REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 147 OF 2014

MARIEL LENGUSHIRO.....APPELLANT

VERSUS

REPUBLIC.....STATE

(Appeal from the Sentence of the Principal Magistrate's Court at Maralal Hon. .B. S Khapoya – Ag Senior Resident Magistrate delivered on the 26th June, 2014 in CMCR Case No. 222 of 2014)

JUDGEMENT

The appellant **MARIEL LENGUSHIRO** has filed this appeal challenging his convictions and sentence by the learned Ag. Senior Resident Magistrate sitting at the Mararal Law Courts.

The appellant together with another accused (who was ultimately acquitted of all charges) was arraigned before the trial court on 28/4/2014 facing charges of **BEING IN POSSESSIONOF WILDLIFE TROPHY CONTARTY TO SECTION 95 OF THE WILDLIFE CONSERVATION AND MANAGMENT ACT OF 2013**. The particulars of the charge were that-

> ***"On the 22nd day of June, 2013 at about 2330hrs along Kisima –Suguta Highway within Samburu County while riding a motor cycle Registration Number KMCZ 285F Make Kim-bird was found being in possession of wildlife trophy namely two pieces of Elephant tusks valued at Ksh One Million (1,000,000) without a permit"***

The appellant pleaded **'Not Guilty'** to the charge and his trial commenced on 30/4/3014. The prosecution led by **INSPECTOR KIBOR** called a total of five (5) witnesses in support of their case.

The prosecution case was that on 22/6/2013 officers of the Kenya Wildlife Service received information through an informer that two motorcycles were being used to illegally ferry elephant tusks (ivory) in the Kisima area. The officers in response to this information laid an ambush along the Nyahururu – Suguta Marmar road near Kisima Girls junction. They intercepted two (2) motor cycles Reg. No. KBC 464H make Shark blue in colour and Reg No. KMCZ 285F make King-bird red in colour ferrying ivory. Upon seeing the KWS officer the riders of the two motor cycles dismounted and ran away abandoning the two motor cycles as well as the ivory. The KWS officers recovered the two motor cycles and 4 pieces of ivory tusks (each cycle was ferrying 2 pieces each of elephant tusks). All these items were produced in court as exhibits. **P.exb 1 to P.exb 7**.

The matter was reported at Maralal Police Station and police commenced investigations into the matter.

PW3 PATRICH MUCHANGI NJAGI told the court that the motor cycle Reg. No KMCZ 285F belonged to his father. He produces the log-book as proof of this fact. **PW3** stated that the appellant was a regular client who often hired this motor-cycle from him.

PW3 stated that sometime in the month of June, 2013 the appellant asked to hire his motor-cycle. They agreed on a price of Ksh 2,000/=. The appellant left with the motor-cycle promising to return it the next day.

The following day the appellant phoned **PW3** and informed him that the motor cycle had been detained by police. The appellant promised to buy **PW3** a new motor cycle but failed to do so. **PW3** went to Maralal police station and found his motor cycle detained there. He later traced the appellant to a pool hall and alerted police who came and arrested him. The appellant was then charged with this offence.

At the close of the prosecution case the appellant was found to have a case to answer and was placed onto his defence. He opted to give a sworn defence in which he denied having participated in ferrying the contraband ivory. The appellant claims that the police arrested him from his shop for no reason.

On 26/6/2014 the learned trial magistrate delivered his judgment in which he convicted the appellant and thereafter sentenced him to a fine of Ksh 1.0 million in default to serve five (5) years imprisonment. Being aggrieved by both this conviction and sentence, the appellant filed this present appeal. **Mr. Kibet** Advocate argued the appeal on behalf of the appellant. **MS OUNDO** learned State Counsel who appeared for the Hon DPP opposed the appeal.

This being a first appeal this court is obliged to re-evaluate the evidence on record and draw its own conclusions on the same. In the case of **AJODE Vs REPUBLIC [2004] 2 KLR 81** it was held

> ***"In law it is the duty of the first appellate court to weight the same conflicting evidence and make its own inferences and conclusions but bearing in mind always that it has neither seen nor heard the witnesses and make allowance for that"***

In this case the charge against the appellant is that of illegal possession of the elephant tusks. In order therefore to prove the charge evidence must be adduced to show that the appellant was found in **'actual possession'** of the contraband. Section 4 of the Penal Code, Cap 63 Laws of Kenya defines "**Possession"** as follows

> **"Possession"**
>
> ***(a) "be in possession" or "have in possession" includes not only having in one's own personal possession but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person***
>
> ***(b) ....."***

In this case it is alleged that acting on a tip off from an informer officers from the Kenya Wildlife Services laid an ambush to apprehend persons who they were told were ferrying elephant tusks on motor bikes. **PW2 PC CHARLES MUTULI, PW4 ROBERT RUTO and PW5 PC ABDALLA MWALIMU** participated in the ambush. They all state that they saw the two motor bikes each loaded with two elephant tusks approaching. However the riders upon noticing the officers jumped off the motor bikes and escaped into the nearby bushes.

