REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL NO. E004 OF 2025
As consolidated with
CRIMINAL APPEAL NO. E005 OF 2025
and
CRIMINAL APPEAL NO. E006 OF 2025

JOHN GITONGA MIATU .... 1ST APPELLANT

MUNGAI NGANGA MWATHA.......................................2ND APPELLANT

MANASSEH MŨTHŨI MANG'ANGA ....3RD APPELLANT

VERSUS

REPUBLIC.. ....RESPONDENT

JUDGMENT

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1. This is an appeal from the conviction by hon N.W.WANJA, resident magistrate and sentence meted out by the Hon. Sandra Achieng Ogot, (Principal Magistrate) dated 20.1.2025 in Othaya MCCR No. E172 of 2023.

2. The Appellants were charged together with another not before this court for dealing in in wildlife trophy of a specified endangered wildlife species without a permit or other lawful exception contrary to section 92(2) as read with section 105 of the Wildlife Conservation and Management Act, 2013. The particulars were that the appellants and BKE, on 17.03.2013, at around 1300 hours, at Gitugi village, in Nyeri south subcounty within Nyeri County, jointly with others not before the court were found dealing in a wildlife trophy namely, 9 pieces of elephant tasks, weighing 38.8 kgs with a street value of Ksh 3,800,000 by battering with intent to sell without authority of the director general of the Kenya wildlife service.

3. On count 2 the Appellants were charged together with another not before this court, with being in possession of wildlife trophy of a specified endangered wildlife species without a permit or other lawful exception contrary to section 92(4) as read with section 105 of the Wildlife Conservation and Management Act, 2013. The particulars were that the appellants and BKE, on 17.03.2013, at around 1300 hours, at Gitugi village, in Nyeri south subcounty within Nyeri County, jointly with others not before the court were found in

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possession of wildlife trophy namely, 9 pieces of elephant tasks, weighing 38.8 kgs with a street value of Ksh 3,800,000 by battering with intent to sell without authority of the director general of the Kenya wildlife service.

4. The appellants were arraigned in court on 4.4.2023, where they pleaded not guilt for both counts. The appellants were released on bond after pretrial report was mad. This was even so for person who was serving a death penalty and another count of escaping form lawful custody. The appellants also sought return of their phones which were indicated to be exhibits. The matter was then consolidated with e386 of 2023. The accused in E386 of 2023 was made the 4th accused. The parties took plea to the amended charge sheet. She was subsequently acquitted hence her cross examination and evidence may not add value to be analysed.

5. There were many pretrial motions including release of a motor cycle which was not an exhibit in the court.

Evidence

6. PW1 was Lydia Njeri of Kenya wildlife services. On 14.03.2023, they received intelligence that some people were selling elephant tusk in Othaya. She got a number of the buyer .and got his number where the buyer informed her that his name was Mwatha. They agreed that they do the transaction on 17.03.2023.

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7. They proceeded to Othaya from Nairobi with sergeant Stephen Ondieki, Major Ibrahim Chacha and driver Damiano Mwaniki. She also called David MINA OF Aberdare to join the. They arrived in Othaya on 16.03.2023 at 2200 hours. They met David Maina on 17.03.2023. Later on 17.03.2023 they went to Othaya police station, where they sought reinforcement to proceed to where the buyer and his team were.

8. She stated that one Mwatha advised her to go to Gitugi factory. They went to Gitugi tea factory with PC Njuguna riding a motor cycle. She met the second and third appellant, that is Mwatha and Mũthũi . The witness identified PC Njuguna as her cousin. They were informed that the tusks were not there. They met the first accused, the second 4th accused and a runner.

9. They were informed that the tusks were in the bushes. They agreed that money be brought. Colleagues were alerted to bring money, a code name for police in the car. As they were loading, the police came and arrested the first appellant who held a bloodied panga and the second and third appellants. The tusks were in three wrapped bundles with 5, 2 and 2 pieces per bag.

10. They interacted with the appellants for one hour as they were being told to wait as people were passing by. He stated

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that she prepared an inventory for the tasks she marked the 8, tusks. The blood-stained blood was marked as PMFI1. inventory and sacks as PMFI 2-7. She identified the appellants, with the second appellant being the one described as the one they spoke to on phone as a prospective buyer. The second and third appellants were at Kaharo, where they had agreed to meet with the second appellant to meet as the came from Gitugi.

11. On cross examination by the first appellant, she stated that she wrote only important details in the witness statement but remembered everything. He stated that he did not speak on phone with the first appellant. She met the 2nd and third appellants at Gitugi and they took the witness and her team to Kaharo tea buying centre where they negotiated. The first appellant was among those who took her to the tusks.

12. She stated that the tusks were hidden inside a tea far near the buying centre. The first appellant and others took the tusks to the car and were arrested. He stated that the farm was near a road but the first appellant warned the witness to hold off if there was someone coming. He stated that she did not take photos, though she knew some were taken.

13. On cross examination by the second appellant, she stated that he was protected by law not to give the name of the informant. She proceeded to verify the information and the

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second and third respondents took her to Kaharo she stated that the first appellant intended to attack officers. There was commotion but excessive force was not used.

14. She stated on cross examination by 3rd appellant that on receipt of intelligence, she informed the bosses. She met the first and second accused as they met at Gitugi. The appellants, 4th accused and another runner showed the appellant the consignment loaded the consignment to the car. The 4th accused acted as security while the third appellant escaped but was arrested at Kaharo.

15. The 4th accused applied and was granted leave to recall PW1. The evidence relates to the 4th accused, who is not party to the appeal. Having been acquitted.

16. On re-examination the witness stated that she met the appellants at Gitugi tea factory. When they came back the 4th accused was involved in the negotiation for the purchase of the tusks. She stated that the appellants and the 4th accused showed her the elephant tusk. She did not name the 4th accused, in the initial statements. She had described the physical appearance that helped in identification parade.

17. PW2 was ranger Ibrahim Chacha of KWS headquarters, with 9 years' experience in investigations. His duties include arrest of wildlife offenders, gathering information and other

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assigned duties. PW1 informed her that there were suspects dealing in elephant tusks and were looking for potential buyers in Othaya.

18. This was also communicated to Ondieki and driver Daminamo. PW1 was communicating with the suspects. They reported the matter at Othaya police station where they informed the police of the mission. Sergeant Mbithuka and PC Njuguna joined them. PW1 went with PC Njuguna arrived at Gitugi where they met the three appellants. The witness and others were following covertly at a distance.

19. The second and third appellants boarded motor cycle leading PW1 and pc Njuguna. PW1 communicated that she had seen elephant tusks. They proceeded to the scene and arrested the appellants. Some of the suspects escaped. The first appellant was resisting arrest but he was arrested. The third appellant tried to escape but was arrested together with tusks. These were in two sacks. The big ones penetrated the sacks and could be seen without opening. The rest were pieces which were in a sack with a picture of chicken. They took the tusks to Othaya police station. The first, second and third appellants signed the weighing certificates. He identified all marked documents. He did not see the 4th accused at the scene.

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20. On cross examination by the first appellant, he stated that he, the first appellant resisted arrest but was subdued, with a lot of commotion. The forms could not be filled at the scene. The first appellant even bit the team using his mouth. He stated that the stated that only tusks are photographed. Hey did not add tusks the panga in court was blood stained and the big pieces were also blood stained. He stated that he did not charge the first appellant with resisting arrest. The first appellant had carried tusks and a panga hence could not escape.

21. On cross examination by the second appellant, he stated that there is no occurrence book for intelligence received. There was however an OB number for in Othaya for the operation. They did not do the dusting of he recovered tusks.

22. On cross examination the 3rd appellant, she stated that they arrived at 12.15. The 3rd appellant tried to escape but was arrested. The third appellant and other were arrested. They recovered 8 sacks and not nine sacks. She stated that they did not consult the area chief on the mission. The situation did not allow the inventory was signed given the circumstances of the case. The inventory was processed and signed at Othaya police station.

