REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CRIMINAL APPEAL NO. 1 & 2 OF 2020

ARCHARD KIRIGHA MWANGAGHE.....1ST APPELLANT

MATHIAS MWANDE MSANGI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgement of Hon. E. M. Nyakundi

at Resident Magistrate's Court Voi

CR. Case No. 276 of 2017 delivered on 7th January 2020)

JUDGMENT

1. The Court has before it two appeals that arise from a single trial before the Resident Magistrate's Court in Voi and a single Judgment. The Learned Trial Court found both Appellants guilty of two counts as presented on the charge sheet. The Appellants were charged on the **8th December 2018** with two counts.

2. In the first count the appellants were: Dealing in wildlife trophy contrary to **section 84 (1) as read with Section 92 of the Wildlife Conservation and Management Act, 2013 Laws of Kenya**. The particulars of the offence were set out as: 1**. ARCHAD KIRIGHA 2. MATHIAS MWANDE MSANGI:** On the 3rd day of December 2018 at around 1200hrs at Maktau areas within Taita Taveta county were jointly found dealing in a wildlife trophy namely two (2) elephant tusks weighing eight (8) kilograms without a permit.

3. In the second count, they were charged with "Being in possession of a wildlife trophy contrary to **Section 95 of the Wildlife Conservation and Management Act, 2013 Laws of Kenya**. The particulars of the offence were: 1. **ARCHAD KIRIGHA 2. MATHIAS MWANDE MSANGI:** On the 3rd day of December 2018 at around 1200hrs at Maktau area within Taita Taveta county were jointly found dealing in a wildlife trophy namely two (2) elephant tusks weighing eight (8) kilograms all which a street value of Kshs 800,000 without a permit.

4. The 1st and 2nd Appellant persons were arraigned in court on the 10th December 2018 and the substance and every element of the charge sheet read to both of them in a language each one understood.

5. Both Appellant persons pleaded NOT GUILTY in relation to Counts 1 and 2 and the same was recorded by the trial court.

6. The court thereafter directed the 1st and 2nd Appellant persons to be supplied with witness statements and any exhibit and also granted each Appellant person a bond of Kshs. 2,000,000.00 with one surety of a like sum or cash bail of 1.5 million, respectively.

7. The trial court conducted hearings on various dates and on the 7th January 2020, the 1st and 2nd Appellant were both found guilty of Count 1 and 2. **Hon. E. M. Nyakundi** sentenced the 1st and 2nd Appellant to a jail term of three years for Count 1 and a further one-year jail term for Count 2. The trial magistrate ordered that the sentences do run concurrently.

8. The Judgment as delivered by **Hon. E. M. Nyakundi** on 7th January 2020 has resulted into the two Appeals herein, with 1st Appellant Person's Appeal being Criminal Appeal No.1 of 2020 and the 2nd Appellant Person's Appeal being Criminal Appeal No. 2 of 2020. There being no objection from the parties herein, the two appeals were consolidated on the 13th November, 2020, with Criminal Appeal No. 1 of

2020 being the lead file. The 1st Appellant then became the 1st Appellant and the 2nd Appellant, the 2nd Appellant.

9. The Appellants filed Grounds of Appeal which are set out below:

> ***In the Criminal Appeal No. 1 of 2020-*** **ARCHAD KIRIGHA VRS REPUBLIC, the grounds of Appeal were filed on 13th January 2020 and they are as follows: -**
>
> > **a. That the learned trial Magistrate erred in law and facts in failing to realize and appreciate that the facts as narrated by the prosecutor did not disclose any offence or the offence charged**
> >
> > **b. That the learned trial Magistrate erred in law and facts in ignoring and not taking into account the appellant mitigation and the mitigating circumstance if this case in general.**
> >
> > **c. The learned trial Magistrate erred in law and facts in not considering by plea of not guilty**
> >
> > **d. The learned trial Magistrate erred in law and facts in not realizing that the evidence by the prosecution was not corroborating.**
> >
> > **e. The learned trial Magistrate erred in law and facts in ignoring my defence which was well narrated.**
>
> **In Criminal Appeal No. 2 of 2020- MATHIAS MWANDE MSANGI VRS REPUBLIC, the following are the grounds of Appeal which were filed on 13th January 2020: -**
>
> > **1. That the learned trial Magistrate erred in law and facts in failing to realize and appreciate that the facts as narrated by the prosecutor did not disclose any offence or the offence charged**
> >
> > **2. That the learned trial Magistrate erred in law and facts in ignoring and not taking into account the appellant mitigation and the mitigating circumstance if this case in general.**
> >
> > **3. The learned trial Magistrate erred in law and facts in not considering by plea of not guilty**
> >
> > **4. The learned trial Magistrate erred in law and facts in not realizing that the evidence by the prosecution was not corroborating.**
> >
> > **5. The learned trial Magistrate erred in law and facts in ignoring my defence which was well narrated.**
> >
> > **6. The learned trial Magistrate erred in law and facts in not considering the evidence of my defence witness.**

