



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ondeyo v Republic (Criminal Appeal 238 of 2018)  
[2020] KEHC 10492 (KLR) (Crim) (2 June 2020) (Judgment)**

Neutral citation: [2020] KEHC 10492 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL**

**CRIMINAL APPEAL 238 OF 2018**

**GWN MACHARIA, J**

**JUNE 2, 2020**

**BETWEEN**

**VICTOR ADUNDO ONDEYO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original conviction and sentence in the  
Chief Magistrate's Court at Makadara in Cr. Case No.1851 of  
2015 delivered by Hon. H. M. Nyaga (CM) on 2nd November, 2018)*

**JUDGMENT**

1. The appellant, Victor Adundo Ondeyo, was charged alongside another with two counts of offences.
  - a. In count 1, he faced a charge of possession of wildlife trophy contrary to section 95 of the *Wildlife Conservation and Management Act*, 2013. The particulars thereof were that on the 11<sup>th</sup> day of June, 2015 at around 1800hrs at Gulf Petrol Station along Jogoo Road within Nairobi County was found in possession of Wildlife Trophies namely; twenty five (25) small pieces of worked elephant ivory weighing approximately 2kgs and five (5) pieces of python skins all with a street value of Kshs. 500,000/=, without a permit.
  - b. In count II, he faced a charge of dealing in wildlife trophy contrary to section 84(1) as read with section 92 of the *Wildlife Conservation and Management Act*, 2013. The particulars thereof were that on the 11<sup>th</sup> day of June, 2015 at around 1800hrs at Gulf Petrol Station along Jogoo Road within Nairobi County was found dealing in Wildlife Trophies namely; twenty five (25) small pieces of worked elephant ivory weighing approximately 2kgs and five (5) pieces of python skins all with a street value of Kshs. 500,000, without a license.



2. The Appellant pleaded not guilty to both counts. After a full trial, he was found guilty of count 1 and acquitted on count II. Consequently, he was sentenced to pay a fine of Kshs. 1,000,000/= in default serve five years imprisonment. The trial magistrate also ordered that the wildlife trophy be handed over to the Kenya Wildlife Service for appropriate disposal or storage. Aggrieved by both his conviction and sentence, he preferred the instant appeal to this court.

### **Grounds of Appeal**

3. The Appellant raised six (6) grounds of appeal in his Petition of Appeal filed on 2<sup>nd</sup> March, 2019. The said grounds have been reproduced as hereunder:
  - i. That the Honourable Magistrate erred in law and fact in convicting the Appellant against the weight of the evidence presented before the trial court.
  - ii. That the Honourable Magistrate erred in law and fact in failing to find and hold that the prosecution had failed to prove the elements of the offence of possession against the Appellant.
  - iii. That the Honourable Magistrate erred in law and fact in failing to consider the submissions of the Appellant on all the issues and failed to analyze the same.
  - iv. That the Honourable Magistrate erred in law and fact in failing to appreciate that the prosecution's evidence was marred with contradictions.
  - v. That the Honourable Magistrate erred in law and fact in finding that the prosecution had proved its case beyond reasonable doubt when the evidence and testimony and record suggest otherwise.
  - vi. That the Honourable Magistrate erred in law and fact in applying wrong principles of law in arriving at the said judgment.