23. PW3 was driver Damiano Mwaniki of KWS headquarters. He gave driving service to various stations and apprehending

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wildlife offenders with 17 years' experience. He was called by sergeant Ondieki on 16.03.2023,and he shared intelligence on persons selling wildlife and to be ready for an operation. They left with PW1 and PW2. They spent a night Nyeri and were joined by the KWS Aberdare team warden 1, Mr. Maina. The operation was set for the following day. in the morning of 17.03.2023, they proceeded to Othaya police station where they were given two police officers from the station. he was the one driving an unmarked service vehicle.

24. He Stated that PW1 met one of the accused at Gitugi Tea Factory, the second appellant. They followed, the second appellant, closely. after some time PW1 Called him saying that him to a bag of money she had left. the witness went with a bag to where PW1 was. PW1 informed her that the first appellant was armed. the first appellant tried to remove a panga from a white sack, but this witness held him until the back up team arrived. he could not remember how many people escaped. the third appellant tried to escape but the vehicle caught up with him and arrested him. others testified but the three appellants were arrested.

25. They placed the exhibits in the vehicle and escorted the appellants to the police station. The first appellant was carrying a blood statins panga, PMFI 1. There were a total of 7 white sacks and one green sack, which were on two batches. These were weighed at 38.8 Kgs. A weighing certificate was

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prepared. He took around 5 minutes. He identified the appellants in the dock. he did not see the 4th accused at the scene.

26. On cross examination by the first appellant, he stated that the first and second appellants placed the elephant tusks in the vehicle before they were arrested. He stated that an inventory should be recorded at the scene if the satiation allows. He stated that the inventory was filled at the police station. He stated that tr tusks were weighed three times in the presence of the appellants. One batch was 18.95 kg and the other 19.80 kg, making 38.75 not 38.8 kg. He stated that he did not prepare the weighing certificate but was present. He continued that there were not many people on the scene when the appellants were arrested. He stated that the first accused carried a panga to cut them.

27. On cross examination by the second accused, he stated that did not have a work ticket showing that he was permitted to drive to Kaharo. He stated that KWS Aberdare Mr. Maina was coming to surveillance and joined them. he did not see the 4th accused at the scene.

28. PW4, was sergeant steven Muchoki Ondieki, a security officer at KWS Headquarters. He had 18 years' experience and he undertook covert and overt operations. he received information on possession of ivory and looking for buyers in

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Othaya. he was accompanied by PW1, PW2 and PW3. They travelled by day and made a stop at Nyeri town. on 17.3.2023, he was accompanied by a colleague from KWS Aberdare, Mr. Maina where they went to Othaya police station and reported their intention and operation. PW1 was in communication with one of the suspects. she posed as a potential buyer. they were to meet and carry out business. the suspect and PW1 had agreed to meet at Gitugi tea factory at 10.00am.

29. He posited that PW1, boarded a motor cycle with PC Njuguna and met suspects in Gitugi Tea Factory. PW1 relayed the information that they were headed to Kaharo tea buying Centre, where the elephant tusks were said to be the information was relaying to sergeant Mituka of Othaya police station, PW2, PW3 and David Maina. They kept surveillance, of PW1 and PC Njuguna, who were in a motor cycle. at around noon they drove to Kaharo tea buying centre and met other suspects. The suspects brought to bundles which PW1 confirmed to be ivory, by PW1. She indicated that money was to be delivered and driver Mwaniki was the one to pose as the person who was to deliver the money.

30. he continued that when they reached where PW1 was, they found that she was accompanied by five people who stood at strategic point. They managed to locate two bundles of ivory and identified themselves as police officers. They arrested two suspects. One escaped but after short hot pursuit, he was

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arrested. The other two managed to escape. the third suspect was the third appellant.

31. They took the suspects and Ivory , 9 pieces and suspects. The ivory was weighed totaling 38.8 Kg. A weighing certificate was filled. The weighing certificates, and inventory were singed by the three appellants and arresting officers.

32. They ascertained that the first appellant was the one with the ivory while the second accused was the one with potential buyers. They also went to Aberdare National Park where they retrieved surveillance photographs where they revealed the resemblance of the first and second appellant. he received a call on 4.06.2023 from David Maina on the escapees. the evidence relates to the 4th accused which is to of use or this appeal.

33. On cross examination by the first appellant, he stated that the second appellant was the one who dealing with pw1. This information was from pw1. He stated that the ivory was put inside a culvert near Kaharo tea buying centre. He stated that the operation team is the one that removed the ivory from a culvert. He was not there when the ivory was placed in the culvert. Pw1 has indicated that the suspects brought the ivory while waiting for money. He stated that the first appellant turned violence and had a manila paper in a sack and turned

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violence on arresting to use the panga as a weapon on the officers. He stated that the panga was blood stained.

34. He stated that ivory was weighed to 18.95 kg and 19.80 making a total to 38.75 kg. 38.8 kg is therefore a rounded figure.

35. On cross examination by the second appellant, he stated that he received information from PW1. He stated that the appellants were booked vide 0.37. The tasks were recovered in a culvert near Kaharo tea buying centre. He stated that circumstances were such that the inventory could not be signed at the scene.

36. On cross examination by the 3rd appellant, he stated that the PW1 and PC Njuguna met the two appellants at Gitugi Tea Factory. He stated that the markings on the tusks was made by the investigating officer. It was impossible to process the scene at Kaharo tea buying area but the scene was processed at the Othaya Police Station. The parties proceeded together to the scene at Kaharo tea buying centre.

37. PW5 was PC Simon Njuguna currently attached at Othaya police station working as anticrime office. On 17.03.2023, he was assigned by the OCS, to go to an operation with Dominic Mithuka to change form work to join KWS, and inserted with KWS. They proceeded, to Kaharo tea buying centre, with PW1

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who posed as a buyer, where they met the Mũthũi and Mwatha, the second and third appellant.

38. He stated that the second and third appellant boarded a vehicle to Kaharo tea buying centre, where they met join and two others, who did not identify themselves. The three appellants, and the PW1 and PW5, went to the to where the ivory was. they convinced them remove the ivory and place it near as they waited for the money. the ivory was placed near the road. the second team was called and informed of the development. the second team came and arrested the first and second and third appellant. the rest tried to escape. they took the appellants to Othaya police station. an inventory was recorded wherein the witness signed. the average weight of the ivory was found to be 38.8 and produced as exhibit 8. he identified the appellants herein on the dock. Two people escaped among the 4th accused.

39. On being cross examined by the first appellant he stated that they met the second and third appellant at Kaharo tea buying centre. It is the second and third appellants who led them to Kaharo tea buying centre.

40. The second and third appellants were communicating with other all this time. At Kaharo tea buying centre, the suspects were five while his team were two. It was his evidence that they met the third appellant at Kaharo tea collection centre

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and proceeded to Kaharo. He stated that they were preparing the inventory but the appellants were violent. They were calling for back up team disguised as money.

41. On cross examination by the third appellant, he stated that he met the third appellant on the material day. They did not disclose the information to the area chief to avoid details leaking. They had been threatened by the first appellant with a panga. The tusks were marked for the court procedure. They managed to convince the appellants to brin the tusks near the road for back up to arrive.

42. On cross examination by the second appellant, he stated that he met the second and third appellant at a place between Gitugi tea factory and Kaharo tea buying centre.

43. PW6 was CPL Michael Odongo of KWS headquarters. He is a Cellebrite certified mobile operator with 4 years' experience. He is also a Cellebrite certified physical analysts and Cellebrite certified mobile forensic examiner under certificate code DACZC1ZXDS. For the digital newbies, this is a tool used to extract, decrypt, and analyze data from locked mobile devices that is usually used for conducting forensic investigations, bypassing security, and recovering data like messages, location history, and deleted files. It is named after the digital forensic company, Cellebrite DI Ltd based in Petah Tikva.

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44. He graduated in 2022. his duties were to extract mobile phone and other digital device and preparing reports. he received 5 exhibits with an exhibit memo form exhibit 10 the phones were marked as Y1,Y2 and y3 which were marked and later produced as exhibits 11,12 and 13. He described the phones and their respective serial umbers and models. He extracted numbers. He found two numbers under name of Mũthũi. They had a message form Mungai Nga'ng'a on 0727942177 to Muchiri 2, 0728432922. The photos of the wildlife trophies were sent on 11.3.2023 at 0800 hours.

