



**Kipnetich & 2 others v Republic (Criminal Appeal 20 & 19 of 2019 & 140 of 2017 (Consolidated)) [2021] KEHC 447 (KLR) (4 March 2021) (Judgment)**

*Nicholas Kipnetich & 2 others v Republic [2021] eKLR*

Neutral citation: [2021] KEHC 447 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAHURURU  
CRIMINAL APPEAL 20 & 19 OF 2019 & 140 OF 2017 (CONSOLIDATED)**

**CM KARIUKI, J**

**MARCH 4, 2021**

**BETWEEN**

**NICHOLAS KIPNETICH ..... 1<sup>ST</sup> APPELLANT**

**ABRAHAM MUTIE ..... 2<sup>ND</sup> APPELLANT**

**JAMES NTOITI ..... 3<sup>RD</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**Meaning and scope of the legal concept of possession.**

Reported by Chelimo Eunice

**Criminal Procedure** – charges – framing of charges – defective charges – circumstances in which a charge could be considered defective – claim that a charge was defective for being at variance with the evidence adduced in support of the charge - whether a charge could be defective if it was at variance with the evidence adduced by the prosecution witnesses – Criminal Procedure Code, (cap 75), sections 34, 136 and 382.

**Criminal Law** – possession – meaning of the legal concept of possession – elements of possession – the doctrine of common intention - elements of the principle of common intention – where 3 accused persons were found in actual possession of wildlife trophies – whether common intention would be inferred in such a case - Penal Code, (cap 63), section 4 and 21.

**Evidence Law** – evidence – adducing evidence in criminal cases - proving facts in criminal cases – whether a particular number of witnesses was required to prove any fact in criminal cases – where the prosecution failed to call all the persons mentioned during the trial – whether in the circumstances, the court could draw a negative inference – whether a court could interfere with the prosecution’s discretion on whether or not to call a witness – Evidence Act, (cap 80), section 143.

**Words and Phrases** - possession – definition of possession - detention and control, or manual or ideal custody, of anything which may be the subject of property, for one’s use and enjoyment, either as owner or as the proprietor



*of a qualified right in it, and either held personally or by another who exercises it in one's place and name - the condition of facts under which one can exercise his power over a corporeal thing at his pleasure to the exclusion of all other persons - Includes; not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person - where there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession it shall be deemed and taken to be in the custody and possession of each and all of them - Black's Law Dictionary.*

### **Brief facts**

The appellants were charged with the offence of being in possession of wildlife trophies contrary to section 95 of the Wildlife Conservation and Management Act. It was alleged that they were jointly found in possession of 5 pieces of elephant tusks weighing 44.5 kgs with a street value of Kshs. 45 million without a permit. They pleaded not guilty to the charge and the matter proceeded to full trial. After the hearing of the case, they were convicted and fined Kshs. 24 million or in default, life imprisonment. They filed the instant appeal claiming, among other grounds, that the sentence was harsh, excessive, and illegal, that the trial was a nullity having been conducted by a prosecutor who was not qualified, that the charge sheet was incurably defective, and that the prosecution failed to call crucial witnesses thus rendering the conviction unsafe.

### **Issues**

- i. What were the circumstances in which a charge could be considered defective?
- ii. Whether a charge was defective if it was at variance with the evidence adduced by the prosecution witnesses.
- iii. What were the elements of the concept of possession?
- iv. What was the scope of the doctrine of common intention?
- v. Whether a court could interfere with the prosecution's discretion on the choice and number of witnesses to be called in a trial.

### **Relevant provisions of the Law**

#### **Penal Code (cap 63)**

#### **Section 4 - Interpretation**

*"possession" —*

*(a) "be in possession of" or "have in possession" includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person;*

*(b) if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them;*

#### **Held**

1. In a first appeal, an appellate court was enjoined to analyze and re-evaluate afresh all the evidence adduced before the trial court and to draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses.
2. The appellants had not raised the issues of defective charges and the prosecutor's lack of competence to prosecute the matter during the trial and they were featuring in the appeal for the first time. From the manner in which the charges were framed, none of the appellants had demonstrated the alleged defect which could go to the root of the validity of the charges.
3. A perusal of the charge sheet *viz-a-viz* the provisions of sections 34 and 136 of the Criminal Procedure Code (the Code) revealed that there were no major irregularities. If any, they could be of a kind considered curable under section 382 of the Code. There was no variance between the particulars of the offence as framed and the evidence by the prosecution witnesses. It was not a case where the appellants



