REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO.48 OF 2015

BALISIO LEKWALE ..... APPELLANT

VERSUS

REPUBLIC ……..…… RESPONDENT

(From the original conviction and sentence in criminal case No. 159 of 2014 of the Chief Magistrate's Court at Isiolo by Hon. R.G Mundia –Resident Magistrate)

JUDGMENT

The appellant, **BALISIO LEKWALE**, was convicted for the offence of being in possession of wildlife trophy contrary to section 95 as read with section 92 of the wildlife Conservation and Management Act of 2013.

The particulars of the offence were that on 17th April 2014, at Nayanakore in Isiolo County, was found keeping one elephant tusk valued at Kshs.350,000/= without a permit from Kenya wildlife Service.

The appellant was fined three million shillings in default to serve seven years imprisonment. He now appeals against both conviction and sentence.

The appellant was in person. He raised three grounds of appeal as follows:

1. That the learned trial magistrate erred in law and in fact by failing to appreciate his constitutional rights were breached.

2. That the learned trial magistrate erred in law and in fact by providing him with an interpreter from his community.

3. That the learned trial magistrate erred in law and in fact by convicting the appellant without sufficient evidence.

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

The facts of the prosecution case briefly were as follows:

Kenya Wildlife Service wardens went to the manyatta of the appellant after receiving some information. In the manyatta of the appellant they recovered an elephant tusk. The appellant had no permit.

The appellant denied any involvement in the offence.

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.**

It is erroneous to charge an accused person with two counts in one charge. This is duplicity. This is how the appellant was charged. Section 92 of the Wildlife Conservation and Management Act provides as follows:

> ***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.***

Section 95 of the Act states:

> ***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.***

This was prejudicial to the appellant. In the case of **CHERERE s/o GUKULI vs. REPUBLIC (1955) E.A. 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 not merely formal but substantial. When 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 convicted he does not know exactly of what he has been convicted.***

The issue of an existing grudge with a Mr. Julius Cheruioyot of KWS did not feature anywhere in the proceedings. The appellant brought it out for the first time during his defence. He never challenged the witnesses who arrested him with this facts. This is clearly an afterthought.

Where an accused person claims that his constitutional rights were breached by being held longer in custody, his recourse is to file a civil suit. This is what the Court of Appeal in the case of **JULIUS KAMAU MBUGUA vs. REPUBLIC [2010] eKLR** said:

> ***The alleged unlawful detention occurred long before the appellant was charged. The alleged unlawful detention does not exonerate the appellant from the serious crime he is alleged to have committed. The breach could logically give rise to a civil remedy – money compensation as stipulated in Section 72 (6). That is the appropriate remedy which the appellant should have sought in a different forum.***

This position obtains in the new Constitution.

The record shows that the proceedings were interpreted in Kiswahili. At no time did the appellant complain to the court that he was not able to follow the proceedings. He is estopped to raise this issue now.

According to the evidence of Ranger **Peter Kariuki Maina** (PW1), it was Mutegi, Sgt. Abdullahi, Lang'o and himself who entered into the house of the appellant. He said the recovery was by Sgt. Lang'o and Mutegi. However according to **Ranger Paul Tanui (**PW2) only three people entered into the house. These were Erick(Mutegi) , Peter and himself. He said he was the first to see the ivory. **P.C Erick Mutegi**(PW3) on his part said Kariuki(PW1),Tanui and himself were the ones who entered the house.

These contradictions viewed against the appellant's defence, cannot be logically reconciled. It was unsafe to convict the appellant. It can only mean that the prosecution case was not proved to the required standards.

The upshot of the foregoing analysis of the evidence on record, is that the appeal succeeds. The conviction is quashed and the sentence set aside.

The appellant is set at liberty unless if otherwise lawfully held.

DATED at **MERU** this **27th** day of **April, 2017**

KIARIE WAWERU KIARIE

JUDGE