45. Another image was sent from the same number 0727942177 to Muchiri 2 at 8.023 hours. Another wildlife image was sent to 0724413148 at 0655 on 11.03.2023.Y2 was a Kabambe, feature phone a small analogue phone and could not extract data. Y3 was android airtel phone. On analysis, it had 13 images of four, were rhino horns and while the rest (9) were elephant tusks. Each image has a unique digital signature which is an identity of each individual image. They found that Y 1 belonged to Mungai Mwatha, the second appellant. Phone numbers 0727942177 and airtel number 073538168 belonged to the first appellant. Y3 Belonged to the 3rd appellant with numbers 0727942177. He produced the reports as exhibit 14 and 15. he also prepared a summary of the report as 16 and certificate of electronic evidence as Exhibit 17. He produced exhibits memo received on 17.06.2023 the two phones and

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other phones related to Accused 4. There was nothing related to the phone on the case.

46. On cross examination by first appellant, he noted that he did not find anything in Y2,Y4 and Y5.

47. On cross examination by the second appellant stated that the PIN for the phones was provided by the investigating officer he stated though android phone can down load messages, he established that some messages were taken directly not downloaded. They were unable to extract data from Y2,Y4 and Y5.

48. On cross examination by the third appellant, he stated that he was able to extract data on ownership of the numbers as indicated in the report. He stated that images were taken by phone, sent by Xender® and stored in the phones.

49. PW7 was Jeremiah Poghon Kaitopok, a laboratory doctor with Kenya wildlife services stationed in Nanyuki station, in Laikipia. He graduated with laboratory medicine in 2002 and graduate of wildlife medicine from the university of Pretoria, *Afrique Du Sud*. He is registered in Kenya as a veterinary surgeon number 1965. He has 21 years' experience and several courses in wildlife medicine locally and internationally. On 26.05.2023, he received several pieces suspected to be

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ivory from a KWS officer, David Maina from Aberdare park. They were indicated as elephant tusks, which he identified.

50. He examined the elephant tusks which were made up of root base, with a hole or pulp cavity for oxygen and nutrients supply, midsection and apex. The first one OPS2 was removed from elephant with flesh. It was removed from fully grown elephant bull. Upon examination, he established it was an elephant tusk. The dentine part of the tusk is known as ivory. There were unique elephantine Schreger lines. OPS1-5, OPS 7-9 were complete tusks. OPS6 was an elephant tusk from a young elephant. The witness established that the 9 tusks were from 5 animals; each elephant has 2 tusks. They had chop marks meaning that the elephant just died before the tusks were removed. This was a threat to endangered species. He filed and signed his report dated 26.05.2023, which was produced as exhibit 22.

51. On cross examination by the first appellant, he stated that he carried his qualification documents in court. He stated that the exhibits brought to him were the same ones he examined. The exhibits were from elephants, *loxodonta africana*, indicated in the proceedings as *sodonto africana.*

52. On cross examination by the second appellant, he stated that the tusks had chop marks showing they were removing

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when the carcass had not decomposed, the same was still fresh.

53. On cross examination by the third appellant, he stated that he was a qualified doctor and a stamp cannot disqualify him. He did not determine the cause of death of the elephants.

54. On cross examination by the 4th accused, he stated that the tusks had Schreger lines, which are found in elephants only. He stated that there are other animals with tusks but not ivory. The mammals(appears to have been mammoths) that had Schreger lines became extinct and could not be the ones. He confirmed that he used morphology not molecular and genetic forensic tests. He was not a molecular biologist. The Schreger lines were also over 100^{0}.

55. PW8 testified that he was David Maina a KWS Warden based at the Aberdare national Park undertaking wild life crime investigations. He joined a covert operation within Othaya township at Gitugi village with a team from KWS headquarters consisting of PW1,PW2, PW3 and PW4. They were briefed that the second appellant was the leader in looking for ivory and were in communication from his number 0735381860. The witness was the senior most in the group. He planned the operation and informed Othaya police station where they were given two officers, PW6 and sergeant

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Dominic Mithuka. PW1 was to pose as a buyer and they left with PW6.

56. PW1 and PW2 left together on a motor cycle and met the suspects, Mwatha and Mũthũi . After a brief chat they informed PW1 that the consignment ewas hidden at Kaharo tea buying centre. They left to confirm the consignment and upon arrival another suspect john Miatu joined them. The three appellants proceeded to reveal the consignment to PW1 and PW2. She placed a call to the team, posing as the driver, the team had been keeping surveillance and arrived at the area. And bounced on the appellants. 9 pieces of ivory were recovered. The three appellants herein were arrested. The witness joined the arresting team took over investigation but could not process the scene since the first appellant became very violent and was armed with a panga. He was disarmed and brough a lot of commotion. He produced the panga as exhibit.

57. The scuffle at the scene attracted members of the public who were shouting at the officers .he commanded the team to leave given the volatile situation. They left with the tusks and the arrested persons. Upon inspection of recovered items, he found 9 pieces of tusks. The appellants confirmed they did not have a permit to possess tusks. Two of the nine tusks appeared fresh meaning they were freshly poached. He produced the tusks in 8 sacks, ropes, inventory which was signed by the

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arresting officers and the three appellants. He produced the certificate of weighing he produced a letter dated 18.05.2023 showing the cancelled visa and the reasons for cancellation of the us visa. He produced other exhibits. Two other suspects had escaped but one person was arrested but only accused 4 was identified . He produced the parade report as exhibit 9. He produced the phones and their reports he identified the appellants in the dock.

58. On cross examination by the first appellant, he stated that the first appellant was armed with a panga. The appellant attempted to flee while in custody and was charged and convicted. he indicated that the second appellant was the one in communication with PW1. He did not witness search of the appellants. the tusks were sent for examination before being repackaged as they were at the time of arrest. he stated that the tusks weighed 38.75 or rounded off to 38.8Kg. the appellant had a blood stained panga but it was not taken for analysis. the witness was looking for carcasses but did not get any hence did not pursue the question of blood on the *machete*.

59. On cross examination by the second appellant, he stated tat he could not disclose information on the informant as it is privileged. The expert Cellebrite analyst had given evidence on communication between the second appellant and PW1. The second appellant's home is in Olojorok Nyahururu and

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only travelled for the deal that went down. He stated that though, all the 7 officers were armed, the situation did not warrant use of guns as they do not use guns wantonly like toys.

60. On cross examination by the third appellant, he stated that he had 20 years' experience. He knew tusks were made of keratin and do not leave fingerprints. (Though from the evidence, they are made of dentine, Ivory and enamel, which acts the same as keratin). He joined the scene after recovery and after analyzing the scene made a decision to get out of the scene.

61. The ruling on case to answer was delivered on 23.04.2024. Upon compliance with section 211 of the criminal procedure code, the parties proposed as follows:

   a. First appellant- sworn testimony and one witness
   b. Second appellant -unsworn testimony and no witness
   c. Third appellant -sworn testimony and no witness
   d. The fourth accused -sworn testimony and at least 5 witnesses.

62. On the hearing date, the first appellant changed his mind on calling one witness and stated he was to give sworn evidence and call no witness. The first appellant John Gitonga Miatu, testified on oath that on 17.03. 2023. He left Muchange in Chinga location to Gitugi looking for work at Nyayo tea zones.

He went and passed by where her recently employed daughter was working and requested for food at lunch time. The work he was giving had ended and was given a job of cutting tea leaves for that day only. He parked his motor cycle and went to work between 11.30 and 10.30 . The daughter brought lunch which he partook and took his panga and continued working.

63. Shortly, he heard noises from Kaharo tea buying centre. He thought something had happened to her daughter. He met two men but did not bother with them. They told him to lie down but he refused. He struggled with them since he did not know them. One of them removed a gun ,when he realized they were police offices and he put his panga down and obeyed. There was an old man lying on the ground who was brought and they were put in the vehicle together. The elderly man he found lying on the road was Mungai Ng'ang'a. He did not know him before the incident. Another elderly man, Manasseh Mũthũi Mang'anga was brought from a nearby homestead.

