

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT VOI

CRIMINAL APPEAL NO. E009 OF 2025

1. MORGAN TOLE MWATEMBO

2. CYRIL MCHANA KITOGHO.....

APPELLANTS

=VERSUS=

REPUBLIC.....

RESPONDENT

**(Being an appeal from the Judgment of Hon. C. K. Kithinji (PM)
in Voi CMCCR Case No. E859 of 2023 delivered on 12th February
2025)**

JUDGMENT

1. The two Appellants were charged with the offence of dealing in wildlife trophy contrary to Section 92(2) of the Wildlife Conservation and Management Act (WCMA).
2. The particulars of the charge were that on 23rd November 2023 at 2327hours at Mshongoro Area near Maktau Centre within Taita Taveta County, the two Appellants with others not before court were found dealing in wildlife trophy, namely seven (7) pieces of

elephant tusks, 2 complete and five (5) broken pieces totalling 33.0kgs without a permit or any lawful exemption.

3. The Appellants pleaded not guilty to the charges and the prosecution called a total of four (4) witnesses.
4. The prosecution evidence in summary was that on 22nd November 2023, the head of investigations at KWS Sofia Centre Voi received information that some people were looking for a market for elephant tusks.
5. PW1 Ranger Emmanuel Tanui went with driver Bernard Kithinji went to the Area and posed as buyers.
6. They were led by the 2nd Appellant and they found the 1st Appellant with the tusks with two other people who escaped.
7. The Appellants denied they had the tusks. The 1st Appellant said he left his house upon being called by one Maingi. The 1st Appellant said he left his house at 5a.m and left behind his wife who was bedridden having undergone a ceaserian section.
8. The 2nd Appellant also said he was implored and he dropped his activities to go to the scene and he was ferrying people with his motorcycle with instructions from Maingi.
9. The trial court found the defence cases unbelievable in view of the prosecution case.

10. **PW4, VERONICA ONDUSO** confirmed the exhibits to be elephant tusks. She works with National Museums of Kenya as a Research Scientist and she has 15 years experience.
11. Each of the Appellant was sentenced to 7 years imprisonment and the exhibits were forfeited to the State.
12. The Appellants have appealed against the sentence and conviction on the following grounds:-

1st Appellant's Grounds:-

- (i) **THAT the learned trial Magistrate erred in both law and fact by disregarding the significant and material contradiction and inconsistencies present in this case that rendered the prosecution untenable.**
- (ii) **THAT the trial learned Magistrate erred failed to undertake analysis of the appellants defence without considering regarding the defence of alibi thus constituting to breach of the natural justice.**
- (iii) **THAT the learned trial Magistrate erred in law and facts by convicting the appellant with a harsh sentence without the circumstances of the case.**

2nd Appellant's Grounds:-

- (iv) **The learned trial Magistrate erred in both law and facts when she misdirected herself.**

- (v) The learned trial Magistrate erred in both law and facts when she shifted the burden of proof from prosecution to the appellant.**
- (vi) The learned Magistrate erred in law when she considered the evidence adduced by prosecution full of massive contradictions.**
- (vii) The learned trial Magistrate erred in law in convicting the appellant on poor investigation adduced by prosecution.**
- (viii) THAT the learned trial court Magistrate erred in law and fact by convicting me the appellant to 7 years imprisonment without considering that the sentence meted on me was harsh and excessive.**
- (ix) THAT the learned trial court Magistrate erred in law and fact by convicting me the appellant to 7 years imprisonment without considering my reasonable defense.**
- (x) THAT the learned trial court Magistrate erred in law and fact by convicting me the appellant to 7 years imprisonment without considering the period spent in remand prison.**

13. The parties filed written submissions as follows:- The 1st appellant, Morgan Tole Mwatembo, submitted that he was convicted with the offence of dealing in wildlife trophies contrary to section 92(2) of the Wildlife Conservation and Management Act, 2013, and sentenced to seven years' imprisonment.
14. He now appeals against both conviction and sentence, having amended his grounds of appeal.
15. On the first ground, he argues that the trial magistrate erred by disregarding material contradictions and inconsistencies in the prosecution's case, which rendered the case untenable.
16. He points out discrepancies among prosecution witnesses regarding the place of arrest, the description of the sacks and the motorcycle registration number, as well as contradictions between the inventory of exhibits and oral testimony.
17. He further notes that the investigating officer admitted that no evidence was retrieved from the appellant's phone, and that another suspect (Maingi) remained at large and was the one communicating about the trophies.
18. The appellant submits that these inconsistencies create reasonable doubt and that the trial court failed to interpret them in his favour.
19. On the second ground, he contends that the trial magistrate failed to properly analyse his defence of alibi.

20. The appellant gave sworn evidence that he had accompanied an acquaintance, Maingi, to Mwakitau without knowledge of any illegal activity, and that he was merely sheltering from rain when arrested.
21. The trial court dismissed his story as unbelievable and a clever fabrication. The appellant argues that the magistrate did not weigh his defence against the prosecution's evidence as required by law, and that the burden remained on the prosecution to disprove the alibi.
22. On the third ground, he claims the sentence of seven years is harsh and excessive.
23. He notes that the trial magistrate rejected a non-custodial sentence recommendation on the basis that it would send a wrong message for a serious offence.
24. The appellant invokes the principle of proportionality, arguing that punishment must fit the crime and that the court overlooked relevant factors. He prays that the appeal be allowed, the conviction quashed, the sentence set aside, and that he be set at liberty.
25. The Respondent's submissions oppose the appeal filed by Morgan Tole Mwatembo and Cyril Mchana Kitogho against their conviction and sentence of seven years' imprisonment for being in

possession of wildlife trophies under the Wildlife Conservation and Management Act, 2013.

