



Mutea & another v Director of Public Prosecution (Criminal Appeal E038 & E039 of 2023 (Consolidated)) [2023] KEHC 22528 (KLR) (21 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22528 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E038 & E039 OF 2023 (CONSOLIDATED)
TW CHERERE, J
SEPTEMBER 21, 2023**

BETWEEN

JOSEPH NTEERE MUTEA 1ST APPELLANT

EDWARD NYAGA KABURU 2ND APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTION RESPONDENT

*(From the conviction and sentence in Meru Chief Magistrate's Court
Criminal No. 1922 of 2016 by Hon. D.Nyambu (CM) on 09th March, 2023)*

JUDGMENT

1. Appellants and another that absconded before the conclusion of the trial in the magistrate's court were charged with two count as follows:

Count 1

Dealing in wildlife trophy contrary to section 95 of the *Wildlife Conservation and Management Act* 2013. The particulars of the offence being that on 08th October, 2016 at Meru Safari Hotel in Imenti North Sub-County within Meru County were jointly found dealing in 9 pieces of elephant tasks and one elephant bone all weighing 22kgs with a street value of 22 million without a licence

Count 2

Being in possession of wildlife trophy contrary to section 95 of the *Wildlife Conservation and Management Act* 2013. The particulars of the offence being that on 08th October, 2016 at Meru Safari Hotel in Imenti North Sub-County within Meru County were jointly found in possession of 9 pieces of elephant tasks and one elephant bone all weighing 22kgs with a street value of 22 million without a licence.



2. Appellants denied the offence and the matter proceeded to full trial

Prosecution case

3. On 08th October, 2016, officers of Kenya Wildlife Service PW1 Sgt Michael Bett, PW2 CPL Joyce Chepkurui, PW3 CPL Nicholas Munene travelled to Meru after receiving information that one Sammy who was in Meru was in possession of game trophy.
4. PW1 Sgt Michael Bett stated that he was given the number of the said Sammy which was 0721906513 which he called and offered to buy the trophies. The said Sammy turned out to be the Accused that absconded and to confirm they were in communication an Mpesa statement PEXH. 5 was tendered and it revealed that the witness had sent KES. 830/- to the said Sammy. The witness further stated that the said Sammy gave him number 0720261468 which he said belonged to one George whom he introduced as the person in possession of the trophies. He stated that 1st Appellant left the hotel with CPL Munene and when CPL Munene returned in company of both Appellants, a sack containing 10 trophies weighing 22kgs was recovered on the back seat where the 2nd Appellant was seated.
5. PW3 CPL Munene the driver of the vehicle from which Appellants were arrested from stated that while he was travelling with the 1st Appellant allegedly to collect the trophies, he picked 2nd Appellant who was carrying a sack on the way which he placed on the back seat where he also sat and that the sack after being searched was found to contain 10 elephant tasks weighing 22kgs.
6. PW2 CPL Joyce Chepkurui one of the arresting officers stated that 1st Appellant was sitted beside the driver CPL Munene whilst the 2nd Appellant sat on the back seat where there was a sack which upon being opened was found to contain 10 pieces of ivory.
7. PW4 Dr. Ogeto a specialist in animal remains analysis stated that he analysed 10 pieces of animal remains and found that they were 9 elephant tasks and one elephant bone as shown on hos report dated 25th October, 2016 tendered as PEXH. 6.
8. PW5 PC Suela who was one of the arresting officers could only recall that Appellants were arrested in the vehicle PW3 CPL Munene was driving and from which Appellants were arrested and trophies recovered but could not recall who among the two sat where in the vehicle. He tendered as PEXH. 5 an mpesa statement that revealed that PW1 had sent KES. 830/- to the Accused that absconded and the trophies as PEXH. 3.

Defence case

9. 1st Appellant denied dealing or being found in possession of game trophies as alleged by the prosecution witnesses. He stated that he got a lift from PW3 along Giaki-Kiburine Road and that when the 3rd Appellant later boarded the vehicle, he had no luggage with him. He stated that PW3 said that he was unfamiliar with Meru and dropped them at Meru Safari Hotel which he said he was familiar with and it was there that both him and the 2nd Appellant were arrested and Accused that absconded was also bundled into the vehicle. He stated that it was upon arrest that he saw a sack which was later opened at Meru Police Station and he noticed that it contained game trophies which he said he knew nothing about. He denied offering to sell trophies to any of the prosecution witnesses.
10. 2nd Appellant similarly stated he got a lift in the motor vehicle that PW3 was driving and he found the 1st Appellant who was unknown to him sitted on the co-driver's seat. He denied that he had any luggage when he boarded the vehicle. He similarly stated that upon arrival at the hotel, they were arrested and Accused that absconded was bundled into the vehicle. It was his evidence that it was at the hotel that



he first a sack which was later opened at Meru Police Station and he noticed that it contained game trophies which he said he knew nothing about.

