



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CRIMINAL APPEAL NO 14 OF 2017

DAUDI WAMWANDU KAFUTA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case Number 895

of 2015 in the Senior Principal Magistrate's Court at Voi delivered

by Hon E.G. Nderitu (SPM) on 15thSeptember 2016)

JUDGMENT

1. The Appellant herein, Daudi Wamwandu Kafuta was charged with the offence of being in possession of wildlife trophy without a permit contrary to section 95 of the Wildlife Conservation and Management Act, 2013 Laws of Kenya. The particulars of this charge were that on the 7th day of November 2014 at around 1400hrs at Ronge Juu area of Wundanyi within Taita Taveta County, jointly with another not before court, the Appellant was found in possession of wildlife trophies namely one live python without a permit.

2. The Learned Trial Magistrate Hon. E. G. Nderitu Senior Principal Magistrate convicted and fined the Appellant Kshs.1,000,000/= or in default serve five (5) years.

3. Being dissatisfied with the said judgment, on 21st February 2017 the Appellant filed a Notice of motion seeking leave to file his Appeal out of time which application was allowed and his Petition of Appeal deemed as having been duly filed and served. He relied on five (5) Grounds of Appeal. His Written Submissions and Further Written Submissions were filed on 23rd April 2017 and 17th October 2017 while those of the State were filed dated and filed on 25th July 2017.

LEGAL ANALYSIS

4. 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”.

5. After perusing the Appellant’s and the State’s Written Submissions, this court was of the view that the issues that had been placed before it for determination were as follows;

- 1. Whether the Charge sheet was incurably defective;**
- 2. Whether the prosecution proved its case beyond reasonable doubt;**
- 3. What was the adequate sentence in the circumstances of the case herein.**

I. CHARGE SHEET

6. The Appellant submitted that the Charge was contradicted by the evidence that was adduced by the Prosecution witnesses thus rendering the whole trial null and void. He did not elaborate how the evidence contradicted the said Charge Sheet. The State did not address this issue.

7. Although the Appellant did not list the issue of defectiveness of the Charge Sheet in his Grounds of Appeal but raised it for the first time in his Written Submissions, this court deemed it prudent to make observations on the same. A charge sheet is not rendered defective merely because the prosecution witnesses give contradictory evidence relating to the case facing an accused person. What is required is for those witnesses to adduce evidence that will prove the case facing such an accused person beyond reasonable doubt failing which the trial court will dismiss the case against him if the same is not proved.

8. As the Appellant did not demonstrate how the trial was rendered null and void, this court did not find any merit in his argument and the same is hereby dismissed.

II. PROOF OF THE PROSECUTION’S CASE

9. Grounds of Appeal Nos (2), (3), (4) and (5) were dealt with together as they were all related.

10. The Appellant’s submission that the Prosecution did not prove its case was hinged on the fact that witnesses adduced contradictory evidence. He stated that Number 88391 PC David Masinde (hereinafter referred to as “PW 3”) testified that he was found with a python that was eight (8) feet while Number 5060 Corporal Mohamed Kuno (hereinafter referred to as “PW 2”) told the Trial Court that he was found with a spotted shuttle that was non-poisonous.

11. He pointed out that Salim Masanyu (hereinafter referred to as “PW 6”) testified that when the sack was hit, a dead chameleon was found therein and that Number 8713 Ranger Edwin Mwasi (hereinafter referred to as “PW 5”) referred to the snake having been found in a white sack. He stated that no other witness told the Trial Court the colour of the sack.

12. It was also his contention that PW 6 also indicated that he had come with a prophet called Ibrahim yet Joseph Mwangemi (hereinafter referred to as “PW 1”) did not make any reference to the said Ibrahim. He added that PW 1 testified that he was called by PW 6 yet PW 2 said that he was called by Corporal Kimeu. He added that PW 3 stated that when they got to the scene they found a hundred (100) people but PW 6 said that there were ten (10) family members.

13. He was emphatic that PW 5 did not conduct thorough investigations and argued that the case was based on mere allegations. He contended that the failure by the Prosecution to call all its witnesses despite it having discretion to decide the number of witnesses to call as was held in the case of **Bukenya & Others vs Uganda 1972 E A 349**, then the benefit ought to be given to him. It was his contention that no matter how weak his case was, the Learned Trial Magistrate ought to have considered the same as was held in the case of **Oketch Olale vs Republic 1965 EA at pg 555**.

14. On its part, the State submitted that the Prosecution adduced a cogent case that had no contradictions and that in his defence the Appellant confirmed that he was arrested with the bag containing the snake. It placed reliance on the case of **Twehangane Alfred vs Uganda Crim App. No 139 of 2001 [2003] UGCA 6** where it was held that the court will ignore minor contradictions in the prosecution's case unless it thought that there was a deliberate effort to be untruthful.

15. It added that the colour of the sack was a non-issue and that although PW 1 did not mention the name "Ibrahim", he did state that the Appellant came with another apostle like himself and PW 6 did not therefore contradict his evidence when he said that that person was "Ibrahim." It averred that the Appellant was the one who invited "Ibrahim" who in his defence said came from Mombasa. It also stated that where PW 6 stated that there were ten (10) family members at the time of the prayers, he did not say the number of people who came after the snake was discovered.

