



**Munee & another v Republic (Criminal Appeal E104 & E105 of 2022
(Consolidated)) [2023] KEHC 22693 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22693 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E104 & E105 OF 2022 (CONSOLIDATED)**

**TM MATHEKA, J
SEPTEMBER 22, 2023**

BETWEEN

THOMAS WAMBUA MUNEE 1ST APPELLANT

MORRIS MULINGE MUTUA 2ND APPELLANT

AND

REPUBLIC RESPONDENT

*(From the original conviction and sentence of Hon. B.N. Ireri (SPM) in Makindu Senior
Principle Magistrate's Court Criminal Case No. 28 of 2020 delivered on 16th August 2022)*

JUDGMENT

1. The appellants were charged with the offence of dealing in a wildlife trophy contrary to section 92(2) of *Wildlife Conservation and Management Act* 2013. The particulars of the offence were that on the 31st day of December 2019 at Makindu Township, Makindu Location in Makindu Sub County within Makueni County, the appellants were found dealing in a wildlife trophy namely elephant tusks weighing 5 kgs with approximate value of kshs 500,000 without authority from Kenya Wildlife service director general.
2. After a full trial, the learned trial magistrate convicted and sentenced them to 7 years' imprisonment.

The Appeal

3. Aggrieved by that decision, the appellants filed separate appeals and listed 10 similar grounds as follows;
 - a. That they pleaded not guilty to the charges.
 - b. That the trial magistrate erred in law and fact by relying on inadmissible hearsay testimony by the witnesses who actually testified to the prejudice of the appellant.



- c. That the prosecution failed to call crucial witnesses especially the informer thus rendering the conviction unsafe.
 - d. That the trial magistrate failed to test the evidence of the prosecution which was riddled with discrepancies and inconsistencies and lacked probative value to warrant a conviction.
 - e. That the trial magistrate erred in law and fact by discounting and not considering the defense thus giving a harsh and excessive sentence in the circumstances.
 - f. That the trial magistrate erred in law and fact by failing to find that the prosecution ought to prove its case beyond reasonable doubt as required by law and not beyond any shadow of doubt.
 - g. That the trial magistrate erred in law and fact by shifting the burden of proof to the appellants.
 - h. That the trial magistrate erred in law and fact and misdirected himself by convicting the appellants on the purported identification evidence by PW1 without ruling out altogether the possibility of mistaken identification more so in view of the prevailing circumstances as alleged scene of crime.
 - i. That the trial magistrate erred in law and fact as he deliberately overlooked that the witnesses gave false evidence despite the fact that they were under oath to tell the truth and also overlooked the cross examination of the defence counsel which was biased and in favour of the prosecution.
4. The appeal was canvassed through written submissions.

The Appellants' Submissions

- 5. On grounds (a) and (b), they submit that the evidence was riddled with discrepancies and inconsistencies and was not sufficient to justify a conviction.
- 6. On ground (c), they submit that the prosecution failed to call the informer yet he was a crucial witness. They contend that before drawing an inference of guilt based on circumstantial evidence, it is necessary to ensure that there are no other existing inference that would destroy or weaken the inference.
- 7. On ground (d), they submit that during their cross examination, they averred that they did not know each other yet the trial magistrate did not rule out the possibility of mistaken identification. That the 1st accused person denied being in the company of the other accused persons and stated that she was arrested among 4 other people yet the prosecution availed 3 accused persons. They submit that the evidence of PW1 and 2 is contradictory with regard to whether they (appellants) were walking or standing at the time of their arrest.
- 8. On ground (e), they submit that their cogent and plausible sworn defence was rejected without cogent reasons.
- 9. On grounds (f) and (g), they submit that no inventory was prepared for them to sign and no photographs or videos were taken. They contend that the recovered items were not dusted for fingerprints in order to confirm that they handled them. They submit that an accused person should only be convicted on the strength of the prosecution case and not on the weakness of his defense.
- 10. On grounds (h) and (1), they submit that apart from the two witnesses stating that the three accused persons were arrested together and charged jointly as per the charge sheet, there was no evidence to show or indicate that the accused persons knew each other during their arrest. They submit that



there was contradiction as to the person who opened the bag containing the elephant tusk. Was it the prosecution witnesses or 1st appellant? They cite the case of J.O.O –vs- R (2015) eKLR where the Court held that;

“Whereas a Court of law is always called upon to make decisions or inferences on some set of circumstances, such courts should endeavor to make such decisions or inferences on the basis of available evidence as adduced before it and it ought to be slow in making assumptions not supported by facts as tendered before Court.”