11. At the conclusion of the trial, both Appellants were found guilty as charged, convicted and sentenced to serve pay a fine of KES. 2,000,000/- and in default serve 5 years imprisonment in both counts.
12. Appellants were dissatisfied by the decision of the learned trial magistrate, and preferred the instant appeal on the grounds which I have condensed as:
 1. There was duplicity of charges
 2. Proceedings in respect of count 1 were defective for the reason that Appellants were not called upon to plead to the charge after it was amended
 3. The prosecution case was not proved beyond reasonable doubt
 4. Whether the sentences ought to have run concurrently or consecutively
 5. Whether a case has been made for enhancement of sentence

Findings and Determination

13. It is a duty to re-evaluate, re-analyze and re-consider the whole evidence in a fresh and exhaustive way before arriving at its own independent decision. (See Collins Akoyo Okemba & 2 Others vs Republic [2014] eKLR).
14. I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions by the State and the Respondents. I have also considered that Appellants were served with notice of enhancement of sentence.

Duplicity of charges

15. The rule against duplicity provides that the prosecution must not allege the commission of two or more offences in a single charge in a charge-sheet. Such a charge is sometimes said to be duplex or duplicitous. The rule stems from two important principles: firstly, as a matter of fairness, a person charged with a criminal offence is entitled to know the crime that they are alleged to have committed, so they can either prepare and/or present the appropriate defence.
16. In the present case, Appellant were charged with two offences in different counts and there was therefore no duplicity of charges.

Whether proceedings in respect of count 1 were defective

17. Appellants contend that the proceedings in respect of count 1 were defective for the reason that they were not called upon to plead to the charge after it was amended.
18. Section 214 of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya provides for instances where a charge can be amended and what ought to follow once the amendment is allowed. The said section states that:

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- (1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the



charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

Provided that -

- (i) Where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;
- (ii) Where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.

19. Article 50 of *the Constitution* of Kenya provides for the right of an accused person to a fair trial. Relevant to this matter is sub-article (2)(b) and (k) which provides that:

- (2) Every accused person has the right to a fair trial, which includes the right-
 - (b) to be informed of the charge, with sufficient detail to answer it;
 - (k) to adduce and challenge evidence.

20. The right to a fair trial extends throughout the entire trial and is among those rights under Article 25 of *the Constitution* that cannot be limited in any manner whatsoever. It therefore means that any time the trial court allowed an amendment to the charge(s), the Appellant was entitled, as of right, to be informed of the amendment with such details as to be able to answer the amended charge(s) and to be accorded a fresh opportunity to plead to the amended charge(s). Further, the Appellants were to be accorded an opportunity to recall any of the witnesses who had testified before the amendment. That is a constitutional guarantee.

21. The trial court record reveals that on 11th July, 2019, the prosecution amended the first count by substituting the section under which Appellants were charged from Section 84 (b) to Section 95 of the Act. In this case the Appellants were not called upon to plead afresh to the amended charge. charges but were accorded an opportunity to recall any of the witnesses who had testified

22. The Court of Appeal addressed the application of Section 214 of the CPC in Joseph Kamau Gichuki V. Republic (2013) eKLR where the leaned justices stated as follows: -

“Before we leave this point, we would like to observe that the case of Harrison Mirungu Njuguna v. Republic Criminal Appeal No. 90 of 2004 (unreported relied upon by the appellant is not a relevant authority in the present appeal. That case involved amendment of a charge under Section 214 of the Criminal Procedure Code. The Code requires that once a charge is amended, the accused person should be called upon to plead to the amended charge and further entitles him to demand the recall of witnesses who have already testified to give their evidence afresh or to be further cross examined. In that case the charge was amended but the accused person was not called upon to plead to the amended charge. This Court held, correctly in our view, that the trial was substantially defective. The effect of amending the charge was to alter the case that the accused person had to meet. Hence, he had to plead to the amended charge afresh and had to be informed of the right to re-call witnesses to testify on the charge as a mended and to be cross-examined.” (Emphasis added).



23. Applying the law statute and case law to the facts of this case, I find that the amendment in count 1 brought in a complete different set of particulars as it introduced the penalty section which was not in the previous count.
24. The trial court was hence under an obligation to comply with the law by inter alia calling upon the Appellants to plead to the amended charge. The failure on the part of the trial court to so comply therefore infringed on the Appellant's right to a fair trial. That rendered the trial on count 1 was substantially defective and the conviction and sentence cannot stand. (See Joseph Ouma Owino v Republic [2019] eKLR).
25. Having so found, I am left with count 2 of possession of game trophy contrary to section 95 of the [Wildlife Conservation and Management Act](#) 2013.

