



REPUBLIC OF KENYA



KENYA LAW
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**Charo v Republic (Criminal Case E008 of 2022)
[2023] KEHC 20896 (KLR) (17 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20896 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL CASE E008 OF 2022**

**SM GITHINJI, J
JULY 17, 2023**

BETWEEN

DAVID CHARO APPELLANT

AND

REPUBLIC RESPONDENT

*(From the conviction and sentence of 5 years imprisonment in
Criminal Case No.335 of 2019 by Hon S.K.Ngii – Senior Resident
Magistrate delivered on 4th May, 2020 at Mariakani SPM’s Court)*

JUDGMENT

- 1 The Appellant herein, one David Charo was charged in the lower court with the offence of being in possession of Wildlife Trophy, contrary to section 95 of the *Wildlife Conservation and Management Act*, 2013.
- 2 The particulars of this offence are that on the 17th day of April, 2019 at Samburu Location, Kinago Sub-County, Kwale County, the appellant herein was found in possession of Wildlife trophies namely Elephant Ivory to wit 6.25Kgs with a street value of 800,000/= without a permit.
- 3 In this case, the prosecution called five witnesses. Four of them, PW-1, PW-2, PW-3 and PW-4 are employees of Kenya Wildlife Services while PW-5 in the Investigating Officer.
- 4 The prosecution case is that on 14/4/2019 Pw-2 was based at Makina Kenya Wildlife Service Station. His duties involved gathering information regarding Wildlife Crime. On this particular day an informer told him that there were some persons who had elephant tusks. One suspect was described as black and darker. PW-2 passed the information to his colleagues who are PW-1 and PW-3 in this case. The three proceeded to Tata area to meet the man who allegedly had the Ivory Tusks for Sale. At the place they met one suspect. He told them to wait for him to avail the tusks. However, when he returned he said the deal did not go through and they should return the following day. The following



- day they proceeded to the agreed place. PW-2 was in touch with the suspect. The transaction did not however go through.
- 5 On 17/4/2019 the appellant called PW-2. He told him the tusks were ready. PW-2 informed PW-1 and PW-2. They went to Vigungani area. They waited till 8pm. The appellant led them to Mudomo road. He got into a thicket. He emerged later from therein accompanied by 3 men. The other 3 stood by the roadside with a motor bike. The appellant carried a gunny bag to where the officers had stood. He handed it to PW-2. PW-2 pretended to weigh the tusks which were therein, using a weighing scale. The other two officers (PW1- and PW-3) arrested the appellant. When they did so, the others escaped using the motor bike. The appellant resisted arrest and in the process of struggle bit PW-2 on the finger. He was however arrested and taken to Samburu Police Station with the two ivory tusks. PW-5 re-arrested him and investigated the case.
- 6 On 25/6/2019 the ivory tusks were taken to PW-4 for analysis. They were marked A1 and A2 respectively. PW-4 checked the cross-section and saw enamel section and dentine sections. Upon magnification he saw schreger lines which are only found in elephant tusks. He concluded that the two pieces were Ivory tusks from a female elephant. He thus made a report of which he produced as exhibit.
- 7 The appellant was placed on his defence and gave sworn testimony. In his defence he alleged that he was operating a boda boda at Bamba. On 14/4/2019 at 10.00am he was called by a person called Said Guta, who gave him work to carry some passengers to Tata area. He took them and upon his return Said Guta paid him for the Services.
- 8 On 16/4/2019 Said Guta gave him more work. He carried him to Kasegeni area. He then returned to Viguruguni, from where he operates.
- 9 On 17/4/2019 at 3.00am he carried his charcoal to Magogo. At 8.00am a customer gave him work to carry more charcoal. He delivered the charcoal and went to Virugugani. He met Said Guta there. Said Guta told him of two people who wanted to be taken to Mudomo area. Later 3 people appeared by a red motor bike. The appellant said he was hired and asked Said Guta to get someone else for the job. Said Guta however insisted that the appellant should take them. He took them and Said Guta went with them. When they arrived at their destination, he asked Said Guta to pay him. Said Guta told him to wait. As he waited two people approached from the front. Said Guta ran away and the appellant was held by one of the passengers he had carried. The men who had chased after those who escaped returned carrying a gunny bag. It had some items. The items were ivory tusks. He was told to disclose the owner and said he did not know. He was taken to Samburu Police Station. He was beaten up as he refused to sign a statement. He has later charged.
- 10 The trial court evaluated the evidence and in its judgment of 14th May, 2020, found the appellant guilty of it. He was convicted and fined 1,000,000/= in default to serve 5 years imprisonment.
- 11 The appellant dissatisfied with the said conviction and sentence, appealed to this Court on the following grounds; -
1. That there is no evidence that he was in possession of the said Ivory.
 2. The informer to PW-2 was not called as a witness.
 3. The period spent in remand was not considered while sentencing him.
- 12 The appeal was canvassed by way of written submissions and both parties filed their respective submissions.



