



**Republic v Kilonzo (Criminal Case E733 of 2023)
[2025] KEMC 118 (KLR) (28 May 2025) (Judgment)**

Neutral citation: [2025] KEMC 118 (KLR)

**REPUBLIC OF KENYA
IN THE MAKINDU LAW COURTS
CRIMINAL CASE E733 OF 2023
YA SHIKANDA, SPM
MAY 28, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

JOSEPH MUTHAMI KILONZO ACCUSED

JUDGMENT

1. Joseph Muthami Kilonzo (hereinafter referred to as the accused person) is charged with the offence of Dealing in wildlife trophy of critically endangered wildlife species without a permit contrary to section 92(2) of the *Wildlife Conservation and Management Act*. The particulars of the offence are that on 21/8/2023 at Makutano area in Kibwezi Sub-county within Makueni County, the accused person was found dealing in eight (8) pieces of elephant tusks weighing approximately 49.5 Kgs, with a street value of 5 Million, without authority from the Director General of Kenya Wildlife Service. When the plea was taken, the accused person pleaded not guilty. The matter was then set down for hearing. On 21/1/2025, the court found that the accused person had a case to answer and proceeded to place him on his defence.

The Evidence

The Prosecution Case

2. The prosecution called a total of four (4) witnesses in a bid to prove their case against the accused person. PW 1 Corporal Andrew Kemboi testified that he worked with KWS at Tsavo West National Park. That on 20/8/2023 at about 10:00 pm he received a call from his colleague Sergeant Mwandau (PW 3) who informed him that there was a person at Makutano area who was in possession of elephant tusks. The witness informed his other colleague then they arranged to meet Sergeant Mwandau, They meet Sergeant Mwandau at Mtito Andei then they proceeded to Makutano area. The officers found



a person under a tree, who showed them elephant tusks. That Sergeant Mwandau posed as a buyer. Eight elephant tusks were recovered from the suspect, who is the accused person herein.

3. The tusks were weighed and found to be 49.5 Kgs. The accused person was arrested and taken to the KWS office then later to Mtito Andei police station. PW 2 Ranger Abel Otiko gave similar testimony. PW 3 Sergeant Isdory Mwandau testified that on 20/8/2023 at about 10:00 pm he received information from a member of public that there was a suspect at Makutano area in Kibwezi who was in possession of what was believed to be elephant tusks and was looking for a buyer. The officers proceeded to Makutano area and found two people. One of them was the Informant. The Informant pointed out the accused person as the seller of the elephant tusks. The accused person stated that he had the elephant tusks. He went to a nearby bush and returned with eight elephant tusks. The accused person was arrested and taken to Mtito Andei police station. PW 3 produced in evidence the elephant tusks and other items allegedly recovered from the accused person. PW 4 Dr. Ogeto Mwebi testified that he was a Research Scientist working with the National Museums of Kenya. That he received the tusks and upon analysis, he confirmed that they were elephant tusks. The witness produced his report in evidence.

The Defence Case

4. Upon being placed on his defence, the accused person gave a sworn testimony without calling any other witness. The accused person testified that on the night of 20/8/2023 he was asleep in his sound when he was woken up by the sound of a motor cycle. He peeped through the window and saw three people on a motor cycle. The people knocked at his door and claimed that they were police officers. The accused person opened the door then two of the people who had visited got hold of him and stated that he was the one they were looking for. The accused person asked what he had done but was informed that he would know later. The accused person was taken to a motor vehicle and ordered to lie down.
5. The motor vehicle was driven to a certain place and when it stopped, he was asked to alight. The accused person realised that he was at Komboyo station. He was placed in a cell and was later called and asked to write his name on a piece of paper. He was asked what he usually looked for in the Game Park. The accused person stated that he had never been in the park. The accused person was later taken to Mtito Andei police station then charged. While in court, the accused person learnt of the charge against him. The accused person denied having committed the offence.

Main Issues for Determination

6. In my view, and in consideration of the charge, the main issues for determination are as follows:
 - i. Whether the accused person was found dealing in wildlife trophy on 21/8/2023;
 - ii. Whether the trophy was of a critically endangered species and in particular elephant tusks;
 - iii. If (i) and (ii) above are in the affirmative, whether the accused person had a permit;
 - iv. Whether the prosecution has proven its case against the accused person to the required standard.



Analysis and Determination

7. I have carefully considered the evidence on record as well as the law applicable. 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.”

8. Under the sixth schedule of the Act, the African elephant is listed as an endangered species.

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;

9. 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.

