REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CRIMINAL APPEAL NO 14 OF 2015

TITO KISANGAU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(**From original conviction and sentence in Criminal Case Number 445of 2014**

in the Senior Principal Magistrate's Court at Voi delivered

by Hon S.M. Wahome (SPM) on 24th December 2014)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Tito Kisangau, was tried and convicted by Hon S.M. Wahome, Senior Principal Magistrate Voi Law Courts for the offences of entering a National Parkcontrary to Sections 102(1)(a)of the Wildlife Conservation and Management Act 2013 (Laws of Kenya)(hereinafter referred to as "the Act"), conveying hunting apparatus into a national park contrary to Section 102(1)(f) of the Act, being in possession of a wildlife trophy without a permit contrary to Section 95 as read with Section 92 of the Act and hunting an endangered animal contrary to Section 92 of the Act.

2. In respect of Counts I and II, the Appellant was fined a sum of Kshs 200,000/= in each count or in default, to serve two (2) years' imprisonment. In respect to Count III, he was fined Kshs 1,000,000/= or in default to serve five (5) years imprisonment. He was acquitted of Count IV as the Learned Trial Magistrate observed that the Kenya Wildlife Services (KWS) Rangers found the elephant dead with the Appellant removing its tusks.

3. The particulars of the Counts were as follows :-

COUNT I

"On the 30th day of May 2014 at around 1230 hrs at Wamata Area of Tsavo East National Park Kitui County, you entered the said national park without authorization."

COUNT II

"On the 30th day of May 2014 at around 1230 hrs at Wamata Area of Tsavo East National Park Kitui County, you were found with (sic) **inside the said National Park with 1 bow, 6 poisonous arrows, 1 un-poisoned arrow, 1 arrow stick, 1 axe, 1 sufuria, 1 bowl, 2 kgs of maize flour with purposes of hunting."**

COUNT III

"On the 30th day of May 2014 at around 1230 hrs at Wamata Area of Tsavo East National Park Kitui County, you were found in possession of wildlife trophies namely two (2) elephant tusks weighing 12 kgs with a street value of Ksh. 240,000/= without a permit."

COUNT IV

"On the 30th day of May 2014 at around 1230 hrs at Wamata Area of Tsavo East National Park Kitui County, you were found to have hunted an endangered species namely an African elephant where you were found to have chopped two (2) elephant tusks weighing 12kgs with a street value of Ksh. 240,000/= being an endangered species."

4. Being dissatisfied with the said judgment, on 26th January 2014, the Appellant filed a Notice of Motion application seeking leaving to file an appeal out of time. The said application was allowed and the Petition of Appeal was deemedas having been duly filed and served. The Grounds of Mitigation the Appellant had relied upon were that:-

1. **THAT the Appellant was too remorseful.**

2. **THAT he was begging leniency despite of the offence** (sic)**.**

3. **THAT he was first offender and a layman in law.**

4. **THAT he prayed that the Hon. High Court consider his state of health as he suffered from kidney and stomach ulcers.**

5. **THAT he was married with three (3) children and his parents were too old and since he was their breadwinner, he was suffering psychologically which was affecting his health** (sic)**.**

5. On 13th September 2016, the court directed him to file his Written Submissions. On 28th September 2016, he filed the said Written Submissions together with Amended Grounds of Appeal which were as follows:-

1. **THAT the Learned trial magistrate erred in law and facts by failing to consider that he was arraigned in court to take his plea before he was charged at the police station.**

2. **THAT the Learned trial magistrate erred both in law and facts by failing to consider that the prosecution's adduced evidence was contradictory c/s 163(1) (c) of the Evidence Act.**

3. **THAT the Learned trial magistrate erred in law and facts by failing to consider that the prosecution had failed to prove their case beyond reasonable doubt c/s 109 and 110 of the Evidence Act.**

4. **THAT the Learned trial magistrate erred in law and facts by failing to adequately consider his defence which was firm to create doubt on the prosecution's case** (sic)**.**

6. The State's Written Submissions were dated and filed on 8th November 2016 while the Appellant's Response to the said Written Submissions was filed on 15th November 2016.

7. When the matter came up on 20th December 2016, both counsel for the Appellant and the State asked this court to rely on their respective Written Submissions in their entirety. This Judgment is therefore based on the said Written Submissions.

