16. The State through learned Counsel **Mr. Mamba Vincent** urged that the Court evaluated evidence tendered by the Prosecution and defence; convicted and meted out the sentence. That the operation was planned after PW1, a Ranger at **KWS Headquarters, Langata** received information about people who intended to sell Elephant Tusks. In company of PW2 they met their informer. PW3 posed as a buyer and they agreed prior to the delivery being made.

17. Further he stated that on cross examination the Rangers left **Nairobi** on the **27th** night and on reaching **Usueni** in the early hours of **28th April, 2017** at about **3.00 a.m.,** PW2 talked to one suspect through informer's phone but could not tell whom he talked to.

18. The State conceded to the Appeal for the following reasons. That PW1 did not clearly say who between the two (2) suspects were in actual possession of the ivory. That the witness was alone when he posed as a buyer. He indicated that he made contact with the sellers who having told him that they had **120 Kgs** they went and returned with the ivory on a motorbike which was wrapped in two (2) bundles, in a bag and mat but he did not indicate how long they took and where his colleagues were and at what time they returned. That he also failed to indicate the kind of light that he used to see when he met the Appellant at **3.00 a.m.**

19. That PW2 stated that when PW1 went to meet the informer he left them behind. That the Appellant was just in company of the Co-Accused who had a motorbike. That according to PW3, the person who carried the exhibit in the car in which they put it was not indicated. That the fourth **KWS Ranger** who was present did not testify and no reason was given why he did not do so. He concluded by stating that there were inconsistencies in the Prosecution's evidence.

20. This being a first Appellate Court, I am duty bound to re-evaluate the evidence that was adduced before the trial Court and come to my own conclusion bearing in mind that I never saw or heard the witnesses who testified. **(See Okeno vs. Republic (1972) EA 32).**

21. As correctly noted, the Appellant and his Co-Accused were acquitted of the charge of **Dealing with Government Trophies** contrary to **Section 84(1)** as read with **Section 92** of the **Act.** They were found guilty of **Being in Possession of Wildlife Trophy** by contravening the provisions of **Section 95** of the **Act** that provides thus:

"Any person who keeps or is found in possession of a wildlife trophy or deals in a wildlife trophy, or manufactures any item from a trophy without a permit issued under this Act or exempted in accordance with any other provision of this Act, commits an offence and 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."

22. Looking at the marginal note, it provides as follows:

"Offences relating to trophies and trophy dealing."

That provision of law creates the offence of being in possession or dealing in wildlife trophy(ies) without a permit and the penalty thereof. It provides for a fine of not less than **one million shillings** or imprisonment for a term not less than **five (5) years imprisonment** or both such imprisonment and fine.

23. It is urged that the charge was erroneously drafted and bad for duplicity. In the case of **Cherere s/o Gakuli (Supra)** as clearly put, where two (2) or more offences are lumped together in one charge it is bad for duplicity hence defective. Evidently, the Accused suffers prejudice. Such a person is disadvantaged as he cannot be in a position of knowing how to defend himself.

24. The Investigating Officer caused the Appellant and his Co-Accused to be charged with the offence of **Being in Possession of Wildlife Trophies** as provided by **Section 95.** Then there was a second Count of **Dealing with Government Trophies** in contravention of **Section 84(1)** of the **Act** that provides thus:

> ***"(1) No person shall operate as a trophy dealer without a license issued by the Service."***

and as read with **Section 92** of the **Act** that provides thus:

> ***"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 shillings or imprisonment for life or to both such fine and imprisonment."***

The second Count should have been an alternative charge. Charging the Appellant and the Co-Accused with the charges as framed was indeed ambiguous and prejudicial to them as correctly submitted. There is no way the Appellant would have known how to defend himself.

25. It is urged that the charge was not proved beyond reasonable doubt. The **Act** does not define possession but the **Penal Code** defines possession 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;"***

26. Per evidence adduced, PW1 **Ranger Nicholas Munene** acting on information received met two (2) people, negotiated with them and they delivered the items that were transported on a motorcycle. They were carried in a bag wrapped in a mat. Others were wrapped in a green sack. The transaction was done between **3.00 – 4.00 a.m.** He stated that each bundle of ivory was covered by a red mat and tied with sisal mats. He identified the persons in Court who had the trophies. He alluded to the fact that the Appellant's Co-Accused was the rider and he had a deformed eye while the 2nd individual was of Somali origin. On cross examination he stated that prior to effecting the arrest he had spoken to the person who was selling the items and negotiated with him in Kiswahili language but he could not tell if he was either of the two (2) Accused.

