



**Masaku alias Mose v Republic (Criminal Appeal E084 of 2025)
[2025] KEHC 17313 (KLR) (26 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 17313 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E084 OF 2025
DR KAVEDZA, J
NOVEMBER 26, 2025**

BETWEEN

ANTONY NGILA MASAKU ALIAS MOSE APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The appellant was charged and after a full trial convicted for the offence of being in possession of wildlife trophy contrary to section 92(4) of the *Wildlife Conservation and Management Act* 2013. The particulars of which were that the appellant had on the 20th day of July 2019 at around 1530 hours at LA Familia building house number B4 in Tala Shopping Centre within Machakos County found in possession of wildlife trophies namely four pieces of elephant tusks weighing five (5) Kilograms in a manila shopping sack inside a purple carrier bag with street value of Kshs. 500,000 without a permit. He was sentenced to pay a fine of Kshs. 20 million or to serve a term of thirty (30) years imprisonment.
2. Aggrieved, he filed an appeal challenging his conviction and sentence. In his appeal, he challenged the totality of the prosecution's evidence against which he was convicted. He maintained that the sentence imposed was harsh and excessive. He urged the court to quash his conviction and set aside the sentence imposed.
3. This being a first appeal, it is the duty of this court as the first appellate court, to reconsider, re-evaluate, and re-analyse the evidence afresh and come to its own conclusion on that evidence. The court should however bear in mind that it did not see witnesses testify and give due consideration for that. (See *Okeno v Republic* [1972] EA 32)
4. PW1, Ranger Anthony Kibue, stated that on 20th July 2019 he was summoned to the KWS Headquarters by his senior, Madam Gladys Tanui, following intelligence that a suspect involved in the killing of a zebra in Kitengela had been traced to Tala. On arrival he joined other officers, including



- Corporal Lydia Njeri, Joyce Muthoni, and Corporal Michael Odongo. The team proceeded to Tala Shopping Centre, collected two police officers from Tala Police Station, and went to La Familia building where the suspect was believed to be.
5. Upon knocking, the occupant opened the door, introduced himself as Anthony Ngila Masaku, and the officers introduced themselves. Under instructions from Madam Tanui, they searched the single-room house. PW1 conducted the search while Joyce photographed the process. In a briefcase placed on a chair, wrapped in two polythene bags, they recovered four pieces of tusks.
 6. PW3, Corporal Odongo prepared an inventory at the scene before the suspect was taken to KWS Headquarters and later booked at Langata Police Station. PW1 identified in court the four pieces of ivory, the bags, and the inventory allegedly signed on 20th July 2019. In cross-examination he stated that the suitcase was left behind due to personal items and that the Tala officers did not sign the inventory.
 7. PW2, Dr Ogeto Mwebi of the National Museums testified that on 22nd September 2019 he received four exhibits from PW6, Corporal Anthony Ndung'u for species identification. Two were found to be elephant tusks and two hippopotamus tusks. He produced his report dated 23rd August 2019. Corporal Odongo confirmed that he was part of the team that laid the ambush and that the four pieces of ivory were recovered from the appellant's briefcase. He prepared the inventory, signed by four KWS officers on 20th July 2019, which he produced in evidence. PW4, Corporal Lydia Njeri corroborated the recovery, confirming that the ivory was found in the appellant's briefcase at La Familia room, though the briefcase itself was not produced in court.
 8. PW5, Warden Gladys Tanui confirmed that she led the operation based on intelligence and that the appellant was found in the room at Tala where four pieces of tusk were recovered from a bag. She identified the items in court, together with the weighing certificate. The investigating officer, Anthony Ndung'u, stated that he received the exhibits from the arresting officers and forwarded them to the National Museums. He weighed the ivory at 5.08 kilograms and produced the certificate. He recorded statements from all officers involved and formally charged the appellant. He produced the four pieces of ivory and the recovery bags as exhibits, noting that the briefcase and photographs taken at the scene were never availed to him.
 9. The appellant, in his unsworn statement, stated that on 20th July 2019 he was in his house at Tala when several officers knocked, handcuffed him, and kept him on the floor before entering his house. He claimed that the officers retrieved the four white pieces from his briefcase during the search.
 10. Having considered the evidence on record, the written submissions, the issue for determination is whether the prosecution proved their case beyond reasonable doubt.
 11. Section 3 of the Wildlife Conservation Management Act defines wild trophy in 2 parts. It provides that Wildlife means; "any wild and indigenous animal, plant or microorganism or parts thereof within its consistent habitat or ecosystem or land or in water. Trophy is defined as "any bone, claw, egg, feather, hair, hoof, tooth or tusk of an animal, and of any species of plant, any bark, branch' The Act under which the appellants were charged provides at section 92(4) as follows;

" Any person without permit or exemption issued under this Act is in possession of any live wildlife species or 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 fine of not less than three million shillings or a term of imprisonment of not less than five years or both such fine and imprisonment."
 12. Section 4 of the Penal Code defines possession as: -



“Be in possession of or have on 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 of oneself or for any other person.”

13. I am in deference with the decision of Peter Mwangi Kariuki vs Republic [2015] eKLR where Mativo J (as he then was) gave the following definition in relation to possession;

“Possession includes two elements, namely being in physical control of the item and being guilty of possession an appellant person must be shown to have knowledge of 2 things namely that he knew the item was in his custody and secondly that the item in question was prohibited. A person has possession of something if the person knows of the presence and has control of it and has power and intention to control it.”

14. To establish possession and knowledge of possession of the tusks by the appellant, the prosecution relied on multiple witnesses whose testimonies corroborated each other. The prosecution led evidence through PW1, PW3, PW5 and the investigating officer that four pieces of tusks were recovered from a briefcase in the appellant’s single-room dwelling. PW1, who conducted the search, stated that the tusks were wrapped in two polythene bags inside the appellant’s briefcase. Corporal Odongo prepared the inventory at the scene, signed by the involved KWS officers. PW5 corroborated the recovery, and the investigating officer later received and secured the exhibits. Although the briefcase itself was not produced, the chain of evidence on the recovered tusks remained consistent.
15. On whether the tusks belonged to an endangered species, Dr Ogeto Mwebi, an expert from the National Museums, examined the exhibits confirmed that two were elephant tusks and two were hippopotamus tusks. Elephant trophies fall under Convention on International Trade in Endangered Species (CITES), Appendix I and the Sixth Schedule while hippopotamus tusks fall under Convention on International Trade in Endangered Species (CITES) Appendix II. He produced a written report confirming the species.
16. In his defence the appellant did not assert that he held any lawful authority to possess elephant or hippopotamus tusks. No permit, authorisation or exemption was found in his possession at the time of arrest. The investigating officer confirmed that no permit existed.
17. From the record, the charge sheet alleged that the appellant was found in possession of four elephant tusks. The prosecution evidence later disclosed a discrepancy, as PW2, the expert witness, confirmed through scientific analysis that only two of the recovered exhibits were elephant tusks, while the remaining two were hippopotamus tusks. This variance concerned the specific description of the trophies rather than the gravamen of the charge, which was possession of a wildlife trophy without a permit. Both elephant and hippopotamus tusks constitute wildlife trophies requiring authorisation, though only elephant is listed under CITES Appendix I.
18. Section 92(4) of the Act, under which the appellant was charged, specifically addresses possession of trophies of critically endangered or endangered species listed in the Sixth Schedule or under CITES Appendix I. Elephant falls squarely within this category, while hippopotamus is not listed under Appendix I. The presence of two hippopotamus tusks did not remove the offence, since the appellant was still found in possession of two elephant tusks, which independently satisfied the statutory requirement. The misdescription of all four tusks as elephant simply overstated the quantity of Appendix I material but did not negate the essential element that the appellant possessed at least one prohibited trophy without a permit.



19. The discrepancy was therefore one of form rather than substance. It did not prejudice the appellant's defence, was clarified through expert testimony, and fell within the ambit of a curable defect under section 382 of the Criminal Procedure Code.
20. Considering the evidence in totality, the prosecution evidence demonstrated possession, species classification within protected categories, and the absence of lawful authority, thereby satisfying all statutory elements of the offence charged. The appellant's conviction by the trial court was therefore proper and is upheld.
21. The appellant was sentenced to pay a fine of Kshs. 20 million in the alternative a sentence of thirty years imprisonment. During sentencing, the trial court considered the pre-sentence report, the appellant's mitigation and the fact that he was a first offender.
22. Taking all this into consideration, I find the sentence imposed by the trial court to have been harsh and excessive.
23. I therefore uphold the conviction but substitute the sentence imposed by the trial court with a fine of Kshs. Three (3) million in default to serve 12 months imprisonment in addition to serve five (5) years imprisonment. The sentence imposed shall run from the date of conviction by the trial court.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 26TH DAY OF NOVEMBER 2025

D. KAVEDZA

JUDGE

In the presence of:

Jaleny for the Appellant

Mutuma for the Respondent

Karimi Court Assistant.

