REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. 31 OF 2018

HASSAN NYAWA NYALE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an original Appeal from original conviction and sentence in criminal case no. 208, delivered by Hon. L. K. Gatheru S.P.M on 20/12/17)

Coram: Hon. Justice R. Nyakundi

Appellant in person

Ms. Sombo for the State

JUDGMENT

The Appellant was charged with the offence of being in possession of wildlife trophy contrary to section 95 of Wildlife Conservation and Management Act, 2013. The particulars of the offence alleged that the Appellant was found in possession of wildlife trophy namely two elephant tusks weighing 11.1 Kgs with street value of Kshs. 222,000/= without permit. This transpired on the 4th day of April, 2017 at Kilisa area of Taru location, Kinango village within Kwale County.

The Appellant denied the charges alleged against him, the court conducted a full trial process after which he was found guilty as charged, convicted and sentenced to five years imprisonment. Having been aggrieved by the trial court's decision, the Appellant filed this appeal against both conviction and sentence citing several grounds of Appeal.

The grounds of appeal as couched in the memorandum of appeal filed on 7th may 2019 are that the charge sheet was defective, section 198 of the CPC was not complied with, the plea was incomplete and that the charges were trumped up.

A brief summary of the matter before the trial court is as follows: the prosecution called a total of five witnesses in support of its case. **Salim Makomba** testified as **PW1, CPL Rodgers Emuria** as **PW2, Gidion Keter** as **PW3, CPL Adan Giriphe** and **Jeremiah Pogon Kaitopok** as PW4 and PW5 respectively. The prosecution witnesses averred that an informer passed information to PW1 a Warden who works with Kenya Wildlife Service informing that the Appellant was in possession of Elephant tusks which he was seeking to sell. PW1 organized with his officers from his camp and left for respective area where the tusks were to be sold. They got in touch with the informer and agreed that one of the officers to be dressed in civilian style and go with the informer to be shown the suspect.

They set a trap where the officer posed as the buyer. The officer was then spotted by other officers with the Appellant who was carrying a white sack on the shoulder at 10pm. They stopped the two (the officer and the Appellant), the Appellant tried to escape, he however, landed into the trap and got arrested by the Kenya Wildlife Service Officers. They took him to the police station where he spent the night. He told them that the owner of the tusks was involved in mining gold in the forest. The Appellant had no permit.

The matter was investigated by PW4 who took over the matter from the Kenya Wildlife Service Officers. He visited the scene and made a sketch of the area. The same was produced in court and marked as Exhibit 6. He took photos of the 2 elephant tusks. He took statements from the Kenya Wildlife officer and the Appellant. He then proceeded to charge the Appellant with the present offence. PW5 conducted laboratory tests on the two pieces of what suspected to be ivory found in possession of the Appellant. The same were marked as A1 and A2.

PW5 confirmed that the same were elephant tusks. He prepared signed and stamped the report on 11/05/17. He also signed the exhibit memo form. The report was produced before court and marked as Exhibit J.

After having considered the totality of the evidence tendered by the prosecution during trial, exhibits produced and the nature and ingredients of the offence herein, the Learned Magistrate made a finding that the prosecution had established a prima facie case against the Appellant person for the offence in question. He was therefore placed on his defence in terms of Section 211 of the CPC. The said section and the ruling were explained to the accused person in a language he understood, that is, Kiswahili. In response to the same, the Appellant elected to give an unsworn statement and not to call any witness.

In his defence, the Appellant denied having committed the alleged offence. He averred that he was coming from his in-law's house when he met with the Kenya Wildlife Service Officers where he had gone to see some orphans around 10.pm. he states he saw some people squatting on the side road while on his way Taru town. The persons dashed into the pushes and later emerged as a larger group, he got scared and tried to run, and we he heard sound of a gun cocking, he stopped and that's how he got arrested and beaten up.

He was taken to the police and after thirty minutes of being held in a cell. The Kenya Wildlife Service Officers brought a white sack whose contents he was not aware of. They opened the bag and removed 2 tusks after which the said officers alleged that they were in his possession. He stated that a number of photos of him were taken under duress and they even forced him to hold the tusks while taking the photos at gun point. The following morning, he was brought to court and charged with the instant offence.

This being a first appeal the guiding principles in **Okeno v Republic [1972] EA 32** point out that this court is entitled to evaluate the evidence of the trial court as a whole and make up its own findings. When the question turns on the manner and demeanor the appellate court must be guided by the impression made by the trial court by virtue of its advantage of observing and seeking witnesses. These principles were as earlier followed in the case of **(Pandya v Republic 1957 EA 336)**.

The Law, Analysis and determination

Section 95 of the Wildlife Conservation and Management Act, 2013 on the other hand provides as follows:

> ***"Any person who keeps or is found in possession of a wildlife trophy or deals in a wildlife trophy, or manufactures any item from a trophy without a permit issued under this Act or exempted in accordance with any other provision of this Act, commits an offence and shall be liable upon conviction to a fine of not less than one million shillings or imprisonment for a term of not less than five years or to both such imprisonment and fine."***

According to the case of **Jean Wanjala Songoi and Patrick Manyola versus Republic Criminal Appeal No 100 of 2014** possession would involve an element of control of the thing a person is said to have. It is in effect the act of having and controlling property. The right under which a person can exercise control over something to the exclusion of all others.

That brings me to the first issue which this court ought to establish, to wit, whether the Appellant was found in possession of the alleged elephant tusks. According to the prosecution case, the Appellant was arrested while in company of two others after a trap had been set up and the accused was at the time carrying a white sack with two tusks therein. On the other hand, the appellant claims to have been arrested while he was on his way home. He states that they ambushed him and assaulted him before taking him to their waiting vehicle. He further claims that these items were planted by the Kenya wildlife service officers. I have carefully considered the evidence of the Kenya Wildlife Service officers vis-a-vis that of the Appellant and I find Officers' evidence to be cogent, corroborative, credible, consistent and truthful. The Appellant's defence is a mere denial.

The defence case is clearly answered by the principles in **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga –vs- Republic Criminal Appeal No. 272 of 2005,**

> ***"…it is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must positive proof, first: that the property was found with the suspect, secondly that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other."***

The prosecution, proved the case of the appellant being in unlawful possession of the tusks, the property of the Kenya Wildlife Services. The 2nd question to ponder is whether the items found with the Appellant were indeed wild life trophy. The definition of trophy is encapsulated in terms of section 3 of the Wildlife (Conservation and Management) Act, 2013, it is defined to mean any wild species alive or dead and any bone, claw, egg, feather, hair, hoof, skin, tooth, tusks or other durable portion whatsoever of that animal whether processed, added to or changed by the work of man or not, which is recognizable as such.

The prosecution invited testimony of an expert in a bid to prove that the items found with the Appellant were indeed tusks. **Doctor Poghon** who examined the items and prepared an expert report came to court and explained his findings depicted in the report dated 11th May, 2017. The mode of analysis was well explained and his conclusion was that the exhibit A1 and A2 are genuine raw elephant tusks. As correctly established by the Learned trial Magistrate, there was no reason to doubt the contents of the expert report. The same was also not vehemently challenged to an extend of creating doubt in the prosecution case. I therefore find that the items found with the Appellant were indeed elephant tusks.

The Appellant did not have a license or permit to handle wildlife trophy. I have not seen any documentary proof of the same in the record of proceedings. Further, the Appellant never claimed to have one since he denied having been in possession of the trophies. In premises I find that that the Appellant was found in possession of the said trophies in contravention of the law.

In the Appellant's grounds of the Appeal, he pointed out that the Learned trial magistrate erred in law and fact by failing to consider that the

charge sheet was defective. That the said Section 198 of the CPC was not adhered to, the plea was incomplete hence it was a mistrial and that the matter in question was a fabricated case which he never committed.

The law on charges as a basis of an indictment is well stated in Section 134 of the Criminal Procedure Code which provides:

> ***"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."***

I have perused the record more specifically the charge sheet concerning the information and particulars of the offence allegedly committed by the appellant I find no evidence of prejudice, or embarrassment occasioned by the facts in relation to the offence. The question therefore of the charge sheet being defective has not been discharged by the appellant.

However, the Appellant seems to have abandoned this position and resorted to mitigation.

In the said mitigation, the Appellant says that he has served 3 years and 4 months, and he seeks the mercy of the Court to be have the remainder of the sentence be placed or substituted to a non-custodial sentence. He urged this court to look into his age. He is 60 years old and at the expiry of his sentence he will be 62 years. he contends that at the time he is going to be released, he will be too old to attend to his life and family. He claims that he is remorseful for the circumstances that formed the subject of this conviction. He also told this court that he has been of good conduct while behind bars.

In light of the forgoing account, Section 95 of the Wildlife Conservation and Management Act, 2013, as already observed, provides for a sentence of a fine of not less than one million shillings or imprisonment for a term of not less than five years or both. The Appellant was sentenced as per that section. He has raised issues in mitigation and asked the court to be lenient. Some of the issues he has raised were not raised before the trial Court. Be that as it may, the sentence passed against the Appellant was the minimum sentence provided in law. He cannot therefore say that the trial magistrate passed a harsh or excessive sentence.

In this appeal, on sentence, I'm inclined to take into account Section 333(2) of the Civil Procedure Code and find that the sentence shall be deemed to have commenced from the date of arrest. I am also of the considered opinion that the conviction is safe and well deserved for the offence. I am left with no doubt that the appellant was properly and rightfully convicted. I therefore find no reason to interfere with both conviction and sentence. The appeal is dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 7TH DAY OF NOVEMBER 2019.

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R. NYAKUNDI

JUDGE