



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Maitha (Criminal Case E348 of 2022)
[2024] KEMC 174 (KLR) (13 March 2024) (Judgment)**

Neutral citation: [2024] KEMC 174 (KLR)

**REPUBLIC OF KENYA
IN THE VOI LAW COURTS
CRIMINAL CASE E348 OF 2022
AM OBURA, CM
MARCH 13, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

DUNCAN KARISA MAITHA ACCUSED

JUDGMENT

1. The Accused was charged with the offence of Dealing in Wildlife Trophy of an endangered species c/s 92(3) of the *Wildlife Conservation and Management Act*, 2013.
2. The Particulars on the Amended charge sheet were that:

“On the 27th day of May 2022 at around 2100 hours at Maungu township within Taita Taveta County, you were found dealing in wildlife trophy, namely; five (5) pieces of elephant tusks weighing 7.7 Kgs without a permit or any lawful exemption.”
3. He denied the charge and a plea of not guilty was entered on 19th October 2022.
4. Prosecution case

Five (5) Prosecution witnesses adduced evidence in support of the charge. In short, it is alleged that on 27th May 2022, KWS Sergeant Lydia Jerono (PW2) received information that there was someone at Maungu area who had elephant tusks and was looking for potential buyers.
5. She informed her colleagues and later that evening at 7.45pm, they allegedly proceeded to Maungu area in the company of KWS Ranger Morris Odhiambo (PW1), KWS Ranger Margaret Naserian (PW3), Ranger Vincent Kamau, Ranger Dominic and their driver Emmanuel Tsuma. It is further alleged that they went in two vehicles with Sergeant Jerono and Ranger Vincent Kamau travelling in a taxi and posing as the interested buyers. The rest of the Rangers travelled in a civilian vehicle as back up.



6. The Prosecution case is that they arrived at Maungu at around 7- 8pm and the informer told them to follow a path behind Maungu Police Station on the Kasigau Route near Public Works area. It is alleged that Ranger Naserian and Ranger Morris got out of the vehicle and walked a distance behind as back up. According to PW 2, she noticed two people approaching the vehicle and one of them had a sack. She asked if they had the consignment and he responded in the affirmative.
7. It is alleged that they requested the man to place the sack on the ground as Ranger Vincent got out of the taxi. They then asked the man to put the sack in the vehicle's boot in order to weigh the consignment. As the man did so, he was allegedly grabbed by Ranger Vincent. A struggle ensued. The other man allegedly escaped as the other KWS Rangers moved in to subdue the man who had tried to jump over a fence. Eventually, the man, who is allegedly the accused herein, was arrested.
8. It is also alleged that the KWS Rangers recovered 5 pieces of suspected elephant tusks (PEXT2) and the green and white sacks (PEXT 3). An Inventory of the said recovered items was PEXT1. According to PW4 Veronica Onduso, the suspected tusks were analyzed and weighed. She concluded that they were 5 pieces of elephant tusks cut in pieces. Her report dated 26th July 2022 was admitted in evidence as PEXT4.
9. The Prosecution also relied on the testimony of KWS Ranger Corporal Michael Odongo (PW5) who allegedly investigated the Accused's mobile phone and established that the Accused was in touch with other people and that they had a deal in relation to the elephant tusks. He produced his Cyber Crime Report as PEXT8, the Certificate under Section 65(8) as read with Section 106B (4) of the *Evidence Act* (PEXT 9), Blue Samsung Mobile phone (PEXT 10), and a sim card serial No. 892540211 789254017-PEXT 11.

PARA 10.

Defence case

11. In his defence, the Accused gave sworn evidence. He testified that on the date when he was arrested, he had just closed his motor cycle mechanics business along Kasigau Road and was walking home. He alleged that he was suddenly confronted by 2 people who stopped him and said they were waiting for him.
12. The Accused testified that he asked what was wrong and raised an alarm. He allegedly saw a Wildlife Works vehicle nearby. He was allegedly forced to enter a waiting vehicle and taken to the KWS offices. It was at the office that he was allegedly shown the elephant tusks and threatened for resisting arrest. The Accused told the Court that he signed the Inventory (PEXT1) because he was forced to do so. The Accused took issue with the evidence of the Prosecution witnesses terming it as contradictory. He also disputed claims that the Maungu Police Station is fenced. He further stated that he was harassed and told to admit the offence. He said the officers had no court order for his arrest and were not in uniform. In his view, the KWS Rangers had a habit of harassing innocent people as they did to him.
13. The Accused called one Pascal Mabishi (DW2). According to him, the Accused who is his relative, had his motor cycle garage business next to DW2's welding shop. He testified that he was familiar with the Accused's routine as he saw him report to work and leave daily. He also claimed that on the material date, they heard commotion before seeing the Accused being bundled into a KWS vehicle. DW2 was later surprised to learn the charges against the Accused. According to him, the Accused is a person of good character and he never heard him involved in crime before.
14. Court's analysis and determination



I have given due consideration to the evidence on record in its entirety.

