



REPUBLIC OF KENYA



**Katua v Republic (Criminal Appeal E103 of 2022)
[2023] KEHC 19724 (KLR) (5 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19724 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E103 OF 2022
TM MATHEKA, J
JULY 5, 2023**

BETWEEN

DANIEL KIOKO KATUA APPELLANT

AND

REPUBLIC RESPONDENT

*(From the original conviction and sentence of Hon. J. D Karani (RM) in Makindu Senior
Principal Magistrate's Court Criminal Case No. 860 of 2019 delivered on 7th October 2021)*

JUDGMENT

1. The appellant was charged with two others in Makindu MCCRC No. 860 OF 2019 with being in possession of wildlife trophy contrary to section 92(4) of the [Wildlife Conservation and Management Act](#), 2013. The particulars were that, Daniel Kioko Katua, the appellant, Kyalo Munyoki Kitonyi and Mary Mwikali Musau on the 12th day of October 2017 at Kyumani area in Kibwezi Sub-county within Makueni County were jointly found being in possession of wildlife trophy namely 6 pieces of elephant tusks weighing 32kgs with an approximate value of Kshs.2 million shillings without authority from the Director General of the Kenya Wildlife Services.
2. After a full trial the court vide its judgment of 07/10/2021 found the appellant and his co-accused guilty. The matter was referred for pre-sentence report.
3. The record is a bit confusing as it states that sentence was to be delivered on 02/11/2021 but matter could not be reached due to pressure of work. Then the record jumps to 17/12/2021 when the 3rd accused was sentenced to pay fine of Kshs. 3,000,000/= in default to serve five years' imprisonment. The 1st and 2nd accused were indicated to be absent. Warrants of arrest were issued against the other two accused persons. The 2nd accused was sentenced to 10 years' imprisonment on 01/08/2022, and the 1st accused the same sentence on 29/08/2022.



4. The 1st accused was aggrieved by the conviction and sentence and has filed this appeal.
5. The grounds of appeal are set out as follows:
 - 1) That he is the sole bread winner of the family hence his continued stay in prison will ruin the lives of his family.
 - 2) That he begs for non-custodial sentence or an attachment to the community service order so that he may serve his sentence at the same time attending to his family.
 - 3) That given the opportunity of going out there he promise to remain a law abiding citizen and an ambassador ensuring that other citizens will also abide by the law.
 - 4) That though the 10 years sentence imposed upon him by the prosecution is within the requirements of the law, he still feel that they are harsh and excessive as a whole being a first offender.
6. In his submissions, he relied on *Omar Guyo Omar* [2021] eKLR and urged the court to be guided by *Pandya v Republic* [1957] E.A 336 of the duty of the 1st appellate court.
7. The appellant filed written submissions. He submitted that the prosecution failed to prove the charge against him and that the sentence was excessive and harsh and sought a non-custodial sentence.
8. For the states the response was on three heads:
 - i. Sufficiency of evidence
 - ii. Identification of the suspects
 - iii. Whether the sentence was harsh and excessive
9. Guided by *Pandya* above the duty of this court is to re-evaluate the evidence and come to its own decision keeping in mind that I never saw nor heard the witnesses.
10. It is evident from the record that the case for the prosecution sits largely on the evidence of PW2. This is what he stated;

I am KWS No. 8915 CPL Nicholas Munene attached at KWS headquarter doing investigations. On 12/10/2017 while at KWS headquarters Langata when at midday I got information from members of public that Chumani in Machinery at Makueni County there were three people being in possession of elephant tusks and wanted to sell the same. I informed my superiors and they gave me a go ahead to plan a recovery operation. I left Nairobi and on the way I called a colleague from Tsavo West National Park being Ranger Isdory Mwandau and Ranger Waweru. Waweru who was to provide re-enforcement. I arrived at Machinery where I met my colleagues. I met my 2 colleagues. They entered our unmarked vehicle and we headed to Chumani while I was directed by one of the accused person. On arrival at Chumani my colleague alighted to provide surveillance. I met two men whom we discussed for a while on the deal and we agreed that the same would be finalized upon seeing the ivory. They informed me that a 3rd person being a lady was guarding the ivory. We left Chumani market and at about 1 kilometre they asked me to stop the vehicle. The 2 men alighted, entered a bush near the road. Asked that we proceed by foot. Inside the bush we measured ivory being 32kg. we carried the said ivory which was in 2 sacks. They were 6 pieces packed in 2 sacks. The two men and a lady then entered the vehicle with the 2 sacks also inside. I drove back to Chumani market and after a short distance I saw my colleagues



by road side whom I signaled and they approached the vehicle while I had stopped. My colleagues and I identified ourselves as KWS officers. We asked for certificate of ownership for the 3 but none provided any. We arrested them and took them to Mtito Andei police station. We booked at the occurrence book and the 3 people were charged with the offence herein. The 2 sacks which the ivory was packed are in court. They are 2 white nylon sacks. The 6 pieces of ivory are also in court. The 6 pieces were tied in a rubber band.

