



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
CRIMINAL APPEAL No.100 OF 2014

JEAN WANJALA SONGOI

PATRICK MANYOLAAPPELLANTS

VERSUS

REPUBLIC RESPONDENT

(An appeal from the original conviction and sentence of J. M. Nang'ea Senior Principal Magistrate in Criminal Case No. 2827 of 2012 delivered on 30th September, 2013 at Kitale.)

J U D G E M E N T

1. The first appellant, **Jean Wanjala Songoi** was jointly charged with the second appellant, **Patrick Manyola**, and another with three offences under the Wildlife Conservation and Management Act (Cap 376 LOK)

In count one, they faced a charge of possession of game trophy, contrary to s.42(1)(b) of the Act, in that on 16th November, at Mama Mombasa Building in Kitale Trans-Nzoia County, were found in possession of six(6) Python skins and six(6) leopard skins valued at Kshs.300,000/= without a permit from the Kenya Wildlife Service.

2. In Count two, the appellants faced a charge of dealing in Government trophy, contrary to s.43(4) of the Act, in that on the 16th November 2012, at Mama Mombasa Building I Kitale Trans-Nzoia County, they were found dealing in six(6) Python skins and six(6) Leopard skins valued at Kshs.300,000/= without a permit or licence from Kenya Wildlife Service. In Count three, the charge was that of failing to make a report of obtaining possession of Government Trophy, contrary to s. 39 (3) (a) of the Act, in that on the 16th November, 2012, at Mama Mombasa building in Kitale Trans- Nzoia County, the appellant failed to report the fact that they had obtained possession of game trophies as required by law i.e The Wildlife Conservation & Management Act.

3. After a full trial before the Senior Principal Magistrate at Kitale, the appellants were convicted on the first and third counts and sentenced to two (2) years imprisonment on the first count and six (6) months imprisonment on the second count. The sentences are to run concurrently. They were all acquitted on the second count. Being dissatisfied with the conviction and sentence, the appellants preferred separate appeals, which were consolidated and heard together. Their grounds of appeal are those contained in the amended petition of appeal dated 5th May 2015, and filed on their behalf by the firm of **R. E. NYAMU & CO. Advocates**.

4. Learned counsel, Mr. Nyamu, appeared for the appellants at the hearing of the appeal and while relying on the grounds of appeal, submitted that the evidence by PW 1 was irrelevant as he was not at the scene to witness anything. That, from the evidence of PW 2 and PW3, the appellants were arrested together with five or six other people including a receptionist in a hotel cum lodge. It was therefore unknown who was actually in possession of the game trophy.

5. Learned counsel, went on to submit that there was contradiction in the evidence of PW2 and PW3 with regard to the number of people arrested and that PW3 admitted in cross examination that he did not know the person who made the offer to sell the Python and Leopard skins. That PW2 and PW3 left the matter to the police who preferred charges against the appellants yet not a single police officer including the investigations officer was called to testify in court.

6. That, it was clear from the evidence of PW1 and PW2 that the hotel receptionist was also arrested but later released. That, the receptionist was a crucial witness, who was in a better position to explain to the court as to whether the material items were in possession of the appellants. That, the failure to call the receptionist was deliberate as she would have given evidence adverse to the prosecution.

7. Learned counsel, contended that the prosecution failed to prove possession of the material items against the appellants who denied the offences and contended that they were not in possession of the skins as confirmed by PW2 who was not certain of their identification as the culprits. That, the informer mentioned by PW2 and PW3 was not called to testify as he should have under the Witness Protection Act. That, PW2 and PW3 relied on the informer yet they did not give the description of the suspects as given to them by the said informer.

8. Learned Counsel, further submitted that the judgment of the trial court was inconsistent with the evidence as may be deciphered from pg.32 of the record of appeal. That, PW2 and PW3 gave contradictory evidence as to whether the material items were on the table or under the table. That, contrary to what the learned trial magistrate said, PW2 and other witnesses did not identify the suspects. That, the prosecution led no evidence of an expert to establish that the material items were actually game trophies i.e. Leopard or Python skins.

9. That, the prosecution case was closed prematurely as vital witnesses were left out and therefore the conviction of the appellants by the learned trial magistrate was against the weight of the evidence. That, the appellants were charged merely on speculation and assumption simply because they were in a hotel which was a public place. That, in any Criminal Case, the trial court ought to ensure before convicting that the prosecution has proved its case.

10. Learned Counsel urged the court to allow the appeal and referred to several authorities in support of his arguments viz:

1. ***Bukenya & Others vs Uganda (1972) EA 549***
2. ***Alex James Muchangi vs Rep(2013) e KLR***
3. ***Kaingu Elias Kasomo vs Rep. Mld Cr.App 504 of 2010 (C/A)***
4. ***James Omondi Were vs Re Kak.Cr. App.217 of 2012 (H/C)***

11. The respondent through the Learned Prosecution Counsel, **Mr. Kakoi** conceded the appeal and submitted that the alleged trophies were not established as having been in the possession of the appellants. That, PW2 and PW3 were the main prosecution witnesses yet PW2 did not know the owner of the items. That, out of the five people arrested at the scene only three were charged such that it was not clear how the decision to prosecute the appellants and another was arrived at. That, the investigations officer did not testify to shed light on the matter. That, it was highly suspicious that the appellants committed the offence but the evidence against them did not go beyond reasonable doubt.

