REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CRIMINAL APPEAL NO. 126 OF 2017

MARTIPEI PARMAYA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 1609 of 2014 of the Principal Magistrate's Court at Makindu)

JUDGEMENT

INTRODUCTION

1. The appellant was tried and convicted by Hon. G.M Mutiso (PM), Makindu Law Courts, for the offence of being in possession of wildlife trophy contrary to Secction 95 as read together with Section 92 of the wildlife conservation and Management Act, 2013.

2. Being aggrieved by the said judgment, the appellant proffered this appeal. The appellant relied on ten grounds as enumerated in his memorandum of Appeal and supplementary grounds of appeal. The question which is manifest from these grounds is;

- *Whether the prosecution proved its case to the required standard which is, beyond reasonable doubt.*

SUBMISSIONS

3. Parties relied on both oral and written submissions to support their respective positions.

4. Briefly, the appellant submitted that the learned trial Magistrate overlooked the contradictions and inconsistencies in the evidence with regard to the mode of his arrest. He also contended that the informers who alerted the arresting authorities were not disclosed to Court. Further, he took issue with the trial Courts conclusion that he was in constructive possession of the wildlife trophies. He urged the Court to allow the appeal.

5. The appeal was opposed. It was submitted on behalf of the prosecution that the evidence tendered was credible, consistent and corroborated. Further, it was submitted that the doctrine of recent possession was properly relied on by the trial Court.

ANNALYSIS

Whether the prosecution's case was contradictory

6. According to Alex Ruto (PW1), a KWS ranger attached at Tsavo West National park the accused was arrested at his manyatta on 21/09/2014 after which he led the arresting authorities to a bush where he had hidden the elephant tusks.

7. He stated the accused was identified by community rangers and wildlife scouts. He admitted not having prior knowledge of the accused.

8. On cross examination, he stated that he was with five other rangers at the time of the arrest. He reiterated that they arrested the accused at his home and that he (accused) led them to a bush where he showed them the elephant tusks.

9. PW2, Naran Shangala, a KWS ranger stated that on 25/08/2014, while patrolling Olorika area, they found an elephant carcass that had no tusks. They did not establish who had killed it immediately. On 20/09/2014 after a tip off from the villagers, they found the accused hiding in the bush. They searched the area and found two elephant tusks in a different bush. They arrested the accused and took him to Mtito Andei police station. On cross examination, he stated that the accused was in the bush when they arrested him.

10. According to Moterian Ntanini (PW3), they found an elephant carcass with no tusks on 25/08/2014. It had been killed using a spear. On 21/09/2017, they arrested the accused while hiding in the bush. They searched his hideout and found the elephant tusks. Further, he stated that the accused was well known to him but there was no grudge between them.

11. PW4, PC Edward Marinya was at Mtoto Andei police station on 21/09/2014 when the accused arrived in the company of KWS rangers. He was taken there with two elephant tusks. He produced them in Court.

12. In my view, the circumstances surrounding the accused's arrest are critical as they will inform the issue of possession. All the three prosecution witnesses testified that they were present and infact involved in his arrest. It therefore goes without saying that their versions of how the event played out should tally.

13. PW1's version was that they went to the accused's home but found him absent. They laid an ambush and upon his arrival, they arrested him. None of the other two witnesses mentioned anything to do with the accused's house. Their evidence was to the effect that the accused was arrested while hiding in the bush.

14. With regard to recovery of the tusks, PW1 stated that after the arrest, the accused led them to a bush where he had hidden the elephant tusks.

15. Curiously, PW2 stated that after arresting the accused in the bush, they searched the area and found him hiding 2 elephant tusks in a different bush. On, cross examination, PW2 stated it was the accused that killed the elephant because they found him near the tusks.

16. If this was the case, it is my opinion that the prosecution should have led evidence to establish a nexus between the accused and the bush where the tusks were found. They should have proved that the accused knew of the existence of the tusks in that different bush.

17. PW3 stated that they arrested the accused while hiding in the bush and after searching his hideout, they found the elephant tusks. In my view, the implication of PW3's statement is that they found the tusks at the same place where they found the accused.

18. It is also noteworthy that there was a disparity in the dates given by the prosecution witnesses. PW1 and PW3 testified that the arrest took place on 21/09/2014 while PW2 testified that they arrested him on 20/09/2014.

19. Be that as it may, it defies logic that three witnesses who were allegedly present at the time of arrest could give such contradicting versions. Consequently, this puts the issue of possession in doubt. In his judgment, the trial magistrate stated as follows;

> ***"PW3 corroborates PWI and PW2 on what transpired in every material particular. I have no reason to doubt any of the prosecution witnesses".***

20. According to the **BLACK'S LAW DICTIONARY;**

> ***"to corroborate is to strengthen, to confirm by additional security, to add strength. The testimony of a witness is said to be corroborated when it is shown to correspond with the representation of some other witness, or to comport with some facts otherwise known or establish."***

21. At page 22 of the judgment, the learned trial magistrate stated as follows;

> ***"I rely on the evidence of PW1, 2 and 3 and hereby find that the accused was arrested near his home at Olorika area after he emerged from a bush in which he was hiding".***

22. In my opinion, the learned trial magistrate's conclusion was speculative as it was not supported by the evidence on record. The evidence of the prosecution witnesses cannot be said to be corroborative.

23. In the same breath, I am of the view that the reliance by the trial Court on the doctrine of recent possession was erroneous. From the evidence on record, it cannot be said with certainty that the elephant tusks were found with the accused.

Was the accused properly identified?

24. According to PW1, they had laid an ambush at the accused's home because he was suspected to have been involved in a poaching incident that had occurred a month earlier. He confirmed that he did not know the accused before the day of the arrest.

25. Having already opined that there was doubt in the prosecution's case with regard to possession of the tusks at the time of arrest, I am of the view that the prosecution should have at the very least placed the accused at the scene where the elephant carcass was found.

26. There was no eye witness. The accused submitted that the source of the tip off was not disclosed. I am alive to the provisions of the **witness protection Act**.

27. It is settled law that the identity of the informer should not be disclosed unless such disclosure is done to establish the innocence of the accused person. Be that as it may, I still hold the view that, the basis of suspecting the accused should have been established.

28. PW3 stated that the elephant had been killed using a spear. This weapon was never produced in Court. Infact, it was the evidence of PW2 that when they found the carcass on 25/8/2014, they did not establish who killed it immediately. Does this mean that after investigations, they established that it was the accused that had killed it? If yes, how?

29. If an ambush was actually laid at the accused's home, the Court was not told whether a search was conducted and whether there were any hunting apparatus recovered from his house.

30. PW3 stated that the accused was well known to him. However, he did not claim to have seen him at the poaching scene neither did he see him with the tusks. His evidence was that after arresting the accused in the bush, they searched his hideout and found the tusks.

31. In my opinion, the rangers were on a fishing expedition. It was common ground among them that the tusks were recovered in a bush. They however failed to place the accused at the point of recovery. In my view, the evidence adduced in Court was largely based on suspicion.

32. It is trite law that no amount of evidence based on suspicion, no matter how strong the suspicion may be can be treated as credible evidence. Such evidence is worthless in a criminal trial where the threshold for proof is very high. *In* **SAWE -VS- REPUBLIC 2003 (KLR) 364** the Court of Appeal stated:

> ***"Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."***

Fair trial

33. The appellant did not raise this issue in his appeal. I however noted that the accused was supplied with witness statements after the 1st prosecution witness had already testified. In light of the fact that the accused was unrepresented, I am of the view that the trial Court should have satisfied itself that he was ready for trial.

34. This is in line with the provisions of **Article 50 of the Constitution of Kenya, 2010, Specifically, Article 50(2)(j)** provides that;

> ***"Every accused person has the right to a fair trial which includes the right to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence".***

Law under which the appellant was charged

35. Section **92 of the Wildlife Conservation and Management Act, 2013 (the 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."***

36. Section **95 of the Wildlife Conservation and Management Act, 2013** on the other hand 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 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."***

37. In my view, it is important to highlight emerging jurisprudence with regard to the aforementioned sections.

38. In **ZHANG CHUNSHENG -VS- REPUBLIC: NAIROBI HIGH COURT CRIMINAL REVISION NO. 9 OF 2014** (unreported) Mbogholi, J. stated as follows regarding section **92 of the Wildlife Conservation and Management Act, 2013:**

> ***"The nature and types of the offences contemplated under this section have not been expressly set out...Section 92 of the Act, to say the least, is ambiguous."***

39. It is therefore clear that Section 95 of the Act deals with offences relating to wildlife trophies and trophy dealing generally while Section 92 is restricted to offences in respect of endangered or threatened species or their trophies only.

40. **Section 3** of the Act defines both "endangered species" and "threatened species" as any wildlife species specified in the **Fourth Schedule** of the Act. However, the Fourth Schedule of the Act deals with provisions as to public consultations and does not contain a list of endangered species.

41. **Section 47** of the Act provides that **"The species of wildlife set out in the Sixth Schedule are declared to be critically endangered, vulnerable, nearly threatened and protected species."** The list of endangered or threatened species is therefore found in the Sixth Schedule to the Act.

42. These two sections were the subject of discussion in **VOI HIGH COURT CRIMINAL APPEAL NO. 7 OF 2014; MUTISYA KIEMA –VS- REPUBLIC** where Justice Kasango expressed herself as follows;

> ***"The question then is, shouldn't the Appellant have been charged under Section 92 of the Act only? After a careful reading of Section 92 of the Act, I notice that it is more of a punishment provision rather than a penal provision. In other words, the section only provides for the punishment for the offences in respect of endangered species or their trophies but does not itself create the offence. I say so because section 92 only provides for punishment "where a person commits the offence in respect of an endangered or threatened species or in respect of any trophy of that endangered or threatened species" but does not make provision for the circumstances under which a person is deemed to have committed the said offence".***

43. While interrogating the consequences of charging an accused person under both sections, she expressed herself as follows;

> ***"What then should have been the consequence of charging the Appellant with an offence under both Sections 92 and 95 of the Act? Should the charge under count one have been rendered defective? I do not think so. Section 179 of the Criminal Procedure Code, Cap. 75 of the Laws of Kenya provides for the conviction of an accused person for a lesser offence than that which the person is charged with. That section provides that:-***
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> ***"(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.***
>
> ***(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."***
>
> ***Although the Appellant was charged with an apparently more serious offence, it is my view that the Wildlife Conservation and Management Act, 2013 as it is now, does not clearly create the offences relating to endangered species or their trophies.***
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> ***It only provides for punishment for the same. This court shall therefore invoke Section 179 of the Criminal Procedure Code and reduce the offence that the Appellant was charged with under both Sections 92 and 95 of the Wildlife Conservation and Management Act, 2013 to offence under Section 95 only.***
>
> ***It is my considered view that unless and until the Act is amended to create the offences restricted to endangered species, suspects should be charged under section 95 of the Act only".***

CONCLUSION

44. The totality of the foregoing is that the prosecution did not prove its case to the required standard. The appeal is thus allowed.

> **1. The appellant conviction is quashed, sentence set aside and he is released forthwith unless otherwise legally held.**

SIGNED, DATED AND DELIVERED THIS 11TH DAY OF DECEMBER, 2017.

C. KARIUKI

JUDGE

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