REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: A.K NDUNG'U J

CRIMINAL APPEAL NO 40 OF 2020

JOHNSON NYARURI OMAMBIA.....APPLICANT

VERSUS

REPUBLIC.....PROSECUTOR

(Being an appeal against the judgment in Kilgoris PMCCRI Case No 823 of 2018 delivered by Hon D.K. Matutu (PM) on 14th November 2019)

JUDGMENT

1. The Appellant herein, JOHNSON NYARURI OMAMBIA, was charged with the offence of being in possession of wildlife trophy contrary to **section 95 of the Wildlife Conservation and Management Act, No 47 of 2013** (*'the Act'*) .The particulars of the charge were that on the 3rd November 2018 at Njipship area in Transmara, he was found in possession of wildlife trophies namely three (3) elephant tusks, weighing 9kgs without a permit. He also faced an alternative charge of dealing in wildlife trophy contrary to **section 95 of the Act**.

2. This being a first appeal, I am mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

> **"On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".**

3. The prosecution before the trial court called 6 witnesses in support of its case.

4. Joseph Turere (PW 1) recalled that on 2nd November 2018 they received a report that the appellant was selling ivory in Keroka town. He went to Keroka town and posed as a buyer thus securing a meeting with the appellant. They scheduled a further meeting and on the agreed date the appellant came with a sack that had 3 pieces of elephant ivory. His colleague Paul Otieno (PW 2) who was also present signaled Nicholas Munene (PW 5) who came and arrested the appellant. PW 2 testified that he had earlier sent the appellant Kshs 1,500/- through M-pesa as a commitment fee. PW 2 testified that when PW 5 and Kennedy Oyugi (PW 4) arrived, they asked the appellant if he had a certificate and when he responded that he did not possess the certificate he was arrested. The photographs of the exhibits were taken at the police station.

5. PW 4 testified that when they arrested the appellant he had no license for the possession of the elephant tusks. They filled and signed the inventory form and also caused the appellant to sign it as well. PW 5 was the arresting officer. He testified that he saw the appellant carrying a grey sack and entered the vehicle. He was then signaled by PW 2 that the items in the sack were ivory. He testified that he first inquired if the appellant had a certificate from the director general Kenya Wildlife Service before he arrested him. He testified that the ivory recovered weighed 9 Kgs.

6. Ben Nyakundi (PW 3) a research scientist for National Museums of Kenya working at the zoology department testified that he hold a Bachelors of Science in Wildlife Management from Moi University. He recalled that on 19th November 2018 he received three (3) exhibits and was tasked to examine whether they were elephant tusks. Using the standard method as per the Convention of International Trade in Endangered Species method he realized that they were all elephant ivory.

7. Willis Ochieng' (PW 6) testified that he was the investigating officer. The suspect was brought in by Kenya Wildlife Service officers from Nairobi and Kilgoris after his arrest. PW 6 testified that the M-pesa statement proves that money was sent to the appellant. The ivory which

the appellant had in a gray sack was taken to National Museum in Nairobi and the same were confirmed to be ivory.

8. When placed on his defence, the modes of defence were explained to the appellant and he elected to remain silent.

9. The subordinate court in its judgment found the appellant guilty and convicted him of the offence of dealing in a wildlife trophy without a licence contrary to ***Section 95*** *of the* ***Act***.

10. The appellant in his memorandum of appeal contends that the prosecution failed to proved its case beyond reasonable doubt; his right under **Article 50 (2) (e) & (j) of the Constitution** were violated as well as that under **Section 194 of the Criminal Procedure Code**; and finally, he faulted the trial court's non compliance with **Section 200(3)** of the **Criminal Procedure Code**.

11. The appellant submitted that the evidence was taken in his absence contrary to **Section 194 of the Criminal Procedure Code**. He relied on the case **Machakos Criminal Appeal No 241 of 2010**, where the court held that a sample of what is to be analyzed is taken to the expert in presence of the suspect and submitted for analysis before the analyst's report is forwarded to the officer in charge for production in court. It was argued that the prosecution failed to call the key witness and that there were inconsistencies and contradictions in the prosecution evidence. The appellant further submitted that after the trial court made a ruling that the appellant had a case to answer he was granted 14 days right to appeal. However, before the 14 days could lapse he was placed on his defence thereby infringing his right to a fair trial.

12. Mr. Otieno, state counsel, submitted that the court gave a right of appeal at the stage of a case to answer but then took it away. He contends that the irregularity is not curable and asked the court to order a retrial.

ANALYSIS AND DETERMINATION

13. Despite the State conceding the appeal on the ground that the trial court took away the appellant's right to appeal, this court still has a duty to ensure that it re-evaluates the evidence afresh and makes its own findings. This obligation was set out in the case of **Odhiambo vs Republic [2008]KLR 565** thus:

> "The court is not under any obligation to allow an appeal simply because the State is not opposed to the appeal. The court has a duty to ensure it subjects the entire evidence tendered before the trial court to a clear and fresh scrutiny and re-assess it and reach its own determination based on the evidence."

