



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 49 OF 2017**

*(An Appeal arising out of the conviction and sentence of Hon. Juma - SPM*

*delivered on 15<sup>th</sup> May 2017 in Kibera CMC. CR. Case No.2000 of 2013)*

**JOSEPH MWITI MPOGO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Joseph Mwiti Mpogo, was charged with the offence of being in possession of Government trophy without a certificate of ownership contrary to Section 42(1)(b) as read with Section 56(2) of the Wildlife (Conservation and Management) Act. The particulars of the offence were that, on 14<sup>th</sup> June 2013 at around 1100hrs at Gathiga Area in Kikuyu within Kiambu County, the Appellant was found in possession of Government trophies namely 2 pieces of decorated elephant ivories weighing 5 kilograms with a street value of Ksh.4,000,000/- on board a red Jiashe Motorcycle registration No.GKB 647A, without a certificate of ownership thereof.

The Appellant was charged with the offence of dealing in Government Trophy without a dealer's licence contrary to Section 43(4)(a) as read with Section 56(2) of the Wildlife (Conservation and Management) Act. The particulars of the offence were that on 14<sup>th</sup> June 2013 at around 11.00hrs at Gathiga Area in Kikuyu within Kiambu County, the Appellant was found dealing in Government Trophies namely 2 pieces of decorated elephant ivories weighing 5 kilograms with a street value of Ksh.4,000,000/- on board a red Jiashe Motorcycle registration No.GKB 647A, without a dealer's licence.

The Appellant was charged with the offence of failing to make a report contrary to Section 39(3)(a) of the Wildlife (Conservation and Management) Act. The particulars of the offence were that on 14<sup>th</sup> June 2013 at around 1100hrs at Gathiga Area in Kikuyu within Kiambu County, the Appellant failed to make a report of possession of Government Trophies namely 2 pieces of decorated elephant ivories weighing 5 kilograms with a street value of Ksh.4,000,000/- to an authorized officer.

When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, the Appellant was convicted as charged on all three counts. In Count 1, he was sentenced to pay a fine of Ksh.30,000/- and to serve a custodial sentence of five (5) years. In Count 2, he was sentenced to pay a fine of Ksh.20,000/- and to serve two (2) years imprisonment. In Count 3, he was sentenced to pay a fine of Ksh.10,000/- and to serve a custodial sentence of one (1) year.

In his petition of Appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved by his conviction stating that the prosecution failed to establish that he was a dealer as defined by the Wildlife (Conservation and Management) Act. He asserted that no evidence was adduced to prove that he was in communication with PW2 and the purported informer. He was of the view that the prosecution's evidence was insufficient to sustain a conviction. He faulted the trial court for failing to acknowledge that the prosecution failed to avail crucial witnesses, especially Ranger Michael Bett and the purported informer to corroborate the adduced evidence. He was aggrieved that the trial court relied on the evidence of PW1 and PW2 that they saw the Appellant in the company of another person, yet that person was not arrested. He complained that the trial court failed to consider his defence evidence in arriving at its decision. He took issue with his conviction stating that the same was based on shoddy investigations. He faulted the trial magistrate for relying on prosecution's evidence to convict him yet the same was inconsistent. He was further aggrieved that the trial court was not alive to the fact that the prosecution shifted the burden of proof to the defence. He therefore urged this court to allow his appeal.

During the hearing of the appeal, this court heard oral submissions made by Airo for the Appellant and Ms. Akunja for the State. Counsel for the Appellant averred that the prosecution evidence was insufficient to sustain a conviction. He submitted that the evidence of PW1 was inconsistent with that of PW2. He pointed out that the evidence with regard to how many people arrived with the Appellant at the scene was inconsistent. He stated that two crucial witnesses, Sgt. Ahmed Abdulahi and Michael Bett were not available before court to adduce evidence. It was his view that this weakened the prosecution's case. He asserted that the prosecution failed to establish a connection between the Appellant, PW2 and the informer. He pointed out that the Appellant was an administration police officer. He was therefore entitled to use the motorcycle with a government registration plate to carry out police surveillance in the course of his duties. He submitted that the trial court failed to consider the evidence presented by defence witnesses. In the premises, he urged this court to allow the Appellant's appeal.

Ms. Akunja for the State opposed the appeal. She made oral submission to the effect that the prosecution had proved its case to the required standard of proof beyond any reasonable doubt. She stated that PW2, a KWS officer received information that the Appellant was illegally selling ivory. He proceeded to the scene accompanied by PW1. They arrested the Appellant at the scene in possession of the ivory. He was in the process of selling the same. She submitted that PW1 and PW2 positively identified the Appellant at the scene. She therefore urged the court to dismiss the Appellant's appeal.

