



REPUBLIC OF KENYA



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**Muigai v Republic (Criminal Appeal E064 of 2022)
[2024] KEHC 9715 (KLR) (22 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9715 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL APPEAL E064 OF 2022
BM MUSYOKI, J
JULY 22, 2024**

BETWEEN

IBRAHIM MUIRU MUIGAI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being appeal from judgment, conviction and sentence in the Chief
Magistrate's Court at Kahawa (Hon Boaz Ombewa SPM) dated 19-09-2022)*

JUDGMENT

1. Peter Gathenya Mburu, Daniel Muikamba Mburu and Joseph Ndii Murage were on 21-04-2021 arraigned in the Chief Magistrate's Court at Kahawa for an offence of dealing with wildlife trophy without a permit contrary to section 92(2) of the *Wildlife Conservation and Management Act*, 2013.
2. The appellant was later arrested and joined in the proceedings vide a fresh charge sheet filed in court on 5-07-2021. The new charge was for the offence of dealing in wildlife trophy without a permit contrary to section 92(2) as read together with Section 105 of the *Wildlife Conservation and Management Act*, 2013. The particulars of the charge were that on 20th day of April 2021 at around 1530 hours at Ndumberi town within Kiambu County jointly with others not before the Court, they were found dealing in wildlife trophy namely eight (8) pieces of elephant tusks weighing 30 kgs with a street value of Kshs 3 million which was being ferried using motor cycle registration number KMEM XXXX without a permit. The trial proceeded and on 19-09-2022 the appellant was convicted and sentenced to five years in jail while his three co-accused persons were acquitted.
3. This is a first appeal which is by way of a retrial. I am called upon to re-evaluate the evidence produced before the lower court and come into my own conclusion always reminding myself that I did not have the opportunity of observing the demeanor of the witnesses. I should also be careful not to interfere with discretionary matters unless the same are so glaringly erroneousness so as to result to injustice.



4. This is a summary of the evidence in the trial court, PW 5 claimed to have received intelligence report that there were people trying to sell elephants tusks within the Ndumberi area. She with approval of her boss mobilized a team to conduct an operation which comprised of herself, PW2, PW3, PW4 and a driver and laid a trap for arrest of the dealers. She did not tell the court how she made contact with the intended sellers and but she stated that the sellers had been given information that she would be the buyer. They drove to the agreed place in an unmarked car and parked at a strategic point. PW2, PW3 and PW4 got out of their car and hid at a vantage point in order to pounce on the dealers when they arrived. At 2.00 pm or thereabouts, the dealers arrived and approached PW5 who had parked their undercover car outside L8 Lodge.
5. Shortly thereafter, the 3rd and 4th accused persons and two more persons came in a motor vehicle registration number KBS XXXXa Toyota fielder which was either grey or white in colour. The dealers came out of their car and approached PW5 who was sitting in their car. They went on to negotiate price for the tusks settling for a price of Kshs 110,000.00 per kilogram. After the negotiations, one of the dealers named as Simon Njoroge made calls and shortly the 2nd accused came in a motor cycle registration number KMEM XXXX which had several crates with one of them laden with a luggage of two sacks. The dealers went back to the operation car and while they were ready expecting payment, PW2, PW3 and PW4 pounced and managed to arrest 2nd, 3rd and 4th accused persons. The 1st accused (now the appellant) and Simon Njoroge escaped. The 1st accused was arrested three months later at Ndumberi while Simon remained at large and was never arraigned.
6. PW7 was the investigations officer. He narrated the process he took in the investigations including analysis of telephone lines and handsets and communications between the accused persons and the untraced escapee. He however does not seem to have investigated the appellant's line, call logs or location. He produced report for the call logs for numbers which he stated belonged to the accused persons. These were;
071787XXXX registered to Peter Gathenya Mburu the 2nd accused;
075210XXXX registered to Ibrahim Mungai the 1st accused (now the appellant);
072556XXXX registered to Joseph Ndii Murage the 4th accused; and
072214XXXX registered to Daniel Muikamba Mburu the 3rd accused.
7. After the close of the prosecutions case, the accused persons were found to have a case to answer. The summary of the accused's evidence was in summary as follows;
8. The 1st accused told the court that he was in business of selling chicken. On 19-04-2021 he was in Nyahururu. On the day of the alleged offence, he arrived in Kiambu at 5.00 pm and he was not at the scene of crime at the time of the operation. He produced a call log of his telephone line number 075210XXXX and called a witness from Airtel Kenya the service provider. The witness from Airtel placed the accused person in the following locations;
At Ridgeways at 1524 hours;
At Gilgil at 1205 hours;
At Naivasha at 1300 hours;
At 1603 at Ndumberi; and
At 1922 hours at Ndumberi.