64. He stated that it is not true that he had been left by the second and third appellant at Kaharo tea buying centre to keep an eye on Ivory. He had known Manasseh Mũthũi Mang'anga from childhood days. He did not see any elephant tusks at Kaharo tea buying centre. Even the officers from Othaya were strangers and they had no grudge. He stated that

his phone was Kabambe, feature phone Y2, and not Y1 or Y 3. He stated that PW1-4 were strangers to him.

65. The second appellant, Mungai Nganga Mwatha, gave unsworn evidence stating that he bought tea for packaging and decided to expand to Nyeri. He went to talk with officers from Gitugi and Chinga tea factories. He stayed in Mukuyu for two days as he did to find officials he was looking for. He boarded a motor cycle on 17.03.2023 and went to Gitugi Tea Factory. He stated that he boarded the third appellant's motor cycle to Gitugi Tea Factory. He was told that the officials were at Kaharo tea buying centre.

66. Further that as he was leaving, a young motor cycle rider carrying a female to show them Kaharo tea buying centre. They arrived at 12.30 pm and there was no one as farmers were picking tea. He decided to wait for the officials. As he sat there, he did not know where his motor cycle rider went to. He saw a vehicle parked and its occupants ordered him to lie down on the tarmac road, yet it was sunny. He found the first appellant handcuffed and, in the vehicle, the third appellant was brought after they moved about 200m. A sack of elephant tusks was brought. He was shocked as he had never seen tusks before. He denied committing the offence.

67. The third appellant testified test he is from Irîa-inî location. He stated that Paul Murage would lend him his motor cycle for

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him to go shopping in town. Three riders were talking when a client approached and wanted to be taken to Gitugi and I was the one to take them. At Gitugi factory gate, the customer, the second appellant stopped and made a call. He stated that he wanted to be taken to Kaharo tea buying centre. After sometime a lady and a man went to where they were and stated that they wanted directions to Kaharo tea buying centre.

68. It was his evidence that he visited a friend, Ndirangu Gichihi about 150 m from Kaharo tea buying centre, where he was served with tea. Before he could take tea, a contingent of police officers led by Sergeant Dominic Mbithuka knocked at the door of the friend's house and arrested him on the road side he met a Landcruiser and found the first and second appellant in the Landcruiser. The vehicle had ivory when they arrived at the station. It was his first time to see ivory consignment.

69. On cross examination, he stated that he borrowed the motor cycle, the second appellant was his customer .he denied borrowing a motor cycle to facilitate the deal. He said the first accused was known to him prior to the incident. He stated that the arresting officers were not known to him but they framed him. he stated that he was arrested in a friend's house.

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70. The 4th accused testified and called one witness and was later acquitted.

Impugned judgment

71. The court analyzed in a very elegant manner, the evidence before her. She analyzed the prosecution evidence from paragraphs 4-26(19 pages). The defence case was analyzed from paragraph 27-44(11 pages). She succinctly set out the applicable law and analysed the evidence in respect to the appellants for count 1 from paragraphs 47 to 88 (38 pages). Some of the paragraphs are 4 pages long.

72. she also made analysis in respect of count 2 for the appellants from paragraph 89 to 97(8 pages). In respect the fourth accused from paragraphs 98 to 120(18 pages). the evidence related to the fourth appellant is irrelevant for purpose of this appeal.

Submissions

73. the first appellant field submissions on 29.07.2025 he set out the facts surrounding the appeal. and the case in the court below. he had been sentenced to seven years imprisonment for count 1, 5years imprisonment for count 2 and 5 years imprisonment with another fine of Ksh. 3,000,000/=, and in default of payment of fine to serve another years imprisonment. he sentences were to run concurrently.

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74. He submitted that the charge sheet was defective. He placed reliance on the case of **Omambia v Republic [1995]** KECA 156 (KLR), where the court of appeal [AM Akiwumi, PK Tunoi & AB Shah, JJA] stated as follows:

> 4. In this regard, it is pertinent to draw attention to the following provisions of S. 134 of the Criminal Procedure Code which makes particulars of a charge an integral part of the charge:
>
> "Every charge or information shall contain, and shall be sufficient if it contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence"

75. Further reliance was placed on the case of **Sigilai v Republic** [2004] eKLR. It is not related to the questions being debated. he submitted that the two offences are similar word for word but the offences are different. he further relied no the case of **Jason Akumu Yongo v Republic** 1983 KECA 44(KLR), where the court of appeal[potter, Hancox JJA & Chesoni Ag JA stated as follows:

> The question is therefore whether the amending section of the Code can be applied where the evidence is at variance with the charge, and in our

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> view it can. We therefore do not think that the wording of the section, bearing in mind its marginal note, precludes an amendment of the charge in a case of this nature, but its provisions should be strictly observed.

76. He submitted that possession was not proved beyond reasonable doubt. he stated that the panga was not taken for forensic examination. he stated that photographs were not taken to liking the possession to the appellant. Reliance was placed on the case of **Joseph Mutisya Mwangangi v Republic** 2020 KEHC3162(KLR) where the court held that:

> 7. The Applicant having been found in possession of Wildlife trophies (2 pieces of worked ivory of elephant tusks) ought to have been charged under section 95 and NOT the non-existent section 92(4) of the said Act.
>
> 8. The fine under section 95 is indicated as Kshs. One million or imprisonment of not more than five (5) years or both.

77. He also relied on the case of **Peter Kariuki Wanjiku & another v Republic** [2015] KEHC 7807 (KLR), where John M. Mativo J, as he then was stated as follows:

> In my view, possession includes two elements; namely being in physical control of the item and knowledge of having the item. To be guilty of

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possession, an accused person must be shown to have knowledge of two things, namely, that the accused knew the item was in his custody and secondly he knew that the item in question was prohibited. A person has possession of something if the person knows of its presence and has physical control of it, or has the power and intention to control it.

78. Further submissions were that concurrent sentences were harsh for a single transaction, and same set of facts. reliance was placed on section 362 of the Criminal Procedure Code. reliance was placed on the case of **Mburu v Republic** (Revision Case E124 of 2024)[2024] KEHC 9418 (KLR), where H. M. Nyaga,J held as follows:

> 15. In the present case, both instances were committed on the same date and against the same complainant. The particulars of the charges actually constitute one continuous utterance by the applicant. It is not clear why the State decided to sever the facts and present two counts against the accused.
>
> 16. Since the acts complained of were constituted in a single transaction, guided by the authorities cited above, the sentences ought to have run concurrently, unless the court deemed it fit to rule that they run consecutively. Since the court was silent, then the law is that they ought to have run concurrently.

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> I therefore revise the sentence and order that the sentences were to run concurrently.

79. He relied on the case of **Amon Muthuri v Republic** [2020] KEHC 3156 (KLR). He also relied on the sentencing guidelines as well as section 14 of the criminal procedure code. Reliance was also placed the Court of Appeal decision in **Peter Mbugua Kabui v Republic** [2016] eKLR stated:

> As a general principle the practice is that if an accused person commits a series of offences at the same time in a single act/transaction concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment.

80. He submitted that sentencing contradicts right to fair trial and risks to undermine public trust in justice system and rule of law.

81. He submitted that his defence was not considered. Contrary to article 50(2) of the constitution. He relied on one civil case, which is of no relevancy to the matters at hand and two other cases, that is, **Stephen Kioko Muli v Republic** [2021] KEHC 8102 (KLR) and **Bilali v Republic** (Criminal Appeal E018 of 2023) [2024] KEHC 4998 (KLR). He submitted

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that when roots are deep there is no reason to fear the wind. He stated that the truth is deeply rooted.

82. The third appellant filed submissions forwarded no 19.05.2025. The appellant's first quarrel was the sentencing to 12 years. It was his position that the sentences should not have run consecutively. The sentence was said to be contrary to article 50(2)(q) of the constitution.

83. The section provides that:

> Every accused person has the right to a fair trial, which includes the right-
>
> If convicted, to appeal to, or apply for review by, a higher court as prescribed by law.

84. The relevance of the section is thus not apparent.

85. He also submitted that the period spent in custody should be considered in view of section 333(2) of the Criminal Procedure Code.

