



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO. 2 OF 2015

(Being an appeal from the original conviction and sentence of the Senior Principal Magistrate's Court at Kajiado in Criminal Case No.983 of 2013 by Hon. E. A. Mbicha)

KERUMPOTI LEIYAN.....APPELLANT

Versus

REPUBLICRESPONDENT

JUDGEMENT

1. The appellant **Kerumpoti Leiyán** was charged on 19/11/2013 with three counts as follows:

Count 1: Killing an animal with intent to steal contrary to section 289 of the penal code.

The particulars of the offence are that on 18/11/2013 at Namelok Location in Kilitome Conservancy within Kajiado County jointly with others not before court killed an animal capable of being stolen namely Elephant with intent to steal the ivory the property of Kenya Government.

2. Count II: Possession of government trophy contrary to section 42(1) of the Wildlife Conservations and Management Act Cap. 376 of the Laws of Kenya.

Particulars of the charge being that on 18/11/2013 at Namelok Location in Kilitome Conservancy within Kajiado County, jointly with others not before court were found being in possession of two elephant tusks of 48 kilogrammes and a python skin measuring of 15 ft with a total street value of Ksh.4.9 million in a motorcycle reg. No. KMCN 860H make Skygo which was used to transport the trophies.

3. Count III: Failing to make a report of obtaining possession of government trophy contrary to section 39(3) (a) of the Wildlife Conservation and Management Act Cap. 3 of the Laws of Kenya.

The particulars of the charge being that on the 18/11/2013 at Namelok Location in Kilitome Conservancy within Kajiado County jointly with others not before court failed to report to authorized officer of obtaining possession of 48Kgs of ivory and 15 ft of python skin being the property of the Kenya Government.

4. The appellant pleaded not guilty to all the counts. The prosecution conducted the trial by calling witnesses. After a full trial the appellant was convicted and sentenced to 5 years imprisonment in respect of Count 1 and one year imprisonment on Count II and III respectively.

5. The appellant dissatisfied by the conviction and sentence of the learned trial magistrate has appealed to this court for quashing of the said orders.

6. The memorandum of appeal filed in court on 21/1/2015 contained eight grounds. However the reading and perusal of the grounds can be summarized into one. The appellant seeks leniency and reduction of this sentence on the ground that he has reformed and recognized his mistake.

That being the main bread winner of his family of four children and other siblings, this court should exercise mercy by reducing the sentence.

7. It is trite law that the duty of the first appellate court is to reconsider the evidence, evaluate it and draw its own conclusion. As an appellate court I have to re-evaluate all the evidence on record and draw my own conclusions.

See **OKENO Vs. REPUBLIC 1972 EA 32, NJOROGE Vs. REPUBLIC 1987 KLR 99.**

EVIDENCE AS ADDUCED AT THE TRIAL COURT

8. Prosecution case:

The prosecution at the trial called seven (7) witnesses:

9. PW1 ELIJAH MARLEN a Security Intelligence Officer with Kenya Wildlife Services stated that on 18/11/2013 he received information of an elephant carcass at Kilitome Conservancy. It was his testimony that in company of PW3 KENNEDY Ole KARIANGEI, PW4 MOSES SIWKOI left for the scene of the crime. He further stated that on arrival at the scene they found an elephant had been killed. The carcass did not have the tusks.

According to PW1 the incident had just taken place as they noticed fresh footprints. Through the footprints they pursued to track the suspects. Where the footprints ended motor cycle marks appeared.

In his testimony they continued with evidence gathering and acting on information they arrived at appellant's home. PW1 further stated that after a few minutes appellant arrived whom they subjected to interrogation. The arrest of the appellant led to the recovery of two elephant tusks, and a python skin which he duly identified in court. The said 2 tusks and python skin according to PW1 were recovered in the compound of the appellant. He further stated that the carrier, a motorcycle registration KMCN 860H whose tyre marks had been seen and identified was also recovered at appellant's residence. The appellant was arrested together with the recovered items and taken to Kajiado Police Station.