9. The appellant maintained that he did not know the other accused persons but admitted that he dealt with the 2nd accused whom he usually used to hire to deliver chicken to his customers. He also admitted talking to the 2nd accused on the material day but on different business and not that of the elephant tusks.
10. The 2nd accused claimed to be a motor cycle operator commonly known in local parlance as boda boda. On the said date at 2.00 pm, he received a call from the appellant with a request to collect chicken from the appellant's place and deliver them to Simon Njoroge in Ndumberi. He went to the 1st appellant's home and picked a luggage in a sack which he delivered to Simon at Ndumberi Delight. Simon told him to put the luggage in motor vehicle which was next to him. He claimed that the appellant had sent his number to Simon who had called him. While Simon was offloading the luggage, people came and arrested him. but Simon ran away. PW5 restrained him from running away and gave him fare of Kshs 100.00. According to him, 3rd and 4th accused persons were not present at this time but were brought in another motor vehicle to Ndumberi police post. In cross examination, he said that when he arrived at the scene, he found Simon standing alone off the road. He was categorical that at the time of arrest, the 1st accused was not there.
11. The 3rd accused told the court that he was a taxi driver. On the day they were arrested, his vehicle had mechanical problems. His client one Njoroge called and requested that he picks him. Since his vehicle had a mechanical problem, he called the 4th accused and requested him to accompany him (with the 4th accused's vehicle) to pick his customer. The two went together picked the customer (Njoroge) at River side and took him to Ndumberi. The customer asked them to wait for five minutes and went to talk to two ladies. They were shortly thereafter arrested, handcuffed and put in a car boot. They were taken to Ndumberi police post where they found the 2nd accused. He added that he saw the 2nd accused at Ndumberi police post and not at the scene of the arrest.
12. The 4th accused's account was similar to that of the 3rd accused. The 3rd and 4th accused persons called a witness who simply confirmed that he knew the 3rd accused and corroborated his evidence that he was a taxi driver. The 3rd accused also called one Stephen Wakaba Muturi who described himself as a mechanic. He corroborated the 3rd accused's evidence that his vehicle had a mechanical problem on the said date.
13. The Magistrate in his judgement summarised the evidence of the witnesses and found that the prosecution had not proved its case against the 2nd, 3rd and 4th accused persons and acquitted them. He convicted the appellant hence this appeal.
14. I have read the judgement from which I note that the Honourable Magistrate was convinced that the 2nd accused delivered the concealed elephant tusks using motor cycle registration number KMEM XXXX. He was also convinced that the appellant was at the scene of the crime. In his own words, the evidence of the prosecution witnesses on how the luggage was delivered tallies with the evidence of the accused 2. My take on this finding is that the Honourable Magistrate heavily relied on the evidence of the 2nd accused to find the conviction. The 2nd accused's evidence was instrumental in the mind of the Magistrate in convicting the appellant.
15. The law on probative value of evidence of a co-accused demands that the court treats the same with a lot of caution. In this case, if the court decided to consider the evidence of the co-accused to find a conviction on the appellant, the same should be so water tight and credible that any judicial officer applying reasonable diligence would not find otherwise. In *Thomas Matheka v Republic* [1983] eKLR, the court held that;



‘Evidence given by a co-accused persons against another should only really be considered if it is believed and if it is corroborated in a material particular by independent evidence pointing to the guilt of the accused and if it also implicates the person giving the evidence of the crime.

16. The evidence given by the 2nd accused in this case could not fall under this position. The 2nd accused gave the evidence in a manner that was meant to exonerate himself from guilt. In *Peter Kinyua Ireri v Republic* [2016] eKLR, the Court of Appeal held that;

‘The law is that the statement and evidence of a co-accused person is evidence of the weakest kind since an accused person can implicate another, intending to save himself from blame’.

17. This in my view was the case in the matter before the court. The 2nd accused was court red handed conveying the tusks and he was at the center of the offence. His evidence against the appellant should not have been relied upon to convict the appellant.

18. In my view, the evidence of the 2nd accused was materially contradictory and it was not safe for the Magistrate to give it the weight he did. It contradicted the evidence of the other prosecution witnesses in many material ways. All the prosecution witnesses were categorical that the four persons who came in motor vehicle registration number KBC XXXX were arrested inside or near the unmarked operation vehicle. The 2nd accused testified that he was arrested alone. The prosecution witnesses were also clear and categorical that the 2nd accused was arrested together with the other two accused persons whereas the 2nd accused testified that he was arrested alone and only met the other accused persons at Ndumberi police post.

19. Of more relevance is the contradiction in the arrests and presence of the appellant at the scene. The prosecution witnesses stated that the appellant was at the scene yet the 2nd accused denied this fact and was very clear that the appellant was not at the scene. The 2nd accused actually corroborated the appellant’s position that he was not at the scene at the time of arrest and that he did not escape. It was improper and wrong for the Honourable Magistrate to believe one portion of the evidence of the 2nd accused and disregard the other. He believed the 2nd accused’s evidence that the appellant had sent him to pick the luggage and at the same time disregarded his evidence that the appellant was not at the scene. In *Munyoke v Republic* [1985] eKLR, the court of appeal held that;

‘It is also a misdirection to deal separately with one part of evidence and omit to relate it to the whole’.

20. The 2nd accused took the position that he picked a luggage from the appellant’s home but he did not know what was in the sacks. He claimed that he thought they were chicken. According to his recorded testimony, he collected the luggage after being called by the appellant at 2.00 pm. Prosecution’s exhibit number 16 shows that the appellant communicated with the 2nd accused once on the material date but the time of the communication is not clear. The duration of the call is not shown unlike the others. Interestingly, the exhibit shows that the call at timeline 8 was an outgoing call which means that it is the 2nd accused who called the appellant. The 2nd accused materially contradicted the prosecution’s case on this part of evidence when he stated that the appellant called him yet the call log shows that he (the 2nd accused) was the one who called the appellant.

21. It should be a point of concern that the prosecution chose not to call for investigations or extraction of the call log for the appellant’s line. They had his line number and it would have been easy for them to establish with whom he communicated at the material time. The prosecution chose to investigate the call logs for the 2nd, 3rd and 4th accused persons. It must be born in mind that the burden of proof remains with the prosecution and it never shifts to an accused person. The appellant had no duty to



- prove his location or communication. However, in his defence he showed that at 2.00 pm when the 2nd accused purportedly communicated with him, he was at Gilgil.
22. The investigations officer testified that the 3rd accused communicated with escapee at 12.05 and gave the number of the escapee as 077505XXXX. There were allegedly two escapees here. The officer was not clear during his evidence in chief whether the escapee he was referring to was the appellant or Simon Njoroge. However, during cross examination by Mr. Njau for the appellant, he stated that the number ending with 491 belonged to Simon Njoroge. In any event Vincent Babu, a defence witness placed the appellant's number at this time at Gilgil.
 23. Simon Njoroge who is said to have escaped during the operation and who the investigations team seemed not keen to pursue was the in my view together with the 2nd accused at the center of conveyance of the luggage to the scene of the crime. Why the investigation officer chose not to pursue him after his alleged escape beats logic. It is more interesting that they believed to go by the version of the 2nd accused as to the source of the tusks than to follow the culprits to whom the luggage was to be delivered. This conduct in my view was selective and must have been actuated by some interest other than catching the real offenders.
 24. PW5 testified that once she received information of the intended sale of the tusks, she conducted the dealers and made arrangements to meet them. She did not tell the court which of the five persons involved in the case they communicated to. At least the appellant's name did not feature in her evidence as the person whom she made contacts with. The prosecution did not produce record of the communication between PW5 and the person with who she arranged to have the meeting for closing the deal. This would have shed light as to whether the appellant was involved in making arrangements for their meeting. The only nexus between the appellant and the transaction is the 2nd accused's evidence whose credibility I find wanting.
 25. The Honourable Magistrate while convicting the appellant held that whereas it was clear from the call data record that he was in Nyahururu on 19-04-2021 and travelled back to Ridgeways the following day, the call data showed that he was at Ndumberi on 20-04-2021 at 16.30 hours. With all due respect to the learned Magistrate, this was a misplaced assumption. The fact that the appellant was in Ndumberi on 20-04-2021 at 16.03 hours does not place him at the scene of the crime at the material time. It can only be a basis for suspicion which would call for further investigations. It is a trite position of the law that suspicion however strong cannot be a basis for conviction. The material time here is 15.30 hours when the tusks were delivered at L8 Lodge.
 26. I have carefully considered the evidence as analysed above and I come to the inevitable conclusion that the lower court convicted the wrong person and set free those who were the likely culprits. Since there is no appeal against acquittal of the other three persons, I will not say more on this.
 27. In conclusion I hold that the prosecution's case was tainted with glaring doubts as to the culpability of the appellant and I hereby overturn the conviction of the appellant which was entered against him on 19-09-2022 in Kahawa Chief Magistrate's criminal case number E006 of 2021. The same is quashed and the sentence thereof is set aside. The appellant shall be released forthwith unless otherwise lawfully held.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY 2024.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

