



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NANYUKI

CRIMINAL APPEAL NO 87 OF 2017

DAVID GITONGA MWARIAMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original Conviction and Sentence dated 30/08/2017 in Nanyuki CM

Criminal Case No 864 of 2014 – L. Mutai, CM)

J U D G M E N T

1. The Appellant herein, **DAVID GITONGA MWARIAMA**, was convicted after trial of ***being in illegal possession of wildlife trophies*** contrary to **section 95** of the ***Wildlife Conservation and Management Act, 2013***. It was alleged in the charge that on 23/09/2014 at about 11.00 hours at Makaa area of Sirimon within Meru County, he was found in possession of 8 pieces of elephant tusk weighing 43 kgs (with a street value of KShs 4.3 million) without due certificate.

2. On 30/08/2017 the Appellant was sentenced to a fine of KShs 1,000,000/00 and in default of payment to serve one year imprisonment. In addition, the Appellant was also sentenced to five (5) years imprisonment. He did not pay the fine and he is therefore serving the cumulative sentence of six (6) years imprisonment. He has appealed against both conviction and sentence.

3. The original petition of appeal was filed by a firm of advocates, but at the hearing of the appeal the Appellant was unrepresented. He filed *amended supplementary grounds of appeal* in addition to the original petition of appeal. The grounds of appeal appearing in both documents can be summarized as follows –

(i) That the learned trial court erred in fact and law in making a finding that the prosecution had proved a charge under section 95 of the Act.

(ii) That the trial court erred in fact and law in relying upon the evidence of PW1 and PW2 in regard to the arrest of the Appellant, the description of the offender having been given to them by an informer who never testified.

(iii) That the alleged admission by the Appellant to PW1 and PW2 that the luggage in which the trophies were found was his amounted to an illegal confession that was not taken in accordance with the law.

(iv) That in any event, the maize and potatoes in the two bags amongst which the trophies were alleged to have been hidden were never produced in court as exhibits.

(v) That the trial court erred in law and fact in finding that the trophies in question were found in possession of the Appellant.

(vi) That the trial court erred in law in failing to take into account the defense of the Appellant.

(vii) That the charge against the Appellant was not proved beyond reasonable doubt.

(viii) That the sentence imposed upon the Appellant was *“excessive in the circumstances of the case.”*

4. I have considered the Appellant’s written and oral submissions, as well as those of the learned prosecution counsel. I have also read through the record of the trial court in order to evaluate the evidence tendered and arrive at my own conclusions regarding the same. This is

my duty as the first appellate court. I have borne in mind however, the fact that I did not see and hear the witnesses myself, and I have given due allowance for that fact.

5. The prosecution case was that on 23/09/2014 PW1 (Ranger Josphat Mengich) received information from an informer of a person in Timau area who had elephant tusks. He was given a description of that person.

6. Acting on that information PW1 and PW2 (Ranger Justin Kinyua) were driven to Timau. In Timau, on the road to Sirimon, after a certain bridge, they saw a person who fitted the description they had been given, standing on the roadside next to some two sacks of luggage. He was at a matatu stage called Kwa Makaa.

7. PW1 and PW2 accosted the man and asked what was in the bags. He said it was potatoes and maize. On checking the two bags, PW1 and PW2 indeed found them with green maize and potatoes. But in each bag, amongst the maize and potatoes, were four pieces of elephant tusks. They arrested him and took him and his luggage to **Nanyuki Police Station** where he was eventually charged with the offence.

8. PW3 (Ogete Mwebi), a Research Scientist with the **National Museums of Kenya**, examined the eight pieces tusk and verified that they were indeed elephant tusks from two different elephants. He produced his report in court.

9. PW4 (PC Hildah Njeri) was the investigating officer of the case. She produced in evidence the 8 pieces of elephant tusk and 2 gunny bags.

10. In his own defence the Appellant testified under oath. He stated that he was arrested at a roadside stage where there were other 8 to 10 people and that he did not have any luggage with him. He also stated that he was assaulted by the people who arrested him and thrown into the boot of their car. He was driven to his home where a search was conducted. Nothing was recovered. He was not in possession of anything when he was arrested and the description allegedly given to PW1 and PW2 by an informer did not fit him. He denied the charge.

11. I have considered the evidence placed before the trial court. The Appellant was accosted by PW1 and PW2 in broad day light. Although there were other persons nearby at the matatu stage where he was standing, he clearly was the one with the two pieces of gunny-bag luggage, and he acknowledged as much to the two rangers. That acknowledgement did not amount to a technical confession as he was not acknowledging that he had in his possession the 8 pieces of elephant tusk. What he was acknowledging was that the two pieces of luggage containing green maize and potatoes were his. He no doubt hoped that the two rangers would not look beyond the maize and potatoes. Unfortunately for him they did, and found the pieces of elephant tusk hidden amongst the food-stuffs.

12. The Appellant was accosted by PW1 and PW2 because he fitted the description given by the informer. It was not necessary for the informer to testify. If no pieces of elephant tusk were found in his possession, there would not have been any further interest in him, and that would have been the end of the information given by the informant as far as he was concerned.

13. The testimonies of PW1 and PW2 were clear and straightforward. They had not known the Appellant before. They had no reason at all to fabricate a case against him.

14. The green maize and potatoes were perishable items. The Appellant was arrested on 23/09/2014. His trial commenced on 11/06/2015, more than 8 months later. There was absolutely nothing sinister about the non-production in evidence of the food-stuffs. They must have perished by then. In any case they were not the focus of the trial. The focus was the eight pieces of elephant tusk.

15. Upon my own evaluation, the Appellant was convicted upon good and sound evidence. The charge against him was proved beyond reasonable doubt. The conviction is safe.

16. As for the sentence, it was lawful and well-deserved. Two elephants must have been killed to obtain the 8 pieces of ivory. To enable this court to intervene, it is not sufficient that a sentence is "*excessive in the circumstances of the case*". It ought to be **manifestly** excessive or harsh. It has not been demonstrated that this was so.

17. In the result I find no merit in this appeal. It is dismissed in its entirety. It is so ordered.

DATED AND SIGNED AT NANYUKI THIS 13TH DAY OF OCTOBER 2020

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 15TH DAY OF OCTOBER 2020