REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 40 OF 2015

(From original conviction and sentence in criminal case No. 4 of 2014 of the Principal Magistrate's Court at Mwingi H. M. Nyaberi Ag. SPM).

SAKAYO MUKETI .... APPELLANT

V E R S U S

REPUBLIC .... RESPONDENT

JUDGMENT

The appellant Zakayo Muketi was charged in the Magistrate's Court with 3 counts at Mwingi. Count 1 was for possessing Government Trophy without a certificate of ownership contrary to Section 4(1)(3) as read with Section 56(2) of the Wildlife Conservation and Management Act (Cap 376 Laws of Kenya). The particulars of the offence were that on 3rd January 2014 at about 2130 hours, at Ngomeni area in Mwingi East District of Kitui County, was found in possession of Government Trophy namely six pieces of ivory with a street value of Kshs 75,000/= in contravention of the said Act. Count 2 was for dealing in Government Trophy without a dealer's licence contrary to Section 43 (4)(a) of the Wildlife Conservation and Management Act Cap 376 Laws of Kenya. The particulars of the offence were that on the same day and place was found dealing in Government trophy namely six pieces of ivory with a street value of Kshs 75,000/- without a dealers licence in contravention of the said Acts. Count 3 was for failing to make a report of being in possession of Government trophy contrary to Section 39(3)(a) of the Wildlife Conservation and Management Act Cap 376 Laws of Kenya. The particulars of offence were that on the same day and place, having failed to report possession of Government trophy was found being in possession of 6 pieces ivory with a street value of Kshs 75,000/= in contravention of the said Acts.

He denied all the charges. After a full trial, he was convicted of all counts. He was sentenced to serve 5 years imprisonment on each count, the sentences were to run concurrently. In sentencing, the Magistrate noted that count 1 should have been brought under Section 95 of the Act.

Aggrieved by the decision of the trial court, the appellant has come to this court on appeal. He filed initial grounds of appeal through his Advocate Mulinga Mbaluka & Co. Advocates on 14th May 2015. The Advocate also filed written submissions on 18th August 2015. Before the appeal was heard however, the appellant in 2016 filed amended supplementary grounds of appeal and his own written submissions. He elected to argue his appeal in person. His amended supplementary grounds of appeal are summarized as follows:-

1. The learned Magistrate erred in law and facts in failing to observe contravention of Section 153

of the Evidence Act on the issue of contradicting statements written by the police and adduced in court, wherein the appellant was not given adequate time to prepare for his defence.

2. The trial court erred in relying on an informer whose source of information was not given.

3. Trial court relied heavily on hearsay evidence contrary to section 25, 28 and 32 of the Evidence Act.

4. There was no evidence sufficient to support a conviction and sentence and to connect the appellant with possession of Government Trophy as stated in the charge sheet.

5. The Magistrate erred in placing the appellant on his defence while no adequate evidence was given by the prosecution and no primafacie case was established as required under Section 169 of the Criminal Procedure Code.

6. The Magistrate erred in law and facts in that the Judgment does not meet the threshold of determination of points of law as required.

7. The Magistrate erred in sentencing him by not considering that he was a first offender and that the charge sheet was defective and also considering irrelevant facts.

Though the appellant filed written submissions, he made oral submissions in court. He stated that he had received threats from the complainant before the trial and so informed the court. He stated that he received threats from Kenya Wildlife Service officers.

He complained that PW3 stated that he was informed by an informer while at Mwingi at 9.30 Pm but arrested the appellant at Ngomeni at the said 9.30 Pm which must be a lie because the distance was 30 Km. He further added that PWI and PW4 did not make any report to the police before arresting him on 3rd January 2014, and that the two refused to inform the Investigating Officer about the identity of the informer. He complained also that he was arrested and Ngomeni at 7.30 Pm with a woman called Lena Kasimba, but that two other persons arrested were released after paying Kshs 30,000/- and Lena was also released though she did not pay anything.

He complained that PW1 and PW4 did not conduct a search in his house to establish if he had committed the offence and that PW4 initially said that he was from the CID but later stated that he was a Kenya Wildlife Service Officer. He further submitted that though PW2 said that he recovered tusks of hippopotamus, hippopotamus did not have tusks like elephants. He stated that the date of the first entry in the police occurrence book was different from the date of arrest. He lastly complained that he was not provided with prosecution witness statements.

The Prosecuting Counsel Mr. Okemwa opposed the appeal. Counsel submitted that the appellant faced 3 counts which related to trophies from wildlife which was Kenya's heritage. According to counsel, there was nothing unusual about the mode of arrest of the appellant as PW1, PW2 and PW4 said that they received information and laid a trap.

Counsel stated that there was a buyer of 6 pieces of ivory and two pieces of ivory. The buyer was in communication with the appellant who was successfully arrested in possession of the items and did not have a licence nor did he declare possession to Kenya Wildlife Service.

Counsel submitted that the appellant in his submissions avoided mentioning anything about the trophies and did not identify the Kenya Wildlife Service or Police Officers with whom he had bad blood.

According to counsel, possession was proved and intention to deal with the trophies was also proved. It was also proved that the appellant did not have a licence. The ingredients of the offences were thus proved.

Counsel emphasized that an expert by the name Ben Nyakundi gave a positive report confirming threat the items were trophies, and that there was no need to search his house as the appellant.

Counsel submitted that there was no link between the death of the wife of the appellant and the Investigating Officers as, during mitigation the appellant said that his wife had died in a road accident. With regard to exchange of money for release of some suspects, counsel submitted that the appellant did not call those suspects to support his story. Counsel appreciated that the Magistrate corrected the section of the law relating to count 1 in sentencing, but maintained that the conviction and sentence were proper.

