Saruni & another v Republic (Criminal Appeal E036 of 2022)
[2024] KEHC 16666 (KLR) (9 October 2024) (Judgment)

Neutral citation: [2024] KEHC 16666 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAJIADO

CRIMINAL APPEAL E036 OF 2022

JL TAMAR, J

OCTOBER 9, 2024

BETWEEN

SAIRIAMU SARUNI ..... 1ST APPELLANT

PARSANKA SENEU ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgement, conviction and sentencing of the appellant the honourable L.L Gicheha-Chief Magistrate delivered at Kajiado on 9{{^th}} November 2022 in kajiado criminal case no 870 of 2017)

JUDGMENT

1. The appellants herein were jointly charged with the offence of possession of wildlife trophy contrary to section 92 as read with section 105 of the *wildlife conservation and management Act*, 2013 now Cap 376 of the Laws of Kenya. The particulars in count one (1) is that on 18th July 2017 at around 17 hours at maili Tisa area within Kajiado County were found in possession of wildlife Trophy namely; (9) pieces of ivory weighing 38 kgs with a street value of ksh.3,800,000/= without a permit.

2. In count two the accused were charged with the offence of dealing with wildlife trophy contrary to section 84(1) as read with section 92 and section 105 of the *wildlife conservation and management Act*,2013 now Cap 376 Laws of Kenya. The particulars are that on 18th July 2017, at around 1700hrs at Maili Tisa area within Kajiado County were found dealing in a wild life trophy; namely nine (9) pieces of ivory weighing 38 kgs with street value of Ksh. 3,800,000/= without a licence.

3. The prosecution presented four (4) witnesses who testified before the trial court and the court being satisfied with their testimonies found for the state and convicted the accused in both counts and sentenced them to pay a fine of ksh. 20, 000,000 in default 10 years each on the two counts.

4. Dissatisfied with the conviction and sentence, the appellant filed a petition of appeal setting out the following grounds;

   i. That the trial magistrate erred in fact and in law in finding that the appellants were in actual possession of wildlife trophy prior to their arrest when no evidence of probative value was presented to prove the same, specifically in the absence of dusting and finger prints report.

   ii. That the learned magistrate erred in fact and in law in finding that the prosecution had proved their case beyond reasonable doubt when so many glaring gaps were pointed to in submissions of the appellant and after defence hearing of the case.

   iii. That the learned magistrate erred in fact and in law by failing to address the authorities referred to by the appellants as well as the appellants submissions both prior to the finding of the existence of a case to answer and at the final judgement stage after the defence hearing.

   iv. That the learned magistrate erred in fact and in law by disregarding the evidence of both the accused persons which clearly demonstrated that they were no in possession of wildlife trophy at the time of the arrest.

The Prosecution Case

5. PW1 No 8035 corporal Felix Dikirr a KWS officer base in kajiado testified and told the court that that he was on duty when his colleague Abdullahi Abdi told him that he had received some intelligence information from an informer that there were some suspects in possession of ivory tusk in Maili Tisa area. They requested two more police officers from DCI Kajiado and together proceeded to the location as directed by the informer who was in constant contact with Abdi. On arriving at the location, they left the vehicle off the road and walked towards the two suspect who were approaching carrying a luggage and ordered them to stop. He told the court that the suspects were carrying a blue sack which when the same was opened 9 pieces of what was then believed to ivory was found. They arrested and escorted them to kajiado police station.

6. PW2 Ben Nyakundi Meroka a research scientist working with the National museum of Kenya and hold a degree in wildlife species from Moi University with over 7 years of experience. He told the court that some samples were brought for identification and requiring of him to ascertain whether they were elephant tusks. Examination of the 9 exhibits reveals that all the 9 of them showed macroscopic and microscopic characteristics consistent with are elephant ivory. All of them had no artificial modifications. He concluded that in his expert opinion the exhibits are unworked Elephant Ivory and therefore wildlife trophy.

7. PW3 NO 7878 Abdullahi Abdi a KWS officer based in Kajiado investigation unit. He told the court that he was in the office when he received intelligence information about people who had ivory tusks and who were looking for a market. He was told that the people were in Maili Tisa area. He requested for more officers to reinforce his team and got an unmarked vehicle for the assignment. He stated that he kept communicating with the identification source who was also in communication with the suspects. On reaching Maili Tisa, the location pointed out to them they were advised to stop beside the road as the suspects would be approaching from the right side of the road. After a short while two men dresses in Maasai Shuka appeared carrying a heavy luggage covered in brown and blue sacks. They intercepted them did a search and recovered 9 pieces of elephant tusk. They prepared inventory which was signed by the two suspects.

8. On cross-examination by counsel for the accused persons, the witness stated that he had received a call from the informer and they were kept informed all along who directed them to the location where the

suspects were. He told the court that the informer was also in contact with the suspect and was also directing them to the location. He stated that there was no vehicle parked beside the road.

9. PW4 No 98643 P.C. Elijah Njagi testified and told the court that he was in the office with P.C Labot when their superior in charge of investigation Reuben Biyegon assigned them some work to accompany Kenya wildlife services officers to arrest some people suspected of dealing in ivory tusks. They met corporal ABDI and P.C. Dikirr and proceeded to the location as directed and arrested two persons who were carrying a sack which when opened had 9 pieces of ivory. The officer denied in cross-examination that the suspects were found in a motor vehicle. further that the suspects phones were taken to establish whether there was any connection with the commission of the offence. Text messages between the informer and the accused were checked but non-was found and the phone then returned to the accused. He further told the court that he never checked any prior communication between the accused and the informer neither did he call for the accused call data.

Defence

10. After the close of the prosecution case, the court found that a prima facie case had been established against the two accused to warrant their being place on defence. The accused gave sworn testimonies and testified in sufficient details. DW1 Parsanka Seneu Nchaha told the court that he is a business man selling herbs, sweets and biscuits in parkland area in Nairobi. He recalls meeting a customer who inquired about availability of land in Kajiado and they exchanged contacts. He told the 2nd accused about his encounter with the customer who wanted land and asked him to scout around for any one selling land. After a week the 2nd accused rang and informed the 1st accused that he had found someone who was willing to sell some parcel. He contacted the customer and started arranging for a meeting to visit the area where the parcel was situated. He told the court that subsequently they met with the customer who had white car whose registration he can't remember and proceeded to Maili Tisa together with the 2nd accused. They visited the land with the customer who told them he liked it was going prepare and come back. On 18th July 2017, the witness met the customer in kajiado who had called the previous day and again proceeded to the land in the customers vehicle. The 2nd accused who was picked in Maili Tisa accompanied them. They visited the land and, on their way, back as they were about to join the tarmac road, the vehicle they were travelling in was stopped by people who introduced themselves as police officers. He stated that he and the 2nd accused were handcuffed as was the owner of the vehicle. The boot of the vehicle was opened and they were shown what was inside. On their way to kajiado police station, money was demanded from them which they did not have. He stated that luggage was removed from the boot of the white vehicle they were in.

11. In cross-examination by the prosecutor, the witness stated that he couldn't remember the name of the owner/driver of the white car but had saved his phone number in a way that he could easily recall. He confirmed that the tusks were removed from the boot of the white car.

12. DW2 Sairiamu Saruni testified on oath and told the court that he operates a boda boda in Maili Tisa area of kajiado county. He recalls that sometimes in the month of may 2017, the 1st accused Parsanke called and told him that there was someone who was looking for some land to buy approximately 50 acres and asked him scout around. On 25th June 2017 they visited together with the would-be buyer and he took them to the location of the land and promised to come back another time. The 1st accused and the would-be buyer were in a white car.

13. On 18th July 2017 he took the buyer and the 1st accused to the land being sold and the buyer identified the portion that he found suitable. They then got into the buyer's white car enroute to Namanga for further discussion. It was then on their way as they were joining the tarmac road that they were stopped

ordered out of the vehicle where the two of them were handcuffed. The vehicle boot was opened and a sack removed. The driver of the vehicle they were in was handcuffed as well but cuffs removed he was let to drive his vehicle off. Demand for money was made against them and subsequently they were charged with the offence for which they were convicted.

14. The appellants filed their submissions on 17th April 2024 challenging their conviction and sentence as did the prosecution who contend that the conviction and sentence was legally proper and should not be disturbed. I have considered the respective submissions in this judgement.

Analysis determination

15. The broader issue for determination is whether the prosecution at the court below had proved the charges against the accused beyond reasonable doubt.

16. In determining this appeal, the court fully understand its duty as an appellate court, which is to subject the evidence as a whole to a fresh and exhaustible examination and arrive at a conclusion backed by the evidence while aware that it neither heard or saw the witnesses testify. See Okeno vs Republic (1972) E.A 570 and Eric Onyango Odeng' vs Republic (2014) eklr

17. The two accused persons were charged in count one with the offence of possession of wildlife Trophy contrary to section 92 as read with section 105 of the *wildlife conservation and management Act* 2013 and in count two with dealing in wildlife Trophy contrary to section 84(1) as read with section 105 of the *Wildlife conservation and management Act* 2013. The particulars were set out earlier.

18. It is important to note that Statute Law (miscellaneous Amendment) Act 2018 introduced several changes to *Wildlife Conservation and Management Act* 2013 and specifically where the offences relating to endangered species were expanded and the punishment prescribed. Five (5) more sub sections were introduced in section 92 and the minimum mandatory sentence reduced in relation to the various offences. The appellants were however charged before the amendments came into force for the offence allegedly committed in 2017.

> " Section 92 before the subsequent amendment provided as follows: -
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> "Any person who commits an offense in respect of an endangered or threatened endangered species or in respect any trophy of the endangered or threatened species shall be liable upon conviction to a fine of not less than 20 million shillings or imprisonment for life or both fine and imprisonment."
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> Section 105 " the court before which a person is charged for an offence under this Act or any regulations made there-under may, in addition to any other order, 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.

