REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 64 OF 2018

JUSTUS SAFARI CHENGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from Original Conviction and Sentence in Criminal Case No. 235 of 2017 of the Senior Principal Magistrate's Court at Mariakani – Hon. L. K. Gatheru (RM))

Coram: Hon. Justice R. Nyakundi

The appellant

Ms. Sombo for State

JUDGEMENT

Basically, the appellant is unhappy with the entire Judgment of the trial court. The appellant argues the conviction and sentencing of appellant to 7 years' imprisonment is incongruous with the law. The appellant's view is that the charges he faced were not properly framed. His stance is that he was wrongly charged in terms Section 92 of the KWC and MAD of 2013. He argues that the learned trial magistrate in his judgement acknowledged the error when it pronounced itself as follows:

> ***"the offence as stated earlier was ambiguous to the court and this has not been the subject not complete as specific offence and hence an accused charged under this section may not know which offence he is dealing with."***

The appellant therefore cited the case of **Yongo versus Republic Criminal Appeal No. 1071 of 1993** which lays the parameters which constitute a defective charge. He argues that the failure the trial magistrate to amend or to substitute to the charge with the proper violated his constitutional right to fair trial.

The counsel for the State **Ms. Barbra Sombo** seems to concur with the appellant's position that the charge sheet was defective but not fatal. The counsel for respondent suggests that Section 92 of the Act in question herein was declared illegal in the case of **Zhang Chunsheng HCCR. No. 9 of 2014** (unreported) where **Mbogholi, J** stated as follows regarding Section 92 of the Wildlife Conservation and Management Act, 2013:

> ***"The nature and types of the offences contemplated under this section have not been expressly set out... section 92 of the Act, to say the least, is ambiguous."***

According to **Ms. Sombo**, a cursory reading of Section 92 of the Act exhibits that there is no specific offence disclosed. However, she took the view that the particulars on the charge sheet refer to possession of elephant tusks without permit and the case proceeded on the background of that understanding. Further that the particulars of the charge were specific enough to enable the accused person understand the nature of the offence he was facing. Learned prosecution counsel's view is that charge is good and she cited Section 134 of the Criminal Procedure Code which explains the element of a validly drawn charge.

Further, the learned counsel for the State conceded that the prosecution did not invoke Section 214 of the Criminal Procedure Code, but, be as it may, the charge should not be rendered defective as the same is curable in terms of Section 382 of the Criminal Procedure Code.

I am in agreement with both the appellant and the counsel for the defendant that charging a person under Section 92 poses a legal

predicament to the court because this section encapsulates only the penalty for several offences relating to endangered species. In this section, it seems to me that the drafters only made provision to punishment but omitted to create the offence itself. I have noted that the learned trial magistrate attempted to ameliorate this quandary when he invoked Section 179 of the Criminal Procedure code and convicted the appellant on the offence under Section 95. What then is the difference between Section 92 and 95 of the said Act?

In Section 95 the fine envisaged is not less than one million shillings or imprisonment for a term of not less than five years or both whereas Section 92 provides for a fine of not less twenty million shillings or imprisonment for life or both.

In light of the foregoing the question to ponder is whether the charge ought to have been rendered incurably defective? Despite the appellant's contention and mere allegation that the failure by the court to order for an amendment of the charge rendered the charge incurably defective and caused a violation of his fundamental right to a fair trial, I still answer in the negative. The provisions of Section 179 which the learned trial magistrate correctly invoked, provides for conviction of an accused person for a lesser offence than that which he was originally charged with. The said section provides as follows:

> ***"179. (1) When a person is charged with an offence consisting of* several *particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.***
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> ***(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.***

*I am in agree*ment with **Kasango J** in **Mutisya Kiema v R [2014] eKLR** that the Wildlife Conservation and Management Act, 2013 as it now, does not clearly create the offences relating to endangered species or whether trophies. It only encapsulates the penalty. Therefore the learned trial magistrate was right in invoking Section 79 of the Criminal Procedure code and reduce the offence that the appellant was charged and convicted of in terms of Section 92 and 95 of Wildlife Conservation and Management Act, 2013 to the offence envisaged in terms of Section 95.

I concur with the counsel for the State's submission that from the onset, the particulars of the charge were very clear and specific to enable the appellant to understand the nature of the offence he was facing. In my view the charge in question herein was clear that the appellant was being indicted for having been found in possession of elephant tusks. In his defence he seems to have understood the same, and he denied having been in possession of the tusks. The only thing that was incorrect in the impugned charge was the section that was cited.

In light of the foregoing, the particulars of the charge constitute a good charge as envisaged in terms of Section 134 of the CPC. It is therefore my view that charge being defective can be cured by the application of 179 of the Criminal Procedure Code. The said section encapsulates the conviction of an accused person for a lesser offence than the one contained in Section 92.

Section 95 of the Wildlife Conservation and Management Act 2013, as I have said somewhere else in this matter, provides for a sentence of a fine of not less than one million or imprisonment for a term of not less than five years or both. The appellant was correctly sentenced as per the section. Having considered all the circumstances of this matter, the sentence meted out against the appellant which is the minimum sentence provided in the Act.

I therefore reject the argument that the trial magistrate exercise of discretion was punitive and excessive. I find no reason to interfere with both the conviction and sentence.

The appellant's second contention is that he was not properly identified as the perpetrator of the alleged crime. He argued that the mode of arrest was doubtful as it was dark. Further, that the intensity of the light at the scene of arrest was not described as well as how they concluded that the luggage belonged to the appellant. He cited the case of **Odhiambo v Republic [2002] KLR 24** which basically cautions the courts of convicting accused persons of the basis of evidence of identification by a single person. The evidence on record is very straight forward and identification of the appellant herein should not be an issue to labour as that would be in vain.

The appellant fell into an ambush that the KWS officers and informers were given information that a certain person had planned on selling elephant tusks. In that ambush, according to PW1 and PW2, the appellant was one of the three perpetrators who were carrying the said trophy on his shoulder and the appellant was the unlucky one because upon attempting to escape, he fell down and got arrested. The other two perpetrators managed to escape. It was later confirmed that the luggage they were carrying was indeed elephant tusks. In that respect the Appellant was caught in the course of committing the crime. Taking into considerations the facts of this case as established at the trial, the pertinent elements of possession as defined under Section 4 of the Penal Code and that of principal offenders in Section 20 and further on common intention as stated under Section 21 of the same code is applicable.

There is no doubt that under Section (111) of the Evidence Act there were matters of peculiarity within the appellant's personal knowledge. The burden of leading evidence of the fact is on the appellant.

In accepting this view, there was no evidence before the trial Magistrate to that effect. Hence I agree with counsel for the State that he cannot be able to argue his appeal on the basis of a faulty identification of the perpetrator. I therefore find that the appellant's alibi was nothing but an afterthought.

Moreover, the jurisdiction of the first appellate court against the decision of trial court is well stated in various authorities, among them being **Karingo v R {1982} KLR 213** where the principle is that:

> ***"The appellate court should resist the temptation to trial findings of fact as holdings of fact and Law and it should not interfere***

with the decision of the trial court or unless it is apparent that on evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bail in Law."

Indeed, with regard to this appeal, I think the trial court did seriously and properly evaluate the issues which have concerned the appellant to recently prefer an appeal to this court. As a result, I have no quarrel with the impugned Judgment and the findings arrived at in convicting and sentencing the appellant.

Accordingly, I dismiss the appeal in its entirety.

14 days right of appeal.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 14TH DAY OF APRIL 2020

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R. NYAKUNDI

JUDGE