2 sacks MFI 4(a) – (b)

Rubber band – MFI 5 – black.

I do not know the accused. I met them on the day I arrested them. I was communicating with accused 1. When I arrived he introduced to me as Katua. He informed me that he was the one I was communicating with. I found accused 1 with accused 2 at Chumani town. The lady colleague was accused 3 who was guarding the ivory where they had hidden them. On 12/10/2017 I went to Chumani area and we reached at 7:30 pm. I found accused 1 and accused 2 standing outside the shop at the market.

11. The learned trial court believed the case for the prosecution and according to the judgment, found that the defence case was like a

“telenovela movie ... nothing short of a script”.
12. The issue for determination is whether the appeal has merit and the key issue is whether the prosecution proved its case beyond a reasonable doubt.
13. It is the duty of the prosecution to prove their case against the accused person beyond a reasonable doubt. It can never be the onus of the accused to fill in the gaps for the prosecution.
14. PW2 told the court that he received intelligence on 12/10/2017 that there were three people at Chumani Machinery, Makindu in possession of elephant tusks. He was in Nairobi. He left Nairobi and called a colleague from Tsavo West – and went to Chumani in unmarked car. His evidence begins to get vague when he states that he headed to Chumani while directed by one of the accused persons he says while I was directed by one of the accused person – which one of the accused persons was this? Under cross examination he says it is the first accused person,. How did this accused person direct him to the venue?. He does not state how this happened in his evidence in chief and it only comes out while on cross examination that the direction was via mobile phone. He can recall the mobile phone number he was using but did not consider it important, him or the I.O the trace the number of the accused person who was directing him.
15. According to PW2 three persons were involved in this tusk heist – a criminal activity – one of them allegedly gave him directions to the meeting point by through a phone conversation. . The prosecution had the obligation to prove this fact beyond any reasonable doubt. They ought to have done so by producing the name of that accused and the means by which he was directing PW2 because the witness was allegedly driving and taking directions. He stated that he met his two colleagues. They entered our unmarked vehicle and we headed to Chumani while I was directed by one of the accused person. Clearly the accused who was directing him was not in the motor vehicle with him and his two colleagues. It can safely be presumed then that the direction was by mobile phone, then he ought to have given the phone numbers they were using and to produce the phone records. The phone particulars would have been used to forensically specifically fix the location where the alleged directing accused person was at the time of the alleged call. KWS has the capacity to give GPS coordinates of persons found within park without authority. Since every aspect of the charge was denied by the



accused persons, the I.O could easily have obtained the requisite data from the mobile phone of the appellant to place him where PW2 claimed he was and to prove that there was communication between his phone and that of PW2. In fact, it is the lack of proof of these initial facts in the case for the prosecution that, in the words of the learned trial magistrate, begin to read like a novel.

16. According to the witness he met two men – one of whom must have been the one giving directions. No name is given.
17. Allegedly the deal was discussed on the roadside and the ivory was weighed in the bush. Now so many questions arise. These persons were doing something criminal. They did not know the alleged buyer, they had never met him, there is nothing in the evidence of the PW2 to indicate how he got the phone number of the accused person who was direction him so as to enable all these.
18. It is noteworthy that there is contradictory evidence to the issue of weighing the evidence. Though on the cross examination he said they weighed the tusks with a weighing machine belonging to the KWS, that weighing machine that was allegedly used to weigh the ivory in the bush was not produced as exhibit. The witness in his evidence in chief produced two sacks and a rubber band. There nothing on record to show that the tusks were marked for identification in evidence in chief by PW2. It is in cross examination as that the ivory is marked as MFI 1(a) to 1(f).
19. It is also not clear at what point the accused persons were notified that they were under arrest and their rights of the arrested persons explained to them. The witness simply states that after the weighing of the tusks, the three got into the motor vehicle and they headed back to Chumani market, from there the two colleagues who had alighted boarded the motor vehicle and they all proceeded to Mtito Andei police station.
20. PW3 testified that he joinedPW2 on an operation – he and his colleague boarded the motor vehicle driven by PW2 on it was back from the bush and he conducted search of the motor vehicle and recovered the two bags of ivory in the back of the motor vehicle – after the three including PW2 had introduced themselves as KWSofficers.
21. It is noteworthy that PW2 said he was driving a Noah PW3 said he would not recall the make – but that it was a small motor vehicle. He said he had not searched the motor vehicle before it went to the bush with PW2. He said he did not know how the ivory got to the back of the motor vehicle- he said he did not have a weighing scale.

