



**Muigai v Republic (Criminal Appeal E007 of 2023)
[2024] KEHC 6383 (KLR) (3 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 6383 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E007 OF 2023**

DR KAVEDZA, J

JUNE 3, 2024

BETWEEN

NGUGI MUIGAI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence of the Chief Magistrate's Court at Kibera Criminal Case No.565 of 2020, R v Jesse Mwangi, Ngugi Muigai & Catherine Kabura, delivered by Hon. C. Njagi (PM) on 25th October 2023)

JUDGMENT

1. The appellant, Ngugi Muigai, was charged with two others in Kibera MCCRC No. 565 of 2020 with the offence of dealing in wildlife trophy contrary to section 92(2) of the [Wildlife Conservation and Management Act](#), 2013. The particulars were that, on the 23rd day of June 2020 at around 1300hrs at Shell Petrol Station, Karen within Nairobi County, the appellant among two others, were found dealing in wildlife trophies, namely two (2) elephant tusks weighing three (3) kgs using motorcycle KMDF 009F with a street value of Kshs.300,000.00/= without a permit.
2. After a full trial, the appellant, along with the two accused persons, was found guilty of the offence, convicted, and accordingly sentenced to serve an imprisonment term of 10 years without the option of a fine.
3. The appellant, having been the 2nd accused (DW2), was aggrieved by the conviction and sentence and has preferred this appeal on the following grounds. That the trial court erred in law and in fact in finding that the appellant was an accomplice of the 1st accused person and failing to appreciate that there was no evidence adduced to link the appellant to dealing with the elephant tusks. Further, that the trial court erred in law and in fact by failing to consider the appellant's defence at the trial and finding that the prosecution had proved its case against the appellant beyond reasonable doubt. Lastly,



the appellant challenged the constitutionality of the mandatory nature of the sentence in Section 92(2) of the *Wildlife Conservation and Management Act* for allegedly violating Articles 27 and 28 of the *Constitution of Kenya*, 2010 and for depriving the court of judicial discretion.

4. In his submissions, the appellant faulted the trial court for holding that he was an accomplice of the 1st accused person, namely Jesse Mwangi (DW1) for the following reasons: Jesse allegedly confessed to the investigating officer that the appellant was the conduit between him (Jesse) and the potential buyer. Secondly, the appellant allegedly called Jesse after he was arrested to ask what had happened, and lastly, that the appellant was at the crime scene as the rider of motorcycle KMDF 009F. It was his submission that from the evidence on record, only the 1st and the 3rd accused person were directly incriminated with the offence and that there was no evidence showing he intended to aid or promote the commission of the offence of dealing in wildlife trophies. The appellant further faulted the trial court for relying on the hearsay evidence of PW6 to whom Jesse had purportedly admitted that he was being connected by the appellant to the buyer of the elephant tusks.
5. Before grappling with the grounds of appeal aforesaid, I am mindful that the first appellate court is under duty to re-evaluate the evidence presented at trial and draw its own independent conclusions. Except, it must bear in mind that it neither saw nor heard the witnesses give their testimonies. Thus, matters of demeanor are best observed by the trial court. See *Okeno v. Republic* [1972] EA 32.
6. Corporal Lydia Njeri (PW1) testified that on June 23, 2020, KWS officers received a report about elephant tusk trading in Karen. They identified the suspects using motorcycle KMFD 009F. The motorcycle, driven by the appellant with Jesse Mwangi as the pillion passenger, was spotted at a Shell Petrol Station. Jesse, carrying a bag with two elephant tusks, was apprehended while the appellant fled. She gave evidence that the suspect was using motorcycle KMFD 009F.
7. Jesse was directed to open the bag he was carrying, revealing two elephant tusks wrapped in newspaper and black nylon paper. The tusks were also tied with a manila rope, and the bag was brown in color. Jesse failed to produce any documents authorizing him to trade or handle wildlife.
8. PW1 further testified that while interrogating Jesse, the appellant called Jesse using mobile number 0729XXXXXX, with the call on loud speaker. Jesse told the appellant that he had also escaped as instructed to say by the KWS officers. The officers later traced the number to Muguga, where they arrested the appellant at around 5:00 p.m. while he was in possession of motorcycle KMDF 009F. Jesse then led them to Catherine Kambura, the 3rd accused, who was identified as the owner of the tusks. Catherine had called Jesse using mobile number 0799XXXXXX, demanding her money, which led them to arrest her at Kawangware Cooperative as she waited to collect the payment from Jesse. PW1 prepared the inventory and the motorcycle was photographed. During cross examination by the appellant, PW1 stated that the appellant was the motorcycle rider and that he escaped when they arrested Jesse.
9. Anthony Kibui (PW2) corroborated PW1's testimony, confirming that on June 23, 2020, he was with PW1 and Gladys when they received intelligence about suspects selling elephant tusks in Karen. They were informed that the suspects were using motorcycle KMDF 009F, which they spotted near a Shell Petrol Station in Karen. Jesse alighted from the motorcycle with a bag, and when intercepted, the other rider fled. Jesse was arrested with two elephant tusks. They tracked the appellant to Muguga in Kiambu County using the phone number 0729XXXXXX, which he used to call Jesse after the arrest. During cross-examination, PW2 confirmed the communication between the appellant and Jesse but could not verify if the phone number was registered to the appellant. He also noted that the motorcycle was registered to Auto Industry Limited and was unsure if the appellant was a boda boda operator.



