



**Mandi v Republic (Criminal Appeal E137 of 2022)
[2024] KEHC 17187 (KLR) (18 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 17187 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E137 OF 2022
TM MATHEKA, J
SEPTEMBER 18, 2024**

BETWEEN

SIMON MANDI APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. Simon Mandi was charged with being in possession of Wildlife Trophy contrary to section 92(2) of the *Wildlife Conservation and Management Act*, 2013. It was alleged that on 15/11/2019 at around 1400hrs at Nzoila area, Kibwezi sub county within Makueni County was found in possession of elephant tusks two pieces packed into a green manila sack with approximate weight of 15kg without permit from Kenya Wildlife Service Director General.
2. The charge was read to the accused on 18/11/2019 and he pleaded not guilty.
3. The trial proceeded on 15/11/2021 and after a full trial the accused was found guilty, convicted and sentenced to 7 years imprisonment.
4. Aggrieved the appellant filed this appeal on 8 grounds summed thus; that the learned trial magistrate erred in law and fact by:-
 5. Relying on hearsay evidence.
 6. Shifting the burden of proof to the accused and meting out a harsh sentence without considering his mitigation.
 7. Failing to test the evidence by prosecution which was adduced with discrepancies and inconsistencies.



8. Failing to find that his arrest was unprocedural and that the prosecution failed to prove the case beyond a reasonable doubt.
 9. Failing to find that the identification evidence bore the possibility of mistake.
 10. Overlooking the fact that witnesses gave false evidence.
5. The case for the prosecution was that on 15/11/2019 No. 8xxx Cpl Isidory Mwandau from Tsavo West National Park Investigation Department – received information from the head of intelligence that there was a suspect at Nzoila area who had in his possession Elephant Tusks. This was at 10:00 am. PW3 No. 7xxx Ranger Cosmas Mulwa was ordered to accompany him to the place.
 6. According to Cpl Mwadau – they made a plan that Ranger Mulwa would pose as the buyer. In the company of other officers – Cpl Lameck Ogolla and Rangers Criprus Mombili and Claus Mweregi they left for the scene.
 7. At Kambu, they met the member of public or informer who introduced them to Simon Mandi. They proceeded to the homestead of Simon Mandi but along the way the road became impassable and they had to stop. The accused then told them to wait – as he went to collect the ivory. He came back with a green sack over his shoulder. He showed them – it was elephant tusks – he did not have a weigh scale. They arrested him, then introduced themselves – escorted him to Mtito Andei police station, booked him and later charged him as he did not have a permit. He identified in court two pieces of tusks marked A1 and A2 and stated that they were marked by the Investigating Officer in his absence.
 8. On cross examination, PW1 told the court that they met the informer at Nzoila and he identified the accused to them. That the informer was present and communicating with the accused in Kikamba.
 9. He stated that when going out on investigations their motor vehicles would not be assigned, and the destination would not be disclosed as Kenya wildlife service has several unmarked cars – that the motor vehicle they had that day had a private registration number. He denied that it had rained – he denied that the motor vehicle was stuck in the mud; he stated that the informer introduced them to the accused person, that accused was first taken to Kambu police post, then Mtito Andei police station that they recorded their statements at the station – that the inventory was prepared at the scene and no police inventory was prepared at the police station; that accused was placed in custody and ivory placed in safe custody. That the Investigating Officer was ranger Duncan Obare- that every exhibit upon recovery is marked with OB No or PCR No; and that it was the officer in charge of the ivory at the time who marked them.
 10. On his part Ranger Cosmas testified that upon joining PW1 they proceeded to Nzoila, and he was given the phone number of the informer. He said he was the one communicating with the informer all the way from Mtito Andei to Nzoila where they met him and he connected them to the suspect. He testified that he is the one who negotiated with the suspect at Ksh 7000 per kg – then the member of public left – that the road was impassable at the time and he fetched ivory and brought it, that he called for backup and the accused was taken to police station.
 11. This witness told the court that the inventory was prepared by Isidory Mwandau after the arrest and it bore his signature as well – that the accused also signed it – He said the ivory was handed over to the police at Mtito Andei for the Investigating Officer to take over.
 12. On cross examination he stated that an inventory is prepared at the scene or place of seizure he could not recall – but that Cpl Mwadau is the one who prepared it. He testified that the informer is the one who introduced them to the accused person, that there had been communication between the accused and the informer but he had no records. He said the Investigating Officer took over the exhibit and



forwarded it to the analyst – that the exhibit memo bore markers of B1 and B2 but the exhibits in court were A1 and A2, and that no weighing was done to ascertain the weight.

