



REPUBLIC OF KENYA



**KENYA LAW**  
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**Makwatha v Republic (Criminal Appeal E109 of 2024)  
[2025] KEHC 1785 (KLR) (11 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1785 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIBERA  
CRIMINAL APPEAL E109 OF 2024  
DR KAVEDZA, J  
FEBRUARY 11, 2025**

**BETWEEN**

**CLEMENT MAKWATHA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the original conviction and sentence delivered by  
Hon. Maroro (S.P.M) on 24th July 2024 at Kibera Chief Magistrate's Court  
Criminal Case no. 1554 of 2019 Republic vs Clement Makwatha & 2 Others)*

**JUDGMENT**

1. The appellant was charged jointly with others not before this court with the offence of possession of wildlife trophy contrary to section 95(d) of the *Wildlife Conservation and Management Act* 2013. After a full trial, He was sentenced to pay a fine of Kshs 1 million in default to serve five (5) years imprisonment. Being aggrieved, he filed an appeal challenging his conviction and sentence.
2. In his petition of appeal, he raised grounds, which have been coalized as follows: He contended the elements of possession were not proved by the trial court. He argued that the sentence is contrary to the express provisions of Section 95(d) of the *Wildlife Conservation and Management Act*.
3. The key ingredients for the offence of possession of wildlife trophy charge contrary to Section 95(d) of the *WCMA* are as follows-  
  
“being in physical control of the item and be guilty of possession”.
4. The issues for consideration by this court are whether the appellant knew the item was in his custody and secondly that the item in question was prohibited and whether the prosecution did prove its case beyond reasonable doubt leading to a proper conviction and sentence.



5. This being a first appeal, it is the duty of this court as the first appellate court, to reconsider, re-evaluate, and re-analyse the evidence afresh and come to its own conclusion on that evidence. The court should however bear in mind that it did not see witnesses testify and give due consideration for that. (See *Okeno v Republic* [1972] EA 32)
6. The prosecution's case was that on 26th November 2019, at approximately 11:45 hours, PW1, Corporal Anthony Ndungu of Kenya Wildlife Service (KWS) Headquarters, recovered 25 suspected ostrich eggs in Athi River. The eggs were found in a house where the appellant was present—10 stored in a yellow sack, another 10 in a carton secured with yellow manila rope and covered with a brown sack, and the remaining five in a carton labeled "Toss," cushioned with sponges and mattress pieces. The items were marked as exhibits and later produced in court.
7. PW2, Sergeant Lesumancha Laanor of KWS Lang'ata, testified that on 26th November 2019, he received intelligence from PW4, Corporal Lugwe Tsuma Mohammed regarding individuals engaged in selling ostrich eggs. Acting on this information, PW2, along with Rangers Wangoi, Kibue, and driver Kisui, proceeded to Athi River. They met with an informant who directed them to the suspects. PW2 remained in the vehicle while PW4 and another officer entered a house to collect the eggs. Upon their return, PW2 demanded to see what they were carrying. After confirming the presence of the eggs, he identified himself as an officer, requested a permit, and, upon finding none, arrested the suspects. Upon interrogation, one suspect, Muema, identified another, Salau, as the supplier. Salau was subsequently arrested in Kitengela.
8. PW3, Ranger Anthony Kibue, corroborated PW2's testimony, confirming that the suspects carried two boxes and a black bag containing the eggs when they boarded the vehicle. After identifying themselves as officers, PW3 assisted in arresting the suspects and later identified the 25 eggs as exhibits in court. He stated that the arrests took place near Athi River Market but could not confirm the exact location where the eggs were initially found.
9. PW4, Corporal Lugwe Tsuma Mohammed of KWS Transmara, testified that on 25th November 2019, he received a tip-off regarding three individuals in possession of ostrich eggs. He established contact with them and negotiated a purchase price of Kshs 2,000 per egg. He relayed the information to PW2, and on the following day, they proceeded to Athi River. PW4 confirmed that the eggs were retrieved from two locations: a mud house and a permanent storey house. The transaction was completed inside a vehicle, where the officers then identified themselves and made the arrests.
10. PW5, Esther Nguta, a research scientist from the National Museums of Kenya, examined the recovered eggs on 27th November 2019. She confirmed that the thick shells were consistent with ostrich eggs and produced a report to that effect. Under cross-examination, she clarified that fingerprint analysis was not within her scope of work.
11. PW6, Sergeant Joyce Muthini of KWS, took photographs of the recovered exhibits, producing seven images as evidence. She also signed and submitted the official inventory of the seized items. She confirmed meeting the suspects at the crime scene and denied any demands for money in exchange for their release.
12. PW7, Corporal Anthony Mbalu, the investigating officer from KWS Lang'ata, received the suspects following their arrest and recorded their statements. He corroborated the testimony of his colleagues and stated that he was unaware of any pre-existing disputes between the parties.
13. When placed on their defence, DW1, Melau Karor, gave unsworn testimony, stating that he was a farmer engaged in selling plots in Kitengela. On 26th November 2019, officers approached him, requesting assistance in viewing a piece of land. He declined, explaining that he could not leave his



premises unattended. He alleged that the officers then demanded fuel money and, upon his refusal, arrested him.

14. DW2, Joseph Muema, testified that in July 2019, he met the appellant who informed him of a buyer interested in purchasing land. Later, Muema identified a suitable plot and provided the title deed (DMFI 1 - Kajiado/Elangata WUAS/3177). On 25th November 2019, the appellant called him at 9:00 PM, stating that the buyer wished to view the land immediately. They arranged to meet at Cabanas the following morning at 8:00 AM. On 26th November 2019, Muema, the appellant, and Melau Karor convened at Kobil Petrol Station in Kitengela. Melau, however, declined to proceed, citing work obligations. The officers allegedly demanded Kshs 50,000 for vehicle expenses. When they failed to produce the money, they were arrested and taken to KWS Headquarters. Muema denied any involvement with the eggs.
15. DW3, Clement Makwatha the appellant herein stated that he was a malimali trader and land dealer. He recounted that a cousin of Mohammed Longwe, Peter Ambu, had approached him regarding land in Kitengela. The appellant then consulted Joseph Muema, who engaged a local agent. On 25th November 2019, Mohammed called, requesting a meeting the next day to facilitate a site visit.
16. On 26th November, the appellant met Mohammed and four others at Cabanas at 8:00 AM. They proceeded to Kitengela, meeting Melau at Kobil Petrol Station, as he was to show them the land. However, Melau could not accompany them due to work commitments. They returned to their vehicle to discuss the next steps, at which point the officers allegedly demanded Kshs 50,000 for wasted fuel. When they could not pay, they were arrested and taken to KWS and later to Langata Police Station.
17. DW4, Mwinzi, testified that he resided in Mwingi but was in Nairobi in 2019. He stated that on the day of the arrest, the appellant had left him to manage his shop while he went to sell a plot at Cabanas. He remained at the shop until 2:00 PM, when the appellant called, informing him of his arrest. Upon cross-examination, he was unable to confirm the details of the land transaction.
18. After the full trial, the appellant and Joseph Muema were convicted while Malau Karor was acquitted.
19. Having considered the evidence on record, the written submissions, the issue for determination is whether the prosecution proved their case beyond reasonable doubt.
20. Section 3 of the *Wildlife Conservation Management Act* defines wild trophy in 2 parts. It provides that Wildlife means; “any wild and indigenous animal, plant or microorganism or parts thereof within its consistent habitat or ecosystem or land or in water. Trophy is defined as “any bone, claw, egg, feather, hair, hoof, tooth or tusk of an animal, and of any species of plant, any bark, branch’ The Act under which the appellants were charged provides at section 95 as follows;

95. Offences relating to trophies and trophy dealing Any person who, without a permit or exemption granted under this Act in relation to a species not specified under section 92—.....

d. is in possession of a wildlife trophy or live wildlife species; or

.....

commits an offence and shall be liable on conviction to a fine of not less than one million shillings or a term of imprisonment of not less than twelve months or to both such fine and imprisonment.



21. Section 4 of the *Penal Code* defines possession as: - “Be in possession of or have on possession includes not only having in one’s own personal possession but also knowingly having anything in the actual possession or custody of any other person or having anything in any place (whether belonging to or occupied by oneself or not) for the use of oneself or for any other person.”
22. I am in deference with the decision of Peter Mwangi Kariuki vs Republic [2015] eKLR where Mativo J (as he then was) gave the following definition in relation to possession; “

Possession includes two elements, namely being in physical control of the item and being guilty of possession an accused person must be shown to have knowledge of 2 things namely that he knew the item was in his custody and secondly that the item in question was prohibited. A person has possession of something if the person knows of the presence and has control of it and has power and intention to control it.”
23. To establish possession and knowledge of possession of the 25 ostrich eggs by the appellant, the prosecution relied on multiple witnesses whose testimonies corroborated each other.
24. PW1 (CPL Anthony Ndungu) testified that 25 ostrich eggs were recovered from a house in Athi River, where the appellant was present. The eggs were found in three separate containers: a yellow sack (10 eggs), a tied carton (10 eggs), and a Toss-labeled carton (5 eggs). PW2 (SGT Lesumancha Laanor) conducted a sting operation after receiving intelligence that the accused was selling ostrich eggs. Upon interception, the appellant failed to produce a permit, leading to their arrest. PW3 (Ranger Anthony Kibue) and PW4 (CPL Lugwe Tsuma Mohammed) corroborated this, stating the appellant personally handled the eggs before being apprehended. PW5 (Esther Nguta, Research Scientist) confirmed through analysis that the eggs were from an ostrich species, producing a report (Exhibit 10a & 10b).
25. PW6 (SGT Joyce Muthini) documented the scene through photographs and inventory records. The evidence collectively demonstrates that the appellant had knowledge and control over the ostrich eggs, fulfilling the legal test for possession under Kenyan law.
26. The prosecution’s evidence, including eyewitness accounts, forensic identification, and documentation of the recovered eggs, supports the charge of unlawful possession of wildlife products under Kenyan law. The defence failed to rebut by demonstrating a lack of knowledge or control over the seized eggs. The Appellant’s conviction by the trial court was proper and is hereby upheld.
27. On appellant was sentenced to pay a fine of Kshs 1 million in default to serve five years imprisonment. Sentencing is discretionary. However, a court sitting on appellant jurisdiction cannot automatically interfere with the exercise of discretion by the trial court. An intervention on discretion is only justified when it is wrongly exercised such as when the court takes in irrelevant facts or leaves out relevant ones and it is automatic when the wrong sentence is imposed which is legally erroneous. (See *Wanjema v Republic* [1971] EA 493 and *Diego v Republic* [1985] KLR 621.)
28. The value of the ostrich eggs as given in the charge sheet is indicated as Kshs 250.000 is by itself, no evidence as to the value. The sentence of payment of a fine of Kshs 1,000,000 in default serve five (5) years imprisonment was therefore invalid. The trial court was required to exercise its discretion while bearing in mind the value of the goods, and the mitigation of the accused person.
29. In his mitigation, the appellant stated that he was a remorseful first offender, he prayed for a non-custodial sentence. The value of the ostrich eggs was never determined. Taking all this into consideration, I find the sentence imposed by the trial court to have been harsh and excessive.



30. I therefore uphold the conviction but set aside the sentence of payment of a fine of Kshs 1,000,000 in default to serve five (5) years imprisonment and substitute it with a fine of Kshs 1,000,000 in default to serve twelve (12) months imprisonment.

Orders accordingly.

**JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 11<sup>TH</sup> DAY OF FEBRUARY 2025**

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**D. KAVEDZA**

**JUDGE**

In the presence of:

Mr. Mutuma for the respondent.

Appellant - present

Achode – court assistant

