REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 147 OF 2014

CHARO BADIVA KIRIBAI..…….....APPELLANT

VERSUS

REPUBLIC…….…….....… RESPONDENT

(From original conviction and sentence in Criminal Case Number 484of 2012 in the Senior Principal Magistrate's Court at Voi delivered by Hon E.M. Kadima(RM) on 13th August 2013)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Charo Bidiva Kiribai, was tried and convicted by Hon E.M. Kadima, Resident Magistrate Voi Law Courts for the offences of being in possession of a firearm and being in possession of ammunition without a firearm certificate contrary to Section 4(1) as read with Section 4(3) of the Firearm Act Cap 114 (Laws of Kenya) and being in possession of government trophy **(sic)** without a certificate of ownership contrary to Section 42(1) (b) of the Wildlife Conservation and Management Act Cap 376 (Laws of Kenya) (now Repealed).

2. In respect of the first count, the Appellant was sentenced to serve three (3) years imprisonment, for the second Count, to two (2) years' imprisonment andfor the third Count, to two (2) years imprisonment with a fine of Kshs 30,000/=. All the sentences were to run consecutively.

3. The particulars of the Counts were that :-

COUNT I

On the 9th day of July 2013 at around 1200 noon at Galana Ranch within Tana River County was found in possession of a firearm make G3 A36513097 without a firearm certificate.

COUNT II

On the 9th day of July 2013 at around 1200 noon at Galana Ranch within Tana River County was found in possession of 15 rounds of 7.62 mm live ammunition without a firearm certificate.

COUNT III

On the 9th day of July 2013 at around 1200 noon at Galana Ranch within Tana River County

was found with in possession of government trophy (sic) **to wit 2 elephant tusk** (sic) **weighing 10 kgs without a certificate of ownership.**

4. Being dissatisfied with the said judgment, on 23rd September 2014, the Appellant filed Mitigation Grounds of Appeal. The grounds of appeal were**THAT**:-

1. He was a father of seven children and married to three wives who depended on him as their breadwinner.

2. He was a farmer but since his arrest and conviction, the said farm had no one to control for further production and security for it (sic)**.**

3. Since his arrest and conviction, he had developed ulcers which were now hindering his health.

4. The Prison department was unable to supply him with the required medicine to cure the ulcers due to the fact that treatment was expensive.

5. He was applying for a lesser sentence or to be placed on Probation to enable him facilitate the above reasons (sic)**.**

5. On 28th April 2016, the Appellant was directed to file and serve his Written Submissions. Instead, on 16th June 2016, he filed an undated Notice of Motion application seeking to amend his Grounds of Appeal, which application was allowed, Amended Grounds of Appeal and Written Submissions.

6. The grounds of the said Amended Grounds of Appeal were as follows:-

1. THAT the Learned Trial Magistrate erred in law and facts in failing to consider that the case was not proved beyond reasonable doubt c/s 109 and 110 of the Evidence Act.

2. THAT the Learned Trial Magistrate erred in law and facts in failing to consider that the ballistic report contravened Section 33 and 77 of the Evidence Act and did not exactly reveal the person who possessed the G3 Rifle at the seen (sic) **of crime or at the time of the arrest.**

3. THAT the Learned Trial Magistrate erred in law and facts by (sic)**failingto consider that there was**(sic)**no cogent reasons to connect him to the alleged offence in question.**

4. THAT the Learned Trial Magistrate erred in law and facts by (sic) **failing to consider that his defence was unrebutted and unchallenged by the prosecution and was firm to create doubt on the prosecution case which was contrary to Section 212 and 235 of the CPC Cap 75 Laws of Kenya.**

7. The State's Written Submissions were dated 22nd June 2016 and filed on 23rd June 2016.

8. When the matter came up on 23rd June 2016, both the Appellant and counsel for the State asked the court to rely on their respective Written Submissions in their entirety when writing the Judgment herein. This Judgment is therefore based on the said Written Submissions which were not highlighted.

LEGAL ANALYSIS

9. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

"**On a first appeal, the court is mandated to look at the evidence adduced before the trial**

afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".

10. While the Appellant consolidated all his grounds of appeal in his Written Submissions, the court found it prudent to address the issues raised therein under the different heads shown hereinbelow.

I. PROOF OF THE PROSECUTIONS' CASE

11. The Appellant pointed out that Section 109 and 110 of the Evidence Act Cap 80 (Laws of Kenya) provides that a person who asserts a fact must prove the same. He referred the court to the 21st Dictionary Revised Edition wherein an assertion is defined as a **"positive or strong statement or claim or act of making such a claim or statement."**

12. He also placed reliance on the case of **Cr Appeal No 115 of 1982 Muiruri Njoroge vs Republic**where it was held as follows:-

"It is a well established rule of practise that a court of law does not act on mere assertions not unless such assertions is(sic) **proved by evidence beyond the court** (sic)**."**

13. His argument was that the Prosecution or the Ballistic Expert did not dust the G3 Rifle at the time of his arrest to verify whether he was the one who was holding or in possession of the said firearm at the material time thus raising doubt whether he was really the one in possession of the same.

14. It was his contention that in the absence of such proof, the only conclusion that could be arrived at was that the said firearm belonged to Kenya Wildlife Services (KWS) and the same was planted on him when he failed to bribe them to secure his release, a fact that he said was corroborated by his witnesses. He was categorical that his alibi defence had remained unrebutted and the Learned Trial Magistrate did not satisfy himself that the Prosecution witnesses told the truth contrary to the provisions of Section 124 of the Evidence Act .

15. He also contended that there was a failure of justice as he was prejudiced by the fact that the Ballistic Report was produced in court by PW 3 and not the maker of the said Report. He argued that reasonable doubt had been created to warrant his acquittal. He relied on the case of **Cr Appeal No 72 of 1985 Wilmington vs Republic**in this regard. It was therefore his submission that the Learned Trial Magistrate relied on unproven evidence to convict him in contravention of Sections 109 and 110 of the Evidence Act.

16. On its part, the State urged the court to uphold the conviction and the sentence that was meted upon the Appellant. It was emphatic that the Prosecution had proven its case beyond reasonable doubt because the evidence that was adduced by the Prosecution witnesses was cogent and detailed, leaving no doubt that the Appellant was indeed guilty of the offences that he had been charged with.

17. It pointed out that both Ranger Nasibu Kasim (hereinafter referred to as "PW 1"), Mohamed Mwatela (hereinafter referred to as "PW 2") and other ranchers laid an ambush at Galana Ranch and arrested the Appellant with the firearm, ammunition and elephant tusks. It averred that the Appellant's defence was concocted as he did not call his mother or any other person to prove that he was indeed at the meeting as he had contended. It added that the alibi defence by Furaha Ngumbao Kiraha (hereinafter referred to as "DW 2") and Gharama Kiriba (hereinafter referred to as "DW 3") ought to have been raised at the earliest opportune time during the trial more so because the Appellant was represented by counsel.

18. It also argued that there was no contravention of the provisions of Section 77 of the Evidence Act as both PW 1 and PW 2 testified that they are the ones who initiated the Appellant's arrest and that in addition, the Appellant did not object to Chief Inspector Alex Mudindi Mwandawiro (hereinafter referred to as "PW 3") who was a Ballistic expert testifying on behalf of a Mr Langat.

19. A perusal of the proceedings shows that according to PW 1, they got a tip off from an informer that there was someone who had been carrying elephant tasks and a gunat Galana Ranch. He said that together with his colleagues, they laid an ambush and arrested the Appellant herein with a G3 Rifle, fifteen (15) rounds of ammunition and two (2) elephant tusks. They asked him to surrender and be obliged. He stated that they then arrested and took him to Voi Police Station. During his Cross-examination, PW 1 denied that he arrested the Appellant from the latter's house.

20. PW 1's evidence was corroborated by that of PW 2 who told the Trial Court that after the tip off, they waited patiently at the Galana Ranch when they saw the Appellant carrying the aforesaid items. He stated that they interrogated him and he informed them that he did not have a certificate to carry the firearm.

21. PW 3 presented the Ballistic Report in which he confirmed that the G3 Rifle was capable of discharging live ammunition. In his Cross-examination, he stated that the Mr Langat who did the examination on the firearm was undergoing a course at CID Training School. PC Lameck Gogo (hereinafter referred to as "PW 4") confirmed that the Appellant was brought to Voi Police Station with two (2) elephant tusks, the firearm and the ammunition.

22. Notably, all the evidence that was adduced in the Trial Court was on oath. In such circumstances, a court is tasked with the duty of weighing and analysing the evidence given by both the prosecution and defence witnesses and arriving at a conclusion in favour of the party that most persuades it most to believe the cogency or veracity of its evidence.

23. The Appellant, DW 2 and DW 3 all testified that the KWS officers came and arrested them. The Appellant told the Trial Court that he knew PW 1. However, he did not elaborate on the circumstances under which he knew him.

