



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

[Coram: A. C. Mrima, J]

CRIMINAL APPEAL NO. 53 OF 2019

1. CHARLES MUSABI NYAMBOBA

2. MARTIN MUKALE MWITA.....APPELLANTS

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. L. N. Mesa Principal Magistrate in Kehancha Magistrate's Criminal Case No. 297 of 2018 delivered on 4/07/2019)

JUDGMENT

1. The Appellants herein, **Charles Musabi Nyamboba** and **Martin Mukale Mwita**, were jointly charged with two counts under the **Wildlife Conservation and Management Act, No. 47 of 2013** (hereinafter referred to as '**the WCMA**').

2. The two counts and their respective particulars were as follows: -

Count I:

Being in possession of wildlife Trophy without a permit contrary to Section 95 of the Wildlife Conservation and Management Act No. 47 of 2013 Laws of Kenya

On the 30th day of March, 2018 at around 1900hrs in Isebania Trading Center, Kuria West Sub-County within Migori County, you were found in possession of Wildlife Tropher namely five (5) pieces of Elephant tusks to wit 17 Kilograms without a permit.

Count II:

Dealing in Wildlife Trophy without a Licences contrary to Section 84(1) as read with Section 95 of the Wildlife Service Conservation and Management Act No. 47 of 2013 Laws of Kenya.

On the 30th day of March 2018 at about 1900hrs in Isebania Trading Center, Kuria West Sub-County within Migori County you were found dealing in Wildlife Trophies namely; five (5) pieces of elephant tasks to wit 17 Kilograms without permit.

3. The Appellants denied the charges and were tried. Four witnesses testified in support of the prosecution's case. **PW1** was **KWS No. 8357 Corp. Rodney Kimutai**. He was stationed at Kenya Wildlife Service Isebania Border Post. **PW2** was **KWS No. 9867 Ranger Samson Mwiti** also stationed at Kenya Wildlife Service Isebania Border Post. **PW3** was a Research Scientist working for National Museums of Kenya at Nairobi. **PW4** was the investigating officer one **No. 82806 Corp. Christopher Samoei** attached at DCI Isebania.

4. At the close of the prosecution's case the trial court placed the Appellants on their defences. The First Appellant gave an unsworn defence whereas the Second Appellant gave sworn evidence. The Appellants did not call any witnesses. The Appellant appeared in person during the trial.

5. The court rendered its judgment where the Appellants were found guilty as charged in Count II and were convicted. Each was sentenced to

a fine of Kshs. 1 Million in default to serve 5 years in prison. The Appellants were acquitted in Count I.

6. Dissatisfied with the convictions and sentences, the Appellants timeously preferred an appeal through *Messrs. Apondi & Company Advocates*. In a Petition of Appeal, the Appellants challenged the judgment, conviction and sentences on the following 7 grounds: -

1. **The learned trial magistrate erred in law and fact by shifting the burden of proof from the prosecution to the accused persons hence convicting the accused persons.**
2. **The learned trial magistrate erred in law by convicting the accused persons of an offence that was not proved beyond reasonable doubt.**
3. **The learned trial magistrate erred in law by convicting the accused person based on hearsay evidence which is not admissible in law.**
4. **The learned trial magistrate erred in law and fact by majorly evaluating the defence testimony instead of the evidence of the prosecution hence convicting based on the defence of the accused persons.**
5. **The trial magistrate erred in law in and fact in misapplying the rule as to the standard of proof in criminal matters.**
6. **The learned trial magistrate erred in law and fact in believing the evidence tendered by the prosecution without exercising reasonable caution in admitting the same.**
7. **The learned trial magistrate erred in law and fact by convicting the appellants of dealing in trophies without having had evidence of the purported buyer of the said trophies.**

7. Directions were taken and the appeal was disposed of by way of written submissions. The Appellants expounded on the grounds of appeal. They also referred to several decisions. The Appellants prayed that the appeal be allowed, convictions quashed and sentences be set-aside.

8. The appeal was supported by the State. It was submitted that the court did not properly appreciate the law since one cannot be guilty of dealing in trophies under **Section 84(1)** of the **WCMA** and be acquitted of being in possession of the same trophies.

9. This being the Appellant's first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okeno vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

10. From the parties' submissions, it is of utmost importance to ascertain whether the charge sheet was defective. I will begin with the law.

11. **Article 50(2)(b) and (n) of the Constitution** provides as follows: -

(2) Every accused person has the right to a fair trial, which includes the right-

(b) to be presumed innocent until the contrary is proved;

(n) not to be tried convicted for an act or omission that at the time it was committed or omitted was not -

i) an offence in Kenya; or

ii) a crime under international law

12. **Section 134** of the **Criminal Procedure Code, Cap. 75** of the Laws of Kenya (hereinafter referred to as '**the CPC**') provides as follows: -

Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

13. **Section 137** of the CPC deals with the rules for framing of charges or informations.

14. Courts have also considered what constitutes a defective charge. The then East Africa Court of Appeal in **Yosefu and Another -vs- Uganda (1960) E.A. 236** held as follows: -

The charge was defective in that it did not allege an essential ingredient of the offence; i.e. that the skins came from animals etc, in contravention of the Act.

15. The Court of Appeal in Nyamai Musyoka v. Republic (2014) eKLR expressed itself as follows: -

The test for whether a charge sheet is fatally defective is a substantive one.....If a defective charge is followed by a series of other procedural or substantive mistakes and which in particular affect the rights of the accused person, or the defect goes into the root of the charge distorting it in a way that the accused person cannot understand the charge, then the Court ought to be reluctant to apply Section 382 C.P.C. to cure the defect... (emphasis added).

16. In the case of Sigilani -vs- R (2004) 2 KLR 480, it was held that: -

The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence.

17. The *Black's Law Dictionary* defines '*defective*' as follows:

Lacking in some particular which is essential to the completeness, legal sufficiency, or security of the object spoken of.....

18. A charge must therefore be clear and easy to understand. In as far as possible the use of technical language in a charge ought to be avoided. An accused person must be accorded an opportunity to understand what he/she is facing before court. The crux of it all must be the manner in which the charge(s) is/are framed.

19. I have reproduced the manner in which the two counts in this matter were framed. As said, the Appellants were eventually convicted of the offence of *Dealing in wildlife trophy* contrary to **Section 84(1)** as read with **Section 95** of the **WCMA**.

20. **Section 84(1)** of the **WCMA** provides as follows: -

No person shall operate as a trophy dealer without a license issued by the Service.

21. **Section 3** of the **WCMA** describes a '*dealer*' as: -

Any person who, in the ordinary course of any business or trade carried on by him, whether on his own behalf or on behalf of any other person-

a. sells, purchases, barter 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.

22. **Section 95** of the **WCMA** states 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.

23. A reading of **Section 95** aforesaid reveal two important issues. First, the section is the sentencing provision in relation to the offence created by **Section 84(1)**. To that end, the second count in this case was properly drafted. Second, the section creates two other offences and also prescribes their sentences. The offences are keeping or possessing wildlife trophies without a permit or appropriate exemption and that of manufacturing any item from a trophy without a permit or appropriate exemption.

24. Going by the wording in **Section 84(1)** of the **WCMA** it follows that an accused person charged with an offence under that section is outrightly deemed to be in possession of the trophy in issue.

25. The question which now begs for an answer is whether a person charged with an offence under **Section 84(1)** of the **WCMA** can also be charged with a separate count on any of the other two offences under **Section 95** of the **WCMA**.

26. I choose to answer in the negative.

27. From the way a *dealer* is defined under **Section 3** of the **WCMA** then one cannot be properly charged with an offence under **Section 84(1)** of the **WCMA** as well as any of the two other offences under **Section 95** of the **WCMA**.

28. The law defines a *dealer* as one who is not only in possession of a trophy or manufactures a trophy in any way or even transports or conveys such a trophy but such a person must do so in the usual ordinary course of that person's business or trade. It therefore follows that one can only be charged under **Section 95** of the **WCMA** if that person does not fit the description of a dealer. Differently put, one must be either a dealer (so as to be charged under **Section 84(1)** of the **WCMA**) or not a dealer (so as to be charged **Section 95** of the **WCMA**). An accused person cannot be both at the same time.

29. I believe I have said enough.

30. The next question which this Court is to address is whether the Appellants were prejudiced by the manner in which the charges were framed.

31. A look at **Section 382** of the **CPC** is of essence. The section provides that: -

Subject to the provisions herein before contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reserved or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to question whether the objection could and should have been raised at an earlier stage in the proceeding.

32. The Appellants were exposed to a legal scenario where they were charged as unlawful trophy dealers on one hand and on the other hand not trophy dealers at all. That can only be a nightmare. It was definitely not possible for the Appellants to decipher what charge(s) they faced. They were obviously prejudiced as the defects went to the root of the charges.

33. I hence find and hold that the charge sheet was incurably defective. The charge sheet could not be cured under **Section 382** of the **CPC**.

34. Having said so, I must also say that even if I am wrong in the foregone analysis, still the charge of *Dealing in wildlife trophy contrary to Section 84(1) of the WMCA* was not proved.

35. I have carefully perused the proceedings and especially the evidence of the prosecution witnesses. There was no iota of evidence to the effect that the Appellants were dealers within the meaning of **Section 3** of the **WMCA**. It was not proved that the Appellants were engaged in any form of business or trade. The charge cannot therefore legally stand.

36. From the record, the Appellants would have been easily found guilty had they been charged with only the first count. That is because the charge sheet would not have been defective and there was ample evidence to that end.

37. The upshot of the foregone analysis is that the appeal must succeed. It is hereby allowed. The conviction is quashed and the sentence set-aside. The Appellants shall be forthwith set at liberty unless otherwise lawfully held. In the event the Appellants had paid the fine, whether full or in part, the same shall be refunded in full. However, the trophies shall be surrendered to the State.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 14th day of February, 2020.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Miss Apondi, Counsel for the Appellants.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

Evelyne Nyauke – Court Assistant.