

REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT AT MOMBASA

CRIMINAL CASE NO. 2511 OF 2016

REPUBLIC PROSECUTION

VERSUS

EPHANTUS GITONGA MBARE ACCUSED

JUDGMENT

The accused person Ephantus Gitonga Mbare is charged as follows:-

COUNT I: Operating as a Trophy Dealer without a licence issued by the Wildlife Service contrary to Section 84(1) as read with Section 92 of the Wildlife Conservation and Management Act No. 47 of 2013.

Particulars: On diverse dates between 6th day of October 2016 and 21st day of December, 2016 between Malaba border and the port of Mombasa, jointly with others not before court operated as a trophy dealer with 335 pieces of ivory weighing 1097.75 kgs. Staffed in 2x20 containers numbers HMCU 305344 and EMCU 3946508 valued at Kshs. 109, 775,000/= for exportation to Cambodia, without a licence issued by the Wildlife Service.

Alternative Charge to COUNT I: Dealing with Wildlife Trophies without permit issued under the Wildlife Service contrary to Section 95 of the Wildlife Conservation and Management Act No. 47 of 2013.

Particulars: On diverse dates between 6th October, 2016 and 21st day of December, 2016 between Malaba border and the port of Mombasa, jointly with others not before court was found dealing in 335 pieces of ivory weighing

1097.75kgs stuffed in 2x20 containers numbers HMCU 305344 and EMCU 3946508 valued at Kshs. 109, 775,000/= for exportation to Cambodia without a permit issued by the Wildlife Service.

COUNT 2: Transmitting documents likely to be useful to a person committing a serious crime, contrary to Section 3(j) as read with Section 4(i) of the Prevention of Organized Crime Act No 6 of 2010.

Particulars: On diverse dates between 6th day of October and 21st day of December between Malaba border and the port of Mombasa, jointly with others not before court transmitted documents to be used in the commission of a serious crime, namely operating as a trophy dealer without licence issued by Wildlife Service, to Kenya Revenue Authority at export office Kilindini port of Mombasa.

During the trial the prosecution called twelve (12) witnesses to prove the charges against the accused persons.

PW1 Amran Abdesalam told the court he is employed by Gulf Badr which is an agent of shipping lines among them Evergreen Limited. He testified that in June 2016 they had one of their regular client Isipina Limited based in Kampala, Uganda which wanted to do a shipment of timber through the port of Mombasa. The timber was loaded in two containers Numbers EMCU 3946508 and HMCU 3053447.

The containers were destined to Cambodia. While these containers were in the high seas, others containers shipped by evergreen Limited were discovered in Vietnam stuffed with ivory. This prompted PW1 to report the matters to the port police and KRA advised that the two containers be returned to the port of Mombasa for verification. Upon verification the two containers were discovered to have ivory pieces concealed in the timber.

In cross -examination he told the court that the shipper of the two containers was Ispina Limited of Uganda. The consignee was Contrinse Co. Limited. He further said that the containers were sealed in in Uganda before being transported to Mombasa port. He also confirmed that when the containers arrived at port of Mombasa. Thee seals were intact. He further told the court that a clearing agent only deals with documentation.

PW2 Vyonne Ngutu waving a clerical Assistant with KPA, Export Department. His duties were to take container numbers and put them in their list. She said she took the numbers are the two containers herein EMCU 3946508 and HMCU 3053447.

In cross- examination she confirmed that the containers were from Kampala, Uganda.

PW3 Isaac Njiru Njoka is an employee of Kenya Revenue Authority based at Kilindini port cargo scanning unit. Among his duties is to subject the containers at the port to scanning to verify the cargo in the containers with the declaration made in the documents presented by the shippers.

He told the court that on 16/12/2016 two containers were escorted by the police to the scanner and he was required to scan the same. They were containers Number EMCU 3946502 and HMCU 3453447. He scanned the same had an image was generated. It was a homogenous image with slightly dense area. They suspected concealment and recommended for 100% verification. He said the verification was done but he was not part of it. He produced the generated images as P exhibit 7 (a) and p exhibit – 7(b).

PW4 Durstan Majaja is an employee of Kenya Revenue Authority. He told the court that on 21/10/2016 they received information about a consignment of which had been intercepted by the Vietinum authorities. It was a container which was

loaded with Teak timber with ivory pieces concealed in it. This prompted them to profile all consignments, of Teak logs.

On 22/10/2016 they started verifying 12 containers. The verification was done by a team of multi-agency from KPA, KRA, KWS, KFS, CID Interpol and EACC. During the exercise they arrested a clerk from Quicklime International Limited, a clearing agency firm.

The verification exercise which started on 27/10/2016 went through to the month of December. During that period they received information that some two containers had been loaded and were enroute to Vietnam. The Authority in charge of Investigations wrote to the shipping line concerned to return the containers to port of Mombasa.

