Kuyoni v Republic (Criminal Appeal 44 of 2017)
[2024] KECA 1268 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KECA 1268 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 44 OF 2017

F TUIYOTT, FA OCHIENG & WK KORIR, JJA

SEPTEMBER 20, 2024

BETWEEN

WILSON KUYONI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Narok (J. M. Bwononga, J.) delivered on 17th May 2017 in H. C. CR. Appeal No. 11 of 2017)

JUDGMENT

1. The two courts below believed the evidence of two game rangers that Wilson Kuyoni (the appellant) was on 30th March 2015 at Mararianda within Narok County found in possession of a piece of elephant tusk weighing 3 kilograms in the process of selling it. In the result, the appellant was convicted of two counts, one being in possession of wildlife trophy contrary to section 95 of the *Wildlife Conservation and Management Act*, 2013. The other for dealing in the said trophy contrary to section 95 of the same statute.

2. The trial court imposed a sentence of Kshs.20 million and in default of life imprisonment for each count, both to run concurrently. While upholding the conviction, the first appellate court (Bwononga, J) suspended the sentence in regard to count 2, reasoning that it;

   "….will amount to double punishment as the offence of selling amounts to 'splitting' of charges on the part of the prosecution."

3. While this second appeal is against sentence only, the above reasoning by the learned Judge reveals an uneasiness as to whether it was lawful to charge the appellant with the two counts: A matter that we think calls for our intervention. On sentence, while section 361(1) of the *Criminal Procedure Code* bars the hearing of a second appeal on the severity of sentence, which is considered a matter of fact, what is

in issue here is the legality of the sentence. A matter which would properly be within our jurisdiction as a second appellate court.

4. As the charges on which the appellant was arraigned in court, charged and convicted are seminal to the controversy before us, it is necessary to set out the charge and particulars of offence verbatim;

> " Charge I:
>
> > Being in possession of Wildlife trophy contrary to section 95 of the *Wildlife Conservation and Management Act* 2013 Particulars: Wilson Kuyoni
> >
> > Kiplagat Rono:
> >
> > On 30th day of March 2015 at Mararianda within Narok County, they were found in possession of Wildlife trophy namely 1 piece of Elephant trunk weighing 3 Kgs with street value of Kshs. 300,000/= without permit.
>
> Count II:
>
> > Dealing in wildlife trophy contrary to section 95 of the *Wildlife Conservation and Management Act* 2013. Particulars:
> >
> > Wilson Kuyoni Kiplagat Rono:
> >
> > On 30th day March 2015 at Mararianda within Narok County they were jointly found selling 1 piece of Elephant tusk at Street value of Kshs.300,000/= without a permit."

5. At the time of the charge and conviction, section 95 of The *Wildlife Conservation and Management Act*, 2013 (now repealed) read;

> " Any person who keeps or is found in Possession of a wildlife trophy or deals in a wildlife trophy, or manufactures any item from a trophy without a permit issued under this Act or exempted in accordance with any other provision of this Act, commits an offence and shall be liable upon conviction to a fine of not less than one million shillings or imprisonment for a term of not less than five years or to both such imprisonment and fine."

6. It is clear to us that, from the language of the above provision, the offences created by the above section are alternative offences. So that a person cannot be charged with keeping a wildlife trophy and at the same time being in possession of it or, as here, being in possession and dealing. This would be open up the accused person to double jeopardy. This is what the 1st appellate Court was alluding to when the learned Judge remarked that punishing the appellant for the two counts "will amount to double punishment as the offence of selling amounts to 'splitting' of charges on the part of the prosecution." It is incumbent on us to do what the first appeal Court should have done. To hold, as we now do, that to charge the appellant with both counts was unlawful and prejudiced him. In that event we quash the conviction in respect to count two and set aside the sentence imposed in respect to that count.

7. We now turn to examine the legality of the sentence imposed in respect to the remaining count. As is evident from the Act, the penalty for the offence in section 95, under which the appellant was convicted for both counts, is a fine of not less than one million shillings or imprisonment for a term of not less than five years or to both such imprisonment and fine.

8. In imposing the sentence, the trial court remarked,

> "On each count minimum sentence of Ksh. 20 million passed on the convict in default on each life imprisonment concurrent." (sic)

9. Undoubtedly the learned trial magistrate was labouring under the impression that the appellant had been convicted for an offence whose minimum sentence was twenty million shillings or imprisonment for life or both such fine and sentence. This was a manifest error because, as we have set out earlier, the minimum punishment under section 95 is much less severe. It seems to us that the trial court imposed the sentence in section 92 which read;

> "Any person who commits an offence in respect of an endangered or threatened species or in respect of any trophy of that endangered or threatened species shall be liable upon conviction to a fine of not less than twenty million shillings or imprisonment for life or to both such fine and imprisonment."

10. The sentence under section 92 could never be invoked for the reason that the appellant was not charged for an offence under that section. Further, any argument that the appellant should have in any event been charged under section 92 because an elephant is either an endangered or threatened species is just as futile. Under the interpretation provisions of section 3 threatened species means:

> ".... any wildlife species specified in the Fourth Schedule to this Act or declared as such under any other written law or specified in Appendices of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)"

11. While endangered species:

> ".....means any wildlife specified in the Fourth Schedule of this Act or declared as such by any other written law or any wildlife specified in Appendices of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)"

12. We have looked at the Fourth Schedule of the statute as it read at the material time and note that the relevant Schedule would in fact be the Sixth Schedule which provides for nationally listed critically endangered, vulnerable, nearly threatened and protected species pursuant to section 47 of the Act which is a substantive provision on those species. The elephant listed in the schedule as endangered is the specie Loxodonta Africana commonly known as the African Elephant. The appellant was charged and convicted of being in possession and selling 1 piece of an elephant tusk. Neither in the charge nor in the evidence was it specified that the tusk was that of an African Elephant or of a specie of an Elephant that has been declared to be endangered or threatened under any other written law or in the appendices of CITES. And this is not to be pedantic because there is a world of difference between the punishment under section 92 and that under section 95.

13. In the end, Ms Kisoo learned Senior Prosecution Counsel was correct in conceding to the appeal in her written submissions of 18th December 2023 and the sentence calls for our interference.

14. The Supreme Court has recently in Petition No. E018 of 2023, *Republic -vs- Joshua Gichuki Mwangi*, reminded us that the matter in contention in the *Muruatetu case (Francis Karioko Muruatetu –vs- Republic* [2017] eKLR (Muruatetu 1)) was the mandatory nature of the sentence of death imposed for the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* and that short of declaration of unconstitutionality of minimum sentences prescribed by statute, such sentences

remain lawful and valid. The effect of the decision in Joshua Gichuki Mwangi is that we cannot impose a different sentence than the minimum prescribed under section 95.

15. Ultimately, we allow the appeal. We quash the conviction in respect to count two and set aside the sentence imposed in respect to that count. Regarding count one, we set aside the sentence imposed by the trial Court and upheld by the High Court and in its place impose a fine of Kenya Shillings one million or default imprisonment of five years. The outcome is that the appellant will have long served his time and so we order, further, that he be set at liberty forthwith unless held for some other lawful reason.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER 2024.

F. TUIYOTT

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JUDGE OF APPEAL

F. OCHIENG

....

JUDGE OF APPEAL

W. KORIR

....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR