



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.3 OF 2015

(An Appeal arising out of the conviction and sentence of Hon. Mochache delivered on 11th August 2015 in Moi Air base Barracks Eastleigh Court Martial No.7 of 2015)

BERNARD MUIGAI MUTAMBO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Bernard Muigai Mutambo, is 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.

The Appellant was charged in count 2 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)** of the **Wildlife Conservation and Management Act** as read with **Section 92** of the same **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 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 charge. After full trial, he was found guilty as charged in count 1 and sentenced to serve seven (7) years imprisonment. He was further dismissed from the Kenya Defence Forces. 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. The Appellant was aggrieved by his conviction stating that the Court Martial had no jurisdiction to hear and determine the present case. He faulted the Court Martial for failing to uphold his right under **Article 50(2)(a)** of the **Constitution** which provides for the presumption of innocence until the contrary is proved. He was aggrieved that his right to a fair hearing provided under **Article 50(2)(b)** of the **Constitution** was violated. He took issue with his conviction stating that the evidence presented by the prosecution was insufficient to sustain a conviction. The Appellant pointed out that the prosecution failed to avail crucial witnesses required to prove its case *i.e.* Daudi and the informant. He asserted that the Court Martial shifted the burden of proof to the Appellant. The Appellant was further aggrieved that the Court Martial relied on hearsay evidence adduced by the military investigating officer. He was of the view that the evidence by the prosecution witnesses was uncorroborated by other evidence. 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, the Appellant filed written submission in support of his appeal. This court also heard oral submissions from Mr. Omenya for the Appellant and Ms. Akunja for the State. Mr. Omenya submitted that the Appellant was never tried and convicted of the present offence in a civil court. He asserted that the Court Martial had no jurisdiction to hear and determine the present case. He stated that **Section 56** of the **Kenya Defence Forces Act** prohibits the Court Martial from interfering with civil offences where the civilian courts have jurisdiction to hear the same. He averred that **Section 107** of the **Wildlife Conservation and Management Act** does not donate prosecutorial powers to the Director of Military Prosecutions.

Mr. Omenya pointed out that **Section 133** of the **Kenya Defence Forces Act** is a discipline section. He submitted that the Appellant was not tried of the present offences in a civil court. He was therefore not liable to be subjected to any punishment under **Section 133** of the **Kenya Defence Forces Act**. Counsel for the Appellant asserted that crucial witnesses such as Daudi were not availed to adduce evidence before the Court Martial. He added that the investigations conducted were shoddy. He was of the view that no evidence was adduced linking the Appellant to the present offences. In the premises therefore, he urged this court to allow the Appellant's appeal.

Ms. Akunja for the State opposed the appeal. She asserted that PW1 arrested the Appellant in possession of the tusks. The Appellant failed to give an explanation of how he came to be in possession of the same. She stated that PW3 corroborated the evidence of PW1. She was of the view that the evidence by the prosecution witnesses was sufficient to sustain a conviction. Learned State Counsel averred that the Court Martial had jurisdiction to hear and determine the matter pursuant to **Section 2** of the **Kenya Defence Forces Act** which defines civil offences. She stated that the ingredients of the offence were established 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 Shadrack Kitusya, was an employee at Kenya Wildlife Services. He stated that he was on duty on 25th February 2015. His colleague, Joyce Muthoni (PW3), informed him that she had received information that there were two people going to South B who were in possession of two pieces of elephant tusks. PW3 told the court that she got a call from a member of the public informing her that there were two men in possession of elephant tusks who 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 and PW3 proceeded to South B Shopping Centre at 9.30 a.m. They had information on what 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 carrying the black bag. PW1 and PW3 approached the two men. They introduced themselves and asked them to open the bag. The Appellant and his accomplice refused to open the bag. PW1 and PW3 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.

PW2, Cpl Jillo Rufus, investigated the present case. He was assigned the case on 3rd March 2015. He proceeded to the Kenya Wildlife Service and interviewed the arresting officers, PW1 and PW3. 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. PW1 and PW3 handed over the two men, who were military police, to him. PW2 interrogated the Appellant. The Appellant informed him that he obtained the elephant tusks in Lokichogio in 2014 from a Mr. Gitahi. He immediately instructed his accomplice (Spte Peter Murugu Njeru) to look for a buyer for the same.

