

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA
CRIMINAL CASE NO. 75 OF 2016

MWENDWA MAITHYA.....APPELLANT

VS

REPUBLIC.....RESPONDENT

JUDGEMENT

The appellant was charged in the Magistrate's Court at Mwingi with 3 counts. Count 1 was keeping a wildlife trophy contrary to section 95 as read with section 92 of the Wildlife Conservation and Management Act 2013. The particulars of the offence were that on 11th June 2014 at Kamuwongo area Kyuso Sub-County in Kitui County kept a wildlife trophy namely two leopard skins and one python skin without a permit. In count 2, he was charged with possession of Wildlife trophy contrary to section 95 as read with section 92 of the Wildlife Conservation and Management Act 2013. The particulars of the offence were that on the same day and place was found in possession of Wildlife trophy namely two leopard skins and 1 python skin without a permit. In count 3, he was charged with dealing in wildlife trophy contrary to section 95 as read in section of the Wildlife Conservation and Management Act 2013. The particulars of the offence were that on the same day and place was found dealing in wildlife trophy namely 2 leopard skins and 1 python skin without a permit.

He denied all the 3 charges. After a full trial, he was convicted and sentenced to 1million shillings on each of count 1 and 2 or in default 5years in prison. He has now come to this court on appeal. His grounds of appeal are as follows:-

1. The learned magistrate heard in law heard in failing to evaluate the evidence tendered before the court which showed that the sack which contained the wildlife trophy was left in the appellant's house by one pastor Gideon Mwinzi and that the appellant did not know that the sack contained wildlife trophies.
2. The learned magistrate heard in law and fact in failing to consider and give evidential value to the evidence, tendered in court by the appellant and DW5 which evidence cast out on the prosecution case and exonerated the appellant from the offence charged.
3. The learned magistrate heard in law and fact in accepting contradictory evidence of PW1, PW2 and PW3 regarding the ownership the wildlife trophies and convicting the appellant on the basis of the contradictory evidence.
4. The prosecution did not prove its case against the appellant beyond any reasonable doubt and left and explained and unproved grey areas that warranted the acquittal of the appellant.
5. The learned magistrate heard in failing to state whether the sentences in the two counts were to run concurrently or consecutively.
6. The magistrate heard in failing to consider the appellant's physical condition, financial position and relevant circumstances before imposing a fine of 1million shillings which was excessive and oppressive in right of monetary value of the wildlife trophies- Kshs. 27,000.

Before the appeal was heard, the appellant filed written submissions which I have perused and considered. At the hearing of the appeal, the appellant on the written submissions and stated verbally that he had informed the trial court that the items belonged to Gideon Mwinzi, who was not called as a

witness. He said that immediately after being charged he mentioned the name of Gideon Mwinzi.

The principal prosecuting counsel stated that the appellant faced 3 counts and that the prosecution had a duty to prove the 3 offences. Counsel submitted that Pastor Gideon Mwinzi who was consistently mentioned by the appellant was a known person in the area and was not called by the prosecution to testify. Counsel also stated that the charge failed to differentiate the offences under section 95 and as a result there was duplicity. In addition, counsel submitted that the appellant was acquitted in count 2 under section 215 of the criminal procedure court but no reason was given while evidence on record was mainly possession of the trophies.

I have considered the evidence on recorded as I am required to do in a first appeal. I have to remind myself that am required to re-evaluate all the evidence on record and come to my own independent conclusions and inferences. See the case of OKENO-VS-REPUBLIC 1972 EA 32.

I have also perused the charge sheet on the judgement of the trial court. In my view, count 1 and count 2 are duplication. Keeping wildlife trophy and possession of the same in my view cannot be charged in the same facts. Either one is in actual possession or keeping the wildlife trophies. The same person cannot do both at the same time with the same facts. The learned magistrate acquitted on count two but did not state the reason. Maybe the acquittal was due to my above opinion, however it is not the function of the criminal court to speculate on the reasons for conviction or acquittal. Those reasons have to be clear and specific and if there is any doubt it has to be given to the accused person. In my view therefore the doubt caused by the charge and the decision of the trial court with regard to count 1 and 2 has to be given to the accused person.

The appellant was convicted and sentenced with regard to count 3. The charge under count 3 is dealing in wildlife trophy. The appellant stated at the trial which he has maintained on appeal that the items were brought in the sack by a pastor Gideon Mwinzi. He also brought witnesses to support his version. The Kenya Wildlife officials stated that they were informed about the items by an informer who was not disclosed. From the circumstances of this case, that informer is likely to be pastor Mwinzi. Maybe he wanted to corner the appellant. Though the Kenya Wildlife Services officials state that the appellant wanted to sell the items to them, the details of the evidence on the transaction were very scanty and appear to be stereotype. In my view, balancing the requirement that the prosecution has to prove a charge beyond reasonable doubt, and the sworn defence of the appellant together with his witnesses, I find that the appellant seriously shook the version of the prosecution. He created a doubt whose benefit he is entitled to. I give him the benefit of the doubt.

In the result I find that the appeal has merits with regards to conviction. I quash the conviction of the appellant in both counts on which he was convicted. The sentence has also to be set aside and I do so. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated at delivered at Garissa on 14th June, 2017.

GEORGE DULU

JUDGE