86. **Victor Mwenda Mulinge & 3 Others V Republic**[2012]eKLR he relied on the three last cases relied on by the first appellant. he also submitted that the charge sheet was defective. he relied on the case of **Peter Mbugua Kabui v Republic** [2016] eKLR, **Jason Akumu Yongo v Republic** (supra), **Peter Mageria v Republic** (1983) eKLR, **Amon Muthuri v Republic** [Supra].

87. He submitted that his defence was not considered. He relied on the case of **Joseph Mutisya Mwangangi v Republic** [supra]. he also relied on the case of **Victor Mwendwa Mulinge v Republic** [2014] eKLR. He stated that he told the court hat he never committed the offence. It was his submissions that the burden of proof never shifts to the defence. Reliance was placed on section 107(1)(2) of the Evidence Act. he relied on **Karanja v Republic**(1983)eKLR. He submitted that the state should have invoked section 309 of the Criminal Procedure Code.

88. He submitted that he had no obligation to proof his innocence. reliance was placed on the case of **Ouma v Republic** [1986] KECA 50 (KLR). the quote given does not arise from the case.

89. The second appellant, filed undated submissions forwarded on 5.4.2025. He stated that the court failed to find that the case was not proved. He stated that he went to various factories in Kiambu and Nyeri including Gitugi and chinga. He regurgitated his evidence in submissions. he relied on a case which I cannot find in the law books. He stated that the sentence was harsh and he was entitled to equal benefit of law under article 50(2)(p) of the Constitution. reliance on the case of case of **Okeno v Republic** [1972] EA 32 at 36 on the duty of the court.

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90. Surprisingly, the state did not file submissions despite assuring the court that they were filed.

Analysis

91. This being a first appeal, this court is under a duty to reevaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence firsthand. The Court of Appeal for Eastern Africa in **Pandya vs Republic** [1957] EA 336 held as follows:

> On a first appeal from a conviction by a Judge or magistrate sitting without a jury, the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than

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another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

92. On a first appeal, the appellant is entitled to a fresh and exhaustive reevaluation of the evidence on record, with the appellate court drawing its own conclusions, while bearing in mind that it did not have the advantage of seeing and hearing the witnesses. In the case of **Okeno v Republic** [1972] EA 32 at 36, the East Africa Court of Appeal stated on the duty of the court on a first appeal:

i. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence

> to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424.

93. The first appellate court is entitled to consider the evidence in the trial court as a whole as being submitted afresh to be subjected to exhaustive examination to guide the court towards its own decision on the evidence. In **Kiilu & Another vs. Republic** [2005]1 KLR 174, the Court of Appeal stated as follows:

> 1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.
> 2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; only then can it decide

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whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.

94. The legal burden of proof is on the prosecution and remains constant throughout. According to established principles, the burden of proof rests upon the prosecution to prove the guilt of an accused person beyond a reasonable doubt. This burden does not shift to the accused, save in a few exceptional statutory instances where the law expressly provides otherwise. According to *Halsbury's Laws of England*, 4th Edition, Volume 17, paras 13 and 14:

> The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation

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is an essential of his case. There may therefore be separate burdens in a case of with separate issues.

95. Brennan J, addressed the standard of proof required in Criminal cases in the case of Re Winship 397 US 358 {1970}, at page 36164 that:

> The accused, during a criminal prosecution, has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction…Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.

96. 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. Lord Denning in **Miller vs. Ministry of Pensions**, [1947] 2 ALL ER 372 had this to say:

> 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.

97. Within these boundaries, the Court is obliged to conduct a fresh and thorough examination of the evidence, reassess the credibility of witnesses, and evaluate any conflicting testimony to reach its own independent conclusions. Throughout this exercise, the legal burden of proof remains unchanged, resting entirely on the prosecution to establish the appellant's guilt beyond reasonable doubt. Only by meticulously scrutinizing all the evidence, while adhering strictly to the statutory framework, can the Court ensure that the appellant is afforded a full and fair reevaluation of the case.

98. Proof beyond reasonable doubt does not impose a standard of proof beyond the shadow of a doubt. Where the evidence tendered is so strong as to leave only a remote possibility in favour of the accused person, which can be dismissed with the sentence of course it is possible, but not in the least probable,

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then it can be said in law that the case is proved beyond reasonable doubt. It was held by the Court of Appeal in **Moses Nato Raphael vs. Republic** [2015] eKLR as doth:

> What then amounts to reasonable doubt? This issue was addressed by Lord Denning in Miller v. Ministry of Pensions, [1947] 2 ALL ER 372 where he stated:-
>
> '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.'

99. Courts dealing with criminal matters must always remain mindful of the high standard of proof required and the serious consequences that a conviction imposes on an accused. The caution has regard to the nature of criminal offences, whose consequences extend beyond the individual to society at large.

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100. The Appellants were charged and convicted of dealing in in wildlife trophy of a specified endangered wildlife species without a permit or other lawful exception contrary to section 92(2) as read with section 105 of the Wildlife Conservation and Management Act, 2013 in the first count and being in possession of wildlife trophy of a specified endangered wildlife species without a permit or other lawful exception contrary to section 92(4) as read with section 105 of the Wildlife Conservation and Management Act, 2013 in count two.

101. The section under which the two counts are anchored in section 92 of the Wildlife Conservation and Management Act, 2013. Section 92 of the said act provides as follows:

1. A person who kills or injures, tortures or molests, or attempts to kill or injure, a 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 five years.
2. 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

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term of imprisonment of not less than seven years.

3. Any person who, without permit or exemption issued under this Act, deals in a live wildlife species of any of critically endangered or endangered species as specified sin the Sixth Schedule or listed 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 three years.

4. Any person without permit or exemption issued under this Act is in possession of any live wildlife 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.
5. Any person who without permit or exemption issued under this Act, manufactures an item from a trophy of a critically endangered or endangered species specified under the Sixth Schedule or listed under CITES Appendix I

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without a permit or exemption issued under this Act, commits an offence and shall on conviction, be liable to a fine of not less than ten million shillings or up to life imprisonment or both such fine and imprisonment.

102. Schedule 6 to the the Wildlife Conservation and Management Act, 2013, lists several nationally listed critically endangered, vulnerable, nearly threatened and protected species. Among those listed as endangered is Loxodonta Africana, that is, African elephant. therefore, the first part, that is, endangered species as specified in the Sixth Schedule or listed under CITES Appendix I, is proved.

1. The second part is whether the exhibits found were wildlife trophy. Evidence tendered was that the examination by PW7 confirm that the items produced in court and recovered o 17.93.2023 were wildlife trophy namely elephant tusks. the endangered animal was not one ,or two but 5 African elephants whose lives were lost to get the nine tusks. prophy is defined in section 3 of the Wildlife Conservation and Management Act, 2013 as follows:

   "trophy" includes any bone, claw, egg, feather, hair, hoof, skin, tooth or tusk of an animal, and for any species of plant, any bark, branch, leaf, log, sip or extract and includes any other durable portion whatsoever of that animal or plant whether

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processed, added to or changed by the work of man or not, which is recognizable as such.

103. Therefore, a tusk of an animal is a trophy. It is therefore proved beyond reasonable doubt that the material recovered on the said date is well covered under section 92(2) of the wildlife conservation and management act, 2013.

104. The next question is whether, circumstances of the case amounted to dealing. deals in a wildlife trophy, means, under section 3 of the wildlife conservation and management act, 2013 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; and

105. PW1 testified, and her evidence was not impeached, that she was called by the second appellant while posing as a buyer.

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the second appellant gave a defence that is consistent with evidence of PW1, except that he denied committing the offence. the second appellant was caught in flagrante delicto. he led the officers, to Kaharo tea buying centre, where the trophies were found in their possession. the evidence of PW1-PW6 was that the appellant were caught with the ivory. the sorry of cutting tea is not series. it was not raised in cross examination. of critical importance the second appellant was on sentence only.

106. PW6 testified that the phones recovered belonged the three appellants. Phone Y1 had a name of the third appellant. It had attachments of wildlife trophies. The messages on wildlife trophies were sent to the second appellant. This was done on 11.03.2023 at 8.00am. Some of the photos were not downloaded. They were taken by the same phone.

