



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA NAIROBI MILIMANI LAW COURTS

CRIMINAL DIVISION

CRIMINAL APPEAL NO. E004 AND E007 OF 2020

HENRY MOKUA ONSONGO.....1st APPELLANT

ELUID WANYONYI WAFUBWA.....2ND APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

1. The judgment herein relates to two consolidated appeal numbers; E004 and E007 of 2020. The appeals arise from the decision of Honourable Joyce Gandari, Chief Magistrate, vide Chief Magistrate's Court criminal case number; 966 of 2015. The case initially involved four (4) accused persons, however the 3rd accused; Richard Ngeleka Kalatanda absconded proceeding after he was granted bail whereas the 4th accused PC Tanui passed on during the trial.

2. Be that as it were, the appellants were both charged in two counts with the offences of; possession of wildlife trophy contrary to; section 95 as read with section 105 of the Wildlife Conservation and Management Act, 2013, and dealing in wildlife trophy contrary to section 84(1) as read with section 92 and section 105 of the Wildlife Conservation and Management Act, 2013, while the 1st appellant was charged in two additional counts with the offence of; obstructing persons in the execution of their powers contrary to; section 101(b) of the Wildlife Conservation and Management Act, 2013, and using a government firearm for an unlawful purpose contrary to; section 26A (1)(a) of the Firearms Act (Cap 114) Laws of Kenya. The particulars of each count are as per the charge sheet.

3. The appellants pleaded not guilty to all the charges and the case proceeded to a full hearing. The prosecution called a total of eight (8) witnesses, while the defence called three (3) witnesses. The case was concluded when the trial court rendered its decision vide a judgment delivered on; 7th August 2020; wherein the trial court found both guilty on the 1st and 2nd count, while the 1st appellant was found guilty on the 3rd and 4th counts and convicted accordingly.

4. The prosecution treated each appellant as a first offender. The appellants then offered their respective mitigation, whereupon, the trial court stated that, it had considered the appellants' mitigation, however, the sentence provided for the offences is not less than; Kshs, 1 million or not less than five (5) years imprisonment. The trial court then sentenced the appellants follows: -

a) Count I – Each accused to serve four years' imprisonment;

b) Count II – Each accused to serve four years' imprisonment;

c) *Count III – 1st accused to pay a fine of Kshs20,000 in default 6 months’ imprisonment;*

d) *Count Iv – 1st Accused to pay a fine of; Kshs20,000 in default 6 months’ imprisonment.*

Count I and II to run concurrently.

5. However, the 1st appellants being aggrieved by the conviction and sentence of the trial court filed petition of appeal, dated; 22nd August 2020, on the grounds that: -

a) *The trial Magistrate erred in law and fact in failing to note that the prosecution did not prove its case beyond reasonable doubt;*

b) *The trial Magistrate erred in law and fact in failing to take into consideration of the evidence of the appellant;*

c) *The trial Magistrate misdirected herself in fact and law by only evaluating the evidence of the prosecution witnesses;*

d) *The trial Magistrate erred in law and fact by not considering the mitigation of the appellant;*

e) *The trial Magistrate erred in law and fact by giving evidence in her judgment while she had opportunity to ask questions where she felt an issue was not well addressed during the hearing.*

6. The 1st appellant filed a supplementary petition of appeal dated; 21st October 2021, on the grounds as follows: -

a) *The learned Magistrate erred in that she admitted inadmissible evidence which, inter alia had a prejudicial effect to the entire case;*

b) *The learned Magistrate failed to find and give effect to the fact that, a number of persons were evident in the entire proceedings and had not been called;*

c) *The learned Magistrate erred when she dismissed off hand the claims by the appellants that he, as a police officer, was on duty and acting on information was at the relevant scene to investigate and effect arrest, if necessary;*

d) *The learned Magistrate did not sufficiently resolve, or at all the contending positions adopted by Kenya wildlife service officers and the appellant as to their relative presence at the material scene;*

e) *The learned Magistrate erred in convicting the appellant notwithstanding the gaps, inconsistencies and contradictions in the prosecution case;*

f) *The case was not proved beyond reasonable doubt;*

g) *The sentence awarded to the appellant was harsh and excessive in all the circumstances.*

7. The 2nd Appellant moved the court vide a petition of appeal dated 9th September 2020, praying that the conviction be quashed and the sentence be set aside on the grounds that;

a) *That the Honourable trial court erred both in law and fact by not finding that, the prosecution failed to prove their case beyond reasonable doubt where it failed to find that there were glaring flaw, contradiction, discrepancies and inconsistencies in the prosecution’s case, that did not warrant the appellant’s conviction and sentence.*

b) *That the Honourable trial magistrate erred in law and fact in meting out the sentence she did when she sentenced the appellant to 4 years imprisonment without considering the 3 years he had*

served prior to the sentencing.

