

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. E126 OF 2022

NOAH ESENDI LALAFI
APPELLANT

versus

REPUBLIC
RESPONDENT

**(From original conviction and sentence by Hon. P. N. Areri. P.
M. in Migori CMCCR. C. NO. E244 of 2022 delivered on 18th
November, 2022)**

JUDGMENT

The Appellant herein Noah Esendi Lalafa was charged with the offence of being in possession of wildlife trophy of a specified endangered species contrary to Section 92(4) as read with Section 105 of the Wildlife Conservation and Management Act No. 47 of 2013 Laws of Kenya.

The particulars were that the Accused person on the 6th day of May 2022 at around 16.00hours at Awendo Township in Awendo Sub-County in Migori County was found in possession of wildlife trophy namely one piece of elephant tusk weighing approximately eleven kilograms which he was transporting using motor cycle Reg. KMFQ414 V TVS blue in color without permission or authority from KWS.

In the alternative the Appellant was also charged with the offence of dealing in wildlife trophy of a specified endangered species without permit contrary to Section 92(2) as read with Section 105 of the Wildlife Conservation and Management Act No. 47 of 2013.

The particulars were that the Accused person on the 6th day of May 2022 at around 16.00hours at Awendo Township in Awendo Sub-County in Migori County was found dealing with one piece of elephant tusk weighing approximately eleven kilograms without a permit or authority from KWS.

Upon consideration of the evidence of 4 prosecution witnesses and the Appellant's sworn statement the Trial Magistrate found that the prosecution had adduced sufficient evidence to find the Appellant guilty for the offence in the second count and he was acquitted for the offence in the 1st Count. He was therefore convicted and sentenced to serve 7 years imprisonment and the motorcycle used to transport the trophy forfeited to KWS whereas the trophy was forfeited to the National Museums of Kenya.

The Appellant was aggrieved by the conviction and sentence and he preferred the Appeal herein vide Petition of Appeal filed on 2nd December 2022 on the following grounds: -

- 1. That the Trial Magistrate erred in both law and facts by not complying with Article 50(2) (g) & (h) of the Constitution.**
- 2. That the Trial Magistrate erred in both law and facts by not observing that the ingredients of the offence herein were not proved as required by law.**

REASONS WHEREFORE the Appellant/prays that:

- 1) The conviction be quashed and sentence set aside
- 2) That the court grant leave for filing of supplementary/amended grounds of appeal after receiving the lower court proceedings.

The brief background of the case is that;

PW1 Samson Mwita a Ranger stationed at Isebania border post recalled that on the material day he was in the office with one of his colleagues George Nyamohanga when the colleague informed him that

their intelligence team had alerted him of individuals possessing Elephant Tusks at Awendo town with the intention to sell them. PW1 gave evidence that the intelligence team connected them to the informant who went to their offices to plan and coordinate the appellant's arrest. PW1 stated that with the aide of the informant who posed as a buyer they got in touch with the appellant pretending to be buyers and took precautionary steps including packing in a secluded area where the transaction would take place as well as directing the Appellant to their direction. It was PW1's further testimony that the Appellant arrived at around 4:00Pm with the elephant tusks on a motorcycle whose registration number they noted down. That the Appellant had the luggage in a black bag tied at the carrier of the motor cycle whereupon he untied it and brought it into the vehicle PW1 and the rangers were on.

PW1 testified that he opened the luggage and found one huge piece of Elephant tusks wrapped in a nylon polythene paper. That as the Appellant was waiting for payment, they introduced themselves as Kenya Wildlife Service (KWS) officers and arrested him. PW1 stated that they asked him for certificate of ownership, permit or licence to possess the elephant tusks but the Appellant had none thus they arrested and escorted him with the exhibit and the Motorcycle to the Police Station for further interrogation. That at Migori Police Station an inventory was made, the Elephant Tusks weighed and approximated at 11kgs and the Appellant signed. PW1 identified the Elephant Tusks before the court, the polythene bag used to wrap the tusks, the Appellant's black laptop bag, the Appellant's motorcycle and the inventory as PMFI 1-5. In cross-examination PW1 stated that the Appellant was alone during arrest and no photographs were taken.

