REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CRIMINAL APPEAL NO. E037 OF 2025

KAZUNGU KARISA MWAKOMBE……

APPELLANT

=VERSUS=

REPUBLIC……

RESPONDENT

(Being an appeal from the Judgment and conviction of Hon. C. K. Kithinji (PM) in Voi Magistrate's Criminal Case No. E717 of 2023 delivered on 30th July 2025)

JUDGMENT

1. The Appellant **KAZUNGU KARISA MWAKOMBE** was charged with the offence of dealing in wildlife trophy contrary to Section 92(2) of the Wildlife Conservation Management Act (WCMA) 2013.

2. The particulars were that on 8th August 2023 at around 2000hours at Zungulukani Area within Taita Taveta County, the Appellant with others not before court was found dealing in wildlife trophy namely (2) pieces of elephant tusks weighing fourteen (14) and seven (7) kilograms respectively.

3. The prosecution evidence in summary was that PW1 got a phone call from the In-charge Investigations Tsavo East one John Were to prepare; a team to go to Zungulukani where it was reported that some persons were in possession of elephant tusks they were intending to sell.
4. PW1 contacted PW2 and they proceeded to Zungulukani Area in an undercover vehicle.

5. At 8:00p.m they saw two people carrying a faded green sack. They stopped them and in the process of inquiring what was in the sack, the persons tried to escape.

6. They managed to arrest the Appellant who was one of the two people while the other person managed to escape.

7. The luggage looked like two pieces of wood. They recovered the two elephant tusks which they produced as exhibits. The Appellant was subsequently charged.

8. **PW3 DR OGETI MWEBI** who works at National Museum of Kenya as a Scientist received the two pieces of animal remains labelled T1 and T2 accompanied with an exhibit memo. PW3 did analysis and he was able to establish that the two were elephant tusks from one animal.

9. In his defence the Appellant said he was at home on 6th August 2024 with a neighbour Kaboni Kombe who told the Appellant that an in-law in Voi wanted his vehicle collected from Voi and taken to Kilifi for work.

10. The in-law was looking for a driver. He was sent Kshs. 3,500/= He left Kilifi and they met at Meli Kubwa Petrol Station.

11. The Appellant said he met Jesca Orenge and Joseph Were who said they were going to Kilibasi to their shamba.

12. They went there but did not go to the shamba. They parked at the road and gave him Kshs. 200/= and sent him to buy Safaricom airtime.

13. When the Appellant returned, the vehicle had been turned and they asked him to drive it.

14. When they go to the road a white Pick Up came ahead of him and stopped. He was asked where he was going and what he was carrying. They searched the boot and found the tusks.

15. The Appellant said he called Jesca but she hang up. He was taken to the police station and charged on 10th August 2023.

16. The trial court found that the prosecution had proved its case to the required standard and the Appellant was convicted as charged and sentenced to 7 years imprisonment.

17. The Appellant has appealed to this court on the following grounds:-

(i) The learned trial Magistrate erred in both law and fact when she misdirected herself.

(ii) The learned trial Magistrate erred in both law and facts when she shifted the burden of proof from prosecution to the Appellant.

(iii) The learned Magistrate erred in law when she considered the evidence adduced by prosecution full of massive contradiction.

(iv) The learned trial Magistrate erred in law in convicting the Appellant on poor investigation adduced by prosecution.

(v) That the learned trial court Magistrate erred in law fact by convicting the Appellant to 7 years

imprisonment without considering that the sentence meted on the Appellant was harsh and excessive.

(vi) That the learned trial court Magistrate erred in law and fact by convicting the Appellant to 7 years imprisonment without considering the Appellant's reasonable defense.

18. The parties filed written submissions as follows; The appellant, Kazungu Karisa Mwakombe, submitted that he is appealing against his conviction and sentence for dealing in a wildlife trophy contrary to Section 92(2) of the Wildlife Conservation and Management Act, 2013.

