



REPUBLIC OF KENYA



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**Lemiliko v Republic (Criminal Appeal E059 of 2021)
[2025] KEHC 13817 (KLR) (2 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 13817 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CRIMINAL APPEAL E059 OF 2021
AK NDUNG'U, J
OCTOBER 2, 2025**

BETWEEN

LOKALE LEMILIKO APPELLANT

AND

REPUBLIC RESPONDENT

*(From original Conviction and Sentence in Nanyuki
CM Criminal Case No 1472 of 2017– L. Mutai, CM)*

JUDGMENT

1. The Appellant Lokale Lemiliko (1st accused during trial) and his co-accused were convicted after trial of being in possession of wildlife trophy contrary to Section 95 of the Wildlife Conversation and Management Act (count II). The particulars were that on the 14/09/2017 at around 2030hrs at Kimanjo area Laikipia North within Laikipia County, jointly were found in possession of four pieces of elephant tusks all weighing 14 kilograms which are trophies of critically endangered wildlife species without a permit.
2. Upon conviction, he was sentenced to pay a fine of Kshs.1,000,000/- and five (5) years imprisonment and if unable to pay the fine, to serve an additional one (1) year imprisonment. He was unable to pay the fine hence serving a cumulative sentence of six (6) years imprisonment.
3. Aggrieved by both the conviction and sentence, the Appellant lodged this appeal premised on the following grounds;
 - i. The learned magistrate erred convicting him on a defective charge sheet.
 - ii. The learned magistrate erred charging him yet the particulars of the charge sheet and the evidence tendered did not accord to the relevant provision of law.



- iii. The learned magistrate erred in her findings that he had in his possession wildlife trophies a finding not supported by evidence on record.
 - iv. The learned magistrate erred in her finding on what amounted to possession under the law.
 - v. The learned magistrate failed to consider his defence.
 - vi. The learned magistrate displayed bias against him.
 - vii. The learned magistrate erred by shifting the burden of proof.
4. The appeal was canvassed by way of written submissions. The Appellant's counsel argued that the Appellant was not aware of the presence of the elephant tusks and he was not in physical possession of the same. That he had no knowledge and was not in control of the tusks during the arrest. That the prosecution failed to prove that he was in possession as his role was that of a hired boda boda rider as per his testimony that his services were sought for by the 2nd accused to transport one Hassan. The fact that he was the rider was confirmed by the prosecution's witnesses hence he was not in actual possession of the elephant tusks and neither was he found keeping them. That he was a victim of circumstances since he had no intention of being in possession, he was not in physical possession, he had no control over the tusks hence he had no power over what he had no knowledge of therefore, he was not in possession and therefore the phraseology of the charge sheet was erroneous and defective.
 5. He submitted that the evidence tendered by the prosecution was inadequate and unsatisfactory to form a basis for conviction as his presence at the scene did not amount to him being in possession as he was under an obligation to transport his passenger. That the reasoning by the trial magistrate that the incident happened at night to evade the law was immaterial and points to assumption on part of the trial magistrate. That the trial court also failed to consider that there was a third party named Hassan who was the one with the sack containing the tusks creating loopholes. That the trial court failed to consider his defence as the trial magistrate failed to take into consideration their evidence. The learned magistrate failed to consider that he was rendering his service to be paid at arrival. The court also failed to consider that their phones were confiscated and no report was tendered to prove that they had knowledge of the presence of the tusks. The trial court also assumed that there was common intention between the Appellant and the 2nd accused which was injudicious of the trial court for failing to consider their defence independently and concluding that there was a common intention. That the lack of consideration of his defence points to biasness by the trial court. The court failed to make any reference to Hassan who was mentioned by the Appellant and his co-accused. The court also ignored that there was no prior communication between the Appellant and the alleged buyers. He submitted that the trial court shifted the burden of proof to the Appellant and erred in putting more emphasis on the prosecution as opposed to his defence.
 6. In rejoinder, the respondent's counsel submitted that the Appellant did not demonstrate in his submissions how the charge sheet was defective or how his right to a fair trial was violated. On whether the prosecution proved its case beyond reasonable doubt, he submitted that the Appellant did not dispute that he was arrested at the scene and the tusks were recovered. Further, the facts were clear that he was in possession as he conceded that he was the rider of the motorcycle used to transport the elephant tusks. That his claim that he had no knowledge of the items in the sack is immaterial to the fact that the tusks were in his custody. Further, no permit was produced hence prosecution's case in regards to possession was proved. As to sentence, he submitted that the sentence was lawful as the court considered his mitigation. The court also considered the seriousness of the offence and the principles of sentencing. Further, sentencing is a discretion of the trial court and the Appellant did not raise any ground for this court to interfere with the same.