### **Summary of Evidence**

4. This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced by the witnesses before the trial court so as to arrive at its own independent verdict whether or not to uphold the decision of the trial court. In doing so, this court is required to take into account the fact that it neither saw nor heard the witnesses. (See *Okeno v Republic* [1972] EA 32).
5. The Prosecution's case can be summarized as follows: On 11<sup>th</sup> June, 2015 at about 4.00 PM, PW2, Chief Inspector Augustine Mutembei who was the OCS at Shauri Moyo Police Station received a call from an anonymous caller. The caller informed him that he was at Kenchick restaurant at Gulf Petrol Station along Jogoo Road, Nairobi and had overheard a conversation between a man and a woman that led him to believe they had game trophy. The caller described to him the two people. He said the man was short and huge, had a green paper bag and was holding a camera. PW2 told the caller to remain vigilant as he organized a team to arrest the two suspects. PW2 went to the CID office where he found officer PW3, PC John Ndwiga Kanampiu and PW4, PC Hassan Karim Abdalla. He briefed them and sent them to Gulf Petrol Station to arrest the suspects.
6. PW3 and PW4 proceeded to Gulf Petrol station on foot while dressed in civilian clothes. They stood outside the restaurant waiting for a signal from PW2. PW3 saw the Appellant entering the restaurant alone. PW3 and PW4 went in and found him seated alone at one end of the restaurant with a yellow paper bag at his feet. PW3 went to him and asked him to open the bag and show them its contents but he refused. They arrested him and took him to the police station where PW2 ordered him to open the bag. The bag had five skins suspected to be python skins wrapped in another bag. There were also



some twenty five chopped pieces of suspected ivory coated in maroon ink. PW2 called Kenya Wildlife Service officers to take over the matter.

7. On June 12, 2015, PW5, Mbola Benson of Kenya Wildlife Service went to Shauri Moyo Police Station and found the Appellant in custody. The police handed over to him the items recovered from the Appellant and a yellow bag. The yellow bag had a brown envelope and a cement bag. PW5 prepared an exhibit memo form and forwarded the items to an analyst on 10<sup>th</sup> September, 2015. Upon analysis, PW1, Esther Nguta, a research scientist from the National Museums of Kenya found that items A1-A25 which had been dyed in maroon ink to conceal the stringer lines which are only found on elephant ivory. PW1 used sand paper to reveal the actual ivory colour. She also found that items B1-B5 which had been dried and tanned were python skins. PW1 compiled a report dated 16<sup>th</sup> September, 2015 which she produced in evidence. The twenty five ivory pieces, five python skins and three paper bags were produced in evidence by PW5 alongside the exhibit memo he had prepared.
8. When placed on his defence, the appellant elected to give a sworn statement. He stated that on 11<sup>th</sup> June, 2015, he got a call from an unknown person who said he wanted a quotation for a house since the person had seen a house that he had built. They agreed to meet at Gulf Petrol Station since there is a hotel there and the Appellant worked nearby. He went to Gulf and saw a lady he had built a house for seated under an outdoor umbrella shade. He spoke to her then she told him to go and talk to the person he was supposed to meet then return to her later. He thought it was the lady who had referred the person to him.
9. He entered the restaurant and found the man at a corner. The man gave him Kshs. 50/= to buy himself a soda from the self-service store which he did and went to join the man at the table. The man said he was going to get a paper and pen and left the restaurant. He saw the man coming back while being followed by three men who were pointing a gun at him. He discretely took a photo of the scene with his camera. The four men entered the restaurant then the client told him to give him a minute and left. The other three men approached him and introduced themselves as police officers. They mentioned animal trophies and told him to pick a paper bag that was near where the client had sat. He had not seen that paper bag before so he told them that it was not his. As such, he was handcuffed and taken to Shauri Moyo Police station.
10. He was taken to the OCS's office where he was forced to open the paper bag. He saw hides and some chopped pieces. He took out his camera and secretly took a photo of the contents then one police officer took away his camera. He tried to seek help from the CID office but to no avail. The OCS then made a call to a 'Muchembele'. He also tried calling his brother but the police took away his phone. He was later charged in court. He denied dealing in animal trophy or being found in possession of any. He suspected that he was set up by the lady, the client and the police.

### **Analysis and determination**

11. This appeal was canvassed by way of written submissions. The Appellant's written submissions were filed on October 2, 2019 whilst those of the respondent were filed on March 2, 2020. The Appellant was represented by learned counsel Mr. Magara whilst the Respondent was represented by the learned state counsel, Ms. Ndombi. Upon carefully reevaluating the evidence on record and considering the parties' respective submissions, I find that the only issue for determination is whether the prosecution proved its case against the Appellant beyond a reasonable doubt.



