Muthii v Republic (Criminal Appeal E093 of 2023)
[2025] KEHC 5265 (KLR) (30 April 2025) (Judgment)

Neutral citation: [2025] KEHC 5265 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E093 OF 2023

AK NDUNG'U, J

APRIL 30, 2025

BETWEEN

JOHN MUSYOKA MUTHII ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant, John Musyoka Muthii was convicted after trial of being in possession of a piece of rhino horn which is a wildlife trophy without a permit contrary to section 92(4) of the *Wildlife Conservation and Management Act* 2013 (count I) and entering a protected area without a permit contrary to section 102(a) of the same Act. On 08/11/2023 he was sentenced to pay a fine of Kshs.3,000,000/- and in default to serve five (5) years imprisonment for count I and a fine of Kshs.200,000/- and in default to serve two (2) years imprisonment for count II.

2. The particulars for count I were that on 27/11/2022 at Castle area, Laikipia Central Sub-County in Laikipia County jointly with another were found in possession of rhino horn which is a wildlife trophy and at the time of doing so, did not have a permit or other lawful exemption granted under this Act. The particulars for count II were that on 27/11/2022 at Castle area, Laikipia Central Sub-county in Laikipia County jointly with another not before court being a national reserve entered into therein without a permit.

3. He has appealed against conviction and sentence vide a petition of appeal filed on 10/11/2023 challenging the conviction and the sentence on the following grounds;

    i. The learned magistrate erred by failing to note that the prosecution did not prove their case beyond reasonable doubt.

    ii. The learned magistrate erred convicting him on a charge sheet that was defective contrary to section 214 and 134 of the Criminal procedure Code.

iii. The learned magistrate erred convicting him without appreciating that the alleged scene where the trophy was allegedly found was not established to be his house as the rightful owner was inside.

iv. That he was not accorded a fair trial and Article 49 of the *Constitution* pertaining to arraignment within 24 hours was not complied with.

v. The learned magistrate erred by failing to note that no concrete investigations were carried out to warrant conviction.

vi. The learned magistrate erred convicting him on a case full of inconsistencies and uncorroborated evidence.

vii. The learned magistrate erred by failing to note that the sentence was harsh and did not consider his mitigation.

viii. The learned magistrate erred by failing to weigh his defence vis-à-vis the weak prosecution's case.

4. The appeal was canvassed by way of written submissions. The Appellant argued that there was no evidence that he intruded into Solio Ranch as no photographic evidence was availed, the pair of pliers were not proven to belong to him as no dusting was done, the house C7 in Castle area was not proved to be his house as the evidence revealed that a man by the name Joel Mutemi Kirapia was found therein and the evidence shows that he was not found in the said house. On the matter of the ownership of the said house, he submitted that the prosecution relied on hearsay evidence of an agent who was supposed to record a statement but did not. That there was no inventory of the recovered items that was produced though he had raised the same issue with PW9.

5. That PW8 testified that the canine team arrived with one dog whereas Pw5 and 6 mentioned two dogs. PW1 and 2 testified they did not witness identification by the sniffer dogs whereas PW1 testified that the canine department followed the footprints but could not identify the person. PW3 said that there was a photograph of the canine team identifying him whereas no such photographs were produced in court and PW5 said he did not take photographs and did not say whether any photographs were taken as alleged by PW3. That it was said members of the public participated in the parade but did not say whether the said members recorded statements. PW6 testified that he did not find him with anything and also said that the Appellant was inside the house which was in variance with other prosecution's witnesses. That he had stated that Musyoka was in the plot and they left the KWs officers to deal with the matter. PW4 stated that the parade comprised of six people and the area chief was also present and the question is why the chief did not record a statement if members of public could not. Further, no evidence that ID parade was carried out as he was not supplied with form 156 and he did not sign any document to show that ID parade was conducted therefore, the prosecution failed to prove that ID parade was carried out to put him at the scene of crime or prove his possession of the rhino trophy.