The Appellant afterwards went to attend a course at the School of Combat and Engineering (SOCE). He carried the tusks with him. On 3rd February 2015, his accomplice informed him that he had located a potential buyer for the tusks. The buyer however wanted more tusks. They located a source in Meru for additional tusks. The deal however fell through. Later, his accomplice managed to convince the buyer to purchase the tusks the Appellant had. They agreed to meet the buyer at South B. The Appellant came to Nairobi with the tusks on 24th February 2015. They went to South B the following morning to meet the buyer. That is when they were arrested.

PW4, 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 PW3. The Appellant was one of the two men. He interrogated the two suspects and discovered that they were KDF officers. The recovered elephant tusks weighed 10kgs. They had a street value of Ksh.1 million. PW4 forwarded the tusks to Kenya Wildlife Museum for forensic analysis. The analyst confirmed that the same were ivory tusks.

PW5, Ben Nyakundi, was a forensic analyst based at the Kenya National Museum headquarters. He received two exhibits on 1st April 2015 from PW4. He was instructed to analyze the exhibits and determine whether the same were ivory tusks. He examined the exhibits and confirmed that they were elephant tusks. He produced a report of the same in evidence.

The Appellant was put on his defence. He testified that he left School of Combat and Engineering located in Isiolo on 24th February 2015 and came to Nairobi. He had some domestic issues he needed to sort out. He arrived at Nairobi at about 6.00 p.m. He spent the night at his uncle's house in Umoja. The next morning, his uncle dropped him at Mater Hospital at about 9.30 a.m. He withdrew money from an Mpesa shop that was nearby. A lady and a man came to the said shop and asked for directions to Mombasa road. He gave them directions on how they could get to Mombasa road. He informed them that he was going to town. They offered to give him a lift. He asked them to drop him at Villa View. When they got to Villa View, they refused to stop the car. The man brandished a pistol. The Appellant on seeing the gun decided to cooperate with them. They drove through Langata Road to the Kenya Wildlife Services headquarters.

On arrival, the Appellant was taken to an office where he met his colleague Peter Murugu. Military police arrived at around 5.00 p.m. A black bag was brought to the office. It contained ivory tusks. They put the tusks on a table and took photos of the same. They thereafter handcuffed the Appellant and Peter Murugu. They were escorted to DOD offices. At DOD, the Appellant was shown a statement which he was required to sign. He declined to sign the statement. He was locked up in a room from 25th February to 15th May 2015. He finally agreed to sign the statement after being locked up for two days in the said room. After signing the statement, he was escorted by the military police to Thika Engineers Battalion. The Appellant denied the charges against him. DW2, Sylvester Kamware, was the Appellant's uncle. He told the court that on 24th February 2015, he arrived home from work and met the Appellant at his house. The following morning, he and the Appellant left the house at about 9.30 a.m. He was going to work. He dropped the Appellant at South B near Mater Hospital.

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.

This court has re-evaluated the evidence adduced before the trial court. It has also considered the rival submission made by the parties to this appeal. The Appellant, in his grounds of appeal, contended that the Court Martial lacked jurisdiction to hear and determine the present case. Counsel for the Appellant submitted that **Section 56** of the **Kenya Defence Forces Act** prohibits the Court Martial from interfering with civil

offences where the civilian courts have jurisdiction to hear the same. He stated that **Section 107** of the **Wildlife Conservation and Management Act** does not donate prosecutorial powers to the Director of Military Prosecutions. He asserted that **Section 133** of the **Kenya Defence Forces Act** is a discipline section. The Appellant therefore ought to have been tried in a civil court, and if found guilty, be subjected to punishment under **Section 133** of the **Kenya Defence Forces Act**. Learned State Counsel on the other hand submitted that the Court Martial had jurisdiction to hear and determine the matter pursuant to **Section 2** of the **Kenya Defence Forces Act** which defines civil offences.

Under **Section 2** of the **Kenya Defence Forces Act 2012**, “civil court” means a court of ordinary criminal jurisdiction; while a “civil offence” means an offence under Part XVII or an offence under some written law other than the **Act**, or an act or omission which if committed in Kenya would constitute such an offence. **Section 2** of the **Act** ensures that the Court Martial has jurisdiction to hear and determine an offence under some written law and in the instant case, **possession of wildlife trophy contrary to Section 95 of the Wildlife Conservation and Management Act**. In addition, **Section 133** of the **Kenya Defence Forces Act** grants the Court Martial jurisdiction to hear and determine cases where accused persons subject to the **Kenya Defence Forces Act** commit a civil offence.

Section 133(1) of the **Act** provides as under:

Any person subject to this Act who commits a civil offence, whether in Kenya or elsewhere, shall be, on conviction by Court Martial:-

a. if the civil offence is treason or murder, sentenced to death or any other lesser punishment provided for in this Act; and

b. in any other case, liable to any punishment which a civil court could award for the civil offence if committed in Kenya being one or more of the punishments provided for by this Act, or such punishment, less than the maximum punishment which a civil court could so award, as is provided for by this Act.

This court’s understanding of the above provision is that, it lays the foundation on which civil offences committed by persons subject to the **Kenya Defence Forces Act** are tried under other laws other than the **Kenya Defence Forces Act**, and in the present case, offences under the **Wildlife and Conservation Management Act** are some of them. Furthermore, **Sub-Section (b)** vests the Court Martial with powers to mete punishment which a Civil Court could impose for the civil offence if committed in Kenya. This court therefore finds and holds that the Court Martial had jurisdiction to hear and determine the matter and was right in pronouncing itself as such.

This court will now determine whether the prosecution established the offence of being in possession of wildlife trophy contrary to Section 95 of the Wildlife Conservation and Management Act to the required standard of proof beyond any reasonable doubt. 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. PW3 was a ranger at the Kenya Wildlife Services. She told the court that she received a tip from an informant that there were two men in possession of ivory 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 PW3 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 the one carrying the black bag. PW1 and PW3 approached the Appellant and his accomplice. They introduced themselves as KWS officers and requested to search the bag. The two men refused. PW1 and PW3 arrested them and took them to their car. While at the car, they searched the bag and found two pieces of elephant tusks.

The evidence of PW1 was corroborated by that of PW3. They were both KWS officers. They took the Appellant and his accomplice to KWS Headquarters. The Appellant and his accomplice were interrogated by PW2 and PW4. The Appellant did not have any documentation to show that he was an authorized holder of the ivory tusks. The evidence of PW1 and PW2 was that the Appellant was arrested in possession of the black bag that contained the ivory tusks. He was carrying the said bag. He was therefore in custody and control of the same. This court is convinced that the element of possession was established by the prosecution.

PW5 was a specialist in identification of animal remnants. He confirmed that the items recovered in possession of the Appellant were wildlife trophies within the meaning of the **Wildlife Act**. When the Appellant was arrested, he did not have any documents with him to prove that he was an authorized holder of the trophies. This court is of the view that the prosecution established all ingredients with regard to count one to the required standard of proof beyond any reasonable doubt.

The Appellant in his defence stated that he was framed by PW1 and PW3. 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. This court also notes that the evidence adduced by the Appellant during cross-examination was inconsistent with that of DW2. The Appellant told the court that when he came to Nairobi on 24th February 2015, he stayed at his uncle’s house (DW2) in Umoja. He stated that he left the next morning with his uncle, who dropped him at Mater Hospital. He said that his uncle was driving a pick-up while the uncle told the court that he was driving a saloon car that morning. The Appellant testified that when he went to the house, he found his aunt and a child aged 17 to 18 years. DW2 on the other hand stated that his wife and two children were at the house that evening. One child was aged 5 years while the other was an adult. Their testimonies varied. The credibility of the Appellant as a truthful witness was put in doubt.

This court is of the view that the Appellant’s testimony and that of DW2 did not dent the otherwise overwhelming prosecution evidence against him. In any case, DW2 did not adduce any evidence as to what the Appellant was doing in South B when he was arrested. The Appellant’s guilt in the present case was established to the required standard of proof beyond any reasonable doubt. He must carry the weight of his sins. Consequently, this Court dismisses his appeal against conviction. On sentence, this court notes that the Appellant was in pre-trial detention before he was convicted 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 8TH DAY OF OCTOBER 2019

L. KIMARU

JUDGE