



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NANYUKI
CRIMINAL APPEAL NO. 3 OF 2015

GODFREY MUGAMBI GIKUNDI.....APPELLANT

versus

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in

Nanyuki Chief Magistrate's Court Criminal Case No. 1940 of 2008

by Hon. E. N. GICHANGI - Resident Magistrate on 16th September 2011)

JUDGMENT

1. **GODREY MUGAMBI (the appellant)** was convicted on one count, out of the three counts he faced before Senior Principal Magistrate's Court Nanyuki. He was convicted of the **offence of entering a private sanctuary contrary to section 13(1) of the Wildlife Conservation Amendment Act No. 16 of 1989**. He was sentenced to pay fine of Kshs.10,000 and in default to serve 3 months imprisonment. He has filed this appeal against his conviction and sentence.
2. The Senior Principal Prosecuting counsel, Mr. Tanui did not oppose the appeal. He conceded to the appeal because the prosecution's sole evidence was that of tracking dog which he said was not full proof. He also conceded that the prosecution's evidence had contradiction.
3. The appellant was charged before the trial court with two other persons who were found not guilty. All the three persons were employed as Kenya Forest Ranger. They were based in Ontulili Post. The prosecution's evidence was to the effect that the three went into Mt. Kenya Wildlife Conservancy whereby they shot a rhino. The rhino was injured but not dead. The gunshots having been heard led to a contingent of Kenya Wildlife Officers, Police officers and two dog handlers and their dogs to go to the forest to investigate. On their arrival at the scene the officers saw an axe and sack. They also collected two bullets. One had been used while the other had not. Whereas some officer said that the dogs were led to sniff the scent of a footprint that was where the rhino slept, PW 3 the Manager of Mt. Kenya Wildlife Conservancy and one dog handler said the dogs were made to sniff the scent on the axe in order to lead them to those that had been there. The dogs led them to Kangaita Forest Post and in particular to the house of the Forest Ranger based at Kangaita Post, who was PW 7. The dogs according to the prosecution's witnesses picked up a scent in that house. PW 7 informed the officers that the appellant and his co-accused had spent the previous night in that house. PW 7 led the officer to Ontulili Forest Post where upon the appellant and his co-accused were arrested and charged.
4. The appellant in his defence stated that he and his co-accused were on the day in question request to investigate an alleged stealing of trees in the forest. On that night they lay an ambush to try and catch the

culprits. They walked around the forest but did not arrest anyone. He confirmed they were armed with their official rifles. At 10.30 p.m. they all went to PW 7's home where they spent the night. He denied being involved in the shooting of the rhino.

5. It is important to state the firearm examiner in his evidence stated that the bullet found at the scene was not fired from the official guns used by the appellant and his co-accused.

6. It follows that the only evidence against the appellant was that of the tracking dogs which prosecution's witnesses said that it pin pointed the appellant. The two dog handlers who testified other than stating that they were trained as dog handlers did not prove that training by way of documentary evidence. Similarly there was no evidence presented on the type of training the dogs had undertaken and whether their tracking had a proved record of reliability. There are three cases on this point:-

(a) **Abdallah Bin Wendo Sheh bin Mwambere (1953) E.A.CA** the court stated:-

“Where the police dogs are used to supply corroboration of an identification of a suspect, it should be accompanied by the evidence of the person who trained the dog and can describe the nature of the test employed.”

(b) **Kennedy Maina v Republic (2008) eKLR**, the court of appeal held:-

“This court in a similar case as this one considered this issue in the recent case of DAVID NJERU KIBUTHU & TWO OTHERS, CRIMINAL APPEALS NOS. 7, 8 and 9 of 1999 and in a judgment delivered on 20th May, 2005 rendered itself thus:-

‘However, we are concerned at the lack of evidence as to both the experience of Omas (police dog) as a tracker dog and as to the ability of tracker dogs to distinguish between the scents of a number of person at a scene of a robbery such as this. It is probably the case that competent experienced dog can do so but there should be evidence adduced from a tracker dog expert.’

(c) In the case **Regina v Das Matthew Theordore Pieteron (1994) EWCA Crim 5 U.K.** the court stated:-

“In our judgment, if a dog handler can establish that a dog had been properly trained and that over a period of time the dog's reactions indicate that it is a reliable pointer to the existence of a scent from a particular individual, then that evidence should properly be admitted. However, it is important to emphasise two safeguards. First, the proper foundation must be laid by detailed evidence establishing the reliability of the dog in question. Secondly, the learned judge must, in giving his direction to the jury, alert them to the care that they need to take and to look with circumspection at the evidence of tracker dogs, having regard to the fact that the dog may not always be reliable and cannot be cross examined.”

7. As correctly submitted by the appellant's learned counsel Mr. Kiget and Mr. Tanui for the respondent, the evidence presented by the prosecution, at the trial, regarding the dogs tracking of the appellant failed to meet the criminal standard of proof. No evidence was tendered to show the training and reliability of the dog handler and more importantly of the dog.

8. There is also a concern where the scent the dogs followed was obtained. Was it, as some witnesses state, from the footprint, or was it from the handle of the axe as stated by others. The lack of clarity on this is of importance when one considers the defence offered by the appellant, that is, that on the same night they were investigating the theft of trees in the forest, which involved walking around. There is indeed doubt whether the police arrested those that were involved in the shooting of the rhino. There is doubt whether the appellant was involved in that shooting.

9. The above observation, in this court's view suffices to show that the prosecution's case failed to prove the charges against the appellant. Accordingly the **appellant's appeal against conviction and sentence succeeds**. The appellant's conviction is hereby quashed and his sentence is hereby set aside. Since appellant was sentenced to 3 months imprisonment, in default of paying a fine, on 16th September 2011, there is no reason to order for the appellant's release from custody now more than 5 years later. If however the appellant paid the fine he shall be refunded the same.

DATED AND DELIVERED THIS 20TH DAY OF FEBRUARY 2017.

MARY KASANGO

JUDGE

CORAM

Before Justice Mary Kasango

Court Assistant: Njue

Appellant: Godfrey Mugambi Gikundi

For the State:

COURT

Judgment delivered in open court.

MARY KASANGO

JUDGE