Mwenda & another v Republic (Criminal Appeal E006 & E009 of 2022 (Consolidated)) [2023] KEHC 22397 (KLR) (21 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22397 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E006 & E009 OF 2022 (CONSOLIDATED)

FROO OLEL, J

SEPTEMBER 21, 2023

BETWEEN

RICHARD KAINGA MWENDA ..... 1ST APPELLANT

EPHANUEL NAWIRA KAMUNDE ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

Background

1. The appellant were jointly charged with being in possession of an endangered wildlife trophy without a permit or other lawful exception, contrary to section 92(4) as read with section 105 of the *wildlife conservation and Management Act* 2013. The particulars of the offence were that on 23rd Day of August 2019 at 1340hrs, at Maratati area near Timau Town within Meru County, they were jointly found in possession of an endangered Wildlife Trophy namely six (6) pieces of elephant tasks weighing 17.5 kilograms with a street value of Kshs. 1,750,000 without a permit from the Director General Kenya Wildlife Service.

2. On count II, both appellants were charged with dealing in Wildlife Trophy of an endangered species, without a permit or other lawful exceptions, contrary to section 92(2) as read with section 105 of the *wildlife conservation and management Act*, 2013. The particulars of the offence were that on that 23rd day of August 2019 at around 1340hrs, in Maratati Area near Timau Town within Meru County, they were jointly found dealing in endangered Wildlife Trophy namely six (6) pieces of Elephant Tusks weighing 17.5 kilograms with a street value of Kshs. 1,750,000 using an motor vehicle, Probox Registration Number KCP 604Z white in colour without a permit from the Director General Kenya Wildlife Service.

3. At trial the prosecution called six (6) witnesses and both appellants were placed on their defence. The 1st appellant opted to give sworn evidence and did not call any witness, while the 2nd appellant opted to give unsworn evidence. He too did not call any witness. The trial magistrate did consider all the evidence tendered a found both appellants, guilty of the offence of being in possession of an endangered Wildlife Trophy without a permit or other lawful exception contrary to section 92(4) as read with section 105 of the *wildlife Conservation and Management Act* 2013 and proceeded to convict them as per provision of Section 215 of the Criminal Procedure Code. Both appellants were giving an opportunity to mitigate before sentencing and the trial court fine each appellant Ksh.2,000,000 in default that were to serve five (5) years imprisonment.

4. The 2nd appellant filed Nanyuki High Court Criminal Appeal No. E009 at 2022. When the 1st appellants Appeal came up for hearing on 21st January 2023 the state counsel Mr. Motanya applied to have Nanyuki Criminal Appeal No. E006/2022 to be consolidated with the 2nd appellants appeal being Nanyuki Criminal appeal No. E009/2022 since both appeals emanated from the same judgment. The 2nd appellant did not object to the same of a consolidation order was issued.

Brief Facts

5. PW1 Sgt. Abdi Haden Yusuf testified that he worked with KWS and had been an investigator for 13 years. He received intelligence information that there were two people in possession of Elephant tusks. They were using Motor Vehicle Registration No. KCP 604Z and intended to sell the said tusks to a women at Maritati Centre. They rushed to the scene and laid an ambush. At about 1340hrs, they saw motor vehicle registration No. KCP 604Z Probox, coming from Emboli Power Station. It had heavily rained and the said motor vehicle veered off the road and got stuck in a ditch. They approached the said motor vehicle and found two occupants. The driver was the 1st appellant, while the passenger was the 2nd appellant and both were person he had not known before.

6. PW1 stated that he was accompanied by Rangers Fred, Michael Siongi and R.O Wako. They introduced themselves and asked to search the motor vehicle, therein they found a gunny bag in the boot and when they opened the said gunny bag they found two (2) complete elephant tusks, four (4) small pieces elephant tusks two(2) weighing scales. He asked the appellants to produce a permit allowing them to possess and to transport the said tusks but the appellants did not have any. They arrested both appellants and he called OCS Timau Police Station who sent a team to the scene. They prepared the inventory which was signed by themselves and the accused. The appellants were rearrested and taken to Timau Police Station. PW1 identified the tusks, weighing scale, gunny bags, motor vehicle and the signed inventory. He further produced the signed inventory as Exhibit 6 & 7.

7. In cross examination, PW1 denied that they set up the appellant and insisted they had acted independently based on intelligence report which was not written. The motor vehicle came from Maritati area and they intercepted the motor vehicle within a feeder road, where it had gotten stuck in mud. In the said motor vehicle they found two persons and there wasn't a 3rd person of Somali origin. The possession of the tusks was constructive and the 1st appellant had a duty checking what the passengers had in their luggage. The exhibit Memo was prepared by the investigation office not him. On further cross examination by the 2nd appellant, PW1 confirmed that he too was arrested as he too was found inside the motor vehicle and that there was no 3rd party who was released, nor did the said 3rd party own the exhibits recovered.

8. PW2 Fred Kogen stated that he worked with KWS as a ranger and was deployed in the Rapid Response Unit (RRU). On 23rd August 2019 they were on patrol with Maritati area with his colleagues Ranger Michael and Abdi (PW1), who received intelligence report that motor vehicle KCP 604Z was carrying

elephant tusks. They laid ambush at Maili Tatu Area and as the said motor vehicle approached it got stuck in the mud 100 meters from where they were. They approached the said motor vehicle and found two passengers who were the two appellants herein. They requested to search the said motor vehicle and the 1st appellant opened the boot, which had a gunny bag containing six (6) elephant tusk. Two were full length tusks, while four (4) were in halves. In the said boot there was also a weighing machine.

