Republic v Lemtambo (Criminal Case E086 of 2022)
[2025] KEMC 70 (KLR) (17 April 2025) (Ruling)

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REPUBLIC OF KENYA

IN THE MAKINDU LAW COURTS

CRIMINAL CASE E086 OF 2022

YA SHIKANDA, SPM

APRIL 17, 2025

BETWEEN

REPUBLIC ..... PROSECUTION

AND

JOHN SAITOTI LEMTAMBO ..... ACCUSED

RULING

The Charge

1. John Saitoti Lemtambo (hereinafter referred to as the accused person) is charged with two offences under the *Wildlife Conservation and Management Act*. In the first count, the accused person is charged with the offence of entering a National Park without a permit contrary to section 102(1)(a) of the *Wildlife Conservation and Management Act*. The particulars of the offence are that on 27/8/2017 at Lengolong area of Chyulu National Park in Kibwezi Sub-county, the accused person was jointly with two others not before court and another already convicted, found in the aforesaid Park without authorization. The 2nd count is that of Dealing in wildlife species meat without a permit contrary to section 98(1) as read with section 105 of the *Wildlife Conservation and Management Act*. The particulars of the offence are that on the date and place aforementioned, the accused person was jointly with two others not before court and another already convicted, found dealing with meat of a Zebra weighing approximately 40kgs ferried in motor vehicle registration number KAZ 557M, without a permit.

The Evidence.

2. At the close of the prosecution case, six (6) witnesses had testified. The brief facts of the prosecution case are that on 26/8/2017 Community Rangers received information that there were suspected Poachers in Chyulu Hills National Park. That the Poachers were in a motor vehicle. The Community Rangers proceeded to the park and lay in wait. They waited for the Poachers all night long. On

27/8/2017 at about 5:00 am, the Rangers saw a motor vehicle approaching towards their direction. When the motor vehicle got close, the Rangers placed a roadblock. The occupants of the motor vehicle opened the doors and started running away. Three suspects managed to escape but one was apprehended. The Rangers inspected the motor vehicle and found a fresh Zebra carcass.

3. The suspect who was apprehended was interrogated. He mentioned his accomplices, with one of them being Saitoti. One of the Rangers took photos of the motor vehicle, the carcass and other recovered items. The items as well as the suspect were taken to Mtito Andei police station. Later on 27/1/2022 the accused person herein was arrested in connection with another similar case. The arresting officer was informed that the accused person was wanted in respect of a similar incident that occurred in 2017. The accused person was charged in respect of this matter.

Main Issue for Determination.

4. The main issue for determination at this stage is whether the prosecution has established a *prima facie* case to warrant the accused person to be placed on his defence in respect of the offences.

Submissions by the Accused Person

5. At the close of the prosecution case, the accused person filed written submissions. The accused person submitted that the prosecution case was replete with glaring inconsistencies and uncorroborated evidence. The accused person argued that the prosecution ought to prove its case beyond reasonable doubt. That the accused person should only be convicted on the strength of the prosecution evidence and not on the weakness of his defence. The accused person submitted that the evidence of PW 1 was suspicious and fictitious. That the witness did not explain well how he knew the accused person. The accused person argued that PW 1 claimed that there was day light at 5:00 am yet it is usually dark at such a time. That PW 1 could not recognize someone in the circumstances.

6. The accused person pointed out that PW 1 stated that the offending motor vehicle was driven to the police station by the suspect who was apprehended but the other eye witness stated that the motor vehicle was driven by their colleague. That PW 1 stated that they left the scene between 11:00 am and 12:00 noon but his colleague stated that they left the scene at 7:00 am. The accused person argued that the suspect who allegedly mentioned the name Saitoti was not called to testify and confirm that the Saitoti he mentioned was the accused person herein. The accused person submitted that he was not found with the meat in issue. That the investigating officer had nothing to link the accused person to the offence. The accused person pointed out that instead of taking meat for analysis, photos were taken to the Scientist. That there is no evidence to connect the accused person to the motor vehicle in issue. The accused person further pointed out that the witnesses gave conflicting testimony with regard to the time at which they arrived at Mtito Andei police station with the suspect that had been apprehended. That the prosecution case was based on suspicion and hearsay. The accused person urged the court to find that he had no case to answer and proceed to set him free.