14. The prosecution submitted that because the trial court did not afford the appellant the right to appeal its ruling on a case to answer the suit should be remitted to the trial court for a re-trial. The Court of Appeal in **Thomas Patrick Gilbert Cholmondeley vs. Republic[2008] eKLR**, addressing itself on interim appeal in criminal cases held as follows:

> **"……..**In ordinary criminal trials, there is generally no interlocutory appeals allowed for **section 379 (1)** of the Criminal Procedure Code allows only appeals by persons who have been convicted of some offence. The Appellant has not been convicted of any offence. As far as we understand the position the basis of an appeal cannot be that an order made in the course of a trial is highly prejudicial to an accused person; MugaApondi, J ruled that the appellant had a case to answer and even if that order would be seen as being prejudicial that alone would not have entitled the appellant to appeal.
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> **…….**
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> ***We would, nevertheless, sound a caution against the exercise of the undoubted right of appeal under*** *section 84 (7)* **of the Constitution. First the fact that a trial Judge has made an adverse ruling against an accused person in a criminal trial does not and cannot mean that the Judge will inevitably convict. The Judge might well acquit in the end and the adverse ruling, even if it amounted to a breach of fundamental right, falls by the wayside and causes no harm to such an accused. The advantage of that course is that the long delay in the hearing of the charge is avoided and in the event of a conviction the matter can be raised on appeal once and for all. In the present appeal the delay has spanned the period from 25th July, 2007 to date, nearly one year. The trial before the learned Judge will, however, resume and go on to its logical conclusion. We think it is against public policy that criminal trials should be held up in this fashion and it is our hope that lawyers practising at the criminal bar will appropriately advise their clients so as to avoid such unnecessary delays. We would add that in future if such appeals are brought the Court may well order that the hearing of the appeal be stayed pending the conclusion of the trial in the High Court."**

15. Quite clearly, **Section 379(1)** of the **Criminal Procedure Code** does not allow appeals at the interlocutory stage in criminal matters. Where aggrieved at the interlocutory stages of a trial, **Article 84(7)** of the **Constitution** in my understanding insulates the rights of such a party to appeal against any interlocutory order that is adverse to them. The court, however, has no obligation to allow the right of appeal and like in our case, give specific timelines. That matter must be left to the election of any party so aggrieved.

16. In our instant appeal, the trial court made a ruling of a case to answer against the appellant and gave the appellant in the court's own words; "Right of Appeal 14 days". The court immediately proceeded to explain the modes of defences available to the appellant upon which the appellant elected to remain silent.

17. The trial magistrate without any prompting or backing in law proceeded to pronounce a right of appeal to the appellant and allowed him 14 days within which to execute the appeal. It is thus inexplicable how and why the same court took away the right given to the appellant having on its own motion granted the right of appeal and the timelines.

18. In my considered view, this was prejudicial to the appellant and I agree with the DPP's contention that the taking away of the right is an irregularity that was not curable. It was a giving of a right of appeal that was not necessary in the first place, but the moment it was given, the court ought to have allowed the appellant the 14 days indicated to appeal at which stage a decision would be made either to stay the lower court proceedings or to proceed. Though this, finding determines the appeal, I consider it necessary to delve into the other issues for determination in the appeal just in case this court were wrong in the above finding.

19. I now turn to consider whether **Section 200 (3)** of the **Criminal Procedure Code** was not complied with. The suit was set down for hearing before Hon D.K. Matutu (PM) who heard the matter to its conclusion and rendered his judgment. The issue concerning non-compliance with **section 200(3) of the Criminal Procedure Code** therefore does not arise.

20. On whether the prosecution proved their case to the required standard, beyond reasonable doubt. ***Section 95*** of the **Act** provides that;

> "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 both.

21. PW 1 and PW 2 both working for the Kenya Wildlife Service, testified that they posed as buyers interested in the purchase of ivory. PW 2 testified that he sent the appellant Kshs 1,500/- on 31st October 2018 two days before his arrest which was confirmed by the M-pesa statement produced before the trial court. There was no contradiction or inconsistencies as alleged in the prosecution testimony. The evidence of PW 1 and PW 2 was further corroborated by PW 4 and PW 5 who were nearby and saw the appellant enter the vehicle with a sack. PW 5 testified that before the appellant was arrested they confirmed that the sack contained elephant tusks.

22. The appellant also complained that his rights under Article **50(2) (j)** of the **Constitution** was violated, in accordance with the said provision, the appellant has a right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence. I have carefully looked at the record before me and find that prosecution evidence was availed to the appellant. I note that on 10th January 2019, before the commencement of the prosecution case, the trial court directed that the appellant be issued with witness statements.

23. According to the inventory report made by the Kenya Wildlife Service, the appellant was in possession of elephant tusks, Tecno mobile phone and a gray sack. The investigating officer, Pw6, prepared an exhibit memo and forwarded the elephant tusks marked as D1, D2 and D3 to the National Museums of Kenya. Pw3 who is a research scientist with the National Museums of Kenya conducted his analysis and made a report in which he was of the opinion that D1, D2 and D3 were unworked elephant (*Loxodontaafricana*) ivory and therefore wildlife trophies.

24. Having considered the totality of the prosecution case against the appellant's defence, I find that the prosecution would have proved its case beyond any reasonable doubt. The appellant was found red-handed in possession of 3 elephant tusks without the requisite permit issued under the Act and with the intention of selling the tusks to PW 1 and PW2. There was no evidence that was led to displace the prosecution case mounted against him.

25. The sentence against him was also not excessive as **Section 95** of the **Act** provides for a fine of not less than one million shillings or imprisonment for a term of not less than five years or both upon a conviction.

26. Having found that the court's act of taking away the right of appeal from the appellant having granted the same (even though not obligated to grant such a right in the circumstances) prejudiced the appellant and the irregularity was not curable, it is this court's finding that the irregularity vitiates the trial. I have considered the principles applicable in ordering of a retrial and am satisfied this is a proper case for a re-trial.

27. Consequently, the appeal herein is found to be meritable and is allowed. The conviction and sentence is set aside. The appellant shall be presented before OCS Kilgoris Police Station for presentation before court for retrial by any magistrate other than D.K Matutu PM.

DATED, SIGNED AND DELIVERED AT KISII THIS 12TH DAY OF APRIL 2021.

A. K. NDUNG'U

JUDGE