PW2 Ben Nyakundi a researcher with a master of Science Degree in Biology Conservation from University of Nairobi and a Bachelor Degree

in Wildlife Management from Moi University working at the National Museums of Kenya gave evidence that he examined the exhibits herein. He stated that he received a marked exhibit on 4/5/2022 which he was asked to examine and establish if they were from wildlife and to specify which animal. PW2 examined the exhibit using the relevant methods and established that it bore the characteristics Schreger line which are the diamond shaped granules that are visible under microscopic observation and is only found in Elephants. PW2 observed that the exhibit was heavily weathered as result of exposure to harsh environmental conditions. After the examination, PW2 concluded that the exhibit was elephant ivory. He produced a Form as exhibit 6 and the report as exhibit 7 for the said elephant ivory.

PW3 Major George Nyamahanga working with Kenya wildlife service stationed at Isebania Border post recalled that on 6/5/2022 at 9.30 Am he was in the office at Isebania when he received a phone call from their Intelligence Officers alerting them of a person in Awendo area who was in possession of what was suspected to be an elephant tusk and was looking for a buyer. That he informed his colleague Samson Mwiti and they arranged how to go about the case. PW3 stated that they pretended to be the buyers of ivory and informed their informant to get in touch with the Appellant and organize for a meeting with the buyer. He stated that they armed themselves, took an unmarked Government vehicle and proceeded to where they had agreed to meet at Awendo Town. That at 2.00 Pm they arrived at Awendo and parked where they had agreed to meet the seller and waited until 4.00 Pm when one male adult arrived riding a motor cycle make TVS 125CC blue in color Registered number KMFQ 4/4V.

PW3 gave evidence that the Appellant was carrying a black bag on the carrier of his motorcycle and on arrival, PW3 requested the him to open the bag and show him the tusk to confirm. That the Appellant took it

to their vehicle so that they could confirm if it was ivory and proceed with the transaction. PW3 stated that his colleague Major Samson Mwiti instructed him to open the bag and found there was one piece of tusk wrapped in clear polythene. That they then identified themselves as officers from KWS and PW3 demanded from the Appellant the possession documents of the tusk but he did not have. They then arrested the person and hand-cuffed him and escorted him to Migori police station. PW3 further gave evidence that they recorded their statements, made an inventory and discovered the suspects name was Noah Esendi Lalafa and booked him in cells. In cross-examination, PW3 stated that it was only the Appellant that was found in possession of the Ivory Tusk and they arrested him with his motor-cycle but did not take photographs.

PW4 CP Kennedy Oyugi the investigation officer in this case recalled that on 6/5/2022, his colleague from Isebania Border post Major Samson Mwiti and George Nyamahanga received information from intelligence officers at Lorigorian in Narok that there were people who had Elephant tusks at Awendo in Migori County and were looking for buyers for the same. PW4 stated that they prepared, proceeded to Awendo and met with one person who came with the tusk and he was arrested. PW4 took over the investigation and prepared an exhibit memo form as well as escorted the tusk recorded to the National Museums of Kenya. That he later received a report which confirmed that the tusk was an Elephant ivory. He stated that he received one black bag, one piece of Elephant tusk weighed 11 kilograms and clear polythene which was used to wrap the tusk. PW4 then produced the black bag, Clear polyethene, MFRI-1 as exhibit, inventory as exhibit 1-4. In cross-examination, PW4 stated that the Appellant never communicated with him and neither was he present during the arrest.

He stated that the Appellant's photographs were not taken at the place of arrest due to security reasons.

