REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CRIMINAL APPEALS NO.33,34,35 & 37 OF 2016

DABASO SARO DULACHA.....1ST APPELLANT

DUB GUYO CHITO.....2ND APPELLANT

BORU WAKO SAKALA.....3RD APPELLANT

GOLICHA WAKO CHACHU.....4TH APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

The appellants were charged with two counts under the Wildlife Conservation Act 2013 as follows:

COUNT I: DEALING IN WILDLIFE TROPHY CONTRARY TO SECTION 84 (1) AS READ WITH SECTION 92 AND 105 OF THE WILDLIFE CONSERVATION AND MANAGEMENT ACT 2013, 6TH SCHEDULE NO.47

The particulars of the offence are that the appellants on the 12th day of May 2016 at about 3.00pm at Golf Hotel in Marsabit Central sub-County within Marsabit County, jointly were found dealing in wildlife trophy of endangered species to wit 4(four) elephant tusks of about 12kg valued at Ksh.1.2million without a valid licence in contravention of the said Act.

COUNT II: BEING IN POSSESSION OF WILDLIFE TROPHY CONTRARY TO SECTION 95 OF THE WILDLIFE CONSERVATION ACT 2013.

The particulars of the offence are that the appellants on the 12th day of May 2016 at about 3.00pm at Golf Hotel in Marsabit Central sub-County within Marsabit County, jointly were found being in possession of wildlife trophy to wit 4(four) elephant tusks of about 12kg valued at Ksh.1.2million without a permit issued under the said Act.

The appellants were also charged in Count III with the offence of being unlawfully present in Kenya contrary to section 53(1)(1)(2) of the Kenya citizenship and immigration Act, 2011. The Particulars of the offence are that the appellants on 12th day of 2016 at Golf Hotel in Marsabit Central Sub-County within Marsabit County, being Ethiopians citizen were found being unlawfully present in Kenya without any valid permit.

The 2ND Appellant, DUB GUYO CHITO was charged in count IV with the offence of being in possession of a firearm contrary to Section 4A(a) as read with subsection 2(a),(3) of the Firearms Act, Cap 114 Laws of Kenya. The particulars of the offence were that the appellant on the 12th day of May 2016 at Goro Rukesa Location in Marsabit Central sub-county within Marsabit county, was found being in a possession of a firearm namely AK47 in circumstances which raised reasonable presumption that the said firearm had recently been used in a manner prejudicial in public order.

Finally the 4th appellant was also charged with the offence of being in possession of ammunition contrary to section 4(2) as read with sub section 3(a) of the Firearm Act. The particulars of the offence as per Court V were that the appellant on the 12th day of May 2016 at Goro Rukesa location in Marsabit Central sub-county within Marsabit County you were found being in possession of 11(eleven) rounds of ammunitions of 7.62x39 special in the contravention of the said act.

All the four (4) appellants were found guilty for count one and were sentences to pay a five of Ksh.20,000,000 in default one (1) year imprisonment and an additional twenty (20) years imprisonment. The 4th appellant was sentenced to serve seven (7) years imprisonment for count IV and seven (7) years imprisonment for count V. The sentence is to run consecutively.

Miss Muna appeared for the 1st, 3rd and 4th appellants. The three appellants filed their respective grounds of appeal on 16.12.2016. All the grounds of appeal are similar and are: -

1. That the learned trial magistrate erred in law and fact in failing to note that the presentation of the exhibited items fell short of the required standard in law.

2. That the learned trial magistrate erred in both law and facts in failing to make a finding that the prosecution failed to summon vital witnesses mentioned during the trial for a just decision to be reached.

3. That the learned trial magistrate erred in law and facts in failing to make a finding that the prosecution witnesses tendered un corroborated and contradictory evidence.

4. That the trial suffered some procedural irregularities

5. That despite being first offenders before any court, the trial magistrate passed a sentence that was hash and excessive

6. That the appellants are illiterate in both English and Kiswahili

7. That the trial court refused to consider the mitigation

Mr. Biwot appeared for the 2nd appellant, Dub Guyo Chito. Counsel filed supplementary grounds of appeal on 12.6.2017. The grounds of appeal are that:

1. The learned magistrate erred in law and fact by failing to re-evaluate and re-analyze the evidence to the prejudice of the appellant.

2. The learned Magistrate erred in law and fact by not finding that the appellant was charged with defective charge sheet and based under wrong provisions of law failing to consider that Section 214 of the Criminal Procedure Code was contravened rendering the charge fatally defective and the trail a nullity.