16. A perusal of the proceedings shows that on the aforesaid date, time and place, the Appellant and his colleague went to the home of Fredrick Masanyu to pray for him as he had encountered some problems. The Appellant started talking about snakes while preaching which made the family members uncomfortable. At some point, the Appellant excused himself to relieve himself. Shortly thereafter, he asked family members to accompany him around the house as he could see something in the kitchen. This was his prophecy.

17. When they got to the kitchen, he asked PW 1 to open a sack that was on the bed, a fact that was corroborated by PW 6. On opening it, they found a snake. PW 1 also testified of having seen a chameleon which the Appellant said had changed from being a snake but he was not convinced by the Appellant's discovery in the kitchen because it was the same snake they saw in the kitchen. The Appellant then asked all those who were present to have a look and warned them not to scream.

18. Although PW 3 stated that it was a python, PW 2 said that it was a shuttle snake. PW 3 and his colleagues went back to the scene and found about a hundred (100) people. The Appellant was arrested and taken to KWS where the bag he was carrying was opened and a shuttle snake found.

19. It was clear from the evidence that was adduced by the Prosecution witnesses that the Appellant was giving false prophesy at a fee and the use of a snake was intended to scare the people he was praying for. The fact that PW 1 and PW 6 mentioned a chameleon did not change the fact that there was a snake in the sack which the Appellant came with to Fredrick Masanyu's house. He placed the snake strategically when he excused himself to go to the toilet.

20. In his defence, the Appellant admitted that he was accompanied by Prophet Ibrahim to the said house and that he was carrying a bag full of clothes. He, however, denied knowledge of the contents of the said bag and contended that it was Prophet Ibrahim who suggested that everyone goes to the kitchen where the snake was discovered in a sack.

21. This court was not convinced by the Appellant's evidence. Both PW 1 and PW 6 were emphatic that it was the Appellant who asked the people to go to the kitchen where the snake was discovered. He placed himself and "Ibrahim" at the said house where the snake was found. Although his intention was to cause fear of witchcraft, he was guilty of the offence of being in possession of a wildlife trophy which in Section 95 of the Wildlife Conservation and Management Act is defined to include a live wild species.

22. In the premises foregoing, this court did not find any merit in Grounds of Appeal Nos (2), (3), (4) and (5) and the same are hereby dismissed.

III. SENTENCE

23. Ground of Appeal No (1) was dealt with under this head.

24. The Appellant contended that it was erroneous for the Trial Court to have meted upon him a harsh sentence since he was a first time offender. On the other hand, the State submitted that Section 95 of the

Wildlife Conservation and Management Act provides for a minimum fine of Kshs1,000,000/= with a minimum sentence of five (5) years.

25. Section 95 of the said Act stipulates as follows:-

“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 permit issued under this Act or is exempted in accordance with any other provision of this Act, commits an offence and shall be liable to a fine of not less than(emphasis court) one million shillings or imprisonment for a term not less than(emphasis court) five years or to both such imprisonment and fine.”

26. In the recent decision of **Petition No 15 of 2015 (as consolidated with Petition No 16 of 2015) Francis Karioko Muruatetu & Another vs Republic & Others**, the Supreme Court found that Section 204 of the Penal Code Cap 63 (Laws of Kenya) which prescribed a mandatory death sentence was unconstitutional as mitigation by a person convicted of capital offence was superfluous.

27. In a case such as this one, although Section 95 of the Wildlife Conservation and Management Act does provide a minimum sentence, the mitigation by a convicted person accords him a fair hearing on sentencing as the trial court has the option of sentencing him to both fine and imprisonment as can be seen from the wordings that he **“shall be liable to a fine of not less than(emphasis court) one million shillings or imprisonment for a term not less than(emphasis court) five years or to both such imprisonment and fine.”**

28. Having considered the mitigation, the Learned Trial Magistrate fined the Appellant herein Kshs 1,000,000/= and in default to serve five (5) years imprisonment. She did not mete out to him both a fine and imprisonment. He was therefore accorded a fair trial as was envisaged in the case of **Francis Karioko Muruatetu & Another vs Republic & Others**(Supra) where the Supreme Court observed as follows:-

“It is evident that the trial process does not stop at convicting the accused. There is no doubt in our minds that sentencing is a crucial component of a trial. It is during sentencing that the court hears submissions that impact on sentencing. This necessarily means that the principle of fair trial must be accorded to the sentencing stage too.”

29. It is trite law that an appellate court will not interfere with the discretion of a trial court unless it can be shown that the discretion was exercised on the wrong principle. In the case of **Wanjema vs Republic (1971) EA 493**, it was held as follows:-

“An appellate court should not interfere with the discretion which a trial court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence was manifestly excessive in the circumstances of the case.”

30. Although the Appellant abused an office society trusted him with, despite him being a first offender, this court was of the view that the penalty that was meted upon him by the Learned Trial Magistrate was fair and reasonable in the circumstances of the case herein. In fact he got out lightly as there was a possibility of him having been fined Kshs 1,000,000/= and being imprisoned for five (5) years imprisonment. This court did not therefore see any merit in interfering in the sentence that was meted upon him.

DISPOSITION

31. For the foregoing reasons, the Appellant’s Petition of Appeal that was lodged on 21st February 2017 was not merited and the same is hereby dismissed. This court hereby upholds his conviction and sentence as the same were lawful and fitting.

32. It is so ordered.

DATED and DELIVERED at VOI this 19th day of December 2017

J. KAMAU

JUDGE

In the presence of:-

Daudi Wamwandu Kafuta - Appellant

Miss Anyumba - for State

Josephat Mavu– Court Clerk