6. That there was no evidence that he was aware that the rhino horn was in house C7 and that he had no knowledge of the existence of the rhino horn in the said house. No dusting was done on the rhino horn was done and it was important for the prosecution to have proved that he had knowledge of possession of the said rhino horn. He submitted that he was framed as there was no photographic evidence to show existence of the horn in house No. C7 and KWS officers might have planted it there. Further, the investigations were sham as he was released on free bond to be summoned later with his co-accused to the police station but his co-accused failed to turn up which indicates that he was a guilt possessor.

7. That the prosecution witnesses testified to be in possession of photographic evidence depicting the point of intrusion at Solio Ranch and of identification parade and none of such photographs were supplied to him as they formed part of the prosecution's case. Further, he was not supplied with PW7's report hence infringing his rights under Article 50(2)(b), (c) and (j) of the *Constitution* and such non-disclosure should vitiate the entire proceedings. That his right under article 49 to be arraigned in court within 24 hours was violated for they were held in cells from Friday to Tuesday when he was released. As to his defence, he submitted that his defence was cogent and was not a mere denial or an afterthought as the prosecution's case was full of conjectures and hearsay evidence and the prosecution failed to discharge their burden.

8. As to sentence, he submitted that the trial court applied the wrong principle by meting out mandatory minimum sentences on both counts which practice has been frown upon by the superior courts. He urged the court to relook into the sentence and the period spent in remand during trial be deducted from the sentence

9. The Respondent's counsel on the other hand argued that the Appellant and the other person found in the house were arrested on 27/11/2022 and were released on the next day to pave way for investigations. He was thereafter arrested on 09/12/2022 and was presented to court on the same day which he admitted in his defence. Further, alleged detention beyond the prescribed timelines does not entitle him to an acquittal and there are parameters set to seek redress by way of a constitutional petition. As to whether the charge sheet was defective, she submitted that this issue is coming up for the first time on appeal and was never raised before the trial court and he seems to have abandoned this ground since he did not submit on the same.

10. As to whether the case was proved to the required standard, counsel submitted that the Appellant was charged with possession of a rhino horn which is an endangered species. As to possession, she submitted that pursuant to Section 4 of the *Penal Code*, possession need not be actual but may also be constructive and one can possess something that is in a house that is either theirs or not and will also suffice where something is found in the midst of more than one person with the knowledge of the others. That a man whom to his knowledge has control or interest over a rhino horn is no less culpable than a man that actually has the physical custody of the said item. It therefore does not assist the Appellant to state that the house the horn was found was not his or there was someone inside the house. That his identification was not only by the canine team but also by PW4 who had previous interaction with the Appellant on 14/10/2022 when sniffer dogs had led them to house C7 where they found him. This was corroborated by PW9. Further, he was identified twice by the sniffer dogs as PW5 and 6 testified. The dogs were well trained as evidenced by certificates produced. The dog handlers were also well trained. PW9 corroborated the evidence of PW3 and 4 that the man found in house C7 introduced himself as Appellant's friend and therefore, he cannot disclaim his connection with house C7.

11. In regards to count two, it is submitted that the circumstantial evidence unerringly points towards him as the two dogs did not pick out anyone else other than him. The two dogs were following a trail and scent from the protected area which led them to him even when placed amidst a group of people. Reliance was placed on the case of Julius Mugambi Njeri & 2 others v Republic (2017) eKLR and stated that the evidence of PW5 and 6 and the certificates issued for the two dogs were sufficient to lay a basis on the dog's capacity, training, skill and reliability and how they tracked him.

12. She submitted that there were no material contradictions in the matter as there were no contradictions on whether exhibit 1 was a rhino horn, whether a rhino is an endangered species, whether the dogs had identified anyone else other than him or whether Solio Ranch is a protected area. On alleged

violation of Article 50 of the *Constitution*, counsel submitted that no photographs or ID Parade form was relied on during trial. Further, he did not complain before the trial court that he was supplied with an incomplete report from National Museum of Kenya and it is therefore difficult to ascertain this. That his defence did not cast doubt on the prosecution's case as he did not lead any evidence as to his place of residence and when he was probed on the same, he said he lived in an unnamed plot. Therefore, the prosecution's evidence that house no. C7 belonged to him remained unchallenged. On the allegation that he was framed up, he did not mention anyone who might have fixed him and did not alleged any issue of grudge with any of the prosecution's witnesses. As regards entry to Solio Ranch, it is submitted that it would have been easier proving alibi that he was not there on the material day and his defence when viewed vis-à-vis the identification by sniffer dogs was weak.

