



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL 98 OF 2019

BERNARD MUSAU MAILU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's

Court at Kibera Cr. Case No. 3543 of 2013 delivered by Hon. Boke on 26th April, 2019).

JUDGMENT

1. The Appellant was initially charged alongside another as the 2nd accused with three counts under the **Wildlife (Conservation and Management) Act Cap 376 Laws of Kenya**. In count I, they were charged with being in possession of Government Trophy without a certificate of ownership contrary to **Section 42(1)(b)** as read with **Section 52(1)(1)**. It was alleged that on the 12th day of October, 2013 at around 1900 hrs, near Tumani Supermarket in Donholm within Nairobi County jointly were found in possession of Government Trophies namely; 6 pieces of elephant tusks weighing 55 kgs with a street value of Kshs. 5,500,000/= on board Mercedes Benz KAC 600D without a Certificate of Ownership thereof.

2. Count II, was dealing in government trophy without a dealer's license contrary to **Section 43(4)(a) of the Act** in that on the same date they were found in possession of the afore stated government trophy in the said motor vehicle without a dealer's license.

3. Count III was failing to make a report of possession of government trophy contrary to **Section 39(1)(a) of the Act** in that in the afore stated date and place jointly failed to make a report of possession of government trophies namely; 6 pieces of elephant tusks weighing 55 kgs to an authorised officer.

4. The trial progressed well against the Appellant and 1st accused up to the point that PW2 testified on 7th February, 2014. No further evidence was recorded until 7th February, 2017 when thereafter the trial proceeded only against the Appellant. The evidence showing the last date when both accused persons were in court was on 9th February, 2015. On the next date of appearance in court, 20th May, 2015, the 1st accused was absent. Counsel for both accused persons Mr. Etole informed the court that the 1st accused had been deported. The court issued a warrant of arrest on account that no evidence of deportation was availed. Nevertheless, prosecution proceeded with its case until the 5th July, 2017 when the prosecution applied to amend and substitute the charge sheet. The effect of the amendment was to remove the name of the 1st accused leaving the Appellant as the only accused person in the charge sheet. A look at the amended charge sheet clearly shows that the charges were similar and drafted under the same provisions of the law as when the 1st accused was on record. I shall hereafter in this judgment address myself as to whether Section 214 of the Criminal Procedure Code upon substitution of the charge sheet was complied with.

5. Having addressed myself to the above, I now set out the grounds of appeal raised by the Appellant. They are set out in the Supplementary Petition of Appeal filed by his counsel F. N. Njanja Advocates on 7th August, 2019. Counsel in his submission abandoned the grounds of appeal contained in the Petition of Appeal filed in person by the Appellant on 8th May, 2019. It suffices to state that this appeal first came to court for canvassing of an application for bail pending appeal in the Notice of Motion dated 16th July, 2019. By the agreement of both the Appellant's counsel and the Respondent, the prosecution of that application was dispensed with and the parties agreed to proceed with the hearing of the substantive appeal. I set out the grounds of appeal as hereunder:

1. That the learned trial magistrate erred in law and fact in failing to make a finding that the ivory was a fabrication and was never found with the Appellant in that:

a. No photograph evidence was produced by scene of Crime Officer that showed the alleged ivory allegedly in the boot of

the Mercedes Car, with the Appellant driving the alleged car at the alleged scene of crime.

b. No documentary evidence was produced before court of the accused arrested with the alleged ivory, and; no initial report made at Donholm Police Post/Station showing any OB record to the effect that ivory was seized with the Appellant.

c. No Register of Exhibits from either Donholm Police Post or Langáta Police Station showing forth that the alleged ivory was indeed booked in any of those stations and it was from the Appellant.

d. Not all the police officers who allegedly witnessed the removal of ivory from the car came to testify, and the only police officer who came to testify alleged that he only took photos of the outside of the Mercedes and not the inside of the Mercedes where the alleged ivory was.

e. No search and Inventory Certificate was ever produced before the court to show that the alleged ivory was indeed found in the motor vehicle driven by the Appellant.

2. That the learned trial magistrate failed to make a finding that the trial was procedurally fatally defective in that:

a. It failed to comply with the provisions of the Constitution of Kenya in that the accused person was denied right of a counsel and forced to proceed with the hearing with no representation.

b. It also failed to comply with Criminal Procedure Code Section 200(3).

3. That the Learned Trial Magistrate was completely biased in that;

a. He disregarded the sworn defence given by the Appellant despite the fact that it remained unshaken by the Prosecution and; was therefore prejudiced against the Appellant.

b. He overlooked obvious contradictions gaps, surmises and doubts in the prosecution's case which all create reasonable doubt as to the possession of the ivory by the Appellant, and which doubts ought to have been resolved in favour of the Appellant.

Submissions

6. The appeal was canvassed by way of oral submissions on 7th October, 2019. Learned counsel for the Appellant Mr. Njanja represented the Appellant. He faulted the prosecution for taking photographs of the ivory that was said to have been recovered in the boot of motor vehicle registration No. KAD 600D. That even if such photographs were taken, they were never produced in court in evidence. According to the counsel, this would have been the only pointer that any ivory was recovered in the said motor vehicle.

7. According to the counsel, the accused persons were first locked up at Donholm Police Post before being transferred to Langata Police Station. However, there was no documentation of the movement of the recovered exhibits namely the ivory. To buttress his submission, he cited the evidence of PW2, 3 and 4 whom he said failed to prepare an inventory certificate to confirm that any ivory was recovered. To this extent, it was his submission that the prosecution failed to link the Appellant with possession of any ivory.

8. It was the counsel's submission that the trial magistrate failed to comply with Section 200(3) of the Criminal Procedure Code. He pointed to when Hon. Ochoi ceased the conduct of the trial, that directions under the provision were given in the absence of the defence counsel Mr. Etole.

9. Counsel further submitted that the entire trial was biased against the defence. This was with regards to disrespect to what he termed lack of consideration of the Appellant's detailed sworn defence. He submitted that it was an error on the part of the learned trial magistrate not to consider the defence in the judgment.

10. Finally, learned counsel submitted that the prosecution's case was tainted with glaring gaps. He poked holes on failure by the arresting officers to enquire into whether the accused persons owned the exhibits. Further, that the accused persons kept demanding to be furnished with the OB extract of the date of their arrest but the same was never given. He urged the court to resolve the glaring doubts in favour of the Appellant. It was his submission that the prosecution failed to prove the case to the required standard and urged that the appeal be allowed.

11. The appeal was opposed by the Respondent. Learned State Counsel, Ms. Kimaru submitted that Section 200 (3) of the Criminal Procedure Code was complied with. Her view was that it was unnecessary to take directions under the provision because when Hon. Ochoi took over the conduct of the trial, no evidence had been recorded. She added that Hon. Boke took over the conduct of the trial on 25th September, 2017 and she ably complied with Section 200(3) and explained their implication to the Appellant in the Kiswahili language. At that point, the Appellant requested that his counsel be present. Directions were again taken on 21st March, 2018 when the Appellant demanded that the matter be heard afresh. Counsel submitted that after hearing the respective rival submissions, the trial court ruled that the case would proceed from where it had reached. Therefore, according to Ms. Kimaru, Section 200 was not breached.

12. With respect to the handling of the exhibits, Ms. Kimaru submitted that PW1 received information that the Appellant was transporting ivory to Nairobi. He and PW4 laid an ambush and arrested the Appellant whilst driving the motor vehicle in issue. The 1st accused later arrived at the scene riding on a motor cycle and drove off with the Appellant. They were later intercepted by PW1 and 3 after which a search

yielded the elephant tusks. Counsel submitted that the manner of arrest being by way of an ambush, no photographs would have been taken because the scene of crime officers were far and availing them would have been difficult. Upon their arrest, the accused persons were taken to Donholm Police Post and thereafter transferred to Lang'ata Police. Counsel emphasised that the police post was only a point of exit and that the OB extract could only be recorded in the police station.

13. On the recording of the OB extract, counsel submitted that PW3 who was the investigating officer testified that the suspects were booked under OB No. 19/13/10/2013. The suspects had been arrested on 12th October, 2013 but the OB extract for this date was not availed. According to the counsel, when PW3 testified, the Appellant was represented by a counsel and did not raise any issue with the non-availability of the OB extract. Furthermore, both PW2 and 3 had confirmed the recovery of the ivory; and their evidence was corroborated by that of an expert, PW5.

14. It was Ms. Kimaru's submission therefore that the failure to record the chain of custody of the exhibits was minor and did not alter the sufficiency of the evidence that the Appellant was arrested in possession of the ivory. It was her submission that the prosecution proved their case beyond a reasonable doubt and urged that the appeal be dismissed.

15. In rejoinder, Mr. Njanja submitted that compliance with Section 200(3) of the Criminal Procedure Code is couched in mandatory terms that directions cannot be taken in the absence of the counsel of the accused. He underscored the importance of recording the chain of custody of the ivory because it would be possible to plant evidence against an accused person if the same is violated. He termed it a joke the submission by the Respondent that photographs could not be taken because there was shortage of photographers. Further, he protested the failure to avail the OB extract of the date of arrest of the Appellant. According to the counsel, this was a clear pointer that the Appellant was framed.

Summary of evidence

16. In summary, the prosecution called a total of seven witnesses. **PW2, Bethwel Thiong'o** and **PW4, CPL Gerald Cheruiyot** both worked with Kenya Wildlife Services (KWS) in the investigations department. On 12th October, 2013 they received information that the Appellant was going to transport ivory from Kibwezi to Choma Base within Donholm using motor vehicle registration No. KAC 600D, a Mercedes Benz. They planned an ambush at Choma Base. Before proceeding to the site, they reported to police at Donholm Police Post and were given police officers to accompany them. Amongst the later was **PW3, PC Charles Oduor**. At around 6.30 pm, the Appellant drove into the Choma Base compound whilst driving the said motor vehicle. Shortly afterwards, the 1st accused person who was a Ginean national arrived whilst riding on a motor cycle. He went to where the Appellant was. After a brief chat, the 1st accused person went to the driver's seat of the Mercedes car whilst the Appellant moved to the passenger's seat. It is then that the KWS and police officers bumped into the suspects.

17. A quick search was conducted in the vehicle. In boot were two gunny bags. The first which was on top of another had charcoal. The one below had six pieces of ivory. The two suspects were arrested and taken to Donholm Police Post where they spent the night. On the following day, they were taken to Langata Police station. The case was investigated by **PW7, CIP Charles Inoti** of DCI Langata.

18. On 26th November, Sgt George Odhiambo of DCI Langata and a scene of crime officer took photographs of the motor vehicle KAD 600D and prepared a report dated 18th January, 2014. A scientific analysis of the impounded ivory proved them as such. This was done by **PW5, Ben Nyakundi Meroka**, a research scientist at National Museums of Kenya department of Zoology. He prepared a report dated 19th August, 2014 which he adduced in evidence.

19. According to **PW1, John Ngari Jesse**, he had given the motor vehicle KAD 600D to the Appellant who apparently said he wanted to use it to take his sick mother to the hospital. On 13th October, 2013, the Appellant was supposed to return the car but could not pick up his calls. At 11.00 am of the same day, he went and reported at Kiamumbi Police Station of what had transpired. It is then that he was informed that the Appellant had been arrested. PW1 adduced proof of ownership of the car vide a log book and purchase documents.

20. In his sworn defence, the Appellant stated that on 12th October, 2013, he approached his pastor, PW1, to give him his vehicle so that he could take his mother to hospital in Nairobi. The hospital appointment was on the following Monday at KNH. He also called the 1st accused's wife who was his cousin to give him money for fuel. His cousin referred him to her husband (1st accused). The 1st accused did not have the money with him. The two agreed they go to a place where he would get the money from. The money was required for fueling the vehicle. They were in a boutique when another motor vehicle with private registration numbers arrived, being driven at a very high speed. The occupants went to where pastor's car was and started knocking on the window violently. The Appellant approached them and owned up that the car belonged to him.

21. The Appellant went on to state that a search of the car yielded two bags belonging to the pastor. One contained some witchcraft material like goat horns. Apparently, the witchcraft materials were for use by the pastor to exorcise demons from the Appellant's family. The pastor told the Appellant that his father died and his mother was ailing because they had been cursed. The curse could only be removed through witchcraft exorcism.

22. The police went away with the 1st accused whilst the Appellant was locked up at Donholm Police Post. The 1st accused had been taken to his house. The Appellant met him the next day at Langata Police Station where he was transferred to. He was forced to record a statement showing that he was arrested in possession of six pieces of ivory after he declined to implicate the 1st accused in a case of terrorism or possession of ivory. After the 1st accused person was released on bail, the Appellant realized that he had gone off line. He later called him and informed him that he had been deported to Guinea.

23. The Appellant denied that he ever drove the Pastor's car or was in possession of the ivory.

Analysis and determination

24. It is paramount to first address the legal issues raised by the Appellant's counsel because if the same are resolved in favour of the Appellant, the trial would be declared a nullity. The first issue is with respect to whether Section 214 of the Criminal Procedure Code was complied with after the substitution of the charge sheet. It provides as under:-

“(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alternation of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case: provided that-

i. Where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;

ii. Where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned by the accused or his advocate, and, in the last mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.

(2) variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.

(3) Where an alteration of a charge is made under subsection (1) and there is variance between the charge and the evidence as described in subsection (2), the court shall, if it is of the opinion that the accused has been thereby misled or deceived, adjourn the trial for such period as may be reasonably necessary

25. I lay emphasis to sub-section (1)(i) which provides that where a charge is altered, the court shall call upon the accused person to plead to the altered charge.

26. To that extent, the trial court fully complied with the law. Under (1)(ii) upon alteration of a charge the accused person may demand that the witnesses or any of the witnesses who had testified be recalled either to give evidence afresh or for further cross-examination by the accused or his defence. In this case, it is clear that apart from the Appellant being called to plead to the charges afresh, he was never informed by the court of his right to elect to either recall the witnesses who had testified for fresh evidence or for further cross-examination by either himself or his advocate. Indeed, although under this provision it is elective of the accused person to choose how he wishes to proceed with the evidence. It is the mandatory duty of the trial court to inform him of his right to elect on how to proceed with the evidence.

27. I then have to grapple with the question of whether the omission to comply with subsection (1)(ii) of Section 214 materially prejudiced the Appellant. A closer look at the amended charge attests that save for the removal of the 1st accused person's name, all other contents both of the statement of the charge and the particulars of the charges were similar. There was therefore no fresh evidence that would have been called by the prosecution even if the Appellant had elected to recall the witnesses who had testified.

28. Consequently, I have solace in subsection (2) of the provision in that even if the charge sheet had not been amended, the evidence on record against the Appellant solely would have remained constant and would not have affected the decision of the court. In that regard, my view is that the failure to comply with subsection 1(i)(ii) did not render the trial a nullity, neither did it prejudice the Appellant.

29. The second submission was with respect to non-compliance with Section 200 of the Criminal Procedure Code after Hon. Ochoi stopped having the conduct of the matter. A perusal of the record of proceedings shows that this is a matter that was handled by various magistrates at various stages. The plea was taken by Hon. Wachira PM, who severally continued with it and dealt with preliminary issues until the 26th November, 2013 when Hon. Mwangi SRM, took over. The said magistrate continued with the file until 29th November, 2013 from 17th December, 2013, Hon. Onyina was in conduct of the trial save that he also dealt with preliminary issues. Thereafter, on 17th January, 2014 Hon. Ochoi, Ag. SPM took over the conduct of the matter. He recorded the evidence of PW1 and 2 on 22nd April, 2014 and of PW3 and 4 on 7th April, 2017.

30. On 25th September, 2017 Hon. Boke, SPM took over the conduct of the trial. He duly complied with Section 200 (3) of the Criminal Procedure Code. The Appellant informed the court that he needed to consult his counsel on how to respond to compliance with the provision. On 21st March, 2018 the prosecution had in court two witnesses but the Appellant's counsel was absent. The court again explained to him Section 200 (3) Criminal Procedure Code to which the Appellant responded that he wished the case to start afresh. His explanation was that his co-accused had been deported. Learned State Counsel objected to the application citing that the case was old having begun in 2015 and was difficult to procure the witnesses. He added that it would have been difficult to get some witnesses who had since left employment. He added that only two witnesses were remaining and it was only prudent to proceed with the case from where it had reached. In rejoinder the Appellant informed the court that a lot of time was wasted when the prosecution was trying to provide some required documents. Furthermore, after the documents were availed they deported the 1st accused to confuse the case. He however said he had no objection to proceed with the case from where it had reached.

31. In its ruling the court noted that the case was too old to order a fresh hearing. It declined to accede to the Appellant's request. On this date, PW5 testified with the Appellant unrepresented. Counsel for the Appellant appeared in court on 22nd May, 2018 when he stated that he would not proceed because he was unwell. The prosecution had one witness in court. On the next hearing date 6th September, 2018, no evidence was taken. Mr. Etole was however present when the evidence of PW 6 and 7 was recorded.

32. My analysis of the above events clearly attests that **Section 200(3) of the Criminal Procedure Code** was duly complied with. The point of contestation by learned counsel Mr. Njanja is that directions under the provision must be taken in the presence of the advocate for the accused person. For avoidance of doubt, Section 200(3) provides as under:

“Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.”

33. My understanding of the above provision is that directions must not be taken in the presence of the counsel for the accused persons. It is however cautious of the court to ensure that an advocate representing the accused ought to be present unless the accused person has informed the court that the advocate would not be present. Directions may also be taken in the absence of a counsel where in the view of the court, the hearing must proceed, the absence of the counsel notwithstanding.

34. In the present case, as explained above, the Appellant was in the first instance given an opportunity to avail his advocate. Come the next date of the hearing, his advocate did not show up. The Appellant did not also explain to the court the whereabouts of his counsel. The court in its wisdom and rightly so noted that the trial was old and had dragged on for five years, consequent which it had to proceed. The directions were accordingly given in the presence of the accused person as the law provides and applying the principle of fairness and justice, the evidence of the witness present had to be taken. More importantly in my view, is that, had the court directed that the matter starts afresh, the same would have been a derailment of justice as the case was very old.

35. Further, the mere fact that the 1st accused was not participating in the trial did not prejudice the Appellant or tilt the evidence already on record or future evidence to be adduced against the Appellant. The result of the substitution of the charge sheet was merely the removal of the 1st accused person's name. The charges and the provisions under which they were brought remained constant. Consequently, the submission by the Appellant that **Section 200(3) of the Criminal Procedure Code** was breached has no merit.

36. The next issue for determination is on the submission by the Appellant's counsel that the failure to produce the OB extract on which the first report was made was fatal to the case because it cast doubt not only on the manner of the arrest of the Appellant but also as to whether he was arrested with ivories.

37. The OB extract being referred to is NO. 19 of 12th October, 2013 made at Donholm Police Post (also referred to as Savana Police Post). This respects the date that the Appellant and his co-accused were arrested. The record of proceedings attests that the Appellant throughout the trial kept requesting for the OB Book without success. Finally, the only thing that was availed on 25th October, 2016 was an Investigations Diary which referred to the OB No. 19/12/10/2013 and another of No. 18/13/10/2013.

38. As at that stage nothing would confirm how the Appellant was arrested and in possession of what goods. So, what is the importance of an OB extract? In this case it would have confirmed the prosecution assertion that after the arrest of the suspects, they were booked in the Police Post and were arrested in possession of the ivories which were being transported in the afore stated motor vehicle Registration No. KASD 600D. It would have exerted the view that the evidence in this respect was not planted. The failure therefore, to adduce this important piece of evidence leads me to conclude that there was likelihood that the trophies were planted.

39. Furthermore, an Investigation Diary is a record that can easily be altered. It only gives a summary of the investigations. Because it referred to the OB No 19/12/10/2013, the physical presence of the OB extract would have been a testimony that indeed the Appellant was arrested on the said date and in possession of the trophies.

40. More doubt arises owing to the fact that no inventory was recorded after the arrest. This is an important piece of evidence which probably would have convinced the court that the trophies were found in possession of the Appellant.

41. More intriguing is that even photographs of the recovered goods were not taken. The explanation given by the investigators for failure to do so beats logic; that a scene of crime officer could not procure because they are few in the country. The court cannot buy into such a flimsy excuse because notably photographs were taken by PW6, a scene of crime officer on 26th November, 2013 close to one and a half months after the arrest. Interestingly too, only the motor vehicle was photographed. It begs how the ivories which were a critical piece of evidence were omitted in this process. It could not have been by mistake or oversight. It was a deliberate omission for reasons best known to the investigators. All same, to seal this gap, an inventory would have confirmed what exactly was recovered with a concession by the suspects. Again, no such record was found necessary to procure, reasons only the investigators could explain.

42. I have tried to piece up this kind of investigation which has brought me to a basic conclusion; of the likelihood of planting evidence. It was shoddy and tainted with deliberate omissions that would otherwise have sealed the case for the prosecution. The net effect of the same is that I cast doubt on the culpability of the Appellant. I accordingly find that the prosecution failed to prove its case beyond a reasonable doubt. The conviction of the Appellant was not safe. I quash it, set aside the sentence and order that he be forthwith set free unless otherwise lawfully held. It is so ordered.

Dated and Delivered at Nairobi this 6th day November, 2019.

G.W.NGENYE-MACHARIA

JUDGE.

In the presence of:

1. Nyambura h/b for Mr. Njanja for the Appellant.

2. M/s Kimaru for the Respondent.