Analysis and Determination

7. I have carefully considered the evidence on record as well as the law applicable. I have further considered the submissions made by the accused person. A *prima facie* case is defined in the Mozley and Whiteley's *Law Dictionary* 11th Edition as:

> "A litigating party is said to have a *prima facie* case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A *prima facie* case then is

one which is established by sufficient evidence and can be overthrown only by rebutting evidence adduced by the other side." Emphasis added

8. The locus classicuson what constitutes a *prima facie* case is to be found in the celebrated case of *Ramanlal Trambaklal Bhatt v R* [1957] EA 332at 334 and 335, where the court stated as follows:

> "Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a *prima facie* case is made out if, at the close of the prosecution, the case is merely one "which on full consideration might possibly be thought sufficient to sustain a conviction." This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is "some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence". A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence..... It may not be easy to define what is meant by a "*prima facie* case", but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence." (Underlining mine)

9. In the authority of *Ronald Nyaga Kiura v Republic* [2018] eKLR, the court observed that a *prima facie* case is established where the evidence tendered by the prosecution is sufficient on its own for a court to return a guilty verdict if no other explanation in rebuttal is offered by an accused person. In my considered view, for the court to find that a prima facie case has been made out against an accused person, the prosecution must have established the following:

   a. That the offence complained of was indeed committed; and

   b. That the evidence links the accused person to the offence complained of.

10. It is my further opinion that in order to show that the offence complained of was indeed committed, the prosecution must establish the key ingredients of the offence. A *prima facie* case is an early screen for a court to determine whether the prosecution can go forward to try the accused person fully for the crime. As such, the standard of proof that the prosecution must satisfy at the *prima facie* case stage is lower than that for proof that the accused is guilty, that is, lower than proof beyond reasonable doubt. In order to establish a *prima facie* case, a prosecutor need only offer credible evidence in support of each element of a crime.

11. The test in determining a *prima facie* case was laid down in *Republic v Galbraith* [1981] WLR 1039, in the following words:

   1. If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case;

   2. The difficulty arises where there is some evidence, but it is of a tenuous character, for example because of interment weakness or vagueness or because it is inconsistent with other evidence;

      (a) where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.

      (b) where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witnesses' reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts

there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.

The Law

12. The accused person faces two counts under the *Wildlife Conservation and Management Act*. Section 102(1) of the said *Act* provides in part as follows:

> " Any person who without a licence or permit of the Service in respect of any national park, national reserve, wildlife sanctuary or marine reserve, or, without authorization from the authority responsible for any other protected area as the case may be—
>
> a. enters or resides in a protected area otherwise than in the course of his duty as an authorized officer or a person lawfully employed in the protected area, as the case may be;
>
> commits an offence and is liable on conviction to a fine of not less than two hundred thousand shillings or to imprisonment of not less than two years or to both such fine and imprisonment."

13. In my view, the ingredients of the offence and which the prosecution must prove are:

a. The accused person entered Chyulu Hills National park;

b. The accused person was not in the course of his duty as an authorized officer or a person lawfully employed in the protected area;

c. The accused person entered the National park without a licence or permit issued by Kenya Wildlife Service or any authorization.

Section 98(1) of the same *Act* provides:

> " Any person who, without permit or exemption issued under this Act, deals in the carcass or meat of any wildlife species commits an offence and shall be liable on conviction, to imprisonment for a term of not less than three years."

14. The key elements of the offence would be:

i. The accused person was found dealing in the carcass or meat of a wildlife species;

ii. The accused person did not have a permit or exemption from Kenya Wildlife Service.

The term "deal" is defined under section 3 of the *Wildlife Conservation and Management Act* to mean:

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.

Analysis

15. It is not in doubt that the accused person was not arrested while in the national park. The prosecution case is that the accused person escaped when the suspects were intercepted by the community Rangers. In order to link the accused person to the offences herein, there must be acceptable evidence to show that the accused person was positively identified as one of the suspects who fled from the scene. In the case of *Anzaya v Republic* [1986] KLR 236, the Court of Appeal sitting at Kisumu held that there is a danger in relying solely on the evidence of a single witness regarding identification, particularly when the identification is said to have occurred at night. In *Mwenda v Republic* [1989] KLR 464, the Court of Appeal held that whenever the case against an accused person depends wholly or substantially on the correctness of one or more identifications of the accused, special need for caution before convicting in reliance on the correctness of the identification is necessary.

