Kinyatta & another v Republic (Criminal Appeal 36 & 38 of 2022 (Consolidated)) [2024] KECA 100 (KLR) (9 February 2024) (Judgment)

Neutral citation: [2024] KECA 100 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 36 & 38 OF 2022 (CONSOLIDATED)

AK MURGOR, M NGUGI & GV ODUNGA, JJA

FEBRUARY 9, 2024

BETWEEN

JAMES MAKERE DULLU ..... 1ST APPELLANT

JOSEPHAT MBOGHO KINYATTA ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgement of the High Court of Kenya at Voi delivered on 5th May, 2020 by F. Amin, J in High Court Criminal Appeal Nos 90 & 93 of 2017 Original Voi SPM's Court Criminal Case No. 512 of 2016)

JUDGMENT

1. This second appeal was lodged by the appellants against the judgements delivered on 5th May, 2020 by Hon Justice F. Amin in Voi High Court Criminal Appeal Nos 90 & 93 of 2017. By the said decisions, the learned Judge, in separate judgements, dismissed both appeals in their entirety.

2. The appellants were convicted on 24th October 2017 of the offence of dealing in a wildlife trophy without a permit contrary to section 84(1) of the *Wildlife Conservation and Management Act*, 2013 (the Act). While the 1st appellant was sentenced to imprisonment for life, the 2nd appellant was sentenced to imprisonment for a term of 20 years. The 1st appellant appealed to the High Court vide Criminal Appeal No. 93 of 2017 while the 2nd appellant's appeal was Criminal Appeal No. 90 of 2017.

3. The prosecution's case, in summary was that PW1, Cpl Jackline Maiyo, an officer attached to Tsavo East National Park, received intelligent information that there were some people in Voi Town who were sourcing for a buyer of elephant tusks; that she shared that information with her superiors and after a meeting, it was agreed that PW1 would pose as a potential buyer; that an arrangement was reached between PW1 and those selling the tusks, one of whom was the 1st appellant, for a meeting on 21st

June, 2016; that on the material day, PW1, in company of two of her colleagues, boarded a private car and agreed with the 1st appellant that they would meet at Mbuyuni in Kaloleni; that the said meeting took place at 6pm when the 1st appellant arrived with a friend called Peter Ngonyo, and together they drove towards Voi Town. After negotiations they settled at Kshs 7,000/- per kilogram of elephant tusk; that the 1st appellant and the said Peter Ngonyo disclosed that they had over 35 Kilograms of ivory. Eventually they headed to Mbulia where the 1st appellant and the said Peter Ngonyo alighted to go and bring the ivory; that in the meantime PW1 contacted their backup team and signalled them to take over.

4. PW1 further testified that the 1st appellant and Peter Ngonyo returned accompanied by two other men, each carrying an elephant tusk, save for the 1st appellant who carried two tusks; that as PW1 and her colleagues were pretending to be weighing the trophies, a vehicle passed and the men ran into the thicket to hide; that the backup team thought the men were running away and swung into action and arrested the 1st and 2nd appellant while Peter Ngonyo and the other man slipped away; that the appellants were thus apprehended and taken to Voi Police Station after which they were charged with the aforesaid offence.

5. The evidence of PW1 was corroborated by her colleagues who testified as PW2 and PW3. PW4, a veterinary officer with Kenya Wildlife Service, upon examination of the pieces of suspected elephant tusks concluded that they were genuine or actual elephant tusks. The matter was investigated by PW5 after which the charges were preferred against the appellants.