107. The witness was unable to extract any data from Y2, which was a feature phone. The phone Y1 belonged to the second appellant. The other numbers involved in the communication belonged to the third appellant, Manasseh Mũthũi Mang'ang'a. In effect the photo on the trophies placed the second and third appellants on the dealing part. The court rightly found that the 4th accused was not involved.

108. The defence evidence places each of the three appellants at the locus in quo at Kaharo tea buying centre. The duty to poof

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an alibi is on the state and not on the defence. In the case of **Bernard Odongo Okutu v Republic** [2018] KEHC 1052 (KLR), R.E.Aburili, which was confirmed later in Ogutu v Republic [2025] KECA 336 (KLR). the learned Judge stated as follows:

109. On Issue 6, the appellant claims that his defence of alibi was not considered in his favour. On the Appellant's defence of alibi, the appellant complained that his defence of alibi was not considered by the trial magistrate. In the case of Charles Anjare Mwamusi V. R CRA No. 226 of 2002 the Court of Appeal stated:

> "An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to the charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable Kiarie V. Republic (1984) KLR 739 at page 745 paragraph 25."

110. I thus take cognizance of the principle that by setting up an alibi defence, the accused does not assume the burden of proving the alibi- **see Ssentale vs. Uganda** [1968] EA 36-. The foregoing was restated in the case of Wang'ombe vs. Republic [1976-80] 1 KLR 1683 where it was stated "the prosecution always bears the burden of disproving the alibi and proving the appellant's guilt."

111. However, this defence should also be raised at the earliest opportune time as was held in the case of **R Vs Sukha Singh S/O Wazir Singh & Others** (1939) 6EACA 145 that:

> " if a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards, there's naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment, it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped."

112. And in the case of **Victor Mwendwa Mulinge vs Republic**, the Court of Appeal rendered itself on the issue of alibi thus:-

> "It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see Karanjavs Republic, this court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilty is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi

at an early stage in the case so that it can be tested by those responsible for investigating and thereby prevent any suggestion that the defence was an afterthought"

113. The presumption of innocence remains, and the burden of proof is on the state. In the locus classicus and the most oft quoted English decision by Viscount Sankey L.C in the case of H.L. (E) Woolmington vs. DPP [1935] A.C 462, pp. 481. Further reliance was placed on the case of **<u>Sekitoleko v Uganda</u>** (1967) EA 531 at p 533, where the legendary Sir Udo Udoma C J stated as follows:

> As a general rule of law, the burden of proving the guilt of a prisoner beyond reasonable doubt never shifts, whether the defence set up is an alibi or something else. That burden always rests on the prosecution.

114. However, in this case, the defence was a sieve that cannot hold scrutiny. the three parties were away from their homes. they never gave evidence that appears to be an alibi. A successful alibi defence entirely rules out the accused as the perpetrator of the offence. There is no burden of proof on the accused to prove an alibi. If there is a reasonable possibility that the accused's alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt. In the case of Kiarie – v- Republic [1984] KLR, this Court stated: "An alibi raises a specific defence and an accused person who puts forward an

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alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable……"

46.In the South African case of S -v- Malefo en andere 1998 (1) SACR 127 (W) at 158 a - e the court set out five principles with respect to the assessment of alibi evidence:i.There is no burden of proof on the accused to prove his alibi.ii.If there is a reasonable possibility that the accused's alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt.iii.An alibi "moet aan die hand van die totaliteit van getuienis en die hof se indrukke van die getuies beoordeel word."iv.If there are identifying witnesses, the court should be satisfied not only that they are honest, but also that their identification of the accused is reliable ("betroubaar").v.The ultimate test is whether the prosecution has furnished proof beyond a reasonable doubt — and for this purpose a court may take into account the fact that the accused had raised a false alibi.

47.The burden of proving the falsity of an alibi was addressed in case of Victor Mwendwa Mulinge –v- R, [2014] eKLR as follows: -"It is trite law that the

burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution...."

48.In another persuasive South African case of R - v - Biya 1952 (4) SA 514 (A) at 521C - D Greenberg JA said:'If there is evidence of an accused person's presence at a place and at a time which makes it impossible for him to have committed the crime charged, then if on all the evidence there is a reasonable possibility that this alibi evidence is true it means that there is the same possibility that he has not committed the crime.

115. The difficulty with the defence offered by the first appellant, is that is is self-incriminating. it places him where PW1, 2,3,4 and 5 placed him. he agrees meeting the man and woman, PW1 and PW5. He even agrees on the order of arrest and recovery of ivory. He confirmed having a panga and resisting arrest except that he mellowed on seeing a gun. I therefore dismiss as the court below did the first appellant's defence. It does not displace, the cogent evidence by the witnesses in the matter.

116. The second appellant conveniently forgot two aspects, the call to PW1 and only dealt with her at Gitugi tea factory. He does not enter the factory despite alleging to have business there. He had pictures of 9 trophies taken by him long before recovery of the trophies. He was led to the gallows slowly by

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the indomitable PW1. She braved, the danger before her and posed as a buyer. Finding himself, at a crime scene where he invited a wildlife protector cannot be said to be business. He eagerly spent two days waiting for business, which he odes not say what it was. He left for Gitugi with the third appellant. The evidence is spurious and unbelievable in the face fo evidence of PW1,PW2,PW3 and PW6. The said evidence lacks merit and cannot be believed.

117. The third appellant's evidence was even a loose sieve. He borrowed a motor cycle, which he did not even know whether it was commercial or private from Irîa-inî. He could not account what he was doing in both Gitugi and kaharo tea buying centre when he was supposed to be at from Irîa-inî location. He was evasive on who he was contacting for work and what kind of work. The defence places him in the *locus in quo*.

118. I do not find any inconsistencies or contradictions that go to the root of the offence as alleged in the record of appeal. The Respondents tendered overwhelming evidence implicating the Appellants, and the trial court correctly returned a verdict of guilty. Courts have held that minor contradictions in the glare of overwhelming evidence to establish the guilt of the Accused person cannot go to the root of disproving guilt. In **Dickson Elia Nsamba Shapwata & Another V. The Republic**, Cr. App. No. 92 of 2007 the Court of Appeal of Tanzania

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addressed the issue of discrepancies in evidence and concluded as follows, a view we respectfully adopt:

> In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor or whether they go to the root of the matter.

119. The powers of this Court are circumscribed by Section 382 of the Criminal Procedure Code, which permits a first appellate court to confirm, reverse, or vary any finding, sentence, or order of the trial court. Within these limits, the court is duty-bound to subject the evidence to a fresh and exhaustive examination, reassess the credibility of witnesses, and weigh conflicting testimony to draw its own independent conclusions. Throughout this process, the legal burden of proof remains constant, resting squarely on the prosecution to establish the appellant's guilt beyond reasonable doubt. It is only by carefully scrutinizing the evidence in its entirety, while remaining faithful to the statutory framework, that the court can ensure the appellant receives a full and fair re-evaluation of the case. The section reads as follows:

> 382: subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on

> appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:
>
> Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

120. Courts in criminal cases should consider the standard of proof and the effect of a conviction on the accused person. In this case, the Appellant was sent in for 10 years. This must be a serious offense that requires the clearest view of the evidence to justify keeping the Appellant behind bars for life. Proof beyond reasonable doubt was the standard, also based on the nature of criminal offences, whose punishment went beyond the effect on the individual to the state. Conviction and sentence as a sexual offender were a badge that a convict could only deserve based on solid evidence.

121. I have perused the judgment. the court considered each of the appellant's defence and dismissed the same. The evidence tendered is not an alibi. it is hard to classify what the appellants' defence was. The 5 witnesses, identified the

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buyers, who were caught in the act. There was no lapse between being caught in the act and arrest. The first and second appellant were arrested in possession of 9 tusks. The third appellant was pursed in a short 200m and arrested. the appellants were recognized as the people that were dealing with PW1 and PW5. The recognition was not lost. In the case of **Reuben Taabu Anjononi, Benjamin Akisa Anjononi and Monya Anjononi v Republi**c [1980] KECA 23 (KLR), the court of appeal [Madan, Law & Potter JJ A] posited as follows:

> The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one, where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in *Siro Ole Giteya v The Republic (unreported).*

122. I find and hold that the appellants was properly recognized as they were arrested in the act. The defence given does not in any way exonerate the appellant. the consequences of the

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foregoing is that each of the three appeals on conviction are lack merit and are dismissed.