12. As at the time the offence in question was committed, section 95 of the [Wildlife Conservation and Management Act](#), 2013 provided 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.”
13. On the issue of possession, the Appellant submitted that the prosecution’s evidence in this regard was scanty and unreliable. He referred to the Black’s Law Dictionary and the case of [Jean Wanjala Songoi & Another v Republic](#) [2015] eKLR where possession was defined inter alia as having and being in control of a thing to the exclusion of all others. He submitted that the trial court’s determination on whether he had possession of the wildlife trophies was speculative and did not take into account his testimony, submissions and/or the entire evidence on record. He argued that it was clear from the testimonies of the arresting officers that he never touched the paper bag from the time they saw him to the time of his arrest meaning he never had control of it and thus did not possess it. He also contended that both PW3 and PW4 corroborated his testimony that he refused to open the bag at the scene because it did not belong to him.
14. In response, the respondent submitted that the prosecution established all the ingredients of the offence and accordingly proved its case against the Appellant beyond reasonable doubt. The Respondent thus urged that this appeal be dismissed and the Appellant’s conviction and sentence be upheld.
15. The [Black’s Law Dictionary](#) 10<sup>th</sup> Edition defines the term possession to mean:
- “The fact of having or holding property in one’s power; the exercise of dominion over property. The right under which one may exercise control over something to the exclusion of all others; the continuing exercise of a claim to the exclusive use of a material object. Something that a person owns or controls”
16. Section 4 of the [Penal Code](#) defines “possession” as follows:
- “(a)be in possession of” or “have in possession” includes not only having in one’s own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person.”
17. According to the evidence on record, the police acted on a tip off from an informer who told PW2 that the Appellant had a green paper bag and was holding a camera. The arresting officers, PW3 and PW4, gave consistent and cogent evidence which corroborated the description given by the informer. Both PW3 and PW4 testified that when they entered the restaurant, they found the Appellant seated alone at one end of the restaurant and there was no one near him. The Appellant had a yellow paper bag at his feet under his seat and also had a camera just as described by the alleged informer. When the said bag was opened at the police station, it had five suspected python skins wrapped in another bag as well as twenty five chopped pieces of suspected ivory coated with maroon ink. This confirmed the suspicion from the informer that he had wildlife trophy.



18. The appellant did not deny being found at the scene. He however claimed that the paper bag was near where his alleged client had sat and that he had not even seen it. He also claims that he was set up the alleged client, the lady he found at the restaurant and the police. I find his defence unbelievable in view of the cogent and consistent evidence tendered by PW2, PW3 and PW4. There was also no evidence of any grudge between him and the people he alleges set him up or framed him with the offence. In the premises, I am satisfied that the appellant was indeed found in possession of items indicated on the charge sheet.
19. The next question is whether the items found in the Appellant's possession were actually wildlife trophies. Section 2 of the Act defines a "trophy" as follows:-
- “ means any wild species alive or dead and any bone, claw, egg, feather, hair, hoof, skin, tooth, tusk or other durable portion whatsoever of that animal whether processed, added to or changed by the work of man or not, which is recognizable as such.”
20. PW1, a research scientist from the National Museums of Kenya examined the items which had been forwarded to her by PW5. She found that items A1-A25 were elephant ivory and items B1-B5 were dried and tanned python skins. PW1 prepared a report dated 16<sup>th</sup> September, 2015 which she produced in evidence. The Appellant did not challenge the said report and neither was there any reason to doubt the report or PW1's expertise. I am therefore satisfied that the items found in the Appellant's possession were indeed wildlife trophy.
21. Further, there was no evidence on record to show that the Appellant was in lawful possession of the wildlife trophy. He did not produce any license or permit allowing him to handle the same. As such, I find that that he was in illegal possession of the said trophies.
22. The Appellant further submitted that the prosecution's case was full of inconsistencies and discrepancies. He pointed out that none of the arresting officers testified that they found him in the company of a lady yet PW2 stated that an informer told him that there were two people being a man and a lady. He also pointed out that PW3 and PW4 gave contradicting evidence as to where they found him. Further, he stated that PW2's testimony that an unknown informer told him that the Appellant was carrying a green paper bag contradicted PW2 and PW3's testimonies that they found the Appellant with a yellow paper bag. He further noted that PW3's stated that the alleged bag was found between or in front of the appellant's feet while PW4 stated that it was found besides the appellant. Lastly, he argued that PW2 testified that the informer told him that the man was short and huge whereas both PW3 and PW4 testified that the person was tall.
23. He submitted that these inconsistencies show that he was framed up and relied on the case of *Martipei Parmaya v Republic* [2017] eKLR where court stated that it was illogical that three witnesses allegedly present at the time of arrest could give contradicting versions. In my considered view, the inconsistencies complained of are immaterial since the evidence against the Appellant is so overwhelming and did not leave any doubt in my mind that he was found in unlawful possession of wildlife trophy. I place reliance on the case of *John Nyaga Njuki & 4 others v R* [2002] eKLR where the Court of Appeal pronounced itself thus:
- “ But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused.”



