



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Muange & 3 others (Criminal Case E246 of 2024)
[2026] KEMC 22 (KLR) (5 February 2026) (Judgment)**

Neutral citation: [2026] KEMC 22 (KLR)

**REPUBLIC OF KENYA
IN THE MAKINDU LAW COURTS
CRIMINAL CASE E246 OF 2024
YA SHIKANDA, SPM
FEBRUARY 5, 2026**

BETWEEN

REPUBLIC PROSECUTION

AND

SHADRACK KYALO MUANGE 1ST ACCUSED

STEPHEN MUTISO KITAVI 2ND ACCUSED

DANSTAN KISYOKA MALELI 3RD ACCUSED

PETER MUTUNGA KIOKO 4TH ACCUSED

JUDGMENT

1. The four accused persons herein are jointly charged with the offence of Dealing in endangered wildlife trophy without a permit contrary to section 92(2) of the *Wildlife Conservation and Management Act*. The particulars of the offence are that on 12/3/2024 at Uathimo Bar and Restaurant in Makindu Sub-county within Makueni County, the accused persons were jointly found dealing in six pieces of ivory tusks weighing approximately 6.8 kgs and valued at Ksh. 2,040,000/= without authority from the Director General of Kenya Wildlife Service. When the plea was taken, the accused persons pleaded not guilty, where after the matter was set down for hearing.

The Evidence

The Prosecution Case

2. The prosecution case was wholly heard by another Magistrate who was subsequently transferred. Upon taking directions under section 200(3) of the Criminal Procedure Code, it was directed that the matter proceeds from where it had reached. At this point, the prosecution had already closed its case. The prosecution called a total of four (4) witnesses in a bid to prove their case against the accused



persons. PW 1 KWS Corporal James Irungu testified that on 12/3/2024 he was on patrol with his colleagues within Makindu area when at about 8:00 pm he received an intelligence report on phone. The informant indicated that there was a person in the company of four others at a restaurant and it was suspected that they were dealing in elephant tusks.

3. PW 1 informed his colleagues as well as the OCS Makindu police station. They then proceeded to Uathimo bar and entered one of the cubicles. They found four people seated. There was a red bag on the table which contained a weighing scale and another sack on the floor. The witness asked them to place the sack on the table and open it. When it was opened, there was a carton containing six pieces of what appeared to be elephant tusks. The officers asked the suspects whether they had a permit but they did not. They were arrested and taken to Makindu police station. The witness identified the items that were recovered.
4. PW 2 Evans Okumu testified that he worked at Chyulu National Park. That on 12/3/2024 he was on duty when PW 1 informed him about the four suspects. The OCS was informed. The officers then proceeded to Uathimo bar and found four people. There was also a nylon sack. The officers asked them to open the sack and when it was opened, a red bag was found inside. There was a weighing machine and carton. Inside the carton, six pieces of what appeared to be elephant tusks were found. The suspects were then arrested. PW 3 Veronica Vaduso testified that she was a Research Scientist at the National Museums of Kenya. She analysed the six pieces and confirmed that they were elephant tusks.
5. The witness produced her report in evidence. PW 4 Police Constable Robert Mugambi testified that he was the investigating officer in the matter. That on 12/3/2024 he was at the police station at about 8:30 pm when he was instructed by the OCS to join KWS officers in an operation. They went to Uathimo bar and found five people but one managed to escape. The witness stated how the six pieces of elephant tusks were recovered. He produced the recovered items in court.

The Defence Case

6. Upon being placed on their defence, each of the accused persons gave sworn testimony. Only the 3rd accused person called an additional witness. The 1st accused person testified that on 12/3/2024 he had visited his grandmother in hospital at Makindu then called the 3rd accused person with the intention of visiting him. The 3rd accused person informed him that he was in Makindu at Uathimo bar. The 1st accused person then proceeded to the bar and met the 3rd accused person. The 3rd accused person told him that he was waiting for someone. After a while, another person joined them. The person stated that he was waiting for his luggage from Matuu. The person received a call and later, the 1st accused person was requested to go to the bus stop and bring the caller.
7. The 1st accused person went to the bus stop and met a person who had a luggage. It was the 2nd accused person herein. He led him to where the rest were. The 3rd accused person's visitor took the luggage and weighed it then made a call to someone, stating that he had received the luggage and that it was okay. The 3rd accused person's visitor did not open the luggage but placed it in a corner. After a while, the 3rd accused person's visitor stated that he was thirsty and wanted cold water. He went outside the bar and in less than two minutes, police officers arrived and stated that they had information that there was a suspicious luggage. The police officers used torches and were able to locate the luggage. It was opened and six pieces of what appeared to be elephant tusks were recovered. That the 4th accused person had passed by to greet the 2nd accused person shortly before the police arrived. The four accused persons were the arrested.
8. The 2nd accused person testified that on 12/3/2024 he was at Matuu area in Machakos when he was given a luggage to deliver to Makindu. The luggage had a carton with a phone number written on it.



