



REPUBLIC OF KENYA



**Mwaisa & 2 others v Republic (Criminal Appeal E014, E015 & E016 of 2023
(Consolidated)) [2024] KEHC 6804 (KLR) (14 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6804 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL APPEAL E014, E015 & E016 OF 2023 (CONSOLIDATED)**

GMA DULU, J

MAY 14, 2024

BETWEEN

GREGORY MWAKILENGE MWAISA 1ST APPELLANT

VICTOR NYANGE 2ND APPELLANT

JOSEPHAT MALASI MWAISA 3RD APPELLANT

AND

REPUBLIC RESPONDENT

(From the conviction and sentence in Criminal Case No. E1466 of 2021 at Voi Law Courts delivered on 23rd January 2023 by Hon. T. N. Sinkiyian (SRM))

JUDGMENT

1. The three appellants were charged in the Magistrate's court with dealing in wildlife trophy contrary to Section 92(2) of the *Wildlife Conservation and Management Act* 2013.
2. The particulars of offence were that on 8th October 2021 at around 1950hours at Mwaktara dam in Bura area of Taita Taveta County, and on 10th October 2021 at 0745hours at Mwatate Police Station jointly were found with two cheetah skins measuring 1.7meters and 2meters respectively which is an endangered wildlife species under the sixth schedule of the Wildlife Act, ferried using motor bike KMEZ 097H, TVS red in colour and wrapped three sacks, two of them white in colour and one blue, this for trade purposes, without a permit or any other lawful exemption.
3. They all denied the charge. After a full trial, they were all convicted of the offence. Josephat Malasi Mwaisa and Gregory Mwakilenge Mwaisa who were in custody during trial were sentenced to seven (7) years imprisonment. Victor Nyange Mtanu who was on bond from 12th January 2022 was sentenced to ten (10) years imprisonment from 23rd January 2023 when he was convicted.



4. Dissatisfied with the conviction and sentence, the three appellants have come to this court on appeal in three appeals. E014 of 2023 Gregory Mwakilenge, E015 of 2023 Victor Nyange; and E016 of 2023 Josephat Malasi; which appeals were consolidated and heard together.
5. The grounds of appeal are similar and are as follows:-
 1. The learned Magistrate erred in law and fact when she misdirected herself.
 2. The learned trial Magistrate erred when she shifted the burden of proof from the prosecution to the appellants.
 3. The learned Magistrate erred when she considered the evidence adduced by the prosecution full of massive contradictions.
 4. The learned Magistrate erred in convicting the appellant on poor investigation adduced by the prosecution.
 5. The learned Magistrate erred in convicting the appellants and sentencing them to imprisonment without considering that the sentence meted on them was harsh and excessive.
 6. That the learned Magistrate erred in convicting them and sentencing them to imprisonment without considering their reasonable defences.
6. The appeals were canvassed through written submissions filed by the three appellants, which were similar and all filed in file E014 of 2023, as well as the submissions filed by the Director of Public Prosecutions.
7. This being a first appellate court, I am duty bound to reconsider and re-evaluate all the evidence on record and come to my own independent conclusions and inferences – see *Okeno v Republic* [1972] EA 32.
8. In proving their case, the prosecution called six (6) witnesses. On their part, each of the appellants tendered sworn defence testimony and did not call additional evidence.
9. I have re-evaluated the evidence on record, both for the prosecution and the defence. I note that the arrest of two of the appellants Josephat Malasi Mwaisa and Victor Nyange occurred at night. The items said to be cheetah skins were recovered at the scene of arrest.
10. The other appellant Gregory Mwakilenge Mwaisa was arrested the next day. The prosecution evidence was that he was mentioned by the other two appellants as the rider of the hired motor bike which belonged to PW2 Chrisantos Mwaita whose evidence was that he hired his motor cycle for Kshs. 300/= on 18th October 2021. Gregory however testified in his defence that he was arrested by the police when he went to the police station looking for Josephat Malasi who had disappeared.
11. I do note that the items recovered were tested by PW6 Jeremiah Poghon Kaitopok a veterinary medicine graduate of the University of Nairobi, whose evidence was that the two items were cheetah skins, which was an endangered wildlife species. This expert evidence was not controverted.
12. In my view, from the evidence on record that two of the appellants were arrested at the scene at Mwaktara dam Bura at 1950hours and items recovered thereat, and the motor cycle rider ran away, but was proved to be the other appellant Gregory, the prosecution proved beyond any reasonable doubt that the three had possession of the items. In addition, the evidence on telephone conversations, and actions of all the three at the scene, proved that each of them was aware of the items (cheetah skins) and why they were taking them to the scene, which was for sale. Thus possession was proved.



13. With regard to dealing, the case of *Ndeka v Republic* [2022] eKLR is on point that there has to be physical control of the items and knowledge of the kind of items and intended purpose. In the present case, there is the evidence of PW1 Ranger Sammy Wanjala Simiyu on the detailed conversation between him and one or two of the appellants, on the intention to sell the items, and also the arrival of the three and subsequent arrest at the agreed point of the sale transaction.
14. In my view, the element of dealing with wildlife trophy as defined under the *Wildlife Conservation and Management Act* was proved.
15. The only error I find regarding the trial, is that the charge sheet was defective in that it contained two offences charged together; as one offence, that is an offence allegedly committed on 8th October 2021 at 1950hours at Mwaktara dam Bura, and yet another offence committed on 10th October 2021 at 0745hours at Mwatate Police Station.
16. In my view, the charge was duplex as it contained two separate offences committed at different times, on different days, and at different places. In my view, an accused person in such a situation will not know which of the two offences to defend himself or herself to, and also to effectively defend himself or herself. Such a situation will result in a miscarriage of justice and amount to a violation of the constitutional principle of fair trial under Article 25 and 50 of the *Constitution*.
17. I appreciate that in the course of the trial, Mr. Mutinda Advocate appeared for the 2nd accused Victor Nyange, but in my view, the charge being still fatally defective, could not be salvaged.
18. In those circumstances, and for only that reason, the three appeals herein will succeed, conviction quashed and sentence set aside.
19. Do I order a retrial? I note that this is a charge involving endangered species of wildlife. The minimum sentence is seven (7) years imprisonment. The trial Magistrate sentenced two of the appellants who were in custody during trial to 7 years imprisonment, while Victor Nyange who was out on bond during trial was sentenced to ten (10) years imprisonment from 23rd January 2023, which is now slightly more than one (1) year.
20. In the circumstances of this case, I am of the view that the appellants have learnt their lesson in prison. I will thus not order a retrial but will warn them not to repeat similar offences.
21. I thus allow the three appeals, quash the convictions and set aside the sentences imposed. I order that each of the three (3) appellants be set at liberty unless otherwise lawfully held. I however warn each of the three appellants not to repeat similar wildlife related offences, otherwise courts will not be lenient on them.

DATED, SIGNED AND DELIVERED THIS 14TH DAY OF MAY 2024 IN OPEN COURT AT VOL.

GEORGE DULU

JUDGE

In the presence of:-

Alfred/Trizah – Court Assistants

All three appellants

Mr. Sirima for State