24. What was not lost to this court was that the coincidence of both DW 2 and DW 3 visiting the Appellant on the same day at about the same time in the morning and then being arrested after being picked out of the group of about ten (10) people who were in a baraza and/or meeting raised more questions than answers.

25. This court had difficulty believing that both DW 2 and DW 3 randomly visited the Appellant on the day he was said to have been arrested and for the two (2) of them to have been arrested alongside him for no apparent reason.

26. The question that disturbed the mind of this court was why would the KWS officers target four (4) people out of a group of about ten (10) people who they all said were in a baraza and/or meeting, which people were unknown to them? It did appear to this court that theevidence by the Appellant, DW 2 and DW 3 was intended to give the Appellant a false alibi. In any event, this alibi evidence ought to have been raised very early in the trial to give the Prosecution an opportunity to test the veracity of the same.

27. The importance of raising the issue of alibi very early in the trial was dealt with in the case of **Karanja vs Republic[1986) KLR 612**wherein the Court of Appeal rendered itself as follows:-

> **"The word "alibi" is a Latin verb meaning "elsewhere" or at another place". Therefore when an accused person alleged he was at a place either than where the offence was committed at the time when the offence was committed and hence cannot be guilty, then it can be said that the accused has set up an alibi. The appellant's story in this case did not amount to an alibi as it was mentioned in passing when giving evidence and, furthermore, it was not raised at the earliest convenience, ie when he was initially charged…"**

28. It was clear that from the facts that were presented before the Trial Court that the Learned Trial Magistrate made a correct observation that the evidence by DW 2 and DW 3 was not credible enough to dislodge the consistent and cogent evidence that was adduced by the Prosecution witnesses.

29. Evidently, this court formed the impression that the Prosecution witnesses were consistent in their

evidence. During his Cross-examination, PW 1 indicated that he had stated in his Statement to the police that the Appellant was a well- known poacher. PW 4 also stated that the Appellant had a pending case for a similar offence to wit **Cr Case No 750 of 2011.**However, no evidence was placed before this court of the existence of this file or the outcome thereof.

30. Appreciably, where an assertion is disputed and the court is unable to verify the veracity of the same, it must treat such assertion with a lot of caution unless of course that assertion is proven. In this case, however, as the Learned Trial Magistrate correctly pointed out in his judgment, the Appellant did not dispute the fact that he had previously been charged in the aforementioned criminal case despite PW 3 having made that assertion during his examination- in- chief.

31. The Appellant had the right and opportunity to cross-examine PW 3 on this averment but he failed to do so. The fact that PW 3's assertion that the Appellant had previously been charged in a previous criminal case for a similar offence was not rebutted, it gave credence to PW 1's evidence that the Appellant was a well-known poacher.

32. Both PW 1 and PW 2 testified that they had not known the Appellant before the incident herein. This court was not persuaded to find that the Prosecution witnesses had framedthe Appellant with the charges he was facingas he did not provide any evidence to support his assertion.

33. Further, as was rightly pointed out by the State, the Appellant did not object to PW 3 submitting the Ballistic Report in place of the Mr Lang'at. He was therefore estopped from raising the issue at the appellate stage. In any event, the Ballistic Report was a public document within the meaning of the Section 79 of the Evidence Act Cap 80 (Laws of Kenya) and could be produced by PW 3 in place of the said Mr Lang'at. This was in line with the provisions of Section 66 (e) of the Evidence Act that provides that secondary evidence includes oral accounts of the contents of a document given by some person who has himself seen it.

34. Accordingly, having considered all the evidence that was adduced in the Trial Court, the Written Submissions and the case law that was relied upon by the parties herein, this court thus came to the firm conclusion that the weight of the evidence that was adduced by the Prosecution witnesses far outweighed the evidence of the Appellant, DW 2 and DW 3.

35. Appreciably, this court's conclusion was fortified by fact that the Appellant admitted his guilt during his mitigation and before the sentence. He stated as follows:-

"…I pray that the court forgives me for the offence that I have committed (emphasis court)**."**

36. It did not matter that the Appellant did not plead guilty to the charges at the time of taking plea. Indeed, admission of guilt can be deduced before trial by a person making a confession in accordance with the law, at the time of taking plea, during the hearing of both the prosecution and defence cases or at the mitigation stage. In other words, an accused person's guilt can be inferred from the time before his arrest until the time he is convicted of an offence.

