Muthoni alias Sonko v Republic (Criminal Appeal E028 of 2023)
[2024] KEHC 498 (KLR) (31 January 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E028 OF 2023

AK NDUNG'U, J

JANUARY 31, 2024

BETWEEN

PETER MUTURI MUTHONI ALIAS SONKO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from original Conviction and Sentence dated 08/03/2023 in Nanyuki CM Criminal Case No 117 of 2022 – B. Mararo, PM)

JUDGMENT

1. The Appellant herein, Peter Muturi Muthoni alias Sonko, was convicted after trial of being in possession of wildlife trophies of endangered species without a permit (count II) contrary to Section 92(4) of the *Wildlife Conservation and Management Act* 2013, laws of Kenya. He was acquitted of count I of dealing with Wildlife trophy contrary to Section 92(2) of the same *Act*.

2. The particulars for count II were that on 04/02/2022 at around 1330hrs, at Lamuria area along Kiawara road in Kieni East Sub-County within Nyeri County he was found in possession of wildlife trophies of an endangered species namely 3 elephant tusks weighing approximately 14.9kgs without a permit. On 08/03/2023 he was sentenced to 3 ½ years imprisonment.

3. He has appealed against both conviction and the sentence on the following grounds;

    i. The learned magistrate erred by failing to find that the prosecution had failed to provide proof of the items allegedly recovered from the Appellant being elephant tusks.

    ii. The learned magistrate erred by finding that the alleged tusks allegedly recovered from the Appellant were the same items which were comprised in exhibit memo which was forwarded to the National Museum of Kenya for analysis and produced in court.

iii. The learned magistrate erred in failing to find that the report produced as exhibit MF1-6 had no connection with the case before him or did not relate to the proceedings before him.

iv. The learned magistrate failed to find that the charge against the Appellant disclosed no offence.

v. The learned magistrate failed to find that the charge was duplex or bad for duplicity.

vi. The learned magistrate failed to find that the charge facing the Appellant was not properly prosecuted.

vii. The learned magistrate erred by placing undue and unwarranted reliance on the investigation diary.

4. The appeal was canvassed by way of written submissions. Learned Counsel for the Appellant argued that the prosecution did not prove that the items found in possession of the Appellant were elephant tusks as the report produced by PW3 was unsigned. That the trial magistrate failed to address himself on this issue and if he would have done so, he would have ruled in favour of the Appellant. Further, the evidence of PW4 was that upon recovery of the items from the Appellant, the tusks were stored alongside other trophies which included elephant tusks before the items were forwarded to the National Museum of Kenya 46 days later. She stated that the items were not marked which leaves doubt that whatever was forwarded to the government analyst was indeed what was recovered from the Appellant. The trial court failed to address itself on this issue and if he would have done so, he would have confirmed the defence doubt as to whether the exhibits presented to the government analyst were indeed what was recovered from the Appellant.

5. It is submitted that from PW4's testimony, the exhibit memo emanated from Kenya Wildlife Service. The report that was prepared by PW3 in response to the exhibit memo was however addressed to the OCS Laikipia police station even though throughout the trial, there was no indication that Nanyuki police station was involved in the investigations. Therefore, if the report was addressed to Laikipia police station, it therefore had nothing to do with the matter before court. Further, the witness denied receiving an exhibit memo from Kenya Wildlife Service which contradicted PW4. So, if she was testifying of exhibits received from Laikipia police station, then those were not the exhibits recovered from the Appellant by PW1, PW2 and PW4 and they must be related to another person and not the Appellant.

6. On the defective charge, he submitted that the defence position before the trial court was that the charges simply described the trophies as elephant tusks whereas the Act under which the charges were laid is specific to the species of the elephant which is African elephant. That failing to specify that the tusks were from African elephant failed both the test of a cardinal ingredients or essential element and ambiguity. The charge sheet as drafted disclosed no offence. Further, charging the Appellant with dealing and being in possession separately and not in the alternative was duplex because possession is an ingredient and a necessary step towards dealing, that dealing must include possession unless the items the subject of dealing are not the same. Hence, charging the Appellant with both offences subjected him to double jeopardy. Reliance was placed on the case of *Douglas Kamwaka Maina vs Republic* (2016) eKLR where the Judge held that a charge of indecent act and another separate count of sexual assault could not stand. Also, *Abdi Ibrahim Harun vs republic* (2018) eKLR in regards to section 84 (1) and 95 of the *Wildlife Conservation and Management Act* where the Judge held that the second count should have been an alternative charge.