10. Dr. Ogeto Mwebi (PW3), a Senior Research Scientist at the National Museum of Kenya, testified that on June 24, 2020, KWS Officer Anthony Mbau delivered exhibits for identification. Dr. Mwebi confirmed that the exhibits, marked B1 and B2, were elephant tusks from a young elephant. He prepared and submitted a report dated June 24, 2020, as prosecution exhibit, with the exhibit memo.
11. Gladys Tanui (PW4), in charge of Wildlife Crimes in Nairobi, testified that on June 23, 2020, she received information about individuals planning to sell tusks at Karen Shopping Centre using motorcycle KMDF 009F. She organized a team, including PW1, Anthony Mbau, and Anthony Kibe, for the operation. At around 12:50 p.m., they observed the motorcycle at the Shell Petrol Station in Karen. The appellant was the rider, and Jesse, who had a bag, was the passenger. They arrested Jesse and found two elephant tusks wrapped in old newspapers. During cross-examination, PW4 stated she could not confirm whether the phone number used by the appellant to contact Jesse after his arrest was indeed the appellant's.
12. Warden Job Magara (PW5), the Deputy Investigations Officer for Wildlife Crime, testified that on January 25, 2022, he was asked by Corporal Anthony Ndung'u to photograph exhibits related to police case No. 172/27/2020. He photographed a motorcycle, a brown bag containing a gunny bag, newspapers, black paper, and two ivory tusks. He took ten photographs in total, including one showing the motorcycle with registration number KMDF 009F and frame number MD2A21BZ3DW181824. He submitted these photographs and the certificate of the photographs as prosecution exhibits.
13. Warden Job Magara (PW5), the Deputy Investigations Officer for Wildlife Crime, testified that on January 25, 2022, he was asked by Corporal Anthony Ndung'u to photograph exhibits related to police case No. 172/27/2020. He photographed a motorcycle, a brown bag containing a gunny bag, newspapers, black paper, and two ivory tusks. He took ten photographs in total, including one showing the motorcycle with registration number KMDF 009F and frame number MD2A21BZ3DW181824. He submitted these photographs and the certificate of the photographs as prosecution exhibits.
14. Corporal Anthony Mbau (PW6), the investigating officer, testified that on June 23, 2020, he received intelligence about a plan to sell elephant tusks. This led him, PW1, and PW2 to the Karen Shell Petrol Station, where they saw motorcycle KMDF 009F with Jesse as a passenger. Jesse was intercepted and found with two elephant tusks, while the rider escaped. Using the phone number, the appellant had called Jesse with, they tracked and arrested the appellant in Muguga.
15. PW6's investigation revealed that Jesse had asked the appellant to find a market for the tusks, as the appellant had connections with Chinese buyers. Catherine Kabura was identified as the tusk owner but claimed they belonged to someone named Yvonne, without providing details. PW6 submitted several exhibits, including the brown bag, black nylon, elephant tusks, newspaper wrap, gunny bag, weighing certificate, inventory, log book, and a letter to NTSA. During cross-examination, PW6 confirmed he did not take any photographs at Karen, the motorcycle was registered to another person, and the appellant was tracked using phone number 0729XXXXXX.
16. When put to his defence, the appellant gave sworn testimony. He testified that testified that on June 24, 2020, he was at home in Kerowa Kikuyu and later went to Kanduma Center to buy medicine. He claimed that he encountered a vehicle with Jesse inside on his way back and was subsequently arrested. He asserted he did not know Jesse prior to the arrest, did not know how to ride a motorcycle, and was not involved with elephant tusks trade or transportation. He stated that no evidence placed him at the scene, the prosecution did not provide call data, and while his phone number is 0729XXXXXX, he denied calling Jesse on the date in question. He also denied knowing Catherine, the third accused.