12. Having considered the grounds of appeal in the light of the foregoing submissions, the duty of this court was to re-consider the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witness.

In that regard, the prosecution case was briefly that on the material date, ***Dominic Ochieng Oduk (PW2), and Hillary Kipyator (PW3)***, both officers of the Kenya Wildlife Services proceeded to Mama Mombasa Lodge in Kitale after receiving information that a group of three (3) people was selling game trophies.

13. At the premises, the officers found a receptionist and about five to six other people suspected to be the sellers and buyers of the game trophies which according to one officer (PW2) were in a yellow polythene bag and a carton on a table and according to the other officer (PW3) were in a carton under a table. The officers introduced themselves and conducted a search in a room where they found the game trophies i.e six (6) python skins (P.Exh.1 and 2). They then arrested all the people in the premises including the appellants and handed them over to the police at Kitale Police Station.

14. Michael Miyonga (PW1), a property agent, was not at the premises at the material time.

He confirmed that he had an office within the premises and on 17th November 2012, he was called to the police station and informed that some people had been found in his office and were arrested. Among those arrested was his uncle, the first appellant. After being handed over to the police, the appellants were apparently charged with the present offences which they each denied.

15. The defence for the first appellant was that he proceeded to a survey office called Mama Mombasa at about 4 .00 p.m on the material date and as he waited for an officer, he was suddenly ordered to sit down and arrested by police officers and others. He was later charged in court along with two other people.

As for the second appellant, his defence was that he was arrested along with the first appellant and another person by police officers who took them to Kitale Police Station.

16. The learned trial magistrate considered the evidence in its totality and with regard to possession of the game trophies found in favour of the prosecution and held that the appellants were in possession of the trophies since they did not deny having been in the lodge at the material time and that they failed to discredit the prosecution evidence.

With regard to dealing in the game trophies, the learned trial magistrate found in favour of the defence for want of sufficient evidence from the prosecution to establish the fact.

17. With regard to making a report to authorized Government Officer, the learned trial magistrate found for the prosecution and held that since the appellants were in possession of the game trophies and did not say that they made the necessary report to any authorized officer then it was taken that they made no such report.

Ultimately, the learned trial magistrate convicted the appellants on the first and third counts and acquitted them on the second count.

18. It is this court's opinion, the evidence by PW2 and PW3 established without any particular dispute that the game trophies were found in a lodge or room in a lodge which was at the time occupied by several people including the appellants. It was however not made clear as to how the trophies were recovered and from whom among the five or six people in the premises. It was also not made clear whether any or all of the people in the premises had necessary knowledge of the presence of the trophies therein. No credible linkage between the trophies and the appellants or any one of them was shown.

19. Whereas officer Dominic (PW2) said that they did not know to whom the trophies belonged, officer Hillary (PW3) said that three (3) men were negotiating prices thereby implying that the trophies belonged to them. He did not however, identify the two appellants as having been part of the three men but said that

they were among the arrested suspects.

It may be noted that Dominic (PW2) indicated that about five (5) to six (6) people were suspected and arrested including the lodge's receptionist.

20. From the foregoing, it was apparent that the evidence with regard to the fact of possession was scanty and unreliable. Possession would invariably involve an element of control of the thing a person is said to have. It is in effect the act of having and controlling property. The right under which a person can exercise control over something to the exclusion of all others.

In this case, that aspect of the offences was not established beyond reasonable doubt against the appellants.

21. It was not clear who among the five or so arrested suspects was in actual possession of the game trophies and whether in fact any of them indeed had them at the place where they were found. The element of constructive possession could not in the circumstances arise for the simple reason that the spot and the manner in which the trophies were found and recovered was uncertain and there was nothing to credibly suggest that the persons found at the material premise including the appellants had the necessary knowledge of the existence of the trophies at that place.

22. This court does not therefore agree with the trial court's finding that the alleged possession of the game trophies by the appellant was proved by the prosecution. The burden to establish the offence lay with the prosecution. It was not therefore the appellant's obligation to prove their innocence by discrediting the prosecution evidence on possession.

Proof of possession meant proof of all the three offences against the appellants and since no such proof was achieved herein it followed that the prosecution failed to prove its case and all charges against the appellants.

23. Consequently, the appellants conviction on the first and the third counts was erroneous and was neither sound nor safe. This fact was noted at the earliest opportunity by the respondent herein and hence its concession of the appeal. It may in passing be mentioned that it was quite intriguing that in this case the police were handed the arrested suspects and the game trophies so as to investigate and possibly arraign the suspects in court. Herein, it would appear that the appellants were charged without any investigations as to whether they had committed any offence. This pointed to lack of seriousness on the part of all those involved in bringing the matter to court i.e. the Kenya Wildlife Services Officials and the Police.

24. In the upshot, this appeal or appeals is/are allowed to the extent that the conviction of the appellants by the trial court is hereby quashed and the sentences set aside. Both appellants shall forthwith be set at liberty unless otherwise lawfully held.

J. R. KARANJA

JUDGE

(Delivered and signed this 4th day of June, 2015)