8. The background facts of the case are that; on 9th March 2015, Kenya Wildlife Service officers attached to; Langata Nairobi Investigation Department received information that, there were people in South B who had a Rhino horn which they were selling. Three officers including; PW1 No. 7468, Corporal Michael Bett, proceeded to the said place.

9. He had been given the description of the sellers by the informer to the effect that, one of them wore a blue jacket, sky blue shirt and was light skinned and the other was dark skinned, wore a checked shirt and black trouser. The informer had told the sellers that, there was a buyer and they agreed that, the seller would wait for the buyer at the junction to Mater Hospital.

10. The officer went to the junction and found two sellers; who introduced themselves as; Richard and Wafubwa. The officer then gave them his telephone number and inquired about the horn. That, Richard said it was weighing 600 grams and selling at Kshs 1.5 million. However, upon negotiation, they arrived at Kshs 1.2 million. Richard then made a call and the parties agreed to go to a petrol station near Mater Hospital. They went into a motor vehicle registration number KBK 819V Probox, where they found two people standing outside. One was tall and bald; the other was of medium height and who introduced themselves as; Onsongo and Tanui.

11. That, Onsongo entered the vehicle and sat on the driver's seat and asked the KWS officer to enter the motor vehicle so that they could talk. Tanui sat on the co-driver's seat while the other three sat on the passenger's seat. That, Onsongo pulled a green paper bag and handed over to the officer, who opened it and saw a "Kifaru" flour paper bag. Upon opening that paper bag, he saw the Rhino horn inside.

12. That, he examined the horn and noticed it was genuine as it did not have a hole like that of a cow. He was directed to give it to Richard. He then requested the whole team go to where his motor vehicle was parked at Bounty hotel to get the money to pay. The parties drove to; Bounty Hotel and parked next to the officer's motor vehicle.

13. The officer, Richard and Wafubwa entered the officer's vehicle and immediately, Richard and Wafubwa were arrested and the Rhino recovered. In the meantime, Tanui who was outside their motor vehicle ran away as Onsongo came out of the vehicle and corked a pistol and stated that he was a police officer.

14. However, he did not have any document to prove that, he was a police officer, but showed the arresting officer a police radio call. The Kenya Wildlife Service Officers identified themselves and told him to put away the pistol but he declined. As a result, the police officers called for reinforcement and a team of five officers, including Mr Inoti, the Liaison Officer arrived from the Langata office. That, he talked to Onsongo and he surrendered and was taken to Kenya Wildlife Service Headquarters.

15. At the KWS Headquarters, the suspects were interrogated and recorded their statements. The Pro-box motor vehicle was photographed and an inventory of all recovered goods including; the Ceska Firearm number C3661, with 15 rounds of ammunition made and signed by all the persons present save for the 1st appellant who declined to sign. Later on 9th March 2015, Tanui who had escaped was arrested, identified by the Corporal Michael Bett. Thereafter, all the suspects were charged as stated herein. 16. The appeal was disposed of through submissions, filed and highlighted. The 1st appellant filed submissions dated; 26th October 2020, in which he argued that, the learned trial Magistrate did not comply with the provisions of; section 200 of the Criminal Procedure Code, by not informing him of his right to demand summoning of any witness.

17. Similarly, the provisions of; section 211 (1) of the Criminal Procedure Code, were not complied with as he was not explained to the substance of the charge, nor given an opportunity to make submissions before, the ruling on case to answer was delivered.

18. Further, the handling of exhibits was not done in accordance with procedure laid down in the case of;

DPP vs Maries Pakine Tenkewa t/a Naresho Bar and Restaurant, Criminal Revision No. 8 of 2017, That, the Rhino horn was not marked and the yellow sticker on the Tanui's driving licence was not there at the time of arrest, therefore, it indicates the possibility of interference with exhibits.