6. Upon being placed on his defence, the 1st appellant in his sworn testimony stated that on 21st June, 2016, his friend, Swaleh Simba, told him that he wanted to send him to Voi to meet a man called Peter Ngonyo who had elephant tusks; that Simba informed the 1st appellant that he was working closely with Kenya Wildlife Services (KWS) with a view to arresting people illegally dealing with elephant tusks; that the 1st appellant's role was to ascertain if Peter Ngonyo indeed had elephant tusks; that Simba was unable to travel since he was in Lamu observing the Holy Month of Ramadhan; that when the 1st appellant got in touch with the said Peter Ngonyo, the latter insisted that he would only deal with a person who was interested in buying the tusks; that Simba told the 1st appellant to pretend that he was a potential buyer; that the 1st appellant travelled to Voi and upon getting in touch with PW1, it was agreed that PW1 would pose as the potential buyer with a view to apprehending Peter Ngonyo; that the 1st appellant organised for PW1 to meet with Peter Ngonyo and thinking that his role was over he proposed to travel back to Mombasa; that Peter Ngonyo insisted that he should accompany them and assist in carrying the tusks and PW1 requested the 1st appellant to do; that the 1st appellant followed Peter Ngonyo to a certain homestead where he found another man who informed them that the tusks were kept at another place; that as they walked back to where the team was, they saw lights at a distance and PW1 directed them to hide by the roadside; that while the 1st appellant was squatting behind a thicket he was arrested while Peter Ngonyo and the other man ran away; that shortly thereafter another man was brought into the vehicle and they were driven to Voi; that at the KWS offices elephant tusks were brought from a room and he was informed that he would be charged in respect thereof unless he disclosed the names of the illegal elephant poachers in Mombasa; and that he was arraigned in court the following morning.

7. According to the 2nd appellant, on the material day, at midnight, he left a bar called Tsavo Springs in Mularambo for home; that after walking for 300 metres, he heard people talking and caught up with them; that a vehicle came from ahead and they were stopped; that two men emerged and held him asking him where he was coming from claiming that he was one of the people who had escaped; that he was taken to the parked vehicle where he was ordered to lie down; that the men introduced themselves

as KWS officers after which he was bundled into the vehicle and taken to Voi KWS Station offices where he was placed in a separate room from the 1st appellant's; that upon interrogation he denied knowledge of the persons who ran away; that after being assaulted, he was photographed holding elephant tusks which were in the room, and he was then taken to Voi Police Station and later charged in court.

8. In his judgement, the learned trial magistrate found that from the evidence of PW4, all the five items were actual or genuine elephant tusks which are categorised as wildlife trophies under the Act; that the 1st appellant and his colleagues returned from where they had gone carrying the elephant tusks; that the 1st appellant's role was not that of an informer, but a broker; that the 2nd appellant was in the group of four men who had turned up with the elephant tusks; that the 2nd appellant was arrested from his hideout in a thicket; and that the appellants were caught red-handedly trying to sell the five ivory tusks which are wildlife trophies protected by law.

9. Though the trial court found the appellants guilty of the offence of being in possession of wildlife trophy without a permit contrary to Section 95 of the *Wildlife Conservation and Management Act*, 2013 as well as the offence of dealing with wildlife trophy without a licence contrary to Section 84(1) as read with Section 92 of the same *Act*, in light of the decision in *Tiapukel Kuyoni and Another v R* [2017] eKLR, the appellants were discharged in respect of Count 1 but sentenced in respect of Count II as stated at the beginning of his judgement taking into account the fact that the 1st appellant was a repeat offender.

10. Aggrieved by the said decision the appellants filed their respective appeals to the High Court as stated hereinabove. After considering the appeals, the learned Judge of the High Court found that a charge sheet containing a charge under Section 95 together with a charge under Section 84 as read with Section 92 is not defective; that from the record, at no time did the Prosecutor mention a conviction hence the claim by the 1st appellant that his previous conviction was improperly introduced in the proceedings was incorrect; that it was the 1st appellant who himself informed the Court that he was sentenced to 5 years imprisonment for the offence of dealing; that sentencing is in the discretion of the trial court and in this case, no misapplication of principle can be discerned; and that the appeal was without merit.

11. We heard this appeal on this Court's virtual platform on 26th September, 2023 during which the 1st appellant appeared from Manyani Prison while the 2nd appellant appeared from Shimo La Tewa Prison. The respondent was represented by learned counsel, Mr Jami Yamina who held brief for Ms Ngina. Both parties filed their written submissions which they relied on entirely.

