



'Not Reportable'

CASE NO.: CA 18/2012

IN THE HIGH COURT OF NAMIBIA

In the matter between:

PATRICK KAYEMBE

Appellant

and

THE STATE

Respondent

CORAM: PARKER, J *et* MILLER, AJ

Heard on: 2012 July 9

Delivered on (*ex tempore*): 2012 July 9

APPEAL JUDGMENT

PARKER J: [1] In this appeal the respondent, represented by Mr Eixab, concedes that the conviction of the appellant on counts 1 and 4 in the trial court cannot be sustained. We accept the concession. We, therefore, consider this appeal in respect of count 2 only. We have considered the record of proceedings in the trial court against the backdrop of counsel's arguments. The appellant is represented by Mr Namandje.

[2] We find that the explanation given by the appellant on how he came into possession of the raw ivory which is the subject matter of count 2 may be reasonably possibly true; nevertheless, our view is that the appellant, as Mr Eixab appears to say, should have done more in the circumstances to clearly dissociate himself from the raw ivory found in his possession. Thus, on his own version, we find that the appellant contravened s. 2(1)(a), read with s. 1 of Proclamation AG 42 of 1980 (as amended). In this regard, it is our view that there might have been misdirections on the part of the learned trial magistrate and there might have been irregularities in the proceedings but we hold that, on the totality of the evidence, none of them could, taken separately or cumulatively, have prejudiced the appellant to the extent that we can say that there has been a failure of justice. It follows that the conviction of the appellant on count 2 should be confirmed.

[3] We pass to consider sentence. In view of what we have said previously respecting the irregularities and misdirection that might have occurred, we think this aspect while it cannot affect the conviction of the appellant, as we have said, it should go in the appellant's favour with regard to sentence. We have also take into consideration the fact that the section of the Proclamation does not prescribe a degree of punishment in relation to the value of the raw ivory involved. We have also taken into account the fact that the appellant has already served a sentence of some 13 months.

[4] Having taken all these into account we conclude that it would meet the justice of the case if this Court interfered with the sentence imposed by the learned trial magistrate; as we do.

[5] In the result, we make the following orders:

- (1) The conviction and sentence on counts 1 and 4 are set aside.
- (2) The conviction on count 2 is upheld.
- (3) The sentence on count 2 is set aside and is substituted with the following:
 - (a) Two years imprisonment, of which one year is suspended for five years on condition that the appellant is not convicted of the offence of contravening s. 2(1)(a), read with s. 1, of Proclamation AG 42 of 1980 (as amended), committed during the period of suspension.
 - (b) The sentence in (a) is backdated to 23 May 2011.

PARKER, J

I agree.

MILLER, AJ

COUNSEL ON BEHALF OF THE APPELLANT: Mr S Namandje

Instructed by: Sisa Namandje & Co. Inc.

COUNSEL ON BEHALF OF THE RESPONDENT: Mr J E Eixab

Instructed by: The Office of the Prosecutor-
General