



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NO.74 OF 2017

(Appeal Originating from Nyahururu CM's Court Cr.No.1511 of 2014 by: Hon. A.P. Ndege – P.M.)

JEMIRIS LEADISMO.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

J U D G M E N T

Jemiris Leadismo was charged with the offence of being in possession of wildlife trophies contrary to section 95 of the Wildlife Conservation and Management Act, 2013 (WCMA).

The particulars of the charge were that on 15/6/2014 at Marmanet Township, Laikipia West District, Laikipia County, was found in possession of wildlife Trophies namely 2 (two) pairs of elephant trophies weighing 6kgs with a street value of Kshs.600,000/= without a permit of ownership.

In Count II he was charged with the offence of dealing in wildlife trophy contrary to section 84(1) as read with Section 92 and 105 of the WCM Act 2013.

The particulars of that charge are that on 15/6/2014 at Marmanet in Laikipia West, Laikipia County was found dealing in 2 pieces of elephant tusks using a motor cycle Registration No.KMCS 453K without a dealer's license.

After a full trial the appeal was found guilty and convicted on count 1 and was sentenced to a fine of Kshs.3,000,000/= in default 8 years imprisonment. He was acquitted of count II. He is aggrieved by the said conviction and sentence and preferred this appeal.

The appeal is predicated on the following grounds:

1. That the trial court failed to find that the evidence of PW1 and 2 was contradictory and inconsistent;
2. That no inventory was produced in evidence as proof of what was recovered;
3. That the prosecution did not call any independent evidence;
4. That the accused's defence was not considered;
5. That the sentence is harsh and excessive;
6. That Section 169 CPC was not complied with.

Mr. Mong'are learned State counsel submitted that the charges were proved after the state called 3 witnesses and that the sentence is not harsh.

This being the first appeal, it is required of this court to evaluate the evidence afresh, analyze it and arrive at its own independent determinations. I am guided by the decision of **Okeno –vrs- Republic (1972) EA 32.**

The evidence before the trial court was as follows:

PW1 Reuben Juma Malemba, a ranger with KWS Rumuruti Station, was at work when his colleague PW2 CPL Aden Yusuf called him and asked him to proceed to the office. He did so and they prepared to go to Marmanet Secondary School where they laid ambush following information that a person would pass there with elephant tusks; that about 9.40 p.m. a motor cycle KMCS 453K (Ex.3) emerged from Rumuruti direction, they stopped it and it had a yellow sack in which they found two elephant tusks, (Sack – P.Ex.No.1 and tusks P.Ex.2). They arrested the appellant and took him to Nyahururu police station where he was charged with two offences. PW2 CPL Aden Yusuf Abdi reiterated what PW1 told the court.

PW3 PC Hillary Kiprono was the investigating officer in this matter after the appellant was taken to Nyahururu police station with the exhibits.

When called upon to defend himself, the appellant made an unsworn statement that on 15/6/2014, he left his home as he pushed his motor cycle which was spoilt but was stopped by PW1 and 2 at Keptum; he explained that he was taking the motor cycle to the garage; they arrested him took him to police station. He denied ever seeing the exhibits produced in court.

It is the appellant's contention that the evidence of PW1 and 2 was inconsistent and that other independent evidence should have been called. First of all, the appellant did not point to any inconsistencies in the said evidence of PW1 and 2. In my view, the evidence of PW1 and 2 was very consistent in all material particulars and was not shaken at all in cross examination. In fact the appellant never asked PW1 any question and therefore his evidence which is similar to that of PW2 was never shaken.

