REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NO.95 OF 2017

(Appeal Originating from Nyahururu CM's Court Cr.No.451 of 2015 by: Hon. J.M. Wanjala – C.M.)

SAMUEL AMNA EKUDONGOI

PETER EMOJONG.....APPELLANT

- V E R S U S –

REPUBLIC.....RESPONDENT

J U D G M E N T

Samuel Emna Ekudongoi and **Peter Emojong** (1st and 2nd) appellants were convicted on the following grounds:

Count I: Being in possession of Wildlife Contrary to section 95 of the Wildlife (Conservation Management) Act 2013.

The facts are that on 10/2/2015 at Ayam Area in Laikipia County, were jointly found in possession of Wildlife Trophies namely 3 pieces of Elephant Tusks weighing 6.5 Kgs with a street value of Kshs.1,000,000/= without a permit.

Count II: Dealing in Wildlife Trophy contrary to Section 84(1) as read with Section 92 of the Wildlife and Management Act, 2013 in that on 10/2/2015 at Ayam Area, Laikipia County, were found in possession of 3 pieces of Elephant Tusks weighing 6.5 kilograms with a street value of Kshs.1,000,000/= without a permit.

The appellants were sentenced as follows:

Count I: Each fined Kshs.1,000,000/= in default five years imprisonment.

Count II: Each fined Kshs.20,000,000/= in default life imprisonment.

Being aggrieved by the conviction and sentence the appellants filed their respective appeals which were consolidated before the hearing.

The appellants filed the respective grounds and further grounds in their submissions which can be summarized as here below:

1) That the charge was defective,

2) That essential witnesses were not called,

3) That the fundamental rights were violated,

4) That the prosecution evidence was full of contradictions and inconsistencies,

5) That the charge was not proved to the required standard.

The appellants relied on the written submissions.

The appeal was opposed by learned counsel Mr. Mutembei who submitted orally.

The appellants submitted that the charge was fatally defective in that the charge bears two dates i.e. 11/2/2011 and 11/2/2015 and the court

did not establish who was arrested and charged in 2011; that the charge sheet did not bear a police seal or rubber stamp and lastly the 2nd appellant added that the court convicted ***Peter Emojong Yadung*** yet he is ***Peter Emojong***.

It is also the appellants' submission that PW1 and PW2's evidence was contradictory as to where the two appellants were arrested; that the evidence was contradictory as to how many elephant tusks were recovered with the appellants.

On failure to call essential witnesses, the appellants argued that the expert witness who examined the exhibits and the informer did not testify which suggests that his evidence may have been adverse to the prosecution evidence.

The first appellant alleged that his rights were violated in that his property i.e. phone was irregularly seized by the police; that he was tortured by Wildlife officers as a result of which he lost his tooth.

It is also the appellant's case that the prosecution evidence was insufficient to support the charge in that the court relied on hearsay evidence; that it is suspect why it took so long to take the exhibit to the Government Analyst; that the exhibit memo was not prepared in the presence of the appellants and it is questionable why no members of public witnessed the recovery of exhibits.

Mr. Mutembei, in opposing the appeal argued that the case was proved to the required standard in that both appellants were found with elephant tusks weighing 6.5 Kgs after PW1 & 2 acted on a tip off; that the elephant tusks were submitted to examination by an expert, were proved to be elephant ivory and that the appellants had no license to be in possession. Counsel added that the sentences are lawful and the court cannot interfere with them.

This being a first appeal, it behoves this court to review all the evidence tendered before the trial court, evaluate it and arrive at its own conclusions. ***See Okeno v Republic (1972) E.A. 32***. Of course this court has to bear in mind that it did not have the benefit of seeing the witnesses for their demeanor.

The prosecution called a total of four witnesses. **PW1 CPL Yusuf Abdi** of Kenya Wildlife Services (KWS). He was on patrol at Ayam in Laikipia when he received information that two people carrying a white nylon sack travelling along Ayam – Rumuruti road towards Rumuruti were suspect. He informed his colleagues, Ranger **Reuben Malembe (PW2)** and driver Isaac Ngugi and they laid ambush near a green house on the said road. About 9.30 a.m. two people carrying a white nylon sack going towards Rumuruti emerged and they stopped them; that the (2nd appellant) agreed to open the sack but 1st appellant refused. PW1 demanded legal documents allowing them to have elephant tusks but they had none; that the 1st appellant, Samuel tried to run away but was chased and caught by PW2 Malembe and he bit PW2 on the back during the arrest. They recovered 3 pieces of elephant tusks in the bag, a long one and 2 small pieces which weighed 6.5. Kgs in total.

