Kira v Republic (Criminal Appeal E022 of 2023)
[2024] KEHC 2430 (KLR) (7 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2430 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

CRIMINAL APPEAL E022 OF 2023

GMA DULU, J

MARCH 7, 2024

BETWEEN

SELINA KIRA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the conviction and sentence in Criminal Case No. E363 of 2021 at Voi Law Courts delivered on 25th May 2023 by Hon. C. L. Adisa (SRM))

JUDGMENT

1. The appellant was charged in the Magistrate's court with two counts. count I was being in possession of wildlife trophy of an endangered species contrary to Section 92(4) of the *Wildlife Conservation and Management Act* 2013, No. 47 Laws of Kenya (Revised 2018).

2. The particulars of offence were that on 6th October 2021 at around 10:00hours at Taveta main stage of Taveta town within Taita Taveta County was found in possession of a wildlife trophy of an endangered species namely two (2) pieces of suspected elephant tusks weighing approximately two (2) kilogrammes with a street value of Kshs. 200,000/= without a permit.

3. Under count II, he was charged with being in possession of a wildlife trophy contrary to Section 95(d) of the *Wildlife Conservation and Management Act* 2013 No. 47 Laws of Kenya (Revised edition 2018). The particulars of offence being that on the same day and place was found in possession of a wildlife trophy namely three (3) pieces suspected hippopotamus tooth weighing approximately one and a half (1.5) kilograms with a street value without a permit.

4. She denied both charges. After a full trial, she was convicted on both counts and sentenced to pay a fine of Kshs. Three Million Shillings in default five (5) years in custody on count I, and fine of Kshs. One Million Shillings and in default five (5) years in custody for count II.

5. Aggrieved by the conviction and sentence, the appellant has come to this court on appeal through counsel Mutinda & Wambura Nthiga Advocates on the following grounds:-

    1. The learned Magistrate erred both in law and fact by holding that the prosecution had proved its case against the appellant beyond a reasonable doubt while the evidence on record did not support such a finding.

    2. The learned Magistrate erred both in law and fact in finding that the appellant was in possession of the wildlife trophies against the evidence on record and the cogent defence revised by the accused.

    3. The learned Magistrate erred both in law and fact in finding that the defence raised was a mere denial and afterthought.

    4. The sentence meted out on 14.06.2023 against the appellant is harsh and excessive in the circumstances of the case.

6. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by counsel for the appellant as well as the submissions filed by the Director of Public Prosecutions.

7. This being a first appeal, I am duty bound to evaluate all the evidence on record afresh and come to my own conclusions and inferences – see Okeno v Republic [1972] EA 32.

8. This being a criminal case, the prosecution was required to prove all the ingredients of the offence beyond any reasonable doubt – see Miller v Minister of Pensions [1947] 2 ALLER 372 and Sawe v Republic [2003] eKLR.

9. In proving their case herein, the prosecution called four (4) witnesses. On her part, the appellant tendered sworn defence testimony and called one other witness, her husband.

10. The major contention on appeal are proof of possession of the game trophies and the sentence imposed.

11. I will start with the sentence imposed. I have perused the sections of the law creating the offences, and find that the sentences imposed are within the legal parameters. In addition, since imprisonment was an alternative to the fines imposed, the prison sentences would have to run consecutively. However, the observation by the Probation Officer that the appellant was not remorseful because she denied committing the offence is an error, as denial of an offence is a constitutional right, which does not constitute unremorsefulness.

12. I now turn to possession. All the evidence on record from PW1 Cpl. Robert Chelanga, PW2 PC Anthony Mureithi and PW4 Sgt. Javis Galole all KWS officers who arrested the appellant, is that they received intelligence information that a woman had game trophies.

13. They proceeded to the Taveta town transport stage and saw the matatu (mini bus), which had passengers and a driver. Passengers alighted and as the KWS officers proceeded to the front of the minibus and saw a woman and a man sitting near the driver's seat, and near them was a bag lying between the driver's seat and the seat on which the woman sat.

14. The KWS officers then ordered the woman to open the bag and she wilfully did so and they found the game trophies therein. The question is, was there proof that the woman was in possession of the said bag which contained the game trophies?.

15. In our criminal law, possession has a legal definition under Section 2 of the Penal Code (Cap.63). What constitutes possession has also been considered in several court decisions including the case of Charles Mbaabu Mburi v Republic [2018] eKLR cited by counsel for the appellant.

16. From the evidence on record herein, in my view, possession of the bag and game trophies by the appellant was not proved. The first reason is that the intelligence information report was not transformed or converted into evidence, as no witness testified in court to the appellant herein having come into the minibus carrying or being the owner of the bag containing the game trophies.

17. Secondly, the fact that the bag was found in the middle of seats between the appellant and the driver, of necessity required evidence to be tendered by the prosecution to show that it was the appellant who had control of that bag and not the driver or any other passenger. In my view, merely being found in a public passenger vehicle sitting next to an item, neither proves that you brought that item into the vehicle nor does it prove that you are in control or possession of the same.

18. I thus find that the prosecution did not prove beyond reasonable doubt that the appellant was in possession of the bag which contained the game trophies. On that account alone, this appeal will succeed, conviction quashed and sentence set aside.

19. Consequently and for the above reasons, I allow the appeal, quash the conviction and set aside the sentence. In case the appellant is in custody, I order that she be released unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED THIS 7TH DAY OF MARCH 2024 IN OPEN COURT AT VOI.

GEORGE DULU

JUDGE

In the presence of:-

Alfred/Trizah – Court Assistant

Appellant

Mr. Orina holding brief for Mr. Mutinda for appellant

Ms. Moke for the State