

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. E143 OF 2024

COSMUS NGALA.....

APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

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(Being an appeal from the original conviction and sentence by Hon.N. Makau, Principal Magistrate, in Malindi Senior Principal Magistrate's Court Criminal Case No. 238 of 2023 delivered on 21/4/2024)

JUDGMENT

1. The Appellant herein was tried and convicted for the offence of dealing in a wildlife trophy of an endangered wildlife species without a permit or other lawful exemption contrary to section 92(2) of the Wildlife Conservation and Management Act, 2013. The particulars of the offence are that on the 25th March 2023 at around 1040 hours at stage ya Maembe area in Malindi sub-county within Kilifi County was dealing in a wildlife trophy, namely three pieces of elephant tusks weighing approximately 29 kgs with a street value of Ksh. 2,900,000/= and at the time of doing so, did not have a permit or other lawful exemption granted under the Act.

2. The Appellant was sentenced to pay a fine of Ksh.9 million in default to serve 15 years imprisonment. He was aggrieved by the conviction and the sentence and filed the instant appeal. The grounds of appeal are that:

- 1) The trial magistrate erred in law and facts by failing to properly re-evaluate the evidence in his own findings which rendered the appellant to suffer prejudice.
- 2) The trial magistrate erred in law and facts by denying the appellant the right to a fair trial as ordained by Articles 50(2) of the Constitution by proceeding to convict and sentence the appellant without considering that the evidence of the prosecution was doubtful.
- 3) To the extent that Section 92 of the Wildlife Conservation and Management Act 2013(sic) thus prosecution relief upon and the witnesses evidence was unconstitutional and not corroborated Contrary to Sec 163(1) of the Evidence Act.
- 4) To the extent that the said sentence should be quashed in addition to and in the alternative this honourable court be pleased to interfere with the sentence and substitute with an appropriate term of imprisonment.

3. The case for the prosecution was that Seargent Julie Odhiambo PW2 and Ranger Kennedy Maccan PW 5 are Kenya Wildlife officers based at Mombasa Regional Headquarters. Peter Njagi PW3 is a driver at the said office.

4. That on the 24/3/2023 Sgt Julie PW2 received information that there was someone at stage ya Maembe in Malindi who was in possession of animal trophies and was looking for a buyer. On the following day, she summoned Ranger Maccan PW5 and their driver PW3 and headed to Malindi in an unmarked motor vehicle. That when they reached near stage ya Maembe, Ranger Kennedy alighted from the motor vehicle so as to keep surveillance while Sgt Julie and the driver proceeded to the stage. They parked their vehicle at the stage. After about 30 minutes a man approached Sgt Julie and offered to sell her elephant tusks. They talked and struck a deal. The man entered into their vehicle for him to go and show them where the goods were. They took the Mombasa Malindi highway and after about 500 meters they branched off. He led them to a house with a green gate. He alighted from the vehicle and picked a sack at the gate. He went back to the vehicle and placed the luggage in the boot. The two officers noted an elephant tusk protruding from the sack. Sgt Julie had negotiated the price with him when they were going to pick the goods and had agreed at the price of Ksh.6,000/= per kg. Sgt Julie convinced him that she was going to pay him at some other place. He accepted. They returned towards the highway. The arrangement was for them to pick Ranger Maccan on the way. They found him on the way and the driver signaled him that they had the goods. Ranger Maccan stopped the vehicle and introduced himself as a KWS officer and demanded to search the motor vehicle. The other two officers revealed to the person, the

Appellant, that they were KWS officers. They arrested the Appellant and escorted him to Malindi KWS office. They opened the sack and found 3 pieces of elephant tusks. They were wrapped in 2 sacks and covered in animal feed. Sgt Julie weighed the tusks at 29kg and prepared a chain of custody and an inventory. She prepared a weighing certificate that was signed by the officers and by the Appellant. Ranger Maccan took photographs of the exhibits. They handed over the goods to the investigating officer, Cpl Isaac Nyaboni PW4 of Malindi Marine National Park. The Appellant was taken to Malindi police station. He was charged with the offence.

4. Cpl Nyaboni PW5 prepared an exhibit memo and took the 3 pieces of tusks to the National Museums of Kenya for examination. They were examined by Dr. Ogeto Mwebi PW1 who certified them to be one piece of elephant tusk from one mature African elephant. He prepared a report dated 29/3/2023 to that effect. During the hearing of the case in court Dr. Ogeto produced his report as exhibit, P.Exh.1. Sgt Julie produced the inventory and the weighing certificate as exhibits, P. Exh. 5 and 6 respectively. The investigating officer produced the pieces elephant tusks as exhibits, P.Exh. 3A - 3C respectively. He produced the exhibit memo as P.Exh.2, the sacks as P.Exh7A - 7C and the animal feed as exhibit 8. He produced the photographs as exhibits, P.Exh.9 (a) - (c).

Defence case

5. When placed to his defence, the appellant stated in a sworn statement that he lives at Tezo. That on 25/2/2023 he went to Malindi town to repair a machine. That after he alighted at Malindi stage he was called by a person whom he recognized to have worked with in Kilifi. He was in short of money and asked him to give him Ksh.1100/=. The person told him to wait for him and he would send him Ksh.100/=. The person went away and delayed in coming back. He decided to go away as it was getting late. As he was going away, a motor vehicle appeared and he asked the occupants for a lift. They accepted and he entered into the vehicle. A person told him that it was his day and he was taken to the Kenya Wildlife offices. He was interrogated and placed in the cells. He saw a sack and he was told to remove what was inside. He was taken to the police station. He was charged on the following Monday. He denied that he was found in possession of the elephant tusks. He said that he cannot have managed to commit the offence as alleged as he is disabled on the legs.

6. The Appellant called one witness, Martha Mbutsi DW2 who testified that she is a neighbor to the appellant. That she had known him for a period of 30 years. That he is disabled and a tailor. That he had never been charged with any offence and she was surprised that he was charged with possession of trophies. She said that she was not with him when he was arrested.

7. The appeal was canvassed by way of written submissions. The Appellant submitted that the sentence of 15 years was harsh and excessive. That the trial court in passing the sentence did not

consider his mitigation that he was a first offender; that he was remorseful; that he was an elderly man aged 70 years and was disabled and that he was a father of 7 children. He urged the court to allow the appeal.

8. The Respondent on the other hand submitted that the Appellant was found with elephant tusks as testified by the officers who arrested him - PW1, PW2 and PW5. That the tusks were confirmed by PW1 to be elephant tusks. That the evidence adduced against the appellant was overwhelming and therefore the conviction was safe.

9. On sentence, it was submitted that the Appellant was charged under section 92(2) of the Wildlife Conservation and Management Act which provides for an imprisonment term of not less than 7 years. That the sentence meted out by the trial court was lawful. They urged the court to dismiss the appeal.

Analysis and determination

10. This being a first Appeal, this Court has a duty to evaluate the evidence, analyze it afresh and draw its own conclusions while bearing in mind that it did not have the advantage of seeing and hearing the witnesses testify as did the trial Court. In **Okeno vs. Republic [1972] EA 32**, the Court of Appeal for East Africa had the following to say in this connection:

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ... and to the appellate

court's own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses..."

11. Though the grounds of appeal filed by the appellant indicated that he was challenging the conviction on the grounds that the trial court did not properly evaluate the evidence; that the evidence presented before the trial court was doubtful and uncorroborated, his submissions were confined to the issue of sentence meted out on him. He faulted the trial court of imposing a harsh sentence without considering his mitigation.

12. I have however re-evaluated the evidence adduced before the trial court and find that the evidence adduced against the appellant for dealing with of 3 pieces of elephant tusks without a permit was overwhelming. The Kenya Wildlife officers PW2, PW3 and PW5 who found him with the tusks did not know him before and they therefore did not have any reason of fabricating the evidence against him. His defence did not in any way cast doubt

on the evidence of the three witnesses. That he was arrested after asking for a lift in the vehicle for him to go home must have been a lie. He never asked the prosecution witnesses in cross-examination that they arrested him after giving him a lift in their vehicle so as to go home. He never brought up the issue that he did not take them to a house off the road which had a green gate where he picked a sack. The Appellant's defence must have been an afterthought.

13. The pieces of tusks were examined by Dr. Ogeto PW1 of National Museums of Kenya and confirmed them to be pieces of the African elephant tusks. The witness had expertise in that area and there was no reason to doubt his findings. The African elephant is specified in the Sixth Schedule of Wildlife Conservation and Management Act as an endangered species. The Appellant was therefore found dealing with a wildlife trophy of an endangered species. He did not have a permit or exemption issued under the Act. The charge against him was proved beyond reasonable doubt and the conviction is thereby upheld.

14. Section 92(2) of the above said Act provides as follows:

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.

15. In my view, the words “shall be liable” and “not less than....” connote that a convicted person shall be sentenced to imprisonment for a period of not less than 7 years. The appellant in this case was sentenced to serve 15 years imprisonment in default of paying a fine of Ksh.9 million.

16. According to the pre-sentence report presented to the trial court, the Appellant was at the time of sentence aged 64 years. In my view the sentence of 15 years imprisonment was harsh and excessive, particularly considering the advanced age of the Appellant and that he was a first offender and had some disability. The court though has to bear in mind that the Appellant had committed a serious offence that showed that he poses a threat to our nation`s endangered species. That said, I consider a sentence of eight years imprisonment to be appropriate.

17. The upshot is that the conviction on the Appellant is upheld but the sentence of the trial court is set aside and replaced with a sentence of EIGHT years imprisonment.

Delivered, dated and signed at GARSEN this 30th day of January, 2026.

J. N. NJAGI

JUDGE

In the presence of:

Miss Oluoch for Respondent

Appellant - present virtually at G. K. Prison Malindi

Court Assistant - Rahma

Original