13. As to sentences, counsel submits that the sentences were lenient and lawful considering that the court had no jurisdiction to impose any lesser sentence than what was prescribed in the Act.

14. This being the first appellate court, my duty is well spelt out namely; to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See Okeno v Republic [1972] EA 32.

15. To achieve this legal requirement, a recap of the evidence at trial is necessary.

16. The evidence before the trial court was as follows; PW1, a KWS officer deployed at Solio Ranch testified that they were on patrol when they found the electric fence had been cut and tampered with and pliers were left there. They informed their bosses who requested for sniffer dogs from Ol Pajeta conservancy. On arrival of sniffer dogs, they saw some footprints which they followed as they escorted the canine department up to an exit point at Mawe ya Farrow. The sniffer dog led them outside the Ranch all the way to Kasu in Naromoru to a house no. C7 and the matter was handed over to DCI for investigations.

17. He testified on cross examination that there were security officers at Mawe ya Farrow and it is possible there were on patrol. The sniffer dogs led them to a house where the person had gone into. That the canine department followed the footprints but could not identify the person. That he was not present when the Appellant was arrested.

18. PW2 was a KWS officer at Solio Ranch. His testimony was similar to that of PW1. He confirmed that the sniffer dogs led them to Kaso area in Naromoru in Eden Estate plot and into house no. C7. He testified on cross examination that there are security officers at Mawe ya Farrow exit but the security team keeps on patrolling and does not stay at one point. None of the security officer saw the person who cut the fence and he did not arrest him when they got to his house.

19. PW3 a KWS officer attached to Rapid response team testified that he received a call from his boss about the intrusion at Solio Ranch. He headed to the scene and confirmed that indeed there was an intrusion so they called for the canine team to trace the footprints. The canine team led them to Naromoru at Kaso area and were led to Eden Estate house number C7. The investigation team and DCI officers joined them and they started questioning the residence who said that the Appellant was the one living in the said house but he was away. He came back at around 5:00pm and the canine team was summoned who identified the Appellant. They instructed him to open his house but he refused and they had to break into the house where they found Joel Mutemi Kirapia sleeping who said that the Appellant was his best friend. Upon searching the house, they found a suspected piece of rhino horn, an axe, 2 pliers, and one screw driver. They arrested them and handed them over to DCI officers.

20. On cross examination, he testified that it was not his work to do dusting on the horn and an axe can be used to remove rhino horns. That a plier was used to cut the fence and that he had kept stocks of pliers

in his house. That an inventory of the items recorded was made and that they suspected the screw driver was for cutting the electric fence. That there was a photograph of the canine team identifying him.

21. PW4, an investigation assistant testified that they were informed of suspected poachers and they organised for foot patrol with the canine team and air patrol. The canine team followed the footprints and led them to one of the houses in Eden estate in Naromoru. He testified that the canine team had led them to the same house which they knew belonged to the Appellant a month ago after an intrusion at Solio Ranch. The previous case was reported on 14/10/2022 and they had received his contacts. They contacted him to appear at DCI offices where he was interrogated. They proceeded to his house in Eden Estate where they found wildlife protection unit and the canine team outside his house. They organised for an identification and the two dogs identified him. They decided to conduct a search in his house but it was locked and the Appellant had no keys. The Appellant broke the padlock and they accessed the house where they found a man who introduced himself as John Mutemi. They conducted a search and they recovered one rhino horn, an axe, two pliers and a screw driver. They arrested them.

22. On cross examination, he testified that he did not know why the other person they arrested was not in court. That the house was the Appellant's and he was called so that he could open it. That they contacted his agent who confirmed that the house was his. The identification parade was comprised of around 6 people from his plot and the area chief was also there. That there were two people who were willing to record their statements but they were initially reluctant. That on 14/10/2022, he was summoned when the canine team led them to his house and he was warned to stop intruding into Solio Ranch and he was advised to move from the area. That the officers were engaged in other duties that is why it took time to charge him. That his friend escaped and both of them should have been charged.

