



**TD v Republic (Criminal Appeal E039 of 2023)
[2024] KEHC 8570 (KLR) (16 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8570 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CRIMINAL APPEAL E039 OF 2023
AK NDUNG’U, J
JULY 16, 2024**

BETWEEN

TD APPELLANT

AND

REPUBLIC RESPONDENT

*(From original Conviction and Sentence in Nanyuki CM’s
Criminal Case No.E515 of 2023– Hon. Masivo, SRM)*

JUDGMENT

1. The Accused, TD was charged with being in possession of wildlife trophies of an endangered species without permit contrary to Section 92 (4) of the [Wildlife Conservation Management Act](#) of 2023 Laws of Kenya. The particulars were that on the 12th day of April, 2023 at around 1330 hours at Ngarengiro Trading Centre in Laikipia East Sub-County within Laikipia County you found in possession of wildlife trophies namely four (4) elephant tusks weighing approximately 6.1 kilograms without a permit. He faced a 2nd Count of Dealing with wildlife trophies of an endangered species without a permit contrary to Section 92(2) of the [Wildlife Conservation Management Act](#) of 2013 Laws of Kenya. Particulars were that on the 12th day of April, 2023 at around 1330 hours at Ngarengiro Trading Centre in Laikipia East Sub-County within Laikipia County you found in possession of wildlife trophies namely four (4) elephant tusks weighing approximately 6.1 kilograms without a permit. He pleaded guilty to the charges, was convicted and sentenced to a fine of Kshs 3000,000 in default 12 months imprisonment in respect of Count 1 and 7 years imprisonment in respect of Count II.
2. Aggrieved by the conviction and sentence, the Appellant has filed this appeal based on the following grounds;
 - i. That the learned trial magistrate erred in matters of law and fact by failing to note that the case was not proved beyond reasonable doubt.



- ii. That the learned trial magistrate erred in matters of law and fact by failing to note that the Appellant herein has no previous records.
 - iii. That the learned trial magistrate erred in matters of law and fact by not appreciating that the plea of guilty was not un equivocal.
 - iv. That the learned trial magistrate erred in matters of law and fact by failing to note that the charge sheet was defective contrary to Section 134 of the [Criminal Procedure Code](#).
 - v. That the learned trial magistrate erred in matters of law and fact by on sentencing the appellant without warning him of his ill- informed plea of guilty.
3. The appeal was canvassed by way of written submissions.
 4. The Appellant has argued 4 salient grounds being that his plea of guilty was equivocal, that he was not warned of the severe consequences of his plea of guilty, that the charges were defective as Count II in the charge sheet bore similar particulars with Count I and further that the sentence was excessive.
 5. In rejoinder, the Respondent maintains that the Appellant is bound by the provisions of Section 348 of the [Criminal Procedure Code](#) having pleaded guilty to the charges. It is urged that the charge sheet was not defective as the same was followed by particulars which gave the Appellant reasonable information as to what he was being charged with.
 6. I have had due regard to the grounds of appeal raised and the submissions on record. The issues for determination crystallize to 3;
 1. Whether the plea of guilty was unequivocal
 2. Whether the charge sheet was defective
 3. Whether the sentence was excessive.

Whether the plea was unequivocal

7. The legal procedure to be adopted by a court taking a plea in a criminal trial was set down in *Adan v Republic* 1973 EA 445 where the Court of Appeal for East Africa considered the manner in which pleas of guilty should be recorded and the steps which should be followed. It laid down the following guidelines: (i) the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language which he understands; (ii) the accused's own words should be recorded and, if they are an admission, a plea of guilty should be recorded; (iii) the prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts, or to add any relevant facts; (iv) if the accused does not agree the facts or raises any question of his guilt his reply must be recorded and change of plea entered; and (v) if there is no change of plea a conviction should be recorded and a statement of facts relevant to sentence together with the accused's reply should be recorded.
8. Further to compliance with the above requirements, it is also expected of the plea taking court that where the likely sentence is severe, the accused be warned of the consequences of a plea of guilty.
9. This requirement was emphasized in *Hando s/o Akunaay v Rex* (1951)18 EACA 307 where the court stated:

“Before on any such plea, it is highly desirable not only that every constituent of the charge should be explained to the accused, but that he should be required to admit or deny every such constituent....we



think the court should also explain to the accused person the natural consequence of a pleading guilty, the conviction and the likely sentence. therefore, for the court to accept a plea of guilty, the facts alleged by the prosecution must be accepted by the accused as accurate and they must, in turn, be sufficient in law to constitute and disclose the offence charged, the proof of which must be beyond reasonable doubt. It is therefore incumbent upon the prosecution, in proof of the charge, to present the exhibits that they would have relied on at the trial.”

10. I have perused the record of the trial court and I note that the trial magistrate fully complied with the conditions that are necessary to achieve an unequivocal plea including a clear warning to the Appellant about the severe sentence attendant to a conviction for the offence charged. To that extent, I am satisfied the plea was unequivocal.

Whether the charge was defective

11. The Appellant contends that the charge sheet relied on by the trial court to convict him was defective. The Supreme Court explained the particulars that a charge should disclose in *Isaac Omambia v R* [1995] eKLR as follows:-

“In this regard, it is pertinent to draw attention to the following provisions of S. 134 of the *Criminal Procedure Code* which makes particulars of a charge an integral part of the charge: 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.”

12. The Court of Appeal in *Sigilani – v- Republic* (2004) 2 KLR, 480 expressed itself on the matter as follows;

“The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence”.

13. Section 134 of the *Criminal Procedure Code* provides for what the components/ingredients of the charge sheet constitute as follows:-

“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”. (emphasis added).

14. In the case of *Isaac Omambia v Republic*, [1995] eKLR, the Court of Appeal considered the ingredients necessary in a charge sheet and opined:

“In this regard, it is pertinent to draw attention to the following provisions of S. 134 of the *Criminal Procedure Code* which makes particulars of a charge an integral part of the charge: 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.”



15. Having taken an analysis of the charge sheet under which the Appellant was charged, the charges read as follows;

Count 1

Being in possession of wildlife trophies of an endangered species without permit contrary to Section 92 (4) of the [Wildlife Conservation Management Act](#) of 2023 Laws of Kenya. The particulars

On the 12th day of April, 2023 at around 1330 hours at Ngare-ngiro Trading Centre in Laikipia East Sub-County within Laikipia County you found in possession of wildlife trophies namely four (4) elephant tusks weighing approximately 6.1 kilograms without a permit. (emphasis added)

Count II

Dealing with wildlife trophies of an endangered species without a permit contrary to Section 92(2) of the [Wildlife Conservation Management Act](#) of 2013 Laws of Kenya. Particulars

On the 12th day of April, 2023 at around 1330 hours at Ngare-ngiro Trading Centre in Laikipia East Sub-County within Laikipia County you found in possession of wildlife trophies namely four (4) elephant tusks weighing approximately 6.1 kilograms without a permit. (Emphasis added).

16. It is clear to the naked eye that the particulars in respect of the 2 counts are similar word for word yet the offences in the 2 counts are different; one relating to possession of wildlife trophies and the other to dealing in wildlife trophies. In those circumstances, the plea taken in respect of count 2 was in answer to an ambiguous charge as having answered to the charge of possession in count I, the particulars of possession to count II do not support a charge of dealing thus falling short of giving reasonable information as to the nature of the offence that the Appellant faced.

The above scenario renders the charge sheet defective

17. The particulars of a charge can render a charge defective. I draw guidance from the Court of Appeal in *Yongo v R* [1983] eKLR where the learned judges held that a charge can be defective if the evidence adduced in its support is at variance with the offence disclosed in the charge or its particulars.
18. In England it has been said: An indictment is defective not only when it is bad on the face of it, but also: When it does not accord with the evidence before the committing magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charges offences not disclosed in that evidence or fails to charge an offence which is disclosed therein; when for such reason it does not accord with the evidence given at the trial.
19. Is the defect in the charge sheet herein fatal? Whether such a defect is fatal was discussed in the case of [Bernard Ombuna v Republic](#) [2019] eKLR where the Court of Appeal laid the test as follows: In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence. Was this the case here?

The Court went on to state:



Looking at the record and the evidence as a whole we cannot say that the appellant did not understand the nature of the charges against him. It is quite clear from his cross examination questions to the prosecution witnesses that he understood he was accused of having inappropriate sexual contact with NNA and that there was no penetration. Therefore, in as much as the particulars did not disclose the offences he was charged with or coincide with the evidence to the extent that there was no penetration on NNA, in our view, did not render the charge sheet fatally defective. We say so because it is clear from the evidence that the appellant had inappropriate sexual contact with NNA and to hold otherwise simply because the particulars in the charge sheet were defective would be an affront to justice. Our position is reinforced by the following sentiments of the Supreme Court of India in the Willie (William) Slaney case:

“We are unable to find any magic or charm in the ritual of a charge. It is the substance of these provisions that count and not their outward form.”

20. While the taking of the plea in Count I herein is on the material on record proper and the plea unequivocal, the same cannot be said of Count II. The particulars of possession do not support the charge of dealing with wildlife trophy. This defect prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result his plea is rendered equivocal.
21. I have considered any possible effect this defect would have on Count I and am persuaded that the plea to Count I is not affected. The charge was properly framed and taken within the parameters of the law. Any element of confusion is removed by the fact that no new particulars were introduced in Count II which particulars restated the fact of possession.
22. As to whether the sentence in respect of Count I was excessive, I find no grounds upon to interfere with the sentence.
23. With the result that the appeal succeeds to the extent that Count II of the charge is found defective. The conviction and sentence in respect of that count is hereby quashed and sentence set aside. The conviction on Count I is upheld and the Appellant is to serve the sentence meted out by the trial court.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 16TH DAY OF JULY 2024

A.K. NDUNGU

JUDGE

