



REPUBLIC OF KENYA



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**Iha v Republic (Criminal Appeal E023 of 2021)
[2023] KEHC 1686 (KLR) (14 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1686 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL E023 OF 2021
SM GITHINJI, J
MARCH 14, 2023**

BETWEEN

HUMPHREY THOYA IHA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal against conviction and sentence from Judgment and decision of Honourable L.N.Wasige – PM dated 10th May, 202 in the Principal Magistrate’s Court at Kaloleni, Criminal Case No.E019 of 2020 between Republic=versus=Kitsao Shaka Menza & Another)

JUDGMENT

CORAM: Hon. Justice S. M. Githinji

Appellant in person

Miss Mutua for the State

- 1 Humphrey Thoya Iha the appellant herein, was the second accused in the lower court where he was charged together with another, Kitsao Shaka Menza, with two counts. The first count being of dealing in a specified endangered wildlife species without a permit or other lawful exemptions, contrary to section 92 (2) as read with section 105 of the *Wildlife Conservation and Management Act* 2013.
- 2 The particulars of this offence are that on the 17th day of September, 2020 at around 1300hours at Kaloleni area within Kilifi County, the appellant jointly with others not before court were found dealing in Wildlife trophy namely elephant tusks four (4) pieces to wit weighing 35kgs with street value of Kshs.3,500,000/= Million (Kshs.100,000 by 35Kgs) packed in a white sack and inserted in a light green sack while on motor bike Registration No.KMDW 863K, being species that is endangered under appendix (1) of the convention of the international trade of endangered species and at the time of doing so, did not have permit or other lawful exemption grant under the Act.



- 3 The second count is of being in possession of Wildlife Trophy of an endangered species, without a permit or other lawful exemption, contrary to section 92 (4) of the [wildlife conservation and Management Act](#) 2013.
- 4 The particulars hereof are that on the 17th day of September, 2020 at around 13.00hours at Kaloleni area within Kilifi County, the appellant jointly with others not before court were found dealing in Wildlife Trophy namely elephant tusks four (4) pieces to wit weighing 35kgs with a street value of Kshs.3,500,000 million (Kshs.100 by 35Kgs) packed in a white sack and inserted in a light green sack while on a motor bike registration No.KMDW 863K, being species that is endangered under appendix (1) of the convention of the international trade of endangered species and at the time of doing so, did not have permit or other lawful exemption grant under the Act.
- 5 The prosecution called five witnesses and their case is that Pw-1, Pw-2, Pw-3 and Pw-4 are all employees of Kenya Wildlife Services (KWS). Their case is that on 16/9/2020 at around noon, Pw-1 received intelligence report from a person called Kadzo of mobile number 079xxxx401, that there were some people looking for a buyer of ivory tusks. Pw-1 was led by the informer to the alleged sellers where he posed as a potential buyer. They met near St George's High School where the appellant herein and his co-accused negotiated with Pw-1 on the sale and purchase of the ivory tusks. They settled at 20,000/= per kilogramme. They had no ivory tusks then and agreed to meet the following day to complete the deal.
- 6 On 17.9.2020 Pw-1, Pw-2 and Pw-3 organized on how to trick the suspects into an arrest. They reported the matter at Kaloleni Police Station and Pw-5 was assigned the duty of accompanying them for reinforcement. Kadzo led them to where the suspects were to deliver the ivory tusks to Pw-1. It was in a bush near St George's High School. On the way before they got to St George's they met the appellant. He stopped them and led them into the bush. In the bush he told them to wait. He left and returned on a red motor bike Registration No.KMDW 863K. He had a pillion passenger who is the first accused and they had a luggage. They alighted and took the luggage to the vehicle where KWS officers were. The ivory tusks were in a green sack and inside were packed in two white sacks. They were two full ivory tusks, each cut into two to make four pieces. The officers introduced themselves and arrested the suspects. They were taken to Kaloleni Police Station with the motor bike, three sacks and four pieces of ivory tusks.
- 7 Pw-4 who is a veterinary doctor working with KWS at Tsavo East National Park was handed the four pieces of Ivory tusks marked XI to X4 by Pw-5, for examination. He did morphological examination and using the produced four pieces matched and fitted them to make two full tusks. Each had a wide base which is attached to the skull and a hole known as pulp. There was the mid-section and a sharper apex, to complete the tusk. He as well did a cross section test which revealed enamel and dentine. He examined schreger units which are only found in elephant and were present. He confirmed that X1 to X4 were ivory tusks. He thus made a report. After Pw-5 completed the investigations the two were charged with the two offences carried in the charge sheet.
- 8 The appellant herein gave unsworn testimony in his defence. He alleged that he is a boda boda operator and on 17.9.2020 he was called by the first accused person whom he knew physically to ferry him and his grandfather from their home to somewhere in Kaloleni. He went to their home and found them. They had a huge luggage. They placed the luggage which was in a sack on the motor bike and went to a place near St George's Secondary School within Kaloleni town. When they reached at the place the grandfather alighted. They removed their luggage and placed it on the ground. After 5 minutes a vehicle arrived. The grandfather urged the 1st accused and the appellant to pick the luggage and place it in the vehicle. They did so and as they were about to place it in the vehicle were arrested. He was