LEGAL ANALYSIS

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

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

9. Having looked at the said Written Submissions, it appeared to this court that the questionsit was being asked to consider and determine were:-

a. **Whether or not the plea taking was defective; and**

b. **Whether or not the Prosecution had proven its case beyond reasonable doubt.**

10. The said issues were therefore dealt with under the distinct heads shown hereinbelow.

I. **DEFECTIVENESS OF THE PLEA TAKING**

11. Amended Ground of Appeal No 1 was dealt with under this head.

12. The Appellant contended that he was taken for the taking of his plea even before the charges that had been preferred against him had been recorded at the police station. He pointed out that he was arraigned in court on 3rd April 2014 but he took his plea on 30th May 2014. He argued that the charge was a nullity as it was evident that the offence was committed while he was in police custody.

13. He submitted that this was not a suitable case for a Re-trial as it would give the Prosecution as opportunity to take their case to the "garage for repair" and the same would greatly prejudice him as he will not be compensated for the time that he has spent in prison, there being no guarantee that the case would be heard expeditiously.

14. In this regard, he referred this court to the case of **Ahmed Ali Dharamshi (1964) 1A 481** where it was held that **"where a conviction is quashed, a retrial will not be ordered due to insufficient evidence from the prosecution witnesses to fill the gaps."**

15. On its part, the State submitted that the Appellant was arraigned in court on 3rd June 2014 and not 3rd April 2014 as he had contended and that he was arrested on 30th May 2014. It stated that the plea was deferred to 4th June 2014 and consequently, the Charges that had been preferred against him were not fabricated.

16. This court looked at the **typed proceedings**(emphasis court) and noted the Coram of the first appearance in the Trial Court and note that the same was indicated as having been on 3rd April 2014. The Prosecution requested that the plea be taken the following day whereupon the Learned Trial Magistrate deferred the taking of the said plea to 4th June 2016. The Charges were read to the Appellant on 4th June 2014 and he pleaded not guilty to the same.

17. This court carefully considered the Appellant's submission that the offences were committed by another person as he was in police custody as at 3rd April 2014 and that there had been a delay in the

taking of his plea. However, this court noted that the indication of 3rd April 2014 was clearly a typographical error. Indeed, the hand written notes in the Trial Court file showed that the Appellant was arraigned in court on 3rd June 2014 and the plea was taken on 4th June 2014.

18. In the premises foregoing, the Appellant's Amended Ground of Appeal No (1) was not meritorious and appeared to have been an attempt to get off the hook by relying on an inconsequential technicality. The said Ground of Appeal is therefore hereby dismissed.

II. **PROOF OF THE PROSECUTION'S CASE**

19. Amended Grounds of Appeal Nos (2), (3) and (4) were dealt with under this head as they were all related.

20. The Appellant referred this court to the definition of **'an assertion"** found in the Chambers 21st Century Dictionary Revised Edition **"as a positive or strong statement or claim or the act of making such a claim or statement and that the same would need to be proved by evidence"**and relied on the case of **Cr Appeal No 115 of 1982 Muiruri Njoroge vs Republic** where the court arrived at the same conclusion.

21. He submitted that the burden of proof of the alleged offence lay with the Prosecution but it had adduced shoddy evidence and failed to discharge this burden of proofbecause the evidence that was adduced by the Prosecution did not link him to the alleged offence.

22. He averred that there was no eye witness who saw him in the National Park and that the State had failed to give a satisfactory reason why he would reside in the National Park. He contended that finger prints on the recovered items was not done and argued that it was not possible for a poacher to go into the National Park and remain undetected as KWS patrolled the area using patrol cars and aeroplanes on a twenty four (24) hour basis.

23. It was his contention that there was contradiction in the evidence of BoruNdenge(hereinafter referred to as "PW 1") and No 9719 Alex Ali Golo(hereinafter referred to as "PW 2"), which he argued were at variance with each other. He pointed out that PW 1 testified that they took three (3) photos but PW 2 referred to four (4) photographs.

24. He referred this court to the provisions of Section 163 (1) (c) of the Evidence Act that providethat **"The credit of a witness may be impeached in the following ways, by adverse party or with the consent of the court by the party who calls him. (sic) by proof of former statements, whether written or oral, inconsistent with any part of his evidence which is liable to be contradicted."**

25. It was his further submission that the omission and/or inconsistencies in PW 1's and PW 2's evidence were sufficient for doubt to be created in the mind of the court and thus urged this court to acquit him.