10. The arresting officers testified that PW 3 posed as a buyer for the elephant tusks. PW 3 testified that he was in communication with the Informant and that the suspect was looking for a buyer. The evidence of the prosecution witnesses was that when they found the accused person, he had a weighing scale and that the retrieved the elephant tusks from the nearby bushes. If the evidence of the arresting officers is anything to go by, it would mean that the suspect was set to do business with the elephant tusks. That would fit the definition of “deal” as envisaged by the governing Act. The offence of dealing in wildlife trophy cannot suffice unless possession of the wildlife trophy by the accused person is proven.

11. 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.”



12. In my opinion, for the offence herein to be proven, the prosecution must establish the following elements:
 - a. The accused person was found in possession of Elephant tusks;
 - b. The accused person was dealing in the elephant tusks;
 - c. The Elephant is an endangered wildlife species;
 - d. The accused person did not have a permit or exemption.
13. The Elephant tusks were produced in evidence and according to the report by PW 4 Dr. Ogeto Mwebi, a Research Scientist, the items were Elephant tusks. The testimonies of PW 1, PW 2 and PW 3 were generally consistent and corroborative on the fact that the accused person was found at Makutano area under a Baobab tree and that he was the one who retrieved the elephant tusks from the bushes. The accused person testified that he found sleeping at his house. The arresting officers identified the accused person as the suspect who was in possession of the elephant tusks. The evidence of the arresting officers was consistent, clear and corroborative with respect to how and where the accused person was found. I am aware that the accused person is not a Lawyer but while cross-examining the arresting officers, the accused person did not allude to the fact that he was arrested at his house or elsewhere, other than where the arresting officers stated.
14. I see no reason to disregard the evidence of the arresting officers or cast doubt on their credibility. The chain of custody of the elephant tusks from recovery to the time they were produced in court is clear and unbroken. The prosecution evidence on record shows that upon recovery, the elephant tusks were in the custody of PW 3 who was the investigating officer. It was the investigating officer who escorted the tusks to Nairobi for analysis. This information is found in the testimony of the arresting officers and the exhibit memo. The evidence on record indicates that the tusks were marked for identification as JM 1 to JM 8. This marking is indicated in the exhibit memo and the report by the Scientist. The report shows a photograph of the tusks with the markings inscribed thereon. The same markings were visible on the tusks that were produced in evidence.
15. With the evidence on record, I have no doubt that the elephant tusks that were produced in evidence were the same ones that were recovered on the material night. I have considered the accused person's defence bearing in mind that he has no duty of proving his defence or innocence. The gist of his defence is that the KWS officers went to his home and arrested him for no reason then framed him for the offence. I am struggling to understand why the KWS officers would just visit the person in the wee hours of the night then plant the tusks on him. The accused person did not allude to the fact that the KWS officers made any demands which he failed to meet and as a result, he was framed for the offence. There is no evidence to show any existing grudge between the accused person and the arresting officers or any of them. It is not even clear whether they were known to each other prior to the incident.
16. The duty is on the prosecution to prove its case against the accused person 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.”

17. 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.”

18. 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)

19. It matters not that the accused person may not have told the truth in his defence. What matters is whether there is sufficient evidence against him. The evidence from the arresting officers places the accused person at the scene on the material night. As already indicated, the evidence of the arresting officers on the recovery of the elephant tusks is consistent and corroborative. I find it to be overwhelming as against the accused person. I am not persuaded by the accused person’s defence. Whereas the accused person has no duty to prove his innocence, his defence, in the face of cogent evidence from the prosecution, has not created any reasonable doubt in my mind. If the accused person’s evidence is anything to go by, I wonder why KWS officers would take their time and spend resources all the way from Tsavo West National Park just to go to a stranger’s home and frame him up.
20. The accused person testified that he was a Herds boy. There is no evidence to show that the accused person and the arresting officers or any of them were known to each other before the incident. What grudge would the KWS officers have against the accused person? How did the KWS officers know where the accused person stayed? The version given by the arresting officers makes more sense. The accused person was brought to court soon after his arrest. In the circumstances, there is doubt that the arresting officers had time to “manufacture” a case against the accused person. The accused person’s defence does not add up. I hereby reject it. I do not find anything to discredit the evidence of the prosecution witnesses. The evidence of the prosecution witnesses was supported by material evidence of what was recovered at the scene. I am convinced that the accused person was found in possession of the elephant tusks in issue. The accused person had no lawful authority to possess the tusks. The tusks were from or of an endangered species. From the evidence of the arresting officers, it is evident that the accused person was in possession of the elephant tusks for commercial purposes. He retrieved the tusks from where they were with the intention of selling them.



Disposition

21. The upshot of the above considerations is that the prosecution has proven its case against the accused person beyond reasonable doubt. Consequently, I find the accused person GUILTY of the offence of Dealing in wildlife trophy of an endangered species contrary to section 92(2) of the [Wildlife Conservation and Management Act](#) and proceed to CONVICT him of the offence accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 28TH DAY OF MAY, 2025.

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.