13. No. 8303 Duncan Odhiambo Osore was the Investigating Officer. He said he called Pw2 and PW3 to take him to the scene – Nzoila area, then to the police station after he was assigned the case to investigate.
14. He confirmed from OB 19/15/11/2019 that the incident had been booked and two pieces of ivory recovered. He weighed the same. The exhibits in court one had markings of A2, the other A1 – but the rest of the markings were erased. He testified that in the exhibit memo he marked them as B1 and B2 but that the analyst made an error and marked them as A1 and A2.
15. That the inventory was made by Cpl Mwadau.
16. On cross examination he told the court that the charge sheet did not have a visible PCR number. He said he weighed the exhibits but did not have weighing certificate. He said he prepared the exhibit memo but did not mark the exhibits. He said there was no similarity between A1, A2 and B1 and B2; that he picked the exhibits from his colleagues at the police station and relied on what his colleagues told him. He did not interrogate the informer. He said his colleagues told him that the accused was arrested on a public road. He further told the court that there was nothing to show that the exhibits had been handed over to the police by his colleagues.
17. PW1 was Dr. Jeremiah Poghon Koitobok from Kenya Wildlife Service Tsavo West National Park – veterinary doctor. He said Osore brought him two elephant tusks marked A1 and A2. He carried out his examination and confirmed they were elephant tusks and prepared a report. He said under cross examination that the exhibit memo referred to B1 and B2, but the tusks he received were marked A1 and A2. He said they were delivered by Duncan Osore. He said he did not find anything linking the tusks to the accused person.
18. In his sworn statement of defence the accused denied the offence. He said he was in the shamba which is near the road when some people whose motor vehicle was stuck on the road called him to assist to push. He went and as they were pushing one of them stopped him - and the next he knew he was accused of having been found with a luggage which was in one of the motor vehicles the persons had – and he was charged.
19. Parties canvassed the appeal through written submissions.
20. The appellant argued substantially that from the evidence on record that the case was clearly fabricated. The markings of the exhibits was the first tip – the Investigating Officer said they were B1 and B2 in the exhibit memo – yet delivered A1 and A2 to the analyst – the tusks were not weighed and there was no weighing certificate, there was no connection between him and the tusks; the alleged informer who was present at his arrest, was never called as a witness. He submits that this case demonstrates that the Kenya Wildlife Service officers would simply pick pieces of ivory from their store and frame whoever they wanted like they did in this case.
21. The State began by reminding the court of its duty as a first appellate court: *Okeno v – Republic* [1972] E.A 32

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya –vs- R* [1957] EA 336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion...”



22. It was submitted that the law clearly provides that a person found guilty of the offence under section 92(2) – was liable to imprisonment for a minimum sentence of 7 years; that the prosecution had proved that indeed there were tusks – and the accused was in possession.
23. With respect to the claim of custody of the exhibits the court was referred to the evidence of the Investigating Officer.
24. I have carefully considered the evidence on record, the submissions by both parties and the issue for determination is whether :

The case for the prosecution was proved beyond a reasonable doubt.

