REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KILGORIS

CRIMINAL APPEAL CASE NO. E017 OF 2021

(Formerly Kisii HCRA 70 OF 2019)

(CORAM: F.M. GIKONYO J.)

(Being an appeal from the conviction and sentence of Hon. R.M. Oanda (P.M) in KILGORIS PMCR case No. 1028 of 2015 delivered on 31/05/ 2019)

KENNEDY OCHIENG'.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

[1]. The Appellant was charged with the offence of being in possession of wildlife trophy contrary to Section 95 of the Wild Life Conservation and Management Act No. 47 of 2013.

[2]. The particulars of the offence were that on 27/07/2015 at Loigorian town in Transmara west district within Narok County was found in possession of wild life trophy namely elephant tusk to wit four pieces weighing four kilograms valued at Kshs. 400,000/= without a permit.

[3]. The Appellant was found guilty of the charge. He was convicted and sentenced to pay a fine of Kshs. 1,000,000/=in default to serve 5 years imprisonment.

[4]. The Appellant being aggrieved by the said decision has lodged this appeal in which he raised eight (8) grounds of appeal in his memorandum of appeal.;

a) That the learned trial magistrate erred in law and in fact and holding that the appellant herein was found in possession of wild life trophy notwithstanding the fact that the circumstances surrounding the alleged recovery of the said trophy contradicts the findings by and / or at the instance of the honourable court.

b) That the learned trial magistrate erred in law and in fact in finding and holding that the respondent herein had proved its case beyond the requisite standards, whilst the evidence tendered by the prosecution was riddled and / or replete with pertinent and material contradictions which negated the probative value of the evidence tendered and / or offered.

c) In finding and holding that the contradiction evident and / or apparent in the evidence of the witnesses were immaterial and inconsequential, the learned trial magistrate misconceived and / or misapprehended the substance of the contradictions, which in any event were material and significant to the extent that same casts doubt on the veracity of the evidence tendered.

d) Having found and held that the respondent herein failed to call the informer, who was critical and material witness, subject to the provisions of the witness protection act 2006 the learned trial magistrate erred in law in failing to draw an adverse against the prosecution, which inference would have been to the advantage of the appellant herein. Consequently the trial magistrate misapprehended the legal duty placed upon the prosecution as pertains to the calling of witnesses and tendering evidence.

e) in finding and holding that the evidence tendered by the appellant had failed to dislodge the solid prosecution case, the learned trial magistrate erred in law in shifting the burden of proof upon the appellant and thereby requiring the appellant to prove his innocence contrary to and in contravention of the established criminal principle that burden of proof rests upon the prosecution and same does not shift whatsoever. In this regard, the judgement of the trial magistrate is coloured with serious misdirection and error in law and hence same is substantially vitiated.

f) That the learned trial magistrate erred in failing to take into account the evidence rendered by the appellant and thereby disregarded the defence evidence without giving credible reasons for such omission. Consequently the appellant herein was not granted a fair hearing, in line with provisions of article 50(1) of the Constitution.

g) That the learned trial magistrate erred in fact and in law in proceeding to and indeed in convicting the appellant on the basis of defence charge and thereby depriving the appellant of constitutional right of equal protection and benefit of the law contrary to and in contravention of article 20 (2) of the constitution.

h) The sentence meted out by the trial magistrate is manifestly excessive, harsh and or punitive.

Evidence

[5]. The prosecution called four witnesses while the appellant gave unsworn defence and did not call any witnesses.

[6]. The trial court noted the mitigation offered by the appellant; that he is a first offender, his relatives were sick. He was also remorseful. The trial court called for probation officers report. The probation officer's report was availed and the same was considered by the trial magistrate. The trial court however noted that the offence was serious and a deterrence sentence was needed. He noted further that the trial court's discretion could not be exercised as the law had prescribed a minimum sentence.

[7]. The probation officers report dated 28/05/2019 had recommended that the appellant was suitable to be placed on probation subject to the wishes of the honourable court.

Appellant's submissions/ mitigation.

[8]. The appellant mitigated that he opted to lodge the appeal to only apply for leniency; that he is a first offender and very remorseful. He did not appeal against conviction but this application is only for review of his sentence to a lesser or non-custodial one.

[9]. The appellant mitigated that prior to his arrest he was married and blessed with two children aged 7 and 2 years. He was a sole bread winner of the said family he prays for a second chance. He prays to be set free or other alternatives be considered for him.

Respondent's submissions

[10]. Mr. Ondimu OGW, senior prosecution counsel in opposing the appeal submitted that the prosecution proved all the ingredients of the offence.

[11]. The respondent submitted that the evidence tendered by the appellant was duly considered and analyzed in the trial court's judgement and there was no shifting of the burden of proof. That the appellant was squarely placed at the scene where the exhibits were recovered from and he did not offer any credible explanation as how he was found at the scene.

[12]. The respondent submitted that the trial court analyzed the evidence on record and came to the conclusion that the appellant was found in possession of the elephant tusks which were subjected to scientific examination. No material was placed before this court to warrant the setting aside of the findings by the trial court which is backed by evidence which is on record.

[13]. The respondent submitted that the sentence passed by the trial court was not illegal or unlawful. The same was proper as it is provided for under section 95 of the act.

[14]. The respondent submitted that there was no contradictions nor inconsistencies and even if there were, they are minor and did not go to the root of the prosecution's case hence this court should ignore them.

[15]. In conclusion, the respondent submitted that the prosecution did discharge its burden of proof. The conviction of the appellant was proper. They therefore urged this court to dismiss the appeal for lack of merit.

[16]. The respondent relied on the following authorities in support of its case;

i. Section 107(1) of the Evidence Act

ii. Woolmington V Dpp [1935] AC 462

iii. Miller V Minister Of Pensions [1947]2 ALL ER 372

iv. Japheth Gituma Joseph & 2 Others Vs R [2016] eKLR

v. Joseph Merithi Kanyita V Republic [2017] eKLR

ANALYSIS AND DETERMINATION

Court's duty

[17]. As first appellate court; I should re-evaluate the evidence afresh and arrive at own independent conclusions. I am however reminded to bear in mind that I neither saw nor heard the witnesses and give due regard for that. See ***Njoroge v Republic (1987) KLR, 19 & Okeno v Republic (1972) E.A, 32.***

[18]. Arising from the memorandum of appeal, the submissions of the respective parties and the record of appeal are the following issues for determination:

i. ***Whether the prosecution proved its case beyond reasonable doubt.***

ii. ***Whether the prosecution's case was tainted with contradictions, discrepancies, flaws and/or inconsistences;***

iii. ***Whether the sentenced passed was manifestly excessive, harsh a punitive.***

[19]. I have noted that the appellant in his written submissions dubbed ''written mitigation'' has departed from his grounds of appeal cited in the memorandum of appeal. The appellant now seeks leniency only. Nevertheless, I will determine whether the prosecution proved its case beyond reasonable doubt and whether the sentence is harsh or excessive.

Whether the prosecution proved its case beyond reasonable doubt;

[20]. The appellant was charged with the offence of being in possession of wildlife trophy contrary to Section 95 of the Wildlife Conservation and Management Act 2013 which provides as follows:

> **"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 to both such imprisonment and fine.''**

[21]. Accordingly, elements of the offence to be proved are:

i. **Possession of a trophy**

ii. **Lack of a permit or exemption under the Act**

[22]. PW1 testified that on 26th July 2015 they received information that there was a person who was selling game trophy- elephant tusk. Together with his team they prepared to lay ambush at room 4- where the dealer was. When they entered the room they found the seller seated in bed and there was a white sack with elephant tusks which had been cut into four pieces. On weighing the said tusks, they found they weighed four kilograms. The same was produced as **P Exh 1(a-d).** The seller who is now the appellant was then arrested and presented in court.

[23]. PW2 corroborated the evidence of PW1.

[24]. PW2 was later recalled by counsel for the appellant for cross examination. PW2 confirmed that he was the first one to enter the room which was locked and there was only one person in the room; the appellant.

[25]. The said elephant tusks were handed over to PW3 a police officer who was the investigating officer. PW3 took the tusks to the National Museum Nairobi Osteology Department for purposes of examination.

[26]. When PW3 was recalled for cross examination, he confirmed that the exhibits were recovered from a room where the appellant was.

[27]. PW4 testified that he examined the exhibits which had been marked C1- C4 and brought by PW3. He came to the conclusion that they were elephant trophies.

[28]. The appellant did not dispute being arrested at room 4 at a Kaungira Guest House though he claimed to have been looking for unknown customer who had allegedly brought his motor bike for repair. Despite his explanation, he did not give any explanation or reasonable explanation on how he ended up in the room which he had locked only to be found with the exhibits produced before court. he did not also give any explanation on how the trophies came to his possession or whether he had a permit or exemption to have them.

[29]. The overall impression of the evidence adduced by the prosecution is that the evidence is watertight and left no gaps or room for any reasonable doubt on commission of the crime. Thus, I find that the prosecution proved its case against the appellant beyond reasonable doubt.

Contrary to the submission by the appellant, the prosecution's case was not tainted with contradictions, discrepancies, flaws and/or inconsistences. The evidence of PW1, PW2 and PW3 were consistent as to the events of 27/7/2015. The appellant has also not denied having been found at the scene.

[30]. The upshot is that I uphold the conviction. The appeal on conviction fails.

Of sentence

[31]. The appellant was a first offender. The trial court considered his mitigation.

[32]. The sentence provided for the offence of being in possession of wildlife trophy contrary to Section 95 of the Wildlife Conservation and Management Act, 2013 is; a fine of not less that, 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 the appellant was sentenced on that count to pay a fine of one million shillings (Kshs 1,000,000) in default to serve five years' imprisonment. That, sentence is therefore lawful.

[33]. I also find that the offence is a serious one as it portends a threat to wildlife tourism in this country. I agree with the trial court that the circumstances of this case and the kind of offence involved calls for deterrent sentence. I therefore decline the invitation to impoe a non-custodial sentence. I also do not see anything that makes the sentence herein harsh or excessive in the circumstances of the case. Consequently, I uphold the sentence. The appeal on sentence also fails. It is so ordered. Right of appeal 14 days.

[34]. In the upshot, the appeal is dismissed.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 7TH DAY OF DECEMBER 2021

F. GIKONYO M.

JUDGE

In the presence of:

1. APPELLANT

2. ONDIMU FOR RESPONDENT

3. KASASO - CA