24. The Appellant also faulted the prosecution for failing to call the alleged informer as a witness. In his view, the prosecution should have made use of the *Witness Protection Act* if indeed the allegations against him were true. He supported his submissions in this regard with the *Martipei Parmaya* Case (supra) in which the court held that the identity of the informer should not be disclosed unless such disclosure is done to establish the innocence of an accused person.
25. In the case of *Kigecha Njuga v Republic* [1965] EA 773 where Sir John Ainley C.J. and Madan J stated that:
- “Informers play a useful part no doubt in the detection and prevention of crime, and if they become known as informers to that class of society among whom they work, their usefulness will diminish and their very lives may be in danger. But if the prosecution desire the courts to hear the details of the information an informer has given to the police clearly the informer must be called as a witness.”
26. Further section 143 of the *Evidence Act*, the prosecution is not obligated to call any particular number of witnesses to prove a fact. My considered view is that it was not necessary to call the informer to testify in this case because the informer gave information which the police acted on and found the Appellant in possession of the wildlife trophies. The evidence of the informer would not therefore have served any useful purpose in proving the Appellant’s innocence or otherwise.
27. Further, the Appellant contended that the trial court did not have a basis for convicting him for the offence of possession of wildlife trophy after acquitting him of the offence of dealing in wildlife trophy. In support, he relied on the cases of *Jean Wanjala Songoi & another v Republic* [2015] eKLR and *Charles Mbaabu Mhuri v Republic* [2018] eKLR. However, these cases are distinguishable from the present case. This is because in both cases, the courts acquitted the Appellants therein of offences relating to possession of game trophies because possession was not proved. In the present case though, possession was established, the basis on which the Appellant was convicted.
28. The end result is that the prosecution proved beyond reasonable doubt that the Appellant was found in possession of wildlife trophies without a permit. His conviction was therefore safe.
29. As regards the sentence, I note that section 95 of the *Wildlife Conservation and Management Act*, 2013 prescribes a sentence of 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. The Appellant was sentenced to pay a fine of one million shillings in default to serve five years imprisonment. The fine in my view was reasonable as it must serve as deterrence with a view to preserving our depleting wildlife. As regards the default sentence, since the appellant was a first offender and having regard to the Supreme Court decision in the case of *Francis Kariokor Muruatetu & another* [2017] eKLR, I substitute the same with three years imprisonment.
30. On noting that the appellant was granted bail pending appeal by the trial court, I order the DPP liaises with investigating officer to arrest the appellant and cause be escorted to prison to serve the sentence if the fine is not paid within three days effective of the date of this judgment.

## Conclusion

31. In the premises, I find that the appellant’s appeal is devoid of merit and the same is dismissed save for the substituted default sentence. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 2<sup>ND</sup> JUNE,2020.**



**G.W.NGENYE-MACHARIA**

**JUDGE**

In the presence of:

Mr. Magara for the Appellant.

Miaa Akunja For the Respondent.