9. The OCS Timau Police Station was informed and he come to the scene with other officers to re-arrest the appellants. PW2 produced the inventory he signed as Exhibit 5. In cross examination PW2 stated that they converged at the scene at 1.00pm from Isiolo and did not sign out while leaving their station, but he was sure PW1, who was their senior did so on their behalf. He was present while the inspection was done on the boot of the motor vehicle and saw the recovered items. It was his further evidence that the 1st appellant must have known what he was carrying in his motor vehicle. The 2nd appellant too was in the motor vehicle and he too should bear the burden as he too was in possession of the said tusks.

10. PW3 CPL Michael Fundi Siengo also stated that he had worked for KWS for 11 years and on 23rd August, 2019, he was with PW1 and they learnt that there were two persons suspected of being in possession of ivory. They proceeded to Emboli Power Station Area and at about 1.40pm spotted the motor vehicle whose registration they had been given. The said motor vehicle was stuck in some muddy stretch. They approached the motor vehicle and found both appellants therein, upon searching the said motor vehicle boot they found elephant tusks in gunny bags. They arrested both appellants and identified them before court. In total the elephant tasks received were six (6) pieces, two were complete and four (4) others were in pieces, they also received a weighing machine in the boot of the said motor vehicle. As at the time the recovery, the appellants were unknown to him.

11. In cross examination PW3 stated that they were at the scene from midday and it had heavily rained on the said date. They were about 90 metres from where the motor vehicle got stuck and they took approximately two minutes to walk to the said motor vehicle. PW3 further stated that he did not see any third party walk away from the motor vehicle towards Maritati Market and it was the 1st accused who opened the motor vehicle boot when asked to do so. The elephant tusks could not be seen until the sacks were opened. Probox motor vehicle was used to transport goods and there good reason to believe the 1st appellant knew what he was carrying. On further cross examination by the 2nd appellant PW3 stated that he found both appellants inside the car and that was the basis of connecting them with the elephant tusks received.

12. PW4 CPL Samule Kihara stated that he worked for KWS and was a gazette Scenes for Crime Officer, Gazette No. 2936 of 30th January, 2019. He had 19 years work experience. On 23rd August 2019 he was requested by PW1 to go photograph recoveries made at Timau Police Station. On the same day he went and photographed Motor Vehicle Registration No. KCB 604Z – Probox, unmarked Elephant tusks weighing scale and one bag. He marked the photograph as A1 – A 4 and produced them as Exhibit, 7(a) – (f) and the certificate as Exhibit 7(g). in cross examination he confirmed that his only duty was to photograph the said items and did not investigate the case.

13. PW5 Veronicah Onduso testified that she worked with National Museums of Kenya as a Researcher. She was a qualified Environmentalist and held a Master's Degree in Research from University of Nairobi. She had 15 years' experience in Data Collection relating To Identification of Species and Data Management Research. She received an Exhibit Memo on 11th September, 2018 accompanied by six (6) Exhibits marked A1-A6 she looked at their physical characteristics and noted that:

    A1 – was complete with oblique cut marked with longitudinal lines on the surface.

    A2 – was complete with oblique cut marked with longitudinal lines on the surface.

A3 – was incomplete with oblique cut marks, cut at proximal and longitudinal lines towards the end.

A4 – was incomplete with oblique cut marks, cut at proximal and longitudinal lines towards the end.

A5 – was incomplete with oblique cut marks, cut at proximal and longitudinal lines towards the end.

A6 – was incomplete with oblique cut marks, cut at proximal and longitudinal lines towards the end.

14. PW5 further stated that she used microscope examination and observed the longitudinal lines. All the Exhibits had unique feature of being elephant tusks when compared to elephant tasks in their custody at the museum. Further the Schregnam lines – diamond shaped graphs lines cleanly shown at various points of the Exhibits were typical characteristics found in Elephant tusk she concluded that all the Exhibit, were elephant tusks. She prepared her report and produced it as Exhibit 11. She also identified the tasks A1-A6 which were before the court. In cross examination PW5 confirmed that she was not the investigating officer.

15. PW6 Inspector Silas Kiteto testified that he was the in charge crime at Timau Police Station and had worked for 31 years. On 23rd August, 2019 he was assigned this case by the OCS and proceed to the scene of crime where he found that both the appellant had been arrested and handcuffed. They had been placed inside KWS motor vehicle. He found a motor vehicle Probox which was stuck on the mud and he learnt that 6 ivory tusks had been recovered from the suspects. Upon opening the boot of the motor vehicle he indeed confirmed seeing the said elephant tusks and there was also a weighing machine. They rearrested the appellants and took the exhibits to the police station.

16. The motor vehicle, they established belonged to one UASA, and there was a sale agreement presented to show that 1st accused had purchased it. PW6 produced all items previously identified as Exhibits. In cross examination PW 6 stated that he rearrested both appellants and did not see the 1st appellant drive the motor vehicle. The tusks received were in the boot of the Probox motor vehicle and the said tusks were visible from the bag. One did not need to open the bags to see the two long tusks.

17. Both appellants were placed on their defence. The 1st appellant gave sworn evidence and stated that he was a transporter and on 23rd August, 2018 he got up and went to work as usual and used his Probox KCB 604Z to drop passengers between Maritati to Ngarendare. On his way back from Ngerendere he had some passengers who alighted before getting to Maritati. It started to rain and his motor vehicle got stuck in the mud. One of his passengers alighted when a white vehicle came and stopped in front of his motor vehicle. The passenger who disappeared was the owner of the luggage in his boot.