PW2 Ranger Reuben Juma Malembe confirmed that he was with PW1 when they were informed of two people carrying a sack with suspect contents; that they laid an ambush, they saw the two people carrying a bag about 9.30 a.m., asked them to open the sack which had 3 pieces of elephant tusks – a long one and two small. PW2 said it is Peter (2nd appellant) who bit him during arrest.

PW3 CPL Peter Malwa of Rumuruti police station received two suspects on 10/2/2015 about 10.00 a.m. who were allegedly found with elephant tusks. He interrogated them, recorded statements of the KWS Officers and charged the two with possession of 3 elephant tusks weighing 6.5 kilograms. He prepared an exhibit memo form and sent the exhibits to Kenya National Museum for verification and later received a report from Mr. Ogeto Mwebi confirming that they were indeed elephant tusks which he produced in court as exhibits.

When called upon to defend themselves, both the appellants opted to make unsworn statements. The 1st appellant stated that he was arrested on 8/2/2015 while on the road going to Rumuruti while speaking on phone. A vehicle suddenly stopped behind him, a person called Adan (PW1) asked why he was walking in the middle of the road while speaking on phone. He took his phone and drew a pistol, took him to the police station where he spent two nights and was taken to court.

The 2nd appellant said he is a herdsman and that on 9/2/2015 he was at Rumuruti with 2 chicken for sale but before he could sell them, four people appeared on the road and said he was the one; one was Juma Malembe, (PW2) who handcuffed him without telling him why he was under arrest; they beat him and took him to the camp and later to the police station where he found 6 people in cells. He was taken to court on 11/2/2018; that he had differences with Malembe over a girl.

The 1st appellant complained that his rights were violated in that his phone was not returned to him and he was tortured.

I have seen the Lower Court file which indicates that when the appellants first appeared before the court for plea on 11/2/2015 when the first appellant complained that his tooth was broken and asked to be taken to hospital. No other complaint was made. It is not until 30/4/2015 that the 2nd appellant complained about his phone and the investigating officer was ordered to appear and explain its whereabouts. On 19/6/2015, the 1st appellant requested to be remanded at Rumuruti police station to make a report of assault and he was indeed remanded at the said police station to make the report. The record does not show who assaulted the 1st appellant nor did he state it in his defence. It is worth noting that PW1 & 2 told the court that one of the appellants tried to escape and PW2 gave chase and arrested him but that the said appellant bit PW2 and he made a complaint to that effect but the one who resisted or tried to escape was not charged. If at all the KWS officers or the police assaulted the 1st appellant, he has a different cause of action, either Criminal or Civil and that does not affect the charge before this court which is very different from violation of his rights. The question before this court is whether the appellant was found in illegal possession of the elephant tusks without a permit. The appellants rights can be addressed by other courts if the appellants moves them.

The appellants also allege that the charge was defective in that it bears two dates 11/2/2011 and 11/2/2015 and that it did not bear the stamp

of the police station. I have seen the original charge sheet in the Lower Court file and it clearly bears the date of the offence as 10/2/2015, date of arrest and 11/2/2015, the date the appellants were arraigned before the court for plea. Further, the charge sheet bears the stamp of Officer In Charge Rumuruti Police Station. The appellants' allegations are totally unfounded.

The 2nd appellant also complained that the court convicted Peter Emojong Yadung yet he is Peter Emojong. That complainant is also misplaced because it is the 2nd appellant who introduced himself in his defence as Peter Emojong Yadung.

On alleged contradictions between the evidence of PW1 and 2, I have carefully considered the said evidence. Both PW1 and 2 testified that they laid ambush near the Green House along Ayam Rumuruti Road. The evidence as regards the place of arrest was very consistent.

As regards how many pieces of tusks were recovered, PW1 and PW2 told the court that they were three, one big and 2 small. PW3 the investigating officer at first said they were 6 pieces but later corrected the position and said they were three pieces. There was no inconsistency in the evidence.

The appellants have also complained that essential witnesses were not called, that is the expert who examined the exhibits and the informer. Under Section 77 of the Evidence Act, it is not mandatory that the expert attends court to produce the expert report.

> **Section 77(1) – (3)**
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> ***(1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.***
>
> ***(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.***
>
> ***(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.***

On 21/4/2016, after the 3rd witness had testified, the prosecution applied for adjournment to call the Mr. Mwebi, the Scientist who examined the exhibits but both appellants told the court that they did not object to the investigating officer producing exhibits. The appellants cannot turn round at this stage to challenge the production of the exhibits by the investigating officer. The exhibits were properly produced and the report dated 30/10/2015 clearly indicates that the exhibits were pieces of unprocessed elephant tusks from two elephants.

As to whether the prosecution should have called the informer as a witness; the Court of Appeal considered the usefulness and admissibility of evidence of informers in ***Kigecha Njuga v Republic (1965) E.A. 73*** where **Sir Airley CJ** and **Madan J.** stated:-

> ***"Informers play a useful part no doubt in the detention and prevention of crime, and if they become known as informers to that class of society among whom they work, their usefulness will diminish and their very lives may be in danger. But if the prosecution desire the courts to hear the details of the information an informer has given to the police, clearly the informer must be called as a witness."***

Generally, basing a conviction on evidence of an informer is dangerous unless it is supported by other independent evidence *see* ***Patrick Kabui Maina v Republic (1986) KLR 889***. This is because evidence of an informer can easily be abused and the court has to exercise great caution when relying on it hence need for corroboration.

In ***Republic v Garofoli (1990) 2 SCR 1421***, the court said this of informer's evidence "***hearsay statements of an informer can provide reasonable and probable grounds to justify a search but evidence of an informer's tip by itself, is insufficient to establish reasonable grounds. The reliability of a tip is to be assessed by having regard to the totality of the circumstances. The results of the search cannot, ex post facto, provide evidence of reliability of the information***."

As to whether the court erred in not calling the informer, this issue was disclosed in.

In ***Joseph Otieno Juma v Republic C.A.214/2009 (2011) KLR***, where the Court of Appeal said "***To sum up and in the context of the circumstances before us, the only exception you can think of where the informer's lid can be lifted, are where failure to do so would undermine the concept of a fair trial and where it would have a bearing on the innocence of an accused person."*** In this case, the information given to PW1 & 2 led to the arrest of the appellants who were found with elephant tusks without a license or permit. The informer was not present at the time of arrest and it was not established that the informer's identity was necessary to establish the innocence of the appellants and therefore the privilege continued to remain in place. It was not necessary to call the informer.

The trial court considered the appellants defences and disbelieved them. The 2nd appellant claimed to have had differences with PW2 over a girl. He did not name the girl nor did he raise it when PW2 testified. It was an afterthought. Their defences were properly dismissed.

The appellants were charged under Section 95 of the Wildlife Conservation and Management Act, 2013. The trial court believed the evidence of PW1 and 2 that they did arrest the appellants along Ayam – Rumuruti Road while in possession of elephant tusks. I find the evidence of PW1 and 2 to have been consistent and unshaken on cross examination and the prosecution did prove that the two appellants were indeed in possession of the elephant tusks and were properly convicted on that charge.

In the second charge, the appellants were charged with dealing in Wildlife Trophy contrary to Section 84(1) as read with Section 92 of the Act.

Section 84(1) reads "***No person shall operate as a trophy dealer without a license issued by the Service***." Section 3 of the Act defines who a dealer is, "***any person who, in the ordinary course of any business or trade carried 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; or

(c) Transports or conveys any trophy."

In this case, the appellants were found transporting or conveying the elephant ivory. They did not have any permit to do so. They did not explain why they had the tusks. They are deemed to be dealers by dint of the above section.

Elephants are an endangered species by virtue of the Sixth Schedule of the Act. I am satisfied that the prosecution proved the two charges to the required standard that the appellants were in possession of the elephant tusks without a permit. I find the conviction to have been sound and I find no reason to disturb them.

As for the sentences, I find that they are lawful. Section 95 of the Act provides the general penalty for offences relating to possession of trophies. One is liable upon conviction, to a fine of not less than One million Kenya Shillings in default 5 years imprisonment or to both fine and imprisonment.

Under section 92 of the Act, a person convicted of an offence in respect of an endangered species is liable to a fine of not less than 20 million Kshs or imprisonment for life or both.

The sentences are therefore lawful as they were meant to serve as a determent in order to save our dwindling wildlife at the hands of poachers.

In the end, the appeals lack merit and they are hereby dismissed.

Dated, Signed and **Delivered** at ***NYAHURURU*** this ***10th*** day of ***April,*** 2018.

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R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Rugut - Prosecution Counsel

Soi - Court Assistant

Appellant – both present