3. The learned Magistrate erred in law and fact by handing the Appellant a very harsh sentence.

4. That the trial was not conducted according to the law.

5. That the trial Magistrate misdirected himself in law and in fact by ignoring that the appellant was a stranger to his co-accused.

6. That the trial Court convicted the appellant of the offence charged notwithstanding, that the prosecution evidence was riddled with contradictions, discrepancies and inconsistencies.

7. That the trial Court convicted the appellant of the offence charged notwithstanding, that the prosecution did not disprove the alibi defense put forward by him.

8. That the trial Court convicted the appellant of the offence charged notwithstanding, that he was not positively and clearly identified at the scene of crime.

9. That the trial Court convicted the appellant of the offence charged notwithstanding, that the evidence of PW6 upon which it based its decision was not corroborated as required under the provisions of Section 24 of the Evidence Act.

10. That the trial Court based its decision on the evidence of PW3 who is said to have posed as a buyer and made phone calls to the 5th accused who has difficulty in understanding and proceeded to make a finding that there was conversation between them.

11. That the trial court failed to accord the accused person reasonable time for the defence since the accused had been represented by an advocate who was away for other engagements.

12. That the trial Court failed to consider the Appellant's mitigation.

13. That the magistrate who pronounced the judgement did not give adequate consideration to the Evidence of the defence.

Miss Muna, Counsel for the 1st , 3rd and 4th appellants submit that the provisions of section 3 of the Wildlife and Management Act No.47 of 2013 is clear. The section deals with selling, purchasing, bartering or dealing with any trophy. The evidence on record does not prove any of the above elements. No money was exchanged. Mere negotiations do not amount to selling, purchasing or bartering of the tusks. No receipt for purchase was produced in court. Counsel reply on the case of **TIAPUKEL KUYONI & ANOTHER V REPUBLIC, Narok CR.A.**

No.25 and 25A of 2017 where Justice J.M. BWONWONGA stated as follows:

"***In ground 9, the appellant has faulted the trial court in finding that the appellant traded in ivory and yet on the evidence no money was produced in court to support that finding. In this regard the evidence of PW1 is that while they were in the booth of the motor vehicle they overheard 2 of their colleagues negotiating over the price of the 6 elephant tusks. As a result, they came out of the booth and immediately arrested the 2 appellants in court. They found the 6 elephant tusks packed in a nylon sack, which tusks were put in evidence as exh PMFI 1-6. In view of this evidence, the finding that the appellants were dealing in elephant tusks is not proved. There were negotiations in respect of the prices which did not end up in a completed sale transactions. In the circumstances, I find that his ground of appeal has merit and I hereby uphold it."***

It is further submitted that the trial court did not prove the element of cutting, carrying, polishing, preserving, cleaning, mounting or otherwise preparing any trophy. The evidence does not prove that it is the appellants who killed the elephants. The gun produced in court was found to be in possession of the 2nd appellant. There was no evidence linking the three appellants to the carcasses. Counsel further contend that there is no evidence proving that the three appellants were conveying any trophy. The evidence only showed that a sack was being carried. The point of departure is not stated. The elements necessary to prove a case under section 85(1) as read with 92 and 105 of the Wildlife Conservation and Management Act, 2013 were not established.

It is further submitted for the three appellants that the sentence imposed by the trial court is excessive. The appellants are first offenders. The sentence is harsh and excessive.

Mr. Biwot, Counsel for the 2nd appellant submitted that the trial court did not appreciate the appellant's defence. The appellant testified that he was not at Golf Hotel in Marsabit town. His defence was that he was just found in town and arrested and then enjoined with the others. Counsel further submit that he appeared for the appellant before the trial court. At one time the appellant was compelled to proceed with his case in the absence of his advocate who had travelled to the Nyeri court. This denied the appellant the right of representation. The appellant intended to call his father as a witness. A gun was found in their homestead. There was a mistrial.

Mr. Biwott further contend that the prosecution relied so much on confessions from the appellants. The process of recording confessions was not followed. The alledged confessions were taken by Kenya Wildlife officers. The appellants were not taken to the Police station. They were first taken to a KWS camp where the alledged confessions were extracted and later taken to the Police station. The alledged recovered gun was also through the confession. The gun was not subjected to any finger prints examination. None of the family members were summoned by the prosecution to explain on the gun. No inventory was produced. No photographs were produced showing the carcasses of the two killed elephants. No spent cartridges were recovered. None of the witnesses testified that the appellant was at the Golf hotel. Council contends that the court can either order a re-trial or acquit the appellant.

