



**Being in possession of wildlife trophy without a permit contrary to Section 95(d) of the Wildlife Conservation and Management Act, 2013.**

Particulars of the offence being that on the 6<sup>th</sup> July, 2023, at around 1130hrs within Nyahururu Township, Laikipia West Sub-County, jointly, the Accused persons were found in possession of wildlife trophy namely 1 piece of python skin with a street value of Kshs.50,000/- without a licence from the Director General Kenya Wildlife Service.

2. Having denied the charges they were taken through full trial, convicted and sentenced to serve seven (7) years imprisonment, with one of the Accused being sentenced in absentia as he had absconded.

3. Aggrieved, the Appellant appeals on grounds that;

***1) That the learned trial Magistrate erred in law and fact by failing to find that the prosecution did not prove the charges of dealing in and being in possession of wildlife trophy.***

***2) The learned trial Magistrate erred in law and fact by failing to give any and/or adequate consideration to the defence advanced by the Appellant.***

***3) The learned trial Magistrate erred in law and fact by failing to find that the prosecution had evidential duty to show how each of the three (3) Accused persons were connected with***

***possession and dealing with the elephant tusk and python skin in question.***

***4)The trial Magistrate erred in law and fact by drawing wrong inferences from the prosecution's evidence and thus prejudicing the Appellant and arriving at a wrongful conviction.***

***5)The trial Magistrate erred in law and fact by arriving at conviction against the weight of the evidence tendered by the Prosecution.***

***6)The trial Magistrate erred in law and fact by passing an excessive sentence in the circumstance of the case before her.***

4. Briefly, facts of the case were that officers from KWS acting on information received moved to Runda Estate, Nyahururu and arrested the Appellant with two (2) others. The Appellant and his Co-Accused were to be picked up by a purported buyer of the items they had. PW1 No. 9482 Daniel Chirchir posed as a driver and drove a motor vehicle to Runda Estate where the suspects were waiting. They boarded the motor vehicle and proceeded to the Nyahururu Central Business area where they found PW2 No. 9708 Daniel Mutai and PW3 No. 11355 Alvin Parsare who posed as buyers. They conducted a search and recovered a sack that was being held by Wilson the Appellant's Co-Accused. Inside the sack was a skin and tusk. They were suspected to be

wildlife trophies hence they arrested and escorted them to the police station.

5. The exhibits were submitted to the Kenya Wildlife Service Station for examination and identification. PW5 Dr. Jeremiah Poghon, a Veterinary Doctor with KWS carried out a morphological examination and found that the incomplete tusk that was broken on the sides was derived from the mid-section of a bigger tusk and was a genuine elephant tusk while the skin that measured 10 feet long was derived from the African Rock Python species.
6. Upon being placed on his defence, the Appellant stated that while in company of his two (2) Co-Accused, they were taken to Maina Village by a Mr. Kandie where they were to do construction work. They were picked by a motor vehicle and while on the way the driver alleged that the vehicle had mechanical problems hence stopped at a garage. That the vehicle was surrounded by five (5) people. They were made to enter another vehicle and taken to KWS office. That a sack was removed from the first vehicle that they boarded. They denied having been in possession of the trophies.
7. The trial court considered evidence adduced and reached a finding of guilty, hence the conviction and sentence.
8. The appeal was canvassed through written submissions that I have taken into consideration.
9. This being a first appellate court it is duty bound to re-examine evidence adduced at trial and scrutinize the

findings bearing in mind that it did not have the opportunity of seeing or hearing witnesses to assess their demeanour, then form its independent conclusions. This, was summed up in **Okeno v Republic (1972) EA 32** thus;

***“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). 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, see Peters v. Sunday Post, [1958] E. A. 424.”***

- 10.** It is urged by the Appellant that a crucial witness was not availed to testify in particular the informer whose identify

was not disclosed. **Section 143 of the Evidence Act** provides thus;

***No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.***

**11.** In the case of **Keter v Republic [2007] eKLR** the Court of Appeal stated that;

***“The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt.”***

**12.** Regarding information given by persons to the police in confidence of their identity being disclosed, in **Kigecha Njuga v Republic [1965] EA 773** Ainley C.J. and Madam J (as they were) stated that;

***“informers play a useful part no doubt in the detection and prevention of crime, and if they become known as informers to that class of society among whom they work, their usefulness will diminish and their very lives may be in danger. But if the prosecution desires the court to hear the details of the information an informer has given to the police, clearly the informer must be called as a witness.”***

- 13.** The information provided for the police is ordinarily done informally to assist in investigations. Such individual's identity is protected and withheld.
- 14.** On the question whether the offence was proved. This being a criminal case the prosecution had the duty of proving the case beyond reasonable doubt.
- 15.** The State/Respondent relied on the case of **Peter Mwangi Kariuki [2015] KEHC 1904 (KLR)** in this regard where the court held that;