Submissions by the Respondent

11. The State, through Prosecution Counsel Margaret Muraguri, has identified the following as the issues for determination;
 - a. Whether the prosecution proved its case beyond reasonable doubt.
 - b. Whether the sentence is fair and proportionate.
 - c. Whether this Court should review or vary the sentence.
12. On issue (a), she submits that the prosecution’s evidence shows that the appellants were caught re-handed dealing with an elephant tusk without a license. She contends that the appellants did not deny being at the scene at the time of the offence but they have given a different version of explanations which are neither corroborated nor supported by documentary evidence. She relies on the case of James Makere Dullu –vs- Republic [2020] eKLR where the Court held that;

“ 30. The Learned Trial Magistrate heard the oral evidence of the Prosecution Witnesses. Their account was corroborated by both Defendants to a point. In the main the Defendants did not deny what happened as to time, place and the production of elephant tusks but they seek to give different explanations of why they were party to those events. The First Accused said he was an informer and the Second Accused claimed to be a passerby. Their uncorroborated evidence was denied and not believed...”
13. On issue (b), she relies on section 92(2) of the [Wildlife Conservation and Management Act](#) for the submission that 7 years imprisonment is the minimum sentence prescribed by law. She cites the case of Jackson Lochibal –vs- Republic [2022] eKLR where the Court held that;

“...Once the trial court decided, as it did, that the Appellant deserved a custodial sentence, its hands were tied by the law as to the minimum number of years it could award him. In this case it was seven (7) years imprisonment, and that is what he got!...There is absolutely no reason for this court to interfere with that minimum term of imprisonment (by law) that the Appellant was awarded. I find no merit in this appeal against sentence. It is hereby dismissed. It is so ordered...”
14. She submits that, in sentencing the appellants to 7 years in jail, the trial Court took into account all relevant factors including the fact that elephants are an endangered species and should be protected at all costs.



15. On issue (c), she submits that this Court should not disturb the trial Court sentence unless it is found to be illegal and manifestly oppressive. She has cited the case of Benson Nkaramata Sakita –vs-R [2018] eKLR where the Court held that;

“The principles upon which appellate court will act in exercising of its jurisdiction to review sentences are firmly established...The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless as was said in James v Republic 19 EACA 147, “it is evident that the judge has acted upon some wrong principles or over looked some material factor. To this, we would also add third criteria, namely that the sentence is manifestly excessive in view of the circumstances of the case”

16. Having looked at the grounds of appeal, the entire record and the appellants’ submissions, it is my considered view that the only issue for determination is whether the prosecution proved its case beyond reasonable doubt.

Duty of Court

17. It is now settled that the duty of a first appellate Court is to scrutinize the evidence on record, make its own findings and draw its own conclusions giving due allowance to the fact that the trial Court had the advantage of seeing and hearing the witnesses.

Proceedings before the trial Court

18. PW1 was Suleiman Kombo Mwatembo, a KWS Ranger based at Chyulu National Park. He testified that on 31/12/2019 at around 7.30pm, he was at Mikururo camp when the officer in-charge, Mohamed Hamisi, informed him that he had intelligence about some people, in Makindu near New York club, who were looking for buyers of wildlife trophy. He proceeded to the scene with his colleagues Shadrack and Olesajuska where they posed as buyers and arrested the appellants. He said that it was the 2nd Appellant who had the bag containing the elephant tusk. He identified the tusk, a dog like animal skin, nylon paper bags and a black bag.
19. PW2 testified that he was No. 6026 and an employee at Big Life Conservation. On 31/12/2019 at 7.30pm, he got information that that there were some people in possession of wildlife trophy. He proceeded to Makindu with driver Shadrack and Kombo. They went near New York club where they met three of the people and posed as buyers. The 2nd Appellant carried a bag which had an elephant tusk and dog skin. They arrested them and took them to Makindu police station.
20. PW3 was Dr. Ogeto Mwebi, a Senior Researcher at Kenya National Museum with over 31 years of experience. His office received a request vide an exhibit memo dated 28/10/2020 concerning the remains of an animal species. He was to analyze and determine what the species was. He conducted scientific and physical examination and determined that it was a tusk from an elephant. He compared it with other tusks at the museum and the microscopic images showed that it had a unique pattern only found in elephant tusks. He produced his report as P. Exh 6.
21. PW4 was Corporal Mike Yego. He testified on behalf of the investigating officer who had been transferred and produced the elephant tusk, dog skin, black bag and exhibit memo form as P. Exh 1-5.



22. The prosecution closed its case and the learned trial magistrate ruled that a prima facie case had been established. Consequently, the appellants were placed on their defence whereupon they elected to give unsworn evidence and not to call any witnesses.
23. The 1st Appellant testified that he was a resident of Kilome Location, Mukaa Sub-Location. That on 29/12/2019, he ferried sugarcane using a vehicle and arrived in Makindu at 3.00pm. He went to the lower market and arrived at around 5.00pm. 30/12/2019 was market day. He sold his sugarcane and closed. On 31/12/2019, he sold his sugarcane using a wheelbarrow and closed at around 5.00pm. He had supper and since it was late, he decided to sleep over. He went to a bar, took some beer and proceeded to his sleeping place. As he walked through a path, he met some officers who pulled, beat and handcuffed him. He saw more than 10 people. A police vehicle arrived and they were taken to the police station. He was then charged together with others.
24. The 2nd Appellant testified that he is a resident of Kiunguani. His occupation was computer work and a barber shop at the market. On 31/12/2020, he went to Makindu with the intention of going to church. At around 7.00pm, they left church and parted with his cousin. He went to buy miraa near the tarmac but the shop was closed. He was directed to another place and while on his way, he met some people running and was arrested together with them. They were taken to Makindu police station. They asked his name and an officer arrived carrying a black paper bag. The officer asked if the bag belonged to him and he responded in the negative. He saw the other 2 accused persons who had been forced to kneel down. They forced him (2nd Appellant) to hold the bag but he refused. A police officer ordered him to open the bag at gunpoint and he complied. There was a horn resembling a cow horn and a sweater. The other two accused persons denied the bag and they were all taken to the police station where they were charged.

