



REPUBLIC OF KENYA



KENYA LAW
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**Mutua & 3 others v Republic (Criminal Appeal E065 of 2023)
[2025] KEHC 44 (KLR) (15 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 44 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CRIMINAL APPEAL E065 OF 2023
AK NDUNG’U, J
JANUARY 15, 2025**

BETWEEN

**STANLEY MUTUA 1ST APPELLANT
KENNEDY MUREITHI 2ND APPELLANT
NICODEMUS BUNDI 3RD APPELLANT
SEBASTIAN MARETE 4TH APPELLANT**

AND

REPUBLIC RESPONDENT

*(From original conviction and sentence in Nanyuki CM
Criminal Case No E2225 of 2021– V. Masivo SRM)*

JUDGMENT

1. The Appellants herein, Stanley Mutua, Kennedy Muriithi, Nicodemus Bundi And Sebastian Marete were each convicted after trial of dealing with wildlife trophies of an endangered species without a permit contrary to Section 92(2) of the [Wildlife Conservation and Management Act, 2013](#) (Count I) and being in possession of wildlife trophies of an endangered species without a permit contrary to Section 92(4) of the same Act (Count II). They were each sentenced to seven (7) years imprisonment in Count I and fined Kshs.3,000,000/- and in default to serve 12 months imprisonment in Count II.
2. The particulars in count I were that on 15/10/2021 at around 1300hrs at Timau area in Buuri sub-county within Meru County they were found dealing in wildlife trophies of an endangered species namely 4 elephant tusks weighing approximately 13 kgs without a permit. The particulars for count II were that on the same date, time and place, they were found in possession of wildlife trophies of an endangered species namely 4 elephant tusks weighing approximately 13 kgs without a permit.



3. They have each appealed against conviction and sentence vide a petition of appeal dated 04/09/2023 challenging the conviction and the sentence on the following grounds;
 - i. That the findings of the fact by the learned magistrate were based on a misapprehension of evidence.
 - ii. The learned magistrate erred by holding that the Appellants were found in possession of wildlife trophies notwithstanding the circumstances surrounding the alleged recovery of the said trophies contradicts the findings by the court.
 - iii. The learned magistrate erred in finding that the Respondent had proved its case whilst the prosecution evidence was marred with material contradictions.
 - iv. The learned magistrate erred shifting the burden of proof to the Appellants by holding that the Appellants' defence were mere denials which had failed to dislodge the prosecution's case.
 - v. That the Appellants were not given a fair hearing because the learned magistrate failed to consider the evidence tendered by the Appellants and disregarded their evidence without giving audible reasons.
 - vi. The learned magistrate erred when he failed to hold that essential elements of the offence to wit possession and proof that the items were wildlife trophy and the Appellants knew that the items were game trophies were not proved.
 - vii. The learned magistrate erred convicting the Appellants on the ground that the trophies had been transported on a motorcycle of which motorcycle was not produced as evidence.
 - viii. That the sentence meted was manifestly excessive, harsh or punitive.
 - ix. The learned magistrate erred sentencing them on the 2nd count of possession as the same was in the nature of an alternative count as one can hardly deal without being in possession.
 - x. That the finding of the learned magistrate is inconsiderate, erroneous, unlawful, biased and untenable in law.
4. The counsel filed supplementary grounds of appeal where he raised the following additional grounds;
 - i. The learned magistrate erred by failing to consider that there were no cogent or credible evidence to connect the Appellants to the alleged offence.
 - ii. The learned magistrate erred when he failed to consider that key component of the offence namely, motorcycle registration no. KMEY 722C was not produced which meant that the alleged trophies could not have been transported to the scene and the trophies produced in court were a set up created by police and KWS officers.
 - iii. There were no photographs of the alleged trophies at the scene casting doubt on whether they were really trophies at the scene which doubt should have been resolved in their favor.
 - iv. The learned magistrate erred relying on evidence which was not tendered into evidence including the evidence by informers and telephone conversations which were not authenticated by evidence.
 - v. The learned magistrate failed to note that the samples of the trophies were taken to PW3, the expert in their absence thereby proving that the element of possession was not proved beyond reasonable doubt.