19. His submissions collectively argue that the prosecution failed to prove its case beyond a reasonable doubt and that procedural errors rendered the trial unfair.

20. Firstly, he contends that the essential elements of "dealing" were not established, as defined in **Ndeka v Republic**, which requires proof of physical control, knowledge of the item, and knowledge that the item is prohibited.

21. The evidence, specifically from PW2, indicated they were following a report about two other individuals, which the appellant argues exonerates him from having the necessary knowledge or involvement in dealing.

22. Secondly, the appellant challenges the integrity of the investigation, stating the Investigating Officer failed to conduct an independent inquiry and doubled as the arresting officer.
23. He maintains his defense that he was merely a driver for two women who were released under unexplained circumstances, a narrative he claims was not disproven by the prosecution.
24. Thirdly, he asserts the charge itself was defective, as it alleged "dealing" (implying a commercial transaction) but no evidence was adduced regarding a buyer or seller, suggesting he should have been charged with mere possession.
25. Further submissions highlight alleged violations of fair trial rights. The appellant argues that hearsay evidence from an informer was improperly admitted without the informer testifying.
26. He also claims a breach of Article 50(2) of the Constitution, as the analyst's report on the tusks was not presented by its maker, nor was he involved in the process of submitting the exhibits for analysis, contrary to established procedure.
27. Additionally, he states the certificate of inventory was defectively prepared without an independent witness, such as a local administrator.
28. Regarding sentence, the appellant, a first offender, argues the seven-year term was harsh and excessive.

29. He submits the trial magistrate failed to exercise discretion judiciously by not fully considering his mitigation including his remorse, parental responsibilities, and status as sole breadwinner or the holistic objectives of sentencing such as rehabilitation and reintegration.
30. In conclusion, the appellant prays for the appeal to be allowed, his conviction quashed, and an acquittal entered. Alternatively, should the court uphold the conviction, he seeks a substantial reduction in his sentence.
31. The Respondent opposed the appeal in its entirety, seeking to uphold both the conviction and sentence.
32. The prosecution's case, presented through four witnesses, established beyond reasonable doubt that the Appellant was dealing in a wildlife trophy contrary to Section 92(2) of the Wildlife Conservation and Management Act, 2013.
33. The evidence demonstrated that on August 8, 2023, officers acting on a tip proceeded to Zungulukani area, where they observed and subsequently arrested the Appellant and another person who were carrying a sack.
34. Upon inspection, the sack contained two elephant tusks with a total weight of 21 kilograms.
35. The Appellant attempted to flee upon being questioned, conduct indicative of his knowledge of the illegality of his actions.

36. A government chemist, PW3, confirmed the recovered items were indeed elephant tusks, a trophy of an endangered species.

37. Critically, the Appellant failed to produce any permit or license authorizing him to deal in such wildlife trophies, a requisite element of the offence.

38. The Respondent contends that the Appellant's physical possession of the tusks, coupled with the intent to supply inferred from the circumstances and his lack of a permit, conclusively proved the charge.

39. Therefore, the conviction is sound and the mandatory minimum sentence of seven years' imprisonment was properly imposed.

40. **The issues for determination in this appeal are as follows;**

(i) Whether the prosecution proved all the essential elements of the offence of dealing in a wildlife trophy contrary to Section 92(2) of the Wildlife Conservation and Management Act, 2013, beyond reasonable doubt;

(ii) Whether the learned trial magistrate erred in law by shifting the burden of proof to the Appellant or by relying on evidence that was contradictory or procedurally flawed;

(iii) Whether the sentence of seven years imprisonment was lawful and appropriate in the circumstances.

41. On the first issue, the gravamen of the offence under Section 92(2) of the Act is the act of "dealing" in a wildlife trophy without a permit. The term "deal" is expansively defined under Section 3 of the Act to include, inter alia, being in possession of, acquiring, or supplying a trophy.

42. The prosecution is therefore obligated to prove possession, knowledge that the item is a prohibited trophy, and the absence of a requisite permit.

43. The evidence of PW1 and PW2, which the trial court believed, was that they found the Appellant and another person carrying a sack containing the two elephant tusks at night.

44. Upon being stopped, the Appellant attempted to flee, which conduct the court was entitled to consider as evidence of a guilty mind.

45. A suspect’s conduct upon being challenged by police, including attempts to escape, is relevant in inferring knowledge and guilt.

46. The scientific evidence of PW3 from the National Museum conclusively identified the exhibits as elephant tusks, a trophy from an endangered species.

47. The Appellant did not, at any stage, claim to have a permit authorizing his possession of the tusks.

48. In the circumstances, the chain of evidence from recovery to analysis was intact, and the trial court correctly found that the prosecution had established possession and dealing.

49. The Appellant's defence that he was an innocent driver duped by his passengers was rejected by the trial court, and this court finds no reason to disturb that finding of fact.

50. An appellate court will not lightly interfere with the findings of fact of a trial court which had the advantage of hearing and observing the witnesses, unless it is shown that the findings were based on no evidence or on a misapprehension of the evidence.

51. This principle was affirmed in **Okeno v Republic [1972] EA 32.** No such misapprehension has been demonstrated here.

52. Regarding the second issue, the contention that the burden of proof was shifted to the Appellant is not borne out by the record.

53. The prosecution led positive evidence placing the tusks in the Appellant's physical custody.

54. Once this prima facie case of possession was established, the evidential burden shifted to the Appellant to offer a plausible explanation for his possession, which explanation the trial court found wanting.

55. This is not the same as shifting the legal burden of proof, which always remains with the prosecution.

56. The Appellant's complaint about hearsay evidence from an informer is also misconceived.
57. The evidence of PW1 and PW2 was based on their own observations and the recovery they effected, not on the contents of the initial tip-off.
58. The tip-off was merely the information that triggered their investigation.
59. Furthermore, the argument that the analyst's report was presented in violation of the Appellant's right to challenge evidence under Article 50(2)(j) of the Constitution is without merit.
60. PW3, Dr. Ogeti Mwebi, was the scientist who conducted the analysis and produced the report. He was cross-examined by the Appellant.
61. There was therefore no breach of procedure. Where the maker of a scientific report testifies and is subjected to cross-examination, the right to a fair trial is upheld.
62. The alleged contradictions in the prosecution evidence were minor and did not go to the root of the case.
63. It is not every contradiction that vitiates a conviction; only those that are material and point to a likelihood of falsehood.

64. Concerning the sentence, Section 92(4) of the Wildlife Conservation and Management Act prescribes a mandatory minimum sentence of not less than five years for the offence.
65. The Appellant was sentenced to seven years. The learned trial magistrate considered the Appellant's mitigation, the gravity of the offence involving an endangered species, and the need for deterrence.
66. The sentence imposed is above the statutory minimum but within the discretion of the trial court.
67. In the absence of any demonstration that the court acted on wrong principles or that the sentence is manifestly excessive in view of all factors, including the Appellant's status as a first offender, this court finds no legal basis for interference.
68. The issue of sentencing is at the discretion of the trial court and an appellate court will only interfere if that discretion is exercised unlawfully.
69. In the final analysis, the appeal against both conviction and sentence lacks merit.
70. The conviction was based on sound evidence that proved all elements of the offence beyond reasonable doubt.
71. The trial was conducted fairly, and the sentence imposed was lawful. Consequently, the appeal is hereby dismissed in its entirety.

72. The conviction and sentence imposed by the learned trial Magistrate in Voi Magistrate's Court Criminal Case No. E717 of 2023 are upheld.

Dated, signed and delivered this 3rd day of December 2025 in open court at Voi High Court.

ASENATH ONGERI

JUDGE

In the presence of:-
Court Assistant: Millicent/Mabishi
State Counsel:……..
Appellant: ……