REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 64 OF 2015

JOSIAH KIVUVA MUTINDA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case Number 33 of 2015 in the Senior Principal Magistrate's Court at Voi delivered by Hon. E.M. Kadima(RM) on 18th September 2015)

JUDGMENT

1.The Appellant herein, Josiah Kivuva Mutinda, and Mulewa Mkare Mulewa (hereinafter referred to as "the Appellant's Co-Accused")were jointly charged on two (2) counts. In Count I, they were charged with 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 Count I were that on the 11th day of July 2014 at around 1400hrs at Muswamenyi area of Mwatate within Taita Taveta County, jointly with others not before court, they was found in possession of wildlife trophies namely four (4) elephant tusks weighing seventeen (17) kilogrammes without a permit.

2. Count II was in respect to dealing with wildlife trophies without a licence contrary to Section 84 (1) as read with section 92 of Wildlife Conservation and Management Act, 2013 Laws of Kenya. The particulars of this Count were that on the aforesaid date and time, jointly with others not before court, they were found dealing in wildlife trophies namely four (4) elephant tusks weighing seventeen (17) kilogrammes without a licence.

3. The Learned Trial Magistrate Hon E.M. Kadima, Resident Magistrate convicted them on both counts. On Count 1, he fined the Appellant Kshs1,000,000/= or in default to serve five (5) years imprisonment. In Count II, he finedhim Kshs20,000,000/=and in default to serve imprisonment for life. The Learned Trial Magistrate ordered that the sentences were to run concurrently. His Co-Accused was not sentenced at the same time as he jumped bail before judgment was delivered.

4. Being dissatisfied with the said judgment, on 25th November 2015 the Appellant filed his Petition of Appeal and he relied on five (5) Grounds of Appeal. He filed seven (7) Amended Grounds of Appeal and his Written Submissions on 20th April 2017.The Respondent filed its Written Submissions on 25th July 2017. The Appellant filed his further Written Submission on 11th October 2017.

5. When the matter came up on 17th October 2017 both the Appellant and the State asked the court to deliver its judgment based on their respective written submissions. The judgment is therefore based on the said written submissions.

LEGAL ANALYSIS

6. 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".**

7. 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 Appellant suffered injustice due to the lack of legal representation;**

3. **Whether the prosecution proved its case beyond reasonable doubt;**

4. **What was the adequate sentence in the circumstances of the case herein.**

I. CHARGE SHEET

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

9. The Appellant submitted that the Charge Sheet as drafted was defective because the contents of the said charge differed from the evidence adduced against him. He averred that the four (4) elephant tusks were not found in his possession. He pointed out that although the Prosecution sought leave to amend the charge sheet due to defects, which leave was granted, the Prosecution did not make the amendments. He stated that the Prosecution only amended the names of his Co-accused but they were not allowed to take plea afresh and hence the trial was a nullity.

10. The State conceded that the trial court erred in not allowing the Appellant to plead afresh as required by Section 214 (1) (i) of the Criminal Procedure Code Cap 75 (Laws of Kenya). The State conceded that the Trial Court erred in not allowing the Appellant to plead afresh as required by Section 214 (1) (i) of the Criminal Procedure Code Cap 75 (Laws of Kenya). It, however, submitted that the error did not result in a nullity of proceedings. It relied on the case of **Josphat Karanja Muna vs Republic [2009] eKLR** where the Court of Appeal held that non-compliance of Section 214 of the Criminal Procedure Code did not result to prejudice of the appellant therein because it was not to be invoked every time an amendment of the charge sheet is made and that the irregularity could be cured by dint of Section 382 of the Criminal Procedure Code..

11. It averred that in any event, the Appellant was not opposed to the amendment and that by the time the said Charge Sheet was amended, no witnesses had testified.

12. A perusal of the proceedings shows that on 30th January 2015, the Prosecutor applied to amend the Charge Sheet. The Appellant's Co-Accused confirmed that the aliases were his. The hearing commenced on 29th April 2015. The granting of the said application to amend the Charge SHeet could not therefore have been said to have prejudiced the Appellant herein.

13. In the circumstances foregoing, this court did not find any merit in Amended Ground of Appeal No (1) and the same is hereby dismissed.

II. FAIR TRIAL

14. Amended Ground of Appeal No (2) was dealt with under this head.

15. The Appellant submitted that he was not assigned an advocate to represent him yet he was a layman. He averred that this was in contravention of his right to have legal counsel appointed by the State to represent him as was envisioned in Article 50 (2) (h) of the Constitution of Kenya, 2010. He further submitted that he was discriminated against when he was denied legal representation contrary to Article 27 of the Constitution.

16. The State submitted that the Appellant's right to legal representation was a progressive right and that the government had not placed sufficient mechanism to ensure all accused persons were accorded free legal counsel, save for accused persons charged with capital offences.

17. It argued that there was thus no error on the part of the trial court. In this regard, it relied on the case of **David Njoroge Macharia vs Republic Cr. Appeal No 497 of 2007** where the Court of Appeal held as follows;

> **"We are of the considered view that in addition to situations where "substantial injustice would otherwise result", persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense."**

18. The limitation of the right to be assigned legal representation by the State was addressed by the Court of Appeal in the case of **Karisa Chengo, Jefferson Kalama Kengha & Kitsao Charo Ngati vs Republic [2015] eKLR** when it stated as follows:-

> **"It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. The Constitution is crystal clear that an accused person is entitled to legal representation at the State's expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. This Court in the David Njoroge Macharia case (supra) seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases where substantial injustice might otherwise result' and to include *all situations where an accused person is charged with an offence whose penalty is death.* This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. However, substantial injustice only arise in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise.**
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> **Again, this Court differently constituted in the case of Moses Gitonga Kimani v Republic, Meru Criminal Appeal No. 69 of 2013, recognized that the Constitution has placed an obligation on Parliament to enact legislation which would ensure realization of an accused person's right to a fair trial under Article 50 of the Constitution within four years of the promulgation of the Constitution. In that regard the court stated as follows:**
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> ***"It is the envisaged legislation that would set out the circumstances and parameters under which an accused person is entitled to legal representation at the State's expense. While appreciating that the framers of the Constitution intended the right to legal representation to be achieved progressively we implore Parliament to enact the requisite legislation."***
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> **Article 261 of the Constitution provides *inter alia*:-**
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> ***(i) Parliament shall enact any legislation required by this Constitution to be enacted to govern a particular matter within the period specified in the Fifth Schedule, commencing on the effective date.***

(ii) Despite clause (1), the National Assembly may, by resolution supported by the votes of at least two-thirds of all members of the National Assembly, extend the period prescribed in respect of any particular matter under clause (1), by a period not exceeding one year

It is therefore apparent that the provisions of Article 261 and the Fifth Schedule to the Constitution, that would give effect to the provisions of Article 50, including Article 50(2)(h), are to be implemented within a period of between 4 and 5 years. We must however lament the obvious lack of the appropriate legislation almost five years after the promulgation of the Constitution to provide guidelines on legal representation at State's expense. We believe time is now ripe and nigh for the enactment of such legislation. That right cannot be aspirational and merely speculative. It is a right that has crystalized and which the State must strive to achieve. We say so while alive to the fact that right to fair trial is one of the rights that cannot be limited under Article 25 of the Constitution."

19. Whilst this court agreed with the Appellant that there was discrimination relating to the provision of legal representation, it was took cognisance of the aforesaid decision by the Court of Appeal and only hoped that the right to assign legal representation to **all**(emphasis court) accused persons will be realised progressively but sooner than later.

20. In light of the aforesaid limitations on assignment of legal counsel, this court was not persuaded to find that the Appellant's rights to fair trial had been infringed as he had contended and his Amended Ground of Appeal No (2) was not merited and the same is hereby dismissed.

III. PROOF OF THE PROSECUTION'S CASE

21. Amended Ground of Appeal Nos (3), (4), (5) and (7) were dealt with under this head as they were all related.

22. The Appellant submitted that Ranger 8246 Dishon Kisu (hereinafter referred to as "PW 1") testified that they received information from an informant regarding a person who was in possession of tusks at Mwatate. He stated that the informant failed to give them the name or description of that person and consequently, KWS officials ought to have treated that information with caution for the reason that recognition was better than identification.

23. He averred that the witnesses who identified him failed to disclose their distance from the suspects at the time of the arrest to demonstrate that they were capable of making a positive identification. He emphasised the need to have had an independent witness from the members of the public to testify during the trial and in particular, the owner of the kiosk in which the witnesses said he entered. He pointed out the importance of conducting an identification parade since he was arrested after a year after the alleged incident.

24. The Appellant submitted that the contradictions in the evidence of the Prosecution's witnesses were prejudicial to him because the same made its case weak and not reliable to sustain a conviction against him. He pointed out that their evidence was not cohesive and that the Trial Court failed to take into account, his defence which created reasonable doubt.

25. On its part, the State averred that PW 1 posed as buyer on 11th July 2014 and confirmed that he met the Appellant's Co-Accused during the day almost at noon. He further testified that he took him to Tree Top Hotel in Mwatate where they met with the Appellant discussed the price of the elephant tusks and logistics. It added that PW 1 followed the Appellant and his Co-accused from Mwatate to Miasenyi where the tusks were located and during this time, PW 1 had ample time to familiarise himself with the Appellant's facial features.

