



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO. 26 OF 2019

CAREN AWINO OLOO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. Caren Awino Oloo, 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. Particulars of the offence were, that on the 1st day of August 2018 at Loitokitok Township in Loitokitok Sub County within Kajiado County, she was found in possession of wildlife trophy to wit, 50 pieces of Pangolin scales with a street value of Kshs. 100,000/=, without permit.

2. The Appellant pleaded not guilty to the offence and after a trial in which the prosecution called 4 witnesses and evidence from the defence, she was convicted and sentenced to a fine of Kshs. One million, or five years in default.

3. The Appellant was aggrieved by both conviction and sentence, and lodged a petition of appeal filed on 13th July, 2019 and raised the following grounds, namely; that the trial court did not consider or take into account her plea of not guilty; that the court did not consider that she was a first offender and that the court did not take into account that she is the sole breadwinner.

4. During the hearing of the appeal, the Appellant who was unrepresented, relied on her written submissions and urged the court to allow her appeal. In the written submissions, the Appellant submitted that there was contradiction between the evidence of PW1 and that of PW2. According to the Appellant, whereas PW1 stated that they laid an ambush at Equity Bank at 2 pm and arrested her when she appeared, PW2 stated that they found her standing at the NHIF signpost, and that she started walking towards Illasit when she saw them. This, she argued, was a contradiction suggesting that the two witnesses were not together at the material time.

5. The Appellant further submitted that PW1 and PW2 did not state how they identified the scales as those of Pangolin, yet they stated that the scales were not fresh, which means it was not easy to identify them. She also argued that the prosecution did not call the informer as a witness.

6. The Appellant argued that PW2 stated that they asked her to open her bag when she was in the vehicle, and that is when they saw the pangolin scales. She therefore questioned why she was arrested in the first place. According to the Appellant, PW1 and PW2 stated that they were given her description despite the fact that people look alike and that they did not say how they identified her. She also argued that there was no explanation how PW1 and PW2 knew that she had the wildlife trophies.

7. Mr. Njeru, Learned Assistant Deputy Prosecution Counsel, opposed this appeal, supported the conviction and sentence. According to counsel, the Appellant was found with the wildlife trophies by PW1 and PW2, which were in her bag. He argued that the Appellant was charged in court and that PW3 testified that the scales belonged to a wild animal. In counsel's view, the prosecution evidence proved the case to the required standard and, therefore, the Appellant was properly convicted. Regarding sentence, counsel left the issue at the discretion of the court.

8. I have considered this appeal, submissions by parties and perused the record of the trial court and the impugned judgment, the subject of this appeal. This being a first appeal, it is the duty of this court to reconsider, reanalyze and reevaluate the evidence and make its own decision on that evidence giving reasons for it. However, the court should bear in mind that it did not see the witnesses testify and give due allowance for that. (See **Okeno v Republic** [1972] EA 32)

9. In **Kiilu & Another v Republic** [2005]1 KLR 174, the Court of Appeal held that:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting

evidence and draw its own conclusions. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."

10. And in *Garpat vs State of Haryana (2010) 12 SCC59*, The Supreme Court of India underscored this duty stating:

"The first appellate court and the High court while dealing with an appeal is entitled and obliged as well to scan through and if need be re-appreciate the entire evidence and arrive at a conclusion one way or the other."

11. PW1 No. 8010 Elijah Mutua, a KWS investigative Assistant attached at Amboseli National Park, testified that on 1st August, 2018 he was at the National Park when he received intelligence report that there was a lady at Loitokitok town wearing blue scab, blue blouse, dark leso and golden head gear, who was suspected to have wildlife trophies and was looking for a buyer. He left for Loitokitok together with a colleague called Melereki, PW2. They laid an ambush at Equity Bank and at about 2 pm the lady appeared. They identified her through her mode of dress. They followed and arrested her. She had a blue back pack which she had covered with the leso. They asked her to open the bag and when she did, they found Pangolin scales inside. They took her to Loitokitok police station and counted the scales which were found to be 50 pieces. They prepared an inventory which the Appellant signed by thump printing. The Appellant was handed over to the police as well as the exhibits. He identified the blue back, MFI 1, black paper bag, MFI 2, 50 pieces of Pangolin scales, MFI 3 and the inventory, MFI 4.