When placed on defense the Appellant testified that on 6th May 2022, he had gone to Kionyo Secondary School where he was doing electrical installation and, on his way, back to God Jope he met a person who had a bag and the person asked to be given a lift on his motorbike. That he carried the person to Oyani Masai and he was told the person to pay him was in Awendo. He said that his passenger was constantly on phone as they travelled. That when they got to Mariwa they came across a Rav 4 vehicle which had stopped on the road and the passenger instructed him to stop. That when he stopped, he was paid 600/= and he went to fuel at Awendo. That before he could reach Awendo a yellow Landcruiser passed him at high speed and 2 people alighted and approached him while armed with pistols aimed at him. That the 2 people asked for his identity and when he identified himself, they asked where the person he carried on his motor bike was. That his motor bike was loaded onto the Landcruiser and shortly thereafter the Rav 4 vehicle arrived and he was forced into it and taken to Migori Police Station where he was charged and taken to court the next day. The Appellant said that at the Police Station a person alighted carrying the bag that the person he had carried earlier had. That the bag was opened and something he had never seen before was removed and he was told to carry it and a photograph was taken. The Appellant said that he had Kshs. 4000/= which was stolen. The Appellant said he did not commit the offence. He said there was no evidence he communicated with the people who arrested him and he urged the court to acquit him.

In cross examination the Appellant said police stole his money but he did not cross examine prosecution witnesses about the issue before. He also said that he did not know the people who arrested him and

they had no reason to frame him. He also said that he did not know the person he carried as they had just met in Kehancha. He said that he did not know what happened to the person he carried on his motor bike.

The appeal herein was heard by way of written submission.

The Appellant's submissions are undated and he amended his grounds of appeal as follows:

1. That he did not plead guilty to the charge herein.
2. That the Trial Court erred in both law and fact by not complying with section 71 C.P.C
3. That the Trial Court erred in both law and facts by not considering that the ingredients of the offence as per section 92(2) of the wildlife trophy of a specified endangered species W/O permit were not proved as to the required standard in law.

It was submitted that section 71 of the C.P.C provides that:

Subject to the provisions of section 69, and to the powers of transfer conferred by sections 79 and 81, every offence shall ordinarily be tried by a court within the local limits of whose jurisdiction it was committed, or within the local limits of whose jurisdiction the accused was apprehended, or is in custody on a charge for the offence, or has appeared in answer to a summons lawfully issued charging the offence.

It was thus submitted that the Appellant was arrested at Awendo market which is within the jurisdiction of Rongo Court but he was booked at Migori police station and charged before Migori Court due to security reasons which were not sufficient enough to demonstrate to the court any risk faced in arresting the suspect on the material day.

It was also submitted that the ingredients of the offence of dealing in wildlife trophy was not proved due to the following reason. The

Appellant argued that PW1 and 3 stated before the court that it was the informant who connected them with the seller of the exhibit in question but no evidence of phone numbers which were used to communicate with them. That his defense was dismissed and the arresting officer's story believed. He also argued that even the price of the exhibit was not disclosed and that there was no I.O from Migori police station to support the allegations from the KWS officers.

Reasons wherefore the Appellant begged this honorable court to quash the conviction, put aside the sentence and grant any other fitting order.

ANALYSIS AND DETERMINATION

Having re-evaluated the evidence, judgment of the trial court and having considered the grounds of appeal, the submissions and authorities cited as the first appellate court, and in line with the principles in **Okeno v Republic [1972] EA 32**, this court is to determine whether the appeal has merit

The above principles were also restated in the case of **Mark Oururi Mose vs. Republic (2013) eKLR** as follows:-

“.....the court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analysed it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.”

Upon re-evaluating the record and submissions, the following issues arise:

1. Whether there was **non-compliance with Article 50(2)(g)(h)** and **section 71 of the CPC**
2. Whether the ingredients of the offence herein were proved to the required standard in Law.

