



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI
CRIMINAL APPEAL NO 36 OF 2016

MUSTAFA MWACHINDA MAILOMA..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(From original conviction and sentence in Criminal Case Number 177 of 2015 in the Senior Principal Magistrate's Court at Voi delivered by Hon E.M. Kadima (RM) on 22nd April 2016)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Mustapha Mwachindi Mailoma and his Co-accused namely, Patrick Joho Ndegwa, Emmanuel Menza Ramadhan, Salim Chibonja and Abubakar Tsuma Nyawa were jointly tried and convicted by Hon E.M. Kadima, Resident Magistrate Voi Law Courts for various Counts. Count I was in respect of the offence of being in possession of wildlife trophy without a permit contrary to Section 95 of the Wildlife Conservation and Management Act, 2013 (hereinafter referred to as "the Act").
2. Count II related to the offence of being in possession of hunting apparatus contrary to Section 102(1) of the Act. Count III related to the offence of hunting an endangered animal contrary to Section 92 of the Act. Count IV related to the Appellant herein, Emmanuel Menza Ramadhan Mwachindi and Patrick Joho Ndegwa and was in respect of failing to register contrary to Section 14(1) of the Registration of Persons Act Cap 107 (Laws of Kenya). Count VI was also for failing to register contrary to Section 14(1) of the Registration of the Persons Act but was limited to Salim Chibonja Munyaka.
3. The Learned Trial Magistrate convicted the Appellant and his Co-Accused of Count I and Count III but acquitted all of them on Count II. He also found the Appellant, Emmanuel Menza Ramadhan and Patrick Joho Ndegwa and Salim Chibonja guilty of Count IV and V.
4. He proceeded to fine them Kshs 1,000,000/= and in default to serve five (5) years in jail. Unfortunately, he did not indicate what this penalty related to. However, in respect of Count III, he fined the Appellant and his Co-Accused Kshs 20,000,000/= and in default to serve life imprisonment. For Count IV and V, he fined the Appellant, Emmanuel Menza Ramadhan and Patrick Joho Ndegwa and Salim Chibonja Kshs 5,000/= and in default to serve three (3) months in jail. He directed that all the sentences run consecutively.
5. Being dissatisfied with the said judgment, on 29th July 2016, the Appellant filed a Notice of Motion application seeking leave to be granted leave to file his Appeal out of time. The said application was allowed and the Petition was deemed to have been duly filed and served.

6. On 30th November 2016, the Appellant was directed to file his Written Submissions. Instead of doing so, on 9th December 2016, he filed his Written Submissions together with Amended Grounds of Appeal. The Amended Grounds of Appeal were as follows:-

1. THAT the learned trial magistrate erred in law and fact by believing the evidence of PW5, PW6 & PW10, without seeing that their evidence does not corroborate the said matter of the appellant in his sentencing.

2. THAT the honourable trial magistrate erred in law and fact not relying that I was among the people escaped and named without any proved evidence or record.

3. THAT the learned trial magistrate erred in law and fact by not considering the importance of a thorough investigation during conviction.

4. THAT the honourable magistrate erred in law and fact by convicting the appellant without any direct and proved evidence.

5. THAT the learned trial magistrate erred in law and fact by not considering my defence submission as the truth.

6. THAT the learned trial magistrate erred in law and fact by convicting the appellant on believing that my confession was used to arrest Mr. Chimbonja without seeing that this allegation was not proved.

7. His Written Submissions and Further Written Submissions were filed on 9th December 2016 and 23rd February 2017 respectively. Those of the State were dated and filed on 7th February 2017.

8. When the matter came up on 23rd February 2017, both the Appellant and counsel for 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

9. 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”.

10. It appeared from the aforesaid Amended Grounds of Appeal that the question that was before this court was really whether or not the Prosecution proved its case. This court therefore dealt with all the grounds together as they were related.

THE APPELLANT’S CASE

11. According to the Appellant there was contradiction in the evidence of Ranger Dishon Kisui(hereinafter referred to as “PW 5”), Ranger Samuel Kitur(hereinafter to as “PW 6”) and Ranger Job Magara (hereinafter referred to as “PW 10”). He stated that PW5 testified that he was the one who called Salim Chibonja. The said that the phone number he used was not given and none of the officers said they had used his phone.