He said the tusks were weighed at the police station when the accused persons were handed over to the Investigating Officer. He said he did not see PW2 label the tusk that were allegedly found with the accused person.
22. He also testified on cross examination that the accused persons and PW2 were the only people at the market at that time and that at 50m away he could identify them in the light of the car and passing bodabodas and other motor vehicles as the persons who stood with Pw2 on the roadside and also boarded the motor vehicle with him.
23. The investigating officer was No. 112117 PC Mwihaki who testified that she took over from the original Investigating Officer PC Kinyua. She established that the matter was reported on 13/10/2017 by PW2 and Others – it is noteworthy that the arrest is said to have happened on 12/10/2017 and the three KWS officers and their catches went straight to the police station. She never visited the scene – there is no evidence that her colleague visited the scene. She simply took over the file from the Investigating Officer on 19/10/2020. It was her testimony on cross examination that she broke into PC Kinyua’s desk to get the police file – that PC Kinyua had not recorded his statement, that there had been an initial Investigating Officer a PC Munyororo who had been transferred and handed over to PC



- Kinyua – that this PC Munyororo had recorded a statement which she read – that his statement did not have anything about the tusks being weighed, she never received any weighing certificate from the Investigating Officer. She could not tell who had marked the tusks (ivory) yet it was the responsibility of the Investigating Officer to mark the exhibits and escort them for analysis.
24. In his defence, the appellant Daniel Kioko Katua told the court that he was with the 2nd accused when they stopped a motor vehicle on the road for a lift and ended up in a KWS operation that led to the home where the 3rd accused who was also arrested. That he saw a sack in the GK motor vehicle that they found in the homestead where A3 was arrested from. That A3 gave the number for DW1 – the area assistant chief who was called to the venue. He testified in the case for the accused persons that he was rang and told to come to the home of A3.
 25. I have carefully considered the case for the prosecution. It is evident that other than the production of the exhibits alleged to have been recovered from the appellant and others, and the prosecution did not place before the court sufficient evidence to warrant the conviction of the appellant.
 26. There is no evidence that he was at the scene where the tusks were said to have been hidden and guarded by A3 – DW1 testified where he found A3. It is only PW2 who knows where the ivory was found and with whom and his colleagues could not have collaborated his evidence that the same was found with the appellant and his co accused. This is because his colleagues only got into the m/vehicle after the three accused persons were in the m/vehicle with the PW2. PW2's colleagues could not say where the ivory came from because they only searched the m/vehicle after the ivory was recovered. The investigating officer ought to have found this fact curio and conducted thorough investigations.
 27. The big break in the chain of evidence was the missing mobile phone records of the alleged calls between the PW2 and the appellant. These would have identified the appellant as that accused who was discussing with PW1 – the fact that the KWS officer chose not to avail that evidence can only draw the conclusion that it was not there and if it was it would not support the case for the prosecution.
 28. The case was not investigated. The Investigating Officer did not record that he weighed and marked the exhibits – there was no weighing certificate, the alleged weighing scale allegedly used to weigh the ivory in the bush was not produced. Other than the testimony of PW1 – there was no investigation by the Investigating Officer. He did not see or use the alleged scale and did not testify in court.
 29. As was stated in *Bhatt v Republic* had the learned trial magistrate scrutinized the evidence of the prosecution's star witness she would have found that it did not add up and would not have placed the accused on their defence. Having done so, there was no reason for the learned trial court to disbelieve the appellant's defence.
 30. Having relooked at the evidence and re-scrutinized the record, I find that the prosecution laid no connection between the appellant and the tusks that were brought to court.
 31. Having found that – I find no reason to deal with the issue of the sentence.
 32. The appeal succeeds – the conviction is quashed, the sentence be and is hereby set aside and the appellant is to be set at liberty forthwith unless otherwise legally held.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 5TH JULY 2023

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MUMBUA T MATHEKA

JUDGE



Court Assistant: Mwiwa

Mr. Tanui for Respondent/State

Appellant present in person