The facts of the case according to the prosecution are as follows: On 14<sup>th</sup> June 2013, PW2 Ahmed Ibrahim, a Kenyan Wildlife Service (KWS) Officer got information from an informer that there was a person in possession of ivory tusks who was willing to sell the same. PW2 contacted the said person and posed as a willing buyer. They arranged a meeting. PW2 proceeded to Gathiga where he was to meet the seller. He was accompanied by PW1 Abdullah Abdi and Ranger Michael Bett. When they arrived, PW1 and Ranger Bett alighted from the car. They stood about 60 meters away from the scene. PW2 met the seller who was the Appellant. He was in the company of another person. The Appellant told him that the ivory tusks weighed 5 kilograms. They agreed on a purchase price of Ksh.40,000/- per kilogram.

The Appellant and the second person left to fetch the ivory. After about ten minutes, the Appellant came back aboard a motorcycle registration No.GK 647A. He was carrying a sack on the motorcycle. He unloaded the luggage and took it to PW2's car. He opened the sack. PW2 noticed two pieces of elephant tusks. He signaled his colleagues, PW1 and Ranger Bett to come to where the car was. They arrested the Appellant and took him to KWS headquarters. At the headquarters, the Appellant was interrogated by PW5 CIP Charles Inoti (the investigating officer). PW5 established that the Appellant did not have the required permit to be in possession of the elephant tusks. The Appellant was also unable to explain from where he got the tusks. He escorted the Appellant to Langata Police Station. He forwarded the tusks to PW4 Ogeto Mwebi, an expert based at the National Museums of Kenya who examined the same and verified that they were indeed elephant tusks. PW3 Peter Gacheru, the Chief of Gathiga Location, Kiambu County confirmed that he had assigned motorcycle registration No.GK 647A to the Appellant for official duties on the material day.

The Appellant was put on his defence. He gave a sworn statement. He stated that he was an administration police officer attached at Gathiga Kamide Administration Police Post. On the material day of 14<sup>th</sup> June 2013, at about 11.00 a.m., he got information that a strange vehicle had been parked near a river on Gathiga-Nairobi Road. He informed the Area Chief (PW3) who assigned him a motorcycle to go and verify the information. He proceeded to check on the said car. He found two occupants in the car. They were of Somali descent. He identified himself as a police officer. The two men informed him that they were also police officers on assignment. They however refused to identify themselves. He took the car keys from the ignition and stepped aside to call his superior. One of the men came out of the car. He ordered the Appellant to get in the car. He handcuffed the Appellant. The Appellant was taken to KWS headquarters in Langata. The two men took him to a senior officer at the said headquarters. He was shown elephant tusks. They told him that they were going to frame him with the present charge for interfering with their mission. He denied the charges against him.

DW2 Geoffrey Gitau Riungu, a member of Nyumba Kumi Security Initiative stated that on the material day, at about 10.00 a.m., he was informed by a young man that there was suspicious motor vehicle that had been parked by the road side for about three hours. He saw the vehicle. It was parked about fifty (50) meters away from where he was. He decided to call the Area Chief (PW3) and inform him of the same. He later saw a police officer on a motorcycle. He stated that there was no luggage on the said motorcycle. The said officer was the Appellant. The Appellant went to talk to the occupants of the said car. He saw the Appellant board the vehicle. He reiterated that the Appellant had nothing in his possession when he was arrested by the KWS Officers.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. As was held by the Court of Appeal in Njoroge -Vs- Republic [1987] KLR 19 at P.22:

*“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570)”.*

In the present appeal, the issue for determination is whether the prosecution established the Appellant's guilt with regard to the charges preferred against him to the required standard of proof beyond any reasonable doubt.

This court has re-evaluated the facts of this case. The Appellant was charged in Count 1 of being in possession of government trophies without a certificate of ownership. Section 42(1)(b) of the Wildlife (Conservation and Management) Act (now repealed) provides that:

*“Save as otherwise provided by this Act, any person who is in possession of any trophy, or of any ivory or rhinoceros horn of any description, without also being in possession of a certificate of ownership in respect thereto shall be guilty of a forfeiture offence and-*

(a).....

**(b) in any other case, be liable to a fine not exceeding ten thousand shillings or to imprisonment for a term not exceeding three years, or both such fine and imprisonment.”**

Therefore, the prosecution is required to establish proof of possession; proof that the items recovered in the Appellant’s possession were trophies; and lack of authority on the Appellant’s part to be in possession of the same. From the evidence adduced, PW2 stated that he received information from an informer that there was someone in possession of ivory tusks who was looking for a buyer. He decided to pose as a buyer. He got into contact with the seller. They set up a meeting. PW2 went to meet the seller in the company of PW1 and Ranger Bett. The said seller was the Appellant. He was in the company of another person. PW1 watched from a distance as PW2 negotiated the sale with the Appellant. PW2 and the Appellant agreed on a purchase price of Ksh.40,000/- per kilogram. The Appellant stated that he had five (5) kilograms worth of the ivory tusks.

