Lengolei v Republic (Criminal Appeal E058 of 2021) [2023] KEHC 19853 (KLR) (12 July 2023) (Judgment)

Neutral citation: [2023] KEHC 19853 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E058 OF 2021

AK NDUNG'U, J

JULY 12, 2023

BETWEEN

MAYUNGA LENGOLEI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(From original Conviction and Sentence in Nanyuki CM Criminal Case No 1472 of 2017– L. Mutai, CM)

JUDGMENT

1. The Appellant , Mayunga Lengolei, and his co-accused were convicted after trial of being in possession of wildlife trophy contrary to section 95 of the Wildlife Conversation and Management Act (Count II). The particulars were that on the 14/09/2017 at around 2030hrs at Kimanjo area Laikipia North within Laikipia County, jointly were found in possession of four pieces of elephant tusks all weighing 14 kilograms which are trophies of critically endangered wildlife species without a permit.
2. He was sentenced to pay a fine of Kshs.1,000,000/- and five (5) years imprisonment and if unable to pay the fine, to serve an additional one (1) year imprisonment. He was unable to pay the fine hence serving a cumulative sentence of six (6) years imprisonment.
3. The Appellant was aggrieved by the conviction and the sentence hence, his appeal to this court. He filed an amended ground of appeal challenging the conviction and the sentence on the following grounds;
    1. The learned magistrate erred by failing to note that there were other key suspects who were never availed in court.
    2. The learned magistrate failed to note that the prosecution failed to prove the case beyond reasonable doubt.

iii. That the learned magistrate erred by failing to note that no photographs were produced to show that the Appellant handled the tusks at the scene of crime.

iv. That the learned magistrate failed to note that the expert evidence was not watertight.

v. The learned magistrate failed to note that the Appellant was a first offender and a victim of circumstances who deserved a more lenient sentence.

vi. The learned magistrate failed to consider the defence statement.

vii. The learned magistrate failed to adhere to the tenets of a fair trial enshrined under Article 50(2) and 25 of the *Constitution*.

4. He filed written submissions and argued that he was a pillion passenger and he was not in possession of the tusks but one Hassan was the one who was carrying the said tusks on his lap and who the prosecution ignored. That PW1 testified that he did not take photographs of the scene hence there was no proof that he was in possession of the tusks. Further, that dusting was not done to ascertain the person who was in possession of the said tusks. That PW1 and PW2's evidence on the time of the arrest was inconsistent. That the case was not investigated as PW4 confirmed that the investigating officer never recorded any statement. The witnesses denied that the motor cycle carried three passengers including one Hassan who was in possession of the tusks and who appeared to be familiar with the KWS officers. It is submitted that PW4, the investigating officer, admitted that he was not the initial investigating officer and did not interrogate the Appellant which renders his testimony inadmissible since he knew nothing about the case.

5. He further submitted that PW5 testified that she could not tell whether the specimen she tested was the one captured in the photo. That the dates did not tarry since PW5 testified that she received exhibits on 29/09/2017 whereas the report was dated 29/09/2013 which means that a different report was forwarded which had nothing to do with the instant case. That on cross examination by the Appellant's counsel, she changed the date to 27/09/2017. He submitted that he was naïve in court process and that is why he mentioned Hassan only on his defence therefore, it cannot be said that it was an afterthought. He urged the court to review the sentence based on the fact that he is elderly, failing in health, he has reformed and that the trial court applied the wrong principles while sentencing him.

6. The Respondent opposed the appeal. Learned Counsel submitted that the prosecution proved that the Appellant who was a pillion passenger in motor cycle registration number KMCP 615H was carrying a sack on his lap containing elephant tusks. An inventory and the weighing certificate were prepared which the Appellant and his co-accused signed and the Appellant did not dispute the fact that he singed the inventory. That PW5 verified that the tusks were elephant tusks and the Appellant was not in possession of a permit. That there was no need of photographs since an inventory was produced which the Appellant had duly signed. That the issue raised by the Appellant on inconsistency on the time of the arrest is minor, does not cause prejudice to the Appellant and are inconsequential to the conviction and the sentence. That there was no discrepancy on the dates on the report. That the Appellant's defence was a mere denial and afterthought since he introduced a third party namely Hassan on defence stage. That the issue that he was naïve to court's procedure does not hold water since he was represented by a counsel throughout trial. On the sentence, the counsel submitted that the sentence was legal and the Appellant did not proffer any reason for the interference with the discretion of the trial court and that the trial court duly considered the Appellant's mitigation. Counsel urged this court not to interfere with the same.