123. Sentencing is discretionary. The discretion to sentence permits balanced and fair sentencing, a hallmark of enlightened criminal justice, and proper consideration of the individual circumstances of each accused person is essential for substantive justice. In **State vs. Tom, State v. Bruce** (1990) SA 802 (A), Smalberger, JA, writing for the majority of Supreme Court of South Africa, made the following pertinent observations about sentencing in general and mandatory sentences in particular:

> The first principle is that the infliction of punishment is pre-eminently a matter for the discretion of the trial court ... That courts should, as far as possible, have an unfettered discretion in relation to sentence is a cherished principle which calls for constant recognition. Such discretion permits of balanced and fair sentencing, which is a hallmark of enlightened criminal justice. The second, and somewhat related principle, is that of the individualization of punishment, which requires proper consideration of the individual circumstances of each accused person. This principle too is firmly entrenched in our law... A mandatory sentence runs counter to these principles. (I use the term mandatory sentence in

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the sense of a sentence prescribed by the legislature which leaves the court with no discretion at all -either in respect of the kind of sentence to be imposed or, in the case of imprisonment, the period thereof.) It reduces the court's normal sentencing function to the level of a rubber stamp. It negates the ideal of individualization. The morally just and the morally reprehensible are treated alike. Extenuating and aggravating factors both count for nothing. No consideration, no matter how valid or compelling, can affect the question of sentence... Harsh and inequitable results inevitably flow from such a situation. Consequently, judicial policy is opposed to mandatory sentences...as they are detrimental to the proper administration of justice and the image and standing of the courts.

124. The sentencing guidelines provide as follows:

4.5.1 In determining the appropriate sentence, courts must assess a number of issues, starting with the degree of both culpability and harm.

4.5.2 The assessment of culpability will be based on evidence of the crime provided through testimony where a trial has been conducted, or, where a plea is entered, through the prosecution summary of facts. Aggravating and mitigating features surrounding the

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offence may be advanced by the prosecution and the accused person (or his/her representative).

4.5.3 Where an offence is committed by more than one offender a court shall ascertain the culpability of each of the offenders involved and render individual sentences commensurate to their involvement in the offence.

4.5.4 The assessment of harm may be based on testimony, or the summary of facts presented and also by a victim impact statement where that has been obtained.

4.5.5 Mitigating factors refers to any fact or circumstance that lessens the severity or culpability of a criminal act and can also include the personal circumstances of the offender.

4.5. 6 Convicted offenders should be expressly provided with the opportunity to present submissions in mitigation.

4.5.7 A list of aggravating and mitigating circumstances – which is not exhaustive – is contained within the GATS along with those specific to murder, manslaughter, and wildlife cases, in Part V.

4.5.8 Having heard all relevant submissions and considered any reports advanced by either

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prosecution or defence, or the probation or children's officer (where applicable), and any victim impact statement, the court should:

i. Decide as to whether a custodial or a non-custodial sentence should be imposed in line with these guidelines.

ii. In the case of sexual offences, before the terms of a custodial sentence are determined, the court must have recourse to relevant probation reports as required in sections 39 (2) and (4) of the Sexual Offences Act No.3 of 2006 that contain provisions about post-penal supervision of dangerous sexual offenders.

125. Five elephants lost their life to feed the appellant's greed. These are classified as endangered species. They are at a risk of extinction. the appellants raised two issues, that is, the sentences were harsh and should have been concurrent sentences instead consecutive sentences.

126. In dealing with the issue as to whether the sentences should run consecutively or concurrently, recourse must be to the law. These kinds of sentences have been addressed in part under Section 14 of the Criminal Procedure Code and for offences committed during the currency of an existing

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sentence or before sentencing for a previous conviction, Section 37 of the Penal Code. To begin with, it provides that it is lawful for a person who is convicted at one trial for two or more distinct offences, the court may sentence him, for those offences, commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently. The said section states as follows:

> (1) Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefor which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.
>
> (2) In the case of consecutive sentences, it shall not be necessary for the court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to impose on conviction of a single offence, to send the offender for trial before a higher court.

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> (4) For the purposes of appeal, the aggregate of consecutive sentences imposed under this section in case of convictions for several offences at one trial shall be deemed to be a single sentence.

127. On the other hand, Section 37 of the Penal Code provides that where a person after conviction for an offence is convicted of another offence, either before sentence is passed upon him under the first conviction or before the expiration of that sentence, any sentence, other than a sentence of death, which is passed upon him under the subsequent conviction shall be executed after the expiration of the former sentence, unless the court directs that it shall be executed concurrently with the former sentence or any part of that sentence. The said section provides as follows:

> 37. Sentences when cumulative Where a person after conviction for an offence is convicted of another offence, either before sentence is passed upon him under the first conviction or before the expiration of that sentence, any sentence, other than a sentence of death, which is passed upon him under the subsequent conviction shall be executed after the expiration of the former sentence, unless the court directs that it shall be executed concurrently with the former sentence or any part thereof: Provided that it shall not be lawful for a court to direct that a sentence of

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imprisonment in default of payment of a fine shall be executed concurrently with a former sentence under subparagraph (i) of paragraph (c) of subsection (1) of section 28 or of any part thereof.

128. It must however, be conceded that sentencing is a complex arena and the court below must as a corollary seek guidance from the sentencing guidelines paragraphs 2.3.21 to 2.3.30. Section 37(4) of the Penal Code provides for the consideration of the total length of the cumulative sentences. It must be remembered that the discretion to impose concurrent or consecutive sentences lies with the court. It carries with it 2 elements, that is, the concept of totality of sentence and double counting. That is to say that when sentencing for more than one offence, should pass a total sentence which reflects all the offending behaviour in a way that is just and proportionate. The courts should avoid double counting, where the additional offences are ancillary to the main offence and not independent offences.

129. The guidelines provide and rightly so that consecutive sentence will normally be appropriate where the offences arise out of unrelated facts or incidents. The sentence may also be appropriate where the offences are of the same or similar kind but where the court is of the view that a concurrent sentence will not sufficiently reflect the overall criminality.

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130. In looking at the sentences, the court must address not only the offending behaviour as a whole but also, the personal circumstances of the offender while bearing in mind the purposes of sentencing, that is, retribution, deterrence, rehabilitation, restorative justice, community protection, denunciation, reconciliation and reintegration.

131. The sentence for count I under section 92(2) is that the convict shall be liable upon conviction to a term of imprisonment of not less than seven years. Therefore, the sentence of 7 years for count 1 was proper. This is because the court's discretion in minimum sentences is non existent. in the case of Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR), where the Supreme Court, [MK Koome, CJ, MK Ibrahim, SC Wanjala, N Ndungu & I Lenaola, SCJJ] posited as follows:

> 11. Mandatory sentences and minimum sentences as punishment in law have been commonly prescribed by legislatures worldwide but recently, various apex courts of several countries such as Canada, the USA, Australia, and South Africa as well as the European Court of Human Rights have struck down both mandatory life imprisonment as well as minimum sentences in an effort to move towards the approach of proportionality in punishment based on the actual crime committed

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12. Before Kenyan courts could determine whether or not the prevailing trends and decisions were persuasive, there ought to be a proper case filed, presented and fully argued before the High Court and escalated through the appropriate channels on the constitutional validity or otherwise of minimum sentences or mandatory sentences other than for the offence of murder. That was the Supreme Court's approach and direction in Muruatetu , which had to remain binding to all courts below.

13. The Court of Appeal failed to identify with precision the provisions of the Sexual Offences Act it was declaring unconstitutional, left its declaration of unconstitutionality ambiguous, vague and bereft of specificity. That approach was problematic in the realm of criminal law because such a declaration would have grave effect on other convicted and sentenced persons who were charged with the same offence. Inconsistency in sentences for the same offences would also create mistrust and unfairness in the criminal justice system. Yet the fundamental issue of the constitutionality of the minimum sentence may not have been properly filed and fully argued before the superior courts below.