18. The motor vehicle that stopped had policemen who come and arrested him and the 2nd appellant. They opened the motor vehicle boot and there were two luggages (two sacks) he could not tell what was in the luggage as he usually does not check passenger luggages. The said luggages were not his but for his passenger. In cross examination the 1st appellant reiterated that the luggage found in the boot of his motor vehicle were not his and belonged to one of his passengers who got off and left hurriedly on seeing the policemen. He also confirmed the elephant tusks were recovered inside the said bags.

19. The 2nd appellant stated that he was a herdsman and on that material day he was with one "Gitonga" on his motor cycle and alighted when they reahed the muddy road. The 1st appellant saw him and called him to assist him push the stuck motor vehicle. As he did so another motor vehicle came and a lady alighted. The other person he was with asked the driver to open the boot in order for him to pick his

luggage. The 2nd appellant stated that he was innocent and was only assisting the 1st appellant push his motor vehicle. He did not know what was inside the said motor vehicle.

20. The trial magistrate considered all the evidence tendered and proceeded to convict both appellant of the offence of being in possession of an endangered wildlife trophy without a permit or other lawful exemption contrary to section 92(4) as read with section 105 of the *Wildlife Conservation and Management Act*, 2013 and sentence each appellant to pay a fine of Kshs. 2,000,000 and in default to serve five (5) years imprisonment.

21. The 1st appellant did file on Amended Petition of Appeal dated 8th March 2022 and raised eight (8) grounds of appeal namely that:

    a. The learned trial magistrate erred in law and fact by trying and convicting the appellant for an offence that does not exist in law.

    b. The learned trial magistrate erred in law and fact by trying and convicting the appellant on a charge that was defective and duplex.

    c. The appellants constitutional rights to a fair hearing in terms of Article 50(2)(b). And 50(3) of *the Constitution* of Kenya were breached thus rendering the appellants trial to subsequent constitution unconstitutional, null and void.

    d. The learned trial magistrate erred in law by failing to follow the determination of a superior court in regard to the offence for which she convicted the appellant.

    e. The learned trial magistrate erred in law by convicting the appellant for an offence that was not sufficiently proved.

    f. That the learned trial magistrate erred in law and in fact by rendering a judgment without judiciously considering the defence tendered by the appellant.

    g. That the learned trial magistrate erred in law by failing to comply with section 169(1) of the criminal procedure code as pertains to written of judgments.

    h. That the learned trial magistrate erred in law by sentencing the appellant for an offence that had not been proved as against him.

22. The 2nd appellant too did file his petition of appeal on 25th January, 2022 and raised eight (8) grounds of appeal namely that:

    a. The learned trial magistrate erred in matters of law and fact by failing to note that the evidence adduced by the prosecution was not watertight to warrant a conviction.

    b. That the learned trial magistrate erred in matters of law and facts by failing to note that the conviction and sentence was based on a defective charge sheet.

    c. That the learned trial magistrate erred in matters of law and facts by failing to note that the section charged with section 92(4) as read with section 105 of the *Wildlife Conservation and Management Act* of 2013 does not exist.

    d. That the learned trial magistrate erred in the matters of law and facts by note noting that the prosecution did not prove its case beyond reasonable doubt.

    e. That the learned trial magistrate erred in matters of law and facts by failing to note that the prosecution evidence was full of contradictions, uncorroborated and full of inconsistencies.

f. That the learned trial magistrate erred in matter of law and facts in failing to consider the provisions of section 333(2) of the criminal procedure code.

1st Appellant Written Submissions

23. The 1st appellant did file his submissions on 10th June 2022 and argued grounds 1, 2 and 4 together. It was his contention that the rules relating to framing of charges in criminal matters are guided by Section 134 and 137 of the Criminal Procedure Act. Every charge had to contain information that was sufficient and it should relate to a specific offence and such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

24. It was the 1st appellant contention that there is no provision of the *wildlife conservation and Management Act* 2013 which creates the offence of "Being in Possession of an Endangered Wildlife Trophy without a permit or other lawful Exception". The statement of offence and the purported particulars supplied were thus null and void as the charge sheet as drafted and presented to court was fatally defective. Reliance was placed on Henry O. Edwin Vs in Republic (2015) eKLR.

25. The 1st appellant further submitted that the appellant was charged under two provisions of the law. He was charged under section 92(4) as read with Section 105 of the Wildlife Conservation Act 2013. Both Sections cited did not create the offence of "being in possession of an endangered wildlife trophy" nor did the said sections provide for any punishment. The 1st appellant was thus greatly prejudiced for not being in a position to understand the offence which he is alleged to have transgressed under the two sections of the law to sufficiently enable him to prepare a defence. To include two different provisions of the law under the same count made the charge duplex and therefore null and void abinito. Reliance was placed on Francisco Laiborus Vs Republic (2017) – KID and Josephat Shikuku Vs Republic (2010) eKLR.

26. In the present case that 1st appellant was convicted under section 92(4) as read with section 105 of the *Wildlife Conservation and Management Act*, 2013 (which was non-existent provision of the law) and this court had no option but to question the said charges. Reliance was placed in Joseph Mutisya Mwangangi (2020)KLR, where the appellant's conviction was quashed as he had been charged and convicted under the very same provision of law and the decision applied to the circumstances herein in all fours.

27. The trial court was further faulted from failing to apply the principle of stare decisis and ignoring binding high court decisions regarding high court findings that provisions of Section 92(4) of the *Wildlife Conservation and Management Act* did not create any offence reliance was placed on the case of Okiya Omtatah Okoiti Vs Attorney General and 2 others (2015) and National Bank of Kenya Vs Wilson Ndol Ayah Civil Appeal No. 119 of 2002; (2009) KLR 762.