10. This being the first appeal, this Court has the duty to re-evaluate and analyze the evidence that was tendered before the trial court afresh and in detail and come up with its own conclusions while bearing in mind that it neither saw the witnesses nor heard the evidence when parties were testifying so as to observe their demeanour. In the case of **Mark Oiruri Mose v Republic [2013] eKLR,** the court of appeal held:

> **"…It has been said over and over again that the first appellate court has the duty to revisit the evidence tendered before the trial court, afresh analyse it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that…"**

11. To prosecute the Appeal herein, the Appellants and the respondents have filed their respective submissions. The 1st and 2nd Appellants filed their separate set of submissions on the **21st July 2020** and further submissions in the consolidated filed on **4th December 2020**. The Respondents filed their submissions on the **10th November 2020.**

12. Briefly, the trial court heard evidence from 4 prosecution witnesses. **PW1- Mwanzia Mwasia** who was described as a ranger with KWS at Tsavo West National Park. He told the court that on 3/12/2018 at 12 noon, he was at his place of work at Salaita when he received a call from his boss, one Mr. Kedogo of KWS who informed him that they were in an area called Kedong and that he was to be on standby. He stated to the court that at around 5.00pm, he left for Kedong and on getting there at an area where there were houses, he was told that the suspects should be inside there. He went into the house and found three people taking tea. It was an old man and two young men. They identified themselves and told the men they were looking for them. They then took them to the police. The men did not have anything in their possession and he did not interrogate them as that was not his job. He categorically stated that the two men were the ones before the court.

13. PW-2 Adan Galgallo, a ranger at Tsavo West stated that he recalls on 3/12/2018, he was at Salaita base when he was called by Corporal Kadogo who informed them there were people with elephant tasks who had ran away and were at large. He went to a place called Mwakitau and found three people from who the investigating officer pointed out two of them as the persons whom had escaped. They took the two people and booked them at Mwatate Police Station.

14. PW-3 Vincent Mwakesi Zighe, also a KWS ranger who was stationed in Taveta told the court that on the 1/12/2018, they were told that

there are suspects with elephant tusks at Mwakitau and were looking for a seller having been urged of the same by PW2. He stated that they sat down as colleagues together with the investigating officer and decided that a raid be done, with PW3 being the driver, investigating officer as the buyer and the rest as back-up. The same was agreed to be done on the 3/12/2018. On 3/12/2018, they left their station with the back-up team, and went to Mwakitau in a private vehicle. On getting to a Catholic church, they alighted and in front of the church, they met a man on a bicycle, who was thin and light skinned. That was the 2nd Appellant. The 2nd Appellant spoke to Corporal Javis (who was acting as the buyer) and indicated that he had elephant tusks to sell and that a kilo would go for Kshs. 15,000/=. When the deal was done, the 2nd Appellant moved 100 meters to where there was a forest and met a tall man. PW3 states it was a bit far but he could see since there were no trees and the time was around 11.00-12.00 pm. He further states that the 1st Appellant gave the goods which were in a white sack to the 2nd Appellant. PW3 testimony is that the 1st and 2nd Appellants then met with corporal Javis and brought the goods to the vehicle, a Noah type of vehicle. The 2nd Appellant put the goods in the vehicle but that the back-up team was a bit far. That, when Corporal Javis tried to arrest one of them, he could not as the 1st and 2nd Appellants escaped. He states that they did not trace the Appellants on that day, but they managed to leave with the goods. The elephant tusks were before court. He states that he was not there when the Appellants were being arrested. He stated the Appellants were before court.