16. The Court of Appeal in the case of *Marube & Another v Republic* [1986] KLR 356 observed that in the evaluation of the evidence of the identifying witness, the court must ensure beyond all reasonable doubt that the witnesses were honest and unmistaken about their identification. In *Kiarie v Republic* [1984] KLR 739, the Court of Appeal was of the opinion that where the evidence relied upon to implicate an accused is entirely of identification, that evidence should be watertight to justify a conviction. A similar observation was made by the Court of Appeal in the case of *Wamunga v Republic* [1989] KLR 424 where the court held as follows:

> "Where the evidence against an accused is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction ".

17. In the English case of *R v Turnbull &Others*, [1976] 3 ALL ER 549,it was held that the factors for consideration by the court on the question of identification are as follows:

    i. The distance between the witness and the suspect when he had him under observation;

    ii. The length of time the witness saw the suspect; and

    iii. The lapse of time between the date of the offence and the time the witness identified the suspect to the police.

18. Further in the case of *Simiyu & Another v Republic* [2005] I KLR 192 at page 195 the Court of Appeal observed:-

> "In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought to be given first of all by person or persons who gave the description and purported to identify the accused and then by the persons or person to whom the description was given. The omission on the part of the complainants to mention their attackers to the police goes to show that the complainants were not sure of the attackers' identity."

19. Similarly, in the case of *Francis Kariuki Njiru & 7 others v Republic* [2001] eKLR,the same court held:

> "The law on identification is well settled as this court has from time to time said that the evidence relating to identification must be scrutinized carefully and should only be accepted

and acted upon if the court is satisfied that the identification was positive and free from the possibility of error. The surrounding circumstances must be considered. Among the factors the court is required to consider is whether the eye witnesses gave a description of his or her attacker or attackers to the police at the earliest opportunity."(Emphasis mine)

20. Was the accused person positively identified and placed at the scene? The only eye witnesses who testified were PW 1 and PW 2. The evidence of PW 1 was that they laid in wait at the National park overnight. According to PW 1, the motor vehicle carrying the suspects appeared at 5:00 am. Immediately the motor vehicle was intercepted, the occupants opened the doors and ran away. That the witnesses managed to apprehend one of the suspects. When PW 1 was examined by the court, he stated that he had known the accused person prior to the incident. However, when PW 1 gave his testimony in-chief, he did not mention that the accused person was one of the suspects who escaped from the scene. He did not mention that he saw and was able to identify the accused person at the scene. PW 1's evidence in-chief was that it was the suspect they apprehended who mentioned his accomplices and one of them was Saitoti.

21. When PW 1 was cross-examined by the accused person, he stated that he saw the accused person at the scene. In further cross-examination by the accused person, it emerged that PW 1 did not indicate his statement to the police that he saw the accused person. His statement merely indicated that he could identify the suspects who escaped. PW 1 stated in examination by the court that he had known the accused person before as John Saitoti. The court wonders why he did not give this name to the police if at all he positively identified the accused person as one of those who escaped from the motor vehicle. The only explanation would be that PW 1 was not sure of the identities of those who allegedly escaped. That is why he even asked for their identities from the suspect who was apprehended. Furthermore, the allegation that the suspect who was apprehended mentioned "Saitoti" is not sufficient to link the accused person to the offence. I say so because the suspect was not called to testify to confirm that the Saitoti he mentioned was the accused person herein. Saitoti is a common name which does not belong to the accused person exclusively. It could refer to anybody else other than the accused person herein.

22. The eye witnesses testified that they intercepted the suspects at about 5:00 am. Thus was inside the National park. It is common knowledge that game parks are bushy with a lot of trees and vegetation. It is also common knowledge that visibility cannot be clear at 5:00 am. It is usually dark at that time, at least in Kenya. The vegetation makes it darker than other places. The prosecution evidence indicates that the suspects alighted and took off immediately they were intercepted. In those circumstances, I doubt that the witnesses had ample time to mark the faces of the suspects. Furthermore, it must have been dark. The prosecution witnesses did not indicate how they were able to identify the suspects at that time, not forgetting that the suspects allegedly opened the doors of the motor vehicle in a rush and ran away. I refuse to buy the notion that the circumstances were conducive for a proper identification. If there was no positive identification, it cannot be said that the accused person entered the National park without authorization.