Whether prosecution case was not proved beyond reasonable doubt

26. It is trite that throughout a criminal trial, an accused person bears no duty to prove his innocence and that the burden is on the prosecution to prove their case beyond reasonable doubt.
27. In Stephen Nguli Mulili v Republic [2014] eKLR the court stated as follows:

“...it is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of DPP V WOOLMINGTON, (1935) UKHL 1 where the court eloquently stated that the “golden thread” in the “web of English common law” is that it is the duty of the prosecution to prove its case. The Kenyan Courts have upheld this position in numerous cases. See Festus Mukati Murwa V R, (2013) eKLR”.
28. In the famous case of Miller v Ministry of Pensions [1947] 2 ALL ER 372 Lord Denning stated with regard to the burden of proof beyond reasonable doubt.

“That degree is well settled. It need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to defeat the cause of justice. If the evidence is so strong against a man as to leave only remote possibility in his favour which can be dismissed with the sentence of course it is possible but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that shall suffice.”
29. In the Nigerian case of Bakare v State (1987) INNLR (PT 52) 579, the Supreme Court stated;

“Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means what it says. It does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability.”
30. In his evidence implicating Sammy the Accused that absconded, Sgt Michael Bett stated that he had not only been in communication with him on cell phone number 0721906513 but had also sent him money as evidenced by an Mpesa statement PEXH. 5 which revealed that the witness had indeed sent KES. 830/- to the said Sammy. In support of his evidence that he had also been in communication with



the 1st Appellant, the witness stated that he had talked to one George whom he identified as the 2nd Appellant on cell phone number 0720261468.

31. 2nd Appellant not only denied that he was George but also denied talking to Sgt Michael Bett cell phone number 0720261468.
32. From the evidence on record, prosecution failed to investigate cell phone number 0720261468 or link it to 1st Appellant and thereby failed to prove that he was the George that offered to sell game trophies to Sgt Bett.
33. Concerning how the game trophies found their way into the motor vehicle that Appellants were arrested from, CPL Munene the driver of the said vehicle stated that he was travelling with the 1st Appellant when 1st Appellant called 2nd Appellant who boarded the motor vehicle carrying a sack from which the trophies were recovered.
34. Both Appellants denied CPL Munene's evidence and stated that they had nothing to do with the sack recovered in the vehicle he was driving. With the uncorroborated evidence of CPL Munene having been controverted by the Appellants, I find that their defence raised a reasonable doubt and it ought to have been given to the Appellants.
35. And even supposing that the sack containing the game trophies were recovered in the motor vehicle that Appellants were arrested from, the main ingredients of the offence of possession was well summarized by in Peter Mwangi Kariuki vs Republic (2015) eKLR as follows:

“Possession includes two elements; namely being in physical control of the item and 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 the presence and has physical control of it or has power and intention to control it.”

36. In this case, the fact that the evidence by CPL Munene was not corroborated leads me to the conclusion that the prosecution case that Appellants had possession of the trophies was not established beyond reasonable doubt.

Whether sentences ought to have run concurrently or consecutively

37. Section 37 of the Penal Code Cap 63 LOK and Section 7.15 of the Sentencing Guidelines Policy provides that in the case of imprisonment in default of payment of a fine, the sentence cannot run concurrently with a previous sentence.
38. It therefore follows that had both counts been proved, the sentences imposed by the trial court would have been lawful.

Enhancement of sentence

39. Section 362 of the Criminal Procedure Code, that if the sentence imposed by the trial Court was illegal or improper, then the High Court has the jurisdiction to re-examine it; and the High Court, by virtue of the provision in s. 364(a) of the same statute, may enhance the sentence if need be.
40. Sentence is essentially a discretionary matter for the trial court but in exercising that discretion, the trial court must consider all the relevant factors. An appeal court, is only entitled to interfere with the exercise of discretion where it is shown that the court whose exercise of discretion is impugned,



has either not considered a relevant factor, or considered an irrelevant factor or that short of these the exercise of the discretion is plainly wrong. (See *Gedion Kenga Maita v Republic* 1997] eKLR).

41. Section 95 of the Act under which Appellants were charged provides that any person convicted under that section would be liable upon conviction to a fine of not less than one million shillings or imprisonment for a term of not less than five years or to both such imprisonment and fine.
42. This section gives the trial magistrate discretion to impose a fine of not less than 1 million and to an imprisonment term of not less than 5 years or to both. Had the appeal not succeeded, this court would in the absence of any aggravating circumstances have had no reason to interfere with the discretion of the trial magistrate concerning the sentences imposed in this matter.
43. From the foregoing analysis, I find that the prosecution failed to prove its case beyond any reasonable doubt and the conviction and sentences cannot be allowed to stand. The appeal on both convictions and sentences is allowed. The convictions are quashed and the sentences set aside. Appellants shall be set at liberty unless otherwise lawfully held.

DATED AT MERU THIS 21ST DAY OF SEPTEMBER 2023

WAMAE. T. W. CHERERE

JUDGE

Appearances

1st Appellant - Present in person

2nd Appellant - Present in person

For DPP - Ms. Rita (PC-1)