28. The 1st appellant also did contend that his right to fair trial / hearing under Articles 50(2) (b), (m), (n) and 50(3) of *the Constitution* of Kenya 2020 were breached and therefore rendered his trial and subsequent conviction unconstitutional null and void. To the extent that he was tried and convicted for a non-existent offence clearly demonstrated that his right to fair trial in terms of Article 50(2) was breached. Further during hearing at no time did the court inquire from the appellant which language he best understood. This was a duty owed to the appellant by the trial court whether he was represented by counsel or not and the court record showed that the language used was not noted. Reliance was placed in Sangei Nkuruma and 2 others Vs Republic (2014) – KLR, Joseph Martin Vs Republic (2008) CKLR and Abdullahi Oiriye Vs Republic (2022) KECA 24 KLR and Gabriel Awag Otik and Another Vs Republic (2009) – KLR.

29. As regard ground raised in 5, 6 and 7 of the grounds of appeal, the 1st appellant submitted that the trial court erred in convicting him for an offence that was not sufficiently proved and rendered a judgment without judiciously considering the defence tendered by the appellant. It was 1st appellants evidence that:

    a. None of the key witnesses; PW1, PW2 and PW3 testified as to what happened to the Exhibits after the alleged recovery.

    b. An Exhibit Memo Form was not prepared in respect of the elephant tusks alleged to have been recovered and that in the event that there was no evidence lead as to who did prepare the same. PW1 Sgt. Yusuf said that the Exhibit Memo was prepared by the investigating officer while the investigating officer Inspector Kiteto said that it was prepared by KWS.

    c. No Exhibit Memo was produced in court.

    d. That though PW5, Veronica Onduso received Exhibit which were accompanied by a Memo, there was no memo produced in court to show that the exhibit which she examined listed the Exhibit alleged to have been received from the appellant.

    e. That PW5 did not testify as to which of the KWS stations in Kenya she received the Exhibit from.

    f. That in her testimony, she said that she had received the Exhibit on 11th September, 2018 whereas the appellant is alleged to have been found with elephant tusks on 23rd August 2019. Logically it follows that the tusks identified by the witnesses could not have been recovered from the appellant.

    g. That the vehicle photographed at Timau Police Station was Registration No. KCB 604Z, whereas the vehicle received from the appellant was KCP 604Z.

30. The 1st appellant submitted that the trial magistrate erred in law by failing to address her mind to the above gaps in the prosecution case and failed to judiciously examine and analyze the evidence to determine if it was sufficiently proved beyond reasonable doubt. The trial court was also faulted for failing to give any reason as to why she concluded that the evidence was insufficient to prove the charge beyond reasonable doubt. In short the trial court was faulted for falling to consider all the evidence tendered and failed to evaluate the same. Reliance was placed on Mkirani Vs Republic (2021) KEHC 377, Ndeka Vs Republic (2022) KEHC 3 (KLR) and MKK Vs Republic (2019(EKLA.

31. The appellant did pray that this court finds that the learned trial magistrate failed to discharge her duty to evaluate the evidence and wrongfully convicted the 1st appellant. He urged the court to proceed to allow this appeal to quash the conviction and sentence.

2nd Appellant Written Submission

32. The 2nd appellant did file hand-written submission on 20th January 2023 and the only issue raised was that the trial magistrate erred in law by failing to consider the entire period he spent in custody and have it deducted off his sentence as provided from under Section 333(2) of the Criminal Procedure Code.

Analysis & Determination.

33. It is now well settled, that a trial Court has a duty to carefully examine and analyze the evidence adduced a fresh and come to its own conclusion, while at the same time noting that it did not have the advantage

of seeing the witnesses and observing their demeanor See Okeno-Vrs- Republic (1972) EA 32 & Pandya Vs. Republic (1975) EA 366.

34. Further this being first Appellate Court, it must itself also weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala-Vrs-R (1975) EA 57. Where it was stated that it is not the function of the first appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower Court finding and conclusion, it must make its own findings and draw its own conclusions only then can it decide whether the magistrate's findings should be supported in doing so, it should make allowance for the fact that the trial Court has made the advantage of hearing and seeing the witnesses.

35. In the case of Republic Vs Edward Kirui (2014) eKLR, the Court of Appeal quoted the Supreme Court of India case of Murugan & Another Vs State by Prosecutor, Tamil Nadu & Another (2008) INSC 1688 where the case of Bhagwan Singh Vs State of M. P. (2002)4 SCC 85 was cited as follows:-

> " The paramount consideration of the court is to ensure that miscarriage of justice is avoided. A miscarriage of justice which may arise from the acquittal of the guilty is no less than from the conviction of an innocent. In a case where the trial court has taken a view of ignoring the admissible evidence, a duty is cast upon the High Court to re-appreciate the evidence on appeal for the purpose of ascertaining as to whether all or any of the accused has committed any offence or not."

36. The appellants grounds of appeal could be summarised into the following grounds;

    a. Whether the appellants were convicted on an offence that does not exist in law and further whether the trial magistrate erred in failing to follow the principal of stare decisis with regard to the offence for which the appellant was convicted.

    b. Whether the charge at trial was defective and duplex

    c. Whether the trial magistrate erred in law and fact convicting the appellants when the burden of proof was not sufficiently established and/or proved.

    d. Whether the 1st appellants rights to a fair trial as guaranteed under the provisions of Article 50(2)(b), (m) and 50(3) were breached therefore rendering the appellants trial and subsequent conviction to be unconstitutional, a nullity and void.

    e. Whether the trial court erred in failing to consider the fact that the 2nd appellant had been in custody during trial and thus should have benefited from the provisions of section 333(2) of the criminal procedure code, when it came to sentencing.