7. This being the first appellate court, my duty is well spelt out namely to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See *Okeno v Republic* [1972] EA 32.
8. It is therefore opportune to have a recap of the evidence as adduced and recorded at the trial court.
9. The case before the trial court was as follows. PW1, CPL Samuel Kihara testified that on 14/09/2017, they were informed that some people were in possession of wildlife trophies near Kimunyo area and where the sale of the said trophies was to take place. Accompanied by his two other colleagues, they laid an ambush at the said area and at about 6:30pm, a motor cycle registration no. KMCP 615H, green in colour appeared with two people. The Appellant was the rider and he had a pillion passenger who was the 2nd accused at trial. The said 2nd accused was carrying a sack on his laps. The officers stopped them and searched the sack and they recovered four horns which they suspected to be elephant tusks. They were in a sisal sack and another white sack. He prepared an inventory which was signed by the Appellant and his co-accused. They weighed the horns which were 14kgs and prepared a certificate. He stated that he had been informed about the registration number of the motor cycle. The accused did not have a permit. He identified the four tusks, the sisal and white sacks and the motor bike. He also identified the weighing certificate and the inventory.
10. On cross examination he testified that the tusks were with the 2nd accused on his laps. He was informed of the route the suspects were to use and he did not know whether there was a buyer and that he never took the photographs. He testified that he did not know someone by the name Lenyausi and he did not know whether phones were used in the transaction.
11. PW2, Ranger Stanley Lekalale, stated that he accompanied PW1 to the scene. A motor cycle approached and stopped and they arrested two people. PW1 recovered a sack and upon searching it, it had suspected elephant tusks. The tusks were in a brown sack but stuffed in a white sack which he identified before the court. He also identified the tusks. An inventory was prepared and a weighing certificate which was signed by the Appellant and his co-accused. The 2nd accused, a pillion passenger was carrying the said sack. The Appellant was the rider and the 2nd accused carried the tusks in the sack. They did not have a permit.
12. On cross examination, he stated that they arrested the two at about 7-8:00pm. He denied knowing Lenyausi and that no phones were recovered from the Appellant and his co-accused.
13. PW3, Ranger Josphat Mengich testified that they laid an ambush at a route near Kimanju and they waited for motor cycle registration number KMCP 615H following information that it was ferrying ivory tusks. At around 8:30pm, the motor cycle arrived and it was stopped by PW1. The Appellant was the rider and his pillion passenger (2nd accused) was carrying a brown sisal sack and inside the sack there were two tusks and the white sack had two tusks as well. He identified the two sacks, the four tusks and the motor bike. He stated that the Appellant and his co-accused did not have a permit.
14. On cross examination, he stated that he did not know the informer and that he did not know one Nyeusi. Photographs were not taken and the phones were handed over to the police.
15. PW4 PC Kipkorir Sang testified on behalf of the Investigating Officer who was on transfer. He produced the white and brown sacks as Pexhibit 1 and 2, the four elephant tusks as Pexhibit 3a-d, the inventory which was signed by both accused persons and the officers as Pexhibit 5, a weighing certificate which was signed by the accused and the officers as Pexhibit 6, exhibit memo forwarding the tusks to National Museum of Kenya Pexhibit 7 and the motor cycle as Pexhibit 4.