7. On ground 6, he stated that the charge was not properly prosecuted since the drafter of the charge was the OCS Nanyuki police station whereas Kenya Wildlife Service prosecuted the matter without explaining the connection between KWS and the police. That the promulgator of the charge was

expected to appear before the court either through his representatives to explain why he preferred the charges. It is urged that the expectation for every case instituted by police is to have an investigating officer testify. Therefore, in absence of promulgator of the charge, the charge went unprosecuted.

8. He further submitted that the trial court relied heavily on the investigation dairy to correct the flaws in the prosecution's case even though the Appellant was not supplied with it since it was introduced at the tail end of the prosecution's case. That investigation diary could not replace or stand in place of hard evidence especially evidence relating to marking and storage of exhibits or the absence of signature on the analyst's report, or why the analyst addressed his report to Laikipia police station rather than to requisitioning entity.

9. On the other hand, the Respondent's counsel submitted that the charge sheet described the offence in accordance with the law creating it. That the statement of the offence as described conformed with section 134 and 137 of the *Criminal Procedure Code* because it was followed by particulars which expounded what endangered wildlife trophy the Appellant was in possession of and which gave the Appellant reasonable information as to what he was being charged with. On the issue that the charge was duplex for charging the Appellant with the offence of dealing and possession separately, she argued that the offence of dealing as defined in section 2 of the *Wildlife Conservation and Management Act* has its own unique ingredients and just because possession might be one of the ingredients does not mean that one cannot be charged separately. That the Act creates distinct offences with different ingredients and penalties and the effect is that one can commit both offences arising from the same set of circumstances. Further, a charge is said to be duplex where more than one offence is charged in the same count whereas the Appellant was charged with two separate counts and therefore, the issue of duplicity did not arise and the issue of multiplicity is one which can be cured under Section 382 of the *Criminal Procedure Code* as was dealt by the court in *K.N vs R* (2018) Mombasa High Court Criminal Appeal No. 67 of 2016 eKLR where the court held that multiplicity can be cured by Section 382 of the *Criminal Procedure Code*.

10. That the elements of the offence of possession were proved as the witnesses testified that he was found with the elephant tusks and no permit was presented and the evidence of PW3 revealed that what was recovered from the Appellant was indeed elephant tusks. As to the report by PW3 not being signed, she submitted that PW3 took ownership of the report and no question was raised as to her expertise. She testified that she prepared the report herself and hence it was produced by the maker. Further, *Advanced learner's dictionary* defines the word sign as write one's name on a document to show that one has written it. The report contained the expert's name and this is considered as signing.

11. On the allegation that the exhibits forwarded for analysis might have been different, she submitted that it was a mere conjecture and guesswork as PW4 was present when the exhibits were recovered and she is the one who forwarded the same for analysis. She also produced the investigation diary showing the chain of custody of the said exhibits and she affirmed that what was forwarded for analysis is what was recovered from the Appellant. And therefore, the prosecution discharged their duty and proved their case beyond reasonable doubt.

12. This is a first appeal. My duty as a first Appellate court is to look at the evidence afresh, analyse it and reach my own conclusion as to whether or not to uphold the decision of the trial court. See *Okeno v Republic* [1972] EA 32.

13. I have taken up that duty by reading, considering and re-evaluating the evidence as recorded by the trial court. In so doing, I have factored that I neither saw nor heard the witnesses testify and have given due allowance for that fact. I have at the same time had occasion to consider the submissions by the learned counsels on record and the case law relied on.

