



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 13 OF 2019

MAURICE MILIMO MATATI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from judgment delivered on 19th June 2018 by Hon. M.O. Rabera Senior Resident Magistrate in Mombasa Chief Magistrate's Court Criminal Case No. 667 of 2017).

J U D G M E N T

1. The Appellant Maurice Mulimo Matai was charged with offence of being in possession of wildlife trophy contrary to Section 95 of the Wildlife Conservation & Management Act of 2013.
2. The particulars were that Morris Milimu Matati on the 22nd day of April 2017 at around 14.50hours at Changamwe (Shell Petrol Station) in Changamwe Sub-County within Mombasa County, was found in possession of thirteen(13) pieces of Wildlife trophy namely elephant tusks weighing 28kgs with a street value of Kshs.1,400,000/= without a permit.
3. The trial Magistrate upon considering the evidence of 6 prosecution witnesses and weighing it with the appellants defence found him guilty and he was convicted and fined Kshs.2,000,000/= and in the alternative serve 8 years in prison.
4. The appellant was aggrieved by the conviction and sentence and he preferred the appeal herein on the following amended grounds of appeal filed on 9th February 2021:-
 - i. That the learned trial Magistrate erred in law & fact in convicting the appellant without considering that the charge as drafted was fatally defective.**
 - ii. That the learned trial Magistrate erred in law & fact in convicting the appellant without considering that the recovery/seizure of the alleged items was not properly done as required by the law.**
 - iii. That the trial Magistrate erred in law & fact in convicting the appellant without considering that the source of arrest of the appellant was not well established and the case at hand was poorly investigated and thus conviction could not be attained.**
 - iv. That the learned trial Magistrate erred in law & fact in convicting the appellant without considering that the present case was marred with various inconsistencies contradictions and in variances.**
 - v. That the trial Magistrate erred in law & fact in convicting the appellant without considering his reasonable defence & mitigation.**
5. The brief facts of the case are that PW 1 a warder with Kenya Wildlife Services got intelligence information that there was a person in possession of Wildlife trophies in Changamwe and he wanted to sell. That together with CPL. Charis and Rangers Mwitii and Omar Dagoi they strategized on how to educate arrest of the suspect. That as they remained at Shell Petrol Station in Changamwe Omar Dagoi proceeded to Chaani to meet with the suspect seller and by 2.45pm returned to Petrol Station in the guise of wanting to fuel. That when the vehicle carrying Dago and the suspect stopped PW1, Mwanyange, PW 2 Ranger Samson Mwitii and CPL Jarvis Kalore - PW 3 approached and asked the appellant/suspect what he was carrying in a manilla bag after they introduced themselves and he told them it was wildlife trophies. That they found 13 pieces of elephant tusks which weighed 28 kgs.
6. PW 6 on examination of the exhibits established that they were elephant tusks from 9 elephants and that 6 of the tusks were pairs. He

produced a report to that effect - EXP 5. PW 1, PW 2, PW 3 & PW 4 also prepared an inventory upon recovery of the tusks from the appellant which was duly signed by them as well as the appellant- EXP 3. PW 5 investigated the offence and preferred charge against the accused person.

7. The appellant gave unsworn statement and said that he was on the way to Shell Petrol Station at Changamwe to board a matatu to Magongo and as MP for Changamwe Hassan Mwinyi's followers were fighting with his opponents, two people arrested him and connected him with a consignment which was on the ground at the stage. He said he was surprised because the consignment didn't belong to him. He said the people who arrested him took his phone and later identified themselves as KWS Officers. He said he didn't understand the genesis of the charges against him.

8. In submissions the appellant argued that the charge was defective as the exhibit memo form indicated that he was arrested upon alighting at Shell Petrol Station at Changamwe and yet the prosecution witnesses claimed he was in a car. He also submitted that the trial Magistrate failed to mention the offence for which he was charged during conviction and sentence.

9. The appellant also argued that the inventory prepared during the alleged seizure was not proper as it was not signed by the driver of the vehicle that he was alleged to have been in at the time of arrest and the registration number of the vehicle was also not indicated. He said his National Identity Card No. was also not indicated and that this prejudiced him as his signature was not verified by an expert.

10. The appellant further submitted that the source of his arrest was not established and that investigations were poorly conducted. He said he was not properly identified and that there is clear indication that there were 2 personalities at the scene the one who alighted from a bus or matatu and the one who KWS Officers lured from Chaani near Shell Petrol Station. He said the doubt raised by the prosecution evidence as to identity of the suspect should be resolved in his favour as he is a victim of circumstances as he had come from church when he was arrested. He denied having signed the inventory.

11. The appellant also submitted that the prosecution's case was riddled with contradictions, invariances and inconsistencies and that the driver of the car he was alleged to have been in didn't testify and the description of suspect are wanting. The appellant argued that PW 2 & PW 4 were coached to fabricate him. He also argued that PW 5 the investigating officer conceded that he didn't know how he was arrested. He argued that conviction was unsafe in view of the alleged inconsistencies and should be rejected.

12. Appellant relied in the holding in **Dickson Elia Nsamba Shapwater & Another vs Republic Appeal No. 92 of 2007** – Tanzania where it was held:-

“In evaluating discrepancies, contradiction and omissions its undesirable for a court to pick out sentences and consider them on isolation from the rest of the statements. The court has to decide whether they go to the route of the matter”.

13. The appellant also argued that his defence was not considered and that the sentence was harsh and excessive. He urged the court to consider his mitigation in the lower court and the fact that he has orphaned children, he is sickly and that he has been rehabilitated and reformed.

14. The Respondent on the other hand submitted that it was not clear from the appellant's submissions which part of the charge sheet was defective and his argument does not go to the substance of the charge.

15. It was also argued that there was nothing irregular about the arrest appellants and there was no need of photographs. It was submitted that the evidence of seizure was corroborated by PW 1, PW 2 & PW 4 who were involved in the operation while acting on a tip off from an information that the appellant had wildlife trophy and was looking for a buyer. That the appellant signed an inventory of the trophies recovered from him and examination and analysis established what was recovered from him were elephant tusks.

16. The Respondent submitted that there were no contradictions in the evidence of prosecution witnesses as the witnesses corroborated each other's evidence. It was argued that investigations arrest and recovery were all above board and there was no reason to fabricate the appellant.

17. On defence mitigation & sentence, the Respondent submitted that the appellant's unsworn statement was considered in the judgment and dismissed as an afterthought. On sentence the Respondent argued that it was lawful, fair and the court should not interfere as the Act provides for a fine not less than 12 months in default of payment of a fine of not less than one million or both fine and imprisonment.

18. The Respondent urged the court to dismiss appeal. The duty of this court as 1st Appellate court is to re-examination and re-evaluate the record of the trial court and come up with an independent conclusions as to sobriety of the trial Magistrates judgment based on the evidence and law.

19. Having considered the evidence on record the judgment of the trial court and the grounds of appeal and submissions by both parties the issues for determination are:-

i. Whether the charge sheet was defective?

ii. Whether seizure of the wildlife trophies was properly done as required by the law?

iii. Whether investigations was poorly done.

iv. Whether reason for arrest of the appellant was not established.

v. Whether prosecution's case was marred with inconsistencies and contradictions.

vi. Whether appellants defence and mitigation was considered.

vii. Whether sentence was harsh & excessive.

20. Whether charge sheet as drafted was fatally defective, the appellant referred to the judgement of the trial Magistrate as having failed to mention the offence and section of the law for which he was convicted. In my view that does not in any way relate to the defect or otherwise of a charge sheet.

21. On the issue of seizure and recovery of the Wildlife trophy from appellant, the inventory was signed by PW 1, PW 2, PW 3 and PW 4 as well as the appellant. The prosecution witnesses followed a tip off to arrest the seizure & arrest of appellant whom they didn't know before and there was no indication that there was any grudge between the appellant and the officers who arrested him. The appellant didn't indicate the law he allege was flouted during the seizure & his arrest. His signature was witnessed by PW 1, PW 2, PW 3 & PW 4 and the exhibits recovered from him were analyzed by PW 6 Dr. Ogeto Mwebi – Senior Research Scientist with a National Museums of Kenya who established the exhibits seized were elephant tusks. This court therefore finds that seizure & arrest were properly conducted. The inconsistencies raised by appellant were those between what he said and what prosecution said. The evidence of prosecution was properly corroborated.

22. On whether investigations were conducted poorly appellant relied on evidence of PW 5 the Investigating Officer who was not present during arrest and who said that he didn't know how appellant was arrested to say that investigations were conducted poorly. The appellant picked out isolated statements and sentences by the prosecution witnesses that don't go to the route of the matter to suggest to that investigations were conducted poorly without saying what in his view amounted to proper investigations.

23. On whether the appellants defence was considered, the trial appellant gave an unsworn statement raising issues which he never told the investigating officer or any of the KWS officers who arrested him

24. The trial Magistrate considered the appellants unsworn statement and said it was an afterthought. Being an unsworn statement it is the view of this court that the appellant's statement that the same had no probative value to be considered as it was not interrogated for integrity and credibility. The said statement did not in any way challenge the evidence of PW 1, PW 2, PW 3 & PW 4 who laid ambush for arrest of the suspect they got a tip wanted to sell wildlife trophy.

25. The Respondent confirmed that the Act provides for a fine not less than one million shillings or alternative of imprisonment of not less than 12 months but the trial Magistrate imposed a fine of Kshs.2,000,000/= in default 8 years imprisonment. The reason given by the trial Magistrate is that our elephants are on the verge of extinction because of such activities of poaching. He said that to obtain the 13 pieces of tusks the appellant killed 9 elephant. I do find that the fine imposed was reasonable but the default sentence of 8 years was not explained. In event that appeal doesn't succeed then the sentence will be revised to a fine of 2,000,000/= in default 4 years imprisonment.

26. In conclusion, this court therefore finds that the appeal has no merit in its entirety and it is dismissed save that the sentence is revised to Kshs.2,000,000/= in default 4 years imprisonment. Orders accordingly. Right of Appeal 14 days explained.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 08TH DAY OF OCTOBER, 2021

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of:-

Ogwel – Court assistant

Appellant – Present in person

Mr. Mulamula for Respondent

Hon. Lady Justice A. Ong'injo

Judge