In his evidence **PW4** stated that this ambush was laid at 23:30hrs that is about 11.30pm. Undoubtedly it was dark at the time. Although **PW2** told the court that he was not able to identify any of the men riding the motor bikes **PW4** claims that he was able to see and identify the appellant as one of the riders. **PW4** claims that he was able to see that it was the appellant who was riding in front and the other rider was behind.

Given that the incident occurred at night the obvious question that arises is how was **PW4** was able to see the appellant. The incident occurred out in the rural area. There were no streetlights and none of the witnesses has mentioned that the moon was out on that night.

PW4 has stated that he was able to see the appellant using the light of the vehicles. **PW4** has not explained how strong these lights were neither has he stated how far the appellant and his colleague were when he saw them. **PW5** the other officer who was at the scene makes no mention of having seen and identified the appellant. **PW5** only states that he saw the appellant at the police station after he had been arrested. Therefore the only witness who places the appellant at the scene is **PW4**.

It is trite law the evidence of a single witness would suffice as proof of a fact in issue. However where the key question of identification revolves around the testimony of a single witness. The court must take great care to ensure that such evidence is reliable.

In the case of **MAITANYI Vs REPUBLIC [1986] KLR 198** the Court of Appeal sitting in Nairobi held as follows-

> ***"1) Although it is trite law that a fact may be proved by the testimony of a single witness. This does not lessen the need for testing with the greatest case the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.***
>
> ***2) When testing the evidence of a single witness a careful enquiry ought to be made into the mature of the light available conditions and whether the witness was able to make a true impression and description"***

In this case the incident occurred at about mid night. It was out in the bushes. There were no streetlights and no moonlight. All these witnesses state that when the motor cycle riders saw the KWS officers they turned abruptly jumped off their motor bikes and disappeared into the bushes. In those circumstances **PW4** could only have possibly caught a fleeting glimpse of the riders. Certainly he did not have enough time and opportunity to see them well. I find that the circumstances did not favour a clear and positive identification at all.

Aside from the visual identification claimed by **PW4** the prosecution also seeks to rely upon circumstantial evidence to link the appellant to this offence.

PW3 the **'owner'** of the motor bike Reg. No. KMCZ 285F told the court that during the material time he had hired out his motor cycle to the appellant. However **PW3** is not specific regarding the date when he gave out the motor bike to the appellant. He only talks of June 2013 **PW3** is unable to provide the court with any documentary proof that such a transaction did occur between himself and the appellant. He state that they made no written agreement and no receipt was issued for the KSh 2,000/= which appellant paid to **PW3** as hiring fee.

Whereas **PW3** claims that no written agreement was entered into **PW5 PC 'Abdalla Mwalimu'** who investigated the matter insisted that the two made and signed an agreement before the chief. This is a major contradiction in the prosecution case. If such an agreement existed why was it not produced in court as an exhibit. The assistant chief who supposedly witnessed this agreement was never called to testify

In order for circumstantial evidence to suffice as proof of guilt that evidence must point at the accused and the accused alone as the perpetrator of the offence. In **REPUBLIC Vs KIPKERING ARAP KOSKE 1949 E.A CA 135** the court held that

> ***"In order to justify the inference of guilt the exculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt".***

In **TEPER Vs REX [1952] AC 489** the court held as follows

> ***"Circumstantial evidence must always be narrowly examined if only because evidence of this kind may be fabricated to cast suspicion on another ……. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co existing circumstances which would weaken or destroy the inference".***

Even it was proved that **PW3** had leased out the motor cycle Reg. No KMCZ 285F to the appellant sometime in June 2013, this fact does not prove that was the appellant who was riding the motor cycle on the night of 22/6/2013. Any other person could have taken the motor cycle and could have been riding it.

On the whole I find that the evidence on identification is wanting. The circumstantial evidence also does not pass muster. I therefore find that the charge against the appellant was not proved beyond reasonable doubt. The appellants conviction was not sound and I do hereby quash the same. The sentence imposed on the appellant is also set aside. The appellant is to be set at liberty forthwith unless he is otherwise lawfully held.

Date in Nakuru this 10th day of February 2017.

Mr. Bett for appellant

Mr Chigiti for state

Maureen A. Odero

Judge