REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL. NO 29 OF 2016

CHARLES MBAABU MBURI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

Being an Appeal from Original Conviction and Sentence in Criminal case No 1878 of 2014 at Mavoko Law Courts before Hon.P.Ooko, Principal Magistrate ,dated 4th September 2015.

JUDGEMENT

INTRODUCTION

1. The Appellant, Charles Mbaabu Mburi was charged with another Geofrey Mbatha Kakani with two counts of offences under the Wildlife Conservation and Management Act of 2013.On the first count, the offence was that of being in possession of Wildlife Trophy contrary to Section 95 as read with Section 105 of the Wildlife Conservation and Management Act of 2013

2. The Particulars of the offence were that on the 1st day of December, 2014 within Mlolongo Township of Machakos County, Charles Mbaabu & others were jointly found in possession of wildlife trophies namely four pieces of elephant tusks weighing 16kg in a Toyota Premio registration number KAW 421 M, white in colour with a street value of Kshs 1.6 million without permit.

3. On the second count the appellant was charged with the offence of dealing in wildlife trophy contrary to Section 84(1) as read with section 92 of the Wildlife Conservation and Management Act 2013.

4. The particulars of the offence were that on 1st December 2014 within Mlolongo town of Machakos County, Charles Mbaabu and others were jointly found dealing with Wildlife trophies namely four pieces of elephant weighing 16kgs in a Toyota premio registration Number KAW 421 M white in colour with street value of Kshs 1.6 million without license.

5. The appellant denied the charges and a plea of not guilty was entered on 02/12/2014.The Prosecution called three (3) witnesses in support of their case and the accused also called 3 witnesses, one witness, Benson Muiruri was summoned by court having been mentioned adversely in the entire proceedings.

6. The Trial Magistrate having been satisfied that the prosecution had proved its case beyond reasonable doubt proceeded to convict and sentence the appellant on the first count accordingly to five (5) years imprisonment or to pay a fine of Kshs one (1) million. He was acquitted on the second count.

7. The appellant being dissatisfied by the decision of the trial court appealed against the judgment on the following grounds;

i. That the Learned Trial Magistrate erred in both law and facts in failing to consider that the case was no proved beyond reasonable doubt contrary to section 109 and 110 of the Evidence Act.

ii. That the Learned Trial Magistrate erred in both law and fact by failing to consider that the prosecution case evidence was highly inconsistent and contradictory.

iii. That the Learned Trial Magistrate erred in both law and fact by convicting him while he never recorded any statement at the police station as required by law in a criminal trial.

iv. The Learned Trial Magistrate erred in both law and facts by convicting the appellant yet he failed to observe that case lacked crucial witnesses, the owner of the white Probox KBX vehicle which was carrying the tusks prior to the one arrested at Peter

Mulei's supermarket i.e. Toyota Premio KAW 421M.

v. That the Learned Trial Magistrate erred in law and fact by failing to consider that there was no cogent or credible evidence to connect the appellant with the exhibits or the alleged offence in question.

vi. Failure by the prosecution and court to have called KWS Ranger No.10080 Assistant Warden Abdi Noor Jirma who was present in the morning and later disappeared creates a lot of doubts in the prosecution.

vii. The Learned Trial Magistrate erred in both law and facts by convicting the appellant while the KWS Officers PW1, PW2 and PW3 prepared an inventory record to prove who really was in possession of the tusks.

viii. Failure by the court to call the owner of M/Vehicle KAW 421M at the earliest opportune time despite having been adversely linked with the offence definitely creates a lot of doubts in their evidence.

ix. Whether the uncorroborated and inconsistent testimonies of the 2nd accused which was contradicted by the court's witness should be thought meant to deny his involvement in the aforementioned items and aimed at misleading the honorable Court.

x. The prosecution failed to prove the case of possession of the material item against the appellants hence this offence was not proved to the required degree i.e beyond reasonable doubt.

xi. Failure by the owner of the vehicle to proof that he had brought the said vehicle for repairs leaves nothing to the court apart from believing he must have been involved in the business of the tusks.

xii. It was a set up and fabricated story created by both the policemen and the KWS officers.

xiii. The intimidation and nepotism by the Court prosecutor led to denial of fair justice to the appellant.

xiv. How the key principal exhibit i.e. ''P-1'' was released to the owner and which the prosecution relied mostly on their evidence in tandem with informers report, leaves the appellant with more questions than answers.