12. He averred that no identification parade was conducted since the use of only one name, Mustafa, was

not unique and there are very many people sharing the same name. He stated that he was arrested because of the name Mustafa and not because he was caught at the scene and there were no exhibits that connected him to this case.

13. He stated a thorough investigation ought to have been carried out and evidence adduced in court. It was therefore his contention that the Prosecution did not prove its case beyond reasonable doubt to warrant his conviction and sentence in the matter herein.

THE STATE'S CASE

14. On its part, the State set out the evidence that was adduced by the Prosecution witnesses in detail and argued that the Appellant was connected to his Co-Accused Patrick Joho Ndegwa by the latter's wife, one Eliana. It said that it could not have been coincidental for them to have been arrested together.

15. It contended that the Appellant's alibi was not proven as he did not call his sister to testify that he was at her house on 13th March 2015 for a goat sale and neither was the party to the transaction called as a witness in the matter herein. It added that he hailed from Talio Village.

16. It submitted that the elephant tusks were found at the Patrick Joho Ndegwa's house after footprints were traced to his house and that the Assistant Chief Paul Mwanjagi Mwamvula (hereinafter referred to as "PW 4") assisted in identifying his Boma, which evidence was corroborated by Ranger Dishon Kisui (hereinafter referred to as "PW 5").

17. It also said that Ranger Guyo Juma, Moses Echakani Lorewa and Ranger Felix Nyakundi (hereinafter referred to as "PW 1", "PW 2" and "PW 3" respectively) confirmed that the hunting apparatus were found at the Appellant's home and that PC Shem Asher (hereinafter referred to as "PW 8") adduced in evidence the photographs of the carcass.

18. It pointed out that the Veterinary doctor Dr Jeremiah Pogo (hereinafter referred to as "PW 9") confirmed having gone to the scene on 14th March 2015 and seeing a dead elephant, which was considered as an endangered species in the Sixth Schedule of the Wildlife Management and Conservation Act, whose tusks had been removed. He said that the colon had been punctured and there was a poisonous black substance. He also retrieved an arrow head embedded inside the colon which was clear that the said elephant did not die of natural causes.

19. It argued that PW 1, PW 2 and PW 3 all arrived at the Appellant's house and found weighing scale, four (4) bow sticks, two (2) poisonous arrows, an axe, a sharpening stone (hereinafter referred to as "the items").

20. It was its submission that the Learned Trial Magistrate meted out a sentence that was lawful as it was in accordance with the law and therefore urged this court to dismiss the Appellant's Appeal.

LEGAL ANALYSIS

21. 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".

22. It appeared from the aforesaid Amended Grounds of Appeal that the question that was before this court was really whether or not the Prosecution proved its case. This court therefore dealt with all the Amended Grounds together as they were related.

23. In establishing whether or not the Prosecution had proved its case against the Appellant herein, this court carefully analysed the evidence that was presented in the Trial Court. PW1 said that they received information that an elephant had been killed at Mgheno Ranch in an area called Panda Two. Its tusks had been removed. When they reached there, the footsteps that led them to a Boma that was about hundred (100) metres) and saw five (5) people sitting under a tree. He said that when they approached, the five (5) men ran away. He stated that he could not identify them but that he saw the Appellant's Co-Accused namely, Patrick Joho Ndegwa in a red tunic running away.

24. It was his testimony that a woman they found at the Boma informed them that the Boma belonged to the said Patrick Joho Ndegwa. He stated that they recovered hunting apparatus and two (2) tusks were found ten (10) metres underneath a tree.

25. When the Appellant and his Co-Accused Cross-examined him, he admitted that he could not tell who among the five (5) ran away as he did not know them and he never found them at the scene. Although he was emphatic that they followed the footsteps to the Boma, he conceded that he could not identify to whom the footsteps belonged to.

26. He also stated that neither the Appellant nor his Co-Accused were found with the items that were tendered in evidence before the Trial Court. He also stated that he never conducted investigations to establish to whom the house the hunting apparatus and tusks were found belonged to but only relied on the confirmation of Patrick Joho Ndegwa's wife that the house belonged to him.

27. When he was recalled to testify, PW 1 averred that they arrived at the Patrick Joho Ndegwa's house at 8.30pm having got a radio call of the elephant that had been killed at 7.30 am.