Whether the trial court erred in convicting the Appellants on a charge-sheet that did not disclose an existing offence

37. The appellants where charged with the offence of being in possession of an endangered wildlife Trophy without a permit or other lawful exemptions contrary to section 92(4) as read with section 105 of the *wildlife conservation and Management Act*, 2013. On count II, the appellants where charged with dealing with wildlife Trophy of an endangered species, without a permit or other lawful exemption, contrary to section 92(2) as read with section 105 of the *wildlife conservation and management Act*,2013.

38. After hearing all the evidence, the trial magistrate convicted the appellants of being guilty of being in possession of an endangered wildlife trophy without a permit or other lawful exemption contrary

to section 92(4) as read with section 105 of the *wildlife conservation and management Act* 2013 and proceeded to sentence them to pay a fine of Kshs 2,000,000/= or in default to serve a term of five (5) years imprisonment.

39. Section 92(4) of the *wildlife conservation and Management Act* 2013 provided that;

> Offences relating to endangered and threatened species
>
> 1. A person who kills or injures, tortures or molests, or attempts to kill or injure, a critically endangered, or endangered species as specified in the Sixth Schedule or listed under CITES Appendix I commits an offence and shall be liable upon conviction to a term of imprisonment of not less than five years.
>
> 2. A person who, without permit or exemption issued under this Act, deals in a wildlife trophy, of any critically endangered or endangered species as specified in the Sixth Schedule or listed under CITES Appendix I, commits an offence and shall be liable upon conviction to a term of imprisonment of not less than seven years.
>
> 3. Any person who, without permit or exemption issued under this Act, deals in a live wildlife species of any of critically endangered or endangered species as specified sin the Sixth Schedule or listed in the Sixth Schedule or listed under CITES Appendix I, commits an offence and shall be liable upon conviction to a term of imprisonment of not less than three years.
>
> 4. Any person without permit or exemption issued under this Act is in possession of any live wildlife species or trophy of any critically endangered or endangered species as specified in the Sixth Schedule or listed under CITES Appendix I, commits an offence and shall be liable upon conviction to a fine of not less than three million shillings or a term of imprisonment of not less than five years or both such fine and imprisonment.
>
> 5. Any person who without permit or exemption issued under this Act, manufactures an item from a trophy of a critically endangered or endangered species specified under the Sixth Schedule or listed under CITES Appendix I without a permit or exemption issued under this Act, commits an offence and shall on conviction, be liable to a fine of not less than ten million shillings or up to life imprisonment or both such fine and imprisonment.

40. Further Section 105 of the said *wildlife conservation and Management Act* does provide that;

> Forfeiture
>
> (1) The court before which a person is charged for an offence under this Act or any regulations made thereunder may, in addition to any other order—
>
> upon the conviction of the accused; or
>
> (b) if it is satisfied that an offence was committed notwithstanding that no person has been convicted of an offence, order that the wildlife trophy, motor vehicle, equipment and appliance, livestock or other thing by means whereof the offence concerned was committed or which was used in the commission of the

offence be forfeited to the Service and be disposed of as the court may direct.

(2) In making the order of forfeiture under subsection (1) the court may also order that the cost of disposing of the substance, motor vehicle, equipment, appliance, livestock or any other thing provided for in that subsection be borne by the person convicted there-under.

(3) The court may further order that any licence, permit or any authorization given under this Act, and to which the offence relates, be cancelled.

41. The 1st appellants contention was that the charge sheet did not disclose any offence existing or known in law and therefore the 1st appellants conviction was not safe. He placed reliance on the case of Joseph Mutisya Mwangangi (2020) Eklr , where the appellant therein too was charged with the offence of being in possession of wildlife trophies contrary to section 92 of the *Wildlife Conservation and Management Act* and the high court on revision held that the charge was made under a non -existent provision of law and quashed the conviction. The trial court herein was also faulted for failing to follow the stare decisis therein.

42. First and foremost, it should be noted that section was amended. Previously the said section provided that

> "Any person who commits an offence in respect of an endangered or threatened species or in respect of any trophy of that endangered or threatened species shall be liable upon conviction to a fine of not less than twenty million shillings or imprisonment for life or to both such fine and imprisonment."

43. While Section 95 of the *Wildlife Conservation and Management Act*, 2013 on the other hand provides as follows:

> "Any person who keeps or is found in possession of a wildlife trophy or deals in a wildlife trophy, or manufactures any item from a trophy without a permit issued under this Act or exempted in accordance with any other provision of this Act, commits an offence and shall 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."

44. The above section 92 before amendment was found to be ambiguous as it did not create any known offence in law. In other words, the section only provides for the punishment for the offences in respect of endangered species or their trophies but did not itself create the offence. See Zhang Chunsheng v. Republic: Nairobi High Court Criminal Revision No. 9 of 2014 (unreported) Mbogholi, J.

45. However, the said section was amended by legal Notice Number 18 of 2018. The new section 92(4) of the *wildlife conservation and management Act* 2013 clearly provides for a specific and un ambiguous offence. The said section clearly provides that;

> Any person without permit or exemption issued under this Act is in possession of any live wildlife species or trophy of any critically endangered or endangered species as specified in the Sixth Schedule or listed under CITES Appendix I, commits an offence and shall be liable upon conviction to a fine of not less than three million shillings or a term of imprisonment of not less than five years or both such fine and imprisonment.