5. Directions were given that the appeal be canvassed by way of written submissions and the parties duly complied.
6. The Respondent's counsel in her submissions raised a preliminary point of law to wit, the appeal was filed out of time and without the leave of the court hence the appeal is bad in law for being time barred and ought to be struck out. She placed reliance on the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* (2014) eKLR and emphasized that the appeal is a nullity and ought to be struck out.
7. The judgment of the lower court was delivered on 18/07/2023 and sentence passed on 24/07/2023. The petition of appeal was filed on 05/09/2023 and the supplementary petition of appeal was filed on 29/09/2023.
8. The period within which a criminal appeal should be filed is statutorily provided under Section 349 of the Criminal Procedure Code which provides:

“An appeal shall be entered within fourteen days of the date of the order or sentence appealed against:

Provided that the court to which the appeal is made may for good cause admit an appeal after the period of fourteen days has elapsed, and shall so admit an appeal if it is satisfied that the failure to enter the appeal within that period has been caused by the inability of the appellant or his advocate to obtain a copy of the judgment or order appealed against, and a copy of the record, within a reasonable time of applying to the court therefor.”
9. The Appellant's counsel was therefore supposed to lodge the appeal before the expiry of 14 days. The appeal was however lodged on 05/09/2023 a month and about 11 days after the trial court sentenced the Appellants. This was outside the stipulated timelines and as the Respondent's counsel submitted, leave was not sought. Section 349 above states that the court can admit an appeal filed out of time but that discretion can only be exercised on the court being formally moved by an application.
10. This issue is not novel and our court's all the way to the Supreme Court have had opportunity to weigh in on the matter both in the Civil and Criminal jurisdictions.
11. The Supreme Court of Kenya in SC Appl No 38 of 2014 between TSC vs Simon Kamau and 19 Others, adopted its earlier decision in *Nicholas Kiptoo Arap Korir Salat vs the IEBC & 7 Others* SC Appl No 16 of 2014 and stated:

“No appeal can be filed out of time without leave of Court. Such filing renders the “document” so filed a nullity and of no legal consequences. Consequently, this court will not accept a document filed out of time without leave of the court.”
12. The Supreme Court further held that a document filed out of time without a leave of court is irregular and unknown in-law and the same should be struck out.
13. Although the above decision related to civil litigation, the principles applicable are same in criminal cases. A party who is convicted and sentenced to serve prison sentence and who proceeds to serve that prison sentence must if he/she so wishes to challenge the decision of the court, file, at the earliest opportunity, an appeal or if for good reason they delayed in filing of the appeal, seek for leave extending the 14 days period. This is not the case here.



14. In Moses Mwicigi and 14 Others -vs- Independent Electoral and Boundaries Commission and 5 Others Supreme Court Petition No. 1 of 2015 the Court held:

“This Court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.”

15. What have the courts said in so far as an infraction in respect of Section 349 of the Criminal Procedure Code is concerned? In the case of Samson Owiti Otambo v Republic (2018) e KLR the judge stated:

“7. The Jurisdiction of this Court to hear and determine the appeal is determined by the appeal being filed within the statutory period or within the enlarged period of time with leave of Court.”

16. In Michael Onyango Owala -v- Republic (2018) e KLR the court stated;

“15. Where an appeal is filed outside the statutory period and no effort is made to seek to validate such an appeal by seeking and obtaining an order under the proviso to Section 349 of the Criminal Procedure Code to enlarge the time for filing of such an appeal or to have the appeal as filed out of time deemed to be duly filed, such an ‘appeal’ is no appeal at all. It is incurably and fatally incompetent and amenable to be rejected without delving into the merits thereof. Such is not a procedural error. It is an error that goes to the root of the appeal as it is the leave that would accord this court the jurisdiction to hear and determine an appeal that is filed out of time.”

17. The Court of Appeal court of appeal where called upon to determine the competence of an appeal before it where the Appellant had failed to file a Notice of Appeal in Faisal Mohamed Ali alias Feisal Shahbal -v- Republic (2015) e KLR stated:

“Accordingly the Court cannot exercise its adjudicatory powers conferred by law or *the Constitution* where the appeal is incompetent and that an incompetent appeal divests a court of jurisdiction to consider factual or legal controversies embodied in the relevant issues.”

18. From the foregoing, there is no competent appeal before the court as the appeal herein was filed out of time and no leave was ever sought even late in the hearing for the admission of the appeal out of time. The court lacks the jurisdiction to entertain the same. The Appeal filed herein is hereby struck out.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 15TH DAY OF JANUARY 2025

A.K. NDUNG’U

JUDGE

