



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ole Kortol v Republic (Criminal Appeal E005 of 2025)  
[2026] KEHC 2620 (KLR) (Crim) (26 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 2620 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ISIOLO  
CRIMINAL  
CRIMINAL APPEAL E005 OF 2025  
SC CHIRCHIR, J  
FEBRUARY 26, 2026**

**BETWEEN**

**BALUNYE OLE KORTOL ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The Appellant was charged and convicted of two Counts relating to wildlife Trophy possession and dealing. On the 1<sup>st</sup> Count, he was charged with being in possession of Wildlife Trophy Contrary to Section 95 of the *Wildlife Conservation and Management Act*, 2013. (The Act) The particulars of the charge were that on 10/04/ 2018 at 7:00 hours at Sereolipi Township along Serolipi -Isiolo Highway ,Samburu County, was found in possession of Seven (7) pieces of Elephant Tusks weighing 30 Kilos without a permit.
2. On the 2<sup>nd</sup> Count he was charged with dealing in Wildlife Trophy Contrary to Section 84 (1) as read with Section 92 of the *Wildlife Conservation and Management Act* 2013. The particulars of the charge were that on 10/04/2018 at 0700 hours at Serolipi Township along Serolipi -Isiolo Highway Samburu County, he was found dealing in Wildlife Trophies namely Seven (7) pieces of Elephant Tusks weighing 30 Kilos without a dealer's licence.
3. The Appellant was initially convicted on his own plea on both counts. However on Appeal to the high court , the conviction on count II was set aside and a Re-trial was ordered.
4. Following a fresh trial on count II , the Appellant was convicted and sentenced to pay a fine of Kshs. 20,000,000 or to serve life imprisonment in default of the fine. He was aggrieved by both the conviction and the sentence, and moved to this court on Appeal.



## Petition of Appeal

5. The Appellant has set out the following grounds:
  1. That the proceedings before Hon. E. Ngigi SRM, Hon E. Tsimonjero SRM and Hon. M. A Odhiambo SRM, and the ensuing conviction were a nullity in law for failure by the three trial Courts to conduct pre-trial discovery as to the Appellant's right to be assigned an Advocate granted the seriousness of the offence coupled with the severity of the sentence thereby violating the Appellant's right to a fair trial granted by Article 50 (2) (h) of *the Constitution* of Kenya which resulted to substantial injustice to the Appellant.
  2. That the proceedings before Hon. E. Tsimonjero SRM and Hon M. A Odhiambo SRM, and the ensuing conviction were a nullity in law because:-
    - a. The proceedings were in Kiswahili, a language not preferred and not understood by the Appellant.
    - b. The Appellants' right to recall witness under Section 200(3) of the Criminal Procedure Code was never explained to him;  
thereby undermining the Appellant's rights to a fair trial and occasioning injustice to him.
  3. That the particulars under Count 11 were defective and bad in law for failing to specify which of the acts of dealing under Section 3 of the charging statute the Appellant was alleged to have done, thereby causing prejudice and injustice to the Appellant.
  4. That Count 11 was not proved in the absence of evidence that the Appellant had been operating a business or a trade which are essential ingredients for qualifying to be a dealer.
  5. That the punishment for dealing in trophies having been drastically reduced in the 2022 Revised Charging statute, it was a grave error on the part of the convicting Magistrate to impose the minimum sentences prescribed for at the time of the commission of the offence in 2018 thereby depriving the Appellant of the benefits conferred under Article 50 (2) (p) of *the Constitution* of Kenya and as such the sentences imposed were unconstitutional an a nullity in law.
  6. That the part trials before the three different Magistrate were mistrials and miscarriages of justice
6. The Appeal was heard by way of Written Submissions.

## Appellant's Submissions

7. The Appellant submits that the trial Magistrates failed to conduct an inquiry to ascertain the necessity of an Advocate or "whether substantial injustice would otherwise result" if the Appellant remained unrepresented. That failure to conduct such an inquiry was a violation of the Appellant's right to fair trial. That consequently the trial and the ensuing conviction was on nullity in law. In this regard the Appellant has relied on the decision in the case of Joseph Ndugu Kagiri vs R. [2016 e KLR where the Court emphasized the need for such an inquiry.
8. The Appellant further submits that trial Magistrate failed to conduct the trial in the Appellant's preferred language and there was no compliance with the provisions of Section 200(3) of the Criminal Procedure Code (CPC). It is pointed out that in some instances there was no indication as whether



a translator was present in Court and some of the proceedings were conducted in Kiswahili. It is submitted that the above omissions compromised the trial and conviction.