132. Further, the same position was reiterated by the supreme court in its decision in **Republic v Manyeso** [2025] KESC 16 (KLR), where is stated as follows:

Paragraph 11 to 14 of the Muruatetu directions are very clear that the decision in the Muruatetu case did not invalidate mandatory sentences or minimum sentences in the Penal Code, Sexual Offences Act or any other statute. Further, that the Muruatetu case cannot be said to be the authority for stating that all provisions of the law prescribing minimum sentences are inconsistent with the Constitution. Paragraphs 93 to 97 of the Muruatetu decision are also explicit that it is not for the court to define what constitutes a life sentence. While we appreciated that a life sentence could mean a certain minimum or maximum time to be set by a judicial officer, this court made the following recommendations to the Attorney General to develop legislation on what constitutes a life sentence:

94. We recognize that although the Judiciary released elaborate and comprehensive Sentencing Policy Guidelines in 2016, there are no specific provisions for the sentence of life imprisonment, because it is an indeterminate sentence. Nevertheless, we are in agreement with the High Court decision in Jackson Wangui, supra, which found that it is not for the court to define what constitutes a life sentence or what number

of years must first be served by a prisoner on life sentence before they are considered on parole. This is a function within the realm of the Legislature.

95. We also acknowledge that in Kenya and internationally, sentencing should not only be used for the purpose of retribution, it is also for the rehabilitation of the prisoner as well as for the protection of civilians who may be harmed by some prisoners. We find the comparative jurisprudence with regard to the indeterminate life sentence is compelling. We find that a life sentence should not necessarily mean the natural life of the prisoner; it could also mean a certain minimum or maximum time to be set by the relevant judicial officer along established parameters of criminal responsibility, retribution, rehabilitation and recidivism.

96. We therefore recommend that the Attorney General and Parliament commence an enquiry and develop legislation on the definition of 'what constitutes a life sentence'; this may include a minimum number of years to be served before a prisoner is considered for parole or remission, or provision for prisoners under specific circumstances to serve whole life sentences. This

will be in tandem with the objectives of sentencing.

133. The sentence of 7 years is therefore proper, being a minimum sentence, though it is lenient. article 42(a) provides as follows:

> Every person has the right to a clean and healthy environment, which includes the right-
>
> (a)to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69

134. On the other hand, article 69(1) of the constitution provides as follows:

1)The State shall-

a. ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits;
b. work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya;
c. protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities;
d. encourage public participation in the management, protection and conservation of the environment; (e)protect genetic resources and biological diversity;

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e. establish systems of environmental impact assessment, environmental audit and monitoring of the environment;
f. eliminate processes and activities that are likely to endanger the environment; and
g. utilise the environment and natural resources for the benefit of the people of Kenya.

135. The conservation of the environment and biodiversity, both flora and fauna is a duty placed on all of us. It is a duty to maintain the fauna for the sake of inter and intragenerational equity. The appellants are not young men. They have lived their lives and lived so for some time .by perpetuating in dealing with wildlife trophy ,where 5 elephants lost their lives, they are perpetuating ;loss of animals in a danger of extinction. the concervation of *loxodonta africana*, the African elephant is a duty bestowed on this generation both for intergenerational and inter-generational equity and sustainable development.

136. The killing of 5 elephants, which fed the appellants with the 9 tusks of *loxodonta africana*, was irreversible harm, that will not be ameliorated. this generation, where the court and the appellants are, are entitled to enjoyment of collective benefits arising from conservation of *loxodonta Africana*. it is irrelevant whether the killing was done by the appellant. the entire chain fits into the viscous cycle of destruction fed on blood, sweat and death of out heritage. The elephants should not just be

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available for the current generation but the next generation. Therefore, without deterrent sentences that ensure sustainable take off and eliminate all forms of poaching, the court will be failing its solemn duty to the future generations. The offences caused both maximum harm and maximum culpability. The offence was meticulously planned and executed. It was deal in trophies of animals that gave their lives for the appellants greed. Surely the appellants should be in a position to give up a substantive portion of their lives as a deterrence to other members of this generation.

137. The second appellant raised issue that count 1 and two are similar. A reading of the act, it creates two distinct offences for which punishment is separately provided.

138. The second count provides for sentence as for a person who commits an offence under section 92(4) 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. The sentence given for this count was fine in default a period not less than 5 years. Having meted out fine, the court cannot give a concurrent sentence. the same is provided under section 37 of the as follows;

> Where a person after conviction for an offence is convicted of another offence, either before sentence is passed upon him under the first conviction or before the expiration of that sentence, any sentence,

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other than a sentence of death, which is passed upon him under the subsequent conviction shall be executed after the expiration of the former sentence, unless the court directs that it shall be executed concurrently with the former sentence or any part thereof:

Provided that it shall not be lawful for a court to direct that a sentence of imprisonment in default of payment of a fine shall be executed concurrently with a former sentence under subparagraph (i) of paragraph (c) of subsection (1) of section 28 or of any part thereof

139. Had the court not given fine, then the issue could be considered. However, the court cannot replace the discretion of the lower court with its own. The court therefore exercised its discretion properly. Consequently, I find that the court exercised its discretion properly in meting out the sentences to run consecutively.

140. There is the issue raised by the first appellant that in respect of the second count, he was sentenced to 1o years instead of 5 years. First the first appellant, the appellant was sentenced to death in CR 166 of 2009. but released for the period served. in 11.09.2020. further, he was convicted in E050 of 2023. and sentenced to five months imprisonment. the reports were filed and shown to the appellants who had no objection. the matter was referred to court 1 for sentencing due to the content of

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the report. is was pursuant to section 221 of the criminal procedure code which provides as follows:

i. Where a person of not less than eighteen years of age is convicted by a subordinate court of the second class of an offence which is punishable by either that court or a subordinate court of the first class, and the court convicting him, after obtaining information as to his character and antecedents, is of the opinion that they are such that greater punishment should be inflicted than it has power to inflict, that court may, instead of dealing with him itself, commit him in custody to the Resident Magistrate's Court for sentence.

ii. ...

iii. Where the offender is committed under subsection (1) or subsection (2) for sentence, the court to which he is committed shall inquire into the circumstances of the case, and may deal with the offender in any manner in which he could be dealt with if he had been convicted by that court; and, if that court passes a sentence which the court convicting him had not the power to pass, the offender may appeal against the sentence to the High Court (if sentenced by a subordinate court of the first class), or to the Court of Appeal (if sentenced by the High Court), but otherwise he shall have the same right of appeal in all respects

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> as if he had been sentenced by the court which convicted him.

141. The first appellant admitted to committing to having prior record. Therefore, this entitles the court to treat him as a repeat offender. the court gave a minimum sentence and the sentence open to the court. the sentence meted out in the circumstances on the first offender who was violent and endangered lives of law enforcement was proper.

142. Lastly there is an issue of the period spent in custody. On this the appellants are not on the same pedestals. The Judiciary Sentencing Policy Guidelines, 2023, as follows:

> The proviso to Section 333(2) of the *Criminal Procedure Code* obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.

143. Section 333(2) of the Criminal Procedure Code requires, nay obligates, the court to take into account the period spent

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in custody pending trial during sentencing. However, it does not apply for those already serving other sentences. Their sentences can only begin after the sentence in situ has been served.

144. The first appellant is serving other sentences. The sentence shall therefore run Consecutive to those sentences. The second and third appellants are not serving any other sentence. The sentence shall run form the date of arrest, excluding any time they were on bond.

<u>Determination</u>

145. In the circumstances, I make the following orders: -

a) The appeal is dismissed. The sentence of the second and third appellants shall start from 17.03.2023, the date of arrest excluding any time they were on bond.

b) The sentence for the first appellant shall be served consecutive with the sentences already be served.

c) Right of appeal 14 days.

d) The file is closed.

DELIVERED, DATED and **SIGNED** at **NYERI** on this **4th** day of **May, 2026**. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

<u>JUDGE</u>

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In the presence of: -

Pro Se for the Appellant

Mr. Kihara for the Respondent

PC Muthengi at Mwea Prison

Court Assistant – Michael/Martin

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