



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARSEN**

**CRIMINAL APPEAL NO.2 OF 2019**

**ISSA NABONGO WANINA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Appeal from Original Conviction and Sentence in Mpeketoni PMCRC No. 24 of 2018***

***delivered by Hon. R. G. Mundia (SRM) on 19th December, 2018)***

**CORAM: Hon. Justice R. Nyakundi**

**The appellant in person**

**Mwangi for the State**

**JUDGEMENT**

The Appellant was charged with being in possession of wildlife trophy contrary to Section 95 of the Wildlife Conservation and Management Act No.47 of 2013. The particulars of the offence were that on 24<sup>th</sup> January, 2018 at around 2200hrs in Lake Amu Village in Mpeketoni division in Lamu West Subcounty within Lamu County was found in possession of Wildlife trophy namely two elephant tusks both weighing 5kgs without a permit in contravention of the said Act.

Aggrieved by the sentence and the conviction of the trial court, the Appellant lodged an appeal on the following grounds:

- 1) That the learned trial magistrate erred in law and fact by relying on the evidence of single witnesses from the prosecution which was insufficient to sustain a conviction.**
- 2) That the learned trial magistrate erred in law and fact by discounting and not considering in detail my defensive evidence.**
- 3) That the learned trial Magistrate erred in law by giving a harsh and excessive sentence in the circumstances of this case.**
- 4) That the learned trial Magistrate erred in law and fact by failing to consider that the prosecution witnesses failed to discharge the burden of proof to their case as required by the law.**

**Background**

**PW1 No. 8369 Ranger Samson Kiptoo** stationed at Mpeketoni outpost under Lamu Station. He informed the court that he had worked as a ranger for over 13 years and that he recalled the events of the 24<sup>th</sup> day of January, 2018. He stated that on the said date while on patrol at Lake Amu, they received information from a member of the public about a trophy they had heard about. He directed them to the site. He informed court that at around 1800hrs, they acted on the information, they headed to the suspect's house, on the way they met the suspect who accompanied them to his house. He said that upon conducting a search in one of the rooms, they discovered 19 snares. They interrogated the Appellant and he directed them to his farm where they retrieved 2 elephant's tusks covered inside a gunny bag which weighed 5kgs. This was around 2200hrs. He stated that they informed him of the likely charges and requested him to accompany them. He said that they took him to Mpeketoni Police Station in order to charge him. He informed court that he prepared an Exhibit Memo dated 24<sup>th</sup> January, 2018 forwarding it to KWS forensic lab Tsavo observation Area. The Exhibit memo was produced as P Exhibit 5.

On cross examination, he confirmed that they met at Amu near his home. He also informed court that they conducted a search and recovered 19 snares and from the farm they recovered two tusks elephants. He said that the Appellant led them to them to his farm and that he did this out of his own volition. He told the court that his house was in the farm where they had discovered the tusks. He confirmed that he arrested him on 24<sup>th</sup> January, 2018 Vide OB No. 02/24/2018.

On re-examination, PW1 confirmed that they did not assault the Appellant and that he did not know the Appellant prior to the arrest. He stated that they found the snares 15 snares from his house and the tusks fifty meters away. That they found the snares inside the house where the Appellant had hidden them. He informed court that the right date ought to be 25<sup>th</sup> January, 2018 when they booked him at the Police Station.

**PW2 No. 10325 Ranger Patrick Kihuga** stationed at Mukowe confirmed that he had worked with KWS for four years. He informed court that on 24<sup>th</sup> January, 2017 between 1500 and 1600 hours, they were on patrol with Ranger Kiptoo and Sekona when an informer told them that there was a hunter with government trophy and snare. They were directed to the house and as they went there, they met the suspect and requested him to accompany them to his house. He informed court that they went a four roomed house and in one room, they recovered 19 snares and that the Appellant also had elephant tusks. He said that the Appellant guided them to a place about 200 meters from his house where they recovered a white and a green sack. They arrested him and escorted him to Mpeketoni Police station. He stated that they took custody of the exhibits and forwarded to their analyst who concluded that they were elephant tusks.

On Cross examination, PW2 stated that they met the Appellant 200 meters from his house, that they were coming from patrol at Lake Amu. He confirmed that they retrieved the snares from the Appellant's house under the bad. He told the court that it was the Appellant who led them to his house where they recovered the exhibits. He informed court that they did not beat up the Appellant.