13 As an appellate Court, I have re-evaluated the charge, evidence tendered in the lower court, judgment of the trial magistrate and sentence, grounds of appeal and the filed submissions.

14 The issues for considerations are two; -

1. Whether the appellant had possession of the alleged game trophies.
2. Whether the sentence meted is harsh, excessive and unjust given the circumstances of the case.

15 The evidence of PW-1, PW-2 and PW-3 shows beyond reasonable doubt that the appellant herein is the one who was in touch with PW-2 on arrangement of how he was to get the Ivory tusks for purchase. Eventually after two other attempts to avail the Ivory tusks had failed, on 17/4/2019 he was able to avail them in presence of others who managed to escape. He was arrested as he was the one who took the ivory tusks to PW-2 as the others stood at a distance, beside the road with a motor bike. When he was arrested the rest of suspects escaped. He was therefore the key person in the entire transaction.

16 Section 95 of the *Wildlife Conservation and management Act* of 2013 provides that; -

“Any person who keeps or is found in possession of wildlife trophy or deals in a wildlife trophy, or manufactures any item from a trophy without a permit issued under this Act or exempted in accordance with any provisions of this Act, commits an offence and shall be liable upon conviction to a fine of not less than one million shillings or imprisonment for a term not less than five years or to both such imprisonment and fine.”

Section 4 of the *Penal Code*, on “possession” states; -

- (a) “be in possession of” or “have in possession” includes not only having in one’s own personal possession, but also knowingly having anything in the actual possessions or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person;
- (b) if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them;”

17 In the case of *Hussein vs R* (1980) KLR 139 the Court of Appeal expounded on the provision, that;-

“In this definition on possession, it does not mean that any legal title had to be proved, nor that access to the complete exclusion of all other persons to be shown, but that a possessor must have such access to and physical control over the thing that he is in a possession to deal with it as an owner could to the exclusion of strangers.”

18 As earlier on stated the appellant herein appears as the starling in the entire transaction. He sought for “buyer”, negotiated with him and eventually though in company of others presented the ivory tusks. In law, his conduct reveals beyond doubt that he was in possession of the said ivory tusks.

19 The two recovered ivory tusks weighing 6.25Kgs were subjected to examination by Pw-4 in this case who established that they were Ivory tusks of a female elephant. Pw-4 observed in them enamel, dentine and schreger lines, only found in elephant tusks. This is evidence enough that the two were game trophies as per section 3 of the Act.



20 The prosecution in law have no obligation to avail an informer as a witness. In *Kigecha Njuga-vs-Republic* [1965]EA 773, the Court stated that;-

“informers play a useful part no doubt in the detection and prevention of crime, and if they become known as informers to that class of society among whom they work, their usefulness will diminish and their very lives may be in danger. But if the prosecution desires the court to hear the details of the information an informer has given to the police, clearly the informer must be called as a witness.”

21 The evidence in this case is complete and there is no lacuna created by failure by the prosecution to call the alleged informer as a witness.

22 Having weighed the foregoing, I find that the appellant was rightly convicted by the trial court on the availed evidence by the prosecution. His defence is a sham, an afterthought and was rightly dismissed.

23 On sentence, the same is within the law. However, I do agree with the appellant that the period spent in remand should have been weighed in the 5 years custodial sentence. He was arrested on 17/4/2019 and the sentence was on 14/5/2020. He had been in custody for a period of slightly over one year.

24 I therefore take care of the said period by holding that the five years imprisonment runs from 17/4/2019. Save for this, the appeal lacks merit as is hereby dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 17TH DAY OF JULY, 2023

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S.M.GITHINJI

JUDGE

In the Presence of: -

The Appellant in Person

Ms Mutua for the Prosecution