28. PW2 corroborated PW 1's evidence that they followed footprints to the Boma and that on reaching there after about five (5) hours, they found one Elina Jumwa who said she did not know the people who ran away. He also said that she identified Patrick Joho Ndegwa as her husband and he was among the five (5) men who ran away and who had come with the items that were presented before the court that morning.

29. During Cross-examination by the Appellant and his Co-Accused, PW 2 admitted that he was not known to them and he could not identify them and that the person who informed them of the dead elephant was not before the court. He also stated that he could not tell to whom the footprints belonged to but he was emphatic that the footprints led them to the Boma.

30. PW3 also said they traced footprints of five (5) people and when they got to the Boma, the five (5) men ran away when they reached Patrick Joho Ndegwa's Boma. He said they chased them but they ran away. They, however, searched the Boma and hunting the tusks and the items and that the said Ellina identified Patrick Joho Ndegwa as her husband, the Appellant herein, Emmanuel Menza Ramadhan and others as having been from Taru. Similarly, during Cross-examination, he stated that he did not see who the five (5) men were and he could not tell to whom the footprints belonged to.

31. On his part, PW4 said that KWS officers informed him that they had followed footprints to Patrick Joho Ndegwa's house. He said that when they got to the said house, they found Elina Mwae who told them that her husband came with a package. He saw two (2) tusks. During Cross-examination, he stated that Kishamba to Talio was about ten (10) kilometres and the Chief of Talio was away on leave.

32. The evidence of Ranger Samuel Kitur (hereinafter referred to as "PW 6") was that on 14th March 2015, they arrested the Appellant and his Co-Accused at Kasighau Centre after being tipped off by an informer. When he was Cross-examined, he confirmed that they were not found with anything on them. Cpl Jillo Suleiman (hereinafter referred to as "PW 7") testified that they arrested Abubakar Tsuma Nyawa hiding behind three (3) doors in his house on 17th May 2015 after he was also tipped off by an informer.

33. PW 8 and PW 9 tendered in evidence photographic evidence of the elephant carcass. On being Cross-

examined, PW 8 said that he did not know the Appellant and his Co-Accused.

34. Notably, the evidence of Ranger Magara (hereinafter referred to as “PW 10”) did not differ from that of PW 1, PW 2 and PW 3 as he also stated that they followed the footprints to Patrick Joho Ndegwa’s Boma whereafter five (5) men escaped and his wife revealed that the people who ran away were him, Emmanuel Menza and Patrick Joho Ndegwa.

35. It was apparent from the evidence by the Prosecution witnesses that an elephant was found dead on 12th May 2015 at Mgheno Ranch. There were, however, some inconsistencies in their evidence. Notably, PW1 had said that they found two (2) tusks weighing 16kg but PW2 stated that they found one (1) tusk weighing 16kg. PW5 talked about one (1) tusk and that it was found at the Appellant’s house.

36. These contradictions on the number of tusks made this court question whether or not the witnesses were really present at the material time. Be that as it may, this court deemed it prudent not to treat the said inconsistencies as material as they did not negate that an elephant had been killed at Mgheno Ranch and its tusks removed.

37. What was of concern to this court was the identification of the Appellant and his Co-Accused. PW 5 mentioned that the lady who they found in the Boma and who identified herself as Patrick Joho Ndegwa’s wife and mentioned the Appellant herein, Emmanuel and Patrick John Ndegwa as the people who ran away. PW 10 said that they lady did not know two (2) of the people who ran away.

38. It appeared to this court that this evidence was intended to connect the Appellant and his Co-Accused to the offences herein. He also said they got information that they were in a particular house at Kasighau. He also explained how the Appellant enticed Chibonja to come and they arrested him which PW6 confirmed. PW 2’s evidence that Eliana is the one who informed them who had run away conflicted PW 10’s evidence that she did not know the names of the people who escaped but who came from Taru.

39. If Elaina did not know who these two (2) people were, how then could PW 5 and PW 6 give their description to the informers which would help them get a tip off of where they were? Further, there was need to have adduced in evidence data forensic evidence to connect the Appellant herein to the said Chibonja.