- were charged and tried with a non-existent offence to occasion prejudice or a failure of justice. There was no misjoinder of parties or defect in the charge sheet to warrant the court to set it aside. The ground on the charges being defective was dismissed.
4. No evidence was adduced in court to show that the ODPP counsel prosecuting the matter was not qualified or validly appointed to undertake the prosecutorial mandate under the law and the Constitution. Thus, the ground was baseless.
  5. Section 95 of the Wildlife Conservation and Management Act described the offence of being in possession of wildlife trophies. It prohibited any person from keeping or being found in possession of a wildlife trophy or dealing in a wildlife trophy, or manufacturing any item from a trophy without a permit.
  6. The legal concept of possession was defined under section 4 of the Penal Code. The definition of possession connoted two elements, being in physical control of the items of the offence and it included joint control with another and secondly, knowledge or intention of having the article, instruments, thing or items constituting the offence.
  7. The scope of the doctrine on common intention as defined under section 21 of the Penal Code was to the effect that when two or more persons formed a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose, an offence was committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them was deemed to have committed the offence. The onus was on the accused to disapprove possession of ivory tusks as stated under section 111 of the Evidence Act.
  8. The prosecution evidence pointed to the fact that the accused persons were found in actual possession of the wildlife trophies and that they had physical control of the elephant tusks. Each accused person ought to have had knowledge of what they were carrying since the elephant tusks recovered were in their custody.
  9. The court could not draw a negative inference from the prosecution's failure to call any person mentioned during the trial. Whether a witness ought to be called by the prosecution was a matter within the discretion of the prosecution and the court could not interfere with that discretion unless it was shown that the prosecution was influenced by some oblique motive. Furthermore, section 143 of the Evidence Act made it clear that no particular number of witnesses was required to prove any fact in the absence of any provisions of law to the contrary.
  10. On whether the appellants' defences were considered, the trial court found that the defence's evidence failed to convince it and found no reason to disregard the prosecution's evidence merely because of it. It found that the prosecution proved its case against the appellants in the first count to the required standard of beyond reasonable doubt. The prosecution having discharged its burden of establishing facts that proved to the required standard of beyond reasonable doubt that the appellants were found in actual possession of the luggage with the ivory pieces, by carrying the same and later being found while with them in a closed store, the burden of disproving knowledge that the items were not ivory pieces, or the existence of the ivory pieces was on each of the appellants as the same was especially within their own knowledge and as required under section 111 of the Evidence Act.
  11. The only sentence provided for under section 95 of the Wildlife Conservation and Management Act under which the appellants were charged, was a fine of not less than Ksh. 1 million or imprisonment for a term of not less than 5 years or to both such imprisonment and fine. The appellants were first offenders, thus, the fine of Ksh. 24 million or life imprisonment imposed was not illegal but excessive in the circumstances of the case. Under Judiciary Sentencing Policy Guidelines, paragraph 23, being a first offender was a mitigating factor.

*Appeal partly allowed.*



## **Orders**

- i. The appeal failed on conviction and succeeded partially on sentence.
- ii. The sentence of fine of Ksh. 24 million and in default life imprisonment for each appellant was set aside.
- iii. Appellants were each sentenced to a fine of Ksh. 5 million and in default to serve a sentence of 10 years each to run from the date of conviction on January 10, 2017.

## **Citations**

### **Cases**

#### **Kenya**

1. *Kioko, Jackson Muasya & others v Republic* Criminal Appeal 1099 of 1989 - (Explained)
2. *Mburi, Charles Mbaabu v Republic* Criminal Appeal 29 of 2016; [2018] KEHC 8176 (KLR) - (Explained)
3. *Njoroge v Republic* Criminal Appeal 115 of 1982; [1983] KLR 197 - (Mentioned)
4. *Omambia, Isaac v Republic* Criminal Appeal 47 of 1995; [1995] KECA 156 (KLR) - (Explained)
5. *Wario, Roba Galma v Republic* Criminal Appeal 159 of 2014; [2015] KECA 521 (KLR) - (Explained)

#### **United Kingdom**

*Woolmington v Director of Public Prosecutions* [1935] AC 462; [1935] UKHL 1 - (Explained)

#### **Regional Court**

1. *Okeno v Republic* [1972] EA 32 - (Explained)
2. *Peters v Sunday Post Ltd* [1958] EA 424 - (Mentioned)
3. *Solomon Mungai v Republic* [1965] EA 782 - (Mentioned)