26. The prosecution argues that it proved its case beyond reasonable doubt through three witnesses, including PW1 who testified that he arrested the appellants after being directed to a location where they were found outside a mud house holding a white sack containing seven elephant tusks (two complete and five pieces), along with a motorcycle.
27. Regarding possession, the Respondent cites the Penal Code and case law to argue that even if the appellants did not have actual physical custody, they had constructive possession and common intention, especially since two people escaped during arrest.
28. On the claim that the burden of proof was shifted, the Respondent attempts to invoke Section 111 of the Evidence Act but acknowledges that the Constitution overrides any statutory attempt to shift the burden on the accused.
29. Concerning contradictions raised by the appellants, such as whether the sack was a manila bag or the motorcycle registration letters, the Respondent submits that these are minor and do not go to the root of the prosecution's case, relying on Tanzanian and Kenyan appellate decisions.

30. On sentence, the Respondent notes that the law prescribes a minimum of seven years for the offence and argues the sentence is neither harsh nor excessive.
31. Finally, the Respondent invites the appellate court to confirm whether the trial court factored the time spent in remand when sentencing, as required under Section 333(2) of the Criminal Procedure Code, and to consider that if it was not factored.
32. The Appellants were convicted by the trial court for dealing in wildlife trophies, specifically seven pieces of elephant tusks weighing 33 kgs, contrary to section 92(2) of the Wildlife Conservation and Management Act (WCMA).
33. The prosecution's case rested primarily on the evidence of PW1, a Kenya Wildlife Service ranger, who posed as a buyer and was led by the 2nd Appellant to a location where the 1st Appellant was found in possession of the tusks.
34. Two other suspects who were present at the scene escaped. The Appellants raised defences of alibi and argued that they had been duped by a person named Maingi, but the trial court found these explanations to be unbelievable.
35. The issues for determination in this appeal are as follows;
 - (i) Whether the trial court erred by shifting the burden of proof to the Appellants in violation of Article 50(2) (a) of the Constitution.**

(ii) Whether the failure to call "Maingi," a key figure in both the prosecution and defense cases, created a fatal gap in the evidence.

(iii) Whether the inconsistencies regarding the identification of the exhibits and the motor vehicle registration rendered the conviction unsafe.

36. Upon a fresh review of the evidence, the court finds that the trial magistrate fundamentally erred by shifting the burden of proof. The Respondent's own submissions acknowledged that while Section 111 of the Evidence Act suggests an accused must prove facts within their special knowledge, this is subordinate to the constitutional presumption of innocence

37. An accused person is not required to prove their innocence or even their alibi; they merely need to raise a defense that might reasonably be true.

38. By dismissing the Appellants' explanation as a "clever fabrication" without the prosecution affirmatively disproving the existence or role of "Maingi," the trial court essentially required the Appellants to prove they were not dealing in the trophies.

39. Furthermore, the prosecution's case relied heavily on an undercover "sting" operation.

40. However, the non-production of the phone records of the Appellants, which the investigating officer admitted yielded no incriminating evidence, creates a significant lacuna.
41. If "Maingi" was the coordinator of the transaction as both sides suggest, the failure of the KWS to arrest him or explain his absence leaves the court with a "lingering doubt".
42. Where a central character in a criminal enterprise is neither called as a witness nor charged, and their absence is unexplained, the benefit of that gap must accrue to the accused.
43. The discrepancies regarding the motorcycle registration and the description of the sacks further weaken the "chain of custody" and the certainty of the arrest scene.
44. While minor contradictions are often overlooked, the cumulative effect of these inconsistencies, paired with the lack of forensic or telecommunication evidence linking the Appellants to a "dealing" arrangement, suggests that the prosecution's case did not transcend the level of strong suspicion.
45. Suspicion, however strong, can never be a basis for a conviction.
46. The appeal is hereby allowed. The trial court erred in law by shifting the burden of proof and failing to accord the Appellants the benefit of the doubt arising from the gaps in the prosecution's investigations.

47. The conviction for the offence of dealing in wildlife trophies contrary to Section 92(2) of the Wildlife Conservation and Management Act is hereby quashed, and the sentence of seven (7) years imprisonment is set aside.
48. The 1st Appellant, Morgan Tole Mwatembo, and the 2nd Appellant, Cyril Mchana Kitogho, are to be set at liberty effectively and immediately unless otherwise lawfully held.
49. The exhibits shall remain forfeited to the State as they constitute prohibited wildlife trophies.

Dated, signed and delivered this 30th day of April 2026 in open court at Voi High Court.

ASENATH ONGERI

JUDGE

In the presence of:-

Court Assistant: Millicent

Prosecutor: Mr. Ogeto

Both Appellants present in open court