**PW3 No. 11093 Ranger Sergon David** attached to Mpeketoni outpost with three years in service. He informed court that on 24<sup>th</sup> January, 2018 he was on patrol at Lake Amu at around 2030 hours when they received intelligence on a person who had elephant tusks and they were given his description. They then headed towards the suspect's house, they met him on the way, they then headed towards the Appellant's house and searched the house but did not recover anything. He stated that there was an adjacent house and on opening the door they found 19 snares. They interrogated the Appellant about the elephant tusks but he denied having any but after convincing him, he admitted to having them. He led them to a grassy patch where they recovered two elephant tusks in a green and white sack. He told the court that they arrested him and called the police who came and took the Appellant.

On cross examination he informed court that they arrested the Appellant on 24<sup>th</sup> of January, 2018 and the OB No. 02/25/1/2017.

**PW4 PC Joab Ochieng No. 106210** attached to Mpeketoni Police Station stated that he had been at Mpeketoni for 2years. He confirmed to court that the matter was being handled by CPL Musyoka who went on transfer. He stated that he was the current investigating officer since 3/4/2018. He told the court that the file was compiled including an expert report from KWS with exhibits. He said that he read the witness statement of the investigating officer and the same was dated 24<sup>th</sup> January, 2018.

On reexamination PW4 confirmed that he read the statement and that the investigating officer visited the scene.

**PW5 Jeremiah Pogon Kaitopik** a veterinary officer working with Kenya Wildlife Service at Tsavo East National Park Voi. He informed court that on 8<sup>th</sup> February, 2018 while at his office at Voi Tsavo, he received a call from one Samson Kiptoo based in Lamu. He brought the pieces of exhibits which he suspected to be elephant tusks and requested for verification. He stated that he conducted a morphological examination and confirmed that the tusks were before court. He said that the appearance of Exhibit A had a base which is hollow (pulp cavity) the mid-section and the apex tip which is curved and the three characteristics are found in elephants. He stated that he made a small cut on both specimen and found out that the tusk had enamel and dentins which were both present in the specimens. He said that he took the pieces he had cut out and examined them under a magnifying glass and was able to see shruvs line which are only found in elephant tusks. He stated that the two pieces presented to him were truly elephant tusks, he later filled the Exhibit memo and prepared a report which he produced as P Exhibit 6.

At the close of the prosecution case, the trial court found that a prima facie case had been established and the Appellant was placed on his defence and he elected to give a sworn statement.

**DW1 Issa Nabongo** informed court that he was farmer and a fisherman. He stated that on the 17<sup>th</sup> of October, 2017, he was at home selling alcohol when KWS officers came and demanded a bribe. He told them that he did not have any money and they arrested him, confiscated his alcohol and took him to their post. He stated that they made him put on a cloth and alleged that he was Alshabab. He said that his wife bribed them, they left but he later met them and they told him that he owed them money and said that they would teach him a lesson.

He informed court that on 24<sup>th</sup> January, 2018 at around 1827hrs he was going home from Mpeketoni. He told them to accompany him home but they later requested him to accompany them to their post so that they could put on their uniform. He told the court that when they got to the house, they demanded that he retrieve some unknown item, they took him out and slapped him to the ground. He said that they beat him up and Rono hit him with the butt of the gun thereby loosing his incisors and another officer called Dosari pulled him on his collar bone and it got shattered. He informed court that he had the X Ray Report which showed the same and the same was produced as D Exhibit 1.

The court later sentenced the Appellant to a fine of one Million shillings (Kshs. 1,000,000) in default five years' imprisonment.

### **Analysis and determination**

In criminal cases before a trial Court one of the fundamental duties of the Court is to establish whether the burden of proof and standard of proof has been discharged beyond reasonable doubt against an accused person. The issue of proof is a matter of evidence. **In R v**

Subordinate Court of the First Class Magistrate at City Hall {2006} EA 330 it was held that:

***“When a person is bound to prove the existence of any fact it is the Law that the burden of proof lies on that person.”***

The general provisions on the legal and evidential burden is to be found in Section 107, 108 and 109 of the Evidence Act. It is trite Law that the state or the prosecution in criminal cases has the burden of proof to prove the existence of certain facts that the accused is guilty contrary to the right on presumption of innocence under Article 50 (2) (a) of the Constitution. The state has to discharge any given issue in an offence framed against an accused to create a doubt in the mind of the Court that he cannot be entitled a right of presumption to innocence. **In Woolmington v DPP [1935] AC 462 Lord Sankey stated in the following terms:**

