REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

HCRA No. 119 OF 2016

MACDONALD NDILO.......................APPELLANT

=VERSUS=

REPUBLIC.......................................RESPONDENT

(An Appeal from the conviction and sentence of 5 years imprisonment

by Hon. D. MOCHACHE (PM) on 30/09/2015 at Mombasa Law Courts

in CR. CASE No. 718 of 2011)

JUDGMENT

1. The Appellant is challenging the conviction and sentence imposed upon him on 30/09/2015 for the following charges:-

COUNT I

CHARGE: BEING IN POSSESION OF GOVERNMENT TROPHIES CONTRARY TO SECTION 42 (I) (b) **OF WILDLIFE (CONSERVATION AND MANAGEMENT) ACT CAP 376 LAWS OP KENYA.**

PARTICULARS:

1. MACDONALD NDILO 2. MGANDI MALEMBI MWATSAHU: On the 28th day of February, 2011 at about 1600 hours at Lukore area, Kwale County within Coast Province were jointly found in possession of 2 whole pieces of ivory weighing approximately 30 kgs without a certificate of ownership thereof.

COUNT II

CHARGE: DEALING IN GOVERNMENT TROPHIES WITHOUT A DEALERS LICENSE CONTRARY TO SECTION 43 (4) (a) AS READ WITH SECTION 52 (1) OF WILDLIFE (CONSERVATION AND MANAGEMENT) ACT CHAPTER 376 LAWS OF KENYA.

PARTICULARS:

1. MACDONALD NDILO 2. MQANDI MALEMBI MWATSAHU: On the 28th day of February,

2011 at about 1600 hours at Lukore area, Kwale County within Coast Province were jointly arrested trying to sell 2 whole pieces of ivory weighing approximately 30kgs, approximate street value of 80,000/= (eighty thousand shilling only) without a dealers ownership license.

COUNT III

CHARGE: FAILING TO MAKE A REPORT OF OBTAINING OF GOVERNMENT TROPHIES CONTRARY TO SECTION 39 (3) (a) OF THE WILDLIFE (CONSERVATION AND MANAGEMENT) ACT CAP 376 LAWS OF KENYA.

PARTICULARS:

1. MACDONALD NDILO 2. MGANDI MALEMBI MWATSAHU: On the 28th day of February, 2011 at about 1600 hours at Lukore area, Kwale County within Coast Province both failed to make a report to an authorized officer on possession of 2 whole pieces of ivory weighing approximately 30kgs.

2. The prosecution evidence in summary was as follows:-

PW1 CPL STEPHEN OKOTH OTIENO an intelligence officer with Mombasa Marine Park was on duty on 28/02/2011 when his colleague ABDULKADIR

HASSAN (PW3) told him that he had received a tip off that there was a suspect at Lukore in Kwale area in possession of elephant ivory trophy.

3. PW1 and PW3 posed as buyers and went to Lukore Centre where they met two people and investigations commenced. The two people directed them to a bushy area. The two people entered the bush and came out with two ivory tasks wrapped in a green net and put inside a white sack.

4. PW I said they put the trophies in their car and then identified themselves as KWS Police officers. They arrested the two suspects and took them to Central Police Station.

5. PW3 said upon receiving a tip off that there were people selling elephant tasks he went with PW1 and a driver and pretended to be buyers. He negotiated with the two people and they told him the tasks were 30 *kgs* and each kg was Ksh. 3,000/=. PW3 was with PW 1 when they arrested the two suspects.

6. The Appellant who was Al in the trial said in his defence that he used to own butchery which he closed down in 2009. He said PW3 was his supplier and he used to call him and issue him threats because he owed suppliers a lot of money.

He said one time a relative of A2 told him he wanted a mason to construct a house. They went to Lukore to construct the house. PW3 called him and told him he wanted to meet him. He said they met with PW3 and A2 at Kwale and drove to the site at Lukore.

After seeing the site PW3 just drove off. When the Appellant protested, he drew out a gun. A2 started crying. PW3 told them he wanted to use them as a bait to arrest someone else. However, he drove them to Central Police Station where they were locked up and later charged with this offence.

7. The trial court found both accused persons guilty as charged on all the counts and sentenced to 5 years imprisonment on count 1 and 2 and 12 months imprisonment on count 3.

The Appellant has now appealed against both sentence and conviction on the following grounds:-

> **(i) THAT the Learned Trial Magistrate erred in law and fact in convicting the Appellant on charges that were a duplicity hence ambiguous and defective.**
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> **(ii) THAT the Learned Trial Magistrate erred in Law and fact in convicting the Appellant on**

a charge of dealing in Government Trophies without a Dealer's Licence when no evidence was adduced to prove the *same.*

(iii) THAT the Learned Trial Magistrate erred in Law and fact in convicting the Appellant in the absence of evidence of the

Investigating Officer.

(iv) THAT the Learned Magistrate erred in Law and,-fact in convicting the Appellant by failing to consider and appreciate that the prosecution evidence was based on grudge between the Appellant and PW3.

(v) THAT the Learned Trial Magistrate erred in Law by shifting the burden of proof to the Appellant.

(vi) THAT the Learned Trial Magistrate erred in law by imposing a sentence which was manifestly excessive in the circumstances.

8. The Appellant was represented at the trial by Mushelle Advocate who submitted in writing as follows:-

(i) That count 1 and 2 were a duplicity as count one deals with the offence of being found in possession of Government trophies while count two is dealing with Government trophies without a dealer's licence.

(ii) That the investigating officer was not called to testify and further that the evidence of the investigating officer is very crucial and in the absence of such evidence the proceedings herein are a nullity.