26. On its part, the State pointed out that although there were no eyewitnesses to the killing of the elephant in question, there was overwhelming evidence to prove that the Appellant was involved in the offences he had been charged with.

27. It averred that the Appellant was arrested inside the National Park and his assertions that his house was five (5) kilometres from the said National Park was not raised during trial to enable the Investigating Officer confirm the same. It was categorical that the utensils and flour that were recovered were indicative of the fact that the Appellant had been residing in the said National Park.

28. It added that the Appellant was found in the National Park in possession of one (1) bow, six (6) poisonous arrows, one(1) un-poisoned arrow, one (1) arrow stick and one(1) axe (hereinafter referred to as "the hunting apparatus") was not a mere coincidence but raised suspicion.

29. Further, it averred that the Appellant had failed to demonstrate in his defence that the KWS Rangers

had a grudge against him that motivated them to prefer false charges against him. It therefore urged this court to dismiss his Appeal as it was not meritorious.

30. According to PW 1, he was in the National Park on 30th May 2014 in the company of PW 2 and others when they noticed footprints belonging to an elephant and a human being, which they followed leading them to where the Appellant herein was sawing off tusks from a dead elephant. He testified that they recovered the hunting apparatus from him.

31. PW 2 reiterated PW 1's evidence. No 8140 Ranger Job Magara (hereinafter referred to as 'PW 3") tendered in evidence the hunting apparatus and also confirmed that he was the one who took the Appellant to Voi Police Station. No 93081 PC Shem Asher (hereinafter referred to as "PW 4") tendered in evidence four (4) photographs that he processed from a film he was given by PW 3.

32. In his unsworn defence, the Appellant said that his farm bordered the National Park and that on the material date, he was fencing his farm when KWS Rangers asked him whether he had seen people pass near there. They requested him to assist them in tracing the footprints but he declined because he feared being arrested. It was his evidence that the said KWS Rangers arrested him and took him for about five (5) kilometres inside the National Park where they photographed him with the hunting apparatus and the dead elephant.

33. Notably, the Appellant adduced unsworn evidence. While the law allowed him to defend himself in such manner, his evidence had little or no probative value.

34. As was rightly pointed out by the State and which the Learned Trial Magistrate aptly found, the Appellant failed to provide prove to show that PW 1 and PW 2 had a grudge that would have made them fabricate the charges against him. Their evidence did not contradict each other. It was not the number of photographs that mattered but rather it was the contents of the said photographs that was material. In any event, the fact that PW 3 referred to three (3) photographs did not mean that only three (3) photographs had been taken but rather those were the photographs that he was asked to comment on.

35. As there was no evidence that the Appellant was the one who killed the said elephant, the Learned Trial Magistrate arrived at a correct conclusion when he gave him benefit of doubt. PW 4 printed four (4) photographs that he adduced in court as evidence. The same showed the Appellant, a dead elephant and the hunting apparatus. The fact that he was found in the National Park in the circumstances that he found himself in proved Count I, Count II and Count III. Indeed, it was not necessary to have dusted the finger prints on the hunting apparatus as he had been found red-handed.

36. Accordingly, having considered the Appellant's Petition of Appeal, his Amended Grounds of Appeal, his Written Submissions and the case law that he relied upon as well as the State's Written Submissions and the case law it relied upon, this court came to the firm conclusion that the Appellant's arguments that the inconsistency between PW 1's and PW 2's evidence was sufficient to create doubt in the mind of this court was misplaced and was a desperate attempt to exonerate himself from the offences herein.

37. On the other hand, it was clear to this court that the evidence that was tendered by the Prosecution witnesses was cogent and consistent and had proven the offences beyond reasonable doubt.

38. In this respect, this court found Amended Grounds of Appeal Nos (2), (3) and (4) were not merited and the same are hereby dismissed.

III. **SENTENCE**

39. Section 95 of the said Act stipulates as follows:-

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

liable to a fine of not less than(emphasis court) **one million shillings or imprisonment for a term not less that**(emphasis court) **five years or to both such imprisonment and fine."**

40. **Section 102 (1) of the Act provides as follows:-**

"Any person who-

(a) **Enters or resides in a national park or reserve otherwise than under licence, permit or in the course of his duty as authorized officer or a person lawfully employed in the park or reserve, as the case may be…**

(f) **conveys into a protected area or is found within a protected area in possession ofany firearm, ammunition, arrow, spear, snare, trap or similar device without authorization**;

commits an offence and is liable on conviction to a fine of not less than two hundred thousand shillings or to imprisonment of not less than two years or to both such fine and imprisonment."