23. PW 1 and PW 2 stated that a Zebra carcass was found in the motor vehicle allegedly used by the suspects. The carcass was not produced in evidence. The incident is said to have occurred in 2017. The accused person was arrested and charged in 2022. Given the passage of time, it would not be reasonably expected that the carcass would be available. However, in the absence of the carcass, my view is that there must be clear and acceptable evidence of existence of the carcass at the material time. Besides, there must be evidence linking the accused person to the carcass. Other than oral testimony from PW 1 and PW 2, the only proof of existence of the carcass are photographs allegedly taken at the scene by PW 1. PW 1 and PW 2 testified that they handed over the carcass to a police officer at Mtito Andei known as Ochieng.

24. The alleged Ochieng was not called to testify and confirm that indeed, he received the carcass from PW 1 and PW 2. No inventory of the recovered items was ever prepared. It is not known what happened to the carcass. The court cannot rely on assumptions. The prosecution was duty bound to adduce evidence indicating a clear chain of custody with regard to the carcass and what was done to it. It was alleged that the suspect who was apprehended was charged and convicted on his own plea of guilty. The court proceedings against the said suspect were not produced in evidence. It is not known whether the carcass was produced in the alleged case and if so, what orders were made in respect of the alleged carcass.

25. If at all the carcass was disposed of, where is the certificate of disposal? There is absolutely no evidence to show that the carcass reached the police station. There is similarly no evidence to show that the carcass was ever produced or even shown to court in the case against the suspect who was allegedly convicted. I repeat, assumptions have no place in law. PW 4 Doctor Ogeto Mwebi gave interesting testimony. That he received a photograph bearing an image of a carcass and was able to identify the carcass as that of a Zebra. The witness is a scientist who deals with animal remains modification analysis and identification. His job is to examine and analyse animal remains and not photographs. He is not a photoanalyst.

26. The action by the investigating officer of taking a photograph to a Scientist for analysis did not add any meaningful value to the prosecution case. The investigators ought to have taken the real carcass for analysis way back in 2017 and relied on the report in this case. The accused person is not charged with dealing in photographs bearing images of meat of a wild species. A photograph cannot be a substitute for a real carcass for purposes of analysis and examination. Given the above-mentioned pitfalls, I find no acceptable evidence to show that the carcass existed. Without proof of existence of the carcass, there will be no basis for even imagining that the accused person was found dealing in meat of a wildlife species without a permit.

27. It is the duty of the prosecution to prove the charge against the accused person. To this end, the prosecution must satisfy the ingredients of the offence at a *prima facie* level before the accused person is called upon to offer an explanation. In the instant case, there is absolutely no acceptable evidence to show that the accused person committed the offences. In the circumstances, I have no difficulty in stopping the case at this juncture. I agree with the observation made by the High Court of Malaysia in Criminal Appeal No. 41LB-202-08/2013 – *Public Prosecution v Zainal Abidin B. Maidin & Another* that the defence ought not to be called merely to clear or clarify doubts. In the case of *Public Prosecutor v Saimin & Ors*[1971] 2 MLJ 16,Sharma J held:

28. It is the duty of the Prosecution to prove the charge against the accused beyond reasonable doubt and the court is not entitled merely for the sake of the joy of asking for an explanation or the gratification of knowing what the accused have got to say about the prosecution evidence, to rule that there is a case for the accused to answer."

29. I may be curious to know what the accused person has to say about the allegations but curiosity is not a reason enough to place the accused person on his defence. I think I have said enough to show that the charge is untenable. If I were to place the accused person on his defence and he opted to remain silent in defence, this court would not convict him. It is not the duty of the accused person to fill in the gaps or tie up the loose ends in the prosecution case. I take judicial notice of the many wildlife crimes that have and continue to rock havoc in this country. Nobody ought to countenance acts of destruction and degradation of our national parks and reserves and everybody should be concerned about the protection and conservation of wildlife. However, the court is guided by the law and evidence.

Disposition

30. In view of the foregoing, I find that the prosecution has failed to establish a *prima facie* case to warrant the accused person to be placed on his defence. Consequently, I make the following final orders:

    a. The accused person has No Case To Answer in respect of the offence of Entering a national park without a permit contrary to section 102(1)(a) of the *Wildlife Conservation and Management Act*;

    b. The accused person has No Case To Answer in respect of the offence of Dealing in meat of a wildlife species without a permit contrary to section 98(1) of the *Wildlife Conservation and Management Act*;

    c. The accused person is hereby Acquitted of Both Counts accordingly, pursuant to section 210 of the *Criminal Procedure Code*;

    d. The accused person be released from custody forthwith, unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 17TH DAY OF APRIL, 2025.

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.