15. The prosecution's last witness was PW4, a **KWS Corporal Javis Galole** stationed in Taveta. He told the court that he is in the investigations department and that he was the investigating officer and a key witness to the case herein. Javis told the court that he received intelligence on the 1/12/2018 that there were two suspects at Mwakitau who were in possession of wildlife species and they were ready to sell them to anyone who was ready to do business. On receiving the information, PW4 said he sat with PW3 **Tom Okwan** and **Bernard Ektala** and they strategized on how they would go about the arrest. He also said that they agreed PW3 would be the driver and the other 2 as back-up and the said raid was to be done on 3/12/2018. And on 3/12/2018, at around 10.00am, they left for Mwakitau and headed behind the Catholic church where they dropped off the back-up team, as he and the driver headed to the front of the church. At the front of the church, they met a thin man on a bicycle, who he identified as the 2nd Appellant whose alias name is "cunny bunny". That they spoke and he agreed to buy the tusks at Kshs. 15,000/= per kilo. He stated the 2nd Appellant went and got the goods from another person who was 100 meters away. PW4 stated that he could see as the area was plain. They met a man who was tall and dark. The person went into the bush and gave the goods to the 2nd Appellant. PW4 stated he could not see the person well, but said that when the person came to meet the 2nd Appellant, he was called and came close. He then stopped at around 5 metres and saw the person clearly. He stated that a problem arose as to how the goods were to get to the vehicle and that is when he saw the person clearly and that it was the 1st Appellant. PW4 states that he recognised the 1st Appellant and he knew him as a community ranger at Lumo Conservancy. Javis told the court that he spoke to the 1st and 2nd Appellants to take the goods to the car so that the same could be weighed. He stated that the area was open but the back-up team was unable to come. He tried to arrest one of the Appellants, but they managed to run.

16. Javis went on to state that they left with the goods and went back to Taveta where he did an inventory of the same, weighed them and found them to be 8kgs. He stated the goods were before the court as Exhibits, and produced the elephant tusks as Exhibits No. 1 (a) and (b). He told the court, that he booked the same at Taveta police and continued with his investigations and arrest of the Appellant.

17. It is in PW4's statement, that he prepared an exhibit memo form and the same was tendered as exhibit No. 3. PW4 also tendered the veterinary results as conducted in Tsavo East on behalf of the Doctor, to confirm that the elephant tusks were genuine. He proceeded by telling the court, that on 8/12/2018, he got information that the Appellants were at a place called Kedong at Taveta. He immediately liased with colleagues and got men to help him in the search. PW4 states when they got to Kedong, they got more information, that the Appellant persons were in a specific house with an old man taking tea. He recognised them, and positively identified them. He took them to Taveta station and interrogated them. They refused to sign the inventory. He later took them to Taveta Police station. He states, that he knows the 1st Appellant but met the 2nd Appellant at the time of incident.

18. The Defence by both Appellants was denial. The 1st Appellant told the court that he was at work on 3/12/2018 from 8am to 4.30pm and that there was a master roll to prove the same, which was never brought to court.

19. The 2nd Appellant on the other hand told the court that he does not know the 1st Appellant and that he was being used to frame the 1st Appellant. The 2nd Appellant stated that on 3/12/2018 he was in Mghange farming and that the whole week he was farming until 8/12/2018 when he left for Taveta and he met two men who told him, that they were KWS officers and took him to the camp where he was asked to help frame the 1st Appellant. That he refused, and that is how he found himself before court.

20. The 1st Appellant had one witness call in his defence, while the 2nd Appellant did not call any witnesses. The 1st Appellant's witness, was **DW 2** one **Venant Mngai**, and testified as DW3 and told the court, that he is a ranger a Lumo wildlife conservancy and lives in Latika village. He told court that he and the 1st Appellant have been colleagues for 10 years and that they work on night shifts from 6pm to 6am. He states that on the 3/12/2018 he was with the 1st Appellant from 6pm to 6am and did not know where the Appellant was at 12.00 noon.

21. After hearing all the parties, in their evidence, the trial court found that the prosecution had put up a strong case. The court stated that PW3 and PW4 had positively identified the Appellants using their physical traits, and that PW4 was able to identify the 1st Appellant as his student and the 2nd Appellant as he identified himself as 'cunny bunny'.

22. In its Judgment, the trial court indicated that the evidence of PW1, PW2, PW3 and PW4 was consistent and corroborated each other. The court based on the evidence of PW1, PW2, PW3 and PW4 convicted and sentenced the 1st and 2nd Appellants to three (3) imprisonment for count 1 and one (1) year imprisonment for count 2. He ordered the said sentences to run concurrently.

23. Being dissatisfied with the conviction, the 1st and 2nd Appellants filed an appeal with five (5) and six (6) grounds respectively.

24. The Appeal was admitted and parties directed to dispose of the same by way of written submissions.

25. In their written submissions the 1st and 2nd Appellant state that the prosecution has not proved its case against them beyond reasonable doubt contrary to **Sections 109 and 110 of the Evidence Act**. The Appellants further state that PW1, PW2, PW3 and PW4, all gave different narrations on what happened and that their stories were not corroborating.

26. The prosecution in their written submissions rebutted the claim by the 1st and 2nd Appellants and submitted that the Appellant persons deserve the sentences as passed.