On whether there was **non-compliance with Article 50(2)(g)(h)** and **section 71 of the CPC**

The Appellant contends that he was denied the right to legal representation and that the trial took place outside the proper territorial jurisdiction since the arrest occurred at Awendo (within Rongo Court's jurisdiction), yet he was charged at Migori.

The record does not show that the Appellant requested for legal representation at State expense under Article 50(2)(g)(h). The offence is not one attracting the death penalty, and there is no indication that the Appellant was unable to conduct his defence. The ground therefore fails.

Section 71 of the CPC provides:

“subject to provisions of Section 69 and to the powers of transfer conferred by Section 79 and 81 every offence shall ordinarily be tried by a court within the local limit of whose jurisdiction it was committed or within the local limit of whose jurisdiction the accused was apprehended or is in custody on a charge for the offence or has appeared in answer to a summons lawfully issued charging the offence”.

Further, **section 50 of the Wildlife Conservation and Management Act of 2013** provides for the disposal of persons arrested and things seized as follows;

(1) Any person arrested under section 49 shall forthwith be taken before a court to be dealt with according to law.

As regards jurisdiction, **section 71 CPC** allows trial either where the offence was committed or where the accused was arrested or in custody. The Appellant was arrested within Migori County and taken to Migori Police Station. There was therefore no procedural irregularity or prejudice suffered by being charged at Migori Law Courts. This ground equally fails.

On whether or not the ingredients of the offence herein were proved to the required standard in Law; In **John v Republic (Criminal Appeal E023 of 2022) [2023] KEHC 1512 (KLR) (21 February 2023) (Judgment)**, the High Court of Kenya at Migori stated that to prove the offence of Dealing with Wildlife Trophy contrary to **Section 92(2)** as read with **Section 105** of the **Wildlife Conservation and Management Act 2013**, the prosecution need to prove that the exhibits were indeed Wildlife trophies and, secondly, the appellant was 'dealing' in them.

From the evidence of PW1 and PW3, the Appellant was found in actual possession of the ivory tusk, having arrived with it tied to his motorcycle Reg. KMFQ 414V TVS and personally presenting it to the undercover officers. The evidence of PW2 scientifically confirmed that the exhibit was indeed elephant ivory. PW1 and PW3 demanded a permit or license, which the Appellant did not have.

The chain of custody was clearly established — from seizure by PW1 and PW3, handover to PW4, to expert verification by PW2. The defense did not dislodge this evidence. The prosecution therefore proved all essential ingredients beyond reasonable doubt.

The Appellant's explanation that he was merely carrying a passenger who owned the bag was not credible. He did not raise the issue of the alleged passenger during cross-examination of any of the prosecution witnesses, nor did he produce any evidence of that person's identity or existence. The trial court correctly found that this defence was an afterthought.

Further, possession under the Act includes constructive possession — having custody or control of a wildlife trophy whether personally or through another. The Appellant being the rider and transporter of the tusk falls within that scope.

The Appellant was sentenced to serve 7 years imprisonment although section 92 provides;

any person who commits an offence in respect of an endangered or threatened species or in respect of any trophy of that endangered or threatened species shall be liable upon conviction to a fine of not less than twenty million shillings or imprisonment for life or to both such fine and imprisonment.

The Appellant was sentenced to a negligible 7 years imprisonment contrary to the mandatory provisions of the law, and his complaint that the value of the exhibit was not disclosed does not hold water because the exhibit was from an endangered species which value cannot be quantified in monetary terms. This Court finds no reason to interfere

with the sentence save that it could have enhanced it if the Respondent had filed a notice for enhancement. This appeal lacks merit and the same is dismissed.

Right of appeal 14 days explained.

DELIVERED, DATED and SIGNED at MIGORI this 30th Day of October, 2025.

ANNE ADWERA ONG'INJO
JUDGE

In presence of; -

Mr. Oimbo for the Respondent / State

Mr. Ongoso Advocate for the Appellant

Appellant- present in person

Maureen- Court Assistant