

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NO. E046 OF 2025

DANIEL CHIRCHIR.....1ST APPELLANT/APPLICANT

ERIC KIRWA.....2ND APPELLANT/APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

1. Daniel Chirchir, and Eric Kirwa, the Applicants, were arraigned for having committed the offence of **Dealing in Wildlife Trophy of a specified endangered wildlife species without a permit contrary to Section 92(2) of the Wildlife Conservation and Management Act, 2013.** Particulars of the offence were that on 11th May, 2024, around 1530hrs, along Nyahururu - Kinamba road near M7 restruarant in Laikipia West Sub-County within Laikipia County, were jointly found dealing in a wildlife trophy namely one(1) piece of elephant tusk weighing 4.08kgs with street value of Kshs.800,000/- without authority from the Director General of the Kenya Wildlife Service.
2. On the second count, they faced the charge of **Being in possession of a wildlife trophy of a specified endangered wildlife species without permit or other**

lawful exemption contrary to Section 92(4) of the Wildlife Conservation and Management Act, 2013.

Particulars being that on the 11th May, 2024, around 1530hrs, along Nyahururu - Kinamba road near M7 restruarant in Laikipia West Sub-County within Laikipia county, were jointly found in possession of a wildlife trophy namely one (1) piece of elephant tusk weighing 4.08kgs with street value of Kshs.800,000/- without authority from the Director General of the Kenya Wildlife Service.

3. Having been taken through full trial, they were convicted on the 1st count and acquitted on the 2nd count. Following the conviction, each Accused (Appellant/Applicant) was sentenced to pay a fine of Kshs.1,000,000/- and in default they were required to serve 7 years imprisonment.
4. A further order was made for forfeiture of the elephant tusk with a view of being destroyed on 15th July, 2025 in the presence of KWS Official, Public Health Officer, Court Administrator, State Counsel and the trial Magistrate; an order that was stayed by Ndung'u J pending further orders.
5. Aggrieved, the Applicants proffered an appeal. In the matter through Notice of Motion dated 7th August, 2025, the Applicants seek orders thus;

1) Spent.

2) That an order be issued directing that the exhibits - wildlife trophy namely elephant tusk be reweighed and weighing certificate be filed

in court before the exhibits herein are forfeited and/or destroyed pursuant to the Judgment delivered on 9th July, 2025.

3) Any other or further order and this court may deem appropriate in the circumstances.

- 6.** The application is premised on grounds that the Applicants were convicted on the basis of the Elephant Tusk Identification Form and the Weighing Certificate that was produced by the prosecution as evidence; the exhibits produced in court may be forfeited to the state and/or destroyed at any time per their reliable information.
- 7.** That the Applicants' were not represented in the lower court case and it is their contention that the alleged weighing may not be in tandem with what was recorded and/or were not factual.
- 8.** That the exhibits were never weighed which makes the particulars of the charge defective hence should be re-weighed before their destruction and the same be done in the presence of their advocate and a weighing certificate be filed.
- 9.** And, that the evidence tendered by the prosecution was extremely contractionary which rendered it unsafe as a basis for conviction; and no prejudice shall be caused to anybody if the order sought is granted.
- 10.** The application is supported by an affidavit deponed by Ms. Njoki Mureithi, learned Counsel in conduct of the matter

who reiterates what is stated in the body of the application and adds that it is in the interest of justice that orders sought be granted.

11. In a response thereto through a replying affidavit sworn by learned prosecution Counsel, Ms. Anastacia Mumbi Wanyonyi, the Republic/Respondent avers that the application seeks preservation and/or re-weighing of the elephants tusk exhibit prior to forfeiture or destruction pending hearing and determination of the appeal and considering that the subject exhibit forms part of the evidentiary material relevant to the pending appeal, in the interest of judicial fairness, transparency and preservation of the integrity of the appellate process, the Respondent does not oppose the application to the extent of availing them to court for purposes of the appeal.

12. That to re-weigh the elephant tusk however, will yield different results from the trial as tusks tend to shrink overtime due to the fact that they are made of collagen. Hence the prayer that this court considers the evidence that was already tendered in court and not entertain new evidence. That the exhibit in issue is preserved at the KWS Nyeri Offices and can be availed through an order of the court.

13. At the hearing of the application, counsel for the Applicants was of the view that the application is unopposed a position corrected by the learned prosecution counsel who

urged that they were opposed to re-weighing of exhibits. To that end, learned counsel for the Applicants sought re-weighing of the exhibits.

14. I have duly considered the application, affidavits in support and opposition and rival submissions. Notably, the charge sheet as drawn contains the weight of the wildlife trophy and, the street value which is just an estimate, nominal price in an illegal market. I have also seen a certificate for weighing of the exhibit that was adduced in evidence stated to have been done in the presence of the Applicants (Accused) a fact being challenged on appeal.

15. The Applicants seek re-weighing of exhibits that were adduced as evidence at trial prior to forfeiture and/or destruction as ordered on 9th July, 2025. The weight of the trophy (exhibit) was carried out and a certificate thereof made which was an official document signed by the Applicants (Accused) acknowledging the contents. The exhibit (trophy) and certificate having been produced in evidence will form part of the Record of Appeal.

16. At the appellate stage, the court will be re-evaluating and re-considering evidence presented at trial which include errors of the law and process. In event that there are reasons to cast a doubt on the weight stated in the charge sheet, it will introduce a doubt in the matter ideally demonstrating that the appeal could be meritorious.

17. Otherwise, making an order to re-weigh the exhibit would be demonstrating that the appeal is meritorious hence calling for new evidence. What is sought by the instant application is tantamount to introduction of new evidence on appeal. And circumstances in which new evidence is introduced at an appellate stage are exceptional.

18. In **Gachuki & Another v Njenga & 2 Others [2025] KECA 451 (KLR)** the Court of Appeal stated that;

“On the same vein, the Supreme Court of Kenya in Mohamed Abdi Mahamud vs Ahmed Abdullahi Mohamad & 3 others (supra) set out the relevant guidelines an appellate court should consider before granting orders for admission of new evidence in the following terms:

a. the additional evidence must be directly relevant to the matter before the court and be in the interest of justice;

b. it must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;

c. it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;

- d. where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;***
- e. the evidence must be credible in the sense that it is capable of belief;***
- f. the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;***
- g. whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;***
- h. where the additional evidence discloses a strong prima facie case of willful deception of the Court;***
- i. the Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful;***
- j. a party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case;***

k. the court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.”

What is sought herein is to introduce a new case on appeal to discredit the case presented by the State at trial. In the interest of justice re-weighing a trophy is done at the point of investigations being carried out. Granting the order sought will be directing the Investigating Officer to carry out further investigations and place it before the appellate court for consideration.

19. As pointed out earlier, this matter is pending hearing and determination of the appeal. The court having determined the matter on 9th July, 2025 the law provides for fourteen (14) days right of appeal unlike the order made of destruction to be effected in 6 days' time.

20. Ordinarily, when a matter is pending appeal exhibits cannot be destroyed, supposing a retrial is ordered? It follows that the exhibits are preserved pending the outcome of appeal thus gives the court the opportunity to consider and determine the appeal.

21. It therefore follows that the exhibit in the matter should be preserved pending determination of the appeal as required by the law. However, the prayer for re-weighing of the exhibit is declined.

22. It is so ordered.

Dated, signed and delivered virtually this 9th day of March, 2026.

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L.N. MUTENDE
JUDGE