46. The appellants contention that the said section does not create an offence of "Being in possession of an Endangered wildlife trophy without a permit or lawful exception" does not hold true and has no basis. The finding of H ongudi. J in Joseph Mutisya Mwangangi (2020) eklr can also be distinguished from the facts herein as in the said case, the appellant was found to be in possession of wildlife trophies (2 pieces of worked ivory of elephant tusks) and therefore ought to have been charged under provisions of Section 95 of the Wildlife. Herein the appellants were not in possession of elephant trophies which had been "worked on- designed/crafted in one manner or the other" and therefore the facts of their case can be distinguished.

47. I do therefore find that section 92(4) of the *wildlife conservation and Management Act* 2013 clearly creates a cognizable offence, upon which the appellants were properly charged before the trial court.

Whether the charge at trial was defective and duplex

48. It was the 1st appellant's contention that the charge as crafted did offend provisions of section 134 and 137 of the criminal procedure code. The statement of offence and the purported particulars supplied thereof were null and void for being based on a non-existent law. Further the said charge sheet was faulted for being fatally defective for the reason that it was duplex. The 1st appellant was charged under two provisions of the law being section 92 (4) and 105 of the *wildlife conservation and management Act* and this greatly prejudiced the 1st appellant as he was not in a position to understand the manner in which he transgressed the two sections of law sufficiently to enable him prepare a defense.

49. Section 134 of Criminal Procedure Code provides for what the components/ingredients of the charge sheet constitutes;

> "Every charge sheet of information shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

50. In determining whether a charge sheet is defective or not the court of Appeal in Sigilani versus Republic (2004)eKLR 480 held as follows;

> "The principle of the law governing charge sheet is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clean and unambiguous manner so that the accused maybe be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence."

51. In the case of Isaac Omambia versus Republic (1995)eKLR the court of Appeal considered the ingredients necessary in a charge sheet and stated as follows;

> "In this regard, it is pertinent to draw attention to the following provisions of Section 134 of the Criminal Procedure Code which makes particulars of a charge an integral part of a charge. Every charge or information shall contain and shall be sufficient, if it contains a statement of the specific offence of offences with which the accused is charged together with such particulars as may be necessary for giving reasonable information as to the nature of the offence."

52. Further, the court of Appeal in Peter Ngure Mwangi versus Republic (2014)eKLR quoted with approval that Isaac Omambie case or further stated that;

> "A charge can also be defective if it is in variance with the evidence adduced in its support. Quoting with approval from Archbold Criminal pleadings, Evidence and Practice (40th Edition) page 52 paragraph 53, this court stated in Yongo versus Republic (198)eKLR that "In England it has been said; an indictment is defective not only when it is bad on the face of it but also;
>
> When it does not accord with the evidence before the committing magistrate either because of inaccuracies or deficiencies in the indictment or because the indictment charges/offences not disclose in the evidence or fails to charge an offence which is disclosed therein.

53. The court of Appeal in Benard ombuna Vs Republic also addressed the issue of a defective charge sheet in the following terms;

> "In a nutshell, the test of whether a charge sheet is fatally defective is subjective rather than formalistic. Of relevance is whether a defect on the charge sheet prejudices the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence."

54. Finally, in BND Vrs REPUBLIC (2017) eKLR it was held as follows;

> "Our case law has given crucial pointers. Two cases are pertinent: the case of Yosefa vr Uganda (1969) E.A. 236- a decision of the court of Appeal- and sigilani Vrs Republic (2004) 2 KLR 480- A high court decision by Justice Kimaru. Both hold that a charge sheet is fatally defective if it does not allege an essential ingredient of the offence.....The answer from our decisional law is this: The test whether a charge sheet is fatally defective is a substantive one: was the accused person charged with an offence known to law and was it disclosed in a sufficient and accurate fashion to give an accused adequate notice of the charges facing him? If the answer is in the affirmative it cannot be said in any way other than a contrived one that the charges were defective..... The question is did this prejudice the appellant and occasion miscarriage of justice? I do not think so. There is no question in my mind that the accused person clearly understood the charges facing him well enough to understand the ingredients of the crime charged so that he could fashion his defence. In this case, he understood it well enough to offer an explanation when the facts were read out to him."

55. Section 382 also gives guidance on whether even with such a defect, justice could still be met or whether the defect is curable. Section 382 of the criminal procedure code provides that;

> " subject to the provision's hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be revered or altered on appeal or revision on account of an error, omission, or irregularity in the complaint, summons, warrant, charge proclamations, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under the code, unless the error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question of whether the objection could and should have been raised at an earlier stage in the proceedings. It follows therefore that the court in determining whether a defect caused injustice has to have regard whether the objection should have been raised at an earlier stage in the proceedings" .

56. Applying the above test, it is clear that the charge sheet was not deficient in any manner, the particulars of the offence were fully provided and with specificity. The 1st appellant fully participated in the proceedings and cross examined all the witnessed. This denotes that he understood the particulars of the charge he faced. The appellant also did not raise any objection as to the facts raised in the charge sheet and a such cannot be said to have been prejudiced in any manner. This ground of appeal therefor cannot hold.

