REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO.101 OF 2016 [CONSOLIDATED WITH HCRA NO.102&103 OF 2016]

1. JAMES MWITI MWAJA

2.DAVID MUTEMBEI RUKARIA

3.JOSEPH KIMATHI MUTHINJI ..... APPELLANTS

VERSUS

REPUBLIC ……. RESPONDENT

(From the original conviction and sentence in criminal case No. 318 of 2015 of the Chief Magistrate's Court a Isiolo by Hon. R.G Mundia – Resident Magistrate)

JUDGMENT

JAMES MWITI MWAJA, **DAVID MUTEMBEI RUKARIA** and **JOSEPH KIMATHI MUTHINJI** the appellants, were convicted for the offence of being in possession of a wildlife trophy contrary to section 95 of the Wildlife Conservation and Management Act,2013 **JAMES MWITI MWAJA** was also convicted for the offence of killing an animal with intent to steal contrary to section 289 of the Penal Code.

The particulars of the offence were that on 25th July 2015 at Chokaa village, in Isiolo County, were jointly found in possession of a male gerenuk without a permit. The first accused allegedly killed the animal with intent to steal.

Each appellant was fined Kshs.2 million in count one and in default to serve 2 years imprisonment. The first appellant was not sentenced in respect of the first count. The appeal is against both conviction and sentence.

The first appellant was represented by Mrs. Ntarangwi while the second and third appellants were represented by Mr. Kimathi Kiara, learned counsel. They raised similar grounds of appeal that I have summarized as follows:

1. That the learned trial magistrate erred in law and in fact by relying on inadmissible confession.

2. That the learned trial magistrate erred in law and in fact by relying on contradictory evidence.

3. That the learned trial magistrate erred in law and in fact by failing to consider the defence of the appellants.

The state opposed the appeal through Mr. Namiti, the learned counsel.

The facts of the prosecution case were briefly as follows:

At about 10.00 p.m, some game wardens saw a lorry parked by the roadside. They became suspicious and went to check. They found the appellants and another, struggling to load a gerenuk on the lorry. They were arrested and charged.

In their defence the appellants denied involvement in the offences.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO vs. REPUBLIC [1972] EA 32.**

Confessions and their admissibility is governed by the provisions of section 25A(1) the Evidence Act. It states:

> ***A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person's choice.***

The learned trial magistrate did not appear to be aware of the stringent requirements before a confession becomes admissible. Not only did he allow the illegal confessions to be adduced in evidence, but also relied heavily on the same in his judgment. The officers who testified on confessions(PW1 and PW2) were not qualified to take confessions. Even in cases of qualified officers, there are laid down regulations of taking a confession; they cannot be taken by the roadside in a very casual manner. This was prejudicial to the appellants and their co-accused who was said to be a minor and was committed to Shimo La Tewa Borstal Institution.

The evidence of **David Rono** (PW1) was that when they turned to where there was a stationary lorry, they found the four appellants struggling to load the gerenuk onto the lorry. The lorry was loaded with sand and was covered on all areas. This is what **CPL. John Lepuse** (PW2) testified to. These two were game wardens working with Kenya Wildlife Services (KWS). The evidence **of Issa Khalid Rambua** (PW4) and which the trial court relied on heavily, is that when the lorry they were in hit the gerenuk, they put it in the lorry. The KWS officers stopped their vehicle while it was in motion and the animal was aboard. This contradicted the evidence of PW1 and PW2. This taken together with the defence of the appellants raised reasonable doubts which ought to have been resolved in favour of the appellants. This incident took place on a road. Had it been in the bush, the burden of prove would not be very heavy on the prosecution.

This takes us to the second count. How did the learned trial magistrate conclude that there was an intention to kill the animal without evidence to that effect? Both wild and domestic animals cross roads and in some instances they are hit and killed. It was erroneous for the magistrate to approach the second count as if the offence was an absolute one.

I did not understand why after convicting the first appellant he was not sentenced in the second count. This was wrong.

From the foregoing analysis of the evidence on record, it was unsafe to convict the appellants and their co-accused who was a minor and who did not appeal. I will therefore quash the convictions in respect of all the appellants and their minor co-accused. The consequential sentences and the order thereof are set aside. The appellants to be set at liberty unless if otherwise lawfully held. The minor co-accused's borstal order is also set aside and he be set at liberty unless if otherwise lawfully held. The order to be served to Shimo La Tewa Borstal Institution.

DATED at **MERU** this **28th** day of **April, 2017**

KIARIE WAWERU KIARIE

JUDGE