(iii) That the trial Magistrate did not take into account the evidence of the Appellant that PW3 had a grudge against him as PW3 used to supply the Appellant with meat. That PW3 brought this case to fix the Appellant who owed him money.

(iv) That all the witnesses who testified belong to KWS and that the proceedings are all based on malice.

(v) That the court said in the judgment that **"the source of the tip off had not been disclosed and therefore seems suspicious"** and therefore a doubt was created in the mind of the court which ought to have been resolved in favour of the Appellant.

9. Opposing the Appeal, Miss Mutua for the Respondent submitted as follows:-

(i) That there was no duplicity of charges and further that section 90 (2) and 382 of the C.P.0 cure any defects in the charge sheet.

(ii) That the prosecution called 3 witnesses and the charges against the Appellant were proved to the required standard.

(iii) That although the investigating officer did not testify, PW2 testified on behalf of him and that the evidence on record was consistent and cogent.

(iv) On the 4th ground that there was a grudge between PW3 and the Appellant, there was no evidence that such a grudge existed.

(v) Finally the Respondent submitted that there is no evidence that the Appellant reported that PW3 drew out a gun and threatened him and finally that the sentence meted against the Appellant is not excessive.

10. I have carefully re-evaluated the evidence adduced at the trial court bearing in mind that the trial court had the opportunity to see the witnesses. This being first appeal, it is incumbent upon this court to re-analyse and re-evaluate the evidence adduced before the trial court and come up with its own conclusion. This role is in line with well-known and established principles of law which have been cited with approval in numerous cases. For example, in **Kiilu & Another Vs Republic** the court citing **Okeno v. R** and held as follow4:-

> ***"An appellant on a first appeal is entitled to expect, the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; it must make its own findings and draw its own conclusions; only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses".***

11. My findings are as follows:-

(i) The Appellant was charged under the following provisions of **THE WILDLIFE (CONSERVATION AND MANAGEMENT) ACT CAP 376 LAWS OF KENYA:-**

Sections 42 (b)

42. (1) Save as otherwise provided by this Act, any person who is in possession of any trophy, or of any ivory or rhinoceros horn of any description, without also being I possession of a certificate of ownership in respect thereto shall be guilty of a forfeiture offence and-

(b) in any other case, be liable to a fine not exceeding ten thousand shillings or to imprisonment for a term not exceeding three years, or both such fine and imprisonment.

Section 43 (4) (a)

(4) Any person who-

(a) not being the holder of a dealer's licence, carries on the business of a dealer;

Shall be guilty of an offence and liable to a fine not exceeding twenty thousand shillings or to imprisonment for a term not exceeding five years, or to both such fine and imprisonment

Section 39 (3) (a) provides:-

3 (a) Any Person who-

a. Fails to make a report required by section (2) of this section;

Shall be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to imprisonment for a term not exceeding twelve months, or to both such fine and imprisonment

(ii) The ingredients of the three offences facing the Appellant were as follows:-

(a) proof of possession,

(b) proof that the items in question were game trophies,

(c) evidence that the appellant was dealing in game trophies without a dealer's licence, and

(d) failure to make a report to an authorized officer.

(iii) I find that there is evidence that the Appellant and his co-accused were in physical control of the trophies. The two led PW1 and PW3 to the place the trophies were kept in a bush. The Appellant and his co-accused entered the bush and came out with two ivory tasks wrapped in a green net and put inside a white sack.

(iv) On the ground of appeal that the charges are a duplicity, the issue as to what constitutes a good charge is explained under Section 134 of the Criminal Procedure Code which reads as follows:-

"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged".

(v) Section 135 (1) & (2) provides for instances where Joinder of counts in charge or information is allowed. They read as follows:

> **1. "Any offences, whether felonies or misdemeanours, may be charged together in the same charge or information if the offences charged are founded on the same facts, or form or are part of a series of offences of the same or a similar character.**
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> **2. Where more than one offence is charged in a charge or information, a description of each offence so charged shall be set out in a separate paragraph of the charge or information called a count".**

(vi) In the case of **Timothy John Victor v Republic [2016] eKLR** the court had the following to say about duplicity of charges referring to Section 135 **(1)** and (2) (above):-

> **"From the above provisions it is correct to estate that duplicity ofcharges would occur in instances where more than one offence is charged in one count. In such a case, an accused would be presented with difficulty as he would not be in a position to know exactly what charge to plead to or defend. This scenario is well expounded by the Court of Appeal for Eastern Africa in the case of Cherere son of Gukuli vs Republic (1955) 22 EACA 478 which stated as follows:**
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> **"Where two or more offences are charged to the alternative in one count, the count is bad for duplicity contravening Section 135(2) of the Criminal Procedure Code; the defect is not merely formal but substantial. Where an accused is so charged, it cannot be said that he is so prejudiced because he does not know exactly with what he is charged, and if he is convicted he does not know exactly of what he had been convicted."**

(vii) In the instant case I find that there was no duplicity of charges. Each charge was described on a separate paragraph.

(viii) On the issue raised in the defence that the Appellant and PW3 knew each other prior to the arrest and that PW3 brought this case to fix the Appellant who owed him money, again there is no evidence to support the said allegations. PWI and PW3 were acting on a tip off when they arrested the Appellant and his co-accused.

(ix) Finally, I find that the sentences meted were lawful and the same are reasonable in view of the seriousness of the offences.

(x) I accordingly dismiss the Appeal and uphold the convictions and sentences.

Dated, Delivered and Sgned at Mombasa this I2th May, 2017 in the presence of the parties.

ASENATH ONGERI

JUDGE.