19. That, PW3 testified on cross examination by 4th accused person that, no arrests were recorded in the occurrence book, nor were the bag or clothes mentioned in the inventory, thus pointing out to the fact that, the narrative provided was not credible. Further, the green and kifarua flour paper bags, where the rhino horn was allegedly stored, were never tested for fingerprints of accused persons and neither were pictures of the scene taken. Additionally, the Probox was improperly produced by Pw 2.

20. The 1st appellant submitted that, he was not in possession of the Rhino horn and that the evidence revealed, the rhino horns were in possession of the 3rd accused; the Congolese national. Further, Pw5 also testified that, he came back with the people who had a rhino horn alluding to the fact that, the 1st appellant was not in possession of the rhino horn, hence, the conclusion that, he was never in possession of the rhino horns nor in the Probox vehicle.

21. He relied on the case of; PNW vs Republic Criminal Appeal No. 189 of 2012 where the court stated that, it's not the duty of the court in case of inconsistencies to speculate which witness is telling the truth, rather it is the duty of the trial court to interpret contradictions as manifestations of doubt and give the benefit thereof to an accused person.

22. The 1st Appellant argued that, since PW3 never met the alleged informant, it is strange that, a stranger would divulge all that information opening up the possibility that, the KWS persons may have been engaging in illegal business.

23. Further, while the PW4 testified that, his description did not match the description that he had been given by the informer, PW3 testified that his description was never given, which raises inconsistencies in the prosecution's case.

24. Additionally, PW4 testified during cross examination that, they were using an undercover motor vehicle, whose registration he never disclosed and refused to produce a work ticket which was crucial to pointing out an authorized outing for KWS people.

25. Similarly, although, PW3 also alluded to the fact that, the 3rd accused Richard made a phone call after negotiation of the purchase price of the horn, the phone data was never availed for verification. Moreover, the SMS sent to PW4 and PW5 informing them that, PW3 had met with potential suspects was never produced in court.

26. Further, the time frame taken by PW3 before reaching out to PW4 and PW5, by SMS on the material day was suspect, as it could not have taken two hours to navigate the small square radius that all the persons were.

27. That the prosecution's case was tainted with contradictions, as PW3 testified that one, Toroitich was the OCPD at Isinya, when 4th accused was identified, whereas PW2 testified that, she referred Mr. Kiprotich, to the OCPD Isinya.

28. Finally, his action of drawing out a gun was reasonable given that, there was possibility of people engaging in illicit trade and he also identified himself.

29. On 2nd March and 5th May, 2021, the 2nd appellants filed two sets of submission dated; 1st March 2021, but bearing same content. He submitted that, there was contradiction in the evidence of; PW2 and PW3, in relation to; the weight of the horn, the person who negotiated with PW3 the price of the horn, the person who had actual or constructive possession thereof and the 2nd appellant's description.

30. He also argued that, the prosecution did not prove that, he was in actual or constructive possession of the rhino horn as, PW3 stated that he never carried anything and later his testimony stated that, he was in

possession of a rhino.

31. Finally, that he spent three (3) years in custody after failing to meet bond terms and therefore pursuant to the provisions of; section 333(2) Criminal Procedure Code the same should have been considered, in sentencing.

32. The Respondent filed submissions dated; 8th April 2021 and argued that, the provisions of; section 200 Criminal Procedure Code, were explained to appellants and responded thereto accordingly as indicated in the response. That, they have not demonstrated any prejudice suffered, due to failure to be notified of right to recall PW1, in that, they were represented when the witness testified and no questions was put to her.

33. The Respondent relied on the case of; Michael Waweru Ndegwa vs Republic; Criminal Appel No 290 of 2010, which states that, section 200 of the Criminal Procedure Code, ought to be used sparingly. Further, the provisions of; section 211 of the Criminal Procedure Code, were properly dealt with, and the appellants response recorded.

34. The Respondent further submitted that, the term “possession” is defined under; section 4 of Penal Code to include knowledge, which can be implied, based on the degree of control of item in question. Reliance was placed on the case of; Kinyatti vs Republic Criminal Appeal No. 60 of 1983.