- He was instructed to call the number the moment he reached Makindu. When the 2nd accused person arrived at Makindu, he called the number and the receiver informed him that he would send someone to pick him up. He described the clothes that the person was wearing. After a while, the 2nd accused person saw the 1st accused person. He matched the description that he had been given. The 1st accused person took the 2nd accused person to where the owner of the luggage was. The owner of the luggage weighed it and said it was okay. He then asked the 2nd accused person to join them for a drink.
9. After a while, the 4th accused person who was known to the 2nd accused person passed by. The owner of the luggage stated that he was going to get water. Shortly after he had left, police officers arrived and arrested the accused persons. The 3rd accused person testified that on 12/3/2024 he was at his home when he was called by one Benson whom he had met at a function. That Benson told the 3rd accused person that he dealt in gemstones and precious metals. According to the 3rd accused person, Benson asked to meet him at Makindu as there was work that he wanted to do with him. The 3rd accused person agreed to meet Benson and travelled to Makindu. He then went to Uathimo bar and informed Benson where he was.
 10. It was the testimony of the 3rd accused person that while waiting for Benson, he received a call from the 1st accused person. He directed the 1st accused person to where he was and the 1st accused person joined him. Benson joined them later and after a while, he received a call. The 1st accused person was sent to collect the caller from the bus stop. The caller was the 2nd accused person. He arrived while carrying a luggage. Benson received the luggage then weighed it. After a while, he stated that he was going to get cold water. Shortly thereafter, police officers arrived and stated that there was an illegal luggage where the accused persons were. The luggage was found and the 3rd accused person was ordered to open it. When he did, he saw items which looked like curved stones. The accused persons were arrested and taken to the police station.
 11. DW 4 Matthew Mutua testified that on 12/3/2024 he went to Uathimo bar in the evening and met the 3rd accused person on his way to the washroom. That the 3rd accused person informed him that he was in the 2nd cubicle. The witness was in the 1st cubicle. At some point, he saw movement in and out of the 2nd cubicle. He saw a person leaving the 2nd cubicle and return with a group of people, two of whom had police uniform. That he saw the person who had left earlier pointing at the cubicle where the 3rd accused person was. He directed the police then left hurriedly. The witness saw the police commanding the 3rd accused person to open a bag. He later saw four people in handcuffs.
 12. The 4th accused person testified that on 12/3/2024 he travelled from Thika as he was to meet a customer at Kibwezi. The 4th accused person arrived at Makindu late and his customer directed him to spend the night at Uathimo bar. At the bar, he met the 2nd accused person who was known to him. The 2nd accused person asked him to go and greet the people he was with. After a short while, police officers arrived and stated that the accused persons had an illegal luggage. The 3rd accused person was ordered to open the luggage. They were then arrested and taken to the police station.

Facts Not In Dispute

13. From the evidence of both parties, the following facts are not in dispute:
 - a. On 12/3/2024 all the accused persons were found together at Uathimo bar in Makindu town;
 - b. A luggage/bag was recovered from the cubicle wherein the accused persons were found;
 - c. The bag contained what was later confirmed to be elephant tusks;



- d. None of the accused persons had a permit or lawful authority to be in possession of elephant tusks;
- e. The luggage had been taken to the cubicle by the 2nd accused person;
- f. There was a 5th person who was not arrested.

Main Issues For Determination

14. In my view, and in consideration of the charge, the main issues for determination are as follows:
- i. Whether the accused persons were found in possession of the elephant tusks;
 - ii. Whether the trophy was of an endangered species and in particular elephant tusks;
 - iii. Whether the accused persons were dealing in the elephant tusks;
 - iv. Whether the prosecution has proven its case against the accused persons to the required standard.

Analysis And Determination

15. I have carefully considered the evidence on record as well as the law applicable. Section 92(2) of the [Wildlife Conservation and Management Act](#) provides:

“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.”