26. It relied on the Court of Appeal decision in the case of **Abdalla Wendo vs Republic (1953) 20 E.A.CA. 166** and **Daniel Muhia Gicheru vs Republic Criminal Appeal No 90 of 2007** where the common thread was that under Section 143 Evidence Act Cap 80 (Laws of Kenya), that there was no

legal requirement on the number of witnesses to be called to prove any fact.

27. It submitted that the Appellant was arrested as he was leaving the kiosk and the evidence of those present at the kiosk would not have sufficed as they were not eye witnesses to the transaction that occurred. PW 1 testified that he entered into a sale transaction of tusks with the Appellant and his Co-accused and that his evidence was corroborated by the evidence of Ranger 8086 Karimi Henry (hereinafter referred to as "PW 2") and Ranger 8140 Job Magara (hereinafter referred to as "PW 3") who accompanied him.

28. This court carefully analysed the evidence that was adduced in the Trial Court and noted that on 11th July 2014, PW 1, PW 2 and PW 3 were introduced to the Appellant by an informant at Treetop Hotel at Mwatate. They followed the Appellant and after some distance, the Appellant's Co-Accused herein came in a motorcycle carrying two (2) sacks containing four (4) elephant tusks that were to be sold to PW 1 at Kshs 100,000/= per kilo. Before the transaction could be completed, the Appellant and his Co-Accused fled leaving the elephant tusks which were taken to Voi Police Station. This was corroborated by PW 2 and PW 3.

29. On 15th January 2015, PW 1 was tipped off regarding the whereabouts of the Appellant and his Co-Accused who were then arrested at Maungu. PW 1 recognised the Appellant as the person he met at Treetops Hotel at Mwatate on 11th July 2014. Ranger Samuel Kitur (hereinafter referred to as "PW 4") confirmed the arrest of the Appellant and his Co-Accused at Maungu.

30. His unsworn evidence appeared evasive and intended to remove himself from the scene on 11th July 2014 and 15th January 2015. PW 1, PW 2 and PW 3 spent sufficient time negotiating with him and hence they were able to recognise them.

31. This court wholly concurred with the conclusion of the Learned Trial Magistrate that the evidence that was adduced by the Prosecution witnesses showed that the Appellant and his Co-Accused were the people who escaped from the dragnet of the KWS officers on 11th July 2014 and were subsequently arrested on 15th January 2015.

32. Having considered the evidence that was adduced in the Trial Court, this court came to the firm conclusion that the Prosecution proved its case beyond reasonable doubt through the evidence of the witnesses who were called to testify. It was not necessary that independent witnesses such as the owner of the kiosk where the Appellant and his Co-Accused were said to have emerged from to have been called as witnesses. The Learned Trial Magistrate therefore arrived at the correct determination.

33. In the circumstances foregoing, Amended Grounds of Appeal No (3), (4), (5) and (7) were not merited and the same are hereby dismissed.

IV. <u>SENTENCE</u>

34. Amended Ground of Appeal No (6) was dealt with under this head.

35. The Appellant contended that it was erroneous for the trial court to have meted upon him a harsh sentence since he was a layman who was unrepresented by legal counsel during trial. Further, he argued that as a first time offender, the Trial Court ought to have given him an alternative sentence.

36. 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 and that the same was not harsh or excessive.

37. Section 95 of the Wildlife Conservation and Management Act provides 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."**

38. 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**that was relied upon by the State,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."

39. Perusal of Section 84 of the Wildlife Conservation and Management Act provides that no person shall operate as a trophy dealer without a license issued by KWS. Section 92 of the Act states that any person who commits as offence in respect of an endangered or threatened species or in respect of any trophy of that threatened or endangered species shall be liable for conviction to a fine of not less than Kshs 20,000,000/= or imprisonment to life or to such fine and imprisonment.

40. It is clear that Section 92 of the Act is a totally different offence and is not the penalty clause for Section 84 of the Act. There is clearly double jeopardy. Parliament omitted to include the penalty clause for Section 84(1) of the Act. It was the view of this court that the Appellant could not be charged under the two (2) Sections in respect of dealing and preferring of Charges under Count II was superflous. This is because Section 95 deals with the offence of being in possession and dealing with wildlife trophy and also has the penalty clause.

DISPOSITION

41. For the foregoing reasons, the Appellant's Petition of Appeal that was lodged on 25th November 2015 was successful in respect of the sentence in Count II. However, the conviction and sentence in Count I is hereby upheld as the same was lawful and fitting.

42. The conviction and the sentence in Count II is hereby set aside and/or vacated as the same was misplaced and amounted to double jeopardy of the Appellant herein.

43. It is so ordered.

DATED and **DELIVERED** at **VOI** this **14th** day of **December** 2017

J. KAMAU

JUDGE

In the presence of:-

Josiah Kivuva Mutinda - Appellant

Miss Anyumba - for State

Josephat Mavu– Court Clerk