9. It is further submitted that the charge was defective for failure to state the essential particulars. That the words such as sold, purchased, bartered or committed some other manner of dealing ought to have appeared in the charge sheet. It is contended that the manner of dealing was not specified. That consequently the charge sheet failed to meet the requirements of Section 134 of CPC.
10. It is the Appellant's further submission that there was no proof that the Appellant was operating a business or trade on the date, the alleged offence was committed. It is argued that for one to qualify as a dealer, he must be shown to have been operating "in the ordinary course of any business of trade", and that there was no suggestion whether in the charge sheet or evidence that the Appellant was engaged on any business or trade.
11. It is the Appellant's final submissions that the sentence imposed was unlawful as the *Wildlife Conservation and Management Act* was revised in the year 2022, the effect of which was to provide a prison term of 7 years for the offence.

### **Respondent's Submissions**

12. On legal representation, it is submitted that there was no suggestion that the Appellant suffered substantial injustice for want of legal representation. To buttress their submissions, the respondent has relied on the decision of *Karisa Chengo & 2 Others*. Cr. Nos. 44, 45 & 76 of 2014, and of *Charles Maina Gitonga* [2018] eKLR.
13. On compliance with Section 200(3) of CPC, it is Submitted that the only mandatory requirement is for the trial Magistrate to inform an Accused person of his or her rights under the aforesaid section, but recalling of the witnesses is not mandatory. It is submitted that the record reflects that the two subsequent Magistrates complied with the provisions of the Act, on 26/09/22 and 03/04/2024 respectively.
14. On the language of the proceedings, it is submitted that the record does not show any request for a different language, at the instances when Kiswahili was used to conduct the proceedings.
15. On the question of whether the charge sheet was defective, it is submitted that it complied with Section 134 of the CPC, and in terms of Section 382 of CPC, it cannot be a nullity as the charges were read to the accused and his response to the charge showed that he understood the charge. It is further pointed out that the Appellant effectively cross- examined the prosecution witnesses.
16. It is the Respondent's final Submissions that the sentence meted out was mandatory and there is no reason for this Court to interfere with it.

### **Analysis and determination**

17. The first Appeal is in the nature of a retrial, and this court is therefore under the duty to review the evidence, re- evaluate and arrive at its own findings. However due allowance must be made for the fact that the trial court had the advantage of hearing the witnesses and observing their demeanour. ( see: *Gitobu Imanyara & 2 others vs AG* ( 2016) e KLR)
18. The following are the issues I have identified for determination:
  - a. Whether the Charge Sheet was defective.
  - b. Whether the Appellant's rights to legal representation was infringed.



- c. Whether the language violated the Appellant’s right to fair trial
- d. Whether Section 200(3) of the CPC was complied with, and the trial by 3 different magistrates caused an injustice.
- e. Whether the sentence was excessive.

**The charge sheet**

- 19. It is the Appellant’s contention that the Charge sheet was defective for want of essential particulars; that the manner of dealing should have been specified as there are so many ways of dealings. Specifically, It is submitted the Charge Sheet should have indicated whether the Appellant sold, purchased or bartered the trophy. In response, the Respondent submits that the particulars of the charge sheet met the requirements of section 134 of the criminal procedure code.
- 20. Section 3 of the Act defines the word “ deal”. It states as follows: "deal" means—
  - “(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. Thus whether he was selling, purchasing or bartering, the Appellant was “ dealing “ with wildlife trophy. Further the insistence on specifics has been made without any statutory basis or known precedent. The definition in the Act is wide enough to capture any motive or reason of handling wildlife trophies. The nitpicking by the Appellants’ counsel is unfounded therefore.
- 22. The evidence of PW 1, is that the Appellant was arrested at a road block at Sereolipi. He had with him seven (7) Elephant Tusks. Based on prior intelligence, one of the Rangers, a Mr. Munene posed as a buyer and arranged to meet with the Accused. He was arrested as he tried to sell the tusks. He was therefore in possession and out to sell of the trophies, which are both elements of dealing as per above cited section of the Act. The essentials of the dealing belonged to evidence, and what one would have wanted to ascertain through the evidence for instance , was whether what the Accused person was doing with the tusks was a conduct covered under the definition given in section 3. It suffices to state that the Charge Sheet contained sufficient particulars for the Accused to understand the Charge.

