Kitio v Republic (Criminal Appeal 97 of 2021) [2023] KEHC 21189 (KLR) (3 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21189 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL APPEAL 97 OF 2021

AC MRIMA, J

AUGUST 3, 2023

BETWEEN

JOSEPHAT LOPOWON KITIO .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal arising from the conviction and sentence of Hon. V. Karanja (Principal Magistrate) in Kitale Chief Magistrate's Court Criminal Case No. 4728 of 2018 delivered on 16 th November, 2021)

JUDGMENT

Background:

1. The appellant herein, Josephat Lopowon Kitio, (hereinafter referred to as 'Josephat') was charged alongside one Adison Mirenga Wanjala, with the offence of dealing in wildlife trophy of an endangered species contrary to section 95 as read with section 105 of the *Wildlife Conservation and Management Act*. The particulars of the offence were that on October 17, 2018 at Junction Inn Hotel, Makutano within West Pokot County with others not before court were found dealing in wildlife trophies namely six (6) pieces of elephant ivory weighing 64kgs and with street value of Kshs 6,400,000/= in a motor vehicle registration number KAN 213S without a valid permit from Director of KWS.

2. When the accused were arraigned before court, they pleaded not guilty to the charge. After a full trial, both accused were found guilty and convicted as charged. They were sentenced to 5 years' imprisonment.

3. The court further ordered that the exhibits be dealt with in accordance with section 105 of the *Wildlife Conservation and Management Act*.

The Appeal:

4. The appellant was aggrieved by her conviction and sentence, hence the instant appeal. He was represented by Counsel on appeal.

5. The petition of appeal raised eight grounds impugning the trial court's findings. The appellant mainly challenged the evidence leading to the conviction and the sentence and argued that the offence was not proved. He prayed that the appeal be allowed.

6. Parties were directed to file written submissions in hearing the appeal. Both complied. The rival submissions urged the parties' respective positions and referred to various decisions in asking the court to find in their favour.

Analysis:

7. This being a first appeal, it's the duty of this court to re-consider and to re-evaluate the evidence adduced before the trial court with a view to arriving at its own independent conclusions and findings (See *Okono vs Republic* [1972] EA 74). In doing so, this court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial court and, therefore, it ought to give due regard in that respect as so held in *Ajode v Republic* [2004] KLR 81.

8. In discharging the above duty, the court must appreciate the trial court for summarizing the evidence adduced at the trial so well such that this court hereby adopts the same, by way of reference, as part of this judgment.

9. Having carefully considered this matter, upon perusal of the record and consideration of the decisions referred to, this court finds that there are mainly two issues for determination in this appeal. They are whether the criminal case was proved and if so, whether the sentence was excessive.

10. The court will deal with the issues in seriatim.

Whether the criminal case was proved in law:

11. The prosecution called six witnesses in a bid to establish that the appellant, in conjunction with others, committed the offence that he was charge with.

12. As said, the evidence was aptly captured by the trial court in the impugned judgment. Further, the appellant in his submissions also elaborately captured the evidence.

13. From the evidence, there were sustained communications between the people who had some pieces of ivory to sell and the officers of the KWS who were disguised as buyers. The ivory was intercepted and eventually proved scientifically as such.

14. The link between the prosecution witnesses and 'the sellers', so to say, remain so apparent and was not disturbed by the appellant's defence. To say the least, the appellant admitted that the motor vehicle registration number KAN 213S belonged to him and his wife. He also admitted that he drove the motor vehicle to Makutano on the fateful day.

15. The evidence that the ivory was found at the boot of the car was well corroborated and stands out despite the attempts by the appellant to allege otherwise. To this court, this was a deal gone sour for the appellant and his companions and he had to attempt to wriggle out of the matter. In so doing, he came up with the defence, which, to this court, remains unconvincing and can only be regarded as an aforethought at its best.

16. By way of evidence, this court is satisfied that the ivory was found in the motor vehicle which vehicle was in control of the appellant and his co-accused. It is of importance to note that there is uncontroverted evidence that the appellant and his co-accused met PW2 in the hotel and even agreed on the price per kilogram. It was upon that agreement that the appellant and his co-accused left in the motor vehicle to Makutano and picked the pieces of ivory. They were arrested as they were showing them to PW2 before she would pay them.

17. There is also sufficient evidence by way of Mpesa statement confirming that the appellant's co-accused was the agent in the sale and even sent money to PW2 for fuel just to cushion her in the event the deal did not materialize.

18. The trial court, properly so, defined what possession entail in law and carefully demonstrated how the appellant and his co-accused were legally in possession of the pieces of ivory. The court also went ahead and confirmed that the recovered pieces were ivory and as such game trophies and wrapped it up with a finding that, indeed, the appellant and his team, were dealing in the game trophies without a valid dealer's licence.

19. This court is not convinced to find that the trial court erred in the manner it analyzed the evidence. The court only buttresses the position that the conviction was sound in law and ought not to be disturbed.

20. Consequently, the appeal against the conviction is hereby dismissed.

The sentence:

21. On the appeal against the sentence, the High Court in *Wanjema v Republic* (1971) EA 493 laid down the general principles upon which the first appellate court may act on when dealing with an appeal on sentence. An appellate court can only interfere with the sentence imposed by the trial court if it is satisfied that in arriving at the sentence the trial court did not consider a relevant fact or that it considered an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate court must not lose sight of the fact that in sentencing, the trial court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate court should be slow to interfere with that discretion.

22. The appellant did not point out how the sentencing court erred in arriving at the sentence. With such an offence at hand, the sentence meted was very reasonable. In fact, this was a case where a stiffer penalty ought to have been granted going by the value of the ivory and the number of elephants that were possibly killed.

23. This court equally finds the appeal on sentence unmerited.

Disposition:

24. On the basis of the above, the appeals against the conviction and sentence are hereby dismissed.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 3RD DAY OF AUGUST, 2023.

A. C. MRIMA

JUDGE

Judgment delivered virtually and in the presence of: -

Mr. Masai, Learned Counsel for the Appellant.

Miss Kiptoo, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Regina/Chemutai – Court Assistants.