The appellant complained that the prosecution should have called other independent evidence besides that of PW1 and 2. Under Section 143 of the Evidence Act, no specific number of witnesses is required to prove a fact. Each case must be considered on its own special circumstances. There may be cases where there is only one witness to the crime and a case cannot fail just because of that. PW1 and 2 acted on a tip off from an informer before arresting the appellant. The appellant contends that the informer should have been called as a witness. Generally, it is accepted that basing a conviction on the evidence of an informer is dangerous because it is hearsay evidence unless supported by other independent evidence. This is because informer's evidence could be based on vendetta or could be mere rumours and may be easily abused. The court must therefore exercise caution when relying on it and hence the need for corroboration. In the case of **Patrick Kibiu Maina and another –vrs- Republic (1986) KLR 889**, the court held:

“If any accused is arrested on the strength of any information given by an informer and he is not put in the witness box in chief or be examined; such evidence should be disregarded.....”

There are of course exceptions to the general rule on evidence of informers. This was considered by the Court of Appeal in **Joseph Otieno Juma –vrs- Republic CA (KSM) Appeal No.214/2009 (2011 KLR)**.

After reviewing several cases involving evidence of informers, the court said:

“To sum up and in the context of the circumstances before us, the only exceptions we can think of where the informer's lid can be lifted, are where failure to do so would undermine the concept of a fair trial and where it would have a bearing on the innocence of an accused person.”

In this case, the informer told PW2 that a person would pass on the particular road on a motor cycle. PW2 stated that they did not know the registration number of the motor cycle that would be carrying the elephant tusks and so they had to stop all motor cycles that passed on that road.

Besides, upon the witnesses stopping the appellant, a recovery was made. The information received is what led to the arrest of the appellant and the recovery corroborates the evidence of PW1 and 2. In this instance, there was no need to lift the 'lid' of the informer.

In Kigecha Njuga –vrs- Republic (1965) EA 773, Sir John Ainley CJ and Madan J stated this of evidence of informers:

“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.”

In this case, there were two witnesses whose evidence was consistent and the trial court believed it and made a finding that they found the accused in possession of elephant tusks in a sack on a motor cycle. The trial court had an opportunity to observe the witnesses and test their demeanor and believed them. This court has no reason to interfere with the said finding.

As to the failure by the witness to produce the inventory, on the recovered items (exhibits), the appellant never asked the witnesses to avail the inventory of the recoveries they made. It cannot be made an issue at this stage.

Further, the appellant contends that photographs were not taken of the exhibits at the scene. Photographs may be taken at the scene but in this case there was no need to photograph them at the scene of the recovery because the exhibits were available for production as exhibits in this court.

The appellant also complained that his defence was not considered. I have read the Judgment of trial court and at paragraph 8 of the Judgment thereof, the court observed that the issues raised in the defence were never raised when the witnesses testified and there was no

reason why the prosecution would frame the appellant with the offence. It is evident that the defence was considered and found it to be an afterthought and therefore dismissed.

Section 169(1) CPC deals with the contents of a well structured Judgment; that it shall contain points for determination, the decision; the reasons for the decision, be dated and signed. I have read the Judgment of the trial court. In the judgment, the magistrate set out the charges, reviewed and analyzed the evidence and then made the final decision convicting the appellant on the first charge. I am satisfied that the trial court did comply with Section 169 CPC. I find that the conviction was proper and sound. I dismiss the appeal on conviction.

The appellant also complained that the sentence was excessive. He was charged under section 95 of the Wildlife Conservation and Management Act which provides that upon conviction, one shall be liable to a fine of not less than one million shillings or imprisonment for a term of not less than 5 years or to both fine and punishment. That is the minimum sentence. I have considered the appellant's mitigation, that he is first offender, a family man and prayed for leniency. In exercise of this court's discretion, I will allow the appeal on sentence by reviewing it downwards. I hereby reduce the sentence from Kshs.3 million in default 8 years imprisonment to the minimum sentence provided under Section 95 of WCMA being Kshs.1 million in default, he will serve 5 years imprisonment. The prison sentence will run from the date he was sentenced by the trial court.

It is so ordered.

Dated and Signed at NYAHURURU this 31st day of March, 2017.

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R.P.V. Wendoh

JUDGE