



**Director of Public Prosecution v Kombo (Criminal Case
E321 of 2021) [2024] KEMC 71 (KLR) (5 March 2024) (Judgment)**

Neutral citation: [2024] KEMC 71 (KLR)

**REPUBLIC OF KENYA
IN THE KWALE LAW COURTS
CRIMINAL CASE E321 OF 2021
ZK KAGENYO, RM
MARCH 5, 2024**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTION REPUBLIC

AND

MANGALE KOMBO ACCUSED

JUDGMENT

1. The accused person was 8th November 2021 arraigned with the offence of Dealing in carcass or meat of wildlife species, contrary to section 98 (1) of the *Wildlife Conservation and Management Act*, 2013 Laws of Kenya. (sic).

The particulars were that on the 05th day of November 2021 at around 2030hrs at mazumalume village puma location kinango subcounty within Kwale county, was found dealing meat of wildlife species namely dikdik the carcass (5) pieces weighing 2 kg at the value of Ksh 100 per pieces which was dried and packed on a white sack without authorization. (sic)

2. It was the case by the DPP that on the 5th day of November 2021, officers from the Kenya Wildlife Service received intelligence reports and in the company of their informers and their intelligence team, they proceeded to the home of the accused where they managed to conduct a search in his house and recovered therefrom meat that was later subjected to forensic examination and found to be meat of a dik-dik, a wildlife species that one would require a license to deal with of which the accused lacked such a license.
3. In his defence, the accused denied ever having dealt with such meat of a wildlife species namely a dik-dik and in a sudden turn of event, blamed his arrest on his relatives being the uncles who were on a vengeance mission for him having been a stumbling block to their selling of their land.
4. This court is called to determine whether the guilty of the accused person has been established.



5. I have considered the evidence tendered by the prosecution witnesses and I observed as the following paragraphs record;
6. Firstly, whereas PW 1 said that the team found the accused in his homestead relaxing, PW 2 who was said to have been in the company of PW 1 and the team said that they found the accused walking towards them. It should be noted that it was said that it was at night, at around 2000 hours and hence such a confusion as to relaxing and walking, a set of two opposite activities that would require keenness as one identified an adversary in the dark of the night and hence a chance of confusing between the two is so remote if none. I find these two factual statements inconsistent with each other. While saying so, I must point out that I consider the same with the fact that it was established that indeed there was a mistaken arrest of the accused's brother who was later released, albeit, the accused stating that he was beaten before the release;
7. Secondly, the state failed to present some witnesses who would corroborate the evidence of PW 1 and PW 2 who were the arresting officers. I verily appreciate that a party does not have to present a superfluity of witnesses to prove a fact but the election of the number and nature of witnesses to present is to be assessed based on the fact in issue. In this case, the mode and manner of arrest was heavily contested by the accused person. When asked why they have not presented the other persons who were in the team that arrested the accused person, the state reported that those are protected as they are informers.
8. At this juncture, I must state that a party should not hide behind the protection given to informers, protected witnesses or whistleblowers not to present a witness. I verily appreciate the protection informers are given as they play an invaluable role in the fight against crime and in the criminal justice system as a whole but at the same time, distinction must be laid between an informer and a known person informing the police.
9. Whereas the law rightfully protects anonymous informers, a known person to an adversary cannot be said to be a protected informer. In the present case, PW 1 and PW 2 told the court that a search was conducted at the accused's house in the presence of the accused, PW 1, PW 2, the intelligence team and the informers. This is the same team that was said to have sojourned at the accused's mother's house and hence it is to be presumed that the team was known. I make an inference, which I verily believe to be a safe inference that indeed the accused person knew the said informers if any was there and even if not by recognition, by mere identification thus extinguishing the state's failure to present such witnesses under the disguise of them being protected informers. I say this considering that PW 2 told the court that the very same informers had identified to them the wrong person leading to the arrest of the accused's brother and not the accused himself which they acknowledged to be wrong.
10. Thirdly, I have considered the manner in which the evidence is said to have been gathered. On a preliminary point, I observe that the state did not prove that the house that the said exhibits were said to have been recovered from belonged to the accused. However, even assuming that the same was proven, which I don't imply that it was, I note that the search into the said house was done in an improper manner.
11. It would appear that the police officers had the information prior to the apprehension of the accused person about the whereabouts of the said meat and they were duty bound to procedurally conduct the search guided by the law on searches into premises if they wanted to get into the accused's house. Section 118 of the Criminal Procedure Code guides us thus;

Where it is proved on oath to a court or a magistrate that anything upon, with or in respect of which an offence has been committed, or anything which is necessary for the conduct of an investigation into



an offence, is, or is reasonably suspected to be, in any place, building, ship, aircraft, vehicle, box or receptacle, the court or a magistrate may by written warrant (called a search warrant) authorize a police officer or a person named in the search warrant to search the place, building, ship, aircraft, vehicle, box or receptacle (which shall be named or described in the warrant) for that thing and, if the thing be found, to seize it and take it before a court having jurisdiction to be dealt with according to law.

12. An application for the Search Warrants was the only way the state would cushion the evidence so obtained from the accusation of an illegally obtained evidence. I dare say that a Search Warrant is one that the court can issue at any day including a Sunday and hence there is no excuse as to not apply for one given that there was prior information.
13. The privacy of a person is protected under Article 31 of *the Constitution* and relevant to this case particularly Article 31 (a) and (b) where in order to lift that constitutional veil, the investigating agency had to move the court appropriately under Article 24 of *the Constitution*.
14. I say this because Article 50 (4) of *the Constitution* warns this Court not to admit any evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.
15. The scales of justice would only balance if the application of the law is done in a fair manner for the law to serve the purpose it is intended to.
16. Fourthly, I make a finding that the charge sheet as drafted was defective for joinder of two offences in one count. It is my view that the use of the words carcass or meat under section 98 (1) of the *Wildlife Conservation and Management Act*, 2013 intended to create two distinct offences as the legislature must have intended to distinguish between a carcass and meat and one would not be in possession of both at the same time as the same subject. This joinder must have prejudiced the accused person and I find as much.
17. In the end, the foregoing makes a recommendation to me that it is unsafe to find against the accused and adjudge him guilty on the material before me as the court must be concerned with the process as much as it is concerned with the product.
18. Having found so, this court hereby dismisses the case against the accused person and forthwith acquits him under Section 215 of the Criminal Procedure Code for either offence under section 98 (1) of the *Wildlife Conservation and Management Act*, 2013, of dealing with either carcass or meat of wildlife species without a permit or exemption in lieu of permit thereof.
19. The accused person who has been out on cash bail is hereby discharged forthwith. The cash bail of Ksh. 30, 000/= deposited in court on 14th December 2021, shall be refunded to the depositor forthwith.

JUDGMENT WRITTEN, DATED AND SIGNED AT NAIROBI ON THIS 1ST DAY OF NOVEMBER, 2023.

KIONGO KAGENYO

RESIDENT MAGISTRATE

This Judgment has been Delivered in Open Court at Kwale on this 5th day of March 2024, by Hon. C. K. Auka in accordance with the provisions of section 200 (1) (a) of the Criminal Procedure Code, upon the transfer of Hon. Kiongo Kagenyo (Mr.) (RM), to Milimani Small Claims Court effective 11th September 2023.

In the presence of



Mr. Khamis the Prosecutor

Mr. Hud the Court Assistant