They were containers Numbers EMCU 3946508 and HMCU 3053447. The containers were duly returned to Mombasa. They arrived on 5/12/2016 and taken to port police. The documentation of the said containers had difference between the customs entry and the shipping orders. The custom entry indicated Lukisa Limited of Tort South Sudan as the consigner/Exporter while the shipping orders indicated the exporter as Isipina Trading Company Limited of Kampala Uganda. He said the containers were verified but at the time of verification he was not present.

In cross examination he told the court that Quicklime International Limited were only clearing agent and not the owners of the Consignments.

PW5 Eric Robert Mwaniki I also an employee of Kenya Revenue Authority curtailed to investigations and Enforcement Department. He was nominated by his supervisor to represent Kenya Revenue Authority in a verification exercise of some two containers which were lying at Kilindini Police yard. He witnessed the breaking of the seals. The containers were opened and suspected pieces of ivory

were found concealed in side teak Logs. He signed the verification attendance sheet.

In cross examination he told the court that the containers were sealed by the exporter. He also stated that he did not know the owners of the said containers and who stuffed them with pieces of ivory.

PW6 Bonny Kipkirui Chepkwony also an employee of Kenya Revenue Authority attached at Malaba border control. He told the court that on 7/10/22016 while on duty a clearing agent from Quicklime International Limited presented documentation to him for clearance of two containers which were transported via railway line.

He was to physically confirm what was indicated in the declaration form. The doors of the containers were loaded facing each other. He could not confirm the seal numbers.

He could only confirm from the declaration form C17 that the containers contained Teak beams and that it was indicated that they were from South Sudan headed to India. The exporter was Lukisa Limited, Torit South Sudan.

After seeing the containers he prepared an online report. He produced the same as p exhibit 8(b).

PW7 Vincent Mwaba is a Forest Ranger working with Kenya Forest Services. He is charged with issuing forest produce movement permits.

On 6/10/2016 he received a custom declarations form C17 in respect of two containers which indicated that the containers were loaded with teak beams destined to India via Mombasa port.

C17 showed that the consignment was from South Sudan. He issued forest produce movement permit. He produced the same as p exhibit 12.

In cross examination he told the court that he received C17 from Kenya Revenue Authority. He also confirmed that they do not open the containers for physical verification of the contents.

PW8 Stephen Ochieng Ondieki works for Kenya Revenue Authority as documentation officer. His duty is to check documents for the export cargo and once he confirms they are in order he prepares export certificate. He said on 14/10/2016 he received customs entry form shipping order and C17 B an export document. After confirming from the online report that the documents were in order, he issued export certificate which he produced as p exhibit 10 (b). He confirmed that they do not open the containers for physical verification of the contents.

In cross examination he said custom entry form C17 is prepared at port of entry.

Regarding this matter the same was prepared at Malaba border.

PW9 Dr. Ogeto Mwebi works for National Museum of Kenya as Senior Research Scientist having specialized in arrival remains analysis. He was in the team of Multi-agency which verified the containers at the Kilindini port which contained the pieces of ivory.

His duty was to examine the alleged pieces of elephant tusks. Using morphological techniques based on sectional observation using microscopic lenses he concluded that the 35 pieces were elephant tusks. He estimated that they had come from 25 elephants. He prepared a report which he produced as p. exhibit -14.

PW10 Dr. Moses Otieno is the Head of Forensic and Genetic Lab at Kenya Wildlife Services. He produced a Forensic DNA Report of ivory which was

prepared by Professor Samuel Wessel of University of Washington. He said he took 17 samples of the ivory, repackaged them and send them to Professor Samuel Wessel who is currently in Seattle in USA.

DNA was extracted from the sample and matched with the African map. From the report prepared by Professor Samuel Wessel it was confirmed the ivory was for elephants from Central Tanzania and a few of them about 5% from Uganda. The report was produced as p exhibit 15.

PW11 Daniel Hamisi is a data analyst with Safaricom Limited. He was required by DCIO Kilindini port police to process data for telephone Account number 0706572399 for both incoming and outgoing calls from the period between 3/10/2016 and 20/10/2016. He noted that the Account Number 07666 572 399 is registered in the name of Ephantus Mbare of identity card number 11169088. He noted that there was communication between the requested number and telephone number +256-704461848 and the initiator of the communication was the owner of telephone number 0706572399.

He said he could not get the subscriber of the telephone number +256704461848 because it is from a different service provider.

He however did not provide the transcript to confirm the conversation.

PW12 Sgt. Cosmas Nyongesa is attached to DCI Kilindini port. He told the court that on 20/12/2016 he was assigned duty of joining the multi-agency team which was carrying out physical verification of two containers seized by KRA being container No. EMCU 3946508 and HMCU 3053447. The two containers contained wooden beams which were identified as having been stuffed with wildlife trophies.

