



**Nzau v Republic (Criminal Appeal E022 of 2023)
[2024] KEHC 6433 (KLR) (4 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 6433 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL E022 OF 2023**

SM GITHINJI, J

JUNE 4, 2024

BETWEEN

RAPHAEL MUSIMBA NZAU APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the Conviction and Sentence by Hon Stephen K.Ngii – Principal Magistrate at Mariakani in Criminal Case No.E138 of 2021 delivered on 26th April, 2023)

JUDGMENT

1. Raphael Musimbi Nzau, the appellant herein was charged in the lower court together with two others with the offence of dealing in a wildlife trophy of a specified endangered species, without a permit or other lawful exemption, contrary to section 92 (2) of the [Wildlife Conservation and Management Act](#) of 2013 (Amended in 2019).
2. The particulars of the offence being that on the 27th day of August, 2021 at around 13.45hours at GPS Coordinate 37 M 0552546 UTM 9572939 in Mariakani Township in Kaloleni Sub County within Kilifi County the appellant together with two others were jointly found dealing in a wildlife trophies namely four (4) pieces of elephant tusks weighing 12 kilograms wrapped in a yellow nylon sack tied with black rubber band with a street value of Kshs.1.2million that being a trophy of a species that is endangered under sixth schedule of this [Act](#), and at the time of doing so, did not have a permit or lawful exemption granted under this [Act](#).
3. The three also faced a second count of being in possession of specified endangered wildlife species without a permit or other lawful exemption, contrary to section 92 (4) of the [wildlife conservation and management Act](#) 2013 (Amendment in 2019).
4. The particulars of this offence are that on the 27th day of August, 2021 at around 13.45hours at GPS coordinates 37M 0552546 UTM 9572939 in Mariakani Township in Kaloleni Sub-County within



Kilifi County, the appellant together with other two were jointly found dealing in Wildlife trophies namely (4) pieces of elephant tusks weighing 12 Kilograms wrapped in a yellow nylon sack tied with black rubber band with a street value of Kshs.1.2 million that being a trophy of a species that is endangered under sixth schedule of this Act and at the time of doing so, did not have a permit or lawful exemption granted under this Act.

5. The prosecution case, of which I must state from the onset that it was well or thoroughly investigated, is founded on evidence of 9 witnesses. Their case is that on 26/8/2021, PW-2 who works as an investigator for Kenya Wildlife Service while in his office received intelligence report that there were 3 individuals at Mariakani Township; Kaloleni Sub-County, in possession of Wildlife Trophies to wit elephant tusks and were looking for a buyer. It was reported that the transaction was to be done at Mariakani behind Diamond Trust Bank, in a rental house of a late businessman known as Shariff Hassan.
6. PW-2 shared the information with his superior, one Timothy Kiringa. He was instructed to carry out an operation to arrest the suspects and recover the trophies. On 27/8/2021 PW -2 called his colleagues to assist in the operation. He called PW-7, PW-6 and PW-4. At around 11.45am they left using unmarked motor vehicle, for the operation. They called Mackinnon officers for back up. They are PW-3 and PW-5 in this case. At 1.30Pm they arrived at Mariakani and met the Mackinnon team. They laid down strategy where PW-2 was to pose as a buyer. The rest were to keep surveillance, assist in arrest and back up. While PW-2 was behind Diamond Trust Bank (DTB), he saw a man who matched the intelligence information. He was huge and short. PW-2 approached him and introduced himself as the person to buy the trophies. The man led him to a house within Plot No. 1149/13, owned by PW-8 as the landlord. There was a single room partitioned by curtains, serving as a sitting and a bedroom. The room was rented by the initially 2nd accused person who was living with the 3rd accused person. The appellant herein is married to the sister of the 2nd accused. The appellant had 12 kilograms ivory tusks which were a set of two tusks each cut into two to form four pieces. They were tied with a rubber band and placed in a yellow nylon bag. They negotiated the price. The appellant asked for 15,000/= per kilogram. PW-2 offered a lesser amount and they settled at 10,000/= per kilogram. The ivory tusks were weighed and they were 12 kilograms, to cost a total of 120,000/=. The appellant introduced himself as Raphael. The 3rd accused was in the house watching television and his mother (2nd accused) joined them soon thereafter. The three allegedly assisted each other in weighing. PW-2 at that point signaled the rest in his team to get into the house. They did so and introduced themselves as well as PW-2. The three suspects were arrested. PW-4 took photos of the recovered Ivory tusks. The three suspects were taken to Mariakani Police Station with the recovered four pieces of ivory tusks.
7. PW-9 investigated the case. PW-1, a veterinary doctor with KWS examined the recovered tusks on 9/11/2021 at Mariakani Police Station. His examination revealed that their base resembled that of elephant tusks. They had shrinker lines peculiar to elephant tusks. They bore distinguished features showing were elephant tusks. He concluded that they were 4 pieces of two complete ivory tusks. He thus made a report. The accused were then charged with the offences in the charge sheet.
8. The 3rd accused who was a University Student had his case later withdrawn following a diversion agreement between him and the prosecution dated 25th July, 2022. The rest were placed on their defence.
9. The first accused's defence is that he hails from Makueni where he is a pastor with Redeemed Gospel Church. He is married to the sister of the 2nd accused whose husband is deceased. They are the ones who had educated the previously 3rd accused person following the demise of his father. The 3rd accused had been admitted to Bomet University. The first accused's wife was to pick him and take him to the University on 13/9/2021. She was however engaged and sent the first accused person (appellant herein). On 27/8/2021 the appellant travelled from Makueni to Mariakani. He arrived at 1.00Pm and



was directed to the house by Caleb (previously 3rd accused person). When he got to the house Caleb was watching television. He handed to the appellant the University admission forms. The appellant took them and as he went through them, two men entered the house. One was PW-1 and he was holding a gunny bag and a weighing scale. He asked the appellant to hold the items for him. He declined. The 2nd accused person entered. Other officers also entered. The appellant stated he could not participate in weighing what he did not know. The officers alleged he had been on their radar for long. They removed four pieces of tusks of which they weighed. He tried to explain he had just travelled to the place but was arrested.