Mr. Chirchir, prosecution counsel, opposed the appeal. Counsel submit that the main issue is whether the appellants were found dealing with wildlife trophies without a licence. The charge sheet is proper. PW3 posed as a buyer. All the appellants went to the hotel room and had the tusks. An agreed price of Ksh.7,500 per kilo was made. Kenya Wildlife officers arrested them.

PW4 confirmed that the exhibits were elephant tusks. No confession was referred to. The trial Court relied entirely on the evidence made with no reference to a confession. The matter was listed four times after it had been adjourned since Mr. Biwott was in Nyeri in the first occasion. The Court proceeded after Mr. Biwot failed to attend court several times. There was no information on the counsel. The 2nd appellant was out on bond. No substantial injustice was suffered by the 2nd appellant. Counsel submit that the sentence is running consecutively and this court can rectify that aspect of the sentence.

This is a first appeal. This court has to re-evaluate the evidence afresh and make its own conclusion. **PW1 OTANGA SILAS** is a KWS officer based in Marsabit. On 1.5.2016 members of the public informed him that they had heard gun shots. He went to Dogogicha where they found two elephant carcasses without their tusks. They recovered five spent cartridges from an AK 47 rifle. On 12.5.2016 they went to Golf Hotel at 1.00pm. They had information that a sale of tusks transaction would take place in room 3 of the hotel. One of them posed as a buyer. After two hours five young men emerged carrying a white sack. They went to room 3. The sack was on the table. They went to the room and arrested them. They recovered tusks from the sacks. The 2nd appellant then led them to where the gun was. The gun was in a metal box. It was an A.K 47 rifle. It had a magazine with 11 rounds of ammunition. Nobody was in the house when they recovered the gun. There was no one where they found the two elephant carcass.

PW2 HARRITON AURA is also a KWS officer stationed at Marsabit. He went to Dogogicha area with PW1 where they found two fresh elephants carcasses without their tusks. His evidence is similar to that of PW1. He was present when the 2nd appellant led them to where the AK 47 was. **PW3 JABIR ALI** is also a KWS officer. On 12.5.2016 he got a report that people wanted to sell elephant tusks. He posed as a buyer. He got a phone number of one of the sellers. He called him and the seller told him his name as Golicha Wako. They planned where they would meet. He booked room No.3 at Golf Hotel. The 4th appellant went to the room. He bargained a price of ksh.7,500 per kilogramme. The 4th appellant went back to the room in the company of four people with the tusks. They entered the room and other KWS officers went in. The appellants were arrested. Four pieces of elephant tusks were recovered. He had met Golicha at 12.00 noon first before Golicha went back with the trophies at 3.00pm.

PW4 OGETO MWEBI works with the National Museums of Kenya. He is a trained research scientist. He received four elephant tusks. He examined them and did a report on 27.5.2016. He concluded that the tusks were from elephants.

PW5 Inspector KENNETH CHOMBA is a ballistic examiner. On 24.5.2016 he received an exhibit memo with an AK magazine, 11 rounds of ammunition and 5 spent cartridges. He examined the exhibits and found that the spent cartridges were fired from four different firearms. He found that two of the cartridges were fired from the AK 47 that was produced in court.

PW6 Corporal PETRO KEBO is an intelligence officer with the KWS. On 1.5.2016 he got information about poaching at Dogogicha area in Marsabit. They went to the scene and found two elephant carcasses. The investigated the matter, PW3 posed as a buyer and the appellants were arrested.

PW7 PC POLYCINE OUMA was attached at the Marsabit Police station. He investigated the case and had the appellants charged with the respective offences. The appellants had their respective Kenyan Identity cards.

BORU WAKO SAKALA 3rd appellant was the first to testify for the defence. He gave sworn evidence. He stated that he is a casual labourer. On the material day he went to town to look for his identity card. He was told it was not ready. He took tea in town. While going near Golf Hotel he was arrested while walking on the road. He was arrested near Golf Hotel. He was later charged with the offence.

GOLICHA WAKO CHACHU 4th appellant also gave sworn evidence. He stated that on 12.5.2016 he went on his boda boda business. At about 2.00pm Abdub Wario Gufu called him on phone. He met him at a stage. He wanted to be taken to Golf hotel. When they reached Golf hotel they were arrested together with him and the other appellants. They were six people and were taken to KWS offices. They were canned. He denied committing the offence. Abdub Wario Gufu was not charged in court.

DABASO SARO DULACHA 1ST appellant gave sworn testimony. He is a casual laborer. He does not know the other appellants. On 12.5.2016 he was at his home area in Sololo. He was coming to town when he met a vehicle and was arrested. He was taken to KWS offices. They were about six (6) people. He then saw the elephant tusks which were planted on him. At 5.00pm they were taken to the Police station. He had Ksh.7000 and it was taken by the KWS officers. He was to send the money to his family.

The 2nd appellant, **DUB GUYO CHITO** gave sworn testimony. On 12.5.2016 he boarded a Nissan at manyatta Olo and alighted in town. He was taking his broken phone to a fundi. While walking near Golf Hotel people who were in a vehicle stopped him. He tried to resist but was assaulted. He was taken to a KWS camp. They were six (6) people. They were assaulted upto 7.00pm and were taken to the Police Station. He was later told that he had a gun. He saw the gun in court.

The issues for determination are

1. **Whether the prosecution proved its case against the appellants beyond reasonable doubt.**

2. **Whether the sentence is excessive**.

On the first issue, it is the prosecution evidence that the appellants were dealing in Wildlife trophy. They were arrested with four pieces of elephant tusks. PW3 possed as a buyer. All the appellants were arrested inside room No.3 at Golf Hotel in Marsabit. The trophies were packed in a sack and were tested and found to be elephant tusks.

The entire defence case is that the appellants were arrested near Golf Hotel and bundled into a vehicle. It cannot be by sheer coincidence that all the four appellants were walking near Golf Hotel. The evidence shows that all the appellants were in a probox vehicle and they went together to the hotel. They packed the vehicle and carried the sack to the hotel room. I do find that the appellants' defence does not controvert the prosecution evidence that the appellants were arrested at Golf Hotel.

Miss Muna contends that the prosecution did not prove the ingredients of the charge. All the appellants were convicted on count one. The trial court considered the 2nd count as an alternative charge. Count one involves dealing in Wildlife Trophy. Section 3 of Act No.47 of 2013 defines "**dealer"** as any person who in the ordinary course of business or trade carried on 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.

The particulars of the offence were that the appellants were jointly found dealing in Wildlife trophy of endangered species. The prosecution evidence does prove that the appellants were indeed arrested with the elephant tusks. Miss Muna's contention that the point of departure where the tusks were taken was not indicated cannot be a defence or a necessity for one to prove the offence. The operating words under the definition of **"dealer**" include sells, purchases, barters or otherwise in any other manner deals with any trophy. The appellants wanted to sell the trophies to PW3. A purchase price of the Ksh.7,500 per Kilo for the 12 kg was agreed. This would have yielded Ksh.90,000 for the four tusks and not Ksh.1.2million as per the charge sheet. It is not necessary that the transaction must be complete. Section 82 of Act No.47 of 2013 oulaws dealing in wildlife trophies without a licence. The appellants were arrested with the trophies without a licence. The terms "**in any manner deals with any trophy**" covers what the appellants were doing. Even the term "**sells"** was proved. The appellants wanted to sell the trophies. I do differ from the holing by Bwononga J in the case of **TAIAPUKEL KUYONI & ANOTHER V REPUBLIC (Supra**). The purchase price need not be paid. If one is found with a wildlife trophy without a licence, he would be in one way or another dealing with that trophy.

From the evidence on record, I am satisfied that the prosecution proved its case beyond reasonable doubt. The appellants were found dealing in wildlife trophy without a licence. They were arrested with those trophies. The contention by Mr. Biwott that his client's constitutional right to a fair trial and representation by an advocate was violated has not been established. The 2nd appellant and his advocate were accorded ample time by the Court to defend the case and call their witnesses.

There is the issue of count 4 and 5 involving the 2nd appellant. The prosecution evidence is that it is the 2nd appellant who led them to their homestead. The A.K 47 rifle was found in a metal box. The rifle was produced in court. Eleven rounds of ammunition were also recovered. They were produced in court. The appellant simply stated that he saw the gun in Court for the first time. That cannot be true. The prosecution did prove that the 2nd appellant was in possession of the AK 47 rifle. Why didn't the witnesses alledge that it was the other appellants who had the rifle. The answer to this is that it is the 2nd appellant who willingly took the Kenya Wildlife officers to where the rifle was. This was not based on the alledged confessions. The trial court did not rely on any confession. No witness talked of a confession. The prosecution evidence is that all the appellants were arrested at Golf Hotel. There was no need for the prosecution to state how each appellant was arrested inside the hotel room. The prosecution evidence sufficiently proves that all the appellants were arrested together in room 3 at Golf Hotel, Marsabit.

The final issue involves the sentence meted out on the appellants. Section 105 of Act No.47 of 2013 deals with forfeitures of Wildlife trophies found with suspects. My view is that it is not necessary for the charge sheet to include this section. All what the prosecution can do is to apply orally under section 105 of the Act and have the Wildlife trophies forfeited to the state. This Section does not deal with any offence or penalty.

Section 92 of Act No.47 of 2013 states as follows:-

Offences relating to endangered and threatened species

> **Any person who commits an offence in respect of an endangered or threatened species or in respect of any trophy of that endangered or threatened species shall be liable upon conviction to a fine of not less than twenty million shillings or imprisonment for life or to both such fine and imprisonment**.

Section 95 of the same Act provides for a sentence of not less than five years for the offence relating to trophies and trophy dealing.

The appellants were convicted in count 1 under section 92. Section 92 provides three different categories of sentencing for offences relating to endangered and threatened species. These are:

1. Fine of Ksh. Twenty million and above; or

2. Imprisonment for life or

3. Both fine and imprisonment.

The trial court imposed a fine of Ksh.20 million in default one year imprisonment. In addition to that sentence, the trial court imposed a 20 years imprisonment sentence.

Section 92 states that any one who commits the offence in respect of an endangered or threatened species or in respect of any trophy of those species – **"shall be liable upon conviction……"**

Where the statute provides for the words **liable** on the sentencing part, then the prescribed sentence become the maximum unless the words "not less than" are used. The sentence under Section 92 therefore can be life imprisonment, fine of not less than Ksh Twenty million or both. The life sentence is the maximum. The statute gives trial courts the leeway of imposing any other sentence other than life imprisonment. Imposition of prison sentence together with a fine is not mandatory. It can either be prison sentence or fine or both. It will be illogical for one to pay a fine of ksh.20 million instead of serving one year prison sentence. The additional twenty (20) years imprisonment imposed by the trial court is not part of the requirement of section 92 of Act No.47 of 2013. Once a prison sentence and fine has been imposed, then the additional prison sentence serves no purpose.

Given the circumstances of the case, I do order that the appellants do serve four (4) years imprisonment for count 1 for dealing in Wildlife trophy contrary to section 84(1) as read with section 92 of Act No.47 of 2013.

The 2nd appellant was charged under the firearms Act, Cap 114 Laws of Kenya. Count IV involved being in possession of a firearm contrary to **Section 4(A(a)** of that Act. That section provides for life imprisonment. It is section **4(3)** which provides for a minimum sentence of seven (7) years and a maximum of fifteen (15) years. Section 4 and 4A provide for different offences and different sentences. The prosecution property utilized section 4A as section 4A (2) list an AK 47 as a "**Specified Firearm**" falling under section 4A (1). The sentence under section 4A goes upto life imprisonment while under section 4 the maximum sentence is fifteen (15) years imprisonment.

Section 4(2) covers the charge of being in possession of ammunition. Section 4(3) provides for a minimum sentence of seven(7) years and a maximum sentence of fifteen (15) years for being in possession of ammunition. The sentence of seven years imposed by the trial court upon the 2nd appellant of seven (7) years imprisonment for being in possession of a firearm and seven years for being in possession of ammunition is proper. The trial court ordered the sentence to run consecutively.

Mr. Chirchir, learned prosecution counsel, is of the view that the sentence can run concurrently. I do agree with the that position as both the firearm and ammunition were found on the same day and at the same place. There is no need for the sentence to run consecutively.

In the end, the appeal on conviction fails. The prosecution proved its case beyond reasonable doubt. The appeal on sentence succeeds. The Twenty (20) years imprisonments is hereby set aside. All the appellants to serve four (4) years imprisonment for count 1. In essence therefore the 1st, 3rd and 4th appellants will serve only four (4) years imprisonment sentence from the date of conviction.

With regard to the 2nd appellant, DUB GUYO CHITO, he is sentenced to serve four (4) years imprisonment for count 1, seven (7) years imprisonments for count IV and seven (7) years imprisonment for count V. The three sentences to run concurrently. The 2nd appellant will therefore serve seven (7) years imprisonment.

Dated, Signed and Delivered at Marsabit this 14th day of May, 2018.

S. CHITEMBWE

JUDGE