**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**CRIMINAL APPEAL NO. 57 OF 2012**

**Peter Mwangi Kariuki……..……..Appellant**

**Versus**

**Republic……..espondent**

*(Appeal against Conviction and Sentence in Criminal Case Number 555 of 2010, Republic versus Peter Mwangi Kariuki at Nyert, delivered by J. Wambillilyanga, S.R.M. on 9.3.2012).*

**JUDGEMENT**

On 11.6.2010, the appellant herein was arraigned before the Resident Magistrates Court charged with **three counts** as follows; being in possession of a game trophy contrary to Section **13 (3) (c)** of the Wildlife (Conservation & Management) Act,[1] failing to make a report of being in possession of a government trophy contrary to section **39 (3) (a)** and **(6)** of the said Act, and Dealing with a business of a dealer contrary to section **43 (1)** of the Act.

On 9.7.2010 the prosecutor successfully applied to substitute the charge sheet stating that the law had changed, and pursuant to the said application the counts were reduced to two as follows:-

**Count One:-** Being in possession of a Government Trophy Contrary to Section **42 (1), (b**) of the Wildlife Conservation Act AND **Count two:-** Failing to make a report of being in possession of a government trophy contrary to Section **39 (3)** of the Wildlife (Conservation and management) Act.

Hearing commenced on 23.7.2010 and PW1 finalized her testimony. When the trial resumed on 20.8.2010, a prosecutor appointed for the purposes the Act came on record and applied to amend the charge sheet and the appellant was called upon to plead to the substituted charge sheet. The substituted charges were:-

**Count One:** Being in possession of a game trophy contrary to section **42 (1) (b)** as read with section **56 (2)** of the Wildlife (conservation & Management) Act. It was alleged that on the 10th day of June 2010 at Tulanga Village in South Nyandarua District within Central Province, was found in possession of Government trophies to wit 4 Elephant tusks without a certificate of ownership thereof.

**Count Two** was dealing in Government Trophies Contrary to Section **43 (4) (a)** as read with Section **56 (2)** of the Wildlife (Conservation & Management) Act. It was alleged that on the 10th day of June 2010 at

Tulanga Village in South Nyandarua District within Central Province, was found dealing in 4 Elephant tusks without a dealer's licence.

**Count Three** was failing to make a report Contrary to Section **39 (3) (a)** of the Wildlife (Conservation & Management) Act. It was alleged that on the 10th day of June 2010 at Tulanga Village in South Nyandarua District within Central Province, failed to make a report of being in possession of 4 Elephant to an authorized officer.

From the record, the substance of the substituted charge(s) and every element thereof were stated by the court to the accused person in a language that he understood and upon being asked whether they admits or denies the charges, he replied *it is not true* to each of the three counts.

This being a first appeal, it is incumbent upon this court to re-analyse and re-evaluate the evidence adduced before the trial court and come up its own conclusion as was held in the case of **Okeno v. R**[2] held:-

*"An appellant on a first appeal is entitled to expect, the evidence as a whole to be submitted to a fresh and exhaustive examination*[3] *and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.*[4] *It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; it must make its own findings and draw its own conclusions; only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.*[5] *"*

In other words, the first appellate court must itself weigh conflicting evidence and draw its own conclusions.[6] It is the function of a first appellate court to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, if should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses**.**[7]

I now proceed to review the prosecution evidence adduced in the lower court with a view to arriving at my conclusions. The prosecution called a total of 5 witnesses whose evidence is summarized below.

**PW1: Edna Mwalenga,** an employee of KWS investigations department testified *inter alia* that her work entails undercover operations and that on 10.6.10 acting on information that the appellant was dealing with trophies she planned with other colleagues and she was to pretend to be a customer and in the company of **Corporal Ng'ang'a** and their driver they proceeded the appellants house and on arrival they met two of his sons who directed them to where the father was. They introduced themselves as buyers and asked to see the ivory. He pulled a sack from under a seat in the sitting room and removed **4** pieces of ivory, they bargained and he asked for **Ksh. 3,000/=** per kilogram which translated to **Ksh. 15,000/=** since they weighed **5Kg.** They accepted the price and while still negotiating as per the plan **Mr Ng'ang'a** called **Sgt Kiongo** who came and arrested them.

