



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO.37 OF 2020

(CONSOLIDATED WITH HCCRA NO. 17 OF 2020 & HCCRA NO. 42 OF 2020

JOSEPH MUTIE MWANIA1ST APPELLANT

STEPHEN NDAMBUKI MUTWIWA2ND APPELLANT

JOSEPH MUTISO DAVID3RD APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence of Hon. A. Ndungu in Makindu Principal Magistrate's Court PMCR Case No.382 of 2017 pronounced on 22nd March, 2019).

JUDGMENT

1. The three appellants, **STEPHEN NDAMBUKI MUTWIWA, JOSEPH MUTIE MWANIA and JOSEPH MUTISO DAVID** were charged in the magistrates' court 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 offence were that on 1st May 2017 at Mangelete area in Kibwezi Sub-County within Makueni County jointly with others not before the court, were found in possession of three full elephant tusks and nine pieces of elephant tusks weighing 71kgs with a street value of Kshs.10,000,000/= without a permit.

2. They all denied the offence. After a full trial, they were convicted of the offence and sentenced to pay a fine of Kshs.1 million each and in default to serve 4 years imprisonment.

3. Dissatisfied with the judgment of the trial court, the appellants have come to this court on appeal in three separate appeals which have proceeded together as consolidated appeals. Their grounds of appeal can be summarized as follows –

1) The magistrate erred in convicting them.

2) That they were first offenders and the sentence imposed was harsh and excessive.

3) That the trial took too long and thus their constitutional rights were violated.

4) That the period they were in custody during trial was not taken into account in sentencing contrary to section 333(2) of the Criminal Procedure Code.

4. The appeals were canvassed through filing of written submissions. I have considered the submissions of each of the three appellants and the submissions of the Director of Public Prosecutions.

5. This being a first appeal, I have to start by stating that as a first appellate court, I am duty bound to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences – See **Okeno –vs- Republic (1972) E.A 32**.

6. I have evaluated the evidence on record. At the trial, the prosecution called six (6) witnesses. Each of the appellants tendered sworn defence testimony and was cross-examined.

7. According to the prosecution witnesses, the Kenya Wildlife Officers, on information received, laid an ambush on a road at night, stopped two motor cycles after one sped off, and arrested the three (3) appellants who were the riders on the two motor bikes which had a load of elephant tusks, with one of the four riders having run away and escaped.

8. The three appellants on their part in their respective defence, described how they were arrested, and denied that they had at the time of arrest possession of the alleged elephant tusks.

9. Having evaluated the evidence on record, my view is that the major issue for determination before the trial court and this court is to do with the credibility of the prosecution evidence against the defence evidence.

10. In my view, the evidence of Pw1 Assistant Warden Richard Lekurchalan; Pw2 Assistant Warden Salim Makomba, Pw4 Ranger Nickson Namisi; on the ambush and Pw5 KWS Officer Edwin Muasya who later took photographs of the motor cycles was consistent.

11. The evidence was clear that an ambush was laid that night that the two motor cycles were stopped, that the said two motor cycles were carrying elephant tusks, that three of the riders of the motor cycles were arrested and charged with the offences. These were the three appellants. Pw3 Dr. Ogeto Mwebi testified that the items found on the motor cycles were elephant tusks.

12. In my view, possession of the elephant tusks was proved against each of the three appellants, satisfying the legal definition of possession under section 4 of the Penal Code.

13. The appellants were three persons and thus could only be convicted of the offence charged if common intention was proved. Common intention is defined under section 21 of the Penal Code as follows –

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence”.

14. The three appellants having been found to be in possession of the elephant tusks, they were deemed to have each committed the offence together as a common undertaking, and the burden shifted to each one of them to explain how come he came to be in such possession. Though Stephen Ndambuki Mutwiwa, in his sworn defence, said that he was an innocent motor cycle for hire (boda boda) driver, his version of where and how he was arrested is not believable. In my view, it was an afterthought. In my view, both motor cycles were found with a load of ivory and were in control of the three appellants as testified to by the prosecution witnesses. Thus the prosecution proved common intention against each of the appellants, to commit the offence.

15. I will thus dismiss the appeal on conviction.

16. With regard to sentence, the magistrate called for pre-sentence reports before pronouncing sentence. Each of the appellants was also granted a chance to mitigate before sentencing.

Considering the quantity and value of elephant tusks involved, in my view, the sentence imposed was neither harsh nor excessive. It cannot be said that the magistrate failed to take into account section 333 of the Criminal Procedure Code. I will thus uphold the sentences imposed.

17. Consequently, I find no merits in the appeals. I dismiss each of the three (3) appeals and uphold both the conviction and sentence imposed by the trial court.

Right of appeal explained.

DELIVERED, SIGNED & DATED THIS 10TH DAY OF NOVEMBER, 2021, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE



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