12. PW2 Raphael Melereli, a KWS Ranger, testified that on 1st August, 2018 at around 1 pm, while on patrol at Kimana, he got intelligence information which was passed through PW1, that a lady was at Loitokitok looking for a buyer of wildlife trophies. They were told that she was at around Equity Bank and were given the description of the cloths she was wearing. He told the court that they went to Loitokitok and found the lady standing at the NHF sign post. According to the witness, when the lady saw them, she started walking away. He went and arrested her. She had a blue bag which was covered by a leso. She was taken to the vehicle and taken to the police station. While in the vehicle, he asked her to open the bag in which they found 50 pieces of Pangolin scales in a black polythene bag. At the police station, they prepared an inventory dated 1st August, 2018 which was signed. He identified the items in court.

13. PW3, Christine Mwinzi, a research scientist with KWS, testified that on 1st August 2018, she received an exhibit she was supposed to identify. On close-examination, she noted that the product was that of the animal in the kingdom of mamalia known as philodidoda. The product was scaled. She further found that the scales belonged to Pangolin. She compared it with other products they had in their possession and found that the scales belonged to Pangolin. She produced the report as PEX 6.

14. PW4 No. 120148 PC Michael Kiprono, a police officer attached to Loitokitok Police Station told the court that on 1st August, 2018 he was instructed to investigate the case. He recorded statements from witnesses and later charged the Appellant. He also sent exhibits to KWS for analysis, which confirmed that it was from Pangolin. He prepared an inventory, which was also signed by the Appellant and the KWS officer. He produced the blue bag PEX 1, black paper bag, PEX 2, 50 pieces Pangolin scales, PEX 3, inventory, PEX 4 and exhibit memo PEX 5.

15. When put on her defence, the Appellant gave a sworn statement and called two witnesses. She told the court that on 1st August, 2018, she went to Loitokitok to buy stock for her salon. Her colleague called and asked her to take her luggage which had her cloths and was with her brother. The friend gave her the brother's cellphone number. The brother then called her and asked her to go to Equity Bank. She went to Equity Bank and found 3 people. However, before she could pick the bag, they arrested her and asked her to board the vehicle. She was taken to Loitokitok police station but the person who had the bag was released. She testified that when they reached the police station, the contents of the bag were poured on a table. That was when the officers claimed that she was in possession of the items. She was then charged with the offence.

16. DW2 Keleyon Simon, a student at Olchoro Onyore High school, told the court that on 1st August, 2018 he was with the Appellant and went together to the Market. The Appellant received a call and the caller asked her to take her luggage. A person came with a motorbike and she asked him to accompany her to pick the luggage. They went to Rombo Stage. They saw the person and a saloon car was next to him. They met the man who gave the Appellant the luggage. Immediately after, some people came from behind and arrested her.

17. DW3 Justus Leken testified that on 1st August, 2018, he carried the Appellant on his motorcycle. On the way a Salonist called and asked the Appellant where she was. The caller told her that her brother had her luggage which she wanted the Appellant to take to her. The caller gave the appellant the brother's number. She met the person in his presence. The person gave her the luggage. According to the witness, people who were standing nearby arrested the Appellant and the man. They later released the man.

18. After considering the above evidence, the trial court was satisfied that the Appellant committed the offence, convicted and sentenced her, prompting this appeal. What I gather from this appeal, the question is whether the prosecution proved beyond reasonable doubt that the Appellant was in possession of the wildlife trophies.

19. In answering this question, the trial court referred to the definition of possession in Black's Law Dictionary and stated that, for the prosecution to prove possession, it was required to prove that the accused was holding the Pangolin scales in her own power and had dominion over the property. The court further stated that possession must not only be physical but may also be constructive, that is; control over the property without actual possession or custody of it.

