REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NANYUKI

CRIMINAL APPEAL NO. 55 OF 2016

JOHN KINYUA GITHINJI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in

Nanyuki Chief Magistrate's Court Criminal Case No. 701 of 2014 by

Hon. Thripsisa Wanjiku Cherere Chief Magistrate on 23rd April 2015).

JUDGMENT

1. JOHN KINYUA GITHINJI by this appeal is challenging his conviction and sentence before the Chief Magistrate's Court Nanyuki of the **offences of possession of wildlife trophies contrary to Section 95 of Wildlife Conservation and Management Act (Act No. 47 of 2013)** and **possession of ammunition contrary to section 4(3)(b) of the Firearm Act (Cap 114).**

2. The appellant by his grounds of appeal has raised the following issues:-

(a) That the trial court erred to have convicted the appellant on the two counts because there was no nexus between the charges and the evidence of the prosecution;

(b) The prosecution's evidence was insufficient uncorroborated, inconsistent and contradictory;

(c) The prosecution failed to call vital witnesses; and

(d) The learned trial magistrate failed to consider the appellant's defence.

PROSECUTION'S CASE

3. P W 2 to PW 4 were Kenya Wildlife Services (KWS) rangers. PW 2 was received intelligence from an informer that someone was intending to travel to Subuiga area in Meru to sell wildlife trophies. The KWS rangers laid an ambush since their informer had informed them that the person with the trophies had boarded a public service vehicle (a matatu) which was travelling to Subuiga. The informer also informed them of the type of clothing the person had on. When the person whose identity had been relayed to the

rangers arrived the rangers introduced themselves as KWS officers and arrested the person. That person was the appellant. On the right hand pocket of the appellant's jacket the rangers found a black paper bag which contained three pieces of elephant ivory and five rounds of ammunition. The rangers escorted the appellant to Subuiga Police station. At that police station they found the officer in charge of station (OCS) (PW 5) . At the police station all the rangers and the OCS testified that a sock containing rhino horn was recovered under the trousers of the appellant. PW 1 a research scientist confirmed in his evidence that the trophies handed to him for examination they were elephant tusks and rhino horn.

DEFENCE CASE

4. Appellant in his defence stated that he was an Administration Police (AP) officer when he was arrested. That he was based at Katheri AP camp. On the day in question he received a call from someone unknown to him but who introduced himself as Kimani, a councillor. Kimani requested appellant to meet him at a hotel at the junction of Meru/Nanyuki/Isiolo. That he was arrested by the rangers on his way to the said hotel and as he purchased airtime credit for his cell phone. Appellant said that he was surrounded by eight men as he conversed with someone. One of those arresting him said that they had been looking for him. They identified themselves as police officers and arrested him. They handcuffed him and one removed appellant's T-shirt while the other loosed his trousers until it fell down. When the arresting rangers took him to the OCS of Subuiga Police Station he said that they informed OCS that the mission had been accomplished. That the arresting person put a black paper bag on the table. When the contents of that paper bag were removed appellant noticed a stapled khaki envelope some newspapers wrappings and a sock. Those contents were the ones exhibited before the trial court.

TRIAL COURT'S JUDGMENT

5. Although the first count related to the charge of possessing three elephant tusks and one rhino horn without permit the trial court found that the possession of the rhino horn was not proved by prosecution. The reason the trial court so found was because in the trial court's opinion the prosecution's evidence in relation to the recovery of the rhino horn was at variance. This is what the trial court stated in the judgment:-

> **"Evidence by the 4 witnesses (the rangers) mentioned herein above is at variance with two of them claiming that it was the accused that retrieved apiece of rhino horn in a sock that was found tucked in his (appellant's) trousers and two of them (rangers) saying that the recovery was made by PW 2 …….. Listening to the 4 witnesses, I could not help but wonder if they were talking (sic) the same incident. From the variance in their evidence this court makes an inference that either all or some (rangers) are lying and the accused (appellant) therefore gets the benefit of doubt as far as the recovery of the rhino horn is concerned."**

6. The trial court proceeded to only convict the appellant of possession of three elephant tusks and five rounds of ammunition.

ANALYSIS AND DETERMINATION

7. The finding of the trial court that the two ranger's evidence on recovery of the rhino horn on the appellant's body was at variance gave the appellant impetus to allege in his ground of appeal that the prosecution's evidence did not support the charges and that the prosecution's evidence was insufficient contradictory and at variance. Learned counsel Mr. Njuguna Kimani, for the appellant, referred the court to the case **NDUNGU KIMANI –V- REPUBLIC (1979) KLR 282** where the Court of Appeal held:-

> **"The witness upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not straight forward person or raise a suspicion about trustworthiness or do (or say) something which indicates that he is a person of doubtful integrity, and therefore unreliable witness which makes it unsafe to accept his evidence."**

8. The appellant also relied on the case **OKEHI OKALE (1965) EA** where it was held:-

"In every criminal trial a conviction can only be based on the weight of the actual evidence adduced and it is dangerous and inadvisable for a trial judge to put forward a theory not canvassed in evidence or in counsels speeches ……..

The burden of proof in criminal proceedings in throughout on the prosecution and it is the duty of the trial judge to look at the evidence as whole."

9. I have considered the prosecution's evidence and I find that the variance mentioned by the trial court in its judgment and relied upon the appellant is non existence when one considers the entirety of the prosecution's evidence.

10. PW 2 to 4 all stated in their evidence that a black paper bag was in appellants' pocket. They arrested the appellant and took him to Subuiga Police Station. According to the OCS that arrest occurred very close to the said police station. PW 2 to PW 4 stated that inside the paper bag were three elephant tusks and five ammunition. There is no doubt in my view on the clarity of that recover from the appellant. Indeed the rangers evidence very well corroborated each other.

11. I beg to differ with the trial court's finding that the retrieval of the rhino horn from the appellant was unclear. PW 2 on that recovery stated:-

"We then took suspect (appellant) to office (sic) of OCS and recovered a piece of rhino horn tied with a sock tucked in his trouser …….. We recovered a piece of rhino horn wrapped in a socks tucked in his trouser."

From that evidence PW 2 did not state that it was he who made the recovery of the rhino horn.

12. PW 3 on that recovery stated:

"one piece of rhino horn wrapped in a sock was recovered from accused (appellant). It was tucked in his trouser."

Later on being cross examined this witness said that the appellant was searched by PW 2 in the OCS office. In this witness evidence he did not state categorically that it was PW 2 who recovered the rhino horn.

13. PW 4 on that recovery said that PW 2 carried out a search over the appellant at Subuiga Police Station. He then stated:-

"The rhino horn was recovered inside a socks and it was recovered by Macharia (PW 2) hidden in the accused body."

This is the only witness who ties down the recovery of the rhino horn to PW 2. But that variance in the evidence on recovery of the rhino horn is in my view, when the whole evidence is considered, is of no legal significance. It is too minor to be the basis of acquittal. On this I am well guided by the Court of Appeal in the case **THOYA KITSAO alias KATIBA v REPUBLIC (2015) eKLR** considered how the court should deal with some variation in the prosecution's evidence and stated:-

"This court had stated severally that the mere fact that there are some variations in evidence does not *ipso facto* prove that the evidence is false or unreliable (see WILLIS OCHEING ODERO V REPUBLIC, CR. APP. NO. 80 OF 2004 (KISUMU). Indeed variation must be expected in evidence that is true. It is said that sometimes evidence without the slightest variation may be good indicator of coached witnesses.

In DICKSON ELIA NSAMBA SHAPWATA & ANOTHER V. THE REPUBLIC CR. APP NO. 92 OF 2007, the Court of Appeal of Tanzania stated as follows regarding discrepancies in evidence which we respectfully endorse:-

'In evaluating discrepancies, contradictions and omissions, it is undesirable for court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."

14. I therefore respectfully find, contrary to the trial court's finding that there was sufficient evidence that the rhino horn was recovered from the person of the appellant. There was no basis of impeaching the prosecution's evidence.

15. The defence offered by the appellant was that he was framed by the rangers and that the recovery of the tusks, horn and ammunition were 'planted' on him. It is clear from the evidence both the prosecution and of the defence that the rangers and the appellant before the arrest of the appellant did not know each other. That being so the question that begs an answer is, whey would total strangers frame another stranger? What would have been the motive when there was no evidence of any hostility or enmity of any kind. I find the defence offered by appellant to be farfetched and not credible. Even if the rangers framed him in the recovery of the elephant tusk appellant failed to explain the recovery of the rhino horn which was in the presence of the OCS of Subuiga Police Station, who it seems, prior to that date, had no working relationships with the rangers which could lead to collusion to frame appellant.

16. Appellant's learned counsel submitted that the prosecution had failed to meet the criminal standard of proof.

17. The learned Senior Principal Prosecuting Counsel Mr. Tanui submitted that the prosecution had proved its case on the recovery of the elephant tusk and the ammunition.

18. In the Court of Appeal in the case **MOSES NATO RAPHAEL v REPUBLIC (2015)eKLR** the court considering the standard of proof in criminal trial and the principle that the burden of proof lies with the prosecution stated:-

"This Principle is well captured in the time honoured English case of **Woolmington v. DPP (1935) A. C 462** where the court stated:-

> **"Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt, subject** (to the qualification involving the defence of insanity and to any statutory exception)**. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether (**the offence was committed by him**), the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."**

19. The Prosecution in my view proved on required criminal standard that the appellant had possession of the animal trophies that were recovered from his person. The prosecution provided evidence of the recovery of those trophies from the appellant and provided evidence of a scientist who confirmed that indeed they were animal trophies. The first count against the appellant was proved.

20. The prosecution however failed to meet that standard of proof in respect to the second count of possession of ammunition contrary to **section 4(3)(b)** of **Cap 114**. The recovery of the alleged ammunition was well proved, just like the recovery of the trophies. However the prosecution failed to adduce evidence of a ballistic expert who needed to confirm that what was revered from the appellant was indeed ammunition as defined under **section 2** of Cap 114. Such an expert would have testified on whether the items recovered from the appellant and alleged to be ammunition were capable of being discharged from or used with a firearm. In the absence of that expert evidence there was no basis convicting the appellant on the second count. The conviction on the second count will therefore succeed.

21. The issues raised by appellant that vital witnesses were not called by prosecution is not supported by the evidence on record. Since appellant's learned counsel did not submit on that issue I shall proceed to regard it as abandoned.

22. On sentence I am of the view the learned magistrate erred in the 5 months default sentence passed on first count. On that count appellant was charged with the offence of possessing animal trophies contrary to **section 95** of **Act No. 47** of **2013**. That section 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."**

23. Appellant on being convicted on the first count was sentenced by the trial court to pay a fine of Kshs. 1 million and in default to serve a five months imprisonment. Clearly the default sentence did not conform to the provision of section 95 above. This court has power under **Section 354** of **Criminal Procedure Code Cap 75** to reduce or increase a sentence at the hearing of an appeal as on conviction.

24. With the above discussion in mind I make the following orders in this judgment:

a. **The appeal against conviction on first count is hereby dismissed. Conviction of the trial court is upheld.**

b. **The sentence on first count is set aside and the appellant is hereby sentenced to pay fine of Kshs. 1 million and in default to serve 5 years sentence.**

c. **The conviction on second count is hereby quashed and the sentence on the second count is hereby set aside.**

DATED AND DELIVERED THIS 16TH NOVEMBER 2016.

MARY KASANGO

JUDGE

CORAM:

Before Justice Mary Kasango

Court Assistant – Njue

Appellant: John Kinyua Githinji ….....

For the State: ….....

COURT

Judgment delivered in open court.

MARY KASANGO

JUDGE