23. PW5 testified that he was a dog handler with Ol Pajeta Conservancy and had been a dog handler for 14 years. On 27/11/2022, they were offered an assignment at Solio Ranch where they were directed to the area where there was an intrusion. The fence had been cut and they could see footprints of two people. They took the scent of the two people and gave to the dogs which led them to one house where they found Musyoka in the said house and the house was searched and pliers and axe were found. Outside the house, there were muddy shoes which had been worn while intruding Solio Ranch. He had also changed his clothes and hanged them outside his house. The dogs identified the Appellant twice by first identifying his house and also, they did a line up and the Appellant was placed in the middle and the dogs identified him. The dog by the name Sarah identified him first while the second dog was Sugar. He identified his certificate that he is a dog handler and certificates in respect of the two dogs.

24. He testified on cross examination that they did a parade involving six to eight people and it was made up of officers and members of the public. They found rhino horn in his house and they did not take photographs at the scene.

25. PW6 testimony was similar to that of PW5. He testified that the dogs led them to a plot in Naromoru township at the house of Musyoka. He was in the house. He testified that the dogs used for identification were Otis and Sugar. He identified his certificate. On cross examination, he testified that there were six members of the public and the Appellant was the 7th one in the identification parade. That the dogs targeted him directly. He did not take photographs. That the canine followed the steps and scent and that they passed so many houses but the dogs led them to him. That he was called to the plot as the house belonged to him.

26. PW7 a researcher in the National Museum of Kenya testified that an exhibit marked A was taken to him by KWS officer which was incomplete as it has been cut. That she did morphological analysis and the results were that it was a horn. That from the size, shape and nature of the horn, she confirmed that it was a rhino horn. She also compared with other rhino horns and concluded that indeed it was a rhino

horn. She produced the report as Pexhibit6(a) and the exhibit memo as Pexhibit6(b). She testified on cross examination that it was not necessary to establish when the rhino had died.

27. PW8 a commander at Solio Ranch testified that he received information there was an intrusion at a place called top plain where the barbed wire had been cut. He proceeded to the scene where he found a pair of pliers and they spotted suspected three footprints. The canine team from Ol pajeta arrived and they introduced the canine to the footprints and it led them to an exit point where the barbed wire had been cut as well. They continued pursuing the foot prints outside the ranch and the canine led them to a residential house at Castle area in Naromoru. The canine stopped at the house that was at far corner.

28. He testified on cross examination that the footprints were visible outside the ranch and that is why they requested for assistance of the canine team. That he left after the house was identified and he left the investigating team to follow up and trace the owner of the house. He was not there when the Appellant was arrested.

29. PW9, the investigating officer testified that he received information of an intrusion at Solio Ranch and that the canine team had led the team to a house and that this was the second time the dogs had led them there. He proceeded to the said house where he found other officers and members of the public. The house was locked and the Appellant said he did not know who locked the house. He broke the lock with the hammer and they gained access where they found Joel Mutemi sleeping and the Appellant identified him as his friend. Upon searching the house, Wilberforce, a KWS officer recovered a suspected rhino horn under the bed, an axe, two pliers and one screw driver. They arrested them and they released them the next day to enable them conduct investigations. After investigations, they summoned them back but only the Appellant honoured the summons. He produced the rhino horn as Pexhibit1, two pliers as Pexhibit7, screw driver as Pexhibit8, metallic hammer as Pexhibit9, axe as pesxihibt10, two dog's handlers certificates as Pexhibit2 and Pexhibit5, certificate for Sugar as pexhibt3 and for Sarah as Pexhibit4. That an identification parade had been done before he arrived at the scene.

30. On cross examination, he testified that he confirmed that the house was his and he used a hammer to break the padlock for them to gain entry. That he found him outside the house and he did not have the keys. He maintained that the Appellant identified Joel Mutemi as his friend. That Joel Mutemi did not return after he was released on free bond and it is not true that they spent two days at the police station as they were released on free bond. That there is no record to show the items recovered from his house and that there was an inventory in the police file. He maintained that he explained to them that the house belonged to him and that there was no photograph of him with the items. That there is no evidence of his fingerprints on the items.

