



**Republic v Mukenga (Criminal Case E586 of 2023)
[2025] KEMC 98 (KLR) (14 May 2025) (Judgment)**

Neutral citation: [2025] KEMC 98 (KLR)

**REPUBLIC OF KENYA
IN THE MAKINDU LAW COURTS
CRIMINAL CASE E586 OF 2023
YA SHIKANDA, SPM
MAY 14, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

KASOO MUKENGA ACCUSED

JUDGMENT

The Charge

1. Kasoo Mukenga (hereinafter referred to as the accused person) is 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 28/6/2023 at Subati area in Kibwezi Sub-county within Makueni County, the accused person with another not before court, was found dealing in four pieces of elephant tusks weighing approximately 33.5 kgs, with a street value of 3.35 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 08/10/2024, the court found that the accused person had a case to answer and proceeded to place him on his 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 four (4) witnesses in a bid to prove their case against the accused person. PW 1 Ranger John Kamau testified that he worked with KWS at Chyulu Hills. That on 28/6/2023 he was informed by one Corporal Bernard that the latter had information of a suspect who



had elephant tusks at Subati area. The KWS officers proceeded to the scene and laid an ambush. They had an unmarked motor vehicle. That their in-charge Bernard posed as a buyer. The suspect led the KWS officers to his home through phone. When the officers reached there, they found two people. The suspect informed them that he had hidden the tusks at the gate. One of the suspects escaped. The officers recovered the elephant tusks at the gate and arrested the accused person herein. Four elephant tusks were recovered. The accused person and the tusks were taken to Mtito Andei police station.

4. PW 2 Esther Nguta testified that she was a Scientist and Researcher working at the Kenya National Museum. The witness testified that she analysed four pieces suspected to be elephant tusks. She received the items on 18/7/2023 and upon analysis, she established that the same were elephant tusks. The witness produced her report in evidence. PW 3 Corporal Bernard Lelanguram from KWS testified that on 28/6/2023 at about 5:00 pm he was called on phone by their intelligence officer and informed that they were following up on suspects believed to be in possession of elephant tusks. The intelligence officer asked the witness to join them and assist in apprehending the suspects. The officers made arrangements and were directed to a place near Kambu area.
5. After waiting for about two hours, they were redirected to Subatu area. On the way to Subatu, the officers were stopped by two people. The people asked whether the officers were the ones they had been waiting for. The two people stated that the package was inside a nearby homestead. The officers alighted and followed the suspects and one of them who happened to be the accused person herein, showed them a package behind the gate. There were four elephant tusks. The officers then introduced themselves and at that point, one of the suspects escaped. The accused person was then arrested. The accused person and the tusks were taken to the KWS office then later to Mtito Andei police station.
6. PW 4 KWS Sergeant Isdory Mwandau testified that on 29/6/2023 at about 6:00 a.m he was informed by PW 3 that they had arrested a suspect who was dealing in four elephant tusks. The witness recorded statements from the arresting officers and interrogated the suspect. PW 4 stated that he received the elephant tusks from PW 3 then weighed them in the presence of the accused person and the arresting officers. The witness produced the elephant tusks in evidence.

The Defence Case

7. Upon being placed on his defence, the accused person gave a sworn testimony without calling any other witness. The accused person testified that on 28/6/2023 he went to Kambu trading centre to buy seeds and fertilizer then returned home. That at about 8:00 pm he went to the market and when he returned home, he found two people at his gate. He asked them what they wanted and instead of responding, they apprehended him and took him to a motor vehicle where he saw elephant tusks. The accused person was taken to Mtito Andei police station.

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 person was found dealing in wildlife trophy on 28/6/2023;
 - 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 person had a permit;
 - iv. Whether the prosecution has proven its case against the accused person to the required standard.



Analysis And Determination

9. 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.”
10. Under the sixth schedule of the Act, the African elephant is listed as an endangered species.
11. Section 3 of the governing Act defines the term “deal” as follows:
- to sell, purchase, distribute, barter, give, receive, administer, supply, or otherwise in any manner deal with a trophy or live species;
 - to cut, carve, polish, preserve, clean, mount or otherwise prepare a trophy or live species;
 - to transport or convey a trophy or live species;
 - to be in possession of any trophy or live species with intent to supply to another; or
 - to do or offer to do any act preparatory to, in furtherance of, or for the purpose of, an act specified above;
12. 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.
13. PW 2 testified that PW 3 posed as a buyer for the elephant tusks. PW 3 also testified that the KWS officers were to pose as buyers and that they were stopped by two people who asked them whether they were the ones the people were waiting for. According to PW 3, the two people led them to where the package was. If the evidence of the arresting officers is anything to go by, it would mean that the suspects were 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.
14. 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:
- “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;
 - 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.”



15. 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.
16. The Elephant tusks were produced in evidence and according to the report by PW 2 Esther Nguta, a Research Scientist, the items were Elephant tusks. The testimonies of PW 1 and PW 3 were generally consistent and corroborative on the fact that the accused person was found at Subati area at a certain homestead and in possession of the elephant tusks. The accused person testified that he found two people at his gate on his way home from Kambu trading centre at night. He further testified that when he was placed in the motor vehicle, he saw the elephant tusks. This implies that the fact that the accused person was found at a homestead and the existence of the elephant tusks at the time of his arrest are not in dispute. What is in dispute is whether the accused person was found in possession of the elephant tusks.
17. The arresting officers identified the accused person as one of the suspects who was in possession of the elephant tusks. The accused person admitted being at the scene at the material night although his evidence was that he was returning home from the market. When the accused person cross-examined PW 3, he alluded to the fact that the two suspects had escaped then the officers got hold of the accused person instead. This is an indication that the accused person was aware that suspects had escaped from the scene. Such indication negates the statement by the accused person that he was just from the market when he was arrested at his home without knowing the reason.
18. 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 1 and PW 3 then handed over to 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, the investigating officer and the exhibit memo as well as the report produced in evidence by PW 2. The evidence on record indicates that the tusks were marked for identification as KM 1 to KM 4. 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.
19. 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 just laid in wait and when he appeared, they arrested him and claimed that he had been found in possession of the elephant tusks. I am struggling to understand why the KWS officers would just wait for a random person 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.



20. 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.”
21. 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.”
22. 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)
23. 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 both parties places the accused person at the scene on the material night. The evidence from both parties also confirms the existence of the elephant tusks 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 and I hereby reject the same. 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 took the KWS officers to where the tusks were with the intention of selling them.



Disposition

24. 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 14TH DAY OF MAY, 2025.

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.

