



IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 51 OF 2018

CORAM: D.S. MAJANJA J.

BETWEEN

BALUNYE OLE KORTOL APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence of Hon.S.M. Mungai, CM dated 12th April 2018 at the Chief Magistrate's Court at Isiolo in Criminal Case No. 477 of 2018)

JUDGMENT

1. The appellant, **BALUNYE OLE KORTOL**, appeals against conviction and sentence after having pleaded guilty on the following two counts as follows:

Count 1: Being in possession of wildlife trophy contrary to section 95 of the Wildlife Conservation and Management Act, 2013 Balunye Ole Kortol: on the 10th April at around 0700 Hrs at Serolipi township along Serolipi Highway Samburu county was found in possession of Seven (7) pieces of elephant tusks weighing 30 kilos without a permit

COUNT 2: Dealing in wildlife trophy contrary to section 84 (1) as read with section 92 of the Wildlife Conservation and Management Act, 2013. Balunye Ole Kortol: On the 10th April 2018 at around 0700 Hrs at Serolipi Township along Serolipi township along the Serolip Isiolo Highway Samburu County, you were found dealing in wildlife trophies namely seven (7) pieces of Elephant tusks weighing 30 kilos without a dealer licence.

2. After conviction, he was sentenced to pay a fine of Kshs. 1 million or in default to serve five years' imprisonment on the 1st count and a fine of Kshs. 20 million or in default to serve life imprisonment on the 2nd count.

3. In prosecuting the appeal, the appellant's counsel relied on the supplementary grounds of appeal dated 9th May 2018. He contended that the plea of guilty was not equivocal as the ordinary meaning of dealing and possession in Samburu language are not synonymous and that both counts could not be replicated in a charge sheet arising out of the same facts. He further contended that the facts as narrated by the prosecution did not disclose any criminal act committed by the appellant. He complained that the trial magistrate erred in convicting the appellant without following the proper procedure for taking a guilty plea.

4. Counsel for the respondent submitted that the appeal was incompetent since **section 348** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)** provides as follows:

No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent of the legality of the sentence.

Counsel submitted that this provision did not permit an appeal against conviction and sentence from a guilty plea. Counsel added that in any case the appellant's guilty plea was unequivocal and that the trial magistrate scrupulously followed the procedure set out in the **Criminal Procedure Code**.

5. Although **Section 348** of the **Criminal Procedure Code** bar an appeal in the case of conviction following a guilty plea, our courts have held that the only way to address whether the sentence was legal is to address whether the plea recorded in the lower court was equivocal which would make the conviction unlawful and thus implicate the legality of the sentence (see **Repha Omari Nyabuto v Republic Kisii HCCRA No. 44 of 2015 [2017]eKLR**).

6. The requirements for recording a guilty plea provided for in **section 207** of the **Criminal Procedure Code** were elucidated in **Adan v Republic [1973] EA 445** as follows:

- i. The charge and all the essential ingredients of the offence should be read to the accused in his language or in a language he understands.
- ii. The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded.
- iii. The prosecution should immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or add any relevant facts.
- iv. If the accused does not agree with the facts or raises any question as to his guilt, his reply must be recorded and a change of plea entered.
- v. If there is no change of plea, a conviction should be recorded and a statement of facts relevant to sentence together with the accused's reply should be recorded.

7. Where the accused has pleaded guilty, he may yet say something in mitigation that negates the offence. The Court of Appeal in **John Muendo Musau v Republic NRB CA No. 365 of 2011 [2013]eKLR** observed that;

We want to add here that if the accused wishes to change his plea or in mitigation says anything that negates any of the ingredients of the offence he has already admitted and been convicted for, the court must enter a plea of not guilty. That is to say that, an accused person can change his plea at any time before sentence.

8. I have considered the proceedings and they show that when the appellant was arraigned in court on 11th April 2018, the charges were read to him in Samburu and he stated on both counts, "*It is true*". After the plea of guilty was entered, the following facts were read to him;

That on 10/2018 at around 7.00 hrs Officers from KWS of Isiolo and Nairobi led by Corporal Indenche received an intelligence report that a suspect was selling an elephant tusk. The officers mobilized themselves and posed as willing buyers. They proceeded to an area along Isiolo Sereolipi road in their K.WS motor vehicle and met the seller who is the accused. He was carrying a white gunny bag. Before he handed over the items he was arrested and the officers upon searching the bag found Seven Elephant tusks. Accused was interrogated. He had no permit to allowing him to be in possession of the tusks or to deal with them. The officers prepared an inventory which they signed together with the suspect. The accused was taken to Archers Police station and he was then charged. I produce the items as follows; White gunny bag – P. exhibit 1, 7 pieces of elephant tusks as P. exhibit 2,3,4,5,6,7 and 8 and the inventory dated 10/4/18 as P. exhibit 9.

9. The appellant, in response to the facts, stated that, "*I admit the facts and confirm that I was found in possession of the tusks and the bag.*" The court then recorded that, "*Accused convicted after confirming the facts and identifying the exhibits.*"

10. An outline of the proceedings shows that the trial magistrate scrupulously followed the procedure provided but when the appellant was asked to confirm the facts, he only admitted that he was in possession of the tusks. I therefore find that and hold that the guilty plea in respect of the 2nd count was not unequivocal.

11. I affirm the conviction and sentence on the 1st count. I allow the appeal only to the extent of that I quash the conviction and sentence in respect of the 2nd count. The appellant shall be taken to Isiolo Chief Magistrates Court to plead to the 2nd Count afresh on **22nd October 2018**.

DATED and DELIVERED at MERU this 17th day of October 2018.

D.S. MAJANJA

JUDGE

Mr Wamache instructed by Kaumbi and Company Advocates for the Appellant.

Mr Kiarie, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.