On Whether the charge sheet was defective because it is duplex

57. In H.C Misc Cr APPL. No 52 of 2014 Joseph Ngunguru wanjohi Vs Republic (2014) eklr Hon Mbogholi .J, the judge delivered himself as follows;

> "My first observation relates to the framing of the charge. whereas the applicant (Appellant) is charged with the conspiracy to commit a felony, it would appear, the alleged felony was complete in the particulars of the charge alluded to the offence of robbery ..... where an offence is complete, it no longer remains a conspiracy unless the two are charged separately. The charge therefore maybe faulted for duplicity"

It is then important to attempt to define what duplicity is. The same concerns the count as opposed to the charge. A charge is said to be bad for duplicity when it contains more than one offence in a single count. Therefore, the test in determining if a charge is duplex is not the evidence but the draftmanship of the charge itself. It is defined in Archbold criminal pleadings, Evidence and practice, 2010 at page 9 as;

> "The indictment must be double; that is to say, no one count of indictment should charge the defendant with having committed two or more separate offences..... The question of whether a count breeches the general rule against duplicity is a question relating to the form of the count, not the underlying evidence..... thus, if particulars set out in the count allege only one offence, the fact that the evidence at trial may reveal more than one offence does not make the count bad for duplicity"

58. The charge sheet as against the appellant did not contain more than one offence in a single count. Section 105 of the *wildlife conservation and management Act* mention by the 1st appellant as providing a second offence only provides for forfeiture of the vessel, motor vehicle, equipment, appliance or livestock used while committing an offence. The said section did not create an extra charge in the count.

59. The charge sheet provided for a specific offence known in law and the particular's and facts thereof were disclosed to him in a sufficiently accurate fashion to give him adequate notice of what charges he did face. During the trial process which took approximately three (3) years at no time did the 1st appellant allege that he did not understand what charge he was facing and cross examined witness based on the said charge sheet. It was thus not defective nor was it duplex. This ground of appeal thus fails.

Whether the trial magistrate erred in law and fact convicting the appellants when the burden of proof was not sufficiently established and/or proved.

60. It is trite law that all criminal offences require proof beyond reasonable doubt. Lord Denning in Miller vs. Ministry of Pensions (1947) 2 All ER, 372 stated as follows;

> "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 the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities

> to deflect the course of justice. If the evidence is so strong against a man as to leave only a 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 beyond reasonable doubt, but nothing short of that will suffice."

61. In the case of Republic Vs Edward Kirui (2014) eKLR, the Court of Appeal quoted the Supreme Court of India case of Murugan & Another Vs State by Prosecutor, Tamil Nadu & Another (2008) INSC 1688 where the case of Bhagwan Singh Vs State of M. P. (2002)4 SCC 85 was cited as follows:-

> "The paramount consideration of the court is to ensure that miscarriage of justice is avoided. A miscarriage of justice which may arise from the acquittal of the guilty is no less than from the conviction of an innocent. In a case where the trial court has taken a view of ignoring the admissible evidence, a duty is cast upon the High Court to re-appreciate the evidence on appeal for the purpose of ascertaining as to whether all or any of the accused has committed any offence or not."

62. A review of the evidence clearly shows that both appellants were the occupants of motor vehicle KCP 604Z Toyota Probox which got stuck in the muddy section of the road towards Emboli Power station from Maritati centre. The 1st appellant was the driver thereof. PW1, PW2 and PW3 all confirmed in their evidence that both appellants were the occupants of the said motor vehicle and on searching the motor vehicle , they recovered six (6) pieces of elephant tusks. Two were full tusks, while four (4) were half tusks all of which were in two gunny bags recovered in the motor vehicle boot.

63. The appellants were arrested and the tusks photographed by PW4 a scene of crimes gazetted officer. PW5 also scientifically looked at the tusks and did a comparative autonomy with other elephant tusks within the museum and they compared well with the same. She further microscopically examined the exhibits and the schregnem lines clearly showed at various points that the said tusks were found in elephants. She too produced her report as Exhibit 11. The investigating officer PW6 also did confirm re arresting both appellants at the scene of crime and produced all other Exhibits into evidence.

64. From the evidence adduced it was thus confirmed that both appellants were found in possession and occupation of Motor vehicle registration No KCP 604Z Probox. In the said motor vehicle, a recovery of elephant tusks was made and the suspected items recovered (elephant tusks) were scientifically ascertained to be elephant tusks.

65. In defence the 1st appellant testified that he was operating the said motor vehicle as a Taxi carrying passengers from Maritati to Ngerendere. On the way some passenger's alighted while others continued with the journey. It was a normal occurrence for passengers to place their luggage in boot and he had no business checking what they were carrying. On the day of the incident it was raining and just before they reached Maritati they got stuck in the mud. He had one passenger remaining who alighted as a white vehicle came and stopped in front of his motor vehicle.

66. The said passenger disappeared and left his luggage in the boot and it is the said luggage which he confirmed in cross examination contained the tusks recovered. Usually he did not open passenger's luggage's and was not in a position to know what they carried. The passenger did not pay him as he left hurriedly when he noticed the police arrive.

67. The trial magistrate in her judgment did weigh the evidence of the prosecution evidence and the evidence of the appellants and did determine that the defence that they had been framed up was a lie. The 2nd appellant did not mention there being any other person he saw alight from the motor vehicle and thus there was no corroboration of the 1st appellants evidence. The trial magistrate further relied

on the definition of possession as provided in the Black's law dictionary and the finding in Charles Mbaabu Mburi Vs Republic (2018) eklr to find that the prosecution had proved beyond reasonable doubt that the appellants were in possession of the elephant tusks.

68. On review of the entire evidence presented at trial, I do find that the findings and conclusion of the trial magistrate cannot be faulted as PW1 to PW3 positively placed both appellants as occupants of the car where the tusks were found. PW5 report scientifically proved that indeed the recovered tusks were elephant tusks and the 1st appellant defence that the said tusks belonged to a passenger who fled on seeing the police too holds no water as PW1 to PW3 did not see the said passenger flee and more importantly even the 2nd appellant did not see any such passenger flee, yet he was at the scene before the policemen arrive.

69. The evidence of the 2nd appellant also contradicted, the 1st appellants evidence that the passenger fled upon arrival of the police and the trial court was right to dismiss the said defence. Both appellants too in cross examination also confirmed that the tusks were recovered with the said motor vehicle. I do thus find that the prosecution discharged the burden of proof.