16. Under the sixth schedule of the Act, the African elephant is listed as an endangered species.

Section 3 of the governing Act defines the term “deal” as follows:

- 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;

16. Section 3 of the Act further defines the phrase “endangered species” as any wildlife specified in the Fourth Schedule (ought to be the sixth schedule) of the Act or declared as such by any other written law or any wildlife specified in Appendices of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). The same provision defines “government trophy” as a trophy declared to be a Government trophy by or under the provisions of the Act. The [Wildlife Conservation and Management Act](#) does not define the term “possession.” The definition is to be found in section 4 of the Penal code which provides 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. In my opinion, for the offence herein to be proven, the prosecution must establish the following elements:
- a. The accused persons were found in possession of and dealing in Elephant tusks;
 - b. The Elephant is an endangered wildlife species;
 - c. The accused persons did not have a permit or exemption.
18. The Elephant tusks were produced in evidence and according to the report by PW 3 Veronica Vaduso, the items were Elephant tusks. I have considered the accused persons' defence. From the defence evidence, it would appear that the 1st and 3rd accused persons were well known to each other and on the other hand, the 2nd and 4th accused persons were well known to each other. However, going by the defence, the 1st and 3rd accused persons were not known to the 2nd and 4th accused persons. In as much as the 2nd accused person admitted that he was the one who conveyed the luggage from Matuu to Makindu, he denied knowledge of what was contained therein. The other accused persons also denied knowledge of what was contained in the luggage prior to their arrest. The evidence of the 1st, 2nd and 3rd accused persons indicates that the luggage belonged to another person identified as Benson, who was not arrested.
19. The duty is on the prosecution to prove its case against the accused persons beyond reasonable doubt. In *Philip Nzaka Watu v Republic* [2006] eKLR, it was held that to find a conviction in a Criminal case, the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt. On proof beyond reasonable doubt, the court stated in *Stephen Nguli Mulili v Republic* [2014] eKLR:
- "It is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of *DPP V Woolmington*, (1935) UKHL 1 where the court eloquently stated that the "golden thread" in the "web of English common law" is that it is the duty of the prosecution to prove its case. The Kenyan Courts have upheld this position in numerous cases. See *Festus Mukati Murwa V R*, [2013] eKLR."
20. In the famous case of *Miller v Ministry of Pensions* [1947] 2 All ER 372, Lord Denning stated with regard to the degree of proof beyond reasonable doubt:
- "That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."



21. In *Bakare v State* (1987) 1 NWLR (PT 52) 579, the Supreme Court of Nigeria emphasized on the phrase proof beyond reasonable doubt, stating:

“Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability.” (Emphasis mine)

22. It matters not that the accused persons may not have told the truth. What matters is whether there is sufficient evidence against them. Each of the accused persons explained how they ended up at the bar and why. The KWS officers and the police did not just bump into the accused persons. They indicated that they had received a call from an informant who was a customer at the bar. From the circumstances of the case, it is obvious that the police and KWS officers knew what to expect when they visited the bar. They had information on what was going on in the bar. It is agreed by both parties that the luggage was packaged as a parcel and there is an indication that it had a phone number or numbers thereon.

23. According to the 2nd accused person, the phone number belonged to the person who received the luggage. This person was identified as Benson by the 3rd accused person. It would appear that the investigations commenced and ended with the arrest of the accused persons. The investigating officer did not investigate to find out who the phone numbers on the package belonged to. He did not even bother to find out whether there was any communication between the accused persons so as to establish a common intention. The prosecution evidence is not capable of rebutting the fact that the accused persons or some of them were strangers to one another and had just met.

Section 21 of the Penal Code provides as follows:

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

24. The essence of the doctrine was aptly stated by the East African Court of Appeal in *Wanjiru d/o Wamerio v R* 22 EACA 521 as follows:-

“Common intention generally implies premeditated plan, but this does not rule out the possibility of a common intention developing in the course of events though it might not have been present to start with”

25. The essential ingredients which give rise to the doctrine of common intention were enunciated in *Eunice Musenya Ndui v R* [2011] eKLR as herein under:

- a. There must be two or more persons;
- b. The persons must form a common intention;
- c. The common intention must be towards prosecuting an unlawful purpose in conjunction with one another;
- d. An offence must be committed in the process;