20. The court then stated:

"The accused person claims she was fixed by her colleague Salonist. It is her evidence that when she came across the

colleague's brother, she was arrested by persons who were alleged in company of this person even before she picked the luggage. The luggage for her colleague, she was arrested even before she picked it. The question therefore why would she be arrested before picking the luggage? The ordinary nature of events should have been to let her pick the luggage and arrest her thereafter" (emphasis)

21. On the basis of the above analysis, the trial court dismissed Appellant's defence and found that of the prosecution watertight and convicted the Appellant.

22. I have considered the evidence and the conclusion reached by the trial court on possession. I have also gone through the record and the evidence by the defence. This appeal turns on whether or not the prosecution proved beyond reasonable doubt that the Appellant was in possession of the wildlife trophies.

23. Section 95 of the Wildlife Conservation and Management Act provides that:

"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."

24. PW1 told the court that he received intelligence that a lady who had game trophies was at Loitoktok and was given specific description on how she was dressed. This was around 1 pm. He together with PW2 proceeded to Equity Bank, the place where they expected to find the Appellant. They found her and as soon as she saw them, she started walking away. They arrested her with the bag. He told the court that they inspected the bag and found game trophies. PW2 similarly told the court that from the intelligence given to PW1 and they went to Loitoktok and found the Appellant near NHIF signpost. They arrested her, took her to the vehicle and asked her to open the bag. That was when they found the game trophies.

25. On her part, the Appellant gave evidence that she was called by a friend who asked her to pick her luggage from her brother, and gave the brother's number. The friend's brother called the Appellant and when she went to pick the luggage, she found him with two other men. She was arrested before she picked the bag. DW2 also testified that he was with the Appellant when she went to collect the luggage and that she was arrested before she picked the luggage. He told the court that the man was also arrested but was released.

26. DW3 also testified that he was the one who took the Appellant on his motor bike to where the people were and that the Appellant was arrested as she was picking the bag. He also told the court that the man was also arrested but was released.

27. From the evidence, there is a divergence on the events of the day. whereas the prosecution witnesses said the Appellant was found in possession of the wildlife trophy, the Appellant and her witnesses told a different story. The question therefore is; was the Appellant found in possession; was arrested before picking the luggage or was she arrested just after she had picked it. Further still, was the Appellant arrested alone or with another person, and if so, who was that person and what happened to him? These questions were critical in determining whether the Appellant was in possession of the game trophies and, therefore, whether the prosecution proved its case against the Appellant.

28. I have evaluated the evidence of both the prosecution and the defence. The prosecution did not deny that the Appellant was arrested with another person. The prosecution witnesses only mentioned the Appellant as the person who had the luggage with the exhibits. Their evidence was that the intelligence they received was that a lady whose description they were given had wildlife trophies and that she was looking for a buyer.

29. The witnesses did not tell the court that their informer, if at all, pretended to be the buyer thus giving away the Appellant. None of the prosecution witnesses told the court that he pretended to be the buyer and therefore they were able to trick the Appellant and arrested her.

30. This evidence, when weighed against the Appellant's defence, that she was asked by a friend to pick a luggage from her friend's brother and that when she went to pick that luggage, she was arrested, raises doubts as to the veracity of the prosecution's case. This is so when one takes into account the fact that PW1 told the Court that they arrested the Appellant at Equity Bank while PW2's evidence was that they arrested the Appellant near the NHIF sign post. The prosecution did not attempt to try to reconcile this apparent discrepancy, to show how close or how far the two places, were in relation to the arrest of the Appellant at one or the other place.

31. It is a cardinal principle in the criminal justice system, that the prosecution bears the burden to prove its case beyond reasonable doubt. In ***Miller v Minister of Pensions*** [1947] 2 All ER 372, **Lord Denning** stated with regard to the phrase "proof beyond reasonable doubt" that:

"Proof beyond reasonable doubt does not mean proof beyond the shadows of doubt. The law would fail to protect the community if it admitted forceful possibilities to deflect the course of justice. If the evidence is so forceful against a man to leave only a remote possibility in his favour which can be dismissed with the sentence, of course it is possible but not in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice."