SUBMISSIONS BY THE APPELLANT

8. The Appellant filed his submissions dated 15th March 2017.It was the appellant's submission that the prosecution had failed to prove the case beyond reasonable doubt. In support of this he invoked **Section 109** and **110** of the Evidence Act which provides that a person who asserts a fact must prove the same. Further, he brought out the meaning of the word assertion as defined in the 21st Dictionary Revised Edition as "a positive or strong statement ,claim or act of making such a claim or statement''

9. He placed reliance on the case of **Muiruri Njoroge Vs Republic Cr. Appeal No 115 of 1982** where it was held;

"….it is well established rule of practice that a court of law does not act on mere assertions not unless such assertions are proved by evidence beyond the court.''

10. He went on to state that it was the evidence of PW1 and PW2 that they were informed that the tusks were being ferried in a Probox but they had been transferred to a Toyota Premio 421M which was impounded at Peter Mulei Supermarket. The question to be answered here is why they did not pursue the people who had the Probox, further there was no proof as to whether the appellant was in the probox at the time of changing the vehicles. No evidence was put across on whether the policemen put effort in trying to arrest the people in the Probox.

11. Further the KWS rangers claim that they were informed that the vehicle was carrying tusks and the people in question were looking for buyers. It is the appellant's submission that if at all this information was to be admitted as evidence; the so called informer/informers ought to have appeared in court to give evidence on the same. No informer was called to court, so what the witnesses PW1 and PW2 gave are just mere assertions and they ought not to have been relied on by court.

12. The fact that the investigating officer was not at the scene of the incident,the appellant submitted that his evidence was irrelevant, he also claimed to have forwarded the tusks to the Kenya National Museums for purposes of examination and the same were received on 10/12/2014,ten das after the appellant's arrest and a he received the report back on 17/12/2014 confirming that the tusks were ivory or elephant tusks. It was the appellant's submission that the said report could not be relied on because the said report was not presented by the maker and the prosecution led no evidence to proof that the report was established by an expert in specimen of Zoology or origin of species expert.

13. He went on to state that the prosecution violated **Article 50(2) (e)** and **(j)** of the Constitution since he was not afforded a fair hearing having not been served with the report presented in court. He went on to invoke **Section 194** of the Civil Procedure Code which states that evidence presented in trial should be taken in presence of the accused or when his personal attendance has been dispensed with, in the presence of his advocates if any. The appellant placed reliance on **Machakos Criminal Appeal Number 241 0f 2010** where it was held;

"a sample of what is to be analyzed or examined is taken to the expert in the presence of the suspect and have them submitted for analysis. Thereafter the analyst's report/certificate is forwarded to the officer for production in court.''

14. It was his contention that in the absence of his presence when conducting the forensic science it would be for to conclude that the element of possession was not proved beyond reasonable doubt.

15. On the second ground of appeal the appellant state d that the trial magistrate had failed to consider that the prosecution case evidence was highly inconsistent and contradictory. In support of this he stated that PW1 and PW2 had give contradictory information on how they learnt about the tusks and also different times, yet each one of them claims that he was informed by his colleague. Further PW! Denied that they were the ones who had opened the brief case to see the tusks, a fact that was rebutted by PW2 who confirmed that it was them who opened the briefcase where the tusks were. Based on this contradiction the appellant feels that the evidence produced did not hold water and ought not to have been upheld as it raised a lot of questions.

16. On the third ,fourth and fifth grounds the appellant still submitted on the issue of the owner of the alleged probox .He went on to say that the prosecution ought to have called the owner to give evidence just like court had summoned the owner of the Premio despite having not been called by the prosecution. He went on to submit that the said probox belonged to a police officer attached at Athi River and the reason why he was not summoned remains a mystery firmly held on the fact that there was no cogent evidence linking him with the offence.

17. He went on to state that the prosecution and the court had also failed in not calling the KWS ranger. No 10080 Assistant Warden Abdnoor Jirma was present at the station the morning he was arrested. Further PW1 and PW2 had failed in stating where exactly the suitcase with the tusks was, in the car. This goes without saying that the evidence admitted by court still had lot to be clarified. The failure to also call the owner of the Premio on time went to show that the prosecution was out to conceal something.

18. In conclusion the appellant said that it was clear that he was not the owner of any of the vehicles used in ferrying the tasks, neither was he a driver nor had he hired any vehicle for him to be in a position to control the driver. Relying on the case of **Jean Wanjala Songoi and Patrick Manyola Versus Republic, Criminal Appeal no.100 of 2014 Kitale; where Justice J.R Karanja (as he then was) held;**

> ***"The court does not therefore agree with the trial court's finding that the alleged possession of the game trophies by the appellant was proved by the prosecution. The burden to establish the offence lay with the prosecution. It was not therefore the appellant's obligation to prove their innocence by discrediting the prosecution evidence on possession. Proof of possession meant proof of all three offences against the appellants and since no such proof was achieved herein, it followed that the prosecution failed to prove its case and all charges against the appellant.''***

As a result he submitted that the prosecution failed completely to prove the case of possession.

19. In laying more emphasis he submitted that the court had gone against section 389(A) of the Criminal Procedure Code in establishing forfeiture of the goods and **Section 105(b)** of the Wildlife Conservation and Management Act of 2013 which states that;

> **"if satisfied that an offence was committed notwithstanding that no person has been convicted of an offence, order that the Wildlife trophy, motor vehicle equipment and appliances, livestock or other thing by means whereof the offence concerned was committed or which was used in commission of the offence be forfeited to the service and be disposed of as the court may direct''.**

In directing that the vehicle be released to the owner without conducting further investigations and the magistrate claiming that he had seen the owner driving the same vehicle prior to the incident.

20. He prayed that court allows appeal and set aside the conviction and sentence against him.

RESPONDENT'S SUBMISSIONS

21. The respondent's filed their submissions dated 9th May 2017 on 11th May 2017.In response to the ground on whether the prosecution had proved its case beyond reasonable doubt, the respondents went ahead to lay out the ingredients of the offence facing the appellant as;

a. Proof of possession

b. Proof that the items in question were game trophies

c. Evidence that the appellant was dealing in game trophies without a dealer's license.

He went on to state that it was the evidence of PW-1 that upon receiving a tip off that there were people with the tusks who were looking for buyers and they embarked on a mission to look for the perpetrators and they cornered them at Peter Mulley Supermarket. The said evidence was later corroborated by the evidence of PW-2. Further PW-3 investigated the case and forwarded the wildlife trophies to the Kenya National Museums for examination and he produced a report in support of the same.

22. Based on the above, the respondent went on to submit that possession consisted of the elements of being in physical control of the item and knowledge of having the item .A person has possession of something if he /she knows of its presence and has physical control of it, or has power and intention to control it. He therefore stated that the accused had knowledge of the existence of the ivory and he knew it was illegal to poach without a license. The prosecution therefore stated that the evidence presented had, met all the ingredients of recent possession as stated in **Gideon Meiteken Koiyet -vs -Republic (2013) eKLR and** therefore the prosecution had proved its case beyond reasonable doubt.

23. In response to the ground of inconsistencies in the prosecution case the respondent stated that in every trial there are bound to be discrepancies and an appellate court ought to be guided by the wording of the Criminal Procedure Code in Section 382 of the Criminal procedure Code viz a viz whether such discrepancies are so grave to cause prejudice on the appellant.

24. He went on to rely on the decision In **Phillip Nzaka Watu Vs Republic (2016) eKLR** where court expressed itself as follows;

> ***"However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistencies in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witness. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question''***

He stated that in the present case discrepancies were only on time the police officers received the tip off from the informers and such discrepancies do not prejudice the appellant's case and hence was inconsequential to the conviction and sentence.

25. On whether the trial prosecutor had failed to call crucial witnesses he relied on the case of **Bukenya & Others vs. Uganda (1972) EA** 549 and submitted that the prosecution is not obliged to call witnesses. That the appellant was at liberty to call his witnesses when he was put on his defence. He submitted that an accused person cannot sit back and not summon witnesses to absorb him and turn around and make the claim that the prosecution should have called witnesses who would have established his defence and therefore that ground of appeal fails**.**

26. In conclusion he submitted that the prosecution had proved his case beyond reasonable doubt, because the evidence tendered was credible, consistent and well corroborated. He prayed to court to dismiss the appeal and court upholds the conviction and sentence of the trial court.

FURTHER SUBMISSIONS BY APPELLANT

27. The appellant filled further submissions dated 28/9/2017.In his submissions he stated that there was an error in his charge sheet since he was charged with the offence of Possession of Wildlife Trophy contrary to Section 95 as read with Section 105 of the Wildlife Conservation and Management Act of 2013 and secondly he was charged with the offence of dealing in Wildlife Trophies contrary to Section 84(i) as read with Section 92 of the Wildlife Conservation and Management Act 2013.He said that his charge sheet was defective because he was charged with the commission of four offences in a single charge sheet.

28. He placed reliance on the case of **Mutisya KIEMA Versus Republic ,Criminal Appeal No. 7 of 2014 ,Voi where court held;**

> **"However it would pose a great legal challenge to the Court when a persn is charged under both Section 92 and 95 of the Act because the two sections provide different penalties for the respective offences under them. It would therefore be uncertain which sentence to pass in a case where a person is charged with offences under both sections''**

He went on to state that the law on framing of charges requires clarity in the charge sheet as provided in Section 134 of the Criminal Procedure Code. Further he indicated that as required by the law, he never recorded a statement with the police.

29. In response to the respondents submission on calling of crucial witnesses the appellant went on to emphasize that the case of **Bukenya and Others Vs Uganda (1972) EA 549** was very clear on calling of witnesses by the prosecution, therefore it was misleading for the prosecution to submit that the prosecution was not obliged to call any witness. He also stated that no inventory was produced before the court to demonstrate that the alleged items were found in possession of the appellant. He termed the informers of the police ghost informers since none was called to court to testify. In conclusion he prayed court to consider the period he already spent in custody and allow his appeal and quash conviction and sentence of the trial court.

ANALYSIS AND DETERMINATION.

30. This being a first appeal I am guided by the principle laid in ***Selle v. Associated Motor Boat Co. Ltd 1968 E.A 123.***I am therefore required to re-evaluate the facts afresh, assess it and make my own independent conclusion. I have considered the appeal and the submissions tendered herein. The main issues that fall for determination are:

a. Whether indeed there was duplicity of the charges and to what extent?

b. Whether the offence of being in possession of Wildlife Trophy was proved?

31. In resolving the first issue we first have to look at the charge sheet in comparison to the set law on drafting of a charge sheet. What constitutes a good charge is explained under **Section 134** of the Criminal Procedure Code which reads as follows:

> ''E**very 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''.**

Section 135 (1) & (2) provides for instances where Joinder of counts in charge or information is allowed. They read as follows:

1. ''Any offences, whether felonies or misdemeanours, may be charged together in the same charge or information if the offences charged are founded on the same facts, or form or are part of a series of offences of the same or a similar character.

2. Where more than one offence is charged in a charge or information, a description of each offence so charged shall be set out in a separate paragraph of the charge or information called a count''.

From the above provisions it is correct to state that duplicity of charges would occur in instances where more than one offence is charged in one count. In our instant case the appellant was charged with the offence of being in possession of wildlife trophy contrary to ***Section 95*** of the ***Wildlife Conservation and Management Act 2013*** 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.''

On the other hand, ***Section 105*** of the ***Wildlife Conservation and Management Act 2013*** is basically on forfeiture where a person is charged with an offence under this Act.

32. Section 95 of the Wildlife Conservation and Management Act, 2013, as already observed, provides for a sentence or 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. Hence there is no duplicity at all as claimed by the Appellant since each of the counts were distinct with their penalties.

Further on count two the appellant was charged under Section 84 (1) as read together with Section 92 of the Wildlife Conservation and Management Act of 2013.However the appellant was acquitted with regard to this charges.

33. On the second issue on proof of possession I find that it was the evidence of the witnesses that indeed the trophies were found in the alleged Premio in a suitcase and it was not established who in fact was the owner of the suitcase. The owner of the vehicle denied being the owner of the suitcase, the appellant said that he was given a lift and was not even aware that the suitcase was in the vehicle.

34. I place reliance on the case of **Jean Wanjala Songoi and Patrick Manyola versus Republic Criminal Appeal No 100 of 2014** where the judge stated as follows;

> "……. 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. In this case, that aspect of the offences was not established beyond reasonable doubt against the appellant. ''

35. It was not clear who among the arrested suspects was in actual possession of the game trophies and whether in fact any of them indeed had knowledge that they were at the place where they were found. The element of constructive possession could not in the circumstances arise for the simple reason that the spot and the manner in which the trophies were found and recovered was uncertain and there was nothing to credibly suggest that the persons found at the material premise including the appellant had the necessary knowledge of the existence of the trophies at that place.

36. This court does not therefore agree with the trial court's finding that the alleged possession of the game trophies by the appellant was proved by the prosecution. The burden to establish the offence lay with the prosecution. It was not therefore the appellant's obligation to prove his innocence by discrediting the prosecution evidence on possession.

37. Proof of possession meant proof of all the offences against the appellant and since no such proof was achieved herein it followed that the prosecution failed to prove its case and all charges against the appellant.

38. Consequently, the appellant's conviction on the first count was erroneous and was neither sound nor safe. In the upshot, this appeal is allowed. The conviction of the Appellant by the trial court is hereby quashed and the sentences set aside. The Appellant is ordered to be set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

Dated and delivered at Machakos this 7th day of March , 2018.

D.K. KEMEI

JUDGE

In the presence of:

Charles Mbaabu Mburi - the Appellant

Machogu - for the Respondent