31. In his sworn defence, the Appellant testified that he was living in Naromoru prior to his arrest and he was a scrap metal dealer. That he was summoned to the station by police officer who informed him that KWS canine had led them to his house after intrusion at Solio Ranch. He stated that no photographs were produced to show there have been an intrusion, the investigation diary stated that he had an elephant horn which was later changed to rhino horn, they did not prove the house was his and the ownership of the recovered items was not proved, no fingerprint dusting was conducted, the evidence revealed there was a person in the said house and the prosecution did not explain why the said person was released, that they were released before being charged which meant that there was no evidence linking them to the charges, the agent of the house refused to record a statement or give a receipt as to who was the tenant hence the case was not proved. That he was led to a house and was asked to open it but he stated that he did not have the keys and that he could not open a house that it was not his and there was no prove that he had rented out the house and the investigating officer should have charged the person who was inside the house and the prosecution failed to follow up about the said man. He testified that the case was made up as PW8 testified that he was not the one who cut the

fence and he did not know him. Further, there were no photographs of him with the items at the place they were recovered, there was no inventory, the dog handlers did not establish the number of people in the identification parade and no photographs were taken.

32. On cross examination, he testified that he was living in Naromoru at Castle in unnamed plot and had lived in Naromoru for around 3 years. He was called by unknown number and he was told to present himself to Naromoru police station. That he was not informed why he was detained at police station and he did not know Joel Mutemi Kirabia and he was taken to Ngobit police station where he remained until Tuesday when he was released to be arrested days later on a Friday and taken to court on the same day. That he was taken to a house that he did not know and that identification parade was not done and there were no sniffer dogs that identified him.

33. That was the totality of the evidence placed before the trial court.

34. I have had occasion to consider the evidence as recorded at the trial court. I have taken cognizance that unlike the trial court, I did not have the advantage of seeing or hearing the witnesses testify and have given due allowance for that fact. In addition, I have considered the applicable law, submissions on record and case law cited.

35. From the Appellant's submissions, there are several issues that this court is tasked to determine. His contention is that possession was not proved, ownership of the house where the alleged rhino horn was found was not proved, he has challenged identification by the sniffer dogs, that his rights were violated as he was detained for more than 24 hours and that he was not supplied with PW7 report.

36. On the issue of violation of Article 49(f) (i) of the *Constitution*, I am in agreement with the Respondent's counsel that this is not the right forum to consider the violation of his right under Article 49. He ought to file a constitutional petition. Secondly, it is trite that not all cases of constitutional violations shall lead to an acquittal as was discussed in Douglas Komu Mwangi V R [2013] eKLR where the Court of Appeal stated:

> " There are many instance in which courts have held that a delay in arraigning a suspect in court beyond 24 hours does not necessary entitle the suspect to an acquittal. (See Dominic Mutie Mwalimu – v – R Criminal Appeal No. 217 of 2005; and Evanson K. Chege –v- R Criminal Appeal No. 722 of 2007). This court has stated that if any constitutional right of an accused person is violated, the remedy lies not in an acquittal but an action in civil suit for damages. In Julius Kamau Mbugua –v – R Criminal Appeal No. 50 of 2008, this court stated that:-
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> > A trial court takes cognizance of pre-charge violation of personal liberty, if the violation is linked to or affects the criminal process. As an illustration, where the prolonged detention of a suspect in police custody before being charged affects the fairness of the ensuing trial e.g where an accused has suffered trial related prejudice as a result of death of an important witness in the meantime, or the witness has lost memory, in such cases, the trial court could give the appropriate protection – like an acquittal. Otherwise, the breach of a right to personal liberty of a suspect by police per se is merely a breach of a civil right, though constitutional in nature, which is beyond the statutory duty of criminal court and which is by section 72(6) expressly compensatable by damages.'
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> In Julius Kamau Mbugua –v- r Criminal Appeal No. 50 of 2008, this court upheld the proposition that even where violation or right to personal liberty of a suspect before he is charged has been proved or is presumptive, the ensuing prosecution is not a nullity and

that a prosecution would only be a nullity, if any of the circumstances stated exist. In the present case, the appellant has not demonstrate that he has suffered a trial related prejudice to warrant an acquittal. This ground of appeal has no merit."