14. In summary, the evidence before the trial court was as follows. PW1, a warden with Kenya Wildlife Service testified that he was doing his routine work when he was informed by his boss that there was a person at Lamuria in possession of elephant tusks and was looking for a buyer. Together with Muriithi and Edwin Mwese who was to pose as a buyer, they proceeded to Lamuria. Edward was in communication with the said person and they agreed to meet at Kiawara road in Lamuria. The said person indicated he would be on the roadside. They saw a man by the roadside and Edwin confirmed he was the one. Upon reaching where he was, Mwangi alighted from the vehicle and proceeded to where the man was and they conversed. The said person crossed the road and went to a nearby bush and he returned with a heavy sack. He was ushered to put the luggage inside the motor vehicle and as he was doing this, the team alighted, introduced themselves and established that the green sack contained three elephant tusks. He did not have a license.

15. They proceeded to Ngobit police station where he took an inventory which they signed. The items recovered were 3 pieces of elephant tusks and green nylon sack. They prepared the weighing certificates and booked the Appellant at Ngobit police station. He produced elephant tusks as Pexhibit 2, inventory as Pexhibit3 and weighing certificate as pexhibit4. On being cross examined by the Appellant's counsel, he stated that he did not know if phone data was taken. He stated that the Appellant was communicating with Mwasi. The Appellant was not a passerby and he did not ask him for a permit.

16. PW2, an assistant warden at KWS stated that he received intelligence that there were suspects in Lamuria area in possession of elephant tusks. He followed up on the tip off and with his team, they headed to the area. He was in contact with the said suspect and they agreed to meet at Lamuria, Kiawara road. They met by the roadside, spoke for a while in person and the suspect went into the bush and came out with a green sack. He opened the car boot for the suspect to place the green sack. He made payment and with his team, they arrested the Appellant and confirmed that there were three pieces of elephant tusks. He produced the green sack as pexhibit1. On cross examination, he testified that the suspect was described to him as Sonko by the informer and he spoke to the suspect in length. They communicated through the phone though no analysis was done on his phone. The Appellant waved at their motor vehicle.

17. PW3 testified that she was from National Museum of Kenya. She stated that she received exhibits marked as A1, A2 and A3 accompanied by exhibit memo which was brought by Millicent from Kenya Wildlife Service for identification. Her analysis revealed that the exhibits were elephant tusks. She produced the report as Pexhibit6. On cross examination, she stated that she prepared the report though it was not signed. That she received the exhibits marked as A1-A3 from Kenya wildlife Service and not Nanyuki police station though the report was addressed to OCS Laikipia police station. That she did not receive the exhibit memo from KWS. That she received trophies from other places but they were marked differently. On re-examination, she testified that she prepared the report, she does not mix up exhibits and that she releases the exhibits to the owner.

18. PW4 Millicent Kimeu from Kenya Wildlife Service was the investigating officer. She testified that she is based at Laikipia Station Investigation Unit. She stated that she received a call from Muthui of a suspect in Lamuria with elephant tusks looking for a potential buyer. They left in two teams using unmarked vehicle. Moses talked to the suspect who was by the roadside as they observed from a distance. After negotiation, the man left and came back with a green sack which he placed on the boot. Mr. Mwasi found three elephant tusks inside the sack. They went to where they were, introduced themselves and the suspect was arrested. He had no permit. She prepared the exhibit memo and she received a report on the same day identifying the elephant tusks. She produced the investigation diary as Pexhibit7.

19. On cross examination, she testified that they were at a distance and could not hear the conversation between Mwasi and the Appellant. The exhibit memo was prepared on 22/03/22 and received them back 21 days days after the arrest. That she marked them and got them from the trophy room. That they have a statement file at their store and the tusks were not marked at the time of the arrest. That the inventory and the weighing certificate did not show that the tusks were marked. That the report was not signed and the same was addressed to OCS Laikipia police station. On re-examination, she stated that the suspect trophies were in the trophy room in a sack and she took them to National Museum of Kenya

20. That was the totality of the prosecution's case. The Appellant was placed on his defence and he elected to offer no evidence.