Analysis

25. Upon Considering all the evidence and submissions the issue for determination is whether the prosecution established the charge beyond a reasonable charge to warrant the conviction and sentence against each of the appellants.
26. The prosecution relied on the evidence of PW1 and PW2 to prove that the two appellants were found dealing with the elephant tusks.
27. It is not in dispute that there was an elephant tusk involved because one was produced in court as evidence. What is in dispute is whether the prosecution proved beyond a reasonable doubt that the appellants committed the offence they are charged with.
28. PW1 told the court that his boss one Mohammed Hamisi told him that he had intelligence that there were people at New York Club looking for buyers for wildlife trophy. According to his testimony he proceeded to the scene with two other persons and saw three people approaching their motor vehicle. He said he had a description of the three, a brown woman, a tall dark slim man an old man with dark completion. He approached them pretending to be a buyer and the 2nd accused produced a bag which he opened, to review a dog skin, and elephant tusk.
29. Contrary to this PW2 – an unknown person going only by number testified that he was with PW1 and one Shadrack. That it is them who got the intelligence that there were some people selling wildlife trophy. That they went directly to New York Club where they met the three outside and that it was PW1 who opened the bag and revealed the elephant tusk. He said the bag was carried by the 2nd accused.
30. PW4 the Investigating Officer did not conduct any investigation but adopted the statements of the two PW1 and PW2 and bonded the expert witness.



31. Before even looking at the defence, it is evident from the testimony of PW1 and PW2 that the case for the prosecution had serious problems. There is no evidence on the record that the said No. 6026 was one of the persons in the company of PW1. Secondly there is the issue of the descriptions of the alleged suspects. they allege to have been given the same by an unknown person. From the description given, there was nothing peculiar that could have pointed at the accused persons and no one else. The descriptions are so general they could have fitted virtually anyone.
32. The record shows that the 2nd accused gave a sworn statement of defence. He explained where he was that day and how he came to be found at the scene where he was arrested. He was on his way to buy miraa, there were people running, he also run, fell, and was arrested. He was made to hold the bag.
33. The 3rd accused gave unsworn statement and also explained why he was at that place.
34. It is noteworthy that the learned trial magistrate believed the explanation given by the 1st accused but not the ones given by the 2nd and 3rd accused yet according to the record, PW1 was categorical that upon arrival and opening the bag the 2nd accused to show what was inside, it was the 1st accused who went and negotiated the purchase price of the trophy.
35. If this piece of evidence was incredible, then the rest of the case for prosecution could not have been credible because the 2nd denied possession of any tusk and 3rd accused said he did not know why he was arrested.
36. If there was no tusk over which the 1st accused was negotiating the price on, the begging question is on what basis were the co accused convicted? That raises a question as to how then were the 2nd and 3rd found to have been in possession of the wildlife trophy? The State is not appealing the acquittal of 1st accused hence evidence that of the alleged intelligence of the three persons working together to sell an elephant tusk becomes doubtful and the charge of possession as between 2nd and 3rd accused cannot stand because the 3rd accused just like the 1st accused was not found with anything. Whatever that was allegedly found is said to have been found with 2nd accused hence from the record there is nothing to tie the 3rd accused to the offence he was convicted of because even under cross examination PW1 told the court that the 3rd accused was only holding his jacket and nothing else.
37. There is no corroboration of the testimony of PW1, and it is not known who PW2 was. The person who allegedly received the intelligence that PW1 relied on is not the same as the one who gave intelligence to PW2 or in any event both did not get intelligence from the same person.
38. In the end the big question is what is there to show that A2 was found with the tusk save the unreliable evidence of PW1, and PW2 put together?
39. Having carefully considered all the evidence and submissions on record. My humble view is that had the learned trial magistrate subjected the evidence to scrutiny the gaps in the case for the prosecution would have been emerged and it would not have been found sufficient to warrant the conviction.
40. With respect to the sentence, the learned magistrate's hands were tied by the law as it provides a mandatory minimum sentence.
41. In the circumstances I find that the appeal succeeds on the conviction. The conviction is quashed; the sentence is set aside. The appellants are to be set at liberty unless otherwise legally held.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 22ND SEPTEMBER, 2023

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MUMBUA T MATHEKA



JUDGE

CA - Nellima

Appellant - present in person

For State - Ms Omollo

