Musyimi v Republic (Criminal Appeal E011 of 2024)
[2025] KEHC 9133 (KLR) (19 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9133 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E011 OF 2024

RC RUTTO, J

JUNE 19, 2025

BETWEEN

OSCAR KAMBONA MUSYIMI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment and sentence of the Hon Paul Wechuli, Principal Magistrate in Kithimani case No 1281 of 2019 delivered on 31.01.2024)

JUDGMENT

A. Introduction

1. The Appellant, Oscar Kambona Musyimi was charged together with another with the offence of being in possession of Wildlife Trophy contrary to section 92(4) of the *Wildlife Conservation and Management Act*, 2013. The particulars of the offence were that on 27th day of November 2019 at about 1630 hours at Ndalani-Sofia Market near Labelus Club within Machakos County, he was found in possession of wildlife trophy namely seven suspected python skins and two crocodile skins, one small and one big, all valued at the street price of kshs 750,000 without a permit.

2. The Appellant pleaded not guilty and the case proceeded to full trial with the prosecution calling 6 witnesses and the defence calling one witness.

B. Proceedings before the trial court

3. PW1 No. 86xx James Anthony Kingori testified that on 22nd November, 2019 he was in the office when he was informed that there was an intelligence report that 2 men at Makutano, Sofia were in possession of 9 hides, 7 python skins, 2 crocodile skins. He left for Makutano to where he met the accused persons identified himself and asked for the permit but and they did not have one. He thus arrested them and

took them to Yatta Police Station. He told the court that the two suspects were carrying their sack and were not forced to accept to carry them. He identified the appellant as the persons he arrested.

4. PW2, No 97xx Lugwe Tsuma Mohammed, an Investigating Officer in animal trophy cases, stated that on 27th November, 2019, a member of the public called to inform them that some people were in possession of game trophy and were looking for a buyer. He went to the scene and found the two accused persons with 2 crocodile skins and 7 python skins standing beside the road. They did not have any permit and as a result, they were both arrested. He stated that he did not force the accused to write a confession and they were found with the trophies.

5. PW3 No 88xx KWS Ranger Lesimarcha testified that on 27th November, 2019, he received an intelligence report that two people, one with a white shirt, black trouser and amputated arm, at Ndalani had wildlife properties and were looking for a buyer. Together with his colleagues, they went to the scene at Labella club and saw a group of people beside the road with a luggage. That PW2 posed as a buyer and was talking to them and they intercepted as the suspects were placing the luggage in the vehicle. They found them with the skins and took them to Yatta. He told the court that no one was forced to write a confession.

6. PW4, Veronica Onduso, a researcher with the National Museums of Kenya, testified that she did an analysis of the exhibits by first doing a physical examination and morphology. A1 and A2 were from a python skin which had small overlapping scales and diamond marks. B1 and B 2 were from crocodile skins, the scales were hard thick and in rows. Her conclusion was that the samples were python skins and crocodile skins. The crocodile skins one was 50 cm long and 31.5 cm wide, the second one was 223 cm long and 50 cm wide.

7. PW5, KWS No. 79xx Gladys Tanui stated that she was approved by the DPP as a Scene of Crime Officer. That on 7th August, 2023, she was given photographs of 4 python skins and 2 crocodile skins by the Investigating Officer and she documented them as exhibits.

8. PW6 KWS No. 81xx Sgt. Joyce Muthoni testified that on 27th November, 2023 she was in the office when Sergeant Lesumacha called her and told them that he had information of 2 suspects in Ndalani in possession of python skins and were looking for a buyer. They left for the scene and saw them when they were 100m from Labella. One was in a blue suit. They explained that they were waiting for a buyer. They then loaded sacks in the vehicle and they were arrested. PW6 took custody of the exhibits which were 7 python skins and 2 crocodile skins

9. On this prosecution evidence, the Appellants were found to have a case to answer and put on their defence. They opted to both give unsworn evidence. DW1 Oscar Musyimi stated that the charges were false, that at that time the he had trauma as he was from hospital and was disabled. He denied being found with any skin or luggage. DW2 Antony Mutie stated that he knew the charges and they were false.

10. The trial court, in a judgment delivered on 31st January, 2024 found the accused persons guilty and convicted them of the offence vide section 215 of the *Criminal Procedure Code*. After considering the Appellant's mitigation, it sentenced each accused to pay a fine of kshs.20 million, in default, 10 years imprisonment.

C. The Appeal

11. Being wholly dissatisfied by the said judgment and sentence, the 1st accused (Appellant) filed his petition of Appeal and raised the following grounds of Appeal, that;

a. The learned Trial Magistrate erred in both law and fact in convicting the appellant on the basis of an insufficient evidence that failed to prove the charges the appellant faced beyond any reasonable doubt as required by law.

b. The learned Trial Magistrate erred in both law and fact by finding the appellant guilty of the charge of being in possession of wildlife trophy in the face of glaring evidence contrary that would warrant acquittal of the said charges.

c. The learned Trial Magistrate erred in law and in fact by misapplying the legal tenets by failing to find that there was no collaborative evidence produced in court as the one adduced was not enough to establish that the appellant was indeed in possession of wildlife trophy warranting conviction.

d. That the learned honourable Trial magistrate erred in law and in fact in failing to analyze and take into consideration the profound testimonial evidence issued in court in favour of the appellant when making a finding on the charges the appellant faced.

e. That the learned Trial Magistrate erred in law and in fact in failing to find that the legal principles governing the ingredients required to prove the offence of being in possession of wildlife trophy weren't established against the appellant to warrant conviction and sentencing in such an offence.

12. The Appeal was canvassed by way of written submissions. The Appellant filed his submissions dated 16.12.2024. he set out two issues for determination namely whether the prosecution proved the charges levelled against the appellant beyond reasonable doubt to warrant the conviction and whether there is a proper judgment written by the trial court in convicting the appellant.

13. It submitted that the prosecution did not adduce sufficient evidence capable of convicting the him. That the 6 witnesses called by the prosecution gave contradictory evidence and that there was no justifiable cause why the investigating officer did not avail independent eye witnesses who would have corroborated the evidence of the arresting officers. It was the Appellant's submission that there was no analysis of the facts of the case and the law by the Trial court and no reasons were given for the conviction. He urged the Court to quash the conviction and the sentence.

14. Upon perusal of the submissions filed by the respondent on the CTS, I note that those submissions relate to different matters but not this matter. This court is at a loss how a respondent can file different sets of submissions relating to other matters and not the appeal in question. Thus, I will take it that the Respondents did not file any submissions. Be that as it may the position of submission in law is known. This court will have to interrogate the appeal on its merits.

15. Before proceeding with the analysis of the appeal, I note that the appellant not only filed the appeal but also filed a Notice of Motion dated 11th March 2024, seeking to be admitted to bond/bail pending the hearing and determination of the appeal. The Respondent opposed this application through a Replying Affidavit sworn by Martin Mwongera on 14th April 2024.

16. However, neither party filed submissions in respect of the application. Instead, the appellant filed submissions addressing the appeal itself. It is evident from the court record that the application remains undetermined. When the parties appeared before me, they proceeded to address the court on taking a date for the determination of the appeal rather than the pending application. Given that the appeal is the substantive matter and its determination may render the application moot, I will proceed to determine the appeal.

D. Analysis and Determination

17. This being a first appeal, this Court is expected to re-evaluate the evidence tendered before the trial court and to come up with its own logical conclusion by taking into account the fact that it did not have the advantage of seeing and hearing the witnesses and their evidence and/or see their demeanour. I refer to the Court of Appeal in Kiilu & Another V Republic, [2005] 1 KLR 174, where it was stated thus:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.
>
> It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

18. In the case of Republic Vs Edward Kirui (2014) eKLR, the Court of Appeal quoted the Supreme Court of India case of Murugan & Another Vs State by Prosecutor, Tamil Nadu & Another (2008) INSC 1688 where the case of Bhagwan Singh Vs State of M. P. (2002)4 SCC 85 was cited as follows:-

> " The paramount consideration of the court is to ensure that miscarriage of justice is avoided. A miscarriage of justice which may arise from the acquittal of the guilty is no less than from the conviction of an innocent. In a case where the trial court has taken a view of ignoring the admissible evidence, a duty is cast upon the High Court to re-appreciate the evidence on appeal for the purpose of ascertaining whether all or any of the accused has committed any offence or not."

19. I have considered the entire record of Appeal, the trial bundle record and the submissions on record filed by the appellant and I find that the issues for determination are:

    a. Whether the offence of being in possession of wildlife trophies was proved; and

    b. Whether the sentence should be quashed and/or set aside

20. The Appellant was charged for committing an offence contrary to Section 92(4) of the *Wildlife Conservation and Management Act* which provides as follows:

> " Any person without permit or exemption issued under this Act is in possession of any live wildlife species or trophy of any critically endangered or endangered species as specified in the Sixth Schedule or listed under CITES Appendix I, commits an offence and shall be liable upon conviction to a fine of not less than three million shillings or a term of imprisonment of not less than five years or both such fine and imprisonment."

21. Accordingly, the elements of the offence that need to be proved are: possession of a trophy belonging to a threatened or endangered species; and lack of a permit or exemption under the Act.

22. Section 2 of the *Wildlife Conservation and Management Act* ,2013 defines a trophy thus:

> " means any wild species alive or dead and any bone, claw, egg, feather, hair, hoof, skin, tooth, tusk or other durable portion whatsoever of that animal whether processed, added to or changed by the work of man or not, which is recognizable as such; (Emphasis mine)

23. From the evidence of PW4, the Researcher, she concluded that the samples given to her were python skins and crocodile skins. The samples are the subject of this suit. PW1, PW2, PW3 PW5 and PW6 positively identified the appellant and confirmed that the Appellant and his co- accused were found with the trophies. It is therefore not in doubt that the said samples were trophies.

24. Possession is defined in Section 4 of the *Penal Code* 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."

25. From the testimonies of PW1, PW2, PW3 PW5 and PW6, there was adduced sufficient and unrebutted evidence that the Appellant was found in possession of the trophies. He had actual possession of the wild trophies before he was arrested. It was their testimony that PW1 was standing by the roadside waiting for a buyer for the said trophies and PW2 is said to have posed as a buyer. PW3 confirmed in her testimony that after her examination she was sure that the trophies were from a python and a crocodile. The Prosecution's case in regard to possession was proved beyond reasonable doubt, hence to the required standard.

26. On the issue of the permit, the Appellant in his defence stated that he was from hospital but did not provide any evidence to prove that he was unwell on the day of the incident and more specifically at the time of arrest. On the other hand, PW1, PW2 and PW3 told the court that they asked the Appellant for a permit but he did not have one.

27. The overall impression of the evidence adduced by the prosecution is that the evidence is watertight and left no gaps or room for any reasonable doubt on commission of the crime. Thus, I find that the prosecution proved its case against the Appellant beyond reasonable doubt.

28. Contrary to the submission by the Appellant, the prosecution's case was not tainted with contradictions, discrepancies, flaws and/or inconsistencies. The evidence of PW1, PW2 and PW4 was consistent as to the events of 27th November 2019. The inconsistencies raised by the Appellant do not shake the evidence that was produced by the prosecution. In this regard, I am persuaded by the observation of the court in the case of Philip Nzaka Watu v Republic (2016) e KLR stated as follows:

> " The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self-contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt.
>
> However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must

> be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

29. Ultimately, I reach the undisputed conclusion that the prosecution proved its case to the required standard and the Appellant's conviction was safe. I find no need to interfere with the trial court's conclusion and conviction.

30. On the issue of whether the judgment was properly written, this court acknowledges that judgment writing is an art form, and styles may vary depending on the approach of the presiding officer. What is crucial, however, is adherence to the requirements set out in Section 169 of the *Criminal Procedure Code*. This provision outlines the essential contents of a judgment, which must be written by, or under the direction of, the presiding officer in the language of the court. It must include the points for determination, the decision on each of those points, and the reasons for the decision. Additionally, the judgment must be dated and signed by the presiding officer in open court at the time it is delivered. In cases where there is a conviction, the judgment should also specify the offence for which the accused has been convicted, the relevant section of the *Penal Code* or applicable law, and the sentence imposed.

31. Therefore, when measured against the statutory requirements outlined in Section 169 of the *Criminal Procedure Code*, it is the finding of this court that the judgment under appeal meets the necessary legal standards. It cannot be said to fall short of what constitutes a valid judgment, as alleged by the appellant.

32. On sentence section 92 (4) is clear on the sentence to be preferred. it states that;

> "be liable upon conviction to a fine of not less than three million shillings or a term of imprisonment of not less than five years or both such fine and imprisonment."

33. The import of the foregoing is that the trial court has discretion to impose a sentence of a fine of not less than three million but with a discretion to give determine any upper ceiling as regards the fine. Equally, it may order for imprisonment of not less than 5 years, but in exercise of discretion, give any higher term sentence or both.

34. The Trial Court sentenced the Appellant to pay a fine of kshs 20 Million in default 10 years imprisonment. Sentencing is an exercise of discretion, and where the same has been exercised, unless it is shown that it was based on wrong principles, an appellate court should not interfere. In this appeal, it has not been stated and or demonstrated how that sentencing discretion was exercised on the basis of wrong principles. Consequently, I find no basis to interfere with the sentence.

35. The upshot is that, the Appeal lacks merit and the same is dismissed in its entirety.

36. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 19TH DAY OF JUNE, 2025

RHODA RUTTO

JUDGE

In the presence of;

.....Appellant

.....Respondent

Sam, Court Assistant