



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

COURT MARTIAL APPEAL NO.4 "B" OF 2015

(An Appeal arising from the Judgment and Order of the Court Martial at Moi Air Base at Nairobi in Court Martial Case No.8 of 2015 delivered on 11th August 2015)

PETER MURUGU NJERU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Peter Murugu Njeru, was at the material time a member of the Kenya Defence Forces. He was charged with two (2) offences before the Court Martial. In the 1st Count, the Appellant was charged with **committing a civil offence** contrary to **Section 133(1)(b)** of the **Kenya Defence Forces Act**, that is to say, being in possession of wildlife trophy contrary to Section 95 of the **Wildlife Conservation and Management Act**. The particulars of the offence were that on 25th February 2015 at 11.00 hours at South B within Nairobi County, the Appellant was found in possession of two pieces of elephant tusks weighing approximately 10kg without a permit, an act he knew or ought to know constituted an offence.

The Appellant was charged in 2nd count with the offence of **committing a civil offence** contrary to **Section 133(1)(b)** of the **Kenya Defence Forces Act**, that is to say, **dealing in wildlife trophy** contrary to **Section 84(1)** as read with **Section 92** of the **Wildlife Conservation and Management Act**. The particulars of the offence were that on 25th February 2015 at 1100 hours at South B within Nairobi County, the Appellant was found dealing in wildlife trophy namely two pieces of elephant tusks weighing approximately 10kg without a licence. When the Appellant was arraigned before the Court Martial, he pleaded not guilty to the charges. After full trial, he was found guilty as charged in count I and sentenced to serve seven (7) years imprisonment. He was further dismissed from the Kenya Defence Forces. He was acquitted of the charges in Count II. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He faulted the trial court for convicting him yet his constitutional rights were violated. He was of the view that the evidence presented by the prosecution was insufficient to sustain a conviction. He was aggrieved by the Court Martial's decision to discharge him from employment. He asserted that the Court Martial disregarded his plausible defence in arriving at its decision. He opined that the Court Martial misdirected itself in law and improperly applied the applicable legal principles. He was further aggrieved that the Court Martial shifted the burden of proof to the Appellant. He was of the opinion that the sentence meted by the Court Martial was manifestly excessive in the circumstances. In the premises, the Appellant urged this court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, this court heard oral submissions from Mr. Njiraini for the Appellant and Ms. Akunja for the State. Mr. Njiraini averred that the evidence adduced by the prosecution failed to establish the charges preferred against the Appellant. He asserted that the prosecution alleged that two people were arrested but the Appellant was charged alone. He submitted that the evidence adduced by the two arresting officers (PW1) and (PW2) was contradictory. They claimed that the Appellant resisted arrest. However, the same was denied during cross-examination. Counsel for the Appellant further averred that no inventory was taken of the elephant tusks that were recovered. He faulted the trial court for disregarding the Appellant's defence and relying on the evidence adduced by the prosecution. He stated that the alleged potential buyers ought to have been availed before the trial court to adduce evidence. He opined that the prosecution's evidence was insufficient to sustain a conviction against the Appellant. In the premises therefore, he urged this court to allow the Appellant's appeal. Ms. Akunja for the State opposed the appeal. She adopted her oral submissions as stated in Court Martial Appeal No.3 of 2015 Bernard Muigai Mutambo vs Republic. The said Bernard was arrested together with the Appellant. Her oral submissions were to the effect that the ingredients of the offence against the Appellant were established by the prosecution to the required standard of proof beyond any reasonable doubt. She therefore urged the court to dismiss the Appellant's appeal.

The facts of the case according to the prosecution are as follows: PW1, Ranger Joyce Muthoni, was an investigator at Kenya Wildlife Services. She was on duty on 25th February 2015 when she received a tip off from a member of the public that there were two people in

South B who were in possession of two pieces of elephant tusks and were looking for a potential buyer for the same. The informant told her that the two men were on their way to South B Shopping Centre, near the postal area. PW1 informed her colleague PW2, Shadrack Muema. They proceeded to South B Shopping Centre at about 9.30 a.m. They had information on the clothes the suspects were wearing. They were also informed that the suspects would be carrying a black bag.

The two suspects arrived at the said shopping center at about 11.00 a.m. The Appellant was one of the two men. He was wearing a red shirt and a black trouser. His accomplice, Bernard Mutambo, was carrying the black bag. PW1 and PW2 approached the two men. They introduced themselves and asked to search the bag. The Appellant and his accomplice refused to open the bag. PW1 and PW2 arrested them. They searched the bag and recovered two pieces of elephant tusks. They did not have a permit to possess same. They escorted the two suspects to Kenya Wildlife Services headquarters for further interrogation. At the headquarters, they discovered that the two suspects were members of the Kenya Defence Forces. When they interrogated them, they discovered that Bernard Mutambo procured the tusks from Turkana and that the Appellant was helping him find a buyer for the same.

PW3, Chief Inspector Inoti, was based at the Kenya Wildlife Services investigation department. On 25th February 2015, two suspects arrested in possession of elephant tusks were brought to Kenya Wildlife Services headquarters by PW1 and PW2. The Appellant was one of the two men. He interrogated the two suspects and discovered that they were military officers. He prepared an exhibit memo and forwarded the recovered elephant tusks to the National Museum for forensic analysis.

PW4, Ben Nyakundi, was a research scientist based at the National Museum of Kenya. He received two exhibits on 1st April 2015 from PW3. He was instructed to analyze the exhibits and determine whether the same were elephant tusks. He examined the exhibits and confirmed that they were elephant tusks. He produced a report of the same in evidence. He told the court that the tusks weighed ten (10) kilograms. The estimated market value of the same was Ksh.200,000/- per kg.

PW5, Cpl. Rufus Njeru, investigated the present case. He was assigned the case on 6th March 2015. He proceeded to the Kenya Wildlife Service and interviewed the arresting officers, PW1 and PW2. They told him that they received a tip off from an informant that the Appellant and his accomplice were in possession of elephant tusks and were looking for a buyer. They proceeded to South B and arrested the two suspects. PW5 interrogated the Appellant. The Appellant told him that he received a call from Spt. Bernard Mutambo who instructed him to look for a buyer for elephant tusks. The Appellant met with a potential buyer known as Mr. Abdi. The buyer however wanted a larger quantity of tusks. They located a source in Meru for additional tusks. The deal however fell through. Later, the Appellant received a call from Mr. Abdi who was seeking to purchase the tusks that they had in their possession. The Appellant and Bernard Mutambo went to South B the following morning to meet the buyer. That is when they were arrested. PW5 stated that the Appellant and his accomplice were arrested in possession of the elephant tusks without a permit.

The Appellant was put on his defence. He stated that he was a member of the Kenya Defence Forces based at 5KR Gilgil. It was his testimony that on 25th February 2015, he was at 5KR Gilgil. He went for a morning run and later travelled to Nairobi. He was meeting one Kathiaka at Nyamakima. On arrival, he sat on one of the City Council posts. A lady who was a city council employee pushed him and scolded him for sitting on the post. They exchanged words as a crowd gathered. Other employees of the City Council appeared and arrested him. They handed him over to another group of people who put him inside their vehicle and drove to Kenya Wildlife Service offices in Langata. He was locked in a room where he was interrogated. After sometime, another KDF officer was brought to the room. He admitted that the said officer, Bernard Mutambo, was his colleague. They were later handed over to military officers. The Appellant denied that he was arrested in possession of elephant tusks. On cross-examination, the Appellant admitted that he knew Bernard Mutambo. They trained together in Eldoret and they also came from the same home area. He admitted that he was in communication with the said Bernard Mutambo in January and February 2015. He stated that he was arrested in Nyamakima and not South B as alleged by the prosecution.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the Court Martial to fresh scrutiny and re-evaluation, before reaching its own independent determination whether or not to uphold the conviction and sentence of the Appellant. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make a comment regarding the demeanour of the witnesses (See Okeno vs Republic [1972] EA 32). In the present appeal, the issue for determination by this Court is whether the prosecution established the Appellant's guilt in the charges preferred against him to the required standard of proof beyond any reasonable doubt.

In the present appeal, the prosecution was required to establish proof of possession, proof that the items recovered in the Appellant's possession were elephant tusks, and lack of authority on the Appellant's part to be in possession of the same. From the evidence on record, PW1 and PW2 were Kenya Wildlife Services (KWS) officers. PW1 told the court that she received a tip off from an informant that there were two men in possession of elephant tusks who intended to sell the same. The informant told her that the men were on their way to South B Shopping Centre. The informant stated that the men would be carrying a black bag and also described how they were dressed.

PW1 and PW2 proceeded to South B Shopping Centre. They arrived at 9.30 a.m. The two men however arrived at 11.00 a.m. The Appellant was among the two men. He was wearing a red shirt and a pair of black trousers. His accomplice, Bernard Mutambo, was the one carrying the black bag. PW1 and PW2 approached them and introduced themselves as KWS officers. They requested to search the bag. The two men refused. PW1 and PW2 arrested them and took them to their car. While at the car, they searched the bag and found two pieces of elephant tusks.