40. There was clearly a missing link as to how the Appellant and his Co-Accused were identified as the persons who killed the elephant and that they were found in Patrick Joho Ndegwa’s Boma as had been contended by the witnesses. The first question as was rightly pointed out by the Appellant, how PW 1, PW 2, PW 3 and PW 10 tracked footprints to the Appellant’s Boma. This was because when PW 1 was recalled, he stated that they arrived at the Appellant’s Boma at 8.00 pm. If indeed, they arrived at night, it was not humanely possible to have tracked footprints in the cover of darkness.

41. Secondly, if as PW 1 had stated that they tracked the footprints from 8.00am- 5.00pm, there was no guarantee that the footprints they found leading to the Boma belonged to people who had killed the elephant. He failed to prove that there were no other houses nearby and that it should have been reasonably expected that the footprints could only have belonged to the killer of the elephant. Sadly, this could not have been so as any other person could also have used the same path during the same period.

42. Thirdly, no evidence was adduced to demonstrate that it was possible to see five (5) different footprints in the terrain the tracing was done or if it was possible to identify to whom they belonged to. This is not something difficult to prove in forensic investigations on the footprints could have been conducted.

43. Fourthly, no witness was able to give the distance from where the elephant carcass was found to the Boma where the tusks and hunting apparatus were said to have been found so as to link the Appellant and his Co-Accused as the only possible perpetrators of the offence. PW 1 said that they started tracing the footprints between 7.30 am- 5.00 pm, which he later changed to 8.30am as having been the time they reached the Appellant’s house while PW 5 said that it took them five (5) hours.

44. On his part, PW 4 said that it was ten (10) kilometres from Kishamba where he was an Assistant Chief to Talio Village. This court was not persuaded by the State's submissions that PW 4 could verify the identity of the Appellant and his Co-Accused as he was not even a chief from their area. His testimony that the Chief at Talio was on leave was not conclusive evidence that he knew where the Appellant stayed.

45. Fifthly, none of the witnesses could confirm having seen the Appellant and his Co-Accused. They all said that five (5) people ran away when they approached the Boma. PW 1's assertions that he saw Patrick Joho Ndegwa running and wearing a red tunic was not sufficient for him to identify him and thus link him to the Appellant herein as having been one of the people who ran away.

46. Sixthly, neither the Appellant nor his Co-Accused were found with the hunting apparatus or the tusks having been found at the Boma. They were in fact arrested at Kasighau. If the Learned Trial Magistrate had acquitted the Appellant and his Co-Accused of the offence of being in possession of hunting apparatus, this court did not see any reason why he did not acquit them of the offence of being in possession of wildlife trophy as they were arrested at Kasighau without any of the said items.

47. There was no doubt that an elephant was killed. Who killed it was not proven. There was also a gap as to how the Appellant who was said to have escaped was identified leading to his arrest. Having considered the evidence that was adduced in the Trial Court, this court found that there were glaring gaps, inconsistencies and contradictions that led this court to find that the prosecution did not prove its case to the required stand as the Appellant and his Co-Accused were never identified to the required standard, which could have been either through physical identification or by recognition.

48. It is unfortunate that the said Eliana could not testify against Patrick Joho Ndegwa due to the limitations in Section 127(3) of the Evidence Act Cap 80(Laws of Kenya) as a wife, if at all, and that the informers could also not come to adduce evidence. Sadly, this is a court of evidence and without evidence that is beyond reasonable doubt, this appellate court had to arrive at a different conclusion from the one that was arrived at by the Learned Trial Magistrate.

DISPOSITION

49. For the foregoing reasons, the court finds the Appellants appeal filed on 29th July 2015 to have been successful and the same is hereby allowed. In view of the fact that the evidence that was adduced before the trial created doubt in mind of this court, that benefit of doubt leads it to quash, set aside the conviction and sentence that was meted upon the Appellant by the trial court on Counts I and III as it would be clearly unsafe to confirm the same. The court will not interfere with the sentence of Count No IV as the Appellant has already served the sentence.

50. The court hereby orders that the Appellant be set free forthwith unless held or detained for any other lawful reason.

51. It is so ordered.

DATED and DELIVERED at VOI this day 27th of April 2017

J. KAMAU

JUDGE

In the presence of:-

Mustafa Mwachinda Mailoma - Appellant

Miss Anyumba - for State

Josephat Mavu- Court Clerk