27. PW2 **Ranger Christopher Odhiambo** travelled with PW1 from **Nairobi** to **Usueni.** He stated that PW1 was the one in constant contact with his informant. PW1 decided to leave them behind as he went to meet the buyer. By the time they joined him the individuals were with him. He stated thus:

> ***"….. Munene alerted us and we joined him. 1st Accused was with the motorbike but 2nd Accused was just in the company …….. I saw the motorbike it was KMDU 905P green, red in colour. 1st Accused was holding the motorbike. They were tied with twice sisal rope (sic)…."***

28. PW3 **Ranger David Aluoch** of **Mwingi KWS** accompanied his colleagues from **Nairobi.** According to him they were in company of another, **Abbas.** His evidence was as follows:

> ***"We left Mwingi for Usueni. We left Mwingi for Usueni, 4 people. We were with Abbas, Munene, Christopher and me. We reached at about 3.00 a.m. Munene left us behind and went ahead to meet his contacts…… I was left with Christopher. Before long our colleague signaled us. We stopped them and identified ourselves. They had 12 pieces of tusks, nylon sack, mats and a knife. At time of arrest, they had already moved the tusk to our vehicle….. I saw the two."***

29. It is contended that inconsistencies that emerged in the testimony were material. It is upon the Court to consider such contradictions, inconsistencies and discrepancies and make a decision if they are simply minor or if they go to the roof of the matter **(See Dickson Elia Nsamba Shapwata & Another vs. Republic Criminal Appeal No. 92 of 2007).**

30. The Appellant contends that he was travelling as a lawful pillion passenger on the motorcycle operated by his Co-Accused when they were stopped by two (2) individuals in civvies who made them join other two (2) people who had been arrested who were subsequently released. These evidence could only be challenged by persons who arrested them. PW2 and PW3 stated that PW1 left them as he went to meet his contacts arrested the suspects prior to PW2 and PW3 joining them. PW3 introduced the presence of another person in evidence. The person's name was given as **Abbas.** PW3 stated that **Munene** left them behind with **Christopher.** He did not say where **Abbas** went to.

PW4 **No. 74758 Corporal Sylvester Toroitich** confirmed the presence of a 4th officer whom he referred to as the boss of the rest. On cross examination he stated that: the informer posed as a buyer. This meant that other than **Abbas** there was a third person who accompanied PW1. This evidence confirmed what the Appellant stated that they found other people when they were stopped.

31. It was also the testimony of PW3 that by the time they arrested the Accused the tusks had already been moved to the motor-vehicle. PW2 on the other hand stated that they found the suspects already tied. These were discrepancies that could not be disregarded. As correctly questioned by the Prosecuting Counsel – who moved the tusks to the motor-vehicle. And who tied the suspect?

32. One of the persons who posed as a buyer is stated to have been an informer. PW4 on cross examination stated thus:

> ***"An informant guided the KWS to the sellers. Informer posed as a buyer….."***

These particular individual was not called as a witness.

33. In the case of **Kigecha Njuga vs. Republic (1965) EA 773 Sir John Ainley C.J.** and **Madan J** stated that:

> ***"Informers play a useful part no doubt in the detection and prevention of crime, and if they become known as informers to that class of society among whom they work, their usefulness will diminish and their very lives may be in danger, But if the prosecution desire the courts to hear the details of the information an informer has given to the police clearly the informer must be called as a witness." (emphasis mine).***

34. In the case of **Julius Kalewa Mutunga vs. Republic, Criminal Appeal No. 31 of 2005** the Court of Appeal stated that:

> ***"As a general principle of law, whether a witness should be called by the Prosecution is a matter within their discretion an appeal court will not interfere with the exercise of the discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."***

35. It is also stated that the informer did pose as a buyer. That being the case his evidence and that of **Abbas** was crucial. In the case of **Bukenya and Others vs. Uganda (1972) EA 549** the Court stated thus:

> ***"(i) The prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent.***
>
> ***(ii) The court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case.***
>
> ***(iii) Where the evidence called is barely adequate the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution."***

36. At the close of the defence case, the Appellant and his Co-Accused argued that there were other people who may have been in possession of the trophies who were released, persons they found under arrest. This would therefore have called for evidence of the purported informer who posed as a buyer and that of **Abbas.** Having not been availed as witnesses, it is very possible that their tale may have been adverse to the Prosecution's case.

37. The Prosecution was of the view that the Appellant herein was in possession of the items recovered. The rider absolved him from that accusation. He stated under oath that indeed he was just a pillion passenger that he had carried. The items were wrapped in a manner that suggested that they were concealed. If indeed they had been carried by the 1st Accused as emphasized by PW1 then it behooved the Prosecution to adduce evidence that it was within the knowledge of the Appellant that what had been carried was indeed trophies. No such evidence was led by the Prosecution.

38. Finally, there is the issue of the sentence that was meted out. The law provides for a fine of not less than **one million shillings** or imprisonment for a term of not less than **five years (See section 95 of the Act).** But the learned trial Magistrate imposed a fine of **twenty million shillings** or in default to serve **life imprisonment.** In passing the sentence the Court noted thus:

> ***"Mitigation of each of the accused is considered. But court notes also that sentences available under the provision of law is circumscribed and court has no discretion though accused were charged under Sec 95 of the Act, court notes that elephant tusks are trophies of endangered species within the meaning of the 6th schedule of the Act. Accused can only be punished under Sec 92 of the Act. ……. Each of the 2 accused is sentenced to pay a fine of Kshs. 20,000,000 (twenty million) or in default serve life in prison."***

39. In this regard the Court fell into error.

40. Having re-considered evidence adduced in total, it is clear that the conviction was unsafe.

41. Accordingly, I quash the conviction and set aside the sentence imposed. The Appellant shall be released forthwith unless otherwise lawfully held.

42. It is so ordered.

Dated, Signed and Delivered at Kitui this 27th day of November, 2018.

L.N. MUTENDE

JUDGE