REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MARSABIT

CRIMINAL APPEAL NO.29 OF 2016

consolidated with Cr. App. No 28 /2016

1. ACHIENGA LOBWIN

2. LODUPURA SEKON.....APPELLANTS

VERSUS

REPUBLIC..... RESPONDENT

(From the original conviction and sentence in criminal case No.593 of 2014 of the Senior Resident Magistrate's Court at Marsabit by Hon. Boaz M. Ombewa – Ag. Principal Magistrate)

JUDGMENT

ACHIENGA LOBWIN and **LODUPURA SEKON** the appellants herein**,** were convicted for the offences in counts 1, 3, 4,5 and 6. The offence in count one was possession of meat of a wildlife species contrary to section 98 of Wildlife Conservation and Management Act 2013. Each was convicted for the offence of being in possession of a firearm without a certificate contrary to section 4(2)(a) as read with section 4(3)(a) of the Firearms Act Cap 114 laws of Kenya. Each appellant was also convicted for the offence of being in possession of ammunition without a firearm certificate contrary to section 4(2)(a) as read with section 4(3)(a) of the Firearms Act Cap 114 laws of Kenya.

The particulars of the offences were that on 10th July 2014 at **Sibiloi National park** in North Horr sub County of Marsabit County were found in possession of meat wildlife species namely gerenuk without a permit. On the same day and place they were each found in possession of firearms and ammunitions without firearms certificate.

They were sentenced as follows:

In count one each appellant was sentenced pay a fine of Kshs.200,000 or in default to serve one year imprisonment, in count three and four each appellant was sentenced to pay a fine of Kshs.1,000,000 or serve three years imprisonment, in count five and six each appellant was sentenced to pay a fine of Kshs.1,000,000 or serve three years imprisonment.

They have appealed against both conviction and sentence.

The appellants were in person. They raised several grounds of appeal that can be distilled into the following four grounds of appeal:

1.That the interpreter was not fluent in Turkana.

2. That they were not supplied with statements of witnesses.

3.That the learned trial magistrate erred in law and in fact by convicting them without calling vital witnesses.

4. That the learned trial magistrate erred in law and in fact by convicting them without making a finding that the prosecution gave contradictory evidence.

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

The facts of the prosecution case were briefly as follows:

Some smoke attracted some game wardens to a thicket inside Sibiloi National Park. when they reached there, they found the two appellants roasting some gerenuk meat. Each of them had a G3 rifle and ammunitions without a firearm's certificate.

The appellants denied any involvement in the offences and each opted to keep mum, when they were placed on their defence.

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.**

In the course of the trial, the court availed three different Turkana interpreters; namely Athur Teleyo, Angela Lucas and Barnabas Elim Elim. At no point did any one of them complain that the interpretation was not proper. The two participated in the trial and cannot be heard to complain about interpretation now. This ground has no merit.

On 14th July 2014 after a plea of not guilty was entered, the learned trial magistrate ordered that the appellants be supplied with witnesses' statements. When the hearing of this matter commenced on the 24th September 2014 the appellants said they were ready for the hearing. None of them complained to the learned trial magistrate that statements were not supplied as ordered. They in fact indicated to the court that they were ready to proceed. They also did not raise the issue during subsequent hearing dates. This ground is clearly an afterthought.

Before the prosecution closed their case, the court prosecutor indicated that the remaining two witnesses were going to give evidence similar to that of P.W 1 and opted to close without calling them. A fact can be proved by the evidence of a single witness. this is trite law. This was restated by the court of appeal in **KIILU & ANOTHER vs. REPUBLIC [2005] 1**

KLR 174 where it said:

> *"**Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness...***

The failure to call other witnesses can only be an issue if there has emerged evidence that casts doubts in the evidence of the witness who has testified or an indication that had such a witness been called, his evidence would have been adverse to the prosecution case. In the instant case no such a scenario has arisen. The evidence of P.W 1 was not discredited by the appellants nor was there a claim that the witnesses who were not called would have given credence to the defence.

Though the appellants contended that the prosecution witnesses gave contradictory evidence, my perusal of the record does not disclose any contradiction. This ground lacks merit.

Section 98 of the Wildlife Conservation and Management Act provides as follows:

> ***A person who engages in hunting for bush-meat trade, or is in possession of or is dealing in any meat of any wildlife species, commits an offence and shall be liable on conviction to a fine of not less than two hundred thousand shillings or to imprisonment for a term not less than one year or to both such fine and imprisonment.*** **(** *emphasis mine)*

The sentence in count one is the minimum provided by the law. Disturbing it will amount to an illegality.

Section 4(3)(a) of the Firearms Act provides as follows:

> ***(3) Any person who is convicted of an offence under subsection (2) shall—***
>
> ***(a) if the firearm concerned is a prohibited weapon of a type specified in paragraph (b) of the definition of that term contained in section 2 or the ammunition is ammunition for use in any such firearm be liable to imprisonment for a term of not less than seven years and not more than fifteen years;***

The sentence in counts 3,4 5 & 6 is illegal. I am substituting the sentence thereof as follows:

In count 3 the 1st appellant to serve seven years imprisonment,

In count 4 the 2nd appellant to serve seven years imprisonment,

In count 5 the 1st appellant to serve seven years imprisonment,

In count 6 the 2nd appellant to serve seven years imprisonment.

The sentences for each appellant to run concurrently.

The appeal by both appellants is accordingly dismissed.

DATED at **MARSABIT** this **19th day of April, 2017**

KIARIE WAWERU KIARIE

JUDGE