19. My analysis of the evidence established that the KWS officers especially P.C. Abdullahi Abdi received intelligence information about some suspects who were engaged in illegal ivory trade. Relying on that information he marshalled a team with the assistance of the officers from Kajiado DCI Offices to apprehend the suspects. The witness told the court that he was in constant communication with the informer on their way to the location to arrest the suspects who gave credible and precise information leading to the arrest of the suspects. It is also evident from the prosecution witness that the informer was also in communication with the suspect(s). The proceedings indicate as follows in relation the evidence of P.C Abdullahi Abdi "I kept in communication with the identification witness source who

was also in communication with the suspects". The appellant challenged the prosecution case pointing out this particular key witness who allegedly led the police to recover the elephant tusks was never called as a witness. Why then was this witness who apparently is known to the accused persons and the police officers called as a witness when it was clear that his identity is known? Generally, the identity of an informer is normally protected for good reasons however, that privilege, could be lifted if the calling of the witness would be necessary for the accused defence or in the interest of justice. In this case the identity of the witness was known to the accused and there were no concerns over his/her safety.

20. If as a matter of fact and evidence the accused was in communication with the informer and that there was no need to call the informer for safety concerns, the call data between the accused and the informer with reduction of details to protect him/her if need be should have been produced. P.C Abdullahi Abdi also told the court that he engaged with the 1st accused person and posed as a buyer of the ivory in order to lure him. This is a crucial piece of evidence which if established would have pointed out to the accused involvement in the crime. However, the officer never produced any call data or any messages exchanged with the accused as corroborative evidence that he spoke to him and posed as a customer.

21. The appellants mounted a spirited defence to extricate themselves from the charges by giving detailed and elaborate accounts of what could have transpired. The appellant told the court that they were arrested together with a third person who had approached 1st accused with the view of buying some land in Maili Tisa area. Indeed, the buyer had visited the parcel to be sold before the fateful day. The 1st accused stated that the buyer had a white car from which a sack containing ivory was recovered. The prosecution witnesses vehemently denied the existence of a motor vehicle or that they released the owner of the vehicle and blamed the two with being in possession of the elephant Tusks.

22. However, looking at the charges against the appellants it is clear that there was a means whereof the offence was committed whether the means was a motor vehicle or any other vessel. I say so because, both charges were to be read together with section 105 of the *wildlife Conservation and Management Act* which empowers the court to make an order of forfeiture of vehicles or any equipment that was used in commission of the offence. The learned magistrate in her judgement dismissed the accused defence that there was a motor vehicle and a third party with whom they had been in touch with regard to the purchase of land. It is not correct as the trial court held that the issue did not arise during cross-examination. It did. The presence of a white car came out constantly in cross-examination of PW3 and PW4 by both appellants and later counsel when the court recalled the witnesses for that purpose and at the defence hearing giving credence to a possibility of there having been a white car and its driver.

23. The trial magistrate observed that the appellants ought to have disclosed the name of the person they had interacted with negotiating the sale of land. With respect, the learned Magistrate shifted the burden of proof to the appellants contrary to the law. It is the responsibility of the prosecution once such an assertion is raised to disprove of it. The police had taken appellants phone and established that there were no text messages between the informer and the appellants. Pw4 P.C Elijah Njagi the investigating officer, told the court that he did not check for prior communication between the appellants, the informer and that other third person. This in my view was serious lapse in investigations

24. The appellants also challenged the prosecution case stating that there was contradiction in manner in which the inventory was taken, whether it was taken at the police station or on the way to the police station. The appellant similarly raised issues with regard to the weight of the recovered ivory and the value attached to it stating that there was no basis for the amount of ksh.3,800, 000 in the charge as representing the street value.

25. Although it is proper to take inventory of the items recovered in the presence of the accused persons ensuring that the weight is properly ascertained, failure to strictly do that is not fatal as the quantity

and value only goes to the consideration to be given in sentencing and not on the gravity of the offence itself. See Kabibi kalume Katsui vs Republic (2015) ekl.

26. As regards the inventory, the court in Stephen Kimani Robe & others vs Republic (2013) eklr stated that the purpose of an inventory is to keep records of the exhibits recovered during investigations. That failure to prepare an inventory cannot override the physical existence of the exhibits especially where other witnesses apart from the officer who made the recovery confirms their existence. The contention by the appellant is not the existence of the inventory but whether it was recorded at the scene of crime or at the police station and the contradiction by the officers as to whether the same were read to the appellants and signed.

27. Based on the above observations, I am satisfied that the Learned Trial Magistrate fell into error by finding that the prosecution had established the charges against the accused beyond reasonable doubt. The appellants have created doubts in the mind of the court as to their involvement in the crime. These doubts must be resolved in their favour.

28. Consequently, the appeal herein is allowed, and the appellants conviction and sentence of November 9, 2022 overturned and set aside. The appellants shall be released forthwith unless otherwise lawfully held.

DATED AND DELIVERED THIS 9TH DAY OF OCTOBER 2024

JOHN T. LOLWATAN

JUDGE