41. Bearing in mind the offences that the Appellant had committed, it was clear to this court that the penalties that were meted upon him by the Learned Trial Magistrate were legal and proper. This court could not interfere with the same. **Indeed, in the case of Kenneth Kimani Kamunyu Vs Republic [2006] eKLR, the Court of Appealheld**that an appellate Court can only interfere with the sentence if it is illegal or unlawful.

42. However, it was worthy of note that the Learned Trial Magistrate did not indicate whether the default sentences were to run concurrently or consecutively. Although the Appellant and the State did not submiton this issue, this court deemed it fit to address the said issue for clarity purposes.

43. Section 14 of the Criminal Procedure Code Cap 75 (Laws of Kenya) provides as follows:-

"(1) Subject to sub-section (3) when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefor which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.

44. In the case **Peter Mbugua Kabui Vs Republic[2016] eKLR**, the Court of Appeal addressed its mind to the question of concurrent and consecutive sentences when it stated as follows:-

"In the case of Sawedi Mukasa s/o Abdulla Aligwaisa [1946] 13 EACA 97, the then Court of Appeal for Eastern Africa in a judgment read by Sir Joseph Sheridan stated that the practice is where a person commits more than one offence at the same time and in the same transaction, save in very exceptional circumstances, to impose concurrent sentences. That is still good practice. As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment."

45. In the said case, the Court of Appeal had found that the appellant therein had committed different offences on different dates and as a result, Achode J who heard the appeal was correct in upholding the Trial Court's holding that the sentence the Appellant was to serve was to run consecutively.

46. On his part, in the case of **George Mwangi Chege & 2 others v Republic [2004] eKLR** , Khamoni J (as he then was) rendered himself as follows:-

"….where more than one sentence of imprisonment are imposed without specifying whether the sentences will run consecutively or concurrently, Section 333(2) of the Criminal Procedure Code will apply so that every one of those sentences is-

"deemed to commence from, and to include the whole of the day of, the date on which it was pronounced" with the result that:-

(**a) If the sentences are in one trial and are pronounced on the same date, they definitely run concurrently.**

(b) If the sentences are in different trials and are pronounced on the same date, they also run concurrently.

(c) If the sentences are in one trial but are pronounced on different dates, the sentences will run concurrently only to the extent of the balance of the formerly pronounced sentence is yet to be served so that if at that time the latter pronounced sentence is longer than the remainder of the formerly pronounced sentence, then the latter pronounced sentence, following the end of the formerly pronounced sentence, will be served consecutive to the formerly pronounced sentence.

I**n other words, the prison sentences will run concurrently only to the extent of the duration of service of the two sentences coinciding.**

(**d) If the sentences are in different trials and are pronounced on different dates, the prison sentences will run concurrently only to the extent of the duration of service of the two sentences coinciding. Otherwise the sentences will run consecutively."**

47. This principle was also expounded in the cases of**Ng'ang'a vs Republic (1981) KLR 530** and **Ondiek vs Republic (1981) KLR 430**where the common thread was that concurrent sentences should be awarded for offences committed in one criminal transaction unless exceptional circumstances prevail.

48. In the instant case, the offences were committed on the same day and arose out of the same transaction. No exceptional circumstances were demonstrated herein to warrant the sentences that were meted upon the Appellant herein out to run concurrently.

49. It is good and proper practise for a trial court to indicate how sentences are to run where an accused person has been convicted on more than one (1) count to avoid any ambiguity. The ambiguity of how the sentence was to run herein must therefore be read in favour of the Appellant herein, which in any event is the correct position of the law.

DISPOSITION

50. The upshot of this court's decision was that the Appellant's Petition of Appeal that was lodged on 26th January 2014 was not merited and the same is hereby dismissed.

51. However, to avoid any ambiguity in the length of sentence that the Appellant herein will serve, this court hereby directs that the default sentences will run concurrently.

52. It is so ordered.

DATED and **DELIVERED** at **VOI** this **28TH**day of **FEBRUARY** 2017

J. KAMAU

JUDGE

In the presence of:-

Tito Kisangau…Appellant

Miss Anyumba for State

Josephat Mavu– Court Clerk