



**Republic v Othim & another (Criminal Appeal E035 of 2022)  
[2023] KEHC 20813 (KLR) (20 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20813 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT HOMA BAY  
CRIMINAL APPEAL E035 OF 2022**

**KW KIARIE, J  
JULY 20, 2023**

**BETWEEN**

**REPUBLIC ..... APPELLANT**

**AND**

**NEHEMIAH OJWANG OTHIM ..... 1<sup>ST</sup> RESPONDENT**

**TOBIAS OYUGI OLOO ..... 2<sup>ND</sup> RESPONDENT**

*(From the original conviction and sentence in Criminal case No.1173 of 2021 of the Chief Magistrate's Court at Homa Bay by Hon. J.M. Nang'ea–Chief Magistrate)*

**JUDGMENT**

1. Nehemiah Ojwang Othim and Tobias Oyugi Oloo, the respondents herein, were acquitted of the offence of possession of wildlife trophy contrary to section 92 (4) of the Wildlife Management Act, 2013.
2. The particulars of the offence were that on the 5<sup>th</sup> December, 2021 in Kagan Location, Rangwe sub county, within Homa Bay County jointly with others not before court were found in possession of two pieces of rhino horns weighing 1.5 kilograms valued at Kshs. 2 million.
3. The appellant was dissatisfied and has appealed against the acquittal. The following grounds of appeal were raised:
  - a. That the learned trial magistrate erred in law and fact in disregarding the prosecution's evidence.
  - b. That the learned magistrate erred in law and fact in acquitting the respondents on the basis of minor contradictions.



- c. That the learned magistrate erred in law and fact in failing to make a determination on whether the respondents were found in possession of game trophies.
  - d. That the learned magistrate erred in law and fact by acquitting the respondents on the basis of a defect in the charge sheet which defect was curable under the law.
  - e. That the learned trial magistrate erred both in fact and law by relying on extraneous facts which did not form part of the proceedings.
4. The respondents opposed the appeal and contended that the appeal lacks merit.
  5. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of *Okeno vs. Republic* [1972] EA 32.
  6. The facts of the prosecution case were briefly as follows:
 

Some officers from KWS received some information from an informer of some two men who were suspected to be in possession of some game trophy. They proceeded to Kagan and were in constant communication with the informer who directed them to the suspects. According to the KWS officers, their informer was also in communication with the suspects for he duped them that he was sending a buyer of the game trophy.
  7. We do not have an Act known as the Wildlife Management Act, 2013. An Act of Parliament that provide for the protection, conservation, sustainable use and management of wildlife in Kenya and for connected purposes is known as the *Wildlife Conservation and Management Act*, 2013. If we assume that this is the Act the prosecution meant, I find that section 92 (4) of the *Wildlife Conservation and Management Act*, 2013 is non-existent.
  8. This, in my view is a serious error which is not curable and section 382 of the Criminal Procedure Code. The respondents ought to have been charged under an existing Act and all particulars of the offence included. As was observed by the trial court, if we were to assume that section 92 (4) of *Wildlife Conservation and Management Act*, 2013 existed, it would imply any possession of wildlife trophy by any person (including the KWS officers) is illegal. All ingredients that make possession an offence ought to have been included.
  9. The prosecution failed to call two very material witnesses. The informer ought to have been called. It cannot be argued that his identity was being protected. The evidence of Fred Minish (PW2) was that they posed as buyers for their informer had told the suspects of persons who were going to buy the trophy. Calling the informer could not have exposed him for these witness did so and if the suspects were the culprits, they knew who informed on them.
  10. The taxi driver was a very material witness considering what defence the respondents proffered. The Court of Appeal in the case of *Bukenya vs. Uganda* [1972] EA 549, (Lutta Ag. Vice President) held:
 

The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.



11. From the foregoing, I find that the acquittal by the trial magistrate cannot be faulted. The appeal is accordingly dismissed.

**DELIVERED AND SIGNED AT HOMA BAY THIS 20<sup>TH</sup> DAY OF JULY, 2023**

**KIARIE WAWERU KIARIE**

**JUDGE**