On cross examination she confirmed that she got the information from an informer from the area and that they laid a trap. She also confirmed that the appellant was an honorary game warder under section **4** of the Act. She denied that she was an accomplice in the offence.

**PW2: David Ng'ang'a,** a driver with KWS collaborated the evidence of **PW1** and confirmed that they had agreed that once they get the tusks he would informing the arresting officer. He stated that the

appellant removed the tusks from the under the seat and when they started discussing the price he signalled the arresting officers who were not far and they appellant was arrested.

On cross-examination he reiterated that they had laid a trap on the appellant and that they were acting on a tip off.

**PW3 Sgt B. Thiongo** testified that on 8.6.10 he got information from an informer that there was a person who had tusks and wanted to sell. He colloborated the evidence of **PW1** & **PW2** and confirmed that the arrangement was that he would be called by while **PW1** & **PW2** while in the process of negotiating the price, and indeed they called him after 30 minutes and he arrested them and took them to Nyeri Police Station.

**PW4 John Mutinda Kitaka** testified that he was informed by **PW3** of a suspect who had tusks and was looking for a buyer and that on 10.6.10 they organized with **PW1 & PW2** to proceed to the area and on arrival they organized how to carry on the operation, and when the appellant produced the tusks **PW2** called them, they rushed and found the tusks and the appellant and promptly arrest them. On cross-examination, he confirmed that the appellant was an honorary of **KWS** but had to have a certificate of ownership to own the ivory.

**PW5 Ogeto Mwangi,** an employee of National Museums of Kenya recalled that on 27.7.201 KWS officers brought to him some exhibits namely ivory tusks. He identified them in court, he examined them and confirmed that they were elephant ivory, he prepared a report. The tusks belonged to three individual elephants.

**PW6 Corporal Charles Wesisi,** a Police officer attached to Mweiga Police Station was on duty when the appellant was brought to the station by KWS officers arrested for having **4** tusks. He charged him with the offence. He produced all the exhibits.

At the close of the prosecution case the learned magistrate concluded that a *prima facie* case had been established and put the three accused person on their defence. The court complied with the provisions of section 211 of the Criminal Procedure Code[8] and the accused elected to give sworn defence.

The appellants' defence was that he was an honorary warden of KWS and his work included picking all things belonging to animals inside the forest and to make roads inside the park and that he used to pick snares and teeth and would take them to SNR Warden at Mweiga. He stated that at the material time he was at Mt. Kenya for 3 weeks for surveillance work, and he went back home on 10.6.10 at around 10am he saw KWS enter his home, and asked to pick ivory and go with them, he said he had none but one officer removed it from where he was hiding. He denied that he was selling the ivory or discussing selling the same with them. His testimony was that he had a licence for surveillance and a KWS pass. He denied ever selling wildlife products. He insisted that the ivory was brought to his farm by a boy and he knew nothing about it.

After analysing the prosecution and defence evidence, and submissions by the prosecution and the defence, the trial magistrate found that all the three counts were proved and found the appellant guilty as charged and convicted him and sentenced him pay a fine of **Ksh.10,000/=** in default to serve **7** months jail for count number one, a fine of **Ksh. 20,000/=** in default to serve **12** months jail for count two and a fine of **Ksh. 10,000/=** in default to serve **6** months jail for count three, all prison sentences to run concurrently.

Aggrieved by the said verdict, the appellant through his advocates appealed against the conviction and

sentence and advanced **6** grounds of appeal namely:-.

i. That the learned Magistrate erred in law by holding that the offence of possession of game trophy had been proved;

ii. That the learned Magistrate ignored the fact that the appellant was an honorary game to and this prejudiced his defence;

iii. That the trial court based its conviction on accomplice evidence;

iv. That there was no evidence that PW5 actually received the tusks, since the relevant witness was not called to establish the said delivery;

v. The evidence of PW5 was not conclusive origin of the tusks or whether they were government property

vi. That the trial court shifted the burden of proof to the appellant.

Learned Counsel for the appellant **Mr. Mahan** filed written submissions and sought to have the conviction quashed and sentence set aside. In brief, counsel for the defence submitted that:-

i. *The appellant was a KWS honorary warden and had authority to be in possession;*
ii. *That indeed possession was not proved;*
iii. *The court relied on the evidence of an accomplice;*
iv. *The prosecution acted on evidence from a source which was not disclosed;*
v. *That there was no evidence of any deal was concluded, hence dealing was not proved;*
vi. *Failure to call a key witness;*
vii. *Source of the tusks was not proved;*
viii. *No hard evidence was tendered;*
ix. *The prosecution was initially conducted by a unqualified prosecutor;*
x. *That the court shifted the burden of prove to the appellant.*

Counsel for the appellant cited the case of **Nyanzi vs Uganda**[9] in support of his argument that the *alibi* of the appellant was not properly evaluated and/or accepted by the trial court. I am persuaded that the said authority is a useful guide in both principles relating to identification evidence and evaluation of *alibi* offered by an accused person.

Learned state counsel **Festus Njeru Njue** for the DPP also filed written submissions and urged the court to uphold both conviction and sentence. He maintained that:-

i. *None of the prosecution witnesses was an accomplice as alleged but posed as buyers since they had information that the appellant had trophies;*
ii. *That there was no irregularity in the two police prosecutors prosecuting this case since prior to the promulgation of the new constitution in 2010, the Honourable Attorney General was mandated under Section 85 (1) of CPC to delegate his prosecutorial powers though a Kenya Gazette Notice;*
iii. *PW5 evidence was limited to confirming the items were ivory;*
iv. *That possession and dealership were proved, and that he was in the process of disposing, but was not having them in the course of his duty;*
v. *He never proved his alibi that the ivory was taken to his house by his son as alled.*

I have carefully evaluated the prosecution evidence, the defence offered by the appellant, both submissions and authorities cited by both parties and the relevant law.The relevant Sections of the Act under which the Appellant was charged are reproduced below:-

**Sections 42 (b)**

***42. (1)*** *Save as otherwise provided by this Act, any person who is in possession of any trophy, or of any ivory or rhinoceros horn of any description, without also being I possession of a certificate of ownership in respect thereto shall be guilty of a forfeiture offence and-*

*(a)*

*(b) in any other case, be liable to a fine not exceeding ten thousand shillings or to imprisonment for a term not exceeding three years, or both such fine and imprisonment.*

**Section 43 (4) (a)**

*(4) Any person who-*

*(a) not being the holder of a dealer's licence, carries on the business of a dealer;*

*Shall be guilty of an offence and liable to a fine not exceeding twenty thousand shillings or to imprisonment for a term not exceeding five years, or to both such fine and imprisonment*

**Section 39 (3) (a) provides:-**

***3 (a) Any Person who-***

*a. Fails to make a report required by section (2) of this section;*

*Shall be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to imprisonment for a term not exceeding twelve months, or to both such fine and imprisonment*

**Section 56 (2)** of the Act provides:-

***(2)*** *Upon the conviction of any person for an offence against this Act which relates to more than one animal or trophy the court may inflict an additional punishment in respect of each animal or trophy after the first of a fine not exceeding six thousand shillings, or one-half of the fine prescribed by this Act for the offence, whichever is the less.*

**Dealer** is defined in the Act as "any person who, in the ordinary course of business or trade carried on by him, whether on his own behalf or on behalf of any other person-

a. *Sells, purchases, barters nor otherwise in any manner deals with any trophy; or*
b. *Cuts, carves, polishes, preserves, cleans, mounts or otherwise prepares any trophy;*

Section **4** of the Act provides that the Director may with the approval of the Minister appoint fit and proper persons to be honorary warders for the purpose of assisting in the carrying into effect the provisions of this Act. It's not disputed that the appellant was a honorary warder duly appointed under the said section.

Section **39** of the Act provides a list of Government trophies and stipulates in sub-section 2 that *'any person who by any means obtains possession of a government trophy shall forthwith make a report thereof to an authorized officer and shall hand the trophy to such officer. Trophy is defined in the Act as "any protected animal, game animal, or game bird alive or dead, and any bone, claw, egg, feather, hair, hoof, skin, tooth, tusk, or other durable portion whatsoever of that animal or bird or fish or other aquatic life whether processed, added to or changed by the work of man or not, which is recognized as such a durable portion.'*

Having examined the relevant sections of the law pertaining to the charges in question, I now turn to examine the grounds of appeal. Regarding ground **no. 4** in the petition that the prosecution failed to call a one **Const. Stephen Musyoka** as a witness to confirm that he was the one who delivered the tusks to **PW5**, I have reviewed the evidence and in my view the alleged failure did not leave a dent in the prosecution case. The appellant himself admitted in his defence that the tusks were indeed recovered from his premises and alleged that they were brought there by his son. The fact that the person who took them for examination was not called as a witness did not in my view prejudice the appellant nor did it weaken the prosecution case. My view on this is reinforced by the holding in **Kiriungi vs. Republic** where the court rejecting a similar argument and citing past precedents held:-

*"……the effect of failure to call police officers involved in a criminal trial, including the investigating officer, is not fatal to the prosecution unless the circumstances of each particular case so demonstrate. We have examined the circumstances of this case and we are satisfied that the evidence of the investigating officer and the arresting officer would not have been prejudicial to the prosecution case as it was established beyond doubt that the appellant was involved in the crime with which he was charged."*

I find that there is no basis to make an adverse inference on the alleged omission.

I now address the question whether the prosecution adduced sufficient evidence to support the conviction and if so, whether the evidence met the required test in law. This calls for a close examination of the evidence and as I do so I wish to point out that the legal burden of proof in criminal cases never leaves the prosecution's backyard. **Viscount Sankey L.C.** in the celebrated case of **Woolmington vs. DPP**[10] in a subtle and masterly fashion stated the law on legal burden of proof in criminal matters, that;

*'Through the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception…No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."*

The above quotation expresses the correct legal position, which is the legal burden of proof in criminal cases rests on the prosecution and this burden must be discharged at all material times. Thus, the legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial the prosecution has failed to establish these to the appropriate standard, the prosecution will lose.[11] It is clear the legal burden of proof in criminal cases is only one and rests on the shoulders of the prosecution.[12] The burden of the prosecution in criminal cases is to establish its case beyond reasonable doubt.[13] The question that follows is whether the prosecution in this case established its case beyond reasonable doubt.

Thus, ingredients of the offences facing the accused were; **(a)** proof of possession, **(b)** proof that the items in question were game trophies, **(c)** evidence that the appellant was dealing in game trophies

without a dealer's licence, and **(d)** failure to make a report to an authorized officer.

In my view, possession includes two elements; namely being in physical control of the item and knowledge of having the item. To be guilty of possession, an accused person must be shown to have knowledge of two things, namely, that the accused knew the item was in his custody and secondly he knew that the item in question was prohibited. A person has possession of something if the person knows of its presence and has physical control of it, or has the power and intention to control it. The evidence adduced is that the appellant pulled a sack from under the seat and removed the tusks and quoted the price of Ksh.3,000/= per kg. The witnesses were acting on information he was selling the items and upon introducing themselves he availed the items and discussion on the price ensued. I am persuaded that possession was proved to the required standard because the appellant pulled the sack containing the tusks from under the seat in a manner that suggested he had custody and control of the same.

**PW5** confirmed that he examined the items and confirmed that they were ivory, from three different elephants. Elephant tusks are trophies within the definition in section **39** of the Act. There is nothing on record to rebut this evidence.

The next question is whether the appellant was a dealer within the definition in the Act. **Dealer** is defined in the Act as "*any person who, in the ordinary course of business or trade carried on by him, whether on his own behalf or on behalf of any other person, Sells, purchases, barters nor otherwise in any manner deals with any trophy.* The evidence adduced was that he removed the tusks and asked for **Ksh. 3,000/=** per kg. The total quoted price was **Ksh.15,000/=** and indeed he was arrested as he was selling. To me, the act of selling was proved and to that extent the ingredient of dealing was established to the required standard. The key test here is that he did not have the licence to possess or to deal with the tusks nor did he report to an authorized officer as the law required.

I find the learned Magistrate properly addressed her mind to the law and the evidence and arrived at the right conclusions and that none of the witnesses was an accomplice. To my mind an accomplice is a person who knowingly, voluntarily, and with intent unites with the principal in the commission of a crime. One who is in some way concerned or associated in commission of crime; partaker of guilt; one who aids or assists, or is an accessory. One who is guilty of complicity in crime charged, either by being present and aiding or abetting in it, or having advised and encouraged it, though absent from place when it was committed, though mere presence, acquiescence, or silence, in the absence of a duty to act, is not enough, no matter how reprehensible it may be, to constitute one an accomplice. One is liable as an accomplice to the crime of another if he or she gave assistance or encouragement or failed to perform a legal duty to prevent it with the intent thereby to promote or facilitate commission of the crime. An accomplice may or may not be present when the crime I actually committed. The circumstances under which the key prosecution witnesses went to the appellants premises acting on a tip off and how they successfully accomplished there mission are well detailed in the evidence and suitable corroboration clearly emerges as one reads all their evidence. There is nothing in the slightest manner to suggest that any one of the witnesses or all of them were accomplices. I therefore find that ground number three has no basis and the same fails.

With regard to ground number one, I am satisfied that the appellant was an honorary warden of KWS duly appointed under the provisions of Section **4** of the Act. However, the appellant never offered sufficient explanation as to how he came into possession of the ivory, nor did he give evidence to demonstrate that he came into possession of the same in the course of his duty. In any even the appellant admitted in cross-examination that an honorary warden was not an authorized officer within the meaning of the Act, hence ground number two also fails.

With regard to ground number **6,** in my view, whatever is thought to be the purpose of criminal punishment, one fundamental principle seems to have evolved in the jurisprudence of the common law legal tradition; that, before an accused person can be convicted of a crime, his guilt must be proved beyond reasonable doubt. Perhaps the most eloquent statement of reason for this is to be found in the opinion of **Brennan J** in the United States Supreme Court decision in **Re Winship**[14] where the court stated:-

*"The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction……Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned"*

The existence of the principle of proof beyond reasonable doubt is unchallenged in the common law world. In the English common law, it elegantly affirmed by the House of Lords in the celebrated judgement of **Viscount Sankay** in **D.P.P vs Woolmington** cited above. The United States Supreme Court in the above cited case of ***Re Winship*** held that the reasonable doubt rule has constitutional force under the Due Process provisions of the United States Constitution.

Guided by the above authorities, and having evaluated the evidence adduced in the lower court and considering the sworn defence of the appellant, I am satisfied that the prosecution discharged the burden of proof to the required standard. In so concluding I have not only subjected the evidence on record to close scrutiny but also I have also an examined the defence advanced by the accused.

In **Uganda vs. Sebyala & Others**,[15] the learned Judge citing relevant precedents had this to say:-

*"The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts"*

The defence offered did not rebut the clear testimony tendered by the prosecution. I conclude that the said evidence is manifestly adequate to support a conviction and that the learned Magistrate properly arrived at the correct conclusion guided by the evidence. In view of my aforesaid conclusion, ground number **6** fails in that the burden was never shifted to the appellant as alleged.

Learned counsel for the appellant in his submissions raised the issue that the prosecution was conducted by an unqualified prosecutor at the initial stage when **PW1** gave evidence. It should be noted that on 20.8.8.10 a one **Lydia Wamukoya**, a prosecutor gazetted for purposes of cap 376 took over the case, the charge sheet was amended and the appellant was called upon to plead afresh. The said prosecutor conducted the trial up to conclusion. The question that follows is effect of the police prosecutor(s) who appeared before to these proceedings.

I determining the above issue, I find useful guidance in the Court of Appeal decision in the case of **Julius Kamau Mbugua vs Republic**[16] where the Court of Appeal cited with approval the decision of **Emukule J** in **Republic vs David Geoffrey Gitonga**[17] where the learned Judge expressed himself as follows:-

*"I am aware that contrary opinions have been expressed by others in this court. I do not share those views. I hold the considered view that such trial is not a nullity at all. These are my reasons. Firstly, the*

*principle of nullity presupposes that the process of trial is void either because it is against public policy, law, order, or indeed, nullity is non-curable. Secondly, for a trial to be void in law it must be shown either that the offence for which the accused is being tried is non-existent, or that the authority or court seized of the matter has no authority to do so. It is a public policy of all civilized states that offenders be subjected to due process in respect of defined offences, and by competent courts or tribunal. A trial will be a nullity where the offence is non-existent or there is lack of jurisdiction. To say otherwise would be against both public policy and the law, The court will not act against the law nor will it go against public policy"*

In the above cited case, the court was dealing with a serious issue of violation of constitutional rights. In the present case, the issue raised in the prosecution by Police Prosecutors who had been appointed under section **85(1)** of the CPC, before the amendments to the said section to align the section to the requirements of the Constitution of Kenya 2010. I find that no prejudice was occasioned to the appellant, and as was held by **Ondunga J** in **Director of Public Prosecutions vs Samuel Gichuru & another**[18] while dealing with a similar situation, such an irregularity is curable under the provisions of Article **159 {2} {d}** of the Constitution of Kenya 2010. In any vent in my view, even if we were to disregard the evidence of **PW1**, the remaining evidence is still overwhelming against the appellant.

In conclusion in view of my findings enumerated above, I find that the conviction on the three counts was supported by the evidence, hence i uphold the conviction.

On sentence, the learned imposed sentences as follows:-

**Count One:** Fine of Ksh. 10,000/= in default 7 month's jail.

**Count Two:** Fine of Ksh.20,000/= in default 12 months jail.

**Count Three:** Fine Ksh. 10,000/= in default 6 months jail.

Prison sentences to run concurrently.

I have carefully examined the sentences provided under the sections of the law under which the appellant was charged and the provisions of Section **28** of the Penal Code[19]and I am satisfied that the said sentences were lawful and I find no reason to interfere with the same.

The upshot is that the appellants appeal against both conviction and sentence is hereby dismissed.

Right of appeal 14 days

Dated at Nairobi this **21st** day of **October** 2015

**John M. Mativo**

**Judge**

---

[1]Cap 376, Laws of Kenya

[2] Infra note 8

[3] See Pandya vs Republic {1957}EA 336

[4] See Shantilal M. Ruwala vs Republic {1957} EA 570

[5] See Peter vs Sunday Post {1958}EA 424

[6] Shantilal M. Ruwala V. R (1957) E.A. 570

[7] see Peters V. Sunday Post (1958) E.A. 424

[8] Cap 75, Laws of Kenya

[9] {1999}1EA228

[10] {1935} A.C 462 at page 481

[11] See Halsburys' Laws of England, 4th Edition, Volume 17, paragraphs 13 & 14

[12] See Peter Wafula Juma & others vs REPUBLIC High Court Criminal Appeal no. 144 of 2011

[13] See Republic vs Derrick Waswa Kuloba {2005} eKLR

[14] 397 US 358 {1970}, at pages 361-64, see also the more recent elaboration of the rationale of the principle in R VS Oaks 25 D.LR (4TH) 200 {1987} at pp 212-214

[15]{1969} EA 204

[16] {2010} eKLR

[17] {Criminal Case No. 79 of 2006, Meru

[18] {2012}eKLR

[19]Cap 63, Laws of Kenya