10. The 2nd accused on her part stated that she had invited her sister to come and help in filling the forms of Caleb who had been admitted to the University. The sister however sent her husband the appellant in this case. The 2nd accused was not in the house when the appellant arrived. When she got to the house she found him with the officers who were asking the appellant to help them weigh the tusks. When she asked what was being weighed she was also arrested. She had not seen the tusks before then and she does not deal in tusks.
11. The trial court evaluated the evidence and found that the offence in count one was defective in its particulars for non-disclosure of how the accused were dealing with the ivory tusks. The two were acquitted of the offence. However, on the 2nd count the trial court found the offence proved beyond reasonable doubt against the appellant herein who was convicted of it and fined Kshs. 3 million in default to serve 5 years' imprisonment.
12. For the second accused, she was acquitted for lack of enough evidence.
13. The appellant herein dissatisfied with the said conviction and sentence appealed to this Court on the grounds that: -
 1. The case against him was not proved beyond reasonable doubt.
 2. The appellant was not in possession of the elephant tusks in question.
 3. The appellant was not a tenant of the house where the trophies were found and was not living therein.
 4. The appellant travelled to the scene to assist 3rd accused to join University.
 5. Prosecution case had lacunas which were not bridged.
 6. Prosecution case is inconsistent and contradictory.
 7. The defence poses doubts on the prosecution case of which should have been utilized in his favour.
 8. Possession was not proved beyond reasonable doubt.
 9. The sentence is excessive given the circumstances.
14. The appeal was canvassed by way of written submissions and both sides filed their respective submissions.
15. I have re-evaluated the charges, evidence adduced by both sides, judgment and sentence of the lower court, grounds of the appeal and submissions filed.
16. Though there are many grounds of appeal raised, I find that they have no basis in this matter. The case as earlier on stated was thoroughly investigated and evidence offered is well-coordinated. However, I do note existence of one major technical error in the charge in count 2. Though the offence in count



1 is of dealing in Wildlife Trophy and the 2nd count of being in possession of specified endangered wildlife species without a permit, the particulars of the offence in both counts are exactly the same. They indicated the accused were jointly dealing in wildlife trophies, instead of being in possession in regard to count two.

17. The trial court had found count No.1 defective in its particulars for failure to specify the manner in which the accused persons were dealing with the trophies, given the definition in section 2 of the Act. The trial magistrate in his judgment indicated the particulars of the offence in count 2 are that the accused persons were found in possession of four pieces of elephant tusks being trophies of an endangered species under the 6th schedule to the Act without permit or lawful exemption granted under the Act.

18. I do not know where the said particulars were derived from as from the charge sheet I have in the file the particulars read; -

“On the 27th August, 2021 at around 13.45hours at GPS coordinate 37M 0552546 UTM 9572939 in Mariakani Township in Kaloleni Sub-County within Kilifi County. You were jointly found dealing in Wildlife trophies namely four (4) pieces of elephant tusks weighing (12) kilograms wrapped in a yellow nylon sack tied with black rubber band with a street value of Kshs.1.2million that being a trophy of a species that is endangered under sixth schedule of this Act, and at the time of doing so, did not have a permit or lawful exemption granted under this Act.”

19. The offence of dealing in a wildlife trophy under section 92 (2) of the Wildlife Conservation and Management Act 2013 (Amended in 2019), is different from the offence of being in possession of specified endangered wildlife species without a permit or other lawful exemption, contrary to section 92 (4) of the said Act.

20. The particulars for the two offences cannot therefore be exactly the same. Dealing is different from being in possession. It is trite that charge need be correct in all its particulars. Every detail of an accusation or charge must be accurate and precise. In legal proceedings, this ensures that the defendant is fully informed of the specific allegations against them, allowing for fair opportunity to prepare a defence – See Article 50 (1) (b) of the Constitution of Kenya, 2010. If any part of the charge is incorrect or misleading, it can be a ground for acquittal if found to have occasioned a miscarriage of justice. Accuracy of the charge is critical to the integrity of the judicial process.

Section 134 of the Criminal Procedure Code states that: -

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

The Court of Appeal in Yongo v Republic [1983] KLR, 319 held that;

“In our opinion a charge is defective under section 214 (1) of the Criminal Procedure Code where;

- a. It does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge or because it charges offences in the charge not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings discloses; or



- b. It does not, for such reasons, accord with the evidence given at the trial; or
- c. It gives a misdescription of the alleged offence in its particulars.”

21. In this case the appellant was prejudiced by the error in the particulars of the charge in count two as there was confusion as to which offence he was defending. As such I do find the offence in count two defective and could not have led to a conviction. On this ground alone I do find the appeal merited. The appellant is lucky to have sailed to freedom through the technicality but he is warned that luck, like lightning rarely strikes twice. The conviction and sentence are quashed and the appellant is set free unless otherwise lawfully held.

Bond/Surety or cash bail should be discharged.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 4TH DAY OF JUNE, 2024

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S.M.GITHINJI

JUDGE

In the Presence of:-

- 1. Appellant and his advocate Mr Muia
- 2. Ms Ochola for the State