7. This being the first appellate court, it is my duty to re-evaluate the evidence recorded by the trial court and reach my own independent findings and conclusions as to whether or not to uphold the decision of the trial court. See *Okeno v Republic* [1972] EA 32.

8. I have in that regard read and considered the evidence adduced at the trial court. I have analyzed the same to enable this court reach its own independent findings bearing in mind that I never saw or heard the witnesses testify and I have accordingly given due allowance for that fact. I have had due regard to the submissions and the authorities tendered by the parties.

9. The case before the trial court was as follows. PW1 CPL Samuel Kihara testified that on 14/09/2017, they were informed that some people were in possession of wildlife trophies near Kimunyo area and where the sale of the said trophies was to take place. Accompanied by his two other colleagues, they laid an ambush at the said area and at about 6:30pm, a motor cycle registration no. KMCP 615H, green in colour appeared with two people. The pillion passenger, the Appellant, was carrying a sack on his laps. They stopped them and searched the sack and they recovered four horns which they suspected to be elephant tusks. They were in a sisal sack and another white sack. He prepared an inventory which was signed by the Appellant and his co-accused. They weighed the horns which were 14kgs and prepared a certificate. He stated that he had been informed about the registration number of the motor cycle. The accused did not have a permit. He identified the four tusks, the sisal and white sacks and the motor bike. He also identified the weighing certificate and the inventory.

10. On cross examination he testified that he did not know whether there was a buyer and that he never took the photographs. He testified that he did not know someone by the name Lenyausi.

11. PW2,Ranger Stanley Lekalale, stated that he accompanied PW1 to the scene. A motor cycle approached and stopped and they arrested two people. PW1 recovered a sack and upon searching it, it had suspected elephant tusks. The tusks were in a brown sack but stuffed in a white sack which he identified before the court. He also identified the tusks. An inventory was prepared and a weighing certificate which was signed by the Appellant and his co-accused. The Appellant was a pillion passenger and he was carrying the said sack. They did not have a permit.

12. On cross examination he stated that they arrested them at about 7-8:00pm. He denied knowing Lenyausi.

13. PW3 Ranger Josphat Mengich testified that they laid an ambush at a route near Kimanju and they waited for motor cycle registration number KMCP 615H which they were informed was suspected to be carrying ivory tusks. At around 8:30pm, the motor cycle arrived and it was stopped by PW1, it had two passengers. The Appellant was a pillion passenger and he was carrying a brown sisal sack and inside the sack there were two tusks and the white sack had two tusks as well. He identified the two sacks, the four tusks and the motor bike. He stated that the accused persons did not have a permit.

14. On cross examination, he stated that he did not know the informer and that he did not know one Nyeusi. Photographs were not taken.

15. PW4 PC Kipkorir Sang testified on behalf of the Investigating Officer who was on transfer. He produced the white and brown sacks as Pexhibit 1 and 2, the four elephant tusks as Pexhibit 3a-d, the inventory which was signed by both accused persons and the officers as Pexhibit5, a weighing certificate which was signed by the accused and the officers as Pexhibit 6, exhibit memo forwarding the tusks to National Museum of Kenya Pexhibit7 and the motor cycle as Pexhibit4.

16. On cross examination he testified that he did not investigate the matter and did not interrogate the accused persons. He stated that the former Investigating Officer never recorded statements. He stated

that the exhibit memo was not dated but had stamp but it was sent to Kenya Museum on 26/07/2017 but the date of the receipt was not clear.