15. In all criminal cases, the burden of proving the charge beyond reasonable doubt rests with the Prosecution and does not shift to the Accused persons.
16. The Accused person faced the charge contrary to Section 92(2) of the *Wildlife Conservation and Management Act*, 2013 which reads:

“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.”
17. “Endangered species” is defined under Section 3 of the Act as follows:

“.. any wildlife specified in the Fourth Schedule of this 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);”
18. The term “trophy” is also defined in the Act 2013 as follows:

“Trophy includes any bone, claw, egg, feather, hair, hoof, skin, tooth or tusk of an animal, and for any species of plant, any bark, branch, leaf, log, sap or extract and includes any other durable portion whatsoever of that animal or plant whether processed, added to or changed by the work of man or not, which is recognizable as such.”
19. The ingredients necessary to prove the charge beyond reasonable doubt are:
 - a. the Accused person was found in possession of wildlife trophy of endangered species, namely, the 5 pieces of elephant tusks
 - b. the Accused person, with others not before the Court, were dealing in the said wildlife trophy of an endangered species
 - c. the Accused person had no lawful authority or permit to deal in such species.
20. The question is whether the Prosecution established the guilt of the Accused beyond reasonable doubt. I shall consider each ingredient of the offence hereunder.
21. Whether the Accused person was found in possession of wildlife trophy of endangered species, namely, the 5 pieces of elephant tusks
22. There was material consistency in the evidence of PW1, PW2 and PW3 that acting on a tip off, they went to Maungu area to meet someone who was sourcing for a buyer of elephant tusks. They told the Court that the alleged buyer was ready to avail the consignment at night. There was evidence that they saw the Accused and another man approach the taxi and that the Accused had a sack. The incident occurred along the Kasigau Road which is the same road that the Accused claims he had his mechanics business.
23. The Prosecution witnesses stated that the sack contained elephant tusks. PW4 confirmed that they were genuine elephant tusks. I am not persuaded that the Accused was wrongly implicated by KWS officers who were eager to arrest anyone.



24. The KWS officers had no reason to be malicious. Moreover, there was evidence that when he realized they were KWS officers, and he had been caught, he started fleeing. His accomplice also fled. They had no reason to flee if indeed he was innocent. I find that his conduct was inconsistent with innocence. I did not believe his claim that he was innocently leaving his workplace when the KWS Rangers pounced on him for no reason at all.
25. Further, considering that both the Accused and DW2 referred to a commotion involving the KWS Rangers and the Accused lends credence to the fact that the Rangers actually caught the Accused and that he tried to resist arrest upon realizing he was trapped.
26. In my view, the Prosecution proved beyond reasonable doubt that the Accused was in possession of the sack containing elephant tusks.
27. Whether the Accused was dealing in wildlife trophy of endangered species
- As to whether the Accused was dealing in elephant tusks, I have considered the meaning of “dealing” as explained in the case of *Ndeka v Republic* (Criminal Appeal E007 of 2021) [2022] KEHC 3 (KLR). In that case, the Honourable Mativo J (as he then was) stated as follows:
- “Dealing includes two elements; namely being in physical control of the item and knowledge of having the item. To be guilty of dealing, an accused person must be shown to have knowledge of two things, namely, that he knew the item was in his custody and secondly, he knew that the item in question was prohibited. The third element is the dealing aspect.”
28. In the present case, the KWS officers acted on information that led them to the scene where the recovery and arrest took place. They were aware that they were going to meet a person who was selling elephant tusks. When they reached the scene, they saw the Accused and another man arrive with a sack. The sack was found to contain elephant tusks. I find that this was no coincidence.
29. Moreover, the fact that the Accused and his accomplice started running away is indicative of a guilty mind and knowledge that they were prohibited from having the tusks in their possession. I also find that the Accused was in physical control and had custody of the tusks. There was also the evidence from PW% that his phone log data was analyzed and it was established that he was communicating with others in relation to the said consignment. These facts were not rebutted.
30. In my view, the Prosecution proved beyond reasonable doubt that the Accused was dealing in the said wildlife trophy. I find his denial a mere denial.
31. Whether the Accused persons had no lawful authority or permit to deal in such species.
- In this case, despite recovery of the items in the Accused person’s hands, he denied knowledge of the consignment in his defence. He has also not attempted to explain his possession or to show that he had lawful authority to possess the said tusks. I am satisfied that this ingredient of the charge was also proved beyond reasonable doubt.
32. In my respectful view, the Defence is a sham and untenable. I reject it in the circumstances.
- Reasons Wherefore, I find the Accused person guilty of the offence charged under Section 92 (2) of the *Wildlife Conservation and Management Act*, 2013. I hereby convict him of the said offence under Section 215 of the *Criminal Procedure Code*.
- Right of Appeal – 14 days.
- Orders accordingly.



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HON. A.M. OBURA (MRS), CM

BEFORE HON. A.M. OBURA, (MRS) CM

Prosecuting Counsel....Mr. Mogaka

C/Assistant:.....Kasaso

Accused:Present

CT: JUDGMENT DELIVERED IN OPEN COURT AT VOI THIS 13TH DAY OF MARCH 2024.

HON. A.M. OBURA (MRS), CM