***“But while the prosecution must prove the guilt of the prisoner, there is no such laid down on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt, he is not bound to satisfy the jury to his innocence. 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 prisoners guilty.”***

Having stated that, this being a first appeal, this court has a duty to revisit the evidence that was before the trial court, reevaluate and analyse it and come to its own conclusion. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanor of the witnesses and the Appellant during the trial and can therefore only rely on the evidence that is on record. See **Okeno v R (1972) EA 32, Eric Onyango Odeng’ v R (2014) eKLR.**

I have considered the grounds of appeal, the respective submissions, and the record and the only issue for determination is whether the prosecution proved its case against the Appellant.

With the foregoing parameters in mind, I have identified the issues that fall for my determination in this appeal. One is as regards whether the prosecution proved its case beyond reasonable doubt. The appellant was charged with the offence of being in possession of wildlife trophy contrary to Section 95 of the Wildlife Conservation and Management Act 2013 provides:

***“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.”***

The following three elements must be proved for a case of this nature to suffice: -

- 1. Proof that the accused was in possession of a trophy;***
- 2. Proof that the items in question are game trophies; and***
- 3. Proof that the accused lacked a certificate of ownership.***

According to the case of **Jean Wanjala Songoi and Patrick Manyola versus Republic Criminal Appeal No 100 of 2014** 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.

The Evidence placed before me by the prosecution is that PW1, PW2 and PW3 received information from a member of the public about a trophy. That they headed to the Appellant’s house and on the way they met him and asked him to accompany them to his house. PW3 on the other hand informed the court during examination in chief that they searched the house but did not recover anything and that the snares were found in an adjacent house but we are not told to whom the house belonged to.

There element of constructive possession is also neither here nor there because the circumstances under which the trophies were found and recovered was ambiguous and there is nothing before me capable to credibly ascertain that the same was either in actual or constructive possession of the said trophies. In that regard I find useful guidance in the case of **Obeng Comfort v Public Prosecutor (2017) 1 SLR 1 633**, where **Menon, CJ** held that in order to prove the fact of possession, the prosecution has to prove beyond reasonable doubt, that the accused person did not only have physical control over the item, but the accused person also knew or aware that the was a controlled wildlife trophy. The prosecution evidence ought to have shown that the appellant actually lived in the so-called adjacent house, search it and arrest him thereafter. In that regard, I find that the prosecution failed to prove the element of possession to the required threshold of proof beyond reasonable doubt.

The next issue as to whether the items in question were wildlife trophy. Section 2 of the Act defines a “trophy” as follows:

***“Means any wild species alive or dead and any bone, claw, egg, feather, hair, hoof, skin, tooth, tusk or other durable portion whatsoever of that animal whether processed, added to or changed by the work of man or not, which is recognizable as such.”***

The evidence of the investigating officer suggest that the exhibits were handed over to the Government Chemist to find out that the items allegedly found with the appellant were wildlife trophy. From the evidence available on record, it seems that the Government examined and confirmed the substance they received to belong to an elephant. There is no report from the Government Chemist which shows that the other items were confirmed to be wildlife trophy. This, to my mind, left a lot to be desired from the prosecution. I am therefore convinced that the prosecution has not proved its case beyond reasonable doubt.

I therefore associate myself with the Court of Appeal guidance in the case of **Pius Arap Maina v Republic (2013) eKLR;**

***“The prosecution must prove a criminal charge beyond reasonable doubt and, as a corollary, any evidential gaps in the prosecution’s case raising material doubts must be in favour of the accused.”***

In the same spirit, and for the reasons aforementioned, it is my considered view that the prosecution failed to prove its case beyond reasonable doubt. The essential elements of an offence of this nature, to wit, possession and proof that the items were indeed wildlife trophy, and that he knew that the items recovered in the adjacent house were game trophies have not been proved. Any reasonable doubt gives the appellant a benefit of doubt.

In the upshot, the appeal is hereby allowed, conviction quashed and the sentence set aside. The appellant is hereby set at liberty unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 12<sup>TH</sup> DAY OF APRIL, 2021.**

**R. NYAKUNDI**

**JUDGE**

**In the presence of:**

Mr. Mwangi for the State

Appellant