21. Two questions emerge for determination: Whether the charge is defective and the effect thereof if at all and should that answer in the negative, whether the prosecution has proved its case to the required threshold in law. I elect to deal with the preliminary point first as the same has the potential of disposing this appeal should the Appellant succeed.

22. The Appellant's counsel raised a preliminary point of law. He argued in his submissions that the charge sheet was defective on two grounds. First, it was defective on account that it described the trophies as elephant tusks whereas the Act under which the charges were laid is specific to the species of the elephant which is African elephant. Secondly, the charge was duplex as the Appellant was charged with the offence of dealing and being in possession separately and not in the alternative. It was duplex because possession is an ingredient and a necessary step towards dealing, that is dealing must include possession unless the items the subject of dealing are not the same. Hence, charging the Appellant with both offences subjected him to double jeopardy.

23. On the first issue, section 134 of the *Criminal Procedure Code* states that;

> " Every charge or information shall 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 charged."

24. Section 137 of the *Code* deals with the rules for framing of charges or information. Section 137 (a) particularly states that;

> "
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> " (ii) the statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by enactment shall contain a reference to the section of the enactment creating the offence;
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> (iii) after the statement of the offence, particulars of the offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary: Provided that where any rule of law or any Act limits the particulars of an offence which are required to be given in a charge or information, nothing in this paragraph shall require more particulars to be given than those so required;
>
> ..."

25. Courts have also considered what is essential in framing a charge sheet. In the case of *Sigilani -vs- R* (2004) 2 KLR 480, it was held that:

> " The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence."

26. The Court of Appeal in *Nyamai Musyoka v. Republic* (2014) eKLR expressed itself as follows: -

> " The test for whether a charge sheet is fatally defective is a substantive one.....If a defective charge is followed by a series of other procedural or substantive mistakes and which in particular affect the rights of the accused person, or the defect goes into the root of the charge distorting it in a way that the accused person cannot understand the charge, then the Court ought to be reluctant to apply Section 382 C.P.C. to cure the defect..."

27. A charge must therefore be clear and easy to understand. In as far as possible the use of technical language in a charge ought to be avoided. An accused person must be accorded an opportunity to understand what he/she is facing before court.

28. I have perused the charge sheet and it was clear that he was found in possession of elephant tusks. I do not see any prejudice or embarrassment for the failure of the charge sheet to specify that it was an African elephant. In my view, since all the rules for drafting a charge sheet were followed, failing to specify that the elephant tusks were from an African elephant was just an omission that is curable under section 382 of the *Criminal Procedure Code* which stats that;

> " 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."

29. Furthermore, the Appellant's counsel who was in conduct of the matter during the trial did not raise this issue during trial. It is highly prejudicial to unleash this secret weapon which was concealed throughout the trial and not mentioned even in cross examination at this stage. The fact is that the accused understood the charge he was facing.

30. The second limb was that the charge sheet was bad in law for being duplex. The argument was that the offence of dealing and possession cannot be charged as separate counts but one ought to be in the alternative. Further, possession is an ingredient and a necessary step towards dealing.

31. The law sets out that every charge must be identified separately and its particulars provided. As submitted by the Respondent's counsel, the *Wildlife Conservation and Management Act* creates two

distinct offences. The offence of dealing is created under Section 92(2) while possession is under Section 92(4). Both offences carry different punishment. Deal is defined under Section 3 of the Act as;

> "(a) to sell, purchase, distribute, barter, give, receive, administer, supply, or otherwise in any manner deal with a trophy or live species;
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> (b) to cut, carve, polish, preserve, clean, mount or otherwise prepare a trophy or live species;
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> (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 an act preparatory to, in furtherance of, or for the purpose of, an act specified above"

32. Possession is not defined in the *Act* but Section 4 of the *Penal Code* defines possession as;

> " be in possession of" or "have in possession" includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person;"

33. To my understanding the offence of dealing involves a commercial aspect of the sale, trade, exchange or transportation from the original party to another. Possession on the other hand involves no exchange from original party to another. The question that this court must grapple with is whether the two charges can co-exist in the same charge sheet as separate counts.