35. Finally, it was submitted that, the exhibits were properly handled. However, the Respondent conceded that, if the provisions of section; 333 (2) of the Criminal Procedure Code were not considered, they can be so considered.

36. At the conclusion of the arguments advanced by the respective parties, I have considered the grounds of appeal by the appellants and I summarise them as follows: -

- a) *Whether the prosecution called all the necessary witnesses;*
- b) *Whether the prosecution’s case was tainted with contradictions, discrepancies, flaws and/or inconsistencies;*
- c) *Whether the prosecution proved its case beyond reasonable doubt;*
- d) *Whether the trial court disregarded the defence case;*
- e) *Whether the trial court considered matters in the judgment that amounted to giving evidence;*
- f) *Whether the sentence meted upon the appellants was harsh, or excessive in the given circumstances.*

37. However, before I deal with these issues, it suffices to note that, the 1st appellant raised and canvassed other grounds in the submissions, that were not in the petition of appeal. These include but are not limited to; the issues of; non-compliance with the provisions of; section 200 and 211 (1) of Criminal Procedure Code and/or whether the exhibits were properly handled in accordance with the procedure laid down in law.

38. To deal with the same quickly, albeit improperly raised, I find that, the provisions of; section 200 (3) and (4) of the Code provides that;

-“(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right.

(4) *Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial (emphasis added).*

39. I have considered the record of appeal and note from the proceedings at page 51 that, indeed the trial court record clearly reflects that, the court explained those provisions to the appellants and each indicated that, they wanted the matter to proceed from where it had reached. If they had not understood the same, they would not have responded as they did. Even then, it is not evident that, they suffered any manifest prejudice by the failure to recall PW1, as the witness had not been cross examined by the defence counsel after her evidence in chief.

40. Similarly, the evidence reveals that, the provisions of section 211 of the Criminal Procedure Code were complied with and the appellants indicated how they would defend themselves. Therefore, arguments and/or submissions that the provisions of; sections; 200 and 211 of the Criminal Procedure Code were not dealt with, hold no water.

41. I shall now deal with the other grounds of appeal. In so doing, the court is mindful of the role of the 1st appellate court, as stated in the case of; Okeno vs. Republic (1972) EA 32, by the Court of Appeal that:-

“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 vs. 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 Vs. R. (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 vs. Sunday Post [1958] E.A 424.”

42. In the instant case, I find that, the evidence of; PW3 revealed that, he first met the 2nd and 3rd accused persons whom he did not know at all and they led him to Kobil Petrol Station, where he also met the 1st and 4th accused, who were also unknown to him. That, it is the 1st appellant who drove the motor vehicle; identified as registration number KBK 819 V to; Bounty Hotel in his company and of the 2nd appellant and the 3rd accused who were selling the Rhino horn.

43. The 1st appellant has not denied owning that vehicle and/or being at the scene of crime on the material date. Similarly, he has not denied having driven that motor vehicle from the petrol station to the hotel. This evidence of; PW3 was corroborated by the evidence of; PW4 Ranger Richard Kiplangat Chebii and PW5, Ranger Christopher Odhiambo that, when PW3, returned to where he had left them, he was in the 1st appellant’s subject motor vehicle and in the company of the other accused.

44. Further, the evidence reveals that, negotiation of the sale of the Rhino horn took place in the 1st appellant’s motor vehicle, and he was seated on the driver’s seat. Further, that it is the 1st appellant who pulled out the paper that, had the horn and gave the 3rd accused who then gave PW3 who inspected it and then returned to the 3rd accused. It suffices no note that, the 1st appellant was not arrested immediately as he remained inside his motor vehicle as the 2nd appellant and 3rd accused, went to get the money and were arrested.

45. The 1st appellant alleges in his evidence that, he was on duty and was assisting the 4th accused to apprehend suspected poachers. The questions that arise are; who assigned him that duty, did Tanui have authority to conduct that operation; did the 1st appellant ask 2nd and 3rd accused at the venue where they first met PW3 and instead drove them to where PW3 had left his motor vehicle?

46. In fact, according to; PW6, Inspector Limo, the 1st appellant was off duty having asked for

permission to take his father to hospital. He did not ask for permission to go and apprehend the alleged suspects. PW7 CIP Shamalla testified that, he was not aware of the 1st appellant had authority to lay the alleged ambush.