- shocked. They were told to open the sack and noted it had ivory tusks. He had not known what he was carrying. When they were arrested, the grandfather and a lady who was also present escaped. They were questioned and the first accused said the luggage was for his grandfather. They went looking for him but in vain. His wife was arrested but later released.
- 9 The trial court evaluated the evidence and found that both offences were proved by the prosecution against both accused beyond reasonable doubt. The two were convicted of both counts and sentenced on count one to 7 years imprisonment and count two 5 years imprisonment, sentences to run concurrently.
- 10 The second accused dissatisfied with the conviction and sentence appealed to this Court on thirteen grounds. The appeal was canvassed by way of written submissions.
- 11 I have evaluated the charges preferred against the appellant, evidence adduced by the prosecution, appellant's defence, judgment of the lower court and sentences, grounds of the appeal and submissions.
- 12 One important issue I have noted is that the second count would have well served as an alternative count to the main count. This is so as one can hardly deal without being in possession. It is also noticeable that the second count is defective as the statement of the offence does not agree to its particulars. The particulars are not about possession but dealing just as they are in count one. As such, the appellant herein ought not to have been convicted of the offence in count 2 having been convicted of the offence in count one, and also given that the said charge is fatally defective.
- 13 For the offence in count one, the evidence of Pw-1 is clear that on 16.9.2020 Kadzo led him to the 1st and 2nd accused persons. They negotiated about sale and purchase of the ivory tusks. They settled at a price of 20,000/= per kilo. The meeting on 17/9/2020 was to accomplish the sale and purchase of the same.
- 12 Given that the evidence was not shaken by the defence during cross-examination, the second accused, who is the appellant herein, claim that he was just hired to deliver the ivory tusk as a boda boda rider on 17/9/2020 not knowing what he was ferrying, cannot be true.
- 13 The appellant does not deny that he carried the elephant tusks but claims he was not aware of what he was carrying. The evidence when weighed in its totality establishes otherwise. He was part of the selling (dealing) team.
- 14 Under the *Wildlife Conservation and Management Act*, Section 3 defines dealer as;-
“ any person who, in ordinary course of any business or trade carried on by him, whether on his own behalf or on behalf of any other person;-
a. Sells, purchases, brokers, or otherwise in any manner deals with any trophy; or
b. Cut, carries, polishes, preserves, cleans, mounts or otherwise prepares any trophy; or
c. Transports or conveys any trophy
- 15 The foregoing definition is vivid that the sale transaction need not to have been completed for one to be considered as a dealer or to have dealt in game trophy.
- 16 The evidence by the prosecution side is watertight and establishes the offence against the appellant, in count one, beyond reasonable doubt. He was rightly convicted.



17 The sentence of 7 years for the offence is provided for under section 92(2) of the *Act*. It is therefore legal and this Court finds no cause to interfere with the same. Given that the meted sentence in Count II of 5 years imprisonment was to run concurrently with the offence in Count No.1, the appellant herein won't be affected in terms of sentence by this court quashing of the conviction and the sentence in court No.2. I have done so, and the appellant herein will complete the 7 years imprisonment in Count No.1. The appeal therefore succeeds and fails to the said extent.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 14TH DAY OF MARCH, 2023

S.M.GITHINJI

JUDGE

In the Presence of; -

The Appellant in Person

Ms Ochola for the State

Mr Oyasi holding brief for Mr Obonyo for the Appellant