37. Once the Appellant admitted during his mitigation that he committed the offences he had been accused of, it followed that the Prosecution had rightly preferred the charges against him. His admission of guilt at the mitigation stage thus estopped him from alleging in an appellate court that the Prosecution did not prove its case beyond reasonable doubt.

38. His assertions that the Learned Trial Magistrate acted in contravention of Sections 109 and 110 of the Evidence Act were therefore inconsequential and irrelevant in the circumstances of this case herein. He made assertion that he could not prove while on the other hand, the Prosecution asserted facts that were proven beyond reason doubt by the Prosecution witnesses.

SENTENCE

39. Section 4 of the Firearms Act Cap 114 (Laws of Kenya) provides as follows:-

> **(1) Subject to this Act, no person shall purchase, acquire or have in his possession any firearm or ammunition unless he holds a firearm certificate in force at the time.**
>
> **(2) …**
>
> **(3) (b)if the firearm is any other type or the ammunition for any weapon not being a prohibited weapon be liable to imprisonment for a term of not less than five, but not exceeding ten years:**

40. In respect to Count I and II, the Learned Trial Magistrate sentenced the Appellant three (3) and two (2) years respectively. This was a total of five (5) years as envisaged in Section 4(3)(b) of the Firearms Act. This court did not see any reason to interfere with the discretion of the said Learned Trial Magistrate as he exercised his discretion judiciously when he sentenced the Appellant to the minimum prescribed sentence.

41. This was despite this court having been of the view that the Appellant herein actually deserved a stiffer sentence as he had been charged with two (2) counts under the Firearms Act and the maximum imprisonment that would have been imposed on him was ten (10) years. Indeed, once a court exercises his discretion judiciously, an appellate court, though it be that a higher sentence ought to have been meted out in a particular case, cannot interfere with that court's discretion.

42. Turning to Count III, the provisions of Section 42 (1) of the Repealed Wildlife Management and Conservation Act under which the Appellant herein was also charged, it is provided as follows:-

> **(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 in possession of a certificate of ownership in respect thereof shall be guilty of a forfeiture offence and—**
>
> **(a) if that person is the holder of a dealer's licence under section 43, be liable to a fine not exceeding thirty thousand shillings or to imprisonment for a term not exceeding five years, or to both such fine and imprisonment; or**
>
> **(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 to both such fine and imprisonment.**

43. On this Count III, the Learned Trial Magistrate ought to have imposed upon the Appellant a fine not exceeding Kshs 10,000/= or to imprisonment for a term not exceeding three (3) years or to both such fine and imprisonment. Although the term of imprisonment was proper and correct, the imposing of a fine of the amount of Kshs 30,000/= instead of Kshs 10,000/= was clearly improper, illegal and unlawful.

44. Having said so, this court took cognisance of the provisions of Section 14 of the Criminal Procedure Code that stipulates as follows:-

> **"(1) Subject to sub-section (3) when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefor which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.**

45. The sentences the Learned Trial Magistrate imposed upon the Appellant were to run consecutively. The Appellant did not submit that the same was harsh. The State did not also ask this court to review the same. Suffice it to note that the Appellant was fortunate to have been charged under the repealed Act of the Wildlife Conservation and Management Act as the current Act carries very stiff penalties for the

offences that he committed.

46. In view of the fact that this court found that the Prosecution had proved its case beyond reasonable doubt, it found that it could not interfere with the terms of imprisonment that were meted by the Learned Trial Magistrate as the same was neither excessive nor harsh in the circumstances of the case herein. However, it found that there was reason to interfere with the order of the fine that was imposed upon the Appellant herein as he was to be imprisoned as well as pay the fine.

DISPOSITION

47. For the foregoing reasons, this court hereby declines to set aside the conviction and/or quashthe sentence that was meted upon the Appellant by the trial court. This court instead affirms the convictionand the said sentenceas they were both lawful and fitting. However, the court hereby substitutes the fine of Kshs 30,000/= that was imposed by the Learned Trial Magistrate and replaces it with a fine of Kshs 10,000/= as is provided for under the law.

48. Accordingly, the upshot of this court's judgment, therefore, was that the Appellant's Appeal lodged on 23rd September 2013was not merited and the same is hereby dismissed.

49. It is so ordered.

DATED and **DELIVERED** at **VOI** this **18TH** day of **JULY** 2016

J. KAMAU

JUDGE

In the presence of:-

Charo Badiva Kiribai…….....for Appellant

Sirima…..……...……...……for State

Simon Tsehlo– Court Clerk