

# Process and outcomes of ivory-related trials in Kenya, 2016–2019

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## Abstract

This article reviews the process and outcomes of 247 trials, involving 422 persons accused of possession and dealing in ivory, brought before the Kenyan courts between 2016 and 2019. Data were collected by legal interns who visited courts and studied case records. Ivory-related cases were found across Kenya, especially in Tsavo Conservation Area, Nairobi, and southern coastal areas. Most arrests followed seizures of ivory, with total seizure cases estimated at 6,500 kg. Most arrested persons were Kenyan men who pleaded not guilty to the charges. Except in the case of guilty pleas, concluding the trials was slow: more than half the trials of those who pleaded not guilty in 2016 were still unconcluded by January 2020. There were conviction rates of 88% for those pleading guilty and 68% pleading not guilty. Rates of acquittals and withdrawals were high, considering that in most cases prosecutors only have to prove possession of illegal ivory to obtain a conviction. Most convicted persons were sentenced to a fine, with jail in lieu of non-payment, typically of USD 10,000 and five years respectively, but with considerable variation and inconsistency in sentencing. The results highlight the challenges involved in assessing law enforcement efforts. We suggest doing so using intermediate-scale studies that follow selected cases from arrest to sentencing and, where possible, combined with scientific analysis to determine the provenance of seized ivory. We conclude that continued reforms in the judiciary and further strengthening of the prosecution service are required to achieve justice for wildlife in Kenya.

## Résumé

Dans cet article, nous relatons le déroulement et les résultats de 247 procès, impliquant 422 personnes accusées de possession et de trafic d'ivoire, traduites devant la justice kényane entre 2016 et 2019. Les données ont été collectées par des stagiaires juridiques, qui se sont rendus dans les tribunaux et ont étudié les dossiers. Ces affaires ont été enregistrées à Nairobi, dans les zones côtières méridionales et dans le périmètre de Tsavo Conservation Area. La plupart des arrestations ont eu lieu suite à des saisies d'ivoire, estimées à un total de 6500 kg. Les personnes arrêtées étaient en majorité des hommes kényans qui ont plaidé non coupable. À l'exception des délinquants concernant les accusés ayant plaidé coupable, les procédures ont été longues : plus de la moitié des procès dont les prévenus avaient plaidé non coupable en 2016 n'avaient toujours pas vu leur conclusion en 2020. Le taux de condamnation a atteint 88 % des individus ayant plaidé coupable et 68 % de ceux ayant plaidé non coupable. Le nombre d'abandons des poursuites et d'acquittements a été élevé, bien que dans la majorité des affaires les procureurs pouvaient facilement obtenir une condamnation en apportant des preuves de possession illégale d'ivoire. La plupart des accusés ont écopé d'une amende de 10 000 \$, agrémentée d'une peine de prison de cinq ans en cas de non-paiement, mais l'on observe de grandes disparités et incohérences dans les sentences. Ces résultats soulignent les défis à relever pour la justice kényane en ce qui concerne l'application de la loi. Nous suggérons des études à moyenne échelle des dossiers, depuis l'arrestation jusqu'au jugement, suivie si possible d'une analyse

scientifique afin de déterminer la provenance de l'ivoire saisi. Nos conclusions mettent en évidence le besoin de poursuivre les réformes dans le système judiciaire et de renforcer le ministère public du pays pour rendre justice aux espèces sauvages au Kenya.

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## Introduction

This article provides an overview of cases related to possession and dealing in ivory brought before 45 courts in Kenya between 2016 and 2019. We describe and discuss the geographical distribution, process, and outcomes of the trials, using data derived from studying court records. The data were collected by courtroom monitors as part of the project *Eyes in the Courtroom*, implemented by the Kenyan NGO WildlifeDirect with funding from the Elephant Crisis Fund<sup>1</sup>.

The illegal ivory trade, like trade in other illegal wildlife products, consists of a complex network of interactions linking suppliers, transporters, sellers and consumers (Fukushima et al. 2021, Fig. 1). Trade in ivory is known to be largely controlled by a small number of organized crime syndicates linking suppliers in Africa to traders based in East Asia (UNODC 2020, p 53). Kenya plays multiple roles in this trade both as a source of ivory and as a transit route from other countries, with the port of Mombasa a principal exit point (Weru 2016).