**Whether the Appellant’s rights under Article 50 (2) (h) were infringed.**

- 23. In this regard, the Appellants submissions is that the Court failed to conduct an inquiry to establish whether substantial injustice might otherwise result for want of legal representation of the Appellant. Article 50 (2) (h) of *the Constitution* entitles an Accused person to have an Advocate assigned to him by the state, and at the state’s expense, if substantial injustice would otherwise result, and to be informed of the said right promptly.
- 24. Courts have repeatedly pointed out that the right under Article 50(2) (h) is a qualified right, and the qualifications is “if substantial injustice would otherwise result”. whereas *the Constitution* does not



define” Substantial injustice”, the legal Aid Act under Section 43 (1A) sets out circumstances which would constitute substantial injustice. The Section provides: In determining whether substantial injustice referred to in paragraph (1) (b) likely to occur, the court shall take into consideration—

- (a) the severity of the charge and sentence;
- (b) the complexity of the case; and
- (c) the capacity of the accused to defend themselves

25. Further in Karisa Chengo’s Case (Supra) cited by the Respondent, the Court of Appeal held “... However, substantial injustice only arises in situation where a person is charged with an offence whose penalty is death and such a person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only that would the state to provide legal representation arise”.
26. The charge herein do not fall under the category of cases referred to in Chengo’s case (supra). Further I have noted that the Appellant extensively cross-examined witnesses particular PW 1, PW 2 and PW 3 who were the key witnesses in the discovery of the trophy. There was therefore no prejudice suffered by the Appellant. The court therefore finds that there was no infringement of Article 50(2) (h) of the constitution.

### **Language of Proceedings**

27. The record shows that the testimonies of PW 1 PW2 and PW 3 were translated from Maasai language to Kiswahili. The last two prosecution witnesses however testified in Kiswahili. However, significant to note is that, the Appellant cross-examined those last two witnesses in Kiswahili. Further in his defence he testified in Kiswahili. His one witnesses too testified in Kiswahili.
28. It is evident therefore that the Appellant not only understood Kiswahili but he could also speak as well. Further, the record does not indicate that he alerted the court about the sudden change in the language of proceedings. It is evident that he understood and participated fully in the part of proceeding that were conducted in Kiswahili. To use this as a ground of appeal is merely an afterthought, as he suffered no prejudice at all.

### **Compliance with S. 200(3) of the criminal procedure Code.**

29. The above Section provides as follows: -“Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re summoned and reheard and the succeeding magistrate shall inform the accused person of that right.” In effect, the mandatory obligation placed on the court is to inform the Accused person of his or her entitlement. The record shows that when Hon. E. Tsimonjeru took up the case on 26.09.22 the record reads “Section 200 of CPC explained to the Accused”; and on 03/04/23 when Hon. M.A Odhiambo took up the case the records reads “Section 200 (3) of CPC explained to the Accused in Kiswahili”.
30. The Appellant argues that he ought to have been informed about his right to recall witnesses. The right to recall witnesses is contained in the same Section 200(3) of CPC. Once the record reads that his rights under that Section had been complied with, it follows that all the requirement of the Section were complied. One wonders how the Appellant came to conclude that part of that part of the section was complied while a part of it was neglected. This complaint is without any merit.
31. Related to this issue is the question of the case having been heard by three magistrates. This issue was not taken up in the submission, perhaps with insight. It suffices to state that section 200 of CPC



provides safeguards, such that if an Accused person is apprehensive that his rights might be jeopardized by several changes on the presiding magistrate or Judge , he or she ought to exercise his rights fully under the section.

### **The Sentence**

31. The Appellant was charged on April 2018, and the offence is pursuant to the *Wildlife Conservation and Management Act* of 2013. The Appellant was convicted on 04/04/2025.

The Appellant has pointed out, correctly, that as at the time of conviction the sentence for the crime of dealing with a trophy without a licence had been revised. The revision was done in 2022 when the Appellant had already been charged. Under Section 92 (2) of the Revised Act, the penalty is one of a minimum of 7 years without an option of a fine. And in terms of Article 50(20)(p) of *the constitution*, the Appellant is entitled to benefit from the revised sentence. consequently, the life sentence is hereby set aside and substituted with a prison term of 7 years.

32. In respect to the first Count, the Appellant was sentenced on 12/04/2018 to a fine of Ksh. 1,000,000- or 5-years imprisonment, in default. He served that sentence, which ended in April 2023. Thus, for the present offence the Appellant had been in custody for 2 years by the time he was convicted for the current offence. Thus, taking into Account the period of 2 years he has already served in respect of the Count II, the 7 years sentence will be discounted by the two.

33. Conclusion

- a). The Appeal on conviction is hereby dismissed.
- b). The sentence by the trial Court is hereby set aside and substituted with a prison term of 5 years from the date of Judgment at the trial Court. The above sentence has considered the two years already served as aforesaid.

**DATED, SIGNED AND DELIVERED AT ISIOLO, THIS 26<sup>TH</sup> DAY OF FEBRUARY, 2026**

**S. CHIRCHIR**

**JUDGE**

In the presence of:-

Ismail Abdow-Court Assistant

Mr. Majale for the Respondent

The Appellant.