17. Jesse Mwangi Karanja (DW1) gave unsworn testimony, stating he was arrested in Kikuyu, Kiambu County, and denied committing the offense. He criticized the prosecution for not providing CCTV footage from the Shell Petrol Station or calling nearby police officers as witnesses. He suggested the tusks presented were not the same ones delivered to the National Museums of Kenya and claimed the case was fabricated. He also noted that the tusks were not dusted for fingerprints.
18. Catherine Kambura (DW3) was initially part of the trial but her lawyer withdrew from representing her when he could not reach her, and this withdrawal was granted by the court.
19. I have carefully considered the record of appeal, submissions by counsel and the law. The grounds of appeal set out elsewhere in this judgment can actually be collapsed into two thematic areas; whether the prosecution proved its case against the appellant beyond reasonable doubt and secondly, whether the sentence imposed on the appellant was warranted.
20. The first issue is whether the offence of dealing in wildlife trophy was proved beyond reasonable doubt. In determining this issue, the court ought to first consider whether the evidence on record established the offence of dealing in wildlife trophy as against the appellant. Section 92(2) provides as follows:

“(2) 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.”
21. It is not disputed that two elephant tusks were recovered from the 1st accused person, namely Jesse Mwangi. There was sufficient evidence to that effect. PW1, PW2, PW4 and PW6 attested to the fact that on 24th June 2020, they received intelligence information about two people on board motorcycle registration KMDF 009F who were in the process of selling elephant tusks. They acted on the information, and at the scene, they arrested the pillion passenger who had alighted from the motorcycle carrying the bag with the elephant tusks. Their evidence was corroborated by PW3’s report which confirmed that the exhibits recovered from Jesse Mwangi were indeed elephant tusks.
22. The critical question, however, is whether the appellant was also culpable for dealing in wildlife trophies. Alternatively, did the prosecution prove beyond reasonable doubt that the appellant was an accomplice of the said Jesse Mwangi and the motorcycle rider who got away after Jesse had been arrested? From the evidence tendered before the court, it is clear that the appellant was not arrested in the company of Jesse Mwangi and neither was he arrested with any wildlife trophy. Thus, there was no direct evidence linking the appellant to the recovery of the elephant tusks, and therefore, the prosecution was hinged on circumstantial evidence. In the case of *Abamad Abolfathi Mohammed and Another v Republic* [2018] eKLR, the Court of Appeal had this to say on circumstantial evidence:

“However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: -

It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of



proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.”

23. The conditions for the application of circumstantial evidence were further expounded by the Court of Appeal in *Sawe v. Republic* [2003] KLR 364 where it held as follows:

“In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused.”

24. The only circumstantial evidence tending to link the appellant to the first accused and to the offence was that of PW1, PW2, PW4 and PW6 who testified that upon arresting Jesse with the elephant tusks at the scene, the motorcycle rider rode off and disappeared. They further testified that the appellant later called the said Jesse using mobile number 0729XXXXXXX, which they traced to Muguga on the same day, where they found and arrested the appellant in possession of the motorcycle KMDF 009F.

25. The appellant, on the other hand, denied having called Jesse Mwangi using mobile number 0729XXXXXXX. It was therefore incumbent upon the prosecution to first establish in whose name the mobile number was registered in order to establish its link to the offence. Secondly, all sim cards used in communication are supposed to be registered using ID Numbers, and so, is the mobile number in question. It was therefore important for the investigator to produce the communication link between the appellant and the first accused. The link would have definitely revealed the communication pattern between the two.

26. I have perused the record and I find no evidence tendered before court to prove that indeed the mobile number in question belonged to the appellant. Furthermore, the investigating officer did not prove that the mobile number called the first accused (Jesse Mwangi) on the material date, and that, the call was made by the appellant. Such evidence would be in the form of electronic records from the service provider, Safaricom, who would be best placed to address the court regarding the call data records of the mobile phones and which cellphone numbers communicated with the number in issue. In *Samwel Kazungu Kambi v Nelly Ilongo & 2 Others* [2017] eKLR the court held as follows with regards to electronic evidence:

“Sub-section (4) of Section 106B requires a certificate confirming the authenticity of the electronic record. Such a certificate should describe the manner of the production of the record or the particulars of the device. The certificate could also have the signature of the person in charge of the relevant device or the management of the relevant activities”

27. Flowing the above, the court finds that no evidence from Safaricom was presented to confirm ownership of the mobile number 0729XXXXXXX. Therefore, the communication between Jesse and the appellant via this number is considered hearsay and inadmissible.

28. The appellant denied having sped off when Jesse was arrested with the elephant tusks. He further denied that he was the rider of the said motor bike. An inventory was produced before trial court listing six (6) items police station including the motorcycle. The inventory was signed by the appellant and his alleged accomplices. However, it does not specifically indicate which exhibits were recovered from each accused person, even though they were allegedly arrested at different times and places.



29. This raises doubts about the accuracy and credibility of the prosecution case. Further, it was incumbent upon the investigating officer to establish that the motor cycle was owned by the appellant since it was registered in a company. The question that was left unanswered is who are the directors of the company that owned the motor cycle in question, and whether the appellant is one of the said directors. To my mind, establishing the ownership of the motor cycle would have been the easiest way to link the appellant to the offence in view of the fact that he denied being the owner and not possessing skills to drive a motor cycle. These uncertainties cast doubt on the appellant being the motorcycle rider.
30. Most importantly, the circumstances surrounding the appellant's arrest were not very clear. It was alleged by PW1, PW2, PW4, and PW6 that the appellant was tracked using his mobile number. However, no evidence was tendered before court to show how the tracking was done, and whether the said tracking was done without violating the appellant's right to privacy under Article 31 of the *Constitution*. As much as it is not within the province of this court to question the investigative techniques that were employed by the investigators, however, it was the duty of the prosecution to produce the electronic evidence that enabled the arrest of the appellant. More so, there was no mention about the make of the phone and the sim card that were used to communicate with the first accused and yet it was through tracking the said phone that the appellant was arrested.
31. Additionally, another strong link relied on by the trial court was the alleged admission by Jesse linking the appellant to the investigating officer upon his interrogation. It was PW6's testimony that Jesse had approached the appellant in a bid to find a market for the elephant tusks since the appellant was conversant with the Chinese who were largely involved in purchase of wildlife trophies. However, when the said Jesse was placed on his defence, he denied committing the offence as well as having been arrested at Karen as alleged by the investigating officer. There is no doubt that the said testimony by PW6 was hearsay in respect to the appellant, hence the need for independent corroborative evidence.
32. The foregoing analysis clearly indicates that the appellant was allegedly arrested because he communicated with the first accused, and that, the first accused implicated the appellant as an accomplice. However, as indicated in this judgement, no evidence was produced from the service provider to corroborate the communication between the first accused and the appellant before and after the arrest of the first accused. It therefore follows that the chain or jigsaw puzzle was incomplete due to the missing and broken links.
33. Having so stated, I do not find it necessary to consider the other grounds of appeal. The upshot is that, I allow the appeal, quash the conviction and set aside the sentence of ten (10) years imposed by the trial court. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 3RD DAY OF JUNE 2024.

D. KAVEDZA

JUDGE

In the presence of:-

Mr. Rienye for the Appellant

Ms. Wafula for the Respondent

Joy Court Assistant