16. On cross examination, he testified that he did not investigate the matter and did not interrogate the accused persons. He stated that the former Investigating Officer never recorded statement. He stated that the exhibit memo was not dated but had stamp but it was sent to Kenya Museum on 26/07/2017 but the date of the receipt was not clear.
17. PW5, Esther Nguta was a Research Scientist from National Museum of Kenya. She testified that on 29/09/2017, she received four exhibits and she was requested to identify them. Using morphological analysis, her findings were that they had a diamond granite found only in elephant ivory. They were also compared with other ivories at the Museum. She testified that exhibit 1 and 3 matched and could be from the same elephant. Her conclusion was that the 4 tusks were elephant tusks. She produced her report as Pexhibit8.
18. On cross examination, she testified that she received the exhibit memo on 27/09/2017 which she signed on the same date. That the report did not contain her credentials and the method that she used. She stated that she used microscope and measurement in analysis and she did not extract any specimen from the exhibit. That she did not do DNA since the methods she used were satisfying. She stated that the exhibits were not in court but she identified the photographs.
19. The Appellant in his sworn defence testified that on 14/09/2017, he was at home when Hassan went and requested for a ride to Kimanjo. Hassan was brought by his co-accused. That he did not have elephant tusks and he never transported them. Hassan was the one who had a luggage and he did not know what it was. They found a motor vehicle which was stuck on their way and they helped in pushing it. Hassan knew the occupants and they were asked into the vehicle. That he took his co-accused with him as it was at night. He had seen Hassan prior the incidence and he was with them at the time of the arrest. They were not photographed and ownership of motor vehicle was not proved.
20. On cross examination, he testified that he rode the subject motor cycle and he had a luggage which became wanted.
21. He testified on re-examination that he was not arrested with the luggage and it was Hassan who had it. He was arrested not on the motorbike.
22. I have had occasion to read and consider the evidence as recorded at the trial court. In doing so am alive to the fact that I did not see neither hear the witnesses testify and have given due allowance for that fact. I have had due regard to the learned submissions filed, case law cited and the applicable law.
23. The only issue for determination is whether the case against the Appellant was proved to the required standard.
24. In embarking on the voyage to find answers to this issue, am reminded of the settled law that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilt beyond reasonable doubt. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty. (See *Ozaki and another v The State, Uganda v Sebyala & Others*, -Case No. 130 of 1988. {1969} EA 204).
25. The onus on the prosecution to prove the charge against the accused beyond reasonable doubt never shifts and there is no onus on the accused to prove his innocence. The evidence must be considered in its totality. In order to convict the evidence implicating the Accused must be certain and conclusive leaving no room for speculation or assumptions and thus erasing any doubts. Should a scintilla of doubt exist, the benefit as per the law goes to the accused.



26. The Appellant was accused of contravening the provisions of section 95 of the *Wildlife Conservation and Management Act* which provides thus;

Any person who, without a permit or exemption granted under this Act in relation to a species not specified under section 92—

- (a) kills or injures, tortures or molests, or attempts to kill or injure, any wildlife species;
- (b) deals in a wildlife trophy;
- (c) deals in a live wildlife species;
- (d) is in possession of a wildlife trophy or live wildlife species; or
- (e) manufactures an item from a wildlife trophy, commits an offence and shall be liable on conviction to a fine of not less than one million shillings or a term of imprisonment of not less than twelve months or to both such fine and imprisonment.

27. The above section provides for distinct offences and the charge did not indicate which sub-section the Appellant contravened. However, the particulars were clear that he was facing an offence of being in possession of wildlife trophies.

28. To prove the offence, the prosecution had a duty to prove that the Appellant was in possession of the wildlife trophy without a permit. On the question of possession, it involves having a degree of physical control over the trophies, with the person in control knowing that the trophies are in his control.

29. This appeal turns on the question of what constitutes possession and whether on the evidence at trial, the prosecution demonstrated that the Appellant had possession within the parameters defined in law of wildlife trophy without a permit.