***“(a) proof of possession,  
(b) proof that the items in question were game trophies,  
(c) evidence that the appellant was dealing in game trophies without a dealer's licence, and  
(d) failure to make a report to an authorized officer.***

***In my view, possession includes two elements; namely being in physical control of the item and knowledge of having the item. To be guilty of possession, an accused person must be shown to have knowledge of two things, namely, that the accused knew the item was in his custody and secondly he knew that the item in question was prohibited. A person has possession of something if the person knows of its presence and has***

***physical control of it, or has the power and intention to control it.”***

**16.** Section 4 of the Penal Code defines ‘possession’ as follows;

***(a) "be in possession of" or "have in 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 or benefit of oneself or of any other person;***

***(b) if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them;***

**17.** It is admitted that the trophies were in the motor vehicle that the Appellant and his Co-Accused were found. The prosecution's evidence did establish that the Appellant's Co-Accused was the one in physical possession of the trophies. The trophies were to be sold by the three individuals including the Appellant who entered the vehicle with the intention of selling them hence they all had knowledge of what they were carrying even if the Appellant

was not in physical possession of the same. Therefore, they were in possession of one piece of python skin without a licence or permit or authorization by the Director General of Wildlife Service.

**18.** On the issue whether the Appellant and his Co-Accused were found dealing in wildlife trophies. **Section 3 of the Act** defines trophy as;

***includes any bone, claw, egg, feather, hair, hoof, skin, tooth or tusk of an animal, and for any species of plant, any bark, branch, leaf, log, sip or extract and includes any other durable portion whatsoever of that animal or plant whether processed, added to or changed by the work of man or not, which is recognizable as such.***

**19.** Expert evidence adduced by Dr. Jeremiah Poghon established that what was in possession of the Appellant and two (2) others was a genuine elephant tusk and a skin of an African Python. These were wildlife species per the definition of the trophy.

**20.** The term deal is defined by **Section 3 of the Act** as;

***(a) to sell, purchase, distribute, barter, give, receive, administer, supply, or otherwise in any manner deal with a trophy or live species;***

***(b) to cut, carve, polish, preserve, clean, mount or otherwise prepare a trophy or live species;***

***(c) to transport or convey a trophy or live species;***

***(d) to be in possession of any trophy or live species with intent to supply to another; or***

***(e) to do or offer to do any act preparatory to, in furtherance of, or for the purpose of, an act specified above;***

**21.**The Appellant and his Co-Accused found themselves in conflict with the law because they were to sell the trophies. They dealt with the trophies so as to sell them.

**22.**The **Black's Law Dictionary Tenth Edition** defines dealing as;

***"1. The business activities or relationships that someone is involved in.***

***2. The activity of buying, selling, or doing business with people."***

**23.**The Appellant with his Co-Accused contravened the law as provided by the Act because they were found dealing in one (1) elephant tusk with a street value of Kshs.200,000/- without a permit, licence or authorization from the Director General of Kenya Wildlife Service which was an offence.

**24.**The trial court considered evidence adduced by the Appellant. Admitting having entered the vehicle which picked them up, his argument was that they were going to Maina Village where they were to do some construction work. The

trial court weighed the evidence in relation to evidence adduced by the prosecution witness which was consistent, corroborative hence reached a logical conclusion to find it overwhelming. This court has no reason to fault the finding of the trial court with regard to the conviction which is affirmed.

**25.** On sentence, **Section 92(2) of the Act** provides thus;

***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.***

**26.** Secondly, **Section 95(d) of the Act** provides thus;

***Any person who, without a permit or exemption granted under this Act in relation to a species not specified under Section 92;***

***(d) is in possession of a wildlife trophy or live wildlife species; or***

**27.** Looking at the sentence meted out it reads thus;

***“Having found the Accused persons guilty as charged, the 3 Accused persons will be sentenced pursuant to Section 92(2) of the Wildlife Conservation and Management by court.***

***The three Accused are sentenced to serve seven (7) years in prison.”***

**28.** The trial court failed to pronounce itself on both/each count. Failure to sentence the Appellant and his Co-Accused on each count created an ambiguity as there was lack of clarity. The law requires the court to determine each charge separately with a corresponding sentence then give directions on whether the sentence will run concurrently or consecutively. (Also see **Mohammed Warsame S.T. Musa Abolle Majelo v Republic [1956] 23 EACA 576**)

**29.** The court having imposed a global sentence without specifying to which charge the sentence was attached was procedurally irregular therefore I call to this court the sentence which I set aside and remit the case to the trial court for re-sentencing.

**30.** Mention before the trial court and/or Chief Magistrate’s Court for re-sentencing on 4<sup>th</sup> February, 2026.

**31.** It is so ordered.

**Dated, signed and delivered virtually this 29<sup>th</sup> day of January, 2026.**

.....

**L.N. MUTENDE**

**JUDGE**