12. According to the appellants, the charge sheet was defective for failure to disclose the value of the five pieces of elephant tusks; that the prosecution's case was weak as it failed to prepare and present concrete evidence as required by the court; that the sentence meted out was harsh in the circumstances; that the evidence fell short of the threshold of dealing pursuant to Section 3 of the *Act*; that the 1st appellant was discriminated against by being sentenced to life while other offenders facing similar offences were serving 5 years imprisonment.

13. On the part of the respondent, it was submitted that the prosecution had the onus to demonstrate possession, as defined by Section 4 of the *Penal Code*; that items in question were indeed trophies; and that the appellants were dealing in game or wildlife trophies without a dealer's licence. It was further submitted that the appellants had not only possessed the tusks but were offering them for sale hence dealing with them; that the charge was neither defective nor were the appellants charged twice as the offence was disclosed; that there were no contradictions in the prosecution case; and that there is no basis for interfering with both conviction and sentence.

14. We have considered the above submissions.

15. In a second appeal such as this, our mandate under Section 361 of the *Criminal Procedure Code* is limited to a consideration of matters of law. In *Karani vs. R* [2010] 1 KLR 73 the Court express that:

> " By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."

16. In their submissions, the respondents have invited us to give the way forward regarding the application of Section 92 and 95 of the *Wildlife Conservation and Management Act*, 2013 in light of the decision in *Tiapukel Kuyoni and Another v R* [2017] eKLR.

17. With due respect to learned counsel for the respondent, in the absence of an appeal by the respondent regarding the manner in which the two courts below dealt with the said provisions, we cannot take it upon ourselves to deal with the same at this stage. This Court does not normally deal with issues raised for the first time before it as a second appellate court and which were not raised before the two courts below. In *Alfayo Gombe Okello v. Republic* [2010] eKLR it was held that:

> " ....the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have."

18. The predecessor to this Court in *Alwi Abdulrehman Saggaf vs. Abed Ali Algeredi* [1961] EA 767 held that the course of taking a point of law, which has not been argued in the court below, on appeal ought not to be allowed unless the court is satisfied that the evidence upon which they are asked to decide established beyond doubt that the facts, if fully investigated, would have supported the new plea. The justification for that holding was that:

> "The appellate jurisdiction is conducted in relation to certain well-known principles and by familiar methods. The issues of fact and law are orally presented by counsel. In the course of the argument it is the invariable practice of the appellate tribunals to require that the judgements of the judges in the courts below shall be read. The efficiency and authority of a Court of Appeal, and especially a final Court of Appeal, are increased and strengthened by the opinions of the learned Judges who have considered these matters below. To acquiesce in such attempt as the appellants have made in this case is in effect to undertake decisions which may be of the highest importance without having received any assistance at all from the judges in the courts below."

19. In this appeal the issues that fall for determination before us are:

    1. Whether the charge sheet was defective for failure to disclose the value of the tusks.
    2. Whether the prosecution's case was weak as it failed to prepare and present the concrete evidence required by the court.
    3. Whether the evidence fell short of the threshold of dealing pursuant to Section 3 of the *Act*.
    4. Whether the sentence meted out was too harsh in the circumstances.

20. On the first issue, we note that the appellants were charged with two counts. In count I, they were charged with being in possession of wildlife trophy without a permit contrary to Section 95 of the *Wildlife Conservation and Management Act*, 2013. The particulars of the offence were that:

On the 22nd day of June, 2016 at around 0030 hours at Mbulia area within Taita Taveta County, jointly with others not before court, you were found in possession of wildlife trophies namely five (5) elephant tusks weighing 34 kgs without a permit.

21. In count II, they were charged with dealing in wildlife trophy without a licence contrary to Section 84(1) as read with Section 92 of the *Wildlife Conservation and Management Act*, 2013. Its particulars were that:

> On the 22nd day of June, 2016 at around 0030 hours at Mbulia area within Taita Taveta County, jointly with others not before court, you were found dealing in wildlife trophies namely five (5) elephant tusks weighing 34 kgs without a licence.

