



**Ibrahim v Republic (Criminal Appeal E071 of 2022)
[2024] KEHC 1593 (KLR) (7 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1593 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CRIMINAL APPEAL E071 OF 2022
AK NDUNG’U, J
FEBRUARY 7, 2024**

BETWEEN

ALIO OSMAN IBRAHIM APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from original Conviction and Sentence dated 03/03/2021
in Maralal SPM Criminal Case No 176 of 2020 – R. Koech, SPM)*

JUDGMENT

1. The Appellant herein, Alio Osman Ibrahim (2nd Accused during trial) was convicted after trial of dealing in endangered species contrary to section 92(2) as read with section 105 (a) and (b) of [Wildlife Conservation and Management Act](#) No. 47 of 2013. On 03/03/2021, he was sentenced to seven (7) years imprisonment.
2. The particulars were that on 19/06/2020 at around 1630hrs at Lengarde area along Wamba-Swari murrum road in Samburu East Sub-County within Samburu County were jointly found transporting suspected endangered tree species namely East African Sandal Wood (*Osiris lonceolata*) weighing approximately 400kg with a street value of Kshs.1.2 million using a motor vehicle registration number KBY 022K make Toyota land-cruiser Prado white in color, without a permit from Director General of Kenya Wildlife Service.
3. Being dissatisfied with the conviction and the sentence, he appealed to this court vide a petition of appeal filed on 08/12/2022 which he later amended and filed amended grounds of appeal. The conviction and the sentence are being challenged on the following grounds;
 - i. The learned magistrate erred convicting him on a case that was not proved beyond reasonable doubt.



- ii. That the learned magistrate failed to note that there were no photographs at the scene of crime depicting the Appellant in company of his co-accused.
 - iii. The learned magistrate failed to note that there was no call data to prove that he was in communication with his co-accused.
 - iv. The learned magistrate quashed his defence without giving good reasons.
 - v. The learned magistrate sentenced him without concrete evidence of his culpability.
 - vi. The learned magistrate erred by meting out a manifestly harsh and excessive sentence of seven years despite being a first offender.
4. The appeal was canvassed by way of written submissions. The Appellant filed his submissions. There are no submissions on record for the Respondent. In his submissions, the Appellant argued that for him to be held culpable, the prosecution had a duty to establish that he had knowledge and that his co-accused was indeed the driver of the motor vehicle on the material day. The second thing the prosecution needed to prove was that he and his co-accused were in action with common intention or in joint enterprise. Therefore, in line with section 21 of the Penal Code, the ingredient of common intention was lacking since he was a stranger to the 1st Accused person and PW3, the motor vehicle owner. He was not connected to the charges levelled against him.
 5. Further, the photographs produced in court pertained to the motor vehicle and the sandalwood but there was none showing him and the 1st Accused together. That the omission was not by default but there was something that the officers were trying to hide. That there were inconsistencies and discrepancies as there was no way the vehicle could have been on the road as alleged by the prosecution witness in that, the vehicle was at police station on 12th. If the owner, PW3 found the vehicle having been impounded on 12th, how and why was the vehicle released and only to be re-arrested on 19th? That PW1 and PW3 did not identify him at the dock. That it was unclear who was John Njoroge, a material witness to the case and without his evidence, the reason why the motor vehicle was at the station on 12/06/2020 remains a mystery. There was also unanswered question why the motor vehicle had a flat tyre and lay abandoned on the roadside. That there were many questions begging for answers in the prosecution case which reveals that the case was founded on suspicion.
 6. That no evidence was produced to show connection between him and the 1st Accused as no call data was produced to show that they were in a joint venture. That the prosecution failed to displace his alibi defence that he was arrested on a different day and alone. The prosecution failed to disprove his defence by failing to produce photographic evidence to show that he was arrested together with the 1st Accused. He was forced to sign an inventory whose content he had not read and his defence was not considered which is contrary to natural justice.
 7. On the sentence, he submitted that the trial court failed to consider section 333(2) of the Criminal Procedure Code as well as paragraph 7:10 of the Sentencing Policy Guidelines. He also urged the court to consider a non-custodial sentence in line with Muruatetu case that declared mandatory sentences as unconstitutional.
 8. This being the first appellate court, my duty is well spelt out namely; to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See *Okeno v Republic* [1972] EA 32.
 9. I have read and considered the evidence as recorded in the trial court with a view to evaluating it and reach my conclusions as to the culpability or lack thereof of the Appellant. In doing so, I have taken



cognizance that I neither saw nor heard the witnesses testify and I have given due allowance for that fact. I have at the same time had due regard to the submissions by the Appellant. (As noted earlier, none were filed for the Respondent).

10. In summary, the evidence before the trial court was as follows. PW1, Peter Mburu, a ranger with Kenya Wildlife service testified that on 19/06/2020, he was at work along Swari-Wamba murrum Road with a colleague. They met a white Toyota land cruiser registration number KBY 022K and they stopped it. There was a driver and one passenger who introduced themselves. They requested they open the car and upon opening, they were carrying peeled wood weighing 400kgs. They suspected the wood to be sandalwood. They informed OCS Wamba police station who took over the matter. He stated that he could identify sandalwood as it does not look like the normal wood. He identified the 1st Accused as the driver and the 2nd Accused as the passenger. He identified the sandalwood and the car.
11. He testified on cross examination that he asked the Accused what they were carrying and they stated that they were carrying wood but they did not specify. They did not appear shocked. That he did not weigh the wood.
12. PW2 Sombe Masoi a corporal at KWS stated that he was in company of PW1 and other officers when they met the subject vehicle. The vehicle had two occupants and they asked them what they were carrying and they responded by stating that they were carrying firewood. They opened the vehicle and with his 30 years experience, he identified the wood as sandalwood. They contacted the OCS. He identified both the Accused. He identified the subject car and the sandalwood parked inside the car.
13. PW3, Paul Kinuthia was the owner of the subject motor vehicle. He testified that in June 2020, he hired the subject vehicle to one John Njoroge who owns a car hire business. That he was informed that there were doctors doing rounds during covid-19. He hired it for four days but he was paid for two days. On the 6th day, John told him that he had overstayed with the car but when he checked the car track, PW3 found the car was in Wamba and when he contacted John, he said that the car was impounded and was at Wamba police station. John informed him later that the car was impounded for carrying sandalwood. He also confessed that he lied to him that the vehicle was to be used to transport doctors. He identified car ownership document and the car hire agreement he entered with John. He stated that he did not know the Accused persons. He identified the car and the sandalwood parked inside the car.
14. On cross examination, he testified that he knew John personally. He was not supposed to sub-hire the car but was to use it himself. He learnt that the Accused hired the car from John and he did not know that the car was to be used to transport sandalwood.
15. PW4, Wycliffe Maina from Kenya Forest Research (KEFRI) testified that he had a degree in Biology technology and had 15 years experience as a research technologist. He is in charge of wood anatomy. He stated that he received samples from a police officer by name Martin Maina that was accompanied by an exhibit memo and he was required to identify the species. They were many samples which were pieces of wood. He analysed the wood samples which were the same. After examination, his finding was that the samples were sandalwood. He produced his report as Pexhibit5. He testified on cross examination that they analyse what they receive and could not tell where the samples were found.
16. PW5 was the investigating officer. He testified that he was assigned this case and they rushed to the scene with his colleague. They recovered the motor vehicle that was loaded with sandalwood weighing approximately 400kgs. They also recovered a car hire agreement and a driving license belonging to the 1st Accused. He prepared the inventory at the scene which was signed by the suspects and officers at the scene. He produced it as Pexhibit4, car hire agreement Pexhibit6, driving licence Pexhibit7. He added that he took the samples of the suspected sandalwood for examination and the report confirmed that



they were sandal wood. He produced the exhibit memo as Pexhibit8, samples forwarded to KEFRI Pexhibit9, photographs taken at the scene and the certificate as Pexhibit 10 (a) and (b), search certificate of motor vehicle as Pexhibit 11(b) and car hire agreement as Pexhibit2, certificate of ownership of the motor vehicle as Pexhibit1. He identified the motor vehicle loaded with sandalwood and produced them as Pexhibit 3(a) and (b).

17. He testified on cross examination that the weight of sandalwood was 400kgs but he did not have proof as to the weight as nothing showed that they weighed the sandalwood. That KWS gave them the estimated value but did not have a valuation report. That the 1st Accused hired the motor vehicle.
18. The Appellant was placed on his defence and he opted to give unsworn testimony. He told the court that he is a livestock trader dealing in goats. On 17/06/2020, he travelled to Wamba to the market as usual. On the following day he boarded a probox to Lolkuniani market and upon arrival, he contacted his two friends who were waiting for him. With his two friends, they had breakfast at a hotel and when he was entering the market, two KWS officers stopped him and started questioning him. They asked him where he had come from and when. They requested that he follow them. He complied and they drove in their motor vehicle. They got to a place where the subject motor vehicle was parked off the road and he was asked if he knew the vehicle and he answered in the negative. He was told that he was the owner of the said vehicle and while arguing with the said officer, OCS arrived at the scene and he was informed that he was the suspect.
19. He was placed in the cells and on the following day, his finger prints were taken and he was asked to sign a paper which he was forced to sign even after requesting that he read first. He told the court that there was no evidence that was brought to court to link him with the offence. That PW1 and PW2 should have taken the photos of him and his co-accused opening the boots if they were telling the court the truth. That if the sandalwood was his, they would have photographed him alongside the cargo so that the court could appreciate that he was there. He did not know his co-accused and John Njoroge. There was no evidence linking him to the offence including phone records to establish what he was doing prior to his arrest.
20. That was the totality of the evidence before the trial court. Having considered the evidence before the trial court, my duty is to ascertain whether the case against the Appellant was proved to the required standard.
21. The Appellant was charged with the offence of dealing with wildlife trophy contrary to section 92(2) of *Wildlife Conservation and management Act* which states that;

“A person who, without permit or exemption issued under this Act, deals in a wildlife 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 term of imprisonment of not less than seven years.”
22. Deal is defined under section 3 of the same Act as
 - “(a) to sell, purchase, distribute, barter, give, receive, administer, supply, or otherwise in any manner deal with a trophy or live species;
 - (b) to cut, carve, polish, preserve, clean, mount or otherwise prepare a trophy or live species;
 - (c) to transport or convey a trophy or live species;



- (d) to be in possession of any trophy or live species with intent to supply to another; or
- (e) to do or offer to do an act preparatory to, in furtherance of, or for the purpose of, an act specified above”

23. The particulars of the charge were that he and his co-accused were jointly found transporting suspected endangered tree species namely East African Sandal Wood. As per the above definition, dealing involves transporting or conveying a trophy or lives species. A trophy is defined under section 3 of the Act as

“trophy”includes any bone, claw, egg, feather, hair, hoof, skin, tooth or tusk of an animal, and for any species of plant, any bark, branch, leaf, log, sip or extract and includes any other durable portion whatsoever of that animal or plant whether processed, added to or changed by the work of man or not, which is recognizable as such.

24. It therefore follows that sandal wood is a trophy. Having established the elements of the charge, the question now is whether the Appellant was found transporting the alleged sandal wood.

25. He submitted that the prosecution case had glaring gaps in that there were no photographs that were produced to show that he was at the scene despite the fact that photographs of the motor vehicle at the scene were produced. That the prosecution’s case was marred with inconsistencies in that according to PW3, his car was impounded on 12th and there was no answer as to how the vehicle was released and again arrested on 19th. That the prosecution failed to call a crucial witness, John Njoroge who would have informed the court why the motor vehicle was that the police station on 12/06/2020. Further, there was no evidence that was produced to show connection between him and his co-accused. That the photographs produced showed that the vehicle had a flat tyre.

26. I have considered the Appellant’s contention and I have considered the evidence on record. I have noticed that the Appellant’s co-accused (1st accused) in his unsworn defence produced Kenya Wildlife Service news bulletin printout as Dexhibit1 (a) and (b) which was stating that the driver of the subject motor vehicle herein escaped and locked the car wheels. I have checked the said bulletin and compared with the photographs that were produced by the prosecution as Pexhibit10 (a) and I have noticed that the photo that the 1st Accused produced is that of the subject motor vehicle.

27. In the bulletin, it is indicated as follows;

A Toyota Prado suspected to be carrying sandalwood was Friday impounded by Kenya Wildlife Service (KWS) officers together with Kenya Police Service in Samburu East Sub-County.

The driver of the vehicle registration number KBY 022K is said to have escaped after locking the vehicle wheels. The vehicle was later towed to Wamba police station. The suspect(s) once apprehended will be charged in court. Sandalwood is a valuable but endangered tree species and in Kenya it is illegal to harvest sandalwood.

28. The next page of the bulletin shows a photo of the vehicle and some writing as highlighted above.

29. The prosecution did not controvert this piece of evidence that was produced by 1st Accused. Interestingly, the trial court failed to comment on this piece of evidence as well. The defence evidence revealed that the driver of the motor vehicle left the vehicle abandoned. It also revealed that no one was arrested at the scene. That means that there was no one at the scene. The motor vehicle wheels



- were locked which forced the officer to engage a mechanic to unlock the wheels for the vehicle to be towed to the station.
30. This contradicted the prosecution's evidence and especially the evidence of PW1, PW2 and PW5 who testified that they arrested the Appellant and his co-accused at the scene. This contradiction in evidence raises doubt as to whether the Appellant was arrested at the scene travelling in the subject motor vehicle or he was arrested somewhere else.
31. It is trite that doubt in prosecution's case must be ruled in favour of an accused person. See Pius arap Maina –v- Republic (2013) eKLR (Criminal Appeal No.247/2011) where the court noted that;
- “It is gainsaid that the prosecution must prove a criminal charge beyond any reasonable doubts. As a corollary, an evidential gaps in the prosecution's case raising material doubts must be in favour of the accused.”
32. The standard of proof must be beyond reasonable doubt enough to lead to a conviction. Lord Denning in the case of Miller vs. Minister of Pensions (1942) A.C. stated as follows:-
- “It need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadows of doubt. The law would fail to protect the community if it admitted forceful possibilities to deflect the course of justice. If the evidence is so forceful against a man to leave only a remote possibility in his favour which can be dismissed with the sentence, of course it is possible but not in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice.”
33. In Woolmington v. DPP (1935) A. C 462 the court stated:
- “Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt, subject (to the qualification involving the defence of insanity and to any statutory exception). If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether (the offence was committed by him), the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”
34. In the present case, it is my finding that there is doubt as to whether the Appellant was at the scene of crime or not and therefore, the prosecution failed to prove that the Appellant was found transporting sandal wood as alleged in the charge sheet. It therefore follows that the prosecution failed to prove their case beyond reasonable doubt.
35. With the result that the appeal herein is wholly successful and is allowed. I quash the conviction of the Appellant and set aside the sentence and substitute thereof an order acquitting the Appellant of the charges. The Appellant is to be released forthwith unless otherwise lawfully held under another warrant.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 7TH DAY OF FEBRUARY 2024

A.K. NDUNG'U

JUDGE