34. The ready answer from a reading of the law is that the two charges cannot be framed in the same charge sheet as principal counts for reason that an accused person would not be in a position to mount a proper defence in those circumstances. Logically, possession is an active ingredient for proof in the offence of dealing with game trophy. A fair trial would demand that the charge of possession be in the alternative. The trial as conducted offended the double jeopardy rule.

35. I agree entirely with the finding by Mutende J in *Abdi Ibrahim Harun v Republic* [2018] eKLR where she stated;

> ''It is urged that the charge was erroneously drafted and bad for duplicity. In the case of *Cherere s/o Gakuli* (Supra) as clearly put, where two (2) or more offences are lumped together in one charge it is bad for duplicity hence defective. Evidently, the Accused suffers prejudice. Such a person is disadvantaged as he cannot be in a position of knowing how to defend himself.
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> The Investigating Officer caused the Appellant and his Co-Accused to be charged with the offence of Being in Possession of Wildlife Trophies as provided by Section 95. Then there was a second Count of Dealing with Government Trophies in contravention of Section 84(1) of the Act that provides thus:
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> "(1) No person shall operate as a trophy dealer without a license issued by the Service."

and as read with Section 92 of the Act that provides thus:

> "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."

The second Count should have been an alternative charge. Charging the Appellant and the Co-Accused with the charges as framed was indeed ambiguous and prejudicial to them as correctly submitted. There is no way the Appellant would have known how to defend himself".

36. Faced with an analogous circumstance albeit involving different offences in Nanyuki HCCREV E066 of 2022, this court had the occasion to explore situations where a prosecutor must of necessity raise one of the charges as an alternative count and not as a principal count with another count in the same charge sheet. The court stated;

> As explained earlier, there is nothing untoward with having an accused person facing multiple charges (counts) in one charge sheets when all relate to the same transaction. Secondly, in agreement with counsel for the Respondent, there is no law that requires that the charge of handling stolen property be an alternative charge. If the evidence in the hands of an investigator supports a charge of handling stolen property and nothing more, I see no legal bar to a charge of handling property being framed as a stand alone charge.
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> Following in the foot prints of the decision in *Gerevasio Mugo v R* (2015) eKLR where the court held that it is not possible for an accused person to commit the offence of robbery with violence regarding the same complainant and involving the same exhibits as well as handle stolen goods being the same exhibits in the robbery charge, similarly, even where the complainants are stated to be different, it is not possible for an accused person to commit the offence of robbery involving the same exhibits as well as handle stolen goods being the same exhibits in the robbery charge as is the case in this matter. This explains why in practice where the state in its view is in possession of evidence to support the main count, the charge of handling is framed as an alternative charge should the evidence on the main count end up being insufficient. Which leads me to the undoing in the proceedings before the trial magistrate on 9th August, 2019.
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> Conventional legal logic would dictate that it is impractical, indeed absurd that that an accused person can be guilty of handling stolen goods and still yet stand trial for robbery with violence in which robbery the same specific goods are said to have been stolen.....".

37. The Appellant in this case would be exposed to a legal absurdity were he to be found guilty of dealing with the elephant tusks and at the same time be guilty of possession of the same tusks and receive different sentences for the 2 offences. This would obviously expose him to obvious double jeopardy.

38. Having so found, the court must now consider the effect of the anomaly to these proceedings. The charge was defective rendering the prosecution of the Appellant prejudicial thereby denying the Appellant the right to a fair hearing. A defective charge cannot form a basis for a conviction. The error is not curable and the Appellant ought to have benefited from an acquittal.

39. From the foregoing and for reasons stated the appeal herein succeeds. The conviction against the Appellant is quashed and the sentence set aside. The Appellant is set at liberty forthwith unless otherwise lawfully held under another warrant.

DATED SIGNED AND DELIVERED AT NANYUKI THIS 31ST DAY OF JANUARY 2024.

A.K. NDUNG'U

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR