REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL APPEAL NO. 22 OF 2016

JOSEPH MASIKONDE NCHOE……APPPELLANT

VERSUS

REPUBLIC……RESPONDENT

[Being an appeal from the conviction and sentence in Cr. Case No.305 of 2014 in the Chief Magistrate's Court at Narok, are R. v. Joseph Masikonde Ole Nchoe dated 15/4/2016]

JUDGEMENT

1. The appellant has appealed against his conviction and sentence of a fine of twenty million shillings (Kshs.20,000,000) in default to serve life imprisonment imposed upon him in respect of being found in possession of 8 pieces of ivory tusks (being count I), dealing in 8 pieces of ivory tusks (being count II) and keeping 8 pieces of ivory tusks (being count III).

2. The state supported both the conviction and sentence.

3. The appellant was convicted on the direct evidence of No. 8312 Kenya Wildlife Service Ranger Paul Munene (PW1) and that of No. 10077 Kenya Wildlife Service Ranger John Longnon (PW2). His defence was that these 2 witnesses framed him.

4. In this court the appellant has raised 8 grounds in his petition. In ground one the appellant has faulted the trial court by convicting him on account of a defective charge sheet. In this regard the appellant was charged in count I with being in possession of 8 pieces of ivory tusks contrary to section 95 as read with section 92 and section 105 (1) (a) of the Wildlife Conservation and Management Act of 2013. Section 92 of the Wildlife Conservation and Management Act creates a penalty for those who commit an offence in respect of an endangered or threatened species. It provides for a sentence of a fine of twenty million shillings (Kshs.20,000,000) or imprisonment for life. Furthermore section 95 of the Wildlife Conservation and Management Act creates offences and provides for a sentence of a fine of not less than one million shillings or imprisonment of a term of not less than 5 years.

5. A reading of section 95 clearly shows that it is a self regulating provision. It creates the offences of possession, keeping and dealing in a wildlife trophy and proceeds to provide for penalties. Furthermore, section 92 of the Wildlife Conservation and Management Act does not in specific terms create offences in respect of any endangered or threatened species. I had addressed this issue in the case of *Tiapukel Kuyoni and Another v. Republic (2017) eKLR* in respect of section 92 and stated that:

> *"……it therefore follows that the reference to section 92 of the same act in the statement of the offences is superfluous. It is irrelevant".*

In the circumstances I find that the charge is defective to the extent that it refers to section 92 of the Wildlife Conservation and Management Act of 2013. The references to section 95 and 105 of the said act are proper.

6. I agree with Mr. Kamwaro that the charge is defective in its statement of the offence for making reference to section 92 of the said act. The reference to section 92 of the act introduces an element of the uncertainty in respect of the statement of law that is alleged to be infringed according to *Sigilani v. R. (2004) 2 KLR, 480.* The contents of the charge were held to be that:

> *"The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence".*

7. In this regard the pronouncement of the law in respect of the method of framing charges as set out in the above case is in accordance with section 134 of the Criminal Procedure Code [Cap 75] Laws of Kenya. The issue that now arises for consideration is whether the defect in the charge sheet in the statement of law is fatal or not. I find that in the 3 counts with which the appellant is convicted, the particulars in support

of each count are crystal clear. For instance, the particulars in support of the offence state as follows:

> " *J. M. Ole Nchoe*
>
> *On 23rd day of February, 2014 at around 0430hours at Elkerin area of Loita within Narok County, R. v. Province was found in possession of a wildlife trophy namely eight (8) pieces of ivory weighing 15kgs with an estimated street value of Kshs.1.5 million without permit".*

8. In view of the foregoing I find that the defect in respect of the statement of the offence charged in each of the 3 counts is cured by the particulars in support thereof. Stated differently the defects in the statement of the offences in each of the 3 counts are curable errors in terms of section 382 of the Criminal Procedure Code.

9. It therefore follows that the accused was not under any misapprehension as regards the offences with which he was charged. Additionally he was also not mistaken or misled in respect of the 3 offences upon which he was convicted. I therefore find no merit in ground 1 which I hereby dismiss.

10. In ground 2, the appellant has faulted the trial court for convicting him without complying with the mandatory provisions of section 200 of the Criminal Procedure Code. The provisions of that section require that:

> "*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 re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right."*

11. The record of the proceedings clearly shows that the evidence of No. 8812 Kenya Wildlife Service Ranger Paul Munene (PW1) was taken by Hon. Z. Abdul, who was a Resident Magistrate. The record further shows that the evidence of Kenya Wildlife Service Ranger No. 10077 John Longnon (PW2), No. 72828 Cpl. Paul Sitienei (PW3) and the unsworn evidence of the appellant were taken before Hon. W. Juma, Chief Magistrate.

12. Furthermore, Hon. W. Juma, Chief Magistrate was the second succeeding magistrate. In taking over, the record shows that:

> "*Court*
>
> *Section 200 (3) CPC complied with*
>
> *Accused- I want to proceed from where it has reached*
>
> *Prosecutor – I have one witness."*

Mr. Kamwaro submitted that the provisions of section 200 (3) of Criminal Procedure Code were not complied with. He has submitted that the record does not show that the maasai language was used. However, it is clear from the record that the accused was explained in a language that he understood. After understanding what was explained to him, he elected to proceed from where the case had reached.

13. The provisions of section 200 (3) are for the protection of an accused person. They also enable the second succeeding magistrate to assess the demeanour of all the witnesses who testify before her. It is instructive to refer to the pronouncement of the law in *Kabiru v. R. (2004) eKLR in which the court stated that:*

> "*The provisions of section 200 (3) of Criminal Procedure Code are mandatory. The provision imposes a duty upon the court to inform the accused person of his right to re-call witnesses who had already given evidence before his predecessor. From the record of the, MR. KANYANGI did not inform the appellant of his right to re-call the witnesses who had testified earlier. That rendered the entire trial defective and a nullity, notwithstanding the fact that the appellant was represented by counsel who did not apply to recall witnesses. Accordingly I quash the conviction and set aside the sentence."*

14. The above pronouncement of the law is authoritative and cannot be contradicted. What is clear, however, is that *Kabiru v. R. supra*, is distinguishable from the instant appeal. In the instant appeal the appellant was explained the requirement of the mandatory provision of the law which he understood. He then elected to proceed with his case from where it had reached. In the circumstance I find that this ground of appeal is lacking in merit and is hereby dismissed.

15. In ground 3, the appellant has faulted the trial court by failing to find that he was a police informer. In this regard the trial court believed the evidence of PW1 and PW2 that the appellant was in possession of the 8 pieces of the elephant tusks which he intended to sell to them. Furthermore, the trial court believed the evidence of PW1 and PW2 that the appellant was in company of two accomplices who escaped, following the arrest of the appellant.

16. Additionally the trial court in particular believed the evidence of Pw1 and PW2 that they had their own informer, who directed them to the scene of crime, where they met the appellant and his co-accomplices. Furthermore the defence of the appellant was that he was on the road while en-route to a safari. He then stopped a probox motor vehicle and the people in that probox arrested him as he was on his way to board a matatu to Ewaso Ngiro market to sell his sheep. He continued to testify that the people who arrested him wanted to hurt him.

17. It is clear from his own unsworn statement that he never told the trial court that he was an informer as contended by Mr. Kamwaro. I therefore reject his submission that the appellant was an informer of PW1 and PW2. The submission is not borne out by the evidence of the prosecution and the defence. In the circumstances I find no merit in ground 3 and it is hereby dismissed for lacking in merit.

18. In ground 4 the appellant has faulted the trial court for convicting him in the absence of a weighing certificate to confirm the weight of the tusks. In this regard the prosecution submitted that there is no requirement in law that a weighing certificate is a legal requirement. From the relevant provisions of the applicable law I find that a weighing certificate is not a legal requirement. In the circumstances I find no merit in this ground of appeal which is hereby dismissed.

19. In ground 5 the appellant has faulted the trial court both in law and fact in concluding that the appellant was trading in ivory. This ground should be considered along with ground 6 in which the appellant has faulted the trial court that he was in possession of the 8 pieces of ivory tusks. In this regard there is ample evidence that the appellant along with his co-accomplices were in possession of the 8 elephant tusks.

20. The offence proved is one of possession which the appellant was charged and convicted in count I. counts II which charged the appellant in dealing with 8 pieces of tusks and count III which charged the appellant with keeping the 8 pieces of ivory tusks were not proved in terms of the evidentiary requirements. There is no evidence that the appellant was a dealer in buying and selling ivory tusks. There is also no evidence that he was keeping the ivory tusks. In the circumstances I acquit the appellant in counts II and III.

21. Furthermore, the appellant has faulted the trial court for convicting him in the absence of scientific proof that the exhibits that were produced in court were actually elephant tusks. In this regard there is evidence of Pw1 and PW2 that these were elephant tusks. The evidence of identification by PW1 and PW 2 that these were elephant tusks was never challenged during trial under cross-examination.

22. Additionally, the appellant in his unsworn statement did not challenge the identity of the exhibits as being elephant tusks. In the circumstances I find that the trial court was entitled to find as it did that indeed the exhibits were elephant tusks. I therefore find no merit in this ground of appeal and is hereby dismissed.

23. In ground 8, the appellant has faulted the trial court for shifting the burden of proof. I find that the trial court considered the totality of the prosecution and defence evidence and found that the offence was proved beyond reasonable doubt. I find no merit in this ground of appeal and I therefore dismiss it.

24. This is the first appeal court. As a first appeal court I am required to re-assess the entire evidence tendered at trial. This is a requirement according to *James Mwangi Mukumbu v. R. (2016) eKLR* which was cited by Mr. Kamwaro in his written submissions. I have re-assessed the entire evidence and I find that the appellant was convicted on sound evidence in count I.

25. The upshot of the foregoing is that the appellant's appeal in count I which charged him with possession is hereby dismissed in its entirety. Counts II and III are hereby quashed together with the consequential orders in respect of the sentence in those two counts.

26. As regard sentence in count I, the authorized sentence in terms of section 95 of the act upon conviction, an accused person is liable to a sentence of a fine of not less than one million shillings or imprisonment for a term of not less than 5 years or both such imprisonment and fine.

27. The appellant was a first offender. He was also a father to a number of children in respect of whom he told the trial court were likely to suffer following his imprisonment. The sentence imposed in respect of count I was not lawful and I hereby set aside. The law provides for a sentence of 5 years imprisonment or a sentence of a fine of one million shillings. In sentencing the appellant I find that he has now served over two years imprisonment. I also find that offences under the Wildlife Conservation and Management Act are serious offences. A sentence imposed should be deterrent to the offender and potential offenders.

28. In the circumstances I find that the appropriate sentence is two years.

Judgement delivered in **open court** this **12th** day of **July, 2018** in the presence of Mr. Kamwaro for the Appellant and Ms. Nyaroita for the Respondent.

J. M. BWONWONGA

JUDGE

12/7/2018