REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

CRIMINAL APPEAL E006 OF 2021

(Being an appeal against the conviction and sentence of 7 years imprisonment in criminal case No.529 of 2019 by

Hon. S.K.Ngii – Senior Resident Magistrate dated 28th September, 2020 at Mariakani)

HUSSEIN WANJALA WEKESA...APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Mr Mwangi for the state

Appellant in person

J U D G M E N T

The appellant was prosecuted before the Senior Resident Magistrate at Mariakani, with the offence of dealing in wildlife trophy of a specified endangered species without a permit or other lawful exemption contrary to Section 92(2) of the Wildlife Conservation and Management Act of 2013. The particular of the offence are that on the 10th of July 2019 at around 1240hrs at Silaloni area within Kwale County, the accused persons were found dealing in wildlife trophy namely four cut pieces of elephant tusks weighing 82kgs being a trophy of a specified species under 6th schedule of the Act with a street value of Kshs. 8.200,000/= without a permit from the Director General; Kenya Wildlife Services.

In count two; being in possession of specified endangered wild trophy without a permit or other lawful exemption contrary to section 92(4) of the Act on the same date, place and time, the appellant was found in possession of four cut pieces of elephant tusks weighing 82kgs being a trophy of a specified species under 6th schedule of the Act with a street value of Kshs. 8.200,000/= without a permit from the Director General; Kenya Wildlife Services.

Facts

The prosecution called a total of 6 witnesses in support of its case. Pw1; Cpl Jackeline Maiyo, an officer with the Kenya Wildlife Service (hereinafter 'KWS') informed the court that on 9/7/2019 she received intelligence report from an informer that there was a person in possession of elephant tusks which he was offering for sale at Silaloni area. She acquired a phone contact for the said person and when she called him, he introduced himself as Husein Wanjala. Presenting herself a probable consumer, she gathered information from the said person that he had approximately 82kgs of elephant tusks which he was offering for sale at Kshs. 100, 000/= per kg. She agreed with him that she would collect the tusks on 10/7/2019. On that date, in company of her colleagues, Hamisi Chuma, Hassan Ponda, Damiano Mwaniki and Pc David Menxa of DCI Mariakani organised an operation at Silaloni with a view of arresting the suspect and recovering the tusks. On arrival at the area aboard a vehicle, Chuma and Menza disembarke, got on a motor cycle and rode ahead of them. According to PW1, she was in continual communication with Wanjala, the suspect. He gave him directions on where she would find him by the roadside. Eventually she came across two men one of whom confirmed to be Hussein Wanjala with whom she had been conversing on phone.

Hussein Wanjala and the person he was with got into a nearby thicket and brought each a pieces of elephant tuck. They made another trip into the thicket and again brought each one piece of elephant tuck making a total of 4 pieces. As they weighed the tusks, the other officers joined them and introduced themselves as KWS officers. It is at this juncture that they arrested Husein and his accomplice because they did not have the requisite permit to deal with and or possess the tusks.

Pw1 identified the four pieces of tucks recovered from the accused persons which were later produced as evidence and marked as P.Exhibit 1 (a-d). She also identified an inventory of recoveries and weighing certificates (P. Exh 2 and 3 respectively). According to his evidence the

accused persons signed the inventory voluntarily. She also identified the 1st Accused (the appellant herein) as Wanjala and the 2nd Accused as Stephen.

In cross- examination, by the 2nd accused, she told the court that the 2nd accused was unknown to her prior to the material date and that the accused was not holding anything when she arrived at the scene. She further reiterated that both accused person were standing by the roadside.

Pw2; Hassan Ponda, Pw3; Damiano Mwaniki, and Pw4; Sgt Hamisi Chuma all of KWS and with whom PW1; Cpl Maiyo carried out the operation also gave evidence which was in all material aspects similar to the evidence given by Pw1. The only distinction is that Sgt Hamisi was not present when the accused persons went for and brought the tusks from the thicket but he was informed by Pw1. Sgt Chuma is the one who prepared the aforesaid inventory.

In cross-examination, by the 2nd accused, PW2 told the court that they found the second accused in the company of the appellant standing by the road side some distance past Silaloni shopping centre and that it is the appellant who signaled them to stop. Pw3 and Pw4 in response to questions by the accused persons denied suggestions by the accused person that the elephant tusks were planted on them.

Pw5, Jeremiah Poghon, a veterinary doctor with KWS informed the court that on 6/11/2019, he was requested to examine for pieces of tusks from DCI Kalaleni with a view to ascertain if they were elephant tusks. According to the report he prepared, the results were positive, and the same was produced in court and marked as P.Exh 5 together with an Exhibit memo. He identified P.exh1 (a-d) as the tusks which were presented to him for examination.

Pw6; Cpl David Menza, of DCI Mariakani, testified that he was party to the operation along with KWS officers. His testimony was basically corroborating that of Pw1. Upon cross-examination, he explained that he did not extract phone conversation between the appellant and Pw1 nor did he retrieve any other phone data thereof. He also stated that even though he had taken photos of the exhibits at the scene he did not have the photos in court. He further clarified that the actual recovery and arrest was made by Cpl Jackeline and her colleagues. That marked the end of the prosecution case.

The Defence Case

The appellant gave an unsworn testimony and told the court that he is involved in livestock trade and that on the material date, he made with the 2nd accused who was unknown to him. According to him, the 2nd accused had been sent by his grandfather to show him the direction to the said grandfather's home. On their way, they came across three people and a blue vehicle with its bonet open. The three asked them for help to load some luggage into the vehicle. As they did so they were ordered to surrender. They obliged and were questioned about the elephant tusks which were packed in the sacks. They were particularly inquired to clarify how they had come across the tucks. It was also his evidence that the officers demanded Kshs. 50, 000/= from each of the suspects. They both refused to give the money. They were thus arrested and charged with the present offence.

The 2nd Accused stated that on the material date he was sent by his grandfather to collect someone with whom they were to meet to discuss sale of some livestock. He met the person and walked together towards Silaloni.

Grounds of Appeal:

The appeal is inspired by the following grounds:

> ***(a) The learned trial magistrate failed to appreciate the need for the phone to be retrieved to prove the said conversation alleged to have happened between Pw1 and the appellant herein.***
>
> ***(b) The mandatory nature of sentence section 92(2) of the wildlife Conservation and Management Act deprived the court of the use of judicial discretion to impose an appropriate sentence.***
>
> ***(c) That the pre-trial incarceration period was not considered.***

Submissions

The appellant tendered written submissions in support of his appeal. His first ground is on the burden of proof. He largely rests it on the phone data and he argued that the alleged conversations between PW1 and him were not proved in Court. He, therefore, submitted that the learned trial magistrate did not appreciate the great need for phone data to be availed in court to prove the said conversation between Pw1 and the appellant in question.

He also submitted on the minimum mandatory sentence. He argues that the mandatory nature of 7 years prescribed in the terms section 92(2) of the Wildlife Conservation and Management Act 2013, deprived the trial court of the use of judicial discretion. In his mitigation he told the court that he was 65 years old and ailing, he prayed for a non-custodial sentence. He also told the court that he is a first offender who will not involve himself in contravening the law again. He, therefore, prayed for a lesser sentence.

On ground three he is asking the court to consider the time he spent in remand custody. He pointed out that he was arrested on 10th July 2019 and convicted on 28 September 2020 which amounted to 1 year and 2 months in remand. He averred that the trial court did not take into account the period spent in remand custody. He, therefore, argues that his right to equal protection and equal benefit of the law has not been accorded to him. His humble submission is therefore that this court considers the time spent in remand custody.

The Respondent opposed the appeal in their submissions filed on 14/06/21. The learned Counsel for the Respondent, Miss L. Kagori, submitted on the question of the allegations by the appellant that identification was not proper, the prosecution case was marred with contradictions and discrepancies and that the appellant's defence was not considered.

On the question of whether the appellant was positively identified as the perpetrator of the offence, the Respondent submitted that identification of the perpetrator proper and exact. According to the Respondent, Pw1 got information of the sale of tusks, he called the number furnished to him and the appellant introduced himself as the seller. On the 10th July 2019 when the operation was to be carried out, the appellant gave directions and upon reaching the place, she met a man who introduced himself as Wanyale. She also met someone else by the name Stephen Riziki Kaingu. Pw1 further reiterated on cross examination that she found both the appellants at the road side. Her evidence is corroborated by that of Pw2 who confirmed that he saw two people standing by the roadside one of whom signaled at them to stop. He further identified them as 1st and 2nd accused. He reiterates the same upon cross-examination when he explained that the appellant his colleague were the two men went into the thicket and collected the tusks. The appellant introduced himself as Hamisi Wanjala and the 2nd Accused as Stephen Kaingu and this is after they were now weighing the tusks with Pw1.

The prosecution averred that all the witnesses identify the appellant at the scene of the crime and their testimonies corroborate each other. Further that, it was in broad day light when the transaction took place. Further that the appellant introduced himself severally to the police officers. Counsel for the Respondent stated that this places the appellant at the scene of crime and nothing in defence rebuts the evidence tendered on identification of the perpetrators. In her humble submission, identification was proper and exact and the learned magistrate did not err.

With regard to the alleged contradictions and discrepancies in the prosecution case, Miss Kagori is of the view that there were no material contraction comes up. Further that the evidence of Pw1 is properly corroborated by the testimonies of the other witnesses. They all place the appellants at the scene and with the tusks. In support of her case, Counsel for the state cited the cases of ***Phillip Nzaka Watu v R (2016) eKLR, Dickson Elia Nsamba Cr App No. 92 of 2007, Joseph Maina Mwangi v R Cr.app No.73 of 1993 and Willis Ochieng Odero v R (2006) eKLR.***

On the ground that the defence of the appellant was not considered, Learned Counsel for the states that the learned trial Magistrate dealt with the appellant's defence case in depth. The learned magistrate found that the defence that the appellants alleging conspiracy by the officers to frame them lacks merit. He goes further to explain that the accused persons and the officers were not known to each other prior to this date and therefore there no scores to settle and the appellant never raised any. Further that the allegation to extract a bride from them was an afterthought as the same was never raised in cross examination. The learned magistrate dismissed the defence and finds that it has been proved beyond reasonable doubt that the appellant was dealing with wildlife trophies. Counsel for the state therefore submits that the appellant's defence was indeed considered and findings made on the same date.

Further, the Learned Counsel for the state conceded to the error that Pw1 and Pw2 were never called for cross –examination as they were in court on the 25/2/2020. The dates were given and the matter never proceeded. Counsel submits that the omission did not prejudice the appellant and his conviction was proper. In her humble view, this can be cured in terms of Section 382 of the Criminal Procedure Code, Laws of Kenya. Further that the omission on its own does not render any injustice on the appellants and further the court on its own motion can consider the evidence and the omission and come to its own conclusion. The Learned Counsel referred to the case of ***Thomas Alunga Ndegwa v Republic (2008) eKLR*** if the omission doesn't occasion injustice to the appellant then the same can be remedied by section 382 of the Criminal Procedure Code.

Finding and Determination

Issues for determination are:

(a) Whether the prosecution proved its case beyond reasonable doubt.

(b) Whether the mandatory sentence imposed is harsh and excessive.

On the first issue, it is the prosecution evidence that the appellant was caught dealing in Wildlife trophy particularly elephant tusks. The appellant and his colleague were arrested with four pieces of elephant tucks. Pw1 posed as a buyer. The appellant and his colleague was arrested while weighing the elephant tusks for purposes of selling them to Pw1. The tusks were packed in a sack and forwarded for testing after which they were found to be tusks.

In his defence, the appellant denied having been found in possession of tusks or trying to deal in wildlife trophy. He was framed by the officers in a bid to extract a bribe from him. When he failed to pay them, they decided to frame him. His main argument is that in the absence of the phone data which have the conversations alleged to have happened between Pw1 and the appellant, the prosecution case cannot be said to have been proved to the required standard of proof beyond reasonable doubt. Count one involves dealing in Wildlife Trophy. Section 3 of Act No.47 of 2013 defines "**dealer"** as any person who in the ordinary course of business or trade carried on by him, whether on his own behalf or on behalf of any other person –

a) Sells, purchases, barters or otherwise in any manner deals with any trophy, or

b) Cuts, carves, polishes preserves, cleans mounts or otherwise prepares any trophy or

c) Transports or conveys any trophy.

The particulars of the offence as set out in the charge sheet were that the appellant and his colleague were jointly found dealing in Wildlife

trophy of endangered species. The evidence tendered by the prosecution sufficiently prove that the appellant was arrested in possession of elephant tusks with the intention of selling them. The appellant's contention of having been framed by the officers in a bit to siphon money from him cannot therefore stand. The appellant wanted to sell the trophies to Pw. A purchase price of Kshs. 100, 000/= per Kilo for the 82 kgs had been agreed. This would have yielded approximately Kshs. 8.2 million as per the charge sheet. The operating words under the definition of **"dealer**" include sells, purchases, barters or otherwise in any other manner deals with any trophy. The fact that the transaction was not complete is not necessary. Section 82 of the Act No.47 of 2013 outlaws dealing in wildlife trophies without licence. The appellant was nabbed with wildlife trophies without a licence. The terms *"**in any manner deals with any trophy**"* covers what the appellants were doing. Even the term "***sells*"** was proved. The appellant intended to sell the trophies, the purchase price need not paid. The intention to sell and steps taken towards executing the sell are sufficient to prove dealing in wildlife trophy. If one is found with a wildlife trophy without a licence, he would be in one way or another dealing with that trophy. From the evidence on record, I am satisfied that the prosecution proved its case beyond reasonable doubt. The appellant was found dealing in wildlife trophy without a licence. He was arrested in possession of the trophies.

On the question of sentence, the appellant was charged in terms of section 92(2) of the Wildlife Conservation and Management Act which states as follows:

> **"(2) A person who, without permit or exemption issued under this Act, deals in a wildlife trophy, of any critically endangered or endangered species as specified in the Sixth Schedule or listed under CITES Appendix I, commits an offence and shall be liable upon conviction to a term of imprisonment of not less than seven years."**

The appellant challenged the sentence that its minimum mandatory nature makes it inappropriate considering the fact that he is a first offender, elderly and ailing. The offence is serious and the fact that an offence is punished by a minimum mandatory sentence does not make the sentence stiff. In sentence circumstances, a minimum mandatory sentence may even be to lenient considering peculiar circumstances of each case.

Given the circumstances of the case, I do find that the sentence of seven (7) years imprisonment imposed by the learned trial magistrate cannot said to be harsh and excessive considering the value of the wildlife trophy involved. The sentence imposed by the learned magistrate stands.

On the question of pre-trial sentence, I hereby side with the appellant that the one year and 2 months he spent in remand custody be taken into account in terms of Section 333(2) of the Criminal Procedure Code, Laws of Kenya.

In light of the forgoing, I do find that the appeal on conviction is hereby dismissed for it is without merit.

The appeal against sentence partially succeeds, particularly on the question of pre-trial sentence. The appellant is hereby sentence to seven years imprisonment computed from the date of his arrest.

It is ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 14TH DAY OF OCTOBER, 2021

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R. NYAKUNDI

JUDGE

In the presence of; -

1. Appellant

2. Mr Mwangi for the State