



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 34 OF 2015

JUSTINE NGEWE.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(From original conviction and sentence in Criminal Case Number 644 of 2014 in the Senior Principal Magistrate's Court at Voi delivered by Hon S.M. Wahome (SPM) on 8th April 2015)

JUDGMENT

INTRODUCTION

1. The Appellant, Justine Ngewe, was tried and convicted by Hon S.M. Wahome, Senior Principal Magistrate Voi Law Courts for 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). He was fined a sum of Kshs 1,000,000/= or in default, to serve five (5) years' imprisonment.
2. However, the Trial Magistrate acquitted of the Appellant of Count II in which he had been charged with the offence of dealing in wildlife trophy without a licence contrary to Section 84 (1) as read with Section 92 of the Wildlife Conservation and Management Act, 2013 (Laws of Kenya) as he had found that the Prosecution did prove the same.
3. The particulars of the charge were that :-

COUNT I

On the 12th day of August 2014 at around 2130 Hrs in Bungule area, Voi (sic) District within Taita Taveta County (sic), jointly with others not before the court you were found in possession of wildlife trophies namely four (4) elephant tusks and one (1) python skin all with street value of Ksh. 120,000/= without permit(sic).

COUNT II

On the 12th day of August 2014 at around 2130 Hrs in Bungule area, Voi (sic) District within Taita Taveta county (sic), jointly with others not before the court you were found dealing in wildlife trophies namely four (4) elephant tusks and one (1) python skin all with street value of Ksh. 120,000/= without permit(sic).

4. Being dissatisfied with the said judgment, on 16th June 2015, the Appellant filed Mitigation Grounds of

Appeal. The grounds of appeal were **THAT:-**

- 1. He was a first offender and therefore a layman in law and conviction and sentence which occasioned imprisonment. (sic)**
- 2. He was one of the key contributors of his family input owning (sic) to the fact that his parents were advanced in age and that there should be provision of livelihood.(sic)**
- 3. He hailed from a poor background and prayed for a reduction in terms of the fine attached to his case so that he could afford the means of settling the same.**
- 4. Together with the shortest time (sic) he had spent in custody, he had learnt a lesson enough to bind him to the terms and conditions of non-custodial sentence if at all he was granted that benefit.**
- 5. Together with the reforms and rehabilitation that had been initiated in prison, he believed that it would grant him the opportunity to sensitize and indicate (sic) in the minds of other laymen citizens (sic) the importance of being a law abiding citizen who could uphold and protect the constitution.**

5. On 13th October 2015, the Appellant filed a Notice of Motion application dated 10th October 2015 in which he sought to amend his Grounds of Appeal, which application was allowed. Although the Appellant was initially acting in person, on 11th November 2015, Mr Mwanyumba applied to be placed on record on behalf of the Appellant as he had acted for him in the lower court, an application that was duly allowed by the court.

6. On 16th November 2015, Mr Mwanyumba notified the court that he would adopt the Amended Petition of Appeal dated 10th October 2015 and filed on 13th October 2015 as aforesaid. The grounds of the said Amended Petition were as follows:-

- 1. THAT the learned magistrate erred in law in failing to make a finding that the evidence adduced by the prosecution was contradictory and inconsistent and thus not safe to convict.**
- 2. THAT the learned magistrate erred in law and fact by convicting the appellant on a charge of being in possession of wildlife trophies without an expert report that material items were actually wildlife trophies.**
- 3. THAT the learned magistrate erred in law and facts (sic) when he relied blindly on testimony of alleged identification by PW2, yet there was no evidence on how the appellant was identified.**
- 4. THAT the learned magistrate erred in law and fact in failing to critically analyze the appellant's defence against the prosecution (sic) case to the detriment of the appellant.**
- 5. THAT the learned Magistrate erred in law and fact by (sic) failing to consider the alibi evidence.**
- 6. THAT the learned magistrate erred in law and misdirected himself when he shifted the burden of proof to the appellant.**
- 7. THAT the whole proceedings were marred with serious loopholes and discrepancies.**
- 8. THAT the court applied inappropriate principles to convict and sentence the appellant concluding that the case was proved beyond reasonable doubt.**

7. The Appellant's Written Submissions were dated and filed on 18th December 2015 while those of the State were dated 24th December 2015 and filed on 8th February 2016.

8. When the matter came up on 8th February 2016, both counsel for the Appellant and the State asked the court to rely on their respective Written Submissions in their entirety. This Judgment is therefore based on the said Written Submissions.

LEGAL ANALYSIS

9. 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”.

10. From his Written Submissions, the Appellant appeared to have merged his grounds of appeal into three (3) issues, namely, the shifting of the legal burden to him, his defence of alibi and the sentence that was meted upon him. The court therefore deemed it prudent to address its mind to the three (3) issues under distinct and separate headings shown herein below but taking into account, the State's Written Submissions which had largely touched on all the Grounds of Appeal in the Appellant's Amended Petition of Appeal.

I. SHIFTING OF BURDEN OF PROOF& DEFENCE OF ALIBI

11. The Appellant argued that the Trial Magistrate shifted the legal burden to him when he stated as follows:-

“... he had no receipt to show that he spent any of the three days in Mombasa for instance any document from a hotel or a guest house... Although he alleges he was the driver and turn boy of the lorry which had transported his charcoal, he never disclosed their names or the registration of the vehicle. The driver and the turn boy were also not called as witnesses...”

12. In his sworn evidence, the Appellant contended that he had just arrived from Mombasa where he sold charcoal and that he came out from the bathroom after hearing a commotion outside only for KWS officers to say that he should be arrested and given **“the ivory”**.

13. In her evidence, Esther Nyambura (hereinafter referred to as “DW 2”) told the Trial Court that the Appellant, who was her husband, had just arrived from Mombasa where he sold charcoal, and was in a towel after taking a bath when the KWS officers came to their house.

14. In his own examination-in-chief, the Appellant stated that he was shown the elephant tusks in the KWS vehicle, which he said belonged to one Nyawa who dealt with elephant tusks and another person he did not see. On its part, the State submitted that the Prosecution had presented evidence of the events as they unfolded. It pointed out that Samson Kirui (hereinafter referred to as “PW 1”) testified that he accompanied Jackline Chepchirchir (hereinafter referred to as “PW 2”) on 11th August 2014 after she had been tipped off by an informer that there were three (3) people at Bungule in Kasigau who had elephant tusks and python snake skins for sale. He stated that they met the three (3) people who entered into negotiations with PW 2 leading to the arrest of the Appellant herein and the escape of the other two (2) persons.

15. PW 1 told the Trial Court that he was present when the Appellant was arrested and that the Appellant even took him and the other KWS officers to the house of one of the escapees, one Nyawa, but they did

not get him. PW 2 reiterated PW 1's evidence and added that she is the one who weighed the elephant tusks and python skin under the pretext that she was going to purchase the same. It was her testimony during cross-examination that the Appellant had indicated that the items were his and that he had wanted money. She contended that she grabbed one of the persons who was with the Appellant but that he escaped and that the Appellant was arrested by her colleagues.

16. The Prosecution evidence gave a blow to blow account of exactly what happened on the material date and time and as the Trial Magistrate observed, there was nothing in the evidence that was adduced by the Appellant and his witness to show that he was framed by KWS officers.

17. If at all the Appellant knew nothing about the items, nothing would have been easier than for him to have told the KWS officers and the Trial Court so. However, he identified the items immediately KWS officers opened the boot of their vehicle to show him the items which he said belonged to Nyawa.

18. It was highly improbable, if not impossible, for the Appellant to have known to whom the elephant tusks and python snake skin belonged unless of course he had seen the items previously or they had particular marks so as to be identified as belonging to the said Nyawa. It was also not lost to this court that he took the KWS officers to Nyawa's house but did not find him.

19. Indeed, this Nyawa was not a fictitious character. DW 2 stated that she did not know him but that he was mentioned at the time the Appellant was arrested. Further the Appellant's evidence during his cross-examination that the man who escaped was a Somali man led this court to believe that there was more to the Appellant's version and that he was being economical with the truth. Notably, in his examination-in-chief, he had stated that he did not see the other man who escaped making it difficult for the court to establish the correct position.

20. This court found that there were glaring inconsistencies in the Appellant's case. On the other hand, the Appellant was properly identified by PW 1 and PW 2 because in his own sworn evidence, he stated as follows:-

“...I was shown the tusks in the boot of the vehicle. The owners of the elephant tusks disappeared and one was Nyawa but the other one I did not see him...”

21. As the Appellant had confirmed in his evidence that the elephant tusks belonged to Nyawa, it was therefore not necessary for the Prosecution to have tendered an expert report to show that the items he was arrested with were wildlife trophies. It was clear to all who were present at the time of the arrest that the items were wildlife trophies. In fact, the Appellant did not challenge the authenticity of the items during his trial. As was rightly pointed out by the State, the argument could not be raised at this appellate stage and must be rejected.

22. The Appellant averred that he had arrived from Mombasa on 12th August 2014. Together with DW 2 and all the Prosecution witnesses, he also testified that he was arrested at his house. The fact that the Appellant was given clothes by DW 2 was not in itself proof that he had just arrived from Mombasa. It is normal for people to bath at any time of the day, irrespective of whether or not they have travelled. He did not elucidate his submission on the defence of alibi in this regard making it difficult for this court to comprehend the relevance of the same in the circumstances of the case herein. Having said so, it was not clear to the court the nature of defence of alibi the Appellant intended to establish as he was said to have been found in actual possession of the wildlife trophies.

23. The Appellant's submission that the Trial Magistrate had shifted the blame on him was therefore neither here nor there. It was completely misplaced and a desperate attempt to escape liability for his unlawful actions.

24. Indeed, it was clear from his initial Mitigation Grounds of Appeal that he felt short of admitting his guilt when he purported to be remorseful of his actions and had even proposed to sensitize the general citizenry of the importance of upholding and protecting the Constitution.

25. Accordingly, having considered the evidence and the submissions that were adduced by the parties in support of their respective cases, this court came to the firm conclusion that the Trial Magistrate's finding that the Appellant was guilty of the offence he was charged with was correct and sound having been based on the strong evidence that had been adduced by the Prosecution and the relevant law.

26. In that regard, this court found and held that Grounds of Appeal Nos 1, 2, 3, 4, 5, 6 and 7 which were more or less related and dealt with together under the aforementioned heading were not successful and the same are hereby dismissed.

II. SENTENCE

27. The Trial Magistrate noted that PW 2 testified that the elephant tusks weighed nine (9) kg while the python snake skin was ten (10) feet. She had further stated that she had negotiated with "the sellers" to purchase the ivory at Kshs 6,000/= per kg and Kshs 2,000/= per foot. He calculated the value of the wildlife trophies at Kshs 74,000/= made up as follows:-

1. Ivory	9 kgs x Kshs 6,000/=	Kshs 54,000/=
2. Python skin	10 feet x Kshs 2,000/=	<u>Kshs 20,000/=</u>
		<u>Kshs 74,000/=</u>

28. The Trial Magistrate observed that the discrepancy of the actual value of the wildlife trophies and the value given in the charge sheet at Kshs 120,000/= is what led him to giving the Appellant the benefit of doubt and acquitted him on Count II under Section 215 of the Criminal Procedure Code.

29. So as to establish whether or not there was merit in the Appellant's arguments that the sentence that was meted upon him was harsh and excessive, the court had due regard to the provisions of Section 95 of the Wildlife Conservation and Management Act, 2013 under which the Appellant was found guilty in which it is stipulated 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.”****

30. It is evident that the Trial Magistrate had the option of sentencing the Appellant to five (5) years imprisonment and also to fine him the sum of Kshs 1,000,000/=. The Trial Magistrate, however, adopted the more lenient option and fined the Appellant Kshs 1,000,000/= or in default, to serve five (5) years imprisonment.

31. In view of the fact that this court found that the Prosecution had proved its case beyond reasonable doubt, it found that it could not interfere with the sentence that was meted by the Trial Magistrate as the same was neither excessive nor harsh in the circumstances of the case herein. In fact, the same was the minimum provided under the law. Consequently, this court found and held that Ground No 8 of the Appellant's Amended Petition of Appeal was not successful and the same is hereby dismissed.

DISPOSITION

32. For the foregoing reasons, this court hereby declines to set aside the conviction and/or quash the sentence that was meted upon the Appellant by the Trial Court. This court instead affirms the said sentence and conviction that was imposed on him as they were both lawful and fitting.

33. The upshot of this court's judgment, therefore, was that the Appellant's Appeal lodged on 16th June 2015 was not merited and the same is hereby dismissed.

34. It is so ordered.

DATED and **DELIVERED** at **VOI** this 23rd day of February 2016

J. KAMAU

JUDGE

In the presence of:-

Mwanyumba.....for Appellant

Sirima.....for State

Simon Tsehlo– Court Clerk