- e. The offence must be of such a nature that its commission was a probable consequence of the prosecution of the unlawful purpose.
26. The evidence on record indicates that the luggage was sealed at the time of recovery. It was not found in the physical possession of any of the accused persons. As already indicated, the accused persons were candid enough to admit that the luggage was found in the cubicle where they were but explained that it belonged to a 5th person who was suspected to have set them up. The arresting officers admitted that there was a 5th person who either escaped or was not arrested. No further investigations were conducted in respect of the 5th person. Furthermore, no further investigations were conducted to establish how the luggage was conveyed to Makindu.
27. It is not enough to merely show that the accused persons were found in the room or cubicle where the elephant tusks were recovered from. The place where the accused persons were found was not owned by either of them. It was a public place. There was need for the investigators to establish how each of the accused persons was involved in the commission of the crime or connected to it. The prosecution had a duty to dispel the explanations given by the accused persons concerning the elephant tusks. It is my considered view that investigators, in the discharge of their statutory and constitutional mandate, are under a legal duty to actively interrogate, test, and where appropriate dispel any defence raised by a suspect in the course of criminal investigations. This duty flows from constitutional principles, statutory obligations, and well established judicial authority, and is essential to the integrity of the criminal justice process. Failure to do so not only weakens the prosecution case but may render the investigation partial, incompetent, or oppressive, exposing the resulting prosecution to collapse.
28. Article 50 of *the Constitution* of Kenya guarantees the right to a fair trial. Embedded within this right is the concept of a fair investigation, which obliges investigators to pursue both inculpatory and exculpatory lines of inquiry. An investigation that merely seeks to confirm guilt, while ignoring or leaving untested a suspect's explanation, offends constitutional values of fairness, objectivity, and equality before the law. Investigators are therefore constitutionally bound to consider and evaluate any defence put forward at the earliest stage. The role of investigators is not that of advocates for conviction, but of fact-finders. The law requires investigators to establish the truth, gather all relevant evidence, and present a complete and accurate evidential picture to the prosecution. A defence raised by a suspect constitutes relevant material. Leaving it unexplored is a dereliction of investigative duty.
29. Every suspect enjoys the presumption of innocence until proven guilty. While the burden of proof rests on the prosecution, investigators play a foundational role in ensuring that the prosecution can meet that burden. Where a suspect raises a defence, the prosecution must ultimately displace that defence beyond reasonable doubt, in order to sustain a conviction. Investigators are therefore required to test the defence, collect evidence that either supports or negates it, and ensure that it does not remain as an unresolved doubt at trial. Unchallenged defences often become fatal gaps in the prosecution case. Courts have consistently held that uninvestigated defences weaken the prosecution case. Failure to rebut a plausible defence may lead to acquittal regardless of the strength of the remaining evidence. Investigators must not wait for trial to confront a defence; it must be addressed at the investigative stage, where evidence is still available and memories are fresh.
30. Modern criminal justice systems impose a duty of objectivity on investigators. Investigators must not selectively collect evidence, ignore inconvenient explanations, or tailor investigations to fit a preconceived theory. Dispelling a defence does not mean suppressing it; rather, it means testing its credibility, verifying or disproving it through independent evidence, and documenting the outcome. This enhances the credibility of the investigation and shields it from accusations of bias or malice. An investigation that ignores a suspect's defence is incomplete, constitutionally infirm, and legally



vulnerable. Whereas there is sufficient and undisputed evidence to show that the elephant tusks were found in the cubicle where the accused persons were, and that the same were taken there by the 2nd accused person, the prosecution has failed to prove that the accused persons had knowledge of the contents of the luggage prior to their arrest and that they were jointly involved in the commission of the offence.

31. The defences raised by the accused persons were plausible and in my considered view, the prosecution has failed to rebut the explanations given by the accused persons. It is not uncommon for security agencies to use informants, who are in most cases perpetrators of crimes, to set up innocent persons just to extort them or abuse the criminal justice system for selfish gain. I find it difficult to disregard the allegation that the person identified as Benson choreographed the arrest of the accused persons. The investigating officer stated that he could not tell who the owner of the luggage was yet he did not bother to investigate the source and destination. The luggage had a delivery address but the investigating officer did not bother to follow up. It is not clear whether the omission was by default or design.
32. The explanations given by the accused persons were consistent and corroborative. The accused persons were able to draw a picture of what could have transpired. The prosecution merely relies on the fact that the elephant tusks were recovered from the place where the accused persons were found. No further evidence links the accused persons to the offence. It is not the duty of the accused persons to establish their connection to the elephant tusks nor is it the duty of the court. The prosecution evidence corroborates the version that was given by the accused persons. The arresting officers admitted that there was a 5th person who was not arrested. As already indicated, I have no reason to disregard the accused persons' defence. There is room for reasonable doubt and as a matter of law, the doubt must be resolved in favour of the accused persons.
33. What we have on record is mere suspicion against the accused persons. In the case of *Joan Chebichii Sawe v Republic* [2003] eKLR, the Court of Appeal held thus:

“The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this court made clear in the case of *Mary Wanjiku Gichira v Republic* (Criminal Appeal No. 17 of 1998 (unreported), Suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence”

Disposition

34. In view of the foregoing, I find that the prosecution has failed to prove its case against the accused persons beyond reasonable doubt. The accused persons' non-involvement cannot be ruled out. Consequently, I find and hold that the accused persons are NOT GUILTY of the offence of Dealing in endangered wildlife trophy without a permit or other lawful exemption contrary to section 92(2) of the *Wildlife Conservation and Management Act*. As the glove does not fit, I proceed to Acquit them accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 5TH DAY OF FEBRUARY, 2026.

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.

HON. Y.A. SHIKANDA