37. As to violation of Article 50(2)(b), (c) and (j), the Appellant claimed that he was not supplied with photographs and identification parade form which formed part of the prosecution's case. Further, he was not supplied with PW7's report. Respondent's counsel submitted, there were no photographs that were produced during trial. There was no identification parade that was conducted according to the Force Standing Order and there was no such form that was filled. This is borne out of record and the Appellant's contention is without basis. I also note from the record that at no particular time did the Appellant object to or challenge the production of PEXHIBIT6(a) on the basis that the said report was not supplied to him. The belated complaint in this appeal cannot, therefore, stand.

38. This leads me to the question whether the case was proved to the required standard. The Appellant has raised several issues as to identification and ownership of the subject house. First, it is not in dispute that there was a rhino horn found in the house No. C7 in Kaso area in Naromoru. PW7 carried out a test that verified that the item so forwarded was indeed a rhino horn.

39. In regard to identification and ownership of the house, the evidence before the trial court was that the KWS officers attached at Solio Ranch noticed that there was an intrusion on the said ranch as the fence had been cut and a pair of pliers were left there. They requested for assistance from canine department from Ol Pajeta Conservancy where two dogs Sarah and Sugar were introduced to the scent at the scene and they followed the said scent upto a house no. C7 at Castle area in Naromoru. PW5 and 6 were the dog handlers and testified to this fact. They testified that after the house was identified, they left and they were summoned later where an identification was done by lining up people and the two dogs identified the Appellant at different times. The certificates for the dog handlers were produced as Pexhibit2 and 5 while the certificates for the dogs were produced as Pexhibit3 and 4.

40. The use of dog's handler in our jurisdiction is not very common and the courts have tried to weigh the strength of that evidence. In Abdallah bin Wendo & Another vs. R [1953], 20 EACA 166 two main issues arose relating to evidence of dogs. First, the admissibility of that evidence, and second its evidential value. The court there said: -

> "We are fully conscious of the assistance which can be rendered by trained police dogs in the tracking down and pursuit of fugitives, but this is the first time we have come across an attempt to use the actions of a dog to supply corroboration of an identification of a suspect by (a human). We do not wish it to be thought that we rule out absolutely evidence of this character as improper in all circumstances but we certainly think that it should be accompanied by the evidence of the person who trained the dog and who can describe accurately the nature of the test employed. In the instant case the dog master was not called and the evidence as to what the dog did and how they did it is most scanty."

41. In Omondi vs. R [1967] EA 802 (K) Ainsley, C.J, discussed the issue and came to the following conclusion: -

> "It is evidence which we think should be admitted with caution, and if admitted should be treated with great care. Before the evidence is admitted the court should, we think, ask for evidence as to how the dog has been trained and for evidence as to the dog's reliability. To say that a dog has a thousand arrests to its credit is clearly, by itself, quite unconvincing. Clear evidence that the dog had repeatedly and faultlessly followed a scent over difficult country would be required, we think, to render this kind of evidence admissible. But having received

evidence that the dog was, if we might so describe it, a reasonably reliable tracking machine the court must never forget that even a pack of hounds can change foxes and that this kind of evidence is quite obviously fallible."

42. It is quite clear from the authorities above that evidence of tracker dogs may be admissible in certain circumstances. In the instant appeal, PW5 and PW6 have confirmed they are dog handlers of extensive experience. They produced their professional certificates. They described the task assigned to the canines and the method of execution. The training, qualification and experience of the canines employed in the investigations (Sarah and Sugar) have been established by way of evidence complete with production of their certificates. The dogs picked out the Appellant twice.

43. In view of the above, I find the evidence of the dog handlers and the dogs reliable and it meets the threshold set in Omondi vs. R (supra).

