



**Republic v Mwanja & another (Criminal Case E487 of 2023)
[2025] KEMC 43 (KLR) (13 March 2025) (Judgment)**

Neutral citation: [2025] KEMC 43 (KLR)

**REPUBLIC OF KENYA
IN THE MAKINDU LAW COURTS
CRIMINAL CASE E487 OF 2023
YA SHIKANDA, SPM
MARCH 13, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

JOSEPH MUTIE MWANIA 1ST ACCUSED

STEPHEN MUSEMBI WAMBUA 2ND ACCUSED

JUDGMENT

The Charge

1. Joseph Mutie Mwanja and Stephen Musembi Wambua (hereinafter referred to as the 1st and 2nd accused persons respectively) are jointly charged with the offence of Dealing in wildlife trophy without a permit contrary to section 92(2) of the *Wildlife Conservation and Management Act*. The particulars of the offence are that on 27/5/2023 at Julia Patra Investments Guest house in Kambu town within Makueni County, the accused persons with others not before court, were found in possession of two elephant tusks weighing 12 kgs, with a street value of one million, without a permit from the Director General of Kenya Wildlife Service. When the plea was taken, the accused persons pleaded not guilty. The matter was then set down for hearing. On 31/12/2024, the court found that the accused persons had a case to answer and proceeded to place them on their defence.

The Evidence

2. The prosecution case was partly heard by another Magistrate who was subsequently transferred. Upon taking directions under section 200(3) of the *Criminal Procedure Code*, I took the evidence of the last two prosecution witnesses.



The Prosecution Case

3. The prosecution called a total of five (5) witnesses in a bid to prove their case against the accused person. PW 1 Ranger David Chomba testified that he worked with KWS at Komboyo platoon. That on 27/5/2023 he was on duty when at 9:30 pm, his in-charge one Duncan Osore informed them that he had an intelligence report of a suspected case of trophy dealing at Kambu town. The officer in-charge asked the officers to follow up. The officers proceeded to Kambu town and arrived at about 10:30 pm. They met their colleagues who were based at Kambu. The officer in-charge of Kambu informed his colleagues that the suspects were at Julia Patra & Sons Investments building. The officers proceeded to the building and knocked at the door. A person opened the door whereupon the officers entered.
4. There were two men in the room. Upon conducting a search in the room, bags were recovered from under the bed. One of the bags contained what was believed to be two elephant tusks. The suspects were arrested and taken to Mtito Andei police station. PW 1 identified the accused persons as the suspects that they had arrested. PW 2 Ranger Jael Cheron and PW 3 Ranger Esther Aminga gave testimonies that were similar to that of PW 1 as far as the operation and recovery was done. PW 4 Corporal Duncan Osore testified that he worked with KWS. That on 27/5/2023 at about 9:30 am he received information from an informant that there were people at Kambu town who were in possession of elephant tusks at a certain guest house and were looking for a buyer.
5. PW 4 informed PW 1 and PW 3 who was at Kambu. PW 4 and PW 1 together with their driver left Mtito Andei and proceeded to Kambu area. They met PW 2 and PW 3. After a briefing, the officers proceeded to a guest house where the suspects were said to be. A search was conducted whereupon two pieces of what was believed to be elephant tusks were found. PW 4 took custody of the tusks. He later took them to the National Museums of Kenya for analysis. The tusks were produced in evidence alongside other items. PW 4 identified the accused persons as the suspects that were arrested on the material day. PW 5 Dr. Ogeto Mwebi testified that he was a Scientist at the National Museums of Kenya. He specializes in identifying animal remains. The witness stated that he received two pieces of animal remains from a KWS officer for purposes of identification. Upon analysis, he established that the two pieces were elephant tusks. PW 5 prepared a report which he produced in evidence.