17. PW5, Esther Nguta was a Research Scientist from National Museum of Kenya. She testified that on 29/09/2017, she received four exhibits and she was requested to identify them. Using morphological analysis, her findings were that they had a diamond granite found only in elephant ivory. They were also compared with other ivories at the Museum. She testified that exhibit 1 and 3 matched and could be from the same elephant. Her conclusion was that the 4 tusks were elephant tusks. She produced her report as Pexhibit8.

18. On cross examination, she testified that she received the exhibit memo on 27/09/2017 which she signed on the same date. That the report did not contain her credentials and the method that she used. She stated that she used microscope and measurement in analysis and she did not extract any specimen from the exhibit. That she did not do DNA since the methods she used were satisfying. She stated that the exhibits were not in court but she identified the photographs.

19. The Appellant in his sworn defence testified that on 14/09/2017, he met Hassan who needed a boda boda to take him to Kimanjo area and he took him to the 1st accused. Hassan had a luggage and he was to meet his people at Kimanjo. He stated that they were to be paid at Kimanjo. He did not know what Hassan was carrying. On their way, they came across vehicles and Hassan wanted to know whether they were his people but they were arrested. He denied handling elephant tusks and stated that he was not arrested with the tusks. He stated that he was not photographed with the tusks.

20. On cross examination, he testified that he did not own the subject motor cycle and their job was to drop Hassan at Kimanjo. He confirmed that they had a luggage on the motorbike which had elephant tusks. On re-examination, he testified that Hassan approached him in order to get him a rider and he had no idea that they were carrying elephant tusks. He stated that he did not know the source of the tusks.

21. That was totality of the evidence before the trial court. The only issue for determination is whether the case against the Appellant was proved to the required standard and whether the sentence meted was lawful.

22. The Appellant was accused of contravening the provisions of section 95 of the *Wildlife Conservation and Management Act* which provides thus;

> Any person who, without a permit or exemption granted under this Act in relation to a species not specified under section 92—
>
> (a) kills or injures, tortures or molests, or attempts to kill or injure, any wildlife species;
>
> (b) deals in a wildlife trophy;
>
> (c) deals in a live wildlife species;
>
> (d) is in possession of a wildlife trophy or live wildlife species; or
>
> (e) manufactures an item from a wildlife trophy, commits an offence and shall be liable on conviction to a fine of not less than one million shillings or a term of imprisonment of not less than twelve months or to both such fine and imprisonment.

23. The above section provides for distinct offences and the charge did not indicate which sub-section the Appellant contravened. However, the particulars were clear that he was facing an offence of being in possession of wildlife trophies.

24. To proof the offence, the prosecution had a duty to proof that the Appellant was in possession of the wildlife trophy without a permit. On the question of possession, it involves having a degree of physical control over the trophies, with the person in control knowing that the trophies are in his control. See Mativo J in *Peter Mwangi Kariuki v Republic* [2015] eKLR where the judge held that;

> " In my view, possession includes two elements; namely being in physical control of the item and knowledge of having the item. To be guilty of possession, an accused person must be shown to have knowledge of two things, namely, that the accused knew the item was in his custody and secondly he knew that the item in question was prohibited. A person has possession of something if the person knows of its presence and has physical control of it, or has the power and intention to control it."

25. The evidence before the trial court was that the Appellant was on board motor cycle registration number KMCP 615H as a pillion passenger. They were stopped by PW1, PW2 and PW3. They all testified that the Appellant was in possession of a sack which was on his lap. The sack was searched and the witnesses recovered four tusks from a white sack that was inside the brown sack. They suspected the tusks to be elephants' tusks. I am persuaded that possession was proved to the required standard because the Appellant was carrying the sack containing the tusks on his lap. He was in physical control of the tusks.

26. The witnesses further testified that the Appellant did not have a permit and none was produced by the Appellant to show that he was licenced to handle the tusks. PW5 confirmed that she examined the items and confirmed that they were elephants' tusks, from two different elephants. Elephant's tusks are trophies within the definition in section 3 of the Act. There is nothing on record to rebut this evidence.