10. PW2 JAMES MWANGI NDUATI, veterenian doctor employed by the Kenya Government and attached to Loitokitok Sub-County conducted a postmortem of an elephant. In his testimony the examination confirmed the carcass to be that of an elephant. The injuries had been occasioned by a sharp object. He prepared a death certificate and from examination formed an opinion that the death was occasioned by excessive bleeding.

11. PW3 KENNEDY OLE KARIANKEI an employer of KWS Amboseli National Park testified that he received information on 18/11/2013 regarding an elephant carcass. He further stated that acting on information they proceeded to the scene of crime in company of PW1 and PW3. While at the scene they took photographs of the carcass. At the scene they could notice fresh footprints which they followed. In the course of the track they were able to see motorcycle tyres. This guided them to pursue possible whereabouts of the perpetrators of the offence.

According to his testimony and relied on intelligence information received they arrived at appellant's house. The appellant was not present. In a little while the appellant arrived whom they arrested. The appellant on being interrogated showed them where he had kept the tusks and python skin. PW3 testified that a motorcycle reg. No. KMCN 860H was recovered as a carrier initially identified through presence of

tyre marks along the route used by the suspects.

12. **PW4 MOSES SIWKOI** who works as a community ranger corroborated the testimony of PW1 and PW3. He confirmed that on 18/11/2013 on receipt of information on the death of an elephant at Kilitome Conservancy they proceeded to the scene. He stated that from the scene they followed the footprints and later on the same road noticed motorcycle tyre marks. He further testified that they eventually arrived at appellant's home. At the initial entry to the home appellant was absent but did arrive few minutes later. It was while on interrogation appellant showed them where he had hidden the tusks and python skin. On examination they confirmed the tusks to be fresh vide evidence of blood stains. PW4 further confirmed in his evidence that a motorcycle reg. KMCN 860H was recovered from appellant's residence. They linked the items to the carcass at the Kilitome Conservancy.

13. **PW5 CPL JOHN TIAPAR** testified that on 18/11/2013 he had accompanied PW1, PW3, PW4 to the scene of the crime and appellant's house. He corroborated the evidence of PW1, PW3 and PW4. On visiting the scene and recovery of the two tusks and python skin from the home of the appellant, it was his testimony that the appellant was arrested and charged with the offences before court.

14. **PW6 C.I ERNEST MARINGA** of scenes of crime CID headquarters gave evidence regarding the photographs taken at the scene. The photographs had been taken by PC Jonathan Mureithi PW7. In his testimony the compact disks containing the photographs were developed under his control and a certificate to that effect prepared. He stated that the photos reflected various views of the dead elephant subject matter of the criminal proceedings. In support of the case he produced the photos as exhibit 1(a) (b) and certificate as exhibit 1(c).

15. **PW7 PC JONATHAN MUREITHI** gave evidence that he conducted investigations by recording statements from witnesses. He further stated that he received 2 elephant tusks, a python skin and motorcycle reg. No. KMCN 860H which had been recovered by PW1, PW3 and PW4. It was his testimony that the photographs taken were sent to the scenes of crime office in Nairobi for development.

According to his evidence the exhibits taken over by him from PW1, PW3 and PW4 were in his custody. He produced them as exhibits in support of the prosecution case. The accused who was already in police custody was then charged with the three counts.

16. At the close of the prosecution case accused was placed on his defence. He gave unsworn testimony. He stated before court that on 18/11/2013 while at his homestead four people he did not know went there and arrested him. He further stated that they took away his motorcycle which he operates as a boda boda. He further stated that a vehicle from the conservancy was brought in by two of the four people who were in his house.

According to him he was ordered to board the vehicle. It was while inside the vehicle he saw two elephant tusks. It was further his evidence that he was taken to Kajiado Police Station. On arrival at the police station he was given a python skin to hold. He denied being in possession of the elephant tusks or the python skin.

17. ON APPEAL

The appellant reiterated the contents of the memorandum of appeal. His main concern at the appeal was to be forgiven, the sentence reduced to a term already served. He urged this court to note that he is a family man and a bread winner whose continued incarceration has affected them.

18. Learned state counsel Mr. Alex Akula for the Director of Public Prosecutions opposed the appeal and urged the court to uphold both conviction and sentence. He maintained that the evidence by prosecution witnesses established the case against the appellant beyond reasonable doubt. He urged this court to find that there was evidence to confirm the items recovered were elephant tusks and a python skin. That the ingredient of possession was proved that the appellant had hidden the trophies within his compound. It was further his submissions that a motorcycle used to transport the items from the scene to the appellant's

house was recovered. The motorcycle belonged to the appellant. It was his argument that the appeal by applicant lacks merit on both conviction and sentence.

19. I have carefully considered the evidence by the prosecution and defence offered by the appellant. The arguments of both parties to this appeal and submissions hereof taken into account.

20. The main issue in this appeal is whether at the trial there was sufficient evidence to sustain the conviction and sentence of the appellant.

21. As regards Count I the prosecution under section 289 of the penal code have to establish two key elements:

a. That there was killing of an animal capable of being stolen.

b. Prove of intention to steal the skin, carcass or any part thereof of the said animal.

22. In the case before me **PW1 ELIJAH MARLEN** testified that on 18/11/2013 he received information that an elephant had been killed at Kilitome Conservancy. He mobilized his colleagues PW3, PW4 and PW5 to visit the scene. It was their evidence that on arrival at the scene they found an elephant carcass. They followed the fresh footprints and gathered further intelligence information which led them to the home of the appellant.

23. It is on record from their testimony that at the home of the appellant they recovered two elephant tusks. The tusks were identified and linked to the elephant carcass at the scene. The vetererian doctor PW2 who examined the carcass and prepared certificate of death confirmed that sharp object had been used to inflict the injuries. The tusks were missing from the carcass.

24. The tusks recovered from the homestead of the appellant according to PW1, PW3, PW4 and PW5 had fresh blood stains. In the course of the recovery of the elephant tusks at his home. Appellant also was found in possession of a python skin. The two elephant tusks and python skin belong to the classified items deponed as government trophies under the Wildlife Conservation and Management Act.

25. The defence by appellant did not challenge nor controvert the evidence by the prosecution.

26. There is cogent evidence from PW1, PW3, PW4 and PW5 placing the appellant at the scene of crime. The footprints from where the elephant was killed. The presence of motorcycle tyre marks. The missing tusks from the carcass were recovered from the home of the appellant. The recovery was in close proximity in time and day when incident had occurred. The possession of the tusks soon after the death of the elephant was the one who killed it and removed the tusks. The elephant was killed at Kilitome Conservancy. The appellant was arrested and taken to Kajiado Police Station and charged accordingly.

27. The recovery of the tusks at the home of the appellant establishes the ingredient of intention.

28. The intention to kill the elephant was to steal the skin, or carcass of the said animal from analysing the evidence in totality.

29. It is clear that prosecution discharged the burden of proof beyond reasonable doubt on this count against the appellant.

30. There was no plausible explanation on how it he came to be in possession of the tusks stolen from the elephant found dead at the Kilitome Conservancy.

31. On scrutiny of the evidence I am of the holding that between the discovery of the carcass and arrest of the appellant there is no intervening factors to weaken the inference of guilty. It is clear that witnesses PW1, PW3, PW4 and PW5 visited the scene. They immediately noticed footprints which assisted them to arrest the appellant. The chain of events as described by the prosecution witnesses is free from error or

mistake regarding arrest of appellant.

32. This level of circumstantial evidence unerringly points to the guilty of the appellant. The legal principles on circumstantial evidence have been clearly spelt out in various case law to guide this court. In the case of **ABANGA Alias ONYANGO Vs. REPUBLIC CR. APPEAL No. 32 of 1990**. The court stated thus:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

- (i) The circumstances from which an inference of guilty is sought to be drawn, must be cogently and firmly established.**
- (ii) Those circumstances should be a definite tendency unerringly pointing towards guilt of the accused.**
- (iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”**

The court also held in the case of **SIMON MUSOKE Vs. REPUBLIC 1958 EA 75** thus:

“It is also necessary before arriving the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”

33. In applying the test on circumstantial evidence to the instant case and guided by the authorities cited, I am of the considered opinion that the learned trial magistrate inferred the appellant guilt correctly. The evidence by PW1, PW3, PW4 and PW5 places the appellant at the scene of the crime.

There are no co-existing factors raised by the defence to dislodge the inference of guilty.

34. Secondly the appellant was also charged with possession of government trophy contrary to section 42(1) (b) of the Wildlife Conservation and Management Act. Under this section the element of the offence to be proved are:

1. Possession of a trophy

2. Lack of a certificate of ownership.

From the evidence by prosecution witnesses PW1, PW3, PW4, PW6, they confirmed that the 2 tusks and python skin were recovered from appellant’s compound.

35. The recovery was made immediately after the killing of the elephant at Kilitome Conservancy on 18/11/2013. The witnesses had pursued the suspect by following footprints and motorcycle tyres. The motorcycle KMCN 860H produced as exhibit was used to convey the items to the home of the appellant. The motorcycle was also recovered at the homestead of the appellant.

36. This situation reinforces the view that appellant was the one in possession and did not present a certificate of ownership.

37. In this case the doctrine of recent possession applies to prove count 2. The doctrine of recent

possession is well explained in the case of **MAHUNGI KATANA MAHUNGI Vs. REPUBLIC 1989 eKLR**. The court held:

“By the application of the doctrine, the burden shifts from prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution has proved certain basic facts; that the item he had in his possession has been stolen; that the lapse of time from the time of its loss to the time the accused was found with it was (from the nature of the item and the circumstances of the case) recent: that there are no co-existing circumstances which point to any other person as having been in possession of the items.”

38. The learned trial magistrate considered the evidence on possession of the game trophies by the appellant. The appellant in his defence told the trial court that he saw the tusks in a vehicle which escorted him to Kajiado Police Station. It was also his testimony that the python skin was given to him to hold when he arrived at the station.

39. While evaluating and scrutinizing the evidence by prosecution visa viz the defence, this court finds that the evidence by prosecution was watertight and left no gaps capable of casting a doubt on commission of the crime.

40. The appellant was found in possession of government trophies being elephant tusks and a python skin. The appellant did not tender a certificate of ownership which is a requirement of the law. There was no explanation how he came to be in possession of the trophies to shift the burden cast upon that he was either a thief or handler.

41. I therefore find that two elements of the offence on possession and lack of certificate of ownership have been proved sufficiently by the prosecution.

42. Thirdly the appellant was also convicted of the charge of failing to make a report of obtaining government trophy contrary to section 39 (2) (a) of the Act. Under section 39 (a – f) of the Act a list of government trophies is provided. It is a requirement of the law under section 39(2):

“That any person who by any means obtains possession of a government trophy shall forthwith make a report thereof to an authorized officer and shall hand over the trophy to that officer.”

43. The Act in section 2 defines trophy as:

“Any protected animal, game animal, or game bird alive or dead, an any bone, claw, egg, feather, hair, hoof, skin, tooth, tusk, or other durable portion whatsoever of that animal or bird or fish or other aquatic life whether processed, added to or changed by the work of man or not, which is recognized as once as durable portion.”

44. Under section 39(2) (a-f) has classified what constitutes government trophies as:

(a) Any trophy found without an owner.

(b) Any protected animal, game animal or game bird found dead or killed by accident or mistake.

(c) Any protected animal or game animal killed in defence of life or in other circumstances authorized by or under this Act, by a person who is not a holder of a game license authorizing him to have such animal.

(d) Any animal or trophy in respect of which a breach of any of the provisions of this Act or the rules has been committed.

(e) Any animal killed by a member of service in the course of his duties as such.

(f) The meat of any animal mentioned in this subsection.

45. The prosecution under Count III had to prove two elements that the appellant was in possession of a government trophy.

Secondly possession of it was unlawful.

46. The evidence of PW1, PW3, PW4 and PW5 was to effect that the two tusks and python skin were recovered from the house of the appellant. This was under the direction of the appellant upon being arrested and interrogated at his homestead.

47. There is credible evidence from the witnesses herein that he showed them where he had hidden the items.

48. The two tusks were positively identified as those removed from the carcass of the elephant killed at Kilitome Conservancy.

49. The prosecution witnesses PW1, PW3, PW4 and PW5 were pursuing a suspect in connection of the killing of the elephant and recovery of the tusks which had been taken away.

50. In their testimony at the home of the appellant they not only recovered the tusks, but also a python skin and motorcycle reg. KMCN 806H.

51. The two exhibits tusks and python skin fall under the category of definition of a trophy as defined in Section 2 as read together with Section 39 (a-f) of the Act.

52. The burden of proving that possession was lawful shifted from the prosecution to the appellant on the basis of evidence adduced against him by the prosecution.

53. The appellant in his defence admitted that he was arrested at his home but denied that the trophies were in his possession.

54. He alluded to have only seen the two ivory tusks on the conservancy vehicle which went to pick him from his home.

55. He further stated that on arrival at Kajiado police the python skin was given to him to hold.

56. The trial court considered and weighed the evidence. The learned trial magistrate concluded that there was overwhelming evidence that the accused was found in possession of the trophies. He dismissed the defence on that aspect.

57. In this first appeal having evaluated and scrutinized the evidence, I can only say there was more than sufficient evidence upon which the learned trial magistrate established possession.

58. I am satisfied that the appellant was convicted on sound evidence in respect of the three counts as indicted.

59. The appellant submitted mainly on sentence. On this ground he argued that the sentence imposed by the learned trial magistrate be reduced. His main contention was that he has realized his mistake and

being family man, he prayed for leniency.

60. I have considered the matter in respect of sentencing. The general approach of appellate court in sentencing has to be dealt with under the following parameters.

(a) Is the sentence wrong in principle

(b) Is the sentence so manifestly excessive

(c) Are there exceptional circumstances which would render it unjust.

The answer to any of the question should guide appellate court to make appropriate orders on sentence.

61. In the instant case the appellant was sentenced to five years imprisonment on Count 1 and one year imprisonment each on Count II and III respectively. The trial magistrate ordered the sentences to run concurrently.

62. The sentence of seven years in prison was based on the old statute (Wildlife Conservation and Management Act Cap 376 of the Laws of Kenya).

These cases of Wildlife Conservation and Management in our country became a matter of national concern due to increase of incidents of poaching. The wanton killing of wildlife animals and species attracted the attention of the legislature, resulting in enacting a new Act.

63. In the year 2013 a new Act came into operation redefining Wildlife Conservation and Management in Kenya. The legislature had to increase the penalty of offences under the new Act to deter the would be offenders.

64. The new amended law the Wildlife Conservation and Management Act of 2013 provides for mandatory and stiffer sentences than the old statute. The sentences complained by appellant were imposed by the trial magistrate applying the old provisions consistent with the indictment which invoked Cap 376 of the Laws of Kenya (now repealed). The sentences imposed were neither wrong nor manifestly excessive.

65. DECISION

Given the above consideration I find no merit on the issue to compel this court to interfere with sentences imposed by the trial court.

66. In view of the foregoing I am satisfied the appellant was properly convicted on watertight evidence and the sentences imposed on Count 1, II and II are lawful. The appeal on both conviction and sentence lacks merit. Accordingly it is dismissed.

It is so ordered.

Dated, delivered and signed at Kajiado on 14/1/2016.

R. NYAKUNDI

JUDGE

Representation

Mr. Akula Senior Prosecution Counsel

Mr. Mateli Court Assistant

Appellant present