47. In fact, interesting, the 1st appellant states that, they had gone to; arrest the suspects in this case the 2nd appellant and 3rd accused, yet the 2nd appellant denies having been at the scene of crime.

Furthermore, even if the court were to believe the 1st appellant, his conduct at the scene does not vindicate him. It is in evidence that, the 1st appellant drew and corked his pistol when the 2nd appellant and 3rd accused were arrested. If he too was there to arrest these suspects, why draw a pistol against the KWS officers? Similarly, his colleague Tanui whom he alleges had gone to assist ran away, why? Obviously, because they were not on a lawful mission.

48. In the same vein, the issue of charges, being planted on the appellants does not arise. All through the prosecution case, that issue did not arise. It was only raised after the appellants were put on their defence. It is an afterthought. In deed the officers from KWS did not know the appellants prior to their arrest, what reasons did they have to frame them up?

49. I shall now turn to issues raised in submissions. The first issue relates to; contradictions in the evidence of the prosecution witness as stated herein. I have analysed the same and in my considered opinion, they are of no great significance. The bottom line is: were the appellants at the scene of crime? Were they in possession of; the Rhino horn?

50. The other issue relates to the way the exhibits were handled. It is in evidence that, an inventory of all recovered exhibits was made, all the persons present signed but the 1st appellant declined to. The key exhibit herein is the Rhino horn. PW1 Esther Nguta, received this exhibit on 10th March 2015 after it was recovered on 9th March, 2015. It was forwarded accompanied by an exhibit memo form; produced as prosecution exhibit number 2. She even took a photo thereof and produced it in court attached to the report she prepared. I find no substance in the argument that, the exhibits were tainted.

51. In the same vein, the appellants argue that, possession was not proved. However, I find that, possession is defined under section 4 of the Penal code (cap 63), Laws of Kenya, as follows; -

“*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”

52. The evidence herein reveals that, the 1st appellant had the horn in his motor vehicle, the 2nd appellant negotiated the price as the seller and was arrested as he was waiting to receive the purchase price.

Isn’t that actual possession? They actually posed as joint owners of the horn. Therefore, the submissions that possession was not proved are not tenable.

53. The question that arises is whether the appellants were licensed to possess the Rhino horn. I find the answer in the negative. Section 3 of the Wildlife Conservation and Management Act, defines a

“dealer” to includes, any person who “sells “any trophy as defined under the Act, without a licence. It is clear from the evidence herein that, the appellants were selling the Rhino horn, therefore dealing in it.

54. As regards the 3rd and 4th counts, I find that, indeed the 1st appellant had a pistol in his possession which he was given in the course of his duty. However, it is in evidence that, he was not supposed to have physical possession while off duty. The 1st appellant did not squarely address that, however, what is critical is the manner he used it.

55. It is in evidence that, the 1st appellant, when challenged, he cocked the pistol and when KWS officers told him to surrender, he declined.

It took the intervention of; PW8 Inoti to surrender to the officers. Is that conduct of an officer on lawful duty, especially when he saw his colleague Tanui take off? That was not lawful use of the firearm and it only confirms that, it was intended for the purpose for which it was not issued. The 1st appellant resisted arrest and in fact, by cocking his gun and wade off the KWS officers. He thus obstructed the officers from executing lawful arrest.

56. Finally, the appellants submitted that, their defence was not considered but I find that, the court analysed the same and found it was not “merituous”. As regards whether, there were material witnesses not called, I find no merit in the same, as the witnesses called established that, the appellants were arrested at the scene in possession of the Rhino horn, it was examined and found to be a Rhino horn. The firearm in possession of the 2nd appellant was indeed established to be as such.

57. The upshot is that, I find there is sufficient evidence to prove the prosecution proved its case beyond reasonable doubt and the appellants were properly convicted. I therefore uphold the conviction.

58. As regards the sentence I find that, the trial court found that, the appellants were first offenders. It also considered their respective mitigation. However, the remarks made by the learned trial magistrate, on how the appellants obtained the horn, were probably “off the cuff” and in my opinion did not influence the sentence, in that, the court stated that, it had taken note of the sentence provided for under the law.