He told the court that the wooden beams had a thin sheet of wood placed on the top supported by screws and rails.

When the top sheet was recovered there were pieces of ivory which had been mixed with white powdery material. In both containers they recovered 335 pieces of ivory weighing 1097.75kgs. with estimated street value of Kshs. 109, 775,000/=

From the record he obtained from KPA and KRA he established that the exporter of the containers was Isipina Trading Co. Limited of Uganda and the Importer was Comtrasit Imports Limited of Cambodia. The shipping line was Evergreen Limited and the clearing agent was Quicklime International Limited.

The clearing agent was summoned and his statement recorded under inquiry. PW12 went ahead and told the court that he decided to charge the accused herein because he was presumed to be the owner of the consignment in accordance to East African Community Customs Management Act. He also confiscated some documents which the accused had.

In the course of his investigations he found that the documents were falsified in Uganda by a clearing agent company called Chie ways Limited.

PW12 further told the court that he also requested call data of the accused person

From Safaricom Limited who produced the same. It indicated that the accused was in constant communication with the transporter via mobile Number 4256704461848.

The accused in his sworn statement told the court that he works for Quicklime International Limited a clearing and forwarding company where he is also one of the directors. The other directors he told the court are Samuel Mutengi, and Robert Ssemanga.

He confirmed that the company handled the two containers in question which were handled over to them for clearing by Robert Ssemanga who is stationed in Uganda.

He said the containers were from Sudan via Uganda on transit through Malaba border. At Malaba border, he told the court that their clerk generated T 1 which is a clearance documents issued by Uganda Revenue authority. The T1 documents indicated that the containers were loaded with logs from Sudan to India.

He further told the court that the containers were sealed at the point of origin. He also told the court that where the consignment is a forest produce, Kenya Forest services must issue movement permit which is applied by the Kenya Revenue Authority after payment of the requested fees.

He further told the court that once the containers arrive in Mombasa they are handed over to Kenya Ports Authority which in turn hands then to Kenya Revenue Authority for clearance purposes. He said he had no idea whether the containers were scanned as required. He was also not involved in verification exercise.

He concluded his defence by stating that he was called by Kenya Revenue Authority and DCI. Officers to record statement which he duly complied. He was thereafter arrested and charged. He denied preparing any documents in respect of the two containers adduced by the prosecution and the defence case. She submitted that pursuant to Sections 84(1), 92 and 95 of the Wildlife Conservation and Management Act or the charges to be proved, the prosecution must prove the element of possession. She further submitted that Sections 84(1) and Section 95 of the Act only outlaws operation as a trophy dealer without license or permit.

She cited the case of FEISAL SHAHBAL VS REPUBLIC CRIMINAL APPEAL No. 87 OF 2016.

On the charges in Count II she submitted that Section 3(j) of the prevention of Organized Crime Act No. 67 of 2010 outlaws possession or transmission of a document involving organized criminal group and the evidence adduced herein did not prove the charges beyond reasonable doubt.

She further submitted that the evidence adduced by the prosecution was largely circumstantial and does not meet the threshold to warrant a conviction. She cited the case of REPUBLIC VS KIPKERING ARAP KOSKE & ANOTHER 16 EACA 135.

She concluded by submitting that the prosecution has not proved the charges beyond reasonable doubt because (i) there is no direct evidence of possession of the containers, (ii) the accused did not load the containers in question (iii) the accused was not parry of the organized criminal group (iv) One of the documents relied upon by the prosecution bore the name or signature of the accused.

The prosecution did not make any submissions.

I have carefully assessed and considered the evidence adduced by the prosecution and the accused defence. I have also considered the submissions by the defence Counsel.

In Count I the accused is charged for operating as a trophy dealer without licensee issued by Wildlife Service contrary to Section 84(1) as read with Section 92 of the Wildlife Conservation and Management Act 2013.

Section 84(1) of the Act which creates the offence provides:-

“No person shall operate as trophy dealer without a license issued by the service.”

In the alternative charge the accused id charged with dealing in Wildlife trophies without a permit issued by the Wildlife Service contrary to Section 95 of the Wildlife Conservation and Management Act 2013. Section 95 of the Act provides:-

“Any person who keeps or is found in possession of a wildlife trophy or deals in wildlife trophy or manufactures any item from a trophy without a permit issued under this Act commits an offence

In the above charges, the essential ingredients which the prosecution must prove are:-

- i) ***Proof of possession***
- ii) ***Proof of that the said items were trophies***
- iii) ***Proof that the accused was dealing in the trophies without a license or permit.***

Possession is defined under Section 44 of the Penal Code as:-

“4(a) 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 a place whether belonging to or occupied by oneself or not for the use or benefit of oneself or of any other person.”

In the case of PETER MWANGI KARIUKI VS REPUBLIC CR APPEAL NO. 52 OF 2012 the Court stated that:-

“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, that the accused knew the item was in his custody and secondly knew that the item in question was prohibited.”

On the question of whether the accused was dealing with the trophies without a licence or permit, a dealer as defined in Section 2 of 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, barter or otherwise in any manner deals with any trophy;
- or

- b) Cuts, curves, polishes, preserves, clears, mounts or otherwise prepares any trophy; or
- c) Transports or conveys any trophy.”

Having set out what possession is and what entails dealing in trophies, I now consider the evidence adduced to determine whether the prosecution has proved the essential ingredients, I have set out herein above.

On whether the 335 pieces of suspected ivory were trophies, evidence was adduced by PW9 Dr. Ogeto that he examined the suspected elephant ivory and conclude that they are unprocessed elephant ivory from at least 25 elephants. They are therefore indeed wildlife trophies from which the accused required dealers license tor permit.

On the question of possession, the evidence adduced by prosecution is that the accused was a clearing agent of the two containers which were found staffed with the elephant ivory. The accused and did not deny being the clearing agent. His position is that he did not know whether the contents contained wildlife trophies. Indeed the investigating officer in his evidence in chief states-

“ a clearing agent could not have known what was in the containers unless via communication. The accused communicated with the transporter

True from the evidence of PW11 Daniel Hamisi who provided call data in respect of the accused mobile number 0706572399 found that the accused was on constant communication with the subscriber of mobile telephone number +256-704-461-848. However, the said call data did not have the contents of the transcript of the conversation.

It is therefore unsafe to speculate that the conversation between the accused and the subscriber of telephone number 2567044461848 was really in respect of the contents of the containers herein.

Further PW12 the investigating officer in the course of his evidence in chief he stated –

“ Since the clearing agent was presumed to be the owner of the consignment according to East African Customs Management Act he was charged ...”

It was wrong for the investigator to presume that the accused was the owner when he had tendered evidence to show that the shipper of the containers was a company called Ispina Trading Company of Kampala whose directors was provided for by Ugandan authorities.

In cross examination PW12 again testified that the clearing agent had no authority to open the containers to verify the contents. The clearing agent only relied on the documents supplied by the shipper.

Such documents were presented and approved by Kenya Revenue Authority.

From the totality of the evidence it is impossible to conclude that the accused had knowledge of the contents off the containers. It therefore could not have dealt with trophies without license or permit as alleged by the prosecution.

The accused faces a further charge of transmitting documents likely to be useful to a person committing serious crime contrary to Section 3(j) as read with Section 4(1) of the prevention of organized crime Act No. 66 of 2010.

Section 3(j) of the Act prohibits possession, collection making or transmitting a document or record likely to be useful to person committing or preparing to commit a serious crime involving an organized criminal group.

From the evidence adduced, it is not in dispute that the accused is the one through his company Quickine International Limited who presented the clearance documents to Kenya Revenue Authority in respect of the two containers.

The question to be answered is whether the accused knew that he said documents were to be used in committing or preparing to commit a serious crime of operating trophy dealer without licence. The accused was a clearing agent. He received the documents from the shipper.

As I have stated, the accused relied on the documents to clear the containers. He could not have known that the contents of the containers were trophies. The prosecution did not adduced evidence that there was conspiracy between the accused and persons named in the documents.

Indeed, this is what PW12 the investigating officer stated in examination in chief:

“ The accused person may have been innocent because e he generated the Kenyan custom entry documents from the Ugandan customs entry which had already been falsified.”

From the a foregoing, I find that the charge in Count II have not been proved as required.

What I have gathered from these proceedings is that transnational organized crime like trafficking on wildlife trophies is a charging and flexible phenomenon with the many benefits of globalization such as easier and faster communication, opportunities have been created for the organized criminal groups to flourish, diversify and expand their activities. This calls for concerted efforts by the community of states to combat it as it has global effects.

In the instant case the investigating officer was able to unravel the owners/shippers of the ivory consignment as Ispina Trading company of Uganda

whose directors are Isiyepo O. William, Aernge Peninah and Isyepo Joseph. He engaged the Interpol and also requested for office of Director of public prosecution to seek mutual assistance in bringing the real culprits to justice. However, it is not clear whether the investigating officer got any cooperation on the part of the Ugandan authorities.

It is unfortunate that the real culprits were not brought before the court.

The accused herein was a mere pawn in the ring of the criminal group.

In the circumstances I hold that the prosecution has not proved the charges against the accused person beyond reasonable doubt and the accused person is acquitted under Section 215 of the Criminal Procedure Code and is set at liberty unless lawfully held.

Delivered signed by me in open court in presence of Okumu for Accused present, Maina for state present, Court Assistant Wesonga this 25th April, 2019.

F. KYAMBIA

SENIOR PRINCIPAL MAGISTRATE