Possession is defined under **Section 4** of the **Penal Code** to mean:-

“Be in possession of” or “have in possession” includes not only having in own personal possession, but also knowledge 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 one self or of any other person;

a. *if there are one or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in*

his or their custody or possession it shall be deemed and taken to be in the custody and possession of each of them.”

In the present appeal, the evidence adduced by PW1 and PW2 was to the effect that the Appellant was arrested together with the said Bernard who was carrying the black bag containing the elephant tusks. This evidence was corroborated by PW3, who was at KWS Headquarters in Langata when the Appellant and his accomplice were brought in by PW1 and PW2. The Appellant was therefore aware that his accomplice Bernard was carrying elephant tusks in the said bag. They were arrested together. PW1 received a tip off that the two were looking for a buyer for the elephant tusks in South B. PW1 and PW2 went to South B where they arrested the Appellant and his accomplice in possession of two elephant tusks.

The Appellant was therefore in possession of the elephant tusks since he had knowledge of the same and was planning to benefit from the sale of the tusks. In addition, by virtue of **Section 20** of the **Penal Code**, the Appellant was a principal offender since he was aiding his accomplice to source for a buyer for the elephant tusks. The said section provides thus;

1. “When an offence has been committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence and may be charged with actually committing it, that is to say;

(a) Every person who actually does the act or makes the omission which constitutes the offence;

(b) Every person who actually does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

(c) Every person who aids or abets another person in

committing the offence;

(d) Any person who counsels or procures any other person to commit the offence; and in the last mentioned case he may be charged either with committing the offence or with counselling or procuring its commission.

2. A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.

3. Any person who procures another to do an act or omit to do any act of such a nature that if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part is guilty of an offence of the same kind and is liable to the same punishment as if he had himself done the act or made the omission and he may be charged with doing the act or making the omission.”

The Appellant in his defence denied being in possession of the elephant tusks. He stated that on the material day of 25th February 2015, he was at his camp in Gilgil. **He went for a morning run and later travelled to Nairobi. He was meeting a friend at Nyamakima. When he arrived, he got into an argument with a City Council employee who scolded him for sitting on a City Council post. Other employees of the City Council appeared and arrested him. They handed him over to KWS officers who put him inside their vehicle and drove to Kenya Wildlife Service offices in Langata. He was locked in a room where he was interrogated. After sometime, another KDF officer, Bernard Mutambo, was brought to the room. They were later handed over to military officers.**

The Appellant’s defence was however displaced by the testimony of PW1, PW2 and PW3. PW1 and PW2 stated that they arrested the Appellant in South B. He was arrested together with Bernard Mutambo. The evidence adduced by the arresting officers was consistent and corroborative. PW3 who was at KWS offices in Langata stated that the Appellant and his accomplice were brought in together. Therefore the Appellant’s assertion that he was arrested in Nyamakima was false. This court is not convinced that the Appellant was arrested by city council officers and handed over to KWS officers who framed him of the present charges. **Why was he not taken to the City Council or handed over to the police?** No evidence was presented before the court to show that the Appellant was known to the witnesses prior to the material day. No evidence of an existing grudge was adduced by the Appellant. This court does not find any reason why the witnesses would want to frame the Appellant.

From the foregoing, this court is of the opinion that the element of possession was established by the prosecution to the required standard of proof beyond any reasonable doubt. PW4 who was a research scientist at the National Museum confirmed that the items recovered in possession of the Appellant were wildlife trophies within the meaning ascribed to the term in the **Wildlife Act**. When the Appellant was arrested, he did not have any documents with him to prove that he was authorized to have possession of the trophies. This court is of the view that the prosecution established all ingredients with regard to Count 1 to the required standard of proof beyond any reasonable doubt. His accomplice was duly convicted by the Court Martial and his conviction affirmed by this court in **Bernard Muigai Mutambo vs Republic [2019] eKLR.**

In the premises, this Court dismisses the Appellant’s appeal against conviction. On sentence, this court notes that the Appellant was a first offender. He was also in pre-trial detention before he was convicted and sentenced by the Court Martial. Under **Section 333(2)** of the **Criminal Procedure Code**, that period ought to have been taken into account. In the premises therefore, this court commutes the Appellant’s sentence to the period served. He is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. The other order issued by the Court Martial of dismissing him from the Kenya Defence Forces shall stand. It is so ordered.

DATED AT NAIROBI THIS 10TH DAY OF JUNE 2020

L. KIMARU

JUDGE