Ngusu v Republic (Criminal Appeal E045 of 2020) [2024] KEHC 8035 (KLR) (Crim) (4 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8035 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E045 OF 2020

K KIMONDO, J

JULY 4, 2024

BETWEEN

DAVID JAMES NGUSU .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal from the judgment of H. Nyaga, Chief Magistrate, in Criminal Case No. 3497 of 2012 at Makadara delivered on 6th November 2019)

JUDGMENT

1. The appellant and three other persons were convicted on various counts of possessing or dealing with government trophies;failing to make a report; attempting to export; deceptively packaging the cargo; and, making false declarations to customs. The offences were committed on 21st June 2012 at the cargo section of Jomo Kenyatta International Airport (hereafter JKIA) Nairobi.
2. In count II, the appellant was charged with attempted exportation of government trophies contrary to section 45 (5) as read with section 56 (1) of the *Wildlife Conservation & Management Act* (CAP 376) [now repealed]. The particulars were that on the 21st June, 2012 at the cargo area at JKIA jointly with others not before court, he attempted to export 345 pieces of raw elephant ivory weighing 601 Kgs and valued at Kshs 60,000,000.He was sentenced to pay a fine of Kshs 40,000 or to serve 3 years imprisonment.
3. On Count III, he was charged with being in possession of government trophies without a certificate of ownership contrary to section 42 (1) (b) of the Act as read with section 56 (1) (a). The particulars were that on the same date and place, jointly with others not before court, they were found in possession of 6 wooden boxes containing the said government trophies. He was fined Kshs 40,000 and in default to serve 3 years imprisonment.

4. In Count IV, he was charged with dealing in government trophies without a dealer's license contrary to section 43 (4) of the Act. The particulars being that at the same place and date jointly with others not before court they were found dealing in the trophies without a dealer's license. He was fined Kshs 20,000 and in default to serve 2 years imprisonment.

5. In Count V, he was charged with failing to report contrary to section 39(3) (a) of the Act. The particulars were that at the same place and date jointly with others not before court, they failed to make a report of possession of the government trophies to an authorized officer. He was fined Kshs 10,000 and in default to serve 6 months imprisonment.

6. In Count VI, he was charged with deceptive packaging of goods for export contrary to section 202 (b) of the East African Community Customs Management Act, 2004. The particulars were that at the same place and date jointly with others not before court, they were found exporting the said government trophies in 6 wooden boxes in a manner intended to deceive customs officers. He was fined Kshs 500,000 and in default to serve 3 years imprisonment.

7. Lastly, in Count VII, he was charged with making a false declaration contrary to section 203 (b) of the *East African Community Customs Management Act, 2004*. The particulars were that at the same place and date jointly with others not before court, they made a false declaration in Customs Entry Number 2012 JKIA 15571470 which was meant for raw elephant ivory purporting it to declare spares. He was fined Kshs 500,000 and in default to serve 2 years imprisonment.

8. The learned trial magistrate further ordered that if the fines were not paid, then the prison terms would run consecutively.

9. Being aggrieved by the conviction and sentences, the appellant lodged a petition of appeal dated 20th September 2021 raising ten grounds. I will compress them into four. Firstly, that the evidence was sketchy, inconsistent, uncorroborated and insufficient. Secondly, that a key witness or suspect was not presented. Thirdly, that some handwriting evidence or CCTV footage was unlawfully or irregularly admitted into the evidence, and, fourthly, that the appellant's sworn testimony was disregarded.

10. In a synopsis, the appellant contends that the trial court arrived at the wrong conclusions. Paraphrased, that none of the offences was proved beyond reasonable doubt.

11. The appellant's counsel filed detailed submissions dated 9th February 2023 with annexed precedents. On the date of the hearing on 15th May 2024, learned counsel did not appear on the virtual platform. However, the appellant informed me that he would rely wholly on those submissions.

12. The appeal is opposed by the Republic through submissions dated 19th May 2023. In a nutshell, the State contends that each and every element of the offences was proved to the required standard; and, that the appeal is hopeless.

13. This is a first appeal to the High Court. I have re-evaluated the evidence and drawn independent conclusions. I am alive that I neither saw nor heard the witnesses. *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] E. A. 32.

14. I will commence with a caveat: The appellant was charged together with three other persons who have not preferred an appeal. I will thus limit my re-evaluation of the evidence to the matters affecting the appellant as well as his sworn defence in the lower court.

15. I will start with his identification. I have paid close attention to the evidence of Joseph Juma Mbaluka (PW10). He is a mechanic and lived in Embakasi. He knew the appellant who also resided in the Estate. On 21st June 2012, at about 09:00 hours, he was at his garage. The appellant enquired from him about

a pick-up truck to transport some items. PW10 recommended Joseph Chege (PW6) who agreed to offer transport.

16. PW10 and the appellant met PW6 and agreed on the transport charges as well as loading charges. PW10 testified that he saw some 6 or 7 boxes outside Kokarioche Bar which the appellant wanted loaded onto the pick-up. The appellant informed them that the boxes contained motor vehicle spares.

17. PW10 was arrested a week later. He found PW6 who had been arrested earlier aboard the police vehicle. PW6 testified that the appellant was introduced to him by PW10. PW6 was driving motor vehicle registration number KUL 255, a Datsun Pick-up. The appellant required the 6 wooden boxes to be transported to JKIA. The appellant told him that the boxes contained second-hand spares like U-bolts and ball joints. They negotiated a rate of Kshs 1500.

18. The appellant rode with PW6 to the airport. After registering at the gate (exhibit 20), the appellant directed him to the cargo gate. The appellant then summoned some men to offload the cargo. PW6 then left the airport. He was arrested five days later and booked at the JKIA Police Station. He was emphatic that he did not know the contents of the boxes and that he was merely offering transport services.

19. From the evidence so far, I entertain no doubt that PW6 and PW10 positively identified the appellant as the person who was in possession or full control of the 6 wooden boxes which were transported to the cargo section of the airport. The contact between the three was also in broad daylight. Furthermore, PW10 had known the appellant for some time as they both lived in Embakasi. See *Wamunga v Republic* [1989] KLR 424.

20. The appellant's counsel has raised doubts about the efficacy of a subsequent identification parade. But granted what I have stated, the parade was perhaps done out of an abundance of caution but it was superfluous in the circumstances.

21. The 6 wooden crates [exhibits 3 (a) (1) to (6)] are the same ones that raised suspicion when a police sniffer dog, a German shepherd known as Dick, developed a keen interest and kept scratching them. The canine was trained to sniff out game trophies and was presented in court to demonstrate its skills. Its posting and health records were produced as exhibit 1. The dog itself was produced as exhibit 2.

22. According to the evidence of its handler Elka Makhanu (PW1) and Jonathan Musani (PW2), upon re-screening the contents of the boxes, the images portrayed images akin to ivory. When the boxes were stripped open, they revealed 345 pieces of raw elephant ivory wrapped in aluminium foil. They weighed 601 Kgs. The street value was estimated at Kshs 60,000,000 [exhibits 3 (a) (i) to (vi)]

23. Ben Nyakundi (PW8) produced the report made by his colleague, Dr. Ogeto Mwebi, a research scientist from the Museums of Kenya. The morphometric analysis and comparative anatomy report dated 15th February 2016 (exhibit 21) confirmed that all the 345 pieces were "unprocessed elephant ivory".

24. I am alive that the burden of proof lay entirely on the prosecution. See *Woolmington v DPP* [1935] AC 462, *Bhatt v Republic* [1957] E.A. 332.

25. When the appellant was placed on his defence, he testified that he lives in Embakasi and is a barber. That confirms the evidence of PW10. He denied that he went by the alias King David or Bouncer. He claimed he was watching a football match in a bar when police officers arrested him and confiscated his phone and ID card. He denied any connection with the vehicle driven by PW6 or the cargo ferried to the airport.

26. I find his entire defence to be a red herring. From my analysis of evidence in paragraphs *15* to *22* of this judgment, it is the appellant who hired PW6 to transport the 6 wooden crates containing raw ivory to the cargo section of the airport and which he, his co-accused or accomplices attempted to export. It is also not true that his defence was disregarded. I, like the learned trial magistrate find it evasive and unmerited. I am also unable to say that the burden of proof was shifted to him.

27. I thus concur with the finding by the learned trial magistrate that the appellant was in possession of the game trophies. Count III was thus proved beyond any reasonable doubt.

28. Like I have stated, I also find and that the appellant, his co-accused or other persons not before the court attempted to export the trophies out of the Republic. This was well captured by the evidence of the investigating officer Samuel Epara (PW12) and that of Isaac Kipyegon (PW7) and fortified by exhibits 9 – 17, 20, 23 and 25 - 29. It is not lost on me either that two of the appellant's co-accused were employees at the Kenya Airways Cargo Centre while the other worked for Transline Freight Cargo at the airport. This is clear from the evidence of Caroline Mutinda (PW4).

29. Accused 2 weighed the boxes and is the one who gave PW4 a Goods Acceptance note (exhibit 12) instead of a Proof of Acceptance note. Accused 3 told her that the consignment was spare parts. He inserted the name of a company (Transline Freight Limited), struck it out and then inserted his name. All these matters made PW4 suspicious and she alerted her senior, Mr. Webo.

30. Accused 3 had earlier approached Isaac Kipyegon (PW7) with a docket number from Kenya Airways. PW7 worked for Freight In Time Limited and had been contracted to handle cargo for Ethiopian Airlines. He issued accused 3 with a blank Airway Bill number 0712168383 (exhibit 14). The prefix 071 was assigned to Ethiopian Airlines.

31. From the copy he later saw, the cargo was misrepresented as motor vehicle spare parts destined for Lagos, Nigeria. In order to deceive customs, the ivory was wrapped in aluminium foil (exhibit 4). The crates were covered with sacks of perishable red pepper and tobacco (exhibits 6 & 7). I have also studied the photographs (exhibit 18) taken by the scenes of crime officer produced by Sergeant Magiri (PW11). The packaging was clearly deceptive. From that further analysis, I readily find that counts II, VI and VII were also proved beyond reasonable doubt.

32. Obviously, the appellant did not have a certificate of ownership or dealer's licence (and it was not his defence that he had a permit to possess the trophies). He had also not made any report of possession of the trophies to an authorized officer. It follows that Counts IV and V were equally proved to the required standard.

33. Before I leave the matter, the appellant submitted that a well-known suspect or witness was never presented to the court. From my re-evaluation of the evidence, I find no sound basis for the allegation that the prosecution withheld exonerating evidence. Learned counsel for the appellant submitted that the CCTV at the cargo area was not produced. He argued that "the CCTV footage in such a high-density security zone did not capture the appellant". I cannot comment on the evidence because it is not on record. But I find that on the totality of the evidence of the 12 witnesses called by the State, all the elements of Counts II to VII were proved to the required standard.

34. I am also alive that under section 143 of the *Evidence Act*, no particular number of witnesses is required to prove any particular fact. Obviously, there were some other actors in the chain. That is why the charge sheet referred to "others not before the court". Unlike the learned trial magistrate, I cannot venture to say the role they played or whether they were the consignors or consignees.

35. I have also dealt at length with the evidence of PW6 and PW10. It is true that they had been arrested over the matter. But I have found that their role was to arrange transport for the appellant and his cargo. Learned counsel for the appellant referred to the evidence of PW12 who said that accused 3 implicated the appellant. But accused 3 in his defence never implicated the appellant. I cannot then say that the conviction was based purely on accomplice evidence.

36. Lastly, learned counsel for the appellant submitted that the impugned judgment did not comply with section 169 of the Criminal Procedure Code; and, that it was undated. True, the typed copy is not dated. But the original handwritten transcript leaves no doubt about the signature and that it was delivered on 29th October 2019 and so is the sentence on 6th November 2019.

37. The points for determination in the judgment are laid out as well as the analysis of the evidence of each of the 12 witnesses and the accused persons. I am unable to impeach the analysis of law and precedents cited by the trial court. There was equally no grave irregularity in titling the subsequent sentence as a ruling; and, in any case, I find that no serious prejudice was occasioned to the appellant.

38. In the end the appeal against conviction is hereby dismissed.

39. I will now briefly turn to the sentence. Section 354 (3) of *Criminal Procedure Code* empowers this court to review the sentence. I have considered the appellant's mitigation that he is an orphan with three children and an extended family that relies on him. He is also a first offender. The learned trial magistrate however found that the offences called for a deterrent sentence. He also correctly found that the value of the ivory was not well established. But what is material is that it was a huge quantity of raw ivory.

40. Elephants were listed as protected species under Part I of the First Schedule to the applicable *Wildlife Conservation & Management Act* (CAP 376) [now repealed]. Granted the gravity of the offences and all the circumstances of this case, I find that the sentences meted out were appropriate and well within the applicable statute. I accordingly decline to disturb them.

41. In the upshot, the entire appeal is without merit and is hereby dismissed.

    It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4TH DAY OF JULY 2024.

KANYI KIMONDO

JUDGE

Judgment read virtually on Microsoft Teams in the presence of-

The appellant.

Ms. Wafula for the respondent instructed by the Office of the Director of Public Prosecutions.

Mr. Edwin Ombuna, Court Assistant.