Determination

27. The court has considered all the pleadings as filed by the parties together with the written submissions, and concluded that the main issue arising for determination, is whether the prosecution proved their case as against the 1st and 2nd Appellants beyond reasonable doubt.

28. In the case of **Pius Arap Maina v Republic [2013] eKLR,** Hon. Justice G. K. Kimondo held that:

> **"….It is gainsaid that the prosecution must prove a criminal charge beyond reasonable doubt. As a corollary, any evidential gaps in the prosecution's case raising material doubts must be interpreted in favour of the Appellant…"**

29. It was therefore the duty of the prosecution to establish their case as against the Appellants, as the burden does not at any given time, shift from the Appellant to the prosecution. ***See the locus classicus case of*** **Woolmington –Vs- DPP (1935) AC 462**, where Lord Sankey in the celebrated *"Golden thread*; speech stated;

> **"Throughout the web of the English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt subject to……. The defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner…..the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."**

30. The court took its time to summarise the evidence of the parties involved for the sole basis of establishing the assertions of each party and if indeed, the case before it had been proved beyond reasonable doubt.

31. This court has noted that the prosecution's witnesses had different statements with regards to the arrest of the 1st and 2nd Appellant. PW1 and PW2 stated that the arrest occurred on 3/12/2018 while PW3 and PW4 stated that the arrest occurred on 8/12/2018. On this, the court finds that the witnesses' statements were not corroborated.

32. PW3 and PW4's statement was consistent on the occurrence of the raid. However, an issue arises on the identification of both the 1st and 2nd Appellants. According to PW3's statement, the description of the 1st Appellant was very confusing. He told the court, that the first Appellant was 100 meters away in a forest area and he could not see him clearly, but he could only see a tall and dark man. He then again told the court, that the area was clear and had no trees and that he could see but it was a bit far. PW3 described 2nd Appellant as thin and light skinned.

33. PW4 on the other hand, is said to be the key witness as he is the person who interacted with both the 1st and 2nd Appellants. He is said to be the sole identifying witness in the case herein.

34. The law on identification and particularly on identification by a single witness is well set out in our jurisprudence. The Court of Appeal for Eastern Africa in the case of **Abdalla Wendo v Republic [1953] 20 E.A.C.A 166** held on this issue as follows:

> **"Subject to certain exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification, were difficult. In such circumstances what is needed is other evidence whether it be circumstantial or / direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."**

35. The same court in the case of **Roria v Republic [1967] EA 573,** also held that:

> **"A conviction resting entirely on identity invariably causes a degree of uneasiness that danger is of course greater when the evidence against an Appellant person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld. It is the duty of this court to satisfy itself that in all the circumstances it is safe to act on such identification."**

36. PW4 states that he met 2nd Appellant on a bicycle and he identified himself as "cunny bunny". He describes the 2nd Appellant as a thin man. In his statement, it is the 2nd Appellant that led him to the 1st Appellant and he says the area was plain and at a distance of 100 meters, he could see a tall and dark man and once the tall and dark man approached at 5 meters, he was able to recognise him as the 1st Appellant, a Community ranger at Lumo Conservancy who he identified as a student.

37. The courts in Kenya have consistently relied on the English case of **R. –vs- Turnbull & Others (1976) 3 ALL ER 549**, which has a detailed discussion on the factors that ought to be considered when the evidence turns on identification by a single witness. The Court there said:

> **"....The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Appellant under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the Appellant before? How often? If only occasionally, had he any special reason for remembering the Appellant? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the Appellant given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made…"**

38. The Court of Appeal in the case of **Wamunga v Republic (1989) KLR 426** followed this view when it stated:

> **"It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction."**

39. The trial court made a conviction based on the testimony of PW4 who stated that he identified the Appellant persons. The trial court notes that PW4 identified the 1st Appellant as a tall dark man who he later says is a ranger at Lumo Conservancy and his former student. He also identified the 2nd Appellant as a thin man with bicycle alias "cunny bunny". The identification by PW4 has not fulfilled the conditions as sited in the cases herein to warrant the conviction and sentence as was dealt by the trial court.

40. This court also finds that there are very many glaring incontinences in the evidence of the prosecution's witnesses for the trial court to have convicted and sentenced the 1st and 2nd Appellants.

41. The upshot is that the 1st and 2nd Appeal succeeds, the convictions quashed and the sentences meted against the appellants set aside. The 1st and 2nd Appellants be and are set at liberty forthwith unless lawfully detained.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 9TH DAY OF FEBRUARY 2021

D. O. CHEPKWONY

JUDGE