



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**CRIMINAL APPEAL NO. E054 OF 2023**

**PATRICIA MWONGELI MBITHI..... APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

*(From the original conviction and sentence in Criminal case NO.423 of 2017 of the Senior Principal Magistrate's Court at Makindu by Hon. A. Ndung'u-Principal Magistrate)*

**JUDGMENT**

1. Patricia Mwangeli Mbithi, the appellant herein, was convicted after pleading guilty to the offence of having wildlife trophy contrary to section 95 of the Wildlife Conservation and Management Act 2013.
2. The particulars of the offence were that on the 13<sup>th</sup> day of May 2017 at Manyanga in Kibwezi sub-county, jointly with another person, 13 kgs of four pieces of elephant tusks were found in possession, valued at KShs. 1,300,00.00.
3. The appellant was sentenced to pay a fine of Kshs. 1 million or serve five years' imprisonment. She was aggrieved and filed this appeal against the sentence through Maosa & Company Advocates. She raised grounds of appeal as follows:
  - a) The plea entered by the trial court against the appellant was not an unequivocal plea of guilty on the part of the appellant.
  - b) The court's record does not support the conviction for possession of Wildlife Trophies Contrary to section 95 of the Wildlife Conservation and Management Act. 2013.
  - c) The Learned honourable trial magistrate erred in law by convicting the appellant on the testamentary evidence provided by un-gazetted prosecution witnesses. They had

- not been gazetted as provided for under the Wildlife Conservation and Management Act 2013, which is the Act upon which the charges against the appellant were brought
- d) The Honourable trial magistrate erred in law when she allowed the charge sheet as initially framed. Yet, there was no existing laboratory report from certified personnel ascertaining whether the alleged exhibits used by the prosecution as its evidence were indeed elephant tusks, that they indeed weighed the alleged 13 kilogrammes and whether they indeed had a value of kshs. 1, 300,000.00. The arresting officers and prosecution witnesses did not demonstrate how they achieved these details at the time of charging and presenting the applicant to the honourable court.
  - e) The Honourable trial magistrate erred in fact and law by admitting as evidence that the value of the alleged elephant tusks was Kshs. 1,300,000.00 without ascertaining and relying on an existing official valuation report.
  - f) The honourable trial magistrate erred by allowing evidence to be adduced in the form of witness statements produced by the prosecution dated 3rd August 2023, which demonstrates that the prosecution pre-empted the charges since it charged the applicants on 15<sup>th</sup> May 2017 but sent the alleged exhibits for official laboratory results on the 27<sup>th</sup> of July 2017.
  - g) The honourable trial magistrate erred by allowing and conducting a prejudicial trial since the laboratory reports were submitted a considerable time after the charges had been laid; therefore, the exercise was prejudicial to the appellant.
  - h) The honourable trial magistrate erred by allowing the prosecution to proceed with the charges as read instead of having a holding and/or miscellaneous charge against the appellant, pending the outcome of the laboratory test to confirm the nature and /or identity of the exhibits, had the appellant charged with possession of the alleged game trophy to wit and later proceed to seek verification of the subject exhibits which amounted to a carriage of justice.
  - i) The honourable trial magistrate erred by admitting the charge before any expert was consulted.
  - j) The applicant's Constitutional rights were therefore infringed based on a plea which was not procedurally taken.
  - k) The sentence meted against the appellant was manifestly excessive.

4. The state opposed the appeal through M/s. Omollo Vera, learned counsel. She argued the appeal lacked merit.
5. This is a first appellate court. As expected, I have analysed and evaluated afresh all the evidence adduced before the lower court, and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs the Republic [1972] EA 32**.
6. Section 95 of the Wildlife Conservation and Management Act 2013 states:

***Any person who keeps or is found in possession of a wildlife trophy or deals in wildlife trophy, or manufactures any item from a trophy without a permit issued under this Act or exempted in accordance with any other provision of this Act, commits an offence and shall be liable upon conviction to a fine of not less than one million shillings or imprisonment for a term of not less than five years or to both such imprisonment and fine.***
7. This case went through the process of a full trial. The issue of a plea cannot arise.
8. The prosecution argued that they received information regarding the smuggling of elephant tusks from Manyanga. An ambush was set, and the appellant, a pillion passenger on a motorcycle, was stopped. The appellant was carrying luggage on her lap. When the luggage was inspected, it was found to contain elephant tusks. This was confirmed by Ranger Lydia Nkirote (PW2) and Ranger Samuel Ayuya (PW3).
9. Esther Nguta (PW1) of the Museums of Kenya confirmed that the four pieces of exhibits were elephant tusks.
10. Patricia Mwangeli Mbithi, the appellant, argued that she was arrested with nothing and that nothing was recovered when she was taken to her home. This defence suggested that she was falsely implicated. My review of the record does not reveal any reason why the arresting officers, who were strangers to her, would falsely implicate her. The learned trial magistrate was justified in dismissing her defence.
11. The value given to the game trophy did not influence the trial magistrate either in conviction or in sentencing. Section 95 of the Wildlife Conservation and Management Act does not consider the value attached as one of the ingredients.

12. An appellate court would interfere with the sentence of the trial court only where there exists, to a sufficient extent, circumstances entitling it to vary the order of the trial court. These circumstances were well illustrated in the case of **Nilsson vs. Republic [1970] E.A. 599**, as follows:

**The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence, and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in JAMES Vs. REX (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor. To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. R Vs. SHERSHEWSITY (1912) C.CA 28 T.LR 364.**

13. The sentence cannot be described as harsh. It is the prescribed one. I will not interfere with it.

14. 4. The conclusion of the preceding analysis of the evidence on record is that the appeal has no merit. The same is dismissed.

**Delivered and signed at Makueni, this 23<sup>rd</sup> day of October 2025**

**KIARIE WAWERU KIARIE**

**JUDGE**