Effective action against the illegal wildlife trade requires a range of complementary and carefully coordinated actions (Hass and Ferreira 2016). Fukushima et al. (2021, Fig. 1) identify “regulation and law enforcement”, alongside “knowledge” and “engagement” as the principal actions required to address the international “illegal and unsustainable wildlife trade”. Law enforcement is itself a multifaceted process, including crime prevention; detection and investigation of crime; and the arrest, prosecution and sanctioning of offenders. Globally, law enforcement efforts focus on the investigation and dismantling of international organized crime cartels. Publications cover ivory shipments, DNA analysis of tusk origin, and trials of “ivory kingpins” (EIA 2017; Morris 2018; Wasser et

al. 2018; Wildlife Justice Commission 2021). From this “top-down” perspective, it is acknowledged that the crime syndicates rely on networks of local accomplices to supply and transport the ivory (Weru 2016; EIA 2017), but few details are available about their operations<sup>2</sup>.

In Kenya, field-based elephant conservation projects typically combine actions to combat poaching and increase incentives to conserve elephants. Examples include those implemented by the [Big Life Foundation](#) in Amboseli, the [Mara Elephant Project](#) in the Masai Mara, and the [David Sheldrick Foundation](#) in the Tsavo Conservation Area. Such projects rely on cooperation between the government’s Kenya Wildlife Service (KWS) and NGOs with a presence in private and community managed landscapes. The success of these efforts is often measured by amounts of ivory seized and numbers of arrests. Similarly, in a literature review, Kurland et al. (2017, p. 7) find that “the large majority of this research [on law enforcement] relates to patrolling effort and ... *strengthening formal surveillance*.”

In these local settings, less attention is paid to what happens next: whether arrested persons come to trial and the outcomes of trials that take place. Being arrested is no deterrent to commercial poaching or trafficking if the accused person knows there is a good chance of protection and acquittal. Across Africa, reports abound of individual cases which suggest that this is indeed the case; however, there are few if any studies that quantify the scale and seriousness of the problem. This article contributes towards filling this knowledge gap. We also highlight the potential of study of these cases to contribute to “bottom-up” investigation of the lower echelons of ivory trafficking cartels.

The inadequacy of court records is often the first hurdle confronting studies of law enforcement in African courts. An initial study covering the period 2008–2013 found that 70% of case files were missing. Subsequent baseline surveys by the NGO Space for

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<sup>1</sup>The Elephant Crisis Fund is managed by Save the Elephants and the Wildlife Conservation Network, in partnership with the Leonardo DiCaprio Foundation (now known as Re:wild).

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<sup>2</sup>A notable exception is the 2016 documentary “The Ivory Game”, directed by Kief Davidson and Richard Ladkani (available to view on Netflix).

Giants in Namibia and Botswana also found that courtroom and prosecution records were inadequate (Space for Giants n.d.[a,b]) However, based on records available, the initial scoping study in Kenya concluded “that wildlife related crime in Kenya is treated as a misdemeanour or petty crime and is ‘mismanaged’ within the Kenyan court systems”, leading to “a culture of impunity among the criminal fraternity and even within the government departments responsible for protecting these national assets” (Kahumbu et al. 2014).

This first report was a wake-up call that led quite rapidly to improved management of wildlife crime cases. By 2015, 94% of case files could be accessed (WildlifeDirect 2016). The capacity of the Office of the Director of Public Prosecutions (ODPP) was enhanced by setting up a dedicated Wildlife Crime Prosecution Unit (WCPU) in 2014 and by the development, with the support of the British High Commission, of improved inter-agency protocols and case analysis tools, which were published as a *Rapid Reference Guide for the Investigation and Prosecution of Wildlife Related Offences* (Government of Kenya 2015). Now in its third edition, the Guide is used by the United Nations Office on Drugs and Crime (UNODC) and NGOs for ongoing capacity building and training of magistrates and prosecutors.

Data on trials between 2008 and 2013 also confirmed that the provisions of the Wildlife Conservation and Management Act (1989) were inadequate to deal effectively with an alarming upsurge in serious wildlife crime. Under this Act, unauthorized trade in ivory was punishable by jail terms; however, these were rarely imposed and the maximum fines available as an alternative were derisory: less than KES 100,000 (USD 1,170 in 2013) for unlawful import and only KES 40,000 (USD 470) for unlawful export of ivory. In response to mounting pressure to strengthen penalties, a new Wildlife Conservation Management Act (2013) was approved by Kenyan legislators in 2014. The new Act stipulated penalties of up to life imprisonment for a range of serious crimes involving endangered species, alive or dead, and their products, which are referred to in the Act as “trophy”. It was greeted by many with approval and relief. These feelings, however, were short-lived. Within a year, the High Court

found, correctly, that the drafting of the key Section 92 covering endangered species was unworkable; thus, the Act *failed* to create any specific offence relating to endangered species and their products or trophies<sup>3</sup>. Ivory traffickers could only be prosecuted under Section 95 of the Act, which stipulated a minimum sentence of five years’ imprisonment and/or a minimum fine of KES 1 million (about USD 11,500 at the time) for any trophy-related offence—whether relating to a haul of tusks, an ivory trinket or an antelope skin. Those convicted of trafficking with access to funds to pay the fine could simply pay and walk away.

It took another six years for Kenya to amend the law, in 2019, creating a more robust framework of offences and penalties relating to wildlife crime. Section 92 was reinstated, setting out penalties specifically relating to the killing and trafficking of endangered species. The 2019 amendments also, for the first time, define “unlawful trade” with reference to Kenya’s obligations under CITES. Nevertheless, ambiguities remain (see Discussion), which have allowed magistrates to ignore the minimum terms for these crimes set by the 2019 amendments.

WildlifeDirect’s *Eyes in the Courtroom* monitoring programme continued throughout this period, expanding in the number of courts monitored and the range of offences. This article covers the period 2016–2019 and focuses on cases related to ivory trafficking. It also draws on data on ivory seizures and arrests near Tsavo and Amboseli from the NGO Big Life Foundation (BLF). The aim is to provide an overview of ivory-related cases in courts from 2016 to 2019 to inform ongoing efforts to enhance law enforcement.

## Methodology

Data were collected by teams of courtroom monitors, comprising WildlifeDirect staff and interns with legal training (six in 2016–2017 and eight in 2018–2019), assisted in 2016–2017 by nine advocates of the High Court of Kenya. An authorization letter from the Judiciary Training Institute (JTI) was presented upon arrival to court officials. During the study period, almost all court records were in handwritten files. Monitors noted case numbers and dates and took photos of the corresponding pages of case files and

<sup>3</sup>Mutisya Kiema vs. the Republic of Kenya Criminal Appeal No. 7 of 2014 eKLR.

later transcribed the details onto Excel files. Data were collected for analysis in accordance with the Standard Operating Procedures (SOP) for collection and analysis of court records previously agreed with the JTI (WildlifeDirect n.d.[a], p. 11).

We examined this data, comprising records of cases brought before 123 courts in 2016–2017 and 113 courts (including two mobile courts) in 2018–2019. Cases involving elephants and ivory (henceforth “ivory cases”) were identified. Broadly speaking, Kenyan law distinguishes three kinds of unlawful hunting: for subsistence; for the bushmeat trade; and for what are still referred to as “trophies” under Kenyan law, even though all trophy hunting was banned in Kenya in 1977. We first identified trophy related offences and then looked for the words “elephant”, “tusk” and “ivory” in the charges<sup>4</sup>.

There are some gaps in the data. In all years, courtroom monitors visited courts towards the end of the year and reviewed cases for that current year, so cases near the end of the year were missed. Moreover, some records from 2018 and 2019 failed to record the animal species and/or the amount of ivory presented in court and/or other details such as date of arrest. Prior to publication of the 2018–2019 courtroom monitoring report, 19 courts where most ivory cases were recorded were re-visited in 2020, providing updated information on 162 out of 223 ivory cases analysed (WildlifeDirect n.d.[b]). While preparing this article, with help from staff at the ODP, we reviewed 42 cases from the original dataset for 2018–2019 that related to “possession of [an unspecified] wildlife trophy” and identified a further 24 ivory-related cases. We also cross-checked our data for these years with data on ivory seizures and arrests by BLF.

The following section presents results for all 247 cases identified. From the partially complete dataset at our disposal, we created partial data sets that could provide valid information on different topics of interest, as explained in the text.

<sup>4</sup>Theoretically, hunting for subsistence or bushmeat trade could also involve killing elephants; however, no such cases were found. Elephants are also killed due to human–elephant conflict (HEC); we identified one (possible) case as described in the text.

## Results

### *Numbers and distribution of cases*

In total we identified 247 elephant/ivory cases, representing 12% of all cases reviewed that were brought to court under the WCMA (2013) during 2016–2019 (Table 1).

Table 1. Numbers of cases, persons and offences in ivory cases recorded by courtroom monitors for the years 2016–2019

	2016	2017	2018	2019	Total
<b>Cases</b>	77	57	81	32	247
<b>Persons</b>	119	104	146	53	422
<b>Offences</b>	171	138	187	64	560

Ivory cases were recorded in 45 courts in 2016–2019 (Fig. 1), with little variation in the distribution of cases over the four-year period. The courts with most ivory-related cases were Makindu (42 cases), Kibera (27) and Voi (25), followed by Narok (13), Jomo Kenyatta International Airport (JKIA, 11), Loitokitok (11), Nyahururu, (10) and Mariakani (10). The remaining cases were heard in the other 37 courts.

Most cases were heard in courts in or near the Tsavo Conservation Area (Makindu, Voi), or in the south coastal region (Kwale, Mariakani) on the route from Tsavo to Mombasa. Many cases were also heard in Nairobi, mainly at JKIA and Kibera. Smaller, but still significant numbers were heard in courts near important elephant ranges: Maasai Mara (Kilgoris, Kehancha), Amboseli (Loitokitok) and the Laikipia–Samburu ecosystem (Nyahururu, Nanyuki, Meru).

### *Arrests and seizures*

Most arrests followed seizures of ivory. Most seizures were of “tusks” or “pieces of tusk”, with just 13 reported seizures of worked ivory, mostly small pieces of jewellery and bangles seized in or near JKIA. Weights of ivory seized were documented in 209 of the 247 cases (Table 2). The total amount reported as seized was 5,750.3 kg, representing approximately 1,050 pieces of raw ivory and 100 pieces of worked ivory and an average of 27.5 kg per seizure of raw ivory. Weights of ivory are not given for a further 181 tusks; this includes 164 tusks recovered in a major seizure in Mombasa in 2017; and, in a few further cases,

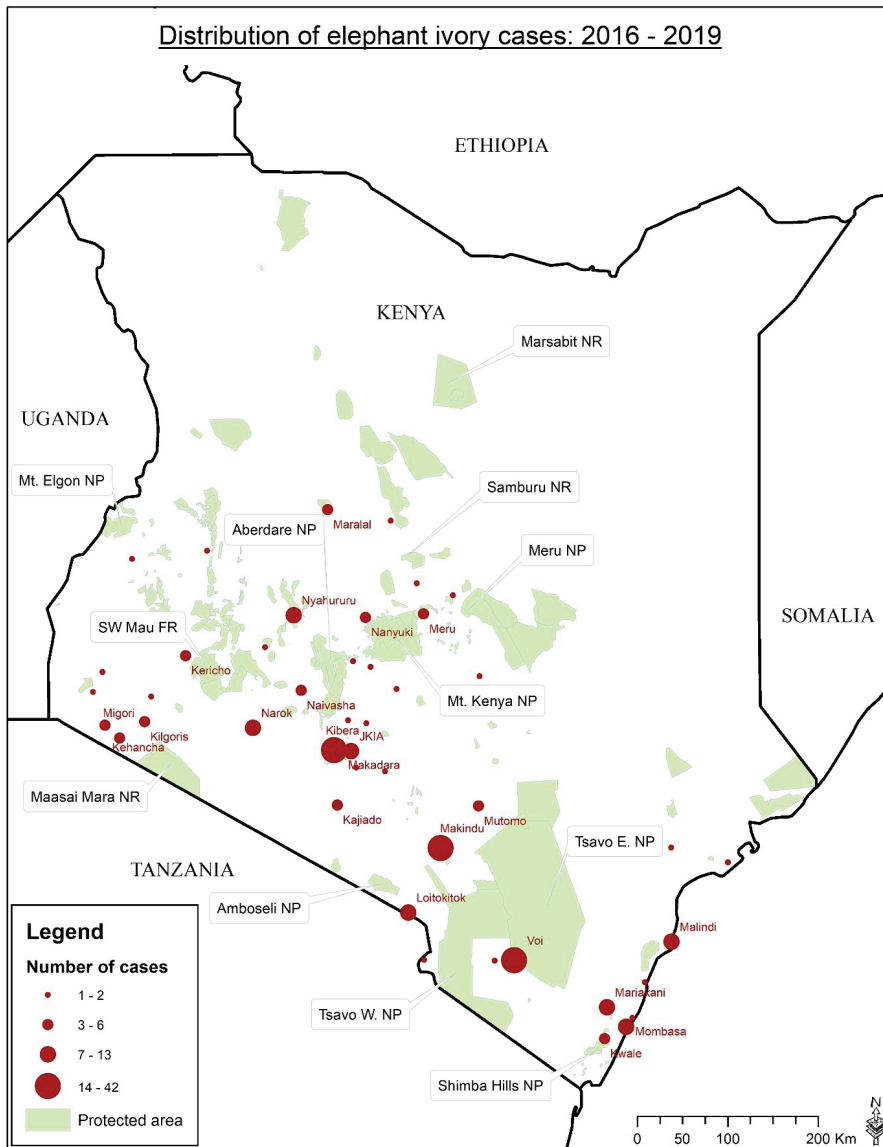


Figure 1. Distribution of elephant and ivory cases brought before courts in Kenya in 2016–2019. The location of the capital, Nairobi is indicated by the court in Kibera and nearby Jomo Kenyatta International Airport (JKIA) (Map drawn by Save the Elephants using data supplied by the authors).

only the monetary value of the ivory is given. Taking account of these incomplete records, the total amount of raw ivory seized in the 247 cases between 2016 and 2019 was likely more than 6,500 kg. The largest single seizure was of 1,097.8 kg in Mombasa in December 2016, which led to the arrest and unsuccessful prosecution of Ephantus Gitonga Mbare, [who was acquitted at Mombasa Law Court](#) in April 2019.

Analysis of 153 cases where information on the weight of raw ivory and number of tusks/pieces was available showed that the average weight of a (piece of) tusk was 4.42 kg, and the median weight 3.75 kg. There are records of 10 tusks weighing 20–30 kg each (from two seizures in 2016 and one in 2019) and of 12 tusks weighing more than 30 kg each (from four seizures in 2018). The largest tusk recorded weighed 39 kg (Fig. 2).

Table 2. Reported ivory seizures leading to arrests of suspects in 2016–2019. Weights are shown in kilograms

	2016	2017	2018	2019	Total
<b>Total cases</b>	77	57	81	32	<b>247</b>
<b>Ivory seizures reported (cases)</b>	65	50	68	26	<b>209</b>
<b>Weight</b>	2,041.0	1,576.7	1,582.2	550.4	<b>5,750.3</b>
<b>Average</b>	31.4	31.5	23.3	21.2	27.5
<b>Max. weight</b>	1097.8	216.8	234.0	82.0	1097.8
<b>Median weight</b>	7.0	12.2	12.0	15.55	11.95

### Weights of individual tusks/pieces seized (2016-2019)

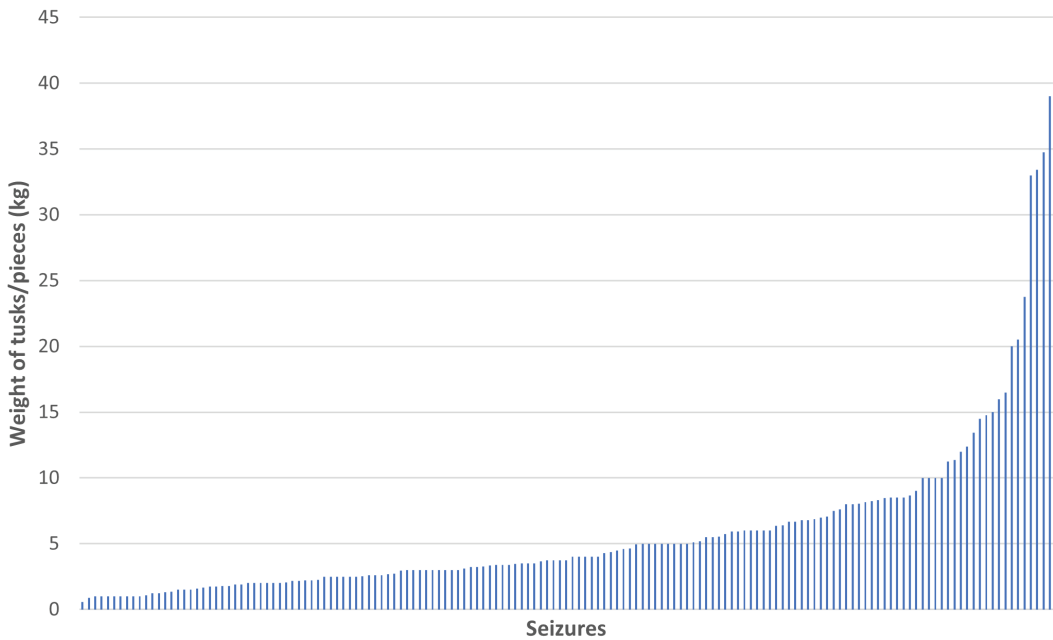


Figure 2. Distribution of seizures by weights of individual (pieces of) tusks, 2016–2019. Each bar shows the average weight of raw ivory items in a single seizure. (For example, a seizure of four items weighing a total of 40 kg is shown as a single bar of 10 kg).

In a few cases, suspects were apprehended in possession of trophies of other species, in addition to elephant, namely: leopard (4 cases), snake (3), pangolin (2), lion, warthog and lesser kudu (1 each).

Most arrests were carried out by KWS, and the remainder by the National Police Service (NPS). As indicated earlier, several NGOs collaborate with KWS in surveillance operations, including tracking, intercepting and seizing poached ivory. For comparison, we retrieved available data on

seizures reported by three of these organizations in 2018–2019 (Table 3). It is notable that total ivory seizures reported by these NGOs in 2018 are equivalent to 85% of amounts in all our court records; while seizures reported by these organizations in 2019 were 60% greater than seizures in cases reviewed by the courtroom monitors. To further investigate this discrepancy, based on detailed data provided by BLF, we attempted to match seizures and arrests in their records for 2018–2019 with data from the courts (Box 1).

Table 3. Seizures of ivory (kg) reported by Big Life Foundation (BLF), Mara Elephant Project (MEP), and Sheldrick Wildlife Trust (SWT) in 2018 and 2019. Sources: Data supplied by BLF; annual and quarterly reports of MEP and SWT

Year	BLF	MEP	SWT	Total
2018	990.8	356	37	<b>1346.8</b>
2019	718.45	183.5	n/a	<b>901.95</b>
<b>Total</b>	<b>1,709.25</b>	<b>539.5</b>	<b>37</b>	<b>2,248.75</b>

Of the 52 ivory seizures reported by BLF in 2018–2019, 24 were matched to cases in the court records. No cases could be found corresponding to the remaining 28 seizures. However, 15 of these 28 seizures occurred between October and December when our courtroom records are incomplete. Of total ivory seizures of 1,709.25 kg reported by BLF, 862 kg corresponds to 20 cases where there is also information on amounts of ivory in the corresponding court records, where the total amount of ivory is recorded as 831.5 kg. The amounts of ivory are the same in 10 cases, while in eight cases the amount in the court record is between 1 and 10 kg less than the amount reported by BLF. In two cases the amount of ivory in the court record is greater than the seizure reported by BLF (by 2 kg and 15 kg respectively).

Box 1. Comparison of seizures reported by Big Life Foundation and in cases in the court records.

### *Accused persons, charges and pleas*

Most accused persons were Kenyan men; specifically, of 422 accused persons, 394 were men and 400 were Kenyans (Fig. 3a,b). Of the 22 non-Kenyan nationals 12 were Chinese, three were Vietnamese, one was Bangladeshi, four were citizens of other African countries, and two were citizens of European countries. Most of these persons (17 out of 22) were arrested in 2016, and most of the accused (16 out of 22) were arrested at JKIA, usually trying to smuggle small quantities of worked ivory trinkets out of the country. A smaller number were caught in possession of larger amounts of ivory. These

included one Italian defendant apprehended in the field by BLF rangers, who was in possession of 234 kg of raw ivory and 700 rounds of ammunition and was charged together with a Kenyan co-defendant. This was the biggest seizure of ivory reported in 2019.

Most defendants were arrested in possession of raw ivory. In 2016–2018, almost all were charged under Section 95 of the WCMA and charged with “possession of wildlife trophy” (Figure 4), since prosecutors were aware that Section 92 was inoperable during this period. In 2019, prosecutors began using the newly reinstated Section 92, although Section 95 continued to appear on many charge sheets. Some defendants were also charged under Section 84 (incorrectly, see Box 2 below) with “dealing in wildlife trophy”. The only record of suspects being “caught in the act” is a case of three persons charged in 2019 under Section 92 with “killing two elephants”. However, court records do not indicate whether this was an instance of poaching for ivory or, for example, human–elephant conflict (HEC). In four additional cases, suspects who may be presumed to be poachers were arrested in possession of ivory and firearms or ammunition and charged under the Firearms Act, in addition to charges brought under the WCMA. In theory, poachers could also be arrested in the field *before* killing an elephant, in which case they would be charged with possession of a firearm and lesser offences such as illegal entry into a PA. However, we found no cases corresponding to this scenario.

Of the 422 people charged with elephant poaching and/or ivory-related offences in 2016–2019, 372 (88%) pleaded “not guilty” to at least one of the offences they were charged with (Fig. 3c). This compares with guilty pleas of up 95% of defendants with lesser offences under the WCMA such as illegal grazing and entering a PA without a permit.

### *Process and outcomes of trials*

Persons who plead not guilty have the right to apply to be released on bail and/or bond. Our records show that 223 out of 422 persons accused of ivory trafficking during 2016–2019 were granted bail and/or bond. The proportion ranged from 76% of accused persons in 2017 to 24.5% in 2019; however, details of bail and bond were not always recorded by monitors in 2018 and 2019 (or, in some cases, may have been granted subsequently to their perusal of court records). The value of bond plus bail (with amounts of bond

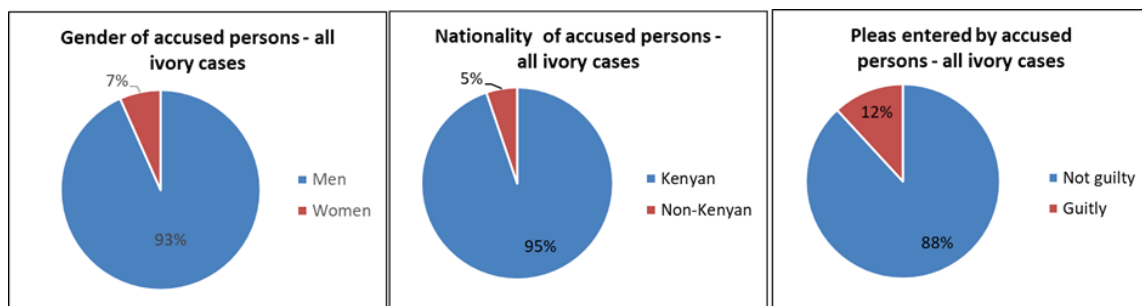


Figure 3. (a) Gender, (b) nationality and (c) pleas of accused persons in ivory case trials, 2016–2019. For persons accused of multiple offences, the plea was recorded as ‘not guilty’ if a not guilty plea was entered for at least one of these offences.

### Charges brought in ivory cases 2016-2019

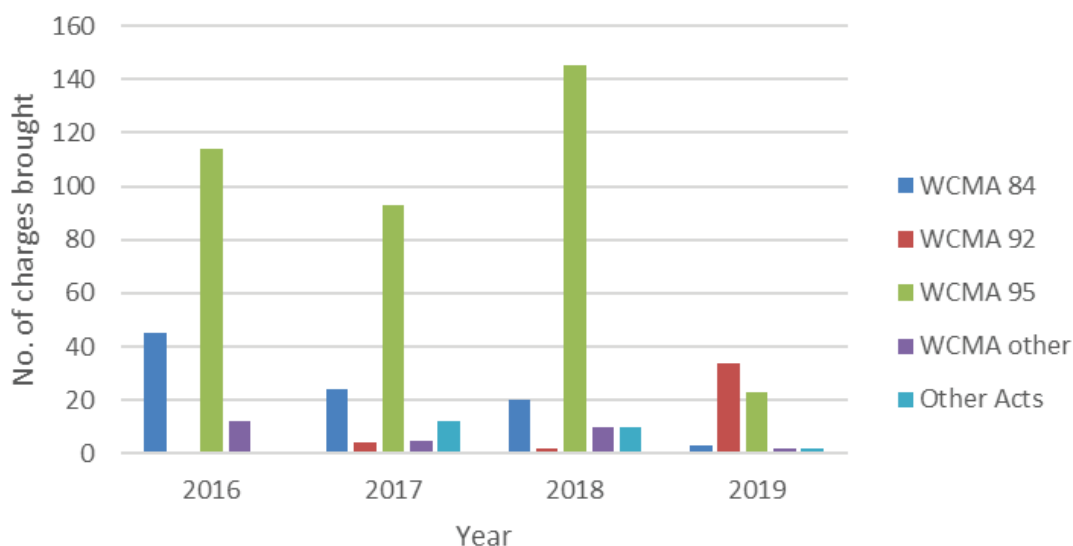


Figure 4. Charges brought against defendants in ivory-related trials, as defined in the Methodology, in the period 2016–2019. Note that some defendants were charged with more than one offence.

typically being much higher than amounts of bail) was more than KES 1,000,000 (USD 10,000<sup>5</sup>) although lower in 2018 compared to other years (Table 4).

Of 247 ivory cases, 117 were recorded as ‘concluded’ by the courtroom monitors. In terms of the number of accused persons, the trials of 183 persons (out of 422) were concluded while those of 239 persons were still ongoing at the time of the most recent court visit. Analysis of a subset of 202 cases for which information is available up

to the end of 2019<sup>6</sup> shows that, although courts made steady progress towards concluding trials, one-third of trials initiated in 2016 (20 cases) and more than half of trials initiated in 2017 (26 cases) still had not been concluded at the end of 2019 (Fig. 5).

To assess outcomes of trials, we considered all persons whose trials are shown as ‘concluded’ in our records. Of 183 persons whose trials were concluded, 134 (73.2%) were convicted, while 31 (16.9%) were acquitted and 18 (9.8%) had their cases withdrawn (Fig. 6). Conviction rates in the trials of 134 persons

<sup>5</sup>The exchange rate fluctuated near to 100 KES = 1 USD throughout the period under review (2016-2019).

<sup>6</sup>In other words, we ignored trials recorded as “ongoing” if the last visit to the court was before the end of 2019.



Table 4. Details of bail and bond granted to persons accused of ivory trafficking in 2016–2019. Amounts shown are for the sum of values of bail plus bond

	Unit	2016	2017	2018	2019	Total
<b>Bail</b>	No. of persons	0	2	1	0	3
<b>Bond</b>	No. of persons	61	70	41	10	182
<b>Bail+bond</b>	No. of persons	14	7	14	3	38
<b>Total</b>	No. of persons	75	79	56	13	223
<b>% bail/bond</b>	% of persons	63.0	76.0	38.4	24.5	58.0
<b>Average amount</b>	Million KES	2.92	3.06	0.83	2.32	2.41
<b>Median amount</b>	Million KES	2.0	1.0	0.5	1.0	1.0

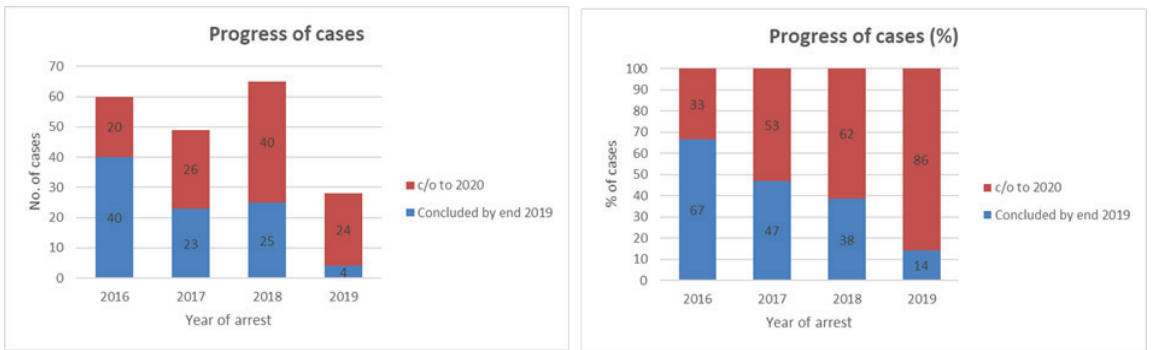


Figure 5. Progress towards concluding trials initiated in 2016–2019.