### **Statutes**

#### **Kenya**

1. Constitution of Kenya In general - (Cited)
2. Criminal Procedure Code (cap 75) sections 34, 134, 136, 382 - (Interpreted)
3. Evidence Act (cap 80) sections 111, 143 - (Interpreted)
4. Penal Code (cap 63) section 21 - (Interpreted)
5. Wildlife Conservation and Management Act (cap 376) sections 92, 95 - (Interpreted)

### **Advocates**

None mentioned

## **JUDGMENT**

1. The appellants were charged with offence of being in possession of Wildlife Trophies contrary to section 95 of *Wildlife Conservation and Management Act* (WC&MA) of 2013. Particulars being that on October 22, 2014 at around 1530hrs at Rumuruti Township within Laikipia County were jointly found in possession of Wildlife Trophies namely five (5) pieces of Elephant Tusks weighing 44.5kgs with a street value of Kshs 45million without permit.
2. They pleaded not guilty to charge and the matter proceeded to full trial. After hearing the case, they were convicted and fined Kshs 24 million in default life imprisonment. Thus they filed appeal raising various grounds; summarized as follows



### **A. For Nicholas Kipnetich;**

- i. At the trial Magistrate erred in law and facts by convicting appellant relying on the prosecution hearsay.
- ii. In facts that were not proved beyond reasonable doubt.

### **B. For Abraham Mwiti Muturi;**

- i. That the trial was a nullity having been conducted by a prosecutor who was not qualified to conduct the same.
- ii. That the charge sheet was incurably defective.
- iii. That the ingredients of the offence were not proved.
- iv. That the prosecution failed to call crucial witnesses especially the informer thus rendering the conviction unsafe.
- v. The sentence was manifestly excessive.

### **C. For James Ntoiti Amended Memo of Appeal;**

- i. The charge was defective contrary to section 214, 134 and 135 of the Criminal Procedure Code occasioning a serious miscarriage of justice.
- ii. The prosecution did not prove case to the required standards.
- iii. That the learned trial magistrate erred in law in rejecting the appellant's cogent and plausible statement in sworn defence without cogent reasons for the rejection occasioning a further prejudice.

### **The Duty of the First Appellate Court**

3. This being a first appeal, this court is, as a matter of law, enjoined to analyze and re-evaluate afresh all the evidence adduced before the lower court and to draw own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See *Okeno v Republic* [1972] EA 32 where the Court of Appeal set out the duties of a first appellate court as follows:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v Republic* [1957] EA (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M Ruwala v Republic* [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's 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 had the advantage of hearing and seeing the witnesses, see *Peters v Sunday Post* [1958] EA 424.”

### **The Evidence Tendered**

4. PW1, KWS 10092 Adan Daudi and PW2, KWS 8349 Ranger Juma Malembe, informed the court that on the material afternoon, they were on normal patrol duties within Rumuruti Town when they got