The Defence Case

6. Upon being placed on their defence, the 1st accused person gave a sworn testimony without calling any other witness whereas the 2nd accused person gave an unsworn testimony without calling a witness. The 1st accused person testified that he was a charcoal burner at Kishushe ranch in Taita Taveta County. That on 27/5/2023 he was at Kishushe ranch with the 2nd accused person who is his brother when at about 9:00 am a motor vehicle appeared at the ranch. Four people alighted from the motor vehicle and went to where the accused persons were. The people posed as buyers of charcoal and wanted to buy the charcoal at a cheaper price. The accused persons declined to sell the charcoal stating that the same had already been booked by a customer.
7. The people then asked the accused persons whether they had a permit allowing them to deal in charcoal. They introduced themselves as KWS officers and stated that the accused persons were under arrest. The KWS officers conducted a search at the scene and took away some implements. The accused persons were arrested and taken to Komboyo KWS office. The investigating officer entered a certain room and returned with two elephant tusks. He ordered the accused persons to hold the tusks. The tusks were later placed in the sacks that had been taken from the accused person's ranch. The accused persons were then taken to Mtito Andei police station and were later charged. The 1st accused person



denied having committed the offence. The 2nd accused person gave a statement that was similar to the testimony of the 1st accused person.

Main Issues for Determination

8. In my view, and in consideration of the charge, the main issues for determination are as follows:
 - i. Whether the accused persons were found dealing in wildlife trophy;
 - ii. Whether the trophy was of an endangered species and in particular elephant tusks;
 - iii. If (i) and (ii) above are in the affirmative, whether the accused persons had a permit;
 - iv. Whether the prosecution has proven its case against the accused persons to the required standard.

Submissions by the 1st Accused Person

9. At the close of the defence case, the 1st accused person filed written submissions. The 1st accused person submitted that the prosecution evidence was full of contradictions, inconsistencies and uncorroborated evidence. That the prosecution witnesses did not prove their allegations beyond reasonable doubt. The 1st accused person pointed out that the prosecution witnesses could not confirm the room number where the accused persons were allegedly arrested and did not produce any receipt from the guest house to prove that the accused persons had rented the room. That no photographs of the scene were produced in evidence. The 1st accused person argued that no person from the guest house was called as a witness to confirm that the accused persons were at the guest house on the material day.
10. The 1st accused person further pointed out that the other arresting officers indicated that upon arrest, the accused persons were taken directly to Mtito Andei police station whereas the investigating officer stated that the accused persons were first taken to Komboya KWS office before being taken to the police station. That the tusks were not dusted for fingerprints to confirm who the owner was. The 1st accused person argued that the duty was upon the prosecution to prove their case beyond reasonable doubt and that they had failed to rebut his defence. That the investigating officer stated that he prepared an exhibit memo but the same was not produced in evidence. It was submitted by the accused person that an accused person should only be convicted on the strength of the prosecution evidence and not on the weakness of his defence. The 1st accused person contended that the prosecution evidence was untrustworthy and urged the court to set him free.

Submissions by the 2nd Accused Person

11. The 2nd accused person's submissions were similar to those that were made by the 1st accused person. I need not reproduce them.

Analysis And Determination

12. I have carefully considered the evidence on record as well as the law applicable. I have further considered the submissions made by the accused persons. Section 92(2) of the [Wildlife Conservation and Management Act](#) provides:

“A person who, without permit or exemption issued under this Act, deals in a wildlife trophy, of any critically endangered or endangered species as specified in the Sixth Schedule or listed



under CITES Appendix I, commits an offence and shall be liable upon conviction to a term of imprisonment of not less than seven years.”

13. Under the sixth schedule of the Act, the African elephant is listed as an endangered species.
14. Section 3 of the governing Act defines the term “deal” as follows:
 - a. to sell, purchase, distribute, barter, give, receive, administer, supply, or otherwise in any manner deal with a trophy or live species;
 - b. to cut, carve, polish, preserve, clean, mount or otherwise prepare a trophy or live species;
 - c. to transport or convey a trophy or live species;
 - d. to be in possession of any trophy or live species with intent to supply to another; or
 - e. to do or offer to do any act preparatory to, in furtherance of, or for the purpose of, an act specified above;
15. Section 3 of the Act further defines the phrase “endangered species” as any wildlife specified in the Fourth Schedule (ought to be the sixth schedule) of the Act or declared as such by any other written law or any wildlife specified in Appendices of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). The same provision defines “government trophy” as a trophy declared to be a Government trophy by or under the provisions of the Act.
16. Going by the definition of “deal” as provided in the Act, I find that the evidence does not disclose any act of dealing with wildlife trophy. The investigating officer testified that he was informed that the accused persons were looking for a buyer. The person who gave the information to the investigating officer was not called to testify. Furthermore, the investigating officer did not establish whether indeed, the accused persons were looking for a buyer as was reported to him. In the circumstances, the evidence that the accused persons were looking for a buyer is hearsay and cannot be relied upon. Mere possession of a wildlife trophy does not amount to dealing. The possession must be accompanied by an intention to supply to another. The prosecution must prove the intention to supply. Assumptions cannot suffice.
17. In my view, given the prosecution evidence on record, the accused persons ought to have been charged with the offence of being in possession of a wildlife trophy without a permit or exemption contrary to section 92(4) of the *Wildlife Conservation and Management Act*, which provides that:

“Any person without permit or exemption issued under this Act is in possession of any live wildlife species or trophy of any critically endangered or endangered species as specified in the Sixth Schedule or listed under CITES Appendix I, commits an offence and shall be liable upon conviction to a fine of not less than three million shillings or a term of imprisonment of not less than five years or both such fine and imprisonment.”

Nevertheless, the mix up is not fatal to the prosecution case.
18. The *Wildlife Conservation and Management Act* does not define the term “possession.” The definition is to be found in section 4 of the Penal code which provides as follows:
 - (a) “be in possession of” or “have in possession” includes not only having in one’s own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person;



- (b) if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them."

19. In my opinion, for the offence herein to be proven, the prosecution must establish the following elements:
- a. The accused persons were found in possession of Elephant tusks;
 - b. The Elephant is an endangered wildlife species;
 - c. The accused persons did not have a permit or exemption.
20. The Elephant tusks were produced in evidence and according to the report by PW 5 Dr. Ogeto Mwebi, the items were Elephant tusks. The testimonies of PW 1 to PW 4 were generally consistent and corroborative on the fact that the accused persons were found in a rented room at Kambu town and in possession of the elephant tusks, among other things. On the other hand, the accused persons denied having been found in a room at a guest house and further denied having been found in possession of the elephant tusks. What is to be determined is whether the prosecution evidence proves beyond reasonable doubt that the accused persons were found at the guest house and in possession of the elephant tusks.
21. PW 1 Ranger David Chomba testified that he was given the information on the accused persons at about 9:30 pm. That the KWS officers left for Kambu at about 10:00 pm and arrived at about 10:30 pm. PW 2 Ranger Jael Cheroni and PW 3 Ranger Esther Aminga also stated that the accused persons were arrested at about 10:30 pm. However, when PW 3 was cross-examined by the defence, she stated that the accused persons were arrested at about 11:00 am. The evidence of the investigating officer also indicates that the accused persons were arrested in the morning. PW 1 testified that when they found the bags/sacks under the bed, the officers asked the accused persons to pull the bags out. That the accused persons pulled out and opened the bags. PW 2 and PW 3 gave similar testimony. However, the investigating officer who was also present at the scene testified that it was PW 3 who pulled the bags from under the bed and that it was the KWS officers who opened the bags.
22. PW 1, PW 2 and PW 3 testified that the accused persons were taken directly to Mtito Andei police station from the scene and that they were not taken to Komboyo KWS station. On the other hand, the investigating officer stated that from the scene, the accused persons were taken to Komboyo KWS office for interrogation, before being taken to Mtito Andei police station. The investigating officer testified that he did not put a mark on the tusks for purposes of identification. That he prepared an exhibit memo and took the tusks to the National Museums of Kenya for analysis. According to the investigating officer, the tusks were taken to the Museum on 7/6/2023. The exhibit memo was not produced in evidence and no explanation was given for that failure.
23. PW 5 testified that he received two tusks from a KWS officer on 7/6/2023. That the tusks were marked A1 and A2. The witness could not recall the name of the officer who took the tusks to him and neither did he record the name in his report. The investigating officer stated that he did not mark the tusks for identification. He did not state that he marked them before taking them for analysis. As already indicated, the exhibit memo was not produced in evidence. It cannot be ascertained whether the tusks marked A1 and A2 were the same tusks that were allegedly recovered from the accused person and taken to PW 5 for analysis. Furthermore, no inventory of the recovered items was prepared. An inventory is important because it identifies what is recovered from a suspect at a given time. There was also no



search certificate to confirm when and where the search was conducted. In other words, the arresting officers did not document the scene at all.

24. I have considered the accused person's defence. The gist of their defence is that they were arrested at Kishushe ranch in Taita Taveta County on allegations of burning charcoal without authority. They denied having been arrested in Kambu town at a guest house. The defence of the accused persons was evident throughout the trial as can be inferred from the cross-examination of the prosecution witnesses. It cannot therefore be said that their defence was an afterthought. The duty is on the prosecution to prove its case against the accused persons beyond reasonable doubt. In *Philip Nzaka Watu v Republic* [2006] eKLR, it was held that to find a conviction in a Criminal case, the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt. On proof beyond reasonable doubt, the court stated in *Stephen Nguli Mulili v Republic* [2014] eKLR:

“It is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of *DPP V WOOLMINGTON*, (1935) UKHL 1 where the court eloquently stated that the “golden thread” in the “web of English common law” is that it is the duty of the prosecution to prove its case. The Kenyan Courts have upheld this position in numerous cases. See *Festus Mukati Murwa V R*, [2013] eKLR.”

25. In the famous case of *Miller v Ministry of Pensions* [1947] 2 All ER 372, Lord Denning stated with regard to the degree of proof beyond reasonable doubt:

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

26. In *Bakare v State* (1987) 1 NWLR (PT 52) 579, the Supreme Court of Nigeria emphasized on the phrase proof beyond reasonable doubt, stating:

“Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability.” (Emphasis mine)

27. It matters not that the accused persons may not have told the truth. What matters is whether there is sufficient evidence against them. The question that I need to pose is this; is there sufficient evidence to rebut the contention by the accused persons that they were arrested at Kishushe ranch on allegations of burning charcoal without a permit? If the prosecution evidence is anything to go by, it would have been expected that the prosecution adduces evidence to prove beyond reasonable doubt that the accused persons were found at a guest house in Kambu. It is common knowledge that records of lodgers are kept at the guest house. No such records were produced in evidence to prove that the accused persons had rented a room at the guest house at the material time.



28. Even if no records were being kept at the guest house, no employee of the guest house was called to confirm that indeed the accused persons had rented a room at the premises. Some prosecution witnesses stated that they found the owner of the guest house or whoever was in charge and even sought her permission to enter the room where the accused persons were said to be. Why did they not call the person in charge as a witness to confirm the presence of the accused persons at the guest house? With the evidence on record, it cannot even be ascertained that the guest house exists. The investigating officer was one of the arresting officers. He had every opportunity to gather as much evidence as possible. The record indicates that the accused persons were brought to court but did not take plea until after 10 days. They were remanded in police custody for 10 days to enable the investigators conclude investigations.
29. There is no indication that any further evidence was obtained during the 10 days in police custody. It is not known what the KWS officers or the police were doing with the accused persons during the 10 days. No evidence at all was adduced on what was done during the 10 days. The investigating officer did not bother to get the relevant records from the guest house or even a person to attend court and confirm that the accused persons had been accommodated at the guest house during the material time. In my view, given the pitfalls in the prosecution case, I find that the evidence does not irresistibly point to the guilt of the accused persons. It is not clear whether the accused persons were arrested at night or during the day, the identity of the elephant tusks allegedly recovered from the accused persons is not clear.
30. There is no cogent evidence to prove that the accused persons were found at the alleged guest house. I have no reason to disregard the accused persons' defence. There is room for reasonable doubt and as a matter of law, the doubt must be resolved in favour of the accused persons. What we have on record is mere suspicion against the accused persons. In the case of *Joan Chebichii Sawe v Republic* [2003] eKLR, the Court of Appeal held thus:

“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. As this court made clear in the case of *Mary Wanjiku Gichira v Republic* (Criminal Appeal No. 17 of 1998 (unreported), Suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence”

Disposition

31. In view of the foregoing, I find that the prosecution has failed to prove its case against the accused persons beyond reasonable doubt. Consequently, I find and hold that both accused persons are Not Guilty of the offence of Dealing in wildlife trophy without a permit or other lawful exemption contrary to section 92(2) of the *Wildlife Conservation and Management Act*. As the glove does not fit, I proceed to Acquit them accordingly. The accused persons be released from custody forthwith, unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 13TH DAY OF MARCH, 2025.

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.

HON Y.A. SHIKANDA	0
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