In response to the prosecuting counsel's submissions, the appellant stated that the evidence of the prosecution was not adequate as he was not arrested in possession of anything.

This being a first appeal, I am duty bound to re-evaluate all the evidence on record and come to my own conclusions and inferences.- see the case of ***Okeno –vs- Republic (1972) EA 32***.

At the trial, the prosecution called 4 witnesses. PW1 was Corporal Wilfred Nyamwea Sawe of KWS. It was his evidence that on 3rd January 2014 at 9.30 Pm, he was at Mwingi with corporal Jerald Cheruiyot and driver Kennedy Sambati when they received a report of an individual working with an NGO in Nairobi, who was looking for a prospective buyer to sell ivory tusks at Mwingi. The informer then told them to proceed to Ngomeni bus stop at a river. They proceeded there and found the informer and the appellant. They opened the appellant's polythene paper bag and found pieces of elephant tusks. They also found hippopotamus tusks which were produced in court.

PW2 was Ben Nyakundi Nyaroaka a zoologist at National Museums of Kenya. It was his evidence that 7th February 2014 he received exh A1- A6 with a exhibit memo. He examined them and found that A3 – A6 had characteristics of elephant ivory. A1-A2 showed that they were hippopotamus ivory. He made a report on the same.

PW3 was PC Festus Kipchumba Bett whose evidence was that on 4th January 2014 at 7.00 Pm at the Mwingi Police station, he came across an OB report of a case of possession of Government trophy. The case was reported by Kenya Wildlife Service Officers and he was required to investigate. The report was that appellant had been arrested in the company of an informer and that the appellant was carrying ivory pieces. He commenced investigations, and the appellant informed him that the ivory belonged to the person who was released. He later prepared an exhibit memo to take the items to National Museums Nairobi and received the report on the same.

PW4 Corporal Cheriot testified that 2nd January 2014, he received a report with Corporal Wilfred Nyamwea that information had been received that a person who worked for an NGO was in possession of ivory at Mwingi town. They were then authorized to proceed to Mwingi arriving at 9.00 Pm wherein an informer told them that the suspect was not readily available at that time.

On the following day 3rd January 2014 at 1900 hours, they were told by the informer to proceed to Ngomeni where they arrived at 9.00 Pm and the suspect came to the vehicle with the informer. The suspect who was the appellant carried something in a black polythene paper, and when they searched him found 6 pieces suspected to be elephant ivory in the paper bad and they arrested him.

In his defence, the appellant stated that he worked in Nairobi, and that he was with one lady called Lena Kasiva and after crossing a river at Kasten bus stage in Mwingi East, he saw lights from a motor vehicle which had on board were 7 people. He asked for the costs of fare to Kasten and he was told it was Kshs 150/= and, when he boarded with the woman the vehicle moved on for 100m and stopped, and two people from the rear cabin came out and told them that they were CID Officers and that they were arresting them, but later released the woman. He stated further that the arresting officers asked them to pay Kshs 30,000/= to be released, which he didn't have. Later, the people who arrested him said they were Kenya Wildlife Service officers.

Considering the evidence of both the prosecution and the defence, in my view the prosecution established that the appellant possessed the items that were described as ivory. Though the appellant claims that hippopotamus do not have ivory, that is his opinion. Ivory is a technical term that refers to animal material that appears to be bone like. It is found in elephants, hippopotamus , and also rhinoceros. Ben Nyakundi PW2 from National Museums of Kenya clearly said that of the six items recovered, four were pieces of elephant ivory and two were pieces of rhinoceros ivory. I find that the items cannot be something else.

The appellant has raised the issue of not being released because he did not have money to pay the Kenya Wildlife Service officers. In my view, that is an allegation and in any case it does not exonerate him from the offence charged. It would only make the Kenya Wildlife Service Officers, if true, be people who were corrupt. He would still be liable for the offence charged if he was proved to be the culprit even if a charge of corruption was laid or preferred against the Kenya Wildlife Service Officers.

The evidence of the prosecution is very clear that the Kenya Wildlife Service Officers received intelligence information from an informer. They proceeded to Mwingi where they were given more guidance. On the next day 3/2/2014, they proceeded to Ngomeni area after being given guidance on how to arrest the suspect. They proceeded there and found the suspect who was the appellant in a company of a woman. He himself admitted that he was in the company of a woman Lenah who had a child and who was released. He was searched and found to be carrying a black plastic bag which contained the items, the subject of the charges herein. The fact therefore that the informer was not called as a witness did not prejudice the appellant nor did it water down the prosecution case on count 1 and count 3, because the appellant was actually found in possession of the items that constituted the offences. Count 2 of dealing with trophies was however not proved, as no evidence as tendered by the prosecution on what constituted dealing. The information from the informer did not constitute evidence as the informer did not testify. I thus find that the prosecution proved its case against the appellant beyond reasonable doubt on count 1 and count 3. I will uphold the conviction on those two counts and acquit him on count 2.

The sentence on count 1 and count 3 is not illegal. I will uphold the same.

To conclude, I uphold the conviction and sentence of the appellant on count 1 and count 3. I however quash the conviction and set aside the sentence on count 2. Since the sentences on count 1 and 3 were ordered to run concurrently, the appellant will serve a total of 5 years imprisonment from the date he was sentenced by the trial court.

Dated and delivered in Garissa this 9th December 2016.

GEORGE DULU

JUDGE