32. And in ***Bakare v State*** (1987) 1 NWLR (PT 52) 579, **Oputa, JSC**, writing for the Supreme Court of Nigeria, amplified that phrase stating:

"Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of

criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability".(emphasis)

33. From both the prosecution and defence evidence, it is difficult to conclude that the prosecution proved beyond reasonable doubt that the Appellant were in possession of the wildlife trophy. Possession being a question of fact, the prosecution must prove that the Appellant had in her custody and control, the thing she was said to be in possession of.

34. In **Zainal bin Hamad v Public Prosecutor and another** [2018] 2 SLR 1119, the Supreme Court of Singapore though dealing with the issue of possession of controlled drugs, stated with regard to possession, that:

"[12] [W]here the Prosecution wishes to prove the fact of possession, it must prove not only that the accused was in possession of the package or the container but also that the accused knew that it contained something, which may later be established to be the shipment of controlled drugs."(emphasis)

35. In **Adili Chibuike Ejike v Public Prosecutor** [2019] SGCA 38 Criminal Appeal No 18 of 2017, **Menon, CJ. held:**

"[A]ll that is required in this context of establishing the fact of possession is that the accused person must know of the existence, within his possession, control or custody, of the thing which is later found to be a controlled drug; it is not necessary that the accused person also knows that the thing was in fact a controlled drug, much less its specific nature."(emphasis)

36. And in **Obeng Comfort v Public Prosecutor** [2017] 1 SLR 633, the same court again stated that in order to prove the fact of possession, the Prosecution has to prove beyond reasonable doubt, that the accused person not only had physical control over the item, but also that the accused person knew or was aware that the item was a controlled prohibited.

37. Flowing from the authorities, the prosecution had the singular duty to prove beyond reasonable doubt that the Appellant had in her possession, the items that turned out to be the wildlife trophies. Although the trial court correctly referred to the definition of possession, it did not attempt to resolve the conflict between the prosecution evidence and that of the defence. In other words, the court did not give the matter a critical view on whether the basis of the evidence before it, the prosecution proved that the Appellant was in actual possession, that is; custody and control of the items and that she knew that the items which were later confirmed to be wildlife trophy were in the luggage.

38. This is clear from his analysis of the evidence when he asked; **"why would she be arrested before picking the luggage? The ordinary nature of events should have been to let her pick the luggage and arrest her thereafter."** The trial court was acting hypothetically instead of determining the case on the basis of the evidence before it.

39. This is so because although the Appellant called witnesses DW2 and DW3, who testified on oath that the Appellant did not have the luggage and that she was arrested when she went to pick it from the person she had been told had it, the prosecution did not cross examine those witnesses in order to disprove what they told the trial court. These witnesses also testified that another man was also arrested but this was not denied by the prosecution since the defence did not cross examined them. This, to my mind, left a lot to be desired from the prosecution. it leads me to conclude that the prosecution did not prove its case against the Appellant beyond reasonable doubt.

40. As the Court of Appeal stated in **Pius Arap Maina v Republic** [2013] eKLR;

"[T]he prosecution must prove a criminal charge beyond reasonable doubt and, as a corollary, any evidential gaps in the prosecution's case raising material doubts must be in favour of the accused."

41. In the circumstances, and for the reasons given above, I find that the Prosecution failed to establish beyond reasonable doubt, a key element of the offence of being in possession, namely; that the Appellant had in her control and custody, the items that turned out to be wildlife trophy and she knew that the luggage contained the prohibited items. Any benefit of doubt goes to the Appellant.

42. Consequently, the appeal is hereby allowed, conviction quashed and the sentence set aside. The Appellant is hereby set at liberty unless otherwise lawfully held.

Dated, Signed and delivered at Kajiado this 7th day of February 2020.

E.C. MWITA

JUDGE