After they settled on the price, the Appellant left to collect the tusks. He came back riding a motorcycle GK 647A. There was a sack tied on the back of the motorcycle. He removed the sack and took it to PW2’s car. PW2 inspected the cargo. When he confirmed that the sack contained ivory tusks, he signaled his colleague PW1 to join them. They immediately arrested the Appellant. The evidence of PW2 was corroborated by that of PW1. They were both KWS officers. They took the Appellant to PW5 who interrogated him. The Appellant was unable to explain where he got the ivory tusks from. He did not have any documentation to show that he was authorized to possess the same.

When PW2 identified himself as a buyer, the Appellant brought a sack containing the ivory tusks. The Appellant was ready to sell the same to PW2. They agreed on a price for the tusks. The Appellant availed the tusks himself. He was therefore in custody and control of the same. This court is convinced that the element of possession was established by the prosecution to the required standard of proof. PW4 is an expert in identification of animal remnants. He confirmed that the tusks recovered in possession of the Appellant were Government trophies specifically elephant tusks within the meaning of **Section 39** of the **Act**. When the Appellant was arrested, he was not able to explain from where he got the trophies. He did not have any documentation with him to prove that he was authorized to possess the trophies. This court is of the view that the prosecution established all ingredients with regard to the charge brought against the Appellant to the required standard of proof beyond any reasonable doubt.

The Appellant in his defence stated that he was framed by PW1 and PW2. No evidence was presented before 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. The Appellant stated that he received information that there was a car parked at Gathiga. There was suspicion that the car was involved in illegal activity. He informed PW3 who gave him the motorcycle to go and check out the complaint. DW2 stated that he called the Chief to inform him of a suspicious car that had been parked by the road side. However, the Chief (PW3) did not state anything referring to the said complaint when he testified before court. He was not cross-examined on the same by the Appellant. This version of events seems like an afterthought on the part of the Appellant. The Appellant’s testimony and that of DW2 does not dent the otherwise strong and overwhelming prosecution evidence that was adduced against him. His conviction by the trial court on Count 1 is affirmed.

With regard to the charge in Count 2, a dealer is defined under **Section 2** of the repealed **Act** as **“any person who, in the ordinary course of business or trade carried on by him, whether on his own behalf or on behalf of any other person;**

**a. Sells, purchases, barters or otherwise in any manner deals with any trophy; or**

**b. Cuts, carves, polishes, preserves, cleans, mounts or otherwise prepares any trophy.”**

In the present appeal, the element of selling was established by the prosecution. The Appellant negotiated with PW2 with regard to sale of the trophy. They agreed on a price of Ksh.40,000/- per kilogram of the trophy. The Appellant informed PW2 that he was willing to sell five (5) kilograms of the trophy. After they agreed on the purchase price, the Appellant availed the trophy for sale to PW2. The Appellant did not avail any dealer’s licence when he was apprehended. His conviction by the trial court on the charge in Count 2 is hereby upheld.

**Section 39(2)** of the repealed **Act** requires any person who by any means obtains possession of a Government trophy to make a report thereof to an authorized officer and hand the trophy over to the authorized officer. Failure to do so amounts to an offence under **Section 39(3)(a)** of the **Act**. In the present appeal, the Appellant was illegally found in possession of the elephant tusks. He failed to report the same to an authorized officer, but instead opted to sell the tusks. This court, in the premises, affirms his conviction on charges in Count 3. The upshot of the above, is that the Appellant’s appeal on conviction lacks merit. The same is hereby dismissed.

With regard to the charge in Count 1, the **Act** provides for payment of a maximum fine of Ksh.10,000/- or a three (3) years imprisonment sentence or both. If the trophies are more than one, **Section 56(2)** of the **Act** provides for an additional fine of Ksh.6,000/- or half of the prescribed fine, whichever is less. The Appellant was sentenced to pay a fine of Ksh.30,000/- and to serve a custodial sentence of five (5) years. This trial court’s default custodial sentence is hereby set aside. If the Appellant failed to pay the fine, he shall serve three (3) years imprisonment.

**In respect of the charge in Count 2, the Act provides for payment of a fine of Ksh.20,000/- or a maximum five (5) years custodial sentence or both. The Appellant was sentenced to pay a fine of Ksh.20,000/- and serve a custodial sentence of two (2) years. The same is hereby affirmed, save that the default custodial sentence is set aside.**

**As regards the charge in Count 3, the Act requires an offender to pay a maximum fine of Ksh.10,000/- or serve a maximum one (1) year custodial sentence or both. The Appellant was sentenced to serve a 1 year custodial sentence and pay a fine of Ksh.10,000/-. The same is hereby affirmed save that the default custodial sentence is set aside.**

The three default custodial sentences are to run concurrently with effect from 24<sup>th</sup> November 2016 when the Appellant was sentenced by the trial court if the Appellant failed to pay the fine. It so ordered.

DATED AT NAIROBI THIS 7<sup>TH</sup> DAY OF MAY 2019

L. KIMARU

JUDGE