Nthiga v Republic (Criminal Appeal E002 of 2025)
[2026] KEHC 1623 (KLR) (12 February 2026) (Judgment)

Neutral citation: [2026] KEHC 1623 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E002 OF 2025

RC RUTTO, J

FEBRUARY 12, 2026

BETWEEN

JOHN NJUKI NTHIGA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against both the conviction and sentence of life imprisonment or a fine of kshs 20,000,000 for the offence of possession of wildlife trophy contrary to section 92(4) of the Wildlife Conservation and Management Act (2013) delivered on 20th December 2024 at Kithimani Law Court by Hon. Khapoya Benson (SPM)

JUDGMENT

A. Introduction

1. The appellant being aggrieved by the decision of the trial court that convicted him for the offence of possession of wildlife trophy without a permit contrary to section 92(4) of the *Wildlife Conservation and Management Act* (2013), has lodged this appeal. He seeks that his conviction be quashed and the life sentence imprisonment imposed, with the alternative of 20 million shillings fine, be set aside.

2. The appeal is premised on the following summarized grounds: that the trial court erred in law and fact; by failing to find that he was not properly identified; in failing to find that the witnesses in the case were incredible witnesses whose evidence could not be used to base a conviction; in sentencing the appellant to an unlawful sentence which was harsh contrary to the sentence that is stipulated under the said Act; and in not realizing that the appellant was not found in possession of the said wildlife trophy as alleged but it was in possession of another person.

B. Background

3. Before the trial court, the appellant was jointly charged with another with the offence of being in possession of wildlife trophy without a permit contrary to section 92(4) of the *Wildlife Conservation and Management Act* 2013. The particulars of the offence were that on 13th January 2022 at Matuu township in Yatta sub county within Machakos County, they were jointly, with others not before court found in possession of wildlife trophies namely elephant tusk (2 pieces) wrapped in a green sack weighing 14 kgs with a street value of Ksh1.4 million without a permit.

4. Before the trial court, the appellant was the 2nd accused person. They both pleaded not guilty and to prove their case, the prosecution called a total of five (5) witnesses.

C. The case before the trial court

Prosecution's Case

5. Pw1, No. 7060 KWS Imran Badera based at KWS Mwingi Station. testified that on 13th November, 2022 at around 1000 hrs, he was at work when he received a call from one Nicholas Munove in Nairobi who told him that there were people in possession of ivory tusks looking for buyers. Nicholas asked them to go to Matuu. That Nicholas posed as a buyer. That they were in the company of Ranger Aluoch. It was 2 elephant tusks. My colleague posed as a buy, a driver. That they arrested two people they found with two elephant tusks. He stated that they had been brought to an unmarked police car. They did not have a permit for the tusks and they took them to Matuu Police Station. He identified the elephant tusks recovered in a green sack. In cross-examination, he stated that his role was only to provide reinforcement and he never spoke to the appellant and his co-accused. That he found them already in the vehicle and did not see the tusks being loaded in the vehicle.

6. PW2, No. 8695, David Atieno Oluoch, testified that on 13th January, 2022 while on duty, he received a call from his incharge CPI Imran who informed him of an operation, that he had been called from KWS Headquarters Nairobi. He was informed of some people in possession of wildlife trophy at Matuu township. They prepared and went to Matuu township. They reported at Matuu police station and met their team from KWS Headquarters at Matuu for more briefing on the mission. They were informed that the people were looking for a buyer for the trophies. PW2 stated that they offered surveillance from a distance. That their colleague, Mr. Munene acted as a buyer of the trophy. That the two people were in the vehicle negotiating and they approached them from behind. PW2 approached from the right side of the vehicle and Imran (PW1) from the left side of the vehicle. The found the suspects inside the vehicle with the willing buyer, Mr. Munene. They introduced ourselves as KWS officers and asked for a permit allowing the possession of the wildlife trophy. The two did not have any documents. They arrested them. He stated that they found in their possession two elephant tusks wrapped in a green manila bag.

7. PW3, No. 8915, Sgt Nicholas Munene, testified that he was from KWS Lodwar station and had 17 years in service investigating wildlife crime and other duties assigned. He stated that on 12th January 2022, while in office at KWS Headquarters Langata Investigation Department, he received intelligence report from members of public that there were two people in possession of wildlife trophies/elephant tusks at Matuu town. He informed his superior Assitant Warden II Michael Bett. They planned for an operation on 13th January 2022. He informed his superior that he had talked with one of the suspects through a mobile number gotten from members of public. He gave the number as 0724119803 belonging to one Muturi Njeru. They agreed to meet at Matuu town to finalize deal.

8. On the same day, they left Nairobi Headquarters KWS with Michael Bett, Joyce Kipkurui and driver Kanke using a KWS unmarked vehicle. They proceeded to Matuu. On the way to Matuu, he called his colleagues from Mwingi and asked them to offer reinforcement and surveillance during the operation.

9. Meanwhile, that he went on communicating with Muturi Njeru, who assured him that he was waiting for them at Matuu. They met their colleagues from Mwingi and they proceeded to Matuu. He stated that his colleagues alighted and he was left alone posing as a buyer. He called Muturi Njeru who came to the vehicle and entered though and sat on the passenger seat. He confirmed he had two elephant tusks weighing 14 kgs valued at Kshs. 100,000/- per kilo. He told him he had his friend in the hiding point where the tusks are kept. They agreed and Muturi left the vehicle to bring his friend, John Njuki (the appellant herein) and the ivory.

10. That they came back carrying a green sack and entered the vehicle through the rear passenger door and placed the sack in between themselves. He requested them to open the sack, checked and confirmed it was elephant tusks. he stated that he notified his colleagues on surveillance who came swiftly and together they introduced themselves as KWS officers and asked for a certificate of ownership or dual ownership of KWS. They did not have. They arrested them and took them to Matuu police station for processing. He produced the elephant tusks in court as exhibits. He identified the appellant and his co-accused in the dock as the people they arrested.

11. On cross-examination, he confirmed that he got Muturi's number (1st accused) from the public and when he called him, he confirmed to having the tusks.

12. PW4, No. 258936, PC Nelson Mureithi testified that on 13th January 2022, he was on crime stand by at Matuu police station when he was called by OCS at 1050 hrs and informed to take over a KWS case. That there were two suspects with two pieces of ivory. He booked the accused and together with the KWS officers, they took the tusks to the weighing machine where upon weighing, they were found to be 14kgs valued at Kshs. 1,400,000/-. He stated that he charged the suspects. PC Mureithi further stated that on 9th February 2022, he took the exhibits to Kenya Museums for examination where the exhibits were analyzed and ascertained to be elephant tusks. He identified the suspects as the persons before court. He produced the exhibit memo as an exhibit.

13. PW5, Esther Maina, a research scientist with 20 years work experience working with National Museum of Kenya. She stated that on 9th February 2022, she received some exhibits from Matuu police station and was requested to identify the exhibits. She examined the two exhibits and both had schreger lives only found in elephant tusks. She compared the exhibits with collections they have at National Museum Kenya and the same matched elephant tusks. On 9th February 2022, she prepared a report which she produced as exhibit before the trial court.

14. Upon close of the prosecution case, the trial court found that a prima facie case had been established and placed the appellant and his co-accused on their defence.

The Defence Case

15. While the appellant is the only one who has appeal before this Court, the defence of his co-accused (the 1st accused) is imperative in this matter. The 1st accused, DW1, Gilfred Muturi Njeru gave sworn testimony and stated that on 13th January 2022, he was at Matuu market as he had come to Trinity College to educate his child. That he went to the college but did not find the manager whom he wanted. It was 1400 hrs and he was told to go the following day.

16. As he was feeling unwell, he sat under a tree where a man in a vehicle noted that he was unwell and offered to help. The man offered him a lift in the vehicle where he sat in front of the vehicle. The driver

promised to drop him at the stage. He stated that when he wanted to alight, he saw about 8-10 people. As he was alighting, a man come with handcuffs, pulled me and handcuffed me. He demanded that he follows him. There was a big crowd. DW1 stated that he was not carrying anything. He had not committed any offence.

17. He stated that at Matuu police station, he saw two people in the report office who had a luggage. They opened the luggage but before DW1 could see it, they pushed it aside. He was locked alone in a cell. He demanded for the OCS as he had done no wrong for him to be arrested, but the OCS could not hear him. That in the morning, they were brought to court.

18. Notably in cross-examination, the prosecution only asked the name of his grandchild and whether anything was recorded at the station.

19. DW2, the appellant, also gave sworn testimony. He described himself as a matatu driver and stated that on 13th January 2022 he ferried passengers from Kiritiri to Matuu. Upon arrival in Matuu, he was unable to get passengers for the return trip and therefore decided to spend the night there. Later that day, he met a person he knew and whom he had ferried him many times before. According to DW2 this person was in a vehicle and as he approached to speak to him, two people suddenly emerged and handcuffed him. He denied ever seeing the exhibits at Matuu police station and insisted that he did not encounter any of the listed witnesses. He further testified that none of the witnesses saw who loaded the elephant tusks in the vehicle and denied being called by any of the officers.

20. Upon consideration of the totality of the evidence on record, the trial court found that the prosecution had not tendered any document linking the 1st accused to the mobile phone in question, and he therefore acquitted. The 2nd accused, the appellant herein, was convicted and sentenced to pay a fine of Kshs. 20, 000, 000 or in default to serve life imprisonment.

D. The Appeal

21. The appeal was argued by way of written submissions as filed by both parties. The appellant's submissions are dated 23rd May, 2025.

(a) Appellant's submissions

22. In his submissions, the Appellant argued that the trial magistrate erred by convicting him despite the prosecution's failure to establish a direct link between him and the offence charged. He contended that the prosecution did not discharge its burden of proof beyond reasonable doubt and that the learned magistrate improperly shifted the burden of proof to the appellant to prove his innocence.

23. The appellant framed three grounds for determination, to wit, that: the ivory was not found in his possession; the appellant's defence was disregarded without cogent reasons; and the prosecution evidence did not link the appellant to the offence.

24. On ground 1, regarding possession of the elephant tusks, the appellant submitted that there was no evidence directly linking him to possession of the elephant tusks. He argued that the prosecution failed to prove its case beyond reasonable doubt and cited the case of Republic v. Mwenda & Another. He spointed out that PW1 did not give any evidence against him, never called him and confirmed that the vehicle used did not belong to him. Similarly, PW2 gave no evidence linking the appellant (2nd accused) to the offence. He therefore, urged that the evidence failed to establish any link him to him.

25. He further submitted that possession requires proof of knowledge, control, and intent, none of which were demonstrated by the prosecution. He argued that mere presence at the location of arrest does not amount to possession under the law. He concluded that the uncertainty surrounding the appellant's

alleged involvement, the contradictions in prosecution witness testimony, coupled with failure to establish mens rea or actus reus, rendered the conviction unsustainable.

26. On ground 2, whether his defence displaces, the prosecution case, the appellant cited the case of Nguku v Republic[1985] eKLR, in submitting that the trial court had a duty to consider both the facts as presented by the prosecution and the defence of the accused. He emphasized that a conviction can only stand if the prosecution's case is free from any doubts and any doubt must be resolve in favour of an accused. He argued that even a single circumstance creating reasonable doubt in a prudent mind is sufficient to acquit.

27. He submitted that the trial court's failure to appreciate his defence was fatal and prejudicial. That during cross-examination, he explained that he was accosted by Police officers while ferrying passengers as a driver and narrated how three people handcuffed him and took him to Matuu police station. He confirmed that he never saw the exhibits, yet his testimony was disregarded and never rebutted. He cited the cases of Victor Mwendwa Mulinge v Republic [2014] eKLR and Suleiman Juma Alias Tom Vs Rep. Criminal Appeal No. 181/02 at Mombasa, to emphasize that the prosecution must present a water tight case before a conviction can be secured, given the liberty interest at stake.

28. On ground 3, the appellant urged that the trial magistrate engaged in conjecture by disregarding his defence. He noted that the trial magistrate erroneously stated that he gave unsworn defence, whereas he had infact testified under oath. He submitted that this mischaracterization of his defence prejudiced him.

29. On these grounds the appellant urged the court to allow the appeal as prayed.

(b) Respondent submissions

30. The respondent began its submissions by setting out the mandate of a first appellate court, namely, to re-evaluate the entire case a fresh and make independent findings as set out in the case of Okeno v R (1972)EA 32. It then proceeded to submit on the grounds of appeal as follows;

31. On ground 1, whether there was direct evidence linking the appellant to possession of the ivory, the respondent referred to the evidence of PW3 Sgt Nicholas Munene which was corroborated by PW1 and PW2. These witnesses confirmed arresting both the 1st accused and the appellant from the vehicle containing the two pieces of trophy. The respondent argued that this evidence demonstrated that the appellant was in the physical possession of the tusks and that he was aware that they were trophies.

32. On ground 2 and 3, concerning whether the defence was disregarded. The respondent conceded that the trial court erred in stating that the appellant gave an unsworn statement whereas the record clearly shows otherwise. However, it submitted that despite thiserror, the trial court reproduce and analysed the appellant's defence in its judgment. The respondent argued that the error did not prejudice the appellant since the defence was duly considered. It further contended that a fresh evaluation of the defence does not introduce any doubt regarding the appellant's possession of the trophies and does not dislodge the overwhelming evidence by the prosecution.

33. The respondent urged the Court to invoke section 382 of the Criminal Procedure Code and find that the sentence imposed was lawful and irreversible. It concluded by urging the Court to dismiss the appeal and uphold the sentence imposed by the trial court.

E. Analysis and Determination

34. This being a first appeal, this Court has a duty to reconsider and re-evaluate the evidence adduced before the trial court and make its own independent conclusion. It must, however bear in mind that

it neither heard nor saw the witnesses testify. See the cases of Pandya v R [1957] EA 336; Ruwalla v R [1957] EA 570 and Kisumu Criminal Appeal No. 28 of 2009 David Njuguna Wairimu v. Republic [2010] eKLR where the Court of Appeal held that:

> "the duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusion on that evidence without overlooking the conclusion of the trial court. There are instances where the first appellate court may depending on the facts and circumstances of the case, come to the same conclusion as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

35. Upon considering the petition of appeal and the parties' rival submissions, the following three issues emerges for determination:

    (a) Whether the prosecution proved its case against the appellant;

    (b) Whether the appellant's defence was disregarded; and

    (c) Whether the sentence was excessive and harsh.

36. The first two issues will be considered together as they are closely intertwined. It is trite law that in criminal cases, the burden of proof rests on the prosecution to prove its case beyond reasonable doubt. That legal burden never shifts. The evidentiary burden may only shift in certain cases where the prosecution has first discharged its evidentiary burden. In essence, the accused bears no burden to proof his innocence.

37. In this case, the appellant was jointly charged with another, person with the offence of possession of wildlife trophy without a license contrary to section 92(4) of the *Wildlife Conservation and Management Act*, 2013. The section provides:

    Any person without permit or exemption issued 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.

38. It is quite clear from the above provision that an offence is committed when a person is found in possession of wildlife trophies relating to endangered species without a permit/authority. Elephants are listed as endangered species.

39. The trial court found that Accused 1 disclosed that the elephant tusks were in possession and control of another (Accused 2), the appellant, who was reached and quickly availed the tusks following which they were promptly arrested. On the basis of that statement, the trial court convicted and sentenced the appellant.

40. I have thoroughly perused the trial record. The prosecution called 5 witnesses. Of these, PW5 who works with the National Museums of Kenya testified that she analysed the exhibits and confirmed that they were elephant tusks. Her testimony did not in any way implicate the appellant. PW4 was the re-arresting officer who took over custody of the appellant and his co-accused long after they had been arrested by the KWS officers. His evidence did not speak to the circumstances of the arrested. This leaves three prosecution witnesses whose evidence was material to the culpability of the appellant herein.

41. PW1, testified how he was called by a colleague who informed him that two people with ivory were looking for a buyer and asked him to go to Matuu. He stated that they went and arrested the two people "who had been brought to an unmarked police car". He explained that they found the suspects already in the vehicle. From his evidence it is clear that by the time they arrived at the "unmarked police car", the two suspects were already there. Hence, he had no knowledge of how he got there. Notably, he did not give any description of the two people, but identified them in court which amounts to dock identification. When cross-examined by the appellant (accused 2) Pw1 stated that both Accused 1 and 2 were in discussions about the sale but he himself did not take part in the negotiations. He further stated that the accused came with the tusks, but again later contradicted himself by saying they found them in the vehicle. Importantly, he admitted that he did not see the tusks being loaded in the vehicle.

42. The totality of PW1's testimony is problematic. First it is contradictory he stated that he found the accused already inside the vehicle, yet also claimed that he never saw the tusks loaded in the vehicle, and finally asserted that the accused came with the tusks. How would he have seen them come with the tusks if he found them already in the vehicle? With these questions in mind, i moved to the testimony of PW2.

43. PW2 testimony was intended to corroborate PW1. He stated that they went to Matuu to conduct surveillance from a distance. His evidence was that they approached and found two suspects inside the unmarked car and arrested them when they failed to produce a permit. He further stated that he had no prior knowledge of the accused persons. When cross-examined by the appellant, PW2 confirmed that they found the suspects already negotiating inside the vehicle.

44. Lastly PW3, is the officer who posed as the buyer. Evaluating his evidence, he testified that upon arriving in Matuu, he called one, Muturi Njeru using mobile number 0724119803. Pw3 stated as follows:

> " I called Muturi Njeru who came to my vehicle and entered through sat passenger seat. We parked for a while. He confirmed he had to elephant tusks weighing 14kg at Kshs. 100, 000/- per kilo. He told me he had his friend in the hiding point where the tusks are kept. We agreed. Muturi left the vehicle to bring his friend John Njuki and ivory"

45. PW3 explained that after the agreement, Muturi left, returned with his friend and a sack, and upon opening and confirming its content, PW3 signalled his colleagues who came and arrested the two accused.

46. PW3's testimony is crucial. If accepted by court, it confirms that the alleged owner of the tusks was one Muturi Njeru and the negotiations were conducted between PW3 and Muturi Njeru. Only after the deal was sealed, did Muturi went and called "his friend", John Njuki, the appellant herein, who was allegedly hiding with the ivory.

47. At this juncture, it must be noted that the trial court acquitted Muturi Njeru, having found that there was no proof that the said telephone Number belonged to him. More significantly, the State did not appeal against the acquittal of Muturi Njeru. From the evidence on record, it is difficult to see how the charges against the 2nd accused, the appellant herein, could be sustained without those against the 1st accused, Muturi Njeru. PW1 and PW2 gave no emphatic evidence against the appellant. PW3 introduced the appellant as "a friend" of one Muturi Njeru with who was called after they sealed the deal.

48. Since the prosecution did not appeal against the acquittal of Muturi Njeru, this appellate court will confine itself to the matter before it. The question that follows is; once the court found that the

prosecution had not proved its case against Muturi, which evidence did it rely upon to convict the appellant? The trial court stated that the evidence of accused 1, Muturi Njeru disclosed that the elephant tusks were in possession and control of the appellant, who was reached and quickly availed the tusks following which they were promptly arrested. This finding by the trial court is untenable for several reasons.

49. First, these sentients do not present the true account of the 1st accused's defence before the trial court. In his defence, the 1st accused was categorical that he had taken his child to Trinity College in Matuu and sought a lift as he was feeling unwell and was arrested while alighting at the stage. He never mentioned the appellant.

50. Secondly, these findings appear to stem from PW3's testimony that he called the 1st accused. Yet, as indicated above, the trial court, dismissed that piece of evidence for lack of documentary prove that the number belongs to Muturi Njeru, the 1st accused. Can a court then dismiss evidence from a witness so as to absolve a main suspect and then rely on the same evidence to convict a supposed accomplice to the acquitted suspect? With respect, this scenario is untenable.

51. Lastly, on what legal basis did the trial court rely on the "evidence" of Muturi Njeru, which was not its actual testimony but a portion extracted from the testimony of PW3, to convict the appellant? Was this treated as accomplice evidence? I reject such an approach as it does not meet the test set out in Waringa v Republic [1984] KLR 617 and/or Karanja & Another v Republic [1990] KLR.

52. It is worth noting that i have perused the record and observed that the appellant gave an elaborate defence under oath. The prosecution did not rebut this defence through cross-examination. Consequently, the defence remained credible and ought to have been considered alongside the prosecution evidence. In its judgment, however, the trial court did not comment on the appellant's defence. Given that the benefit of doubt must go to the accused, i find that on these two grounds, the conviction of the appellant was unsafe. There remain many question that the evidence on record, which, as the law requires, ought to have been resolved in favour of the appellant.

53. The above finding is enough to determine this appeal. However, it is necessary for the court to pronounce itself on the third issue regarding sentence. The appellant was sentenced to a fine of Kshs. 20, 000, 000 or in default, life imprisonment. The Act states "any person ... 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." It clearly from the provision that the sentence meted was extremely punitive.

54. While a trial court has a discretion in sentencing, that discretion ought to be exercised judicially and not whimsically. Although the sentences under the *Wildlife Conservation and Management Act* are meant to be deterrent, given the Act's objective of protecting endangered species, it remains a good practice that before a court imposes any sentence, due regard be given to the circumstances of the case guided by the Judiciary Sentencing Policy guidelines.

55. In this case the appellant sought leniency in mitigation. The trial court, without any explanation, proceeded to sentence him to pay a fine of Kshs. 20, 000, 000 in default life imprisonment. With respect, the trial court, ought to have explained why it did not impose the minimum sentence of Kshs. 3, 000, 000 or in default 5 years imprisonment but instead opted for the highly punitive sentence it gave.

56. The upshot is that I find the conviction of the appellant herein was not safe. The prosecution did not adduce sufficient evidence to implicate the appellant and the trial court erred in convicting and sentencing him. The appellant's conviction is therefore, quashed, and sentence set aside. He is acquitted and shall be released henceforth unless otherwise legally held.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 12TH DAY OF FEBRUARY, 2026.

RHODA RUTTO

JUDGE

In the presence of;

.....Appellant

.....Respondent

Selina Court Assistant