27. The Appellant however faulted the report on account that PW5 testified that she received the exhibits on 29/09/2017 whereas her report is dated 29/09/2013. This is not the case as the report which was produced as Pexhibit8 is dated 27/09/2017 and the exhibit memo which was produced as Pexhbit7 is dated 26/09/2017. Though PW5 had testified that she received the exhibits on 29/09/2017, she confirmed on cross examination that it was on 27/09/2017. This was just a confusion on dates.

28. The Appellant further argued that photographs were not taken at the scene to proof that he was in possession of the elephant's tusks. He also argued that dusting was not done. As the prosecution counsel argued in her submissions, this does not hold water since an inventory was prepared which the Appellant signed. Furthermore, there is no legal requirement that photographs must be taken at the scene. The Court of Appeal in *Munene v Republic* (Criminal Appeal 2 of 2017) [2022] KECA 519 (KLR) (28 April 2022) held that;

> " As such, notwithstanding that no inventory or photographs were taken at the scene of arrest at Kutus, this did not infer that there was no cannabis in the motor vehicle. This is because the three police officers at the scene confirmed under oath that cannabis was found in his motor vehicle, and this is what led to his arrest."

In the case of *Brian Momanyi & 2 other v Republic* [2020] eKLR W. Musyoka J held that;

> " He argued that no photographs were taken of the scene of crime. There is no legal requirements that the same be taken. It may be prudent in certain cases for photographic

evidence to be taken, but it is not a mandatory requirement. The most critical evidence is the oral statement of the witness, which may be supplemented by other information, either through documents, pictures or articles. The failure to rely on pictorial evidence was, therefore, not of any consequence."

29. The Appellant further argued that PW1 and PW2 evidence on time of arrest was inconsistent. PW1 testified that they arrested the Appellant at around 6:30pm whereas PW2 testified that it was around 7-8:00pm. To me, the extent of discrepancy is inconsequential. It does not negate the fact that he was arrested in possession of the tusks. As was noted by the Uganda Court of Appeal in *Twehangane Alfred Vs Uganda*, Crim. App. No 139 of 2001, [2003] UGCA, 6 it is not every contradiction that warrants rejection of evidence. As the court put it:

> "With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

30. The Appellant further argued that his defence that Hassan was the one carrying the alleged tusks was ignored and was termed as an afterthought by the trial court. He submitted that he was naïve of court procedure and that is why he mentioned a third party at defence stage. This is not factual since the Appellant was represented by a counsel throughout the trial. The trial court rightly rejected the Appellant's defence by terming it as an afterthought. The Appellant's defence did not oust the prosecution evidence.

31. The final issue is on the sentence. The Appellant was sentenced to both the fine of Kshs.1,000,000/- and five (5) years imprisonment and if unable to pay the fine, to serve an additional one (1) year imprisonment. He was unable to pay the fine hence serving a cumulative sentence of six (6) years imprisonment.

32. He argued that the trial court applied the wrong principles while sentencing him, that the sentence was harsh and excessive and that the amount of fine was exorbitant since he was a mere herder. He submitted that he is elderly and failing in health and that he has reformed and he is now a church elder at the prison and has recently engaged in adult classes. He urged this court to consider a non-custodial sentence.

33. Sentencing is at the discretion of the trial court. The principles upon which an appellate Court will act in exercising its discretion to review or alter a sentence imposed by the trial court were settled in the case of *Ogolla S/o Owuor v R* [1954] EACA 270 that:

> "The Court does not alter a sentence unless the trial Judge has acted upon wrong principle or overlooked some material factors. Typically as held in *Shadrack K Kogo v R* Cr Appeal No 253 of 2003, the Court of Appeal said: "Sentence is essentially an exercise of discretion by the trial Court and for this Court to interfere, it must be shown that in passing the sentence, the sentencing Court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (*Sayeka v R* [1989] KLR 306)."

34. I find no cogent ground upon which to invite my interference with the sentence.

35. With the result that the appeal fails in its entirety and is dismissed.

DATED SIGNED AND DELIVERED AT NANYUKI THIS 12TH DAY OF JULY 2023

A.K. NDUNG'U

JUDGE