



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 30 OF 2016

IBRAHIM ABDI MOHAMED.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in criminal case No.775 of 2013 of the Chief Magistrate's Court at Isiolo by R.G Mundia – Resident Magistrate)

JUDGMENT

The appellant, **IBRAHIM ABDI MOHAMED**, was convicted for the offence of being in possession of government stores contrary to section 324(2) of the Penal Code. He was also convicted for the offence of being in possession of government trophy contrary to section 42 (1)(b) as read with section 52 (1) and section 56 (1) of the Wildlife Conservation and Management Act cap 376 Laws of Kenya.

The particulars of the offence were that on 2nd day of November 2013 at Old town Isiolo within Isiolo County, had in his possession one ground sheet valued at Kshs.3000/= used by Kenya armed forces and was suspected to be unlawfully obtained. On the same day and at the same place he is said to have had in his possession 4 tusks of elephant without a certificate.

The appellant was tried and convicted and sentenced on both counts. The sentences were ordered to run concurrently. He now appeals against both conviction and the sentence.

The appellant was represented by M/s Thibaru, learned counsel, raised several grounds of appeal that can be summarized as follows:

1. That the learned trial magistrate erred in law and facts by failing to find that the charge in count two was defective.
2. That the learned trial magistrate erred in law and fact by failing to make a finding that both counts were not proved.
3. That the learned trial magistrate erred in law and fact by shifting the burden of proof to the appellant.

The state conceded the appeal and was represented by Mr. Namiti, the learned counsel.

The facts of the case are briefly as follows:

After game wardens received some information of suspected people who had game trophy, they went and arrested the appellant and another person. They were tried convicted and sentenced. This gave rise to this appeal.

On his part the appellant contended that he was falsely implicated.

This is a first appellate court as expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO Vs. REPUBLIC 1972 EA 32.**

There is no section 42 (1) (b) of the Wildlife Conservation and Management Act. There is however section 42 (1) which provides as follows:

Any person who is registered as a proprietor of land in accordance with the provisions of any written law may donate or bequeath all or part of that land to the national government, county government, community, an educational institution or an association for purposes of wildlife conservation.

The charge was therefore defective and it is not curable under section 382 of the CPC for it does not inform the appellant adequately the offence he was facing. Since he could not prepare for his defence well it was prejudicial to him.

Section 324 (2) of the Penal Code states:

Any person who is charged with conveying or having in his possession, or keeping in any building or place, whether open or enclosed, any stores so marked, which may be reasonably suspected of having been stolen or unlawfully obtained, and who does not give an account to the satisfaction of the court how he came by the same, is guilty of a misdemeanour.

One of the requirements for the government stores is that such stores must be marked. The sheet that was purported to be government stores was not marked. The evidence of the witnesses was only suspicion that it could have been government stores. The learned trial magistrate did not have any evidence to convict on this charge.

In count one what was alleged to be ivory was not proved to be ivory. In absence of the report the prosecution should have produced the recovered items for the court to form an opinion whether they came from animals or they were manmade. This count was not as well proved.

I therefore allow the appeal on both conviction and sentence on both counts. The appellant is set at liberty unless if otherwise lawfully held.

DATED at Meru 19th day of December 2016

KIARIE WAWERU KIARIE

JUDGE