30. As to what constitutes possession, I will not re-invent the wheel on this well-trodden path. In *Peter Mwangi Kariuki v Republic* [2015]eKLR Mativo J stated;

“In my view, possession includes two elements; namely being in physical control of the item and knowledge of having the item. To be guilty of possession, an accused person must be shown to have knowledge of two things, namely, that the accused knew the item was in his custody and secondly, he knew that the item in question was prohibited. A person has possession of something if the person knows of its presence and has physical control of it, or has the power and intention to control it. The evidence adduced is that the appellant pulled a sack from under the seat and removed the tusks and quoted the price of Ksh.3,000/= per kg. The witnesses were acting on information he was selling the items and upon introducing themselves he availed the items and discussion on the price ensued. I am persuaded that possession was proved to the required standard because the appellant pulled the sack containing the tusks from under the seat in a manner that suggested he had custody and control of the same”.

31. The evidence before the trial court was that the Appellant was the rider of motor cycle registration number KMCP 615H. His co-accused was carrying a sack on his laps which contained the elephant tusks. The tusks were tested by PW5 and they were found to be indeed from elephant. The Appellant’s counsel argued that the Appellant was just a rider of the motor cycle hence he was not in control of the elephant tusks nor did he have the knowledge that there were elephant tusks. The Appellant in his



defence also testified that one Hassan was carrying the said sack which contained the elephant tusks and the said Hassan had hired him for transportation.

32. It is confirmed by prosecution witnesses that the Appellant was the rider of the subject Motor Cycle while the 2nd Accused was his pillion passenger and who was holding the tusks in a sack. The defence by the Appellant was that he was a hired rider with no knowledge of the contents of what his passenger was carrying.

33. In addressing that issue, the learned Magistrate expressed herself as follows;

‘From the evidence of the above expert it is clear that the four tusks recovered with the accused persons were indeed four elephant tusks. They were weighed in the presence of accused persons and certificate prepared to that effect which the accused participated in signing it. From the foregoing I was left convinced that the accused were in actual possession of the 4 ivory tusks which they transported using the said motorbike in which the 1st accused was the rider and the 2nd accused a pillion passenger and who carried the said luggage.

The two were moving at night after 8.30pm which time is indeed suspect. It is the belief of this court that both accused knew and were knowledgeable enough of what they carried with them at night. They were moving at night because they knew that what they were doing was against the law and that the time would presumably favor them.

The fact that that motorbike belonged to 1st accused was not denied. 1st accused himself admitted in his defence owning the motorbike. 2nd accused in his evidence also confirmed that the motorcycle was owned by the 1st accused person”.

34. With profound respect, the conclusions by the learned Magistrate were heavily laced with presumptions and speculation not supported by evidence, at least in so far as the Appellant was concerned. This court takes judicial notice as a matter of common notoriety of the now thriving boda boda business in the country where riders of motor cycles are hired for reward to transport both people and goods. The motor cycles operate during the day and at night. Whereas it is reasonable to infer that the Appellant’s movement at night (and I note it was early evening) with a passenger carrying contraband may be suspicious, suspicion alone cannot be the basis of a conviction.

35. The Court of Appeal while addressing the law on the matter in the case of *Joan Chebichii Sawe vs Republic* [2003] eKLR held that:

“The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt... Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”

36. The Appellant was not holding the contraband items. He had a pillion passenger who was holding the same. The only person who could have satisfactorily connected the luggage to the Appellant was the pillion passenger who was in actual possession. Tellingly, no evidence at all was tendered in support of a common intention between the Appellant and his pillion passenger in perpetration of the crime. There was no connection established between the two either through calls, messages or otherwise to build a case of a common intention.

37. There therefore arises real doubts as to whether the Appellant committed the offence or not. Such doubts must in law be resolved in favour of the Appellant.



38. With the result that the appeal herein has merit and succeeds in its entirety. I quash the conviction and set aside the sentence imposed on the Appellant. He is to be set at liberty forthwith unless otherwise lawfully held.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 2ND DAY OF OCTOBER, 2025.

A.K. NDUNG’U

JUDGE