22. It is clear that the charge sheet did not disclose the value of the tusks. However, the sections quoted in the charge sheet do not require the value of the trophies to be disclosed. Section 137(a)(iv) of the *Criminal Procedure Code* makes it abundantly clear that the rules of framing the charge are not cast in stone. The Code contemplates that there may be variations, so long as there is substantial compliance with the rules. In the same vein, section 382 of the Code focuses, not on formal compliance with the rules of framing the charge, but on whether any error, omission or irregularity that has occurred in the charge has occasioned a failure of justice. The question is whether the charge has occasioned a miscarriage of justice.

23. In *George Njuguna Wamae vs. Republic*, Crim. App No 417 of 2009 this Court stated as follows regarding the effect of section 382 on defects alleged in the charge:

> " By dint of this provision, to reverse the findings of the courts below on account of an error, omission, or irregularity in the charge, we must be satisfied that such error, omission or irregularity has occasioned a failure of justice, and in making that determination, we must consider whether the issue being raised now could have been raised at an earlier stage in the proceedings. We are of the considered opinion that there was no failure of justice and that the appellant did not suffer any prejudice arising from the manner in which the statement of offence was framed in the charge sheet. The offence with which he was charged was clearly disclosed as robbery with violence contrary to section 296(2) of the Penal Code...More importantly, this is the kind of objection which, under the provision to section 382, should have been taken at the earliest opportunity before the trial court if the appellant considered the charge to be defective or otherwise lacking in clarity."

24. We were not addressed by the appellants on the prejudice or the miscarriage of justice that was occasioned by the failure to disclose the value of the trophies. We are, however, of the view that it is important to disclose the same for the purposes of sentencing where a conviction arises.

25. On the issue whether the prosecution's evidence was sufficient to justify a conviction, in order to find in favour of the appellants, we would have to scrutinise the evidence presented before the trial court as well as the concurrent findings of the High Court thereon and arrive at a different view. In *Koingo v Republic* [1982) KLR 213 it was pronounced that:-

> " A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless it is based on no

evidence. The test to be applied on a second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karasi S/O Karanja V. R. [1956] 17 E.A.C.A 146)"

26. In this case the issues mentioned by the appellants that the trophies were not weighed at the point of arrest and that no inventory was taken were considered by the first appellate court and were found unmerited. We have ourselves considered the evidence on record and we are not satisfied that the findings of the two courts below regarding the sufficiency of the evidence was perverse. According, that ground fails.

27. On whether the evidence fell short of the threshold of dealing pursuant to Section 3 of the *Act*, the said Section provides that:

> " deal" means —
>
> a. to sell, purchase, distribute, barter, give, receive, administer, supply, or otherwise in any manner deal with a trophy or live species;
>
> b. to cut, carve, polish, preserve, clean, mount or otherwise prepare a trophy or live species;
>
> c. to transport or convey a trophy or live species;
>
> d. to be in possession of any trophy or live species with intent to supply to another; or
>
> e. to do or offer to do any act preparatory to, in furtherance of, or for the purpose of, an act specified above.

28. In this case, the evidence was that the appellants were either selling the said trophies or were facilitating their sale. At the point of their arrest, they were in the preparatory stage geared towards the sale of the said trophies. Their actions fell squarely within (d) above. Accordingly, we find no reason to differ from the concurrent findings of the two court below that the appellants were dealing in the said trophies.

29. On the issue whether the sentence meted out was too harsh or discriminatory in the circumstances, while we have no reason to depart from the sentence meted on the 2nd appellant we find no justification for meting life sentence against the 1st appellant. The fact that he was a repeat offender did not justify such a sentence particularly after the finding that he was a broker.

30. In the premises we dismiss the appeal by the appellants on conviction as well as the 2nd appellant's sentence but allow the 1st appellant's appeal on sentence. We set aside the life sentence imposed upon him and substitute therefor with a fine of Kshs. 20,000,000 and in default 20 years imprisonment.

31. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 9TH DAY OF FEBRUARY, 2024

A. K. MURGOR

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR