

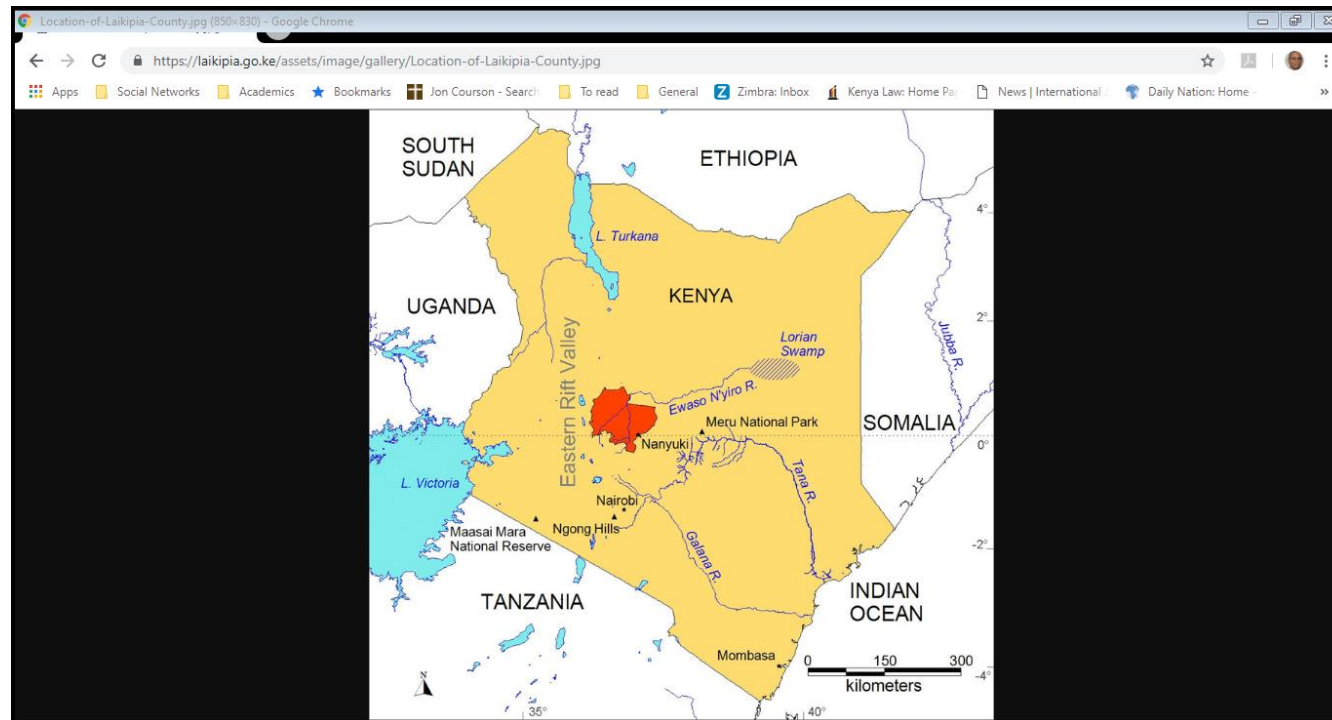


# CHALLENGES AND LESSONS

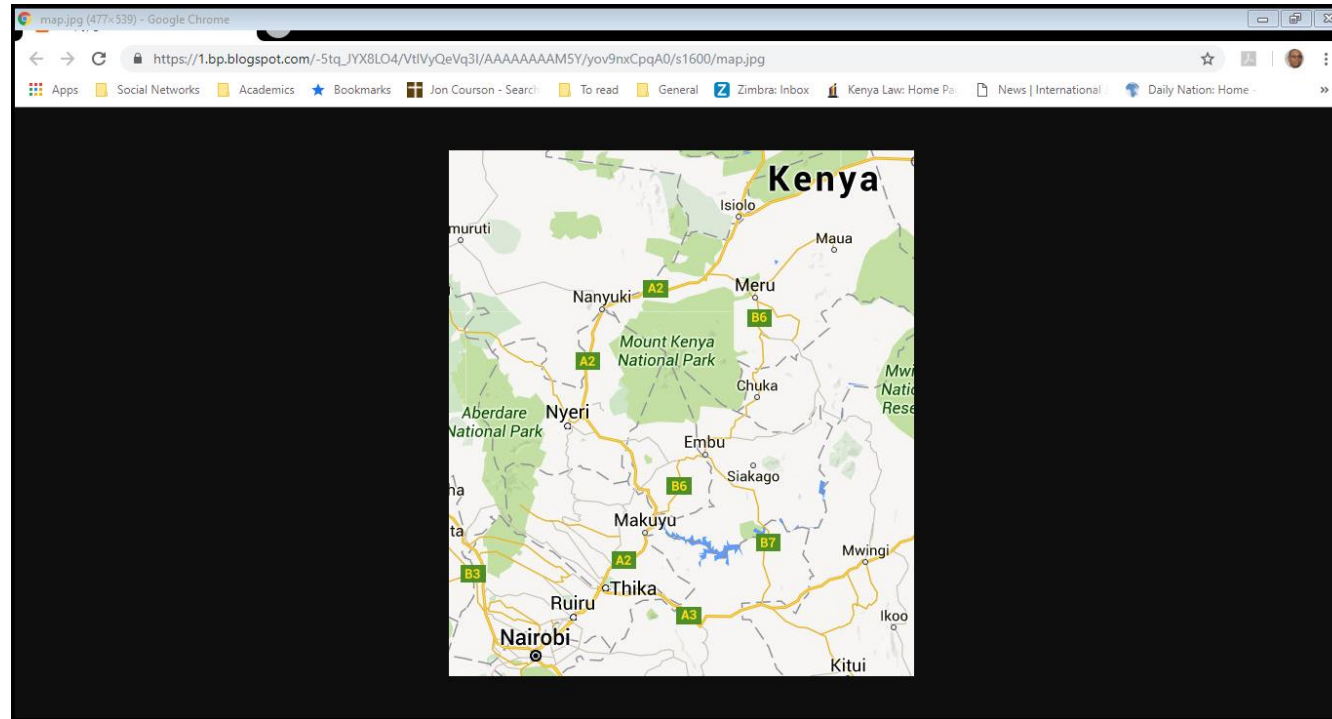
WILDLIFE CASES IN KENYA

PRESENTED AT THE GREAT LAKES JUDICIAL COOPERATION NETWORK ON 12<sup>TH</sup>  
NOVEMBER 2018

# NANYUKI CASE STUDY: NANYUKI GEOGRAPHY



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- ▶ Mount Kenya National Park with an area of 715 square kilometres.
- ▶ The **Oi Pejeta Conservancy** is a 90,000-acre (360 km<sup>2</sup>) wildlife conservancy.
- ▶ Further on towards Meru –Isiolo areas is the Lewa Conservancy incorporating the Ngare Ndare Forest and covering over 62,000 acres (250 km<sup>2</sup>).

# NANYUKI CASE STUDY: THE FOOT SOLDIERS

- ▶ Arrests often involve the foot soldiers, those working as drivers transporting wildlife trophies, loaders, transporters, hunters and does not end up with the arrest of the Kingpins.
- ▶ Once prosecution commences and there is a conviction, it is considered a victory even in the absence of the main Kingpins being sort after.
- ▶ Since investigations may end at the arrest of those found with wildlife trophies, there is little emphasis on following the money or extending the investigations to other areas.
- ▶ Thus the link is broken and is not visible.
- ▶ What you get is multiple cases of the workers of the Kingpins and they are able to finance the cases and their operations continue.

# NANYUKI CASE STUDY: PHOTO OF FOOTSOLDIER



The image is a screenshot of a Twitter post from the official account of the Directorate of Criminal Investigations (DCI) in Kenya. The tweet, posted by @DCI\_Kenya, reports the arrest of a 43-year-old man named James Muriuki in Isiolo Town. The man is accused of poaching and is currently in custody for possession of 12 kilograms of elephant tusks. The tweet includes a photograph of the suspect, James Muriuki, who is holding a white placard with his name and identification number written on it. To the left of the man in the photo, there are several large, curved pieces of elephant tusk. The tweet also features the hashtag #StopPoaching and mentions the DCI and Kenya Wildlife Service (@kwkenya).

DCI KENYA on Twitter: #Poaching|Mr.James Muriuki aged 43 years was arrested yesterday in Isiolo Town by @DCI\_Kenya Detectives and @kwkenya officers for being in possession of Elephant Tusks weighing 12 Kilograms. The suspe...

https://twitter.com/DCI\_Kenya/status/1060474256419631104

DCI KENYA @DCI\_Kenya

#Poaching|Mr.James Muriuki aged 43 years was arrested yesterday in Isiolo Town by @DCI\_Kenya Detectives and @kwkenya officers for being in possession of Elephant Tusks weighing 12 Kilograms. The suspect is currently in lawful custody awaiting arraignment in court. #StopPoaching.



James Muriuki (Suspect)  
122078304

# NANYUKI CASE STUDY: THE NEW CASH COWS

- ▶ There is an increase of sandal wood cases in Nanyuki.
- ▶ Possession of python skin, zebra skin, live baboon.
- ▶ There is need to interrogate whether there is any linkage between the wildlife cases and the forest cases related to indigenous species.

# NANYUKI CASE STUDY: IDENTIFICATION EVIDENCE

- ▶ Courts have laid emphasis that identification evidence should place the accused persons to the commission of the crime.
- ▶ The witnesses ought to record their statements describing the accused persons or how they were able to identify them, the time of day/night and what aided the identification. Nanyuki team have tried cases in which the warden were unable to identify those they had arrested in court when called as witnesses. See Criminal case no. 320 of 2016 Nanyuki CM court.



# NANYUKI CASE STUDY: RELATED CRIMES

- ▶ Forest Related Offences e.g logging
- ▶ Firearms Possession
- ▶ Possession and transportation of bulk cash

# NANYUKI CASE STUDY: COLLABORATIONS

- ▶ NGOs such as Space Giants come to court to observe the proceedings and act as court monitors. They do not however engage in active court proceedings. There could be a case made that they can be more involved in the complex cases and give information on the impact of the offences to the communities.
- ▶ There is need for more collaborations among agencies in wildlife cases especially in the arrests that don't attract attention. The collaborations should go beyond the arresting of those found in possession of wildlife trophies and focus on the economic aspects such as taxes and seizer of unexplained wealth.
- ▶ There is need to adopt surveillance as an investigative tool.
- ▶ There is use of intelligence sources leading to arrest but there is failure in tying the accused persons often in possession, to the financiers of the crime/beneficiaries.

# NANYUKI CASE STUDY: TEETHING CHALLENGES

- ▶ Limitation of number of staff and scope of area to cover leads to non-appearance of officers during the hearings leading to adjournments.
- ▶ This also affects the scope in which the investigations can take such as investigating the destination of the wildlife trophies and the dealings of the employers of the workers found in possession of the trophies.
- ▶ Where there are limited staff there is high dependency of general service police officers who may not understand wildlife offences e.g such as its impact on the economy or relation to other offences and thereby treat them as less important offences to what they may be used to such as murder.
- ▶ Misunderstanding on what charges to lay may arise between the KWS officers and the police officers which may lead to variance of the evidence in support of the charges.

# NANYUKI CASE STUDY: CRIMINAL CASE NO. 320 OF 2016, REUBEN MARETE & OTHRs

- ▶ R vs. Reuben Kaimenyi Marete & 8 others was before the Chief Magistrate Nanyuki.
- ▶ The accused persons were charged with being possession of endangered tree species contrary to section 95 of WMCA as rread with section 105 of WMCA 2013.
- ▶ The accused persons had been found in possession of 4 tonnes of sandal wood valued at 4 million which was hidden beneath wheat bran in a Lorry.
- ▶ The accused were arrested at a road block transporting the sandal wood at night.

# NANYUKI CASE STUDY: CRIMINAL CASE NO. 320 OF 2016, REUBEN MARETE & OTHRs

- ▶ Two motor vehicles were impounded. The lorry which was transporting the sandal wood and an escort vehicle that was ahead of the Lorry.
- ▶ Identification problems arose during the hearing of the case as the arresting officers could not tell which of the accused were in the escort vehicle and who were in the Lorry.
- ▶ There was no evidence linking the escort vehicle with the Lorry carrying the sandal wood.
- ▶ Only the driver of the Lorry and the tout could be linked to the Lorry carrying the sandal wood.
- ▶ The defence of the other accused persons convinced the court and they were acquitted. The 1<sup>st</sup>, 4<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> accused claimed they were taking one of the prosecuting witnesses to hospital. The 5<sup>th</sup>, 6<sup>th</sup> and 10<sup>th</sup> accused had claimed they were walking home when they were arrested.

# ENDANGERED SPECIES: SECTION 92

## WMCA

- ▶ Section 92 of the Wildlife Conservation and Management Act, 2013 provides as follows:
- ▶ **“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.”**

# SECTION 92 WMCA: AMBIGUOUS

- ▶ **Zhang Chunsheng v. Republic: Nairobi High Court Criminal Revision No. 9 of 2014** (unreported) where Mbogholi, J. stated as follows regarding section 92 of the Wildlife Conservation and Management Act, 2013:
- ▶ **“The nature and types of the offences contemplated under this section have not been expressly set out...Section 92 of the Act, to say the least, is ambiguous.”**
- ▶ **“The Act should have set out the offences relating to those species so that the investigators, prosecutors, accused and courts are clear of what they are dealing with”**

# IMPACT OF ZHANG CASE

- ▶ *In Criminal Case No. 76 of 2014 of the Senior Principal Magistrate's Court at Voi, **MUTISYA KIEMA** was charged together with another person, **KISONZO NZAU** with two counts of offences under the Wildlife Conservation and Management Act, 2013. The first count was the offence of being in possession of wildlife trophy contrary to section 95 as read with Section 92 of the Wildlife Conservation and Management Act , 2013.*
- ▶ The second count was the offence of being in possession of hunting apparatus contrary to Section 102 (1) (f) of the Wildlife Conservation and Management Act, 2013.
- ▶ Accused pleaded guilty to both counts.



# MUTISYA KIEMA APPEAL

- ▶ Mutisya Kiema appealed on Mitigation grounds and did not challenge conviction and sentence in his, **CRIMINAL APPEAL NO. 7 OF 2014 arising from the above case: Mutisya Kiema v Republic [2014] eKLR.**
- ▶ However the Appellate court still considered the case afresh being a 1<sup>st</sup> appellate court. It held: The count quoting section 92 of WMCA cannot be upheld as per the Zhang case. Instead the court convicted him of section 95 of WMCA.
- ▶ The court quashed the conviction under section 102 (1) (f) as it failed to state in the count that the area in which he was found in possession of ...**“hunting apparatus namely 2 bows, 4 poisoned arrows, a piece of poison bite, 1 axe, 2 knives and 43 wire snares”** was a protected area as defined by WMCA.

# Common Charges Preferred

## **Section 84. Dealing in trophies**

- ▶ (1) No person shall operate as a trophy dealer without a license issued by the Service.

## **Section 95. Offences relating to trophies and trophy dealing**

- ▶ Any person who keeps or is found in possession of a wildlife trophy or deals in a wildlife trophy, or manufactures any item from a trophy without a permit issued under this Act or exempted in accordance with any other provision of this Act, commits an offence and shall be liable upon conviction to a fine of not less than one million shillings or imprisonment for a term of not less than five years or to both such imprisonment and fine.

# Common Charges Preferred

## Section 102. Breach of protected area regulations

- ▶ (1) Any person who—
- ▶ (a) enters or resides in a national park or reserve otherwise than under licence, permit or in the course of his duty as authorized officer or a person lawfully employed in the park or reserve, as the case may be;...
- ▶ (f) conveys into a protected area or is found within a protected area in possession of any firearm, ammunition, arrow, spear, snare, trap or similar device without authorization;
- ▶ commits an offence and is liable on conviction to a fine of not less than two hundred thousand shillings or to imprisonment of not less than two years or to both such fine and imprisonment.

# Proving Possession of Wildlife Trophies

- ▶ **Evodi Ngarkoni Mtei v Republic [2018] eKLR** this was an appeal from a Judgment of Resident Magistrate Court where the accused had been found guilty of being in possession of wildlife trophies of 24 pieces of ivory tusks weighing 30kgs in contravention of the WMCA.
- ▶ The accused person was found with a bag with his accomplice carrying a similar bag which both had ivory tusks.
- ▶ Possession was proved through showing that the accused had control of the trophies and had a common intention to convey the trophies thereby constructive knowledge that they were in possession of the trophies.

# Proving Possession of Wildlife Trophies

- ▶ In **Charles Mbaabu Mhuri v Republic [2018] eKLR** had appealed against their conviction for possession of wildlife trophies namely four pieces of elephant tusks weighing 16kg in a Toyota Premio registration number KAW 421 M, white in colour with a street value of Kshs 1.6 million without permit.
- ▶ The prosecution failed to prove possession as there was no evidence linking the accused with the trophies found in the car. The court held:

“ It was not clear who among the arrested suspects was in actual possession of the game trophies and whether in fact any of them indeed had knowledge that they were at the place where they were found. The element of constructive possession could not in the circumstances arise for the simple reason that the spot and the manner in which the trophies were found and recovered was uncertain and there was nothing to credibly suggest that the persons found at the material premise including the appellant had the necessary knowledge of the existence of the trophies at that place.”
- ▶ The appellant had claimed that the trophies were in a suitcase in the car and he had no control of the suitcase or the motor vehicle. He was just a passenger.

# WHAT IS POSSESSION: SECTION 4 PENAL CODE

- ▶ 4 (a) be in possession of or to have possession includes having in one's own personal possession but also knowingly having anything in the actual possession custody of any other person or having anything in any place whether belonging to or recapped by oneself or of any other person.
- ▶ (b) if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody of possession it shall be denied and taken to be in the custody and possession of each and all of them.
- ▶ “..... possession would involve an element of control of the thing a person is said to have. It is in effect the act of having and controlling property. The right under which a person can exercise control over something to the exclusion of all others...” **Jean Wanjala Songoi and Patrick Manyola versus Republic Criminal Appeal No 100 of 2014.**

# GAPS

- ▶ What do we do with the owners of the motor vehicles used in the commission of the crime? How do we establish their role?
- ▶ The need to utilize inventories of recovered items by the arresting officers.
- ▶ Rangers evidence/statement should be clear on the role each played and describe the role each accused person played e.g in the case of finding them in the commission of the crime or in the transport motor vehicle.
- ▶ Prosecution and Witnesses to ensure they are able to show possession where applicable by showing that the accused had control and had knowledge or intention of the items recovered. Circumstantial evidence may be used but must be proved.
- ▶ Drafting charges challenge (despite manual): The practice of utilizing section 92 with another count (as read with) in view of Zhang case could it provide grounds of appeal?

# MLA COMMON CHALLENGES 1

## **Language**

The need to have requests and accompanying documents translated in the official languages of the requested state is a major impediment owing to the cost and time involved.

## **Different Legal Regimes**

Common Law and Civil Law Regimes have different methods of gathering evidence. Evidence gathered in one jurisdiction may not be admissible in another.



# MLA COMMON CHALLENGES 2

## **Death Penalty**

States have different penalties for same offences.

Some States decline to offer cooperation if the death penalty is likely to be imposed.

## **None cooperation by some states**

States may decline to render assistance due to real or perceived hostility amongst other factors.

# MLA COMMON CHALLENGES 3

## **Unstable governments**

In cases where there is no stable Government, it is difficult to seek assistance as the same is unlikely to be executed.

## **The requirements for a bilateral treaty**

Some domestic laws make the existence of a treaty a condition precedent to cooperation.

In the absence of a treaty as legal basis, cooperation is declined.

## **Extradition of nationals**

This is one of the restrictions for extradition in some countries which impede extradition.

# MLA COMMON CHALLENGES 4

## **Capacity**

Due to limited human resources.

## **Tipping off**

Upon making a request to another State, the fugitive may be tipped off by unprincipled officers.

## **Long court battles**

Constitutional and Judicial Applications challenging execution of requests for international cooperation including but not limited to extradition and investigations.

## **Porous borders**

THE END

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