25. The case for the prosecution is based on intelligence that a certain person was in possession of tusks. The PW2 and PW3's testimonies are that the so called informer literally took them to the accused and introduced them to him, and left after negotiations for the sale and purchase of the tusks. How then could this be an informer whose identity required to be hidden – this person was the only independent witness to the whole thing and the accused knew that this was the person who literally handed him over to the KWS officers the one who introduced them to the accused, and the purpose of the introduction, the he ceased to be an informer – he is so called cover was blown and he ought to have testified.
26. What is noteworthy here is that the Investigating Officer PW4 did not see the need to speak to the informer. Here was a case where the accused person was arrested on the word of a known person – but the Investigating Officer – did not see it fit to interrogate this person – so what investigations did he conduct? What if as submitted by the appellant – his colleagues had taken exhibits from the store and framed him, how would anyone know if that is not the case without proper investigations?
27. Worse still – the Kenya Wildlife Service Officers were not certain who made the inventory and who marked the exhibits.
28. The Investigating Officer prepared an exhibit memo for exhibits marked B1 and B2 – however what was delivered to the analyst was marked A1 and A2 – how then would anyone know without any evidence that that was a mistake. PW2 evaded the responsibility by saying that when they were marked he was not present. The Investigating Officer told the court he prepared the exhibit memo and delivered the exhibits for analysis – the court was told that exhibits would bear additional details of OB entry and PCR number – these ones A1 and A2 the OB and PCR details appear to conveniently faded or they could have been old exhibits collected from previous caches and presented in court as evidence against this appellant. The Investigating Officer could not explain that part where an exhibit memo bears different marker from an exhibit than the exhibit itself. This state of affairs gives credence to the appellant's submissions.
29. There was no weighing certificate why? Evidently the exhibit was not weighed or if it was something else happened to it so that the actual weight would not be known.
30. The foregoing scenario raises so many questions which the DPP ought to have asked the I.O before proceeding to charge? How would the court know that what was allegedly recovered from the accused is what was produced in court? Are there no other exact, scientifically, and evidentially accepted means of capturing such evidence at the scene of recovery or seizure? What evidence did Ranger Mutua have to prove that he entered into negotiations with the appellant to buy the tusks from him? And that the appellant went to fetch the same from some bush and brought it to them? If truly the Kenya Wildlife Service at Tsavo National park has a web of intelligence collecting teams – how come, they have not gone in and mopped up all these elephant tusks sitting in bushes and homesteads of people within the



vicinity of the park –where do these tusks come from without evidence of dead elephants? Yet, the impression created is that there are these tusks all over the place ?

31. With respect to the chain of custody of the exhibits – the evidence on record is unreliable as there is no evidence of who received the exhibits at the police station yet PW2 CPL Isidory told the court they handed over to the police for their Investigating Officer to pick them – to whom did they handover the exhibits? – the Investigating Officer says he collected the same exhibits from his colleagues – this kind of evidence from officers does not draw credibility towards it.
32. A perusal of the documentary evidence – PEX 1 is the report dated 3/2/2020 – it clearly states the samples are exhibit A1 and A2. The report states – “The exhibits were brought by Kenya Wildlife Service personnel from Tsavo West National Park ,,,” The report continuously refers to them as A1 and A2 as many as four time . The exhibit memo is headed “The Kenya Police” . Station is Mtito Andei. It reads:

“ To: KWS Veterinary Officer.

I forward herewith registered by/under escort of 8785 RGR Isdory Mwandau. Exhibits and identification markings –

B1 and B2. Two pieces of tusks packed in a green manila sack... Taken possession by: RGR Duncan Osore.
33. The same is signed on 30/1/2020 as having been received. There is a stamp of 3/2/2020 presumably of the veterinary officer.
34. The question then becomes – if as testified by PW2 CPL Isidory the case of Kenya Wildlife Service are investigated by Kenya Wildlife Service, the exhibits are kept by Kenya Wildlife Service there is no explanation why is the exhibit memo is headed “Kenya Police” – yet no evidence was produced to show that aany police officer handled the said exhibits, or whether any officer at Kenya Police was holding the exhibits from 15/11/2019 to 30/1/2020 when RGR Duncan Osore took over. Further its it there is no explanation why the memo state that it is Isdory forwarding the exhibits to the veterinary officer, yet the testimony was that Osore is the one who delivered the same.
35. For an offence that carries such tough penalties one would expect better investigations, better handling of the exhibits, better chain of custody.
36. The case for the prosecution is weak evidence full of contradictions and inconsistencies. The submission by the appellant that it is the officers who know the source of these tusks appears not to be idle as it is supported by their own evidence. It was the duty of the prosecution to prove their case – as per Bhatt –vs- R. and that the trial court applied its mind to the evidence on record the appellant would not even have been put on his defence.
37. I find that the appeal has merit. The appeal is allowed. The conviction is quashed; the sentence is set aside.
38. The appellant is to be set at liberty unless otherwise legally held.

DATED SIGNED AND DELIVERED IN OPEN COURT ON 18THSEPTEMBER 2024

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MUMBUA T MATHEKA

JUDGE



CA Ms Nelima/Ms Elizabeth

Ms Nyakibia for state

Appellant

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA

THE JUDICIARY OF KENYA.

MAKUENI HIGH COURT

HIGH COURT DIV

DATE: 2024-09-23 08:20:35