- a tip off from a Good Samaritan that some three (3) people were jointly carrying a suspicious luggage while heading towards a tobacco store next to the bus park within the town.
5. That they immediately used their unbranded vehicle to rush towards the tobacco store. That while 80 – 100 meters from the store, they saw three (3) people while holding a luggage which they entered with in to the store and immediately closed the door behind them. The two (2) KWS Rangers proceeded to the store, knocked the closed door. The door was opened for them by the people who they recognized as the appellants herein.
  6. They then introduced themselves and requested them to open the luggage which they did. They found from inside the luggage, a black crate wrapped on top with a brown carton. That inside it was a weighing scale and 5 pieces of elephant tusks wrapped in a nylon sack.
  7. They then arrested the appellants and escorted them to Rumuruti Police Station together with the five (5) pieces of ivory and all the other recovered items, i.e. the black crate, weighing scale, brown carton and the sack for further investigations.
  8. At the police station, they were received by PW3, No 77542 PC Reynard Omboto who rearrested the appellants herein. He then escorted the pieces of ivory to the National Museums of Kenya for analysis using an Exhibit Memo Form which he prepared and produced as the pieces were trophies from an elephant.
  9. He produced the black crate, as P-Exhibit No 1, the carton as P-Exhibit No 2, the five (5) pieces of ivories as P-Exhibit No 3, the nylon sack as P-Exhibit No 4, the weighing scale as P-Exhibit No 5 and the report from the analyst dated 14/04/2015 as P-Exhibit No 7.
  10. The 1<sup>st</sup> accused in his defence, as corroborated by the evidence of the 3<sup>rd</sup> accused, DW3 and DW4, Sophia Ndwiga, is that on the material day he had been sent by his father from Nakuru to deliver tobacco to DW4, Sophia Ndwiga. That upon delivering tobacco, he and the 3<sup>rd</sup> accused (DW3) were sent by DW4 Sophia Ndwiga, who was the 3<sup>rd</sup> defendant's employer at the tobacco store, to collect canvas (chandarua or chandalua) from a neighbour's plot.
  11. That upon reaching there, they found five (5) people who included the 2<sup>nd</sup> accused herein, and the two (2) KWS Rangers herein. That the 2<sup>nd</sup> accused and two (2) others were handcuffed and next to luggage that they later learnt were the elephant trophies herein. That the 2<sup>nd</sup> accused soon implicated them with the luggage.
  12. They were then arrested and together with the other prisoners, taken to the police station. That at the police station, the 2<sup>nd</sup> accused confessed that the luggage and trophies belonged to him and that they and others were innocent. That the other two (2) prisoners were however released.
  13. The 2<sup>nd</sup> accused in his sworn testimony DW2, stated that he was hawking khat (miraa) within Rumuruti Town Bus Park when he was approached by some people in a double cabin pick up who posed as miraa customers. That the 'customers' requested him to accompany them to a restaurant within the town, where he could sell to them the khat.
  14. That instead of being taken to the restaurant, he suddenly found himself being arrested by the 'customers' who turned out to be under cover Wildlife Rangers, on false allegations that he was in possession of elephant tusks.
  15. He was arrested and taken to the police station where he was shown some suspects who had been detained in a certain house therein. He did not know any of them. That the police then attempted to extort Kshs 10,000/- bribe from him, which he did not have. He denied knowing the co-accused herein.



16. In cross – examination he denied that the luggage or the ivory pieces herein were his and as alleged by the other defence witness herein.

**1<sup>st</sup> Appellant Nicholas Kipngetch's Submissions;**

17. It is submitted that on cross – examination by accused 2, pw1 went ahead to contradict the evidence by stating that he saw three (3) people entering the store very fast and they closed the door while carrying a crate.

18. He admitted that no inventory was prepared for signing by the suspects and no photographs were taken.

19. PW3 the investigating officer was not present when the suspects were arrested and he only relied on what he was informed by PW1 and PW2. On cross – examination by accused 2, he stated that “you were found with him and carrying the luggage. It was elephant tusks, sacks and one (1) crate. You carried it two (2) of you.”

20. It is contended that, he confirmed that the recovered items were not dusted for fingerprints for comparison with those of the accused to confirm that they had handed them. No inventory was prepared.

21. Thus it is submitted that, from the evidence, it is clear that PW1 and PW2 did not see the accused persons carrying a sack or a crate and if indeed they are to be believed, that aspect of carrying was only reported to them by an informer who was not called to testify.

22. It is submitted that, the 1<sup>st</sup> appellant denied that he was found in the store at the time of arrest and in his defence, he stated that he was found in a field while going to collect a canvas with accused No 3, thus KWS Officers ought to have placed the appellant in the store by preparing an inventory of the recovered items at the time of arrest and taking photographs of the scene as it normally the case such evidence would have placed the appellant in the store with the recovered tusks.

23. It is contended that, if PW1 and PW2 are to be believed that the appellant was indeed found in the store, he was not found holding or carrying the crate and there was no proof that he had knowledge of the contents of the crate.

24. PW1 and PW2 confirmed that the tusks were concealed in a sack which was tied in a crate.

25. The crate covered with a brown carton had to be untied to reveal the sack. Inside the sack is where the five (5) pieces of ivory were found. The investigating officer ought to have dusted the recovered items for fingerprints to establish that indeed the appellant had handled them.

26. The mere fact that the items were found in a store where the appellant was, did not in itself prove possession. The prosecution witnesses admitted that the store had tobacco and the appellant and his witnesses confirmed that he had delivered tobacco from Nakuru on the date of arrest.

27. The appellant was not the actual or special owner of the store. He cites the case of [\*Charles Mbaabu Mburi v Republic\*](#) [2018] eKLR the judge held as follows;

“..... possession would involve an element of control of the thing a person is said to have. It is in effect the act of having and controlling property. The right under which a person can exercise control over something to the exclusion of all others. In this case, that aspect of the offence was not established beyond reasonable doubt against the appellant.”



28. On sentence, he complained that the same was harsh and indeed illegal as the only sentence provided for under section 95 of the *Wildlife Conservation and Management Act 2013* under which the appellant was charged, is a fine of not less than one million shillings or imprisonment for a term of not less than five (5) years or to both such imprisonment and fine.

29. The fine of 24 million or life imprisonment imposed was thus not applicable in this case.

### **2<sup>nd</sup> Appellant Abraham Mutie Submissions:**

30. It is submitted that the sentence meted was not only excessive, but was unlawful and unconstitutional.

31. The appellants although charged with two counts of being in possession of Wildlife Trophy contrary to section 95 and dealing with Wildlife Trophy contrary to section 92 were only convicted on count one and were sentenced to pay a fine of Kshs 24,000,000 and in default to serve life in prison.

32. The appellants are first offenders, and had been in custody throughout the trial period to date. Thus urged the court to be guided by the provisions of the Constitution and the mitigation offered and thus substitute the sentence with a less severe.

33. It is submitted that the prosecution was not able to prove that the appellants were found in physical control or exclusive possession of the game trophies. The appellants were found in a room which had in it suspicious luggage amongst other items. The officers from KWS PW1 and PW2 entered the said store and found the appellants there and asked them to open the suspicious luggage which they did and upon opening it the contents were found to be elephant tusks.

34. It is contended that from the evidence of PW1 and PW2 they say that when they reached the place where the suspected luggage was they found the door locked, knocked and the appellants opened and that they found then standing doing nothing.

35. Secondly there is no evidence to prove that the store belonged to any of the appellants but the store belonged to another who was not arrested and charged nor called as a witness.

36. It is submitted that, the fact that no inventory of the goods found allegedly in possession of the accused persons was ever taken, lends credence to our submission that possession has not been proved. Where police make any recoveries of items in a crimes scene an inventory of the items found ought to be taken and failure to so do is fatal against the case of the prosecution.

### **3<sup>rd</sup> Appellant James Ntoiti Submissions:**

37. It is submitted that none of the critical elements of offence charged were actually proved beyond reasonable doubt. The court is urged to take judicial notice that the alleged elephant tusk was not even recorded as having been in possession of the appellant or any of other two accused as per the inventory and hence the same was not proved.

38. It is submitted that the charges as laid out were therefore incurably defective and on this ground alone, this appeal ought to succeed.

39. On burden of prove, a case of *Woolmington v DPP* [1935] AC 462; is cited where court held;

“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. ....”



40. Also cited is *Jackson Muasya Kioko & others v Republic* Cr Appeal No 1099/89 where it was held that;
- “It was the duty of the prosecution to prove its case against the appellant and not hope to rely on appellant in his defence or evidence to achieve a conviction.”

**Respondent’s Submissions:**

41. It is submitted that the prosecution proved its case to the required standards. The prosecution evidence was consistent and well corroborated.
42. PW1 testified that he received a tip off regarding three people carrying suspicious luggage and heading towards a tobacco store. He was with PW2 and their driver at the time. He testified that they all proceeded to the store where they saw three people carrying luggage, entering store and closing the door behind them.
43. PW2 corroborated PW1 version of events. He stated that they knocked on the door which was subsequently opened and on entering they found three people inside.
44. It is submitted that, from the record it is very clear that the appellants were seen carrying the crate to the store. PW1 testified that he saw three people carrying a luggage and entering the store then closing the door behind them.
45. That they knocked the door which was opened and upon introducing themselves, requested to open the luggage. Upon opening, they found a black crate wrapped on top with a brown carton. He testified that inside the crate was a weighing scale and five pieces of elephant tusks wrapped in a nylon sack.
46. PW2 corroborated what PW1 said.

“Possession is defined in *Black’s Law Dictionary* as “The detention and control, or manual or ideal custody, of anything which may be the subject of property, for ones use and enjoyment, either as owner or as the proprietor of a qualified right in it, and either held personally or by another who exercises it in one’s place and name. that condition of facts under which one can exercise his power over a corporeal thing at his pleasure to the exclusion of all other persons.

Includes; Not only having in one’s own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person;

If there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession it shall be deemed and taken to be in the custody and possession of each and all of them.”

47. It is contended that the prosecution evidence point to the fact that the accused persons were found in actual possession of the wildlife trophies. Both PW1 and PW2 saw three people carrying suspicious luggage. They also found the three people with the luggage confirming that the accused persons had physical control of the elephant tusks. It is our further submission my Lord that each accused person ought to have had knowledge of what they were carrying and further that the elephant tusks recovered were in their custody.



48. It is urged that a negative inference should not be drawn for the prosecutions failure to call any person mentioned during the trial. Reliance is made on the case of *Roba Galma v Republic*[2015] eKLR where they decided that;

“Whether a witness should be called by the prosecution is a matter within the discretion of the prosecution and the court will not interfere with that discretion unless it may be shown that the prosecution was influenced by some oblique motive.”

49. Furthermore, cites section 143 of the *Evidence Act* cap 80 Laws of Kenya states that particular number of witnesses shall be required to prove any fact in the absence of any provisions of law to the contrary.

### **Issues, Analysis and Determination**

50. After going through the proceedings and the parties’ submissions, I find the issues are;

Whether the charges were defective? Whether the prosecutor was competent to prosecute the matter? Whether the prosecution proved case beyond reasonable doubt? Whether defence were considered? Whether sentence was excessive?

51. On the first two issues, the appellants did not raise the same during trial and they are featuring in appeal for the first time. The way the charges are framed, none of the appellant has demonstrated the defect which can go to the root of the validity of the same charges.

52. I have perused the charge sheet viz aviz the provisions of section 34 and 136 of the *Criminal Procedure Code* to see if there are any irregularities. If any they could be of a kind, I consider curable under section 382 of the Code. There is no variance between the particulars of the offence as framed and the evidence by the prosecution witnesses. This is not a case where the appellants were charged and tried with a non-existent offence to occasion prejudicial or a failure of justice as the defence wants this court to believe. There is no misjoinder of parties or defect in the charge-sheet to warrant this court to set it aside. This ground on a charge being defective is dismissed.

53. That was also the position taken by the court in the case of *Isaac Omambia v Republic*[1995] eKLR as follows: “In the regard it is pertinent to draw attention to the following provisions of 134 of the *Criminal Procedure Code* which makes particulars of the charges. Every charge or information shall contain and shall be supportive if it contains a statute of the specific offence or offences with which the accused person is charged together with such particulars on may be necessary for giving reasonable information as to the nature of the offence”. In the instant case, I associate myself with the above principles.

54. On the complaint that the prosecutor was incompetent, no evidence was shown to court the ODPP counsel in court doing the task of prosecution was not qualified or validly appointed to undertake the prosecutorial mandate under the law and *the constitution*. Thus the ground is baseless.

55. The offence of being in possession of Wildlife Trophies contrary to section 95 of *Wildlife Conservation and Management Act* (WC & MA) of 2013 is described as follows;

Section 95. 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.



56. The legal concept of possession is defined under section 4 of the penal code as: (a) be in possession of or to have possession includes having in one's own personal possession but also knowingly having anything in the actual possession custody of any other person or having anything in any place whether belonging to or recapped by oneself or of any other person. (b) if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody of possession it shall be denied and taken to be in the custody and possession of each and all of them.
57. Under this section the definition of possession connotes two elements being in physical control of the items of the offence and it includes joint control with another. Secondly, knowledge or intention of having the article, instruments, thing or items constituting the offence.
58. The scope of the doctrine on common intention as defined under section 21 of the Penal Code as provided for herein is to the effect:
- “When two or more persons from a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”
59. The provision squares well with the following passage in the case of Njoroge in the case of Njoroge v Republic [1983] KLR 197 and Solomon Munga v Republic [1965] EA 363 where both courts held as to the elements on the principle of common intention thus. “If several persons combine for an unlawful purpose and one of them kills a man, it is murder in all who are present whether they actually aided or abated or not, provided that the death was caused by act of someone of the party in the course of the endeavours to effect the common object of the assembly.”
60. The onus was now on the accused to disapprove possession of ivory tusks as stated under section 111 of the Evidence Act.
- “When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exception from or qualification to, the operation of the law creating the offence with which he is charged and the burden proving any fact especially within the knowledge of such person is upon him. Provided that such burden shall be discerned to be discharged if the evidence given by the provision, whether in cross-examination or otherwise, that since circumstances of facts exists”.
61. PW1 testified that he received a tip off regarding three people carrying suspicious luggage and heading towards a tobacco store. He was with PW2 and their driver at the time. He testified that they all proceeded to the store where they saw three people carrying luggage, entering store and closing the door behind them.
62. PW2 corroborated PW1 version of events. He stated that they knocked on the door which was subsequently opened and on entering they found three people inside. The record shows that the appellants were seen carrying the crate to the store. PW1 testified that he saw three people carrying a luggage and entering the store then closing the door behind them.
63. That they knocked the door which was opened and upon introducing themselves, requested to open the luggage. Upon opening, they found a black crate wrapped on top with a brown carton. He testified that inside the crate was a weighing scale and five pieces of elephant tusks wrapped in a nylon sack. PW2 testimony corroborated what PW1 said.



Possession is defined in *Black's Law Dictionary* as

“The detention and control, or manual or ideal custody, of anything which may be the subject of property, for one's use and enjoyment, either as owner or as the proprietor of a qualified right in it, and either held personally or by another who exercises it in one's place and name. that condition of facts under which one can exercise his power over a corporeal thing at his pleasure to the exclusion of all other persons.

Includes; Not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person;

If there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession it shall be deemed and taken to be in the custody and possession of each and all of them.”

64. The prosecution evidence point to the fact that the accused persons were found in actual possession of the wildlife trophies. Both PW1 and PW2 saw three people carrying suspicious luggage. They also found the three people with the luggage confirming that the accused persons had physical control of the elephant tusks. Each accused person ought to have had knowledge of what they were carrying and further that the elephant tusks recovered were in their custody.

65. The court cannot draw a negative inference for the prosecution's failure to call any person mentioned during the trial. As stated in the Court of Appeal in *Roba Galma v Republic* [2015] eKLR where the court decided that;

“Whether a witness should be called by the prosecution is a matter within the discretion of the prosecution and the court will not interfere with that discretion unless it may be shown that the prosecution was influenced by some oblique motive.”

66. Furthermore, section 143 of the *Evidence Act* cap 80 Laws of Kenya states that no particular number of witnesses shall be required to prove any fact in the absence of any provisions of law to the contrary.

67. On whether the appellants' defences were considered, the trial court found that, the defence evidence failed to convince it and found no reason to disregard the evidence of PW1 and PW2 merely because of it.

68. It found that the prosecution proved its case against the appellants herein in the first count to the required standard of beyond reasonable doubt. The prosecution having discharged its burden of establishing facts that prove to the required standard of beyond reasonable doubt that the appellants were found in actual possession of the luggage with the ivory pieces herein, by carrying the same and later being found while with them in a closed store, the burden of disproving knowledge that the items were not ivory pieces, or the existence of the ivory pieces therein, were on each of the appellants herein as the same was especially within their own knowledge and as required under section 111 of the *Evidence Act*.

69. Having found their defence to be evasive, and meant to divert from the real issues herein on how they were seen, found and arrested while with the luggage with the ivory pieces herein, trial court found that they failed to discharge their part of the burden of proof, especially as far as the knowledge component of possession is concerned.



70. I have carefully gone through their defences and do agree with trial court that the defences lacked merit and were baseless.
71. Thus the court finds no merit in the appeal on conviction.

**On Sentence:**

72. it is urged that the sentence was harsh excessive and illegal. The only sentence provided for under section 95 of the *Wildlife Conservation and Management Act 2013* under which the appellants were charged, is a fine of not less than one million shillings or imprisonment for a term of not less than five (5) years or to both such imprisonment and fine.
73. The appellants were first offenders thus the fine of Ksh 24 million or life imprisonment imposed was thus not illegal but excessive in the circumstances of this case. Under Judiciary Sentencing Policy Guidelines para 23 being a first offender is a mitigating factor.
74. Thus the court is minded to reduce it and substitute it with a lesser one.
75. Thus the court makes the following orders;
- (i) The appeal fails on conviction and succeeds partially on sentence.
  - (ii) The sentence of fine of Ksh 24 million and in default life imprisonment for each appellant is set aside.
  - (iii) Appellants are each hereby sentenced to a fine of Ksh 5 millions and in default to serve a sentence of 10 years each to run from the date of conviction on January 10, 2017.

**DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 4<sup>TH</sup> DAY OF MARCH, 2021.**

**CHARLES KARIUKI**

**JUDGE**

Present:-

Rugut – State Counsel

1<sup>st</sup> Appellant

2<sup>nd</sup> Appellant

Court Assistant - Henry