Whether the 1st appellants rights to a fair trial as guaranteed under the provisions of Article 50(2) (b), (m) and 50(3) were breached therefore rendering the appellants trial and subsequent conviction to be unconstitutional, a nullity and void.

70. The 1st appellant alleged that his rights to a fair trial was breached due to the fact that he was tried and convicted on a non-existent offence The 1st appellant also further submitted that at no time did the trial court inquire from him which language he best understood and this was a sacred duty owed to the appellant by the trial court whether or not he was represented.

71. Article 50(2),(b),(m),(n) and (3) of *the constitution* of Kenya 2010 proved as follows;

50(2) Every 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,

(m) To have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial.

(n) not to be convicted for an act or omission that at the time it was committed or omitted was not:-

(i) an offence in Kenya; or

(ii) A crime under international law;

50(3) If this Article requires information to be given to a person, the information shall be given in a language that the person understands.

72. Further Section 198 of the Criminal procedure code states that;

> "whenever any evidence is given in a language not understood by the accused, and he is present in court, it shall be interpreted to him in open court in a language which he understands."

73. As regards his contention that he was tried and convicted of an non-existent offence, I have already clarified herein above that section 92 of the *wildlife conservation and management Act* 2013, was amended via legal notice 18 of 2018 and the section under which the 1st appellant was charged with,

section 92(4) of the said Act clearly provides for a cogent and cognizable offence. His contention therefore is not correct.

74. The proceedings of 26th August 2019 do indicate that, when the appellant was charged, the charges were explained to him in a language he understood, and when asked whether he admitted or denied the truth of the charges, he replied that "It is not true". The said proceedings further clearly show that the appellants indicated they understood "English/Kiswahili" as a medium of communication.

75. On 13th September 2019 the appellants confirmed too court that they had been supplied with a copy of the charge sheet, investigations diary, weighing certificate, copy of inventory, copy of letter dated 23rd August 2019 from KWS to NTSA, copy of driving licence for 1st accused, copy of NTSA records for the motor vehicle KCP 604Z and prosecution witness statements. Both appellants acknowledged receipt of these documents.

76. During trial the 1st appellant had counsel on record, who represented him. The proceedings clearly show that his counsel was given an opportunity to ask all witnesses questions. The record also clearly show that interpretation was being done from English to Kiswahili, while the 2nd appellant, who was unrepresented asked questions in Kiswahili. The 1st appellant and or his counsel did not at any point during the three (3) year trial raise any objection that he did not understand the language which the court was using.

77. It is trite law that where such an issue of fact was not raised during trial it cannot be raised on appeal as no finding on the same was made by the trial court. It is also too late in the day for the 1st appellant to allege that he did not understand the language used to read out the charge to him, yet his counsel Miss Mwangi holding brief for Mr Wanjohi advocate was also present and representing him.

Whether the trial court erred in failing to consider the fact that the 2nd appellant had been in custody during trial and thus should have benefited from the provisions of section 333(2) of the criminal procedure code, when it came to sentencing.

78. The 2nd appellant only ground of appeal was that the trial court failed to consider the period he was in custody and by virtue of provisions of Section 333(2) of the criminal procedure code.

79. Section 333(2) of the criminal procedure code provides that;

> "Subject to the provisions of section 38 of the penal code, every sentence shall be deemed to commence from and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this code.
>
> Provided that where the person sentenced under sub section (1) has prior, to such sentence shall take into account of the period spent in custody"

80. The provisions of Judiciary sentencing policy Guidelines also state that;

> " The provision's to section 333(2) of the criminal procedure code obligates the court to take into account the time already served in custody if the convicted person has been in custody during trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by the offender, the court must take into account the period in which the offender was held in custody during the trial."

81. The Court of Appeal in the case of Benard Kimani Gacheru Vs Republic (2002) eKLR stated;

> "It is now settled law, following several authorities by this court and by the High Court that sentence is a matter which rests in the discretion of the trial court. Similarly, sentencing depends on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless the sentence is manifestly high/excessive in the circumstances of the case or that the trial court overlooked some mutual factors or took into account some wrong material or cited upon a wrong principle. Even if the Appellate court feels that the sentence is heavy and the Appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the decision of the trial court on sentence unless anyone of the matter stated i.e. shown to exist.

82. The applicant has a legitimate expectation that during trial he is subject to equal treatment before law and is accorded a fair hearing, which includes his right to have all relevant provisions of the law to be applied in favourably where the circumstances allow . See Ahmad Abolfathi Mohammed & Another Vs Republic (2018) eKLR & Bethwel Wilson Kibor Vs Republic (2009) eKLR.

83. The 2nd appellant was never released from custody and spent the entire trial period in remand. The trial court ought to have considered this period as mandated under provisions of section 333(2) of the criminal procedure code. I do find that indeed the trial court did err in failing to consider the period the 2nd appellant spent in custody from 23rd August 2019, when he was arrested to 14th January 2022, when he was sentenced.

Conclusion

84. Having considered all the grounds of appeal raised I do find that the appeal against conviction by both appellants has no merit and this same is dismissed.

85. The 1st appellants appeal as against sentence is also dismissed.

86. The 2nd appellants appeal as against sentence partially succeed. His sentence shall run from 23rd August 2019, which is the date of arrest.

87. Right to Appeal 14 days.

88. Judgement accordingly

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 21ST DAY OF SEPTEMBER, 2023.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 21ST DAY OF SEPTEMBER, 2023.

In the Presence of

1st Appellant

2nd Appellant

----------For ODPP

----------Court Assistant