44. On the issue of ownership of the house, the Appellant denied owning the house. He submitted that he did not have the keys to the house since the house did no belong to him and that no one testified as to ownership of the house. He also argued that the person found in the house was the rightful owner and there was no explanation why he was not charged. The evidence was that after the dogs identified house C7, the police gained access where they found one Joel Mutemi sleeping. The Appellant did not have the keys to the house and they broke the padlock to gain the access. The Appellant denied knowing the said person but PW3 testified that the man informed them that the Appellant was his best friend. PW9 testified that the Appellant informed them that Joel was his friend. PW4 further testified that on 14/10/2022, there was an intrusion at Solio Ranch and the canine team led them to the same house which belonged to the Appellant. They took his contacts and when the canine team led them again to the said house on 27/11/2022, they contacted the Appellant and summoned him to the station and he complied. This was corroborated by PW9. The Appellant also confirmed this on his defence that he was contacted by unknown number and he was summoned to the station.

45. I have reviewed the evidence of the recovery of the rhino horn in a house said to belong to the Appellant. The question of ownership of the house was treated rather casually in the evidence adduced. The investigators confirm the said house was locked from outside and when they went there with the Appellant, the Appellant had to break the padlock. Interestingly, they find one Mutemi sleeping in the house. The said Mutemi is now at large having been arrested and released pending investigations. No attempt was made to adduce evidence supporting the fact that the house belonged to the Appellant. Evidence of the Land lord or ownership documents by the Appellant would have come in handy in support of the fact that the house belonged to the Appellant. It is not enough for PW4 to state that on his own accord he knew the house belonged to the Appellant. The proof of a criminal charge is a serious matter and the threshold is high. In those circumstances, the evidence supporting possession becomes shaky.

46. On the issue that an inventory of the recovered items was not produced, I am guided by the case of Gilbert Onyango Osino & another v Republic [2016] eKLR where the Court of Appeal held that;

> " No inventory of the stolen items was made available to the court. In Leonard Odhiambo Ouma & another vs Republic, Nakuru Criminal Appeal No. 176 of 2009, this Court observed;
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> > Failure to compile an inventory as contended in ground 5, is in our view, a procedural step which in the circumstances, did not prejudice the appellants in any way and for this reason the omission did not vitiate the trial."

In the instant case, we are of a similar view. The evidence of Alex Oremo was clear that a toy pistol and a jungle jacked were recovered from the 1st appellant's house, while a jungle jacket was recovered from the 2nd appellant's house. Since there was no uncertainty as to the items recovered from the appellants, we find that the lack of an inventory would not amount to a valid basis upon which to declare a mistrial. This ground is therefore without merit."

47. In respect to count II, he was charged under section 102 (1) (a) of the *Wildlife Conservation and Management Act* which provides as follows:

1. Any person who without a licence or permit of the Service in respect of any national park, national reserve, wildlife sanctuary or marine reserve, or, without authorization from the authority responsible for any other protected area as the case may be—

a. enters or resides in a protected area otherwise than in the course of his duty as an authorized officer or a person lawfully employed in the protected area, as the case may be.

commits an offence and is liable on conviction to a fine of not less than two hundred thousand shillings or to imprisonment of not less than two years or to both such fine and imprisonment.

48. Section 3 of the Act defines protected area as;

"a clearly defined geographical space, recognized, dedicated and managed through legal or other effective means, to achieve long- term conservation of nature with associated ecosystem services and cultural values."

49. The particulars of the charge in Count II were that;

"On 27/11/2022 at Castle area Laikipia Central Sub-county in Laikipia County jointly with another not before court being a national reserve entered therein without a permit."

50. As concluded earlier in this court's analysis of the evidence, the Appellant was identified through Sarah and Sugar, 2 canines that followed the scent from the point of entry and picked out the Appellant as the person who had entered a protected area, Solio Ranch. On re-evaluation of the evidence, am satisfied that the evidence on record proved this charge beyond reasonable doubt.

51. As to sentences, the Appellant was sentenced to pay a fine of Kshs.3,000,000/- and in default to serve five (5) years imprisonment in respect to count I and to pay a fine of Kshs.200,000/- and in default to serve two (2) years imprisonment in count II. The trial magistrate did not indicate whether the sentences were to run consecutively or concurrently.

52. From the above, am of the finding that the evidence in support of Count I of the charges was based on shaky evidence and is not sustainable. I quash the conviction and set aside the sentence in respect of Count I. The appeal against Count II fails and is dismissed.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 30TH DAY OF APRIL 2025.

A.K. NDUNG'U

JUDGE