REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 76 OF 2020

RACHAEL MUTHIKE JOHN.....APPELLANT

-VERSUS-

REPUBLIC..... RESPONDENT

(Being an appeal from the judgment of Hon. J. O Magori in Makindu Senior Principal Magistrate's Court Case No.1001 of 2016 pronounced on 29th July, 2020).

JUDGMENT

1. The appellant was charged in the magistrates' court with another with being in possession of wildlife trophy contrary to section 95 of the Wildlife Conservation and Management Act 2013. The particulars of offence were that on 12th August 2016 at Kibwezi – Kitui road in Kibwezi District within Makueni County while in motor vehicle registration No. KBM 932J Toyota Corola were jointly found in possession of wildlife trophy namely four 4 elephant tusks to wit 45kgs with a street value of Kshs.4, 500,000/=.

2. They both denied the charge. After a full trial, they were convicted of the offence and sentenced to pay a fine of Kshs.2,000,000/= and in default to serve 5 years imprisonment.

3. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal. It is not clear whether the other co-accused has appealed.

4. The appellant has relied on the following grounds of appeal –

> ***1) That the trial magistrate erred both in law and fact and misdirected himself by holding that the case had been proved to the required standard whereas on the basis of the record, the burden of proof was not discharged and indeed left reasonable doubts that ought to have been resolved in favour of the appellant.***
>
> ***2) The learned trial magistrate erred in law and fact by wholly relying on the prosecution witnesses testimony yet in the circumstances the case ought to have been backed by evidence linking her to the offence.***
>
> ***3) The magistrate misdirected himself after failing to cautiously explore statements of the prosecution witnesses who could not prove the case beyond reasonable doubt.***
>
> ***4) The magistrate preferred a harsh and excessive sentence.***

5. The appeal proceeded by way of filing written submissions. I have perused and considered the submissions of both the appellant and the Director of Public Prosecutions.

6. This is a first appeal. As a first appellate court, I have an obligation to evaluate the evidence on record afresh and come to my own independent conclusions and inferences. See **Okeno –vs- Republic (1972) E.A 32.**

7. I have evaluated the evidence on record afresh. In proving their case, the prosecution called four (4) witnesses. Pw1 KWS Corporal Michael Bett, and Pw2 KWS Ranger Nicholas Munene, on receipt of intelligence information proceeded from Nairobi to the Kitui-Kibwezi road where they stopped the motor vehicle KBM 932J driven by the appellant and in which there as a passenger who was the co-accused. It was their evidence that on searching the vehicle boot, they found nothing, but on the back seat, they found a bag containing 4 pieces of elephant tusks.

8. These pieces were later examined by Pw3 Ogeto Mwebi, a wildlife specialist in the National Museums, and found to be elephant tusks, thus the two occupants of the motor vehicle above were charged with the offence.

9. In her defence, the appellant gave sworn testimony and said that she was a taxi driver on hire. She said that the cargo in the vehicle belonged to the co-accused Wilfred Mwenga Musili.

10. The issue here in my view, turns on possession. Though the appellant has submitted so strongly on contradictions in the prosecution evidence, I see no material contradiction in the prosecution evidence herein, as it is clear that she was the driver of the vehicle, and the items were found in that vehicle in broad day light. There was no contradiction on the description of what happened. Thus in my view possession was proved of the bag, which were not something she did not know about.

11. Once possession of the bag was proved, the burden shifted to the appellant to explain how she came to be in possession of the bag, if she was to exonerate herself from blame. She would also have to show that she was not aware of the contents to exonerate her from a guilty mind, and to show that she did not know or had no reason to know that the items were elephant tusks.

12. I note that at the trial, he appellant gave a long narrative of her trip with the co- accused, all of which in my view, showed that she knew that the items in the bag were not lawful cargo. She drove all the way from Machakos to Tseikuru with the co-accused. She testified at the point before arrest, the co-accused was frantically phoning somebody about a deal. It is of note also that the cargo was not of an assortment of different items but merely elephant tusks. In my view, guilty mind was proved, and thus it was proved by the prosecution that the offence charged was committed by the appellant thus her conviction will be upheld.

13. With regard to sentence, the 5 years imprisonment default sentence imposed was the maximum sentence for the offence. The fine in my view was justified, but the default prison sentence was too harsh. I will reduce the prison term to 3 years imprisonment.

14. Consequently, I dismiss the appeal on conviction and uphold the conviction of the trial court. With regard to sentence, I vary the sentence, and order that instead the appellant will pay a fine of Kshs.2,000,000/= and in default serve three (3) years imprisonment from the date she was sentenced by the trial court.

It is so ordered.

DELIVERED, SIGNED & DATED THIS 18TH DAY OF NOVEMBER, 2021, IN OPEN COURT AT MAKUENI.

.....

GEORGE DULU

JUDGE