59. In that regard, I note that the appellants are charged in counts 1, with an offence of being in possession of wildlife trophy contrary to section 95 of the Wildlife Conservation and Management Act, 2013. The sentence provided for the offence; is a fine of not less than, one million shillings (Kshs 1,000,000) or a term of not less than five (5) years or both such fine and imprisonment. From the record; each appellant was sentenced on that count to serve; four (4) years’ imprisonment. That, sentence is therefore unlawful, as the minimum term is five (5) years.

60. As regards count 2, the appellants were charged with the offence of dealing in wildlife trophy contrary to; section 84(1) as read with section 92 of the said Act. The sentence under section 92 is; a fine of not less than, twenty million shillings (Kshs 20,000,000) or imprisonment for life, or both such fine and imprisonment. The appellants were sentenced to four (4) years. In the given circumstances, that sentence, is also unlawful.

61. However, I note that, although the charge sheet indicates the penalty for the offence of dealing in wildlife trophy, is under section 92, section 95 provides clearly provides for a penalty of dealing in trophy. Section 92 does not, expressly deal with the penalty for dealing in wildlife trophy, but offence relating to endangered and threatened species. Therefore, the appropriate sentence should have been under section 95 of the Act.

62. In view of the aforesaid, as the sentences on counts 1 and 2 are unlawful, even though there is no notice of enhanced by the Respondent, the court cannot uphold an unlawful sentence. In that regard, I set aside the sentence of; four years’ imprisonment on both (1) and (2) and substitute it with a sentence of five years’ imprisonment, on each count, for each appellant. These sentences shall run concurrently.

63. As regards count 3, the sentence provided for the offence of which the 1st appellant is charged with of; obstructing persons in execution of their powers is; a fine of not less than one hundred thousand shillings (Kshs 100,000) or imprisonment for not less than six months or to both such fine and imprisonment. The 1st appellant was sentenced to pay a fine of; twenty thousand shillings; (Kshs 20, 000)

in default to serve six months' imprisonment. In that regard the fine of Kshs 20, 000, is therefore unlawful.

64. Finally, the 1st appellant is charged with the Offence of using a government firearm for an unlawful purpose, on count 4, under the provisions of; section 26(A) (1) (a) which provides for a penalty of; imprisonment term of not less than seven years and not more than fifteen years. In the instant matter, the 1st appellant was fined; twenty thousand shillings (Kshs, 20,000) in default to serve six (6) months' imprisonment. Obviously that sentence is unlawful.

65. In that regard, I enhance the sentence on count 3 to; a fine of Kshs 100,000 or in default to serve six months' imprisonment and on count 4, the sentence imposed is set aside and substituted with a custodial sentence of; seven (7) years. If the 1st appellant does not pay the fine, on count 3, the custodial sentence on all the four (4) counts he is convicted on shall run, concurrently.

66. In that, the 1st appellant will serve an accumulated period of seven years, if he does not pay the fine on count 3, whereas the 2nd appellant shall serve an accumulative period of five years.

67. Finally, the appellants requested the court that, while sentencing them, to consider the period they were in custody, pursuant to the provisions of; section 333(2) CPC. In that regard, I note that, the 2nd appellant was in custody from date of arrest on 9th March 2015 to 1st March 2018, when he was released on cash bail, a period of about three years. That period will be taken into account. As such, his custodial sentence will commence on, 24th August 2020, when he was sentenced, but be reduced by a period of three years.

68. The 1st appellant was released on cash bail after an order was made to that effect immediately after plea and later cash bail withdrawn and substituted with surety on 9th July 2015. Therefore, he was not in custody during the trial. Thus, he cannot benefit from the provisions of section 333(2) of the CPC. His sentence runs from the date thereof.

69. In a nutshell, the appeal on conviction is dismissed and appeal on sentence, abide aforesaid orders.

It is so ordered.

DATED, AND SIGNED ON THIS 3RD DAY OF JULY, 2021.

GRACE L NZIOKA

JUDGE

DELIVERED VIRTUALLY ON 13TH JULY 2021 BY;

LILLIAN MUTENDE

JUDGE

In the presence of;

Mr Nyakundi for the 1st appellant (E004 of 2020)

Mr Kuloba for 2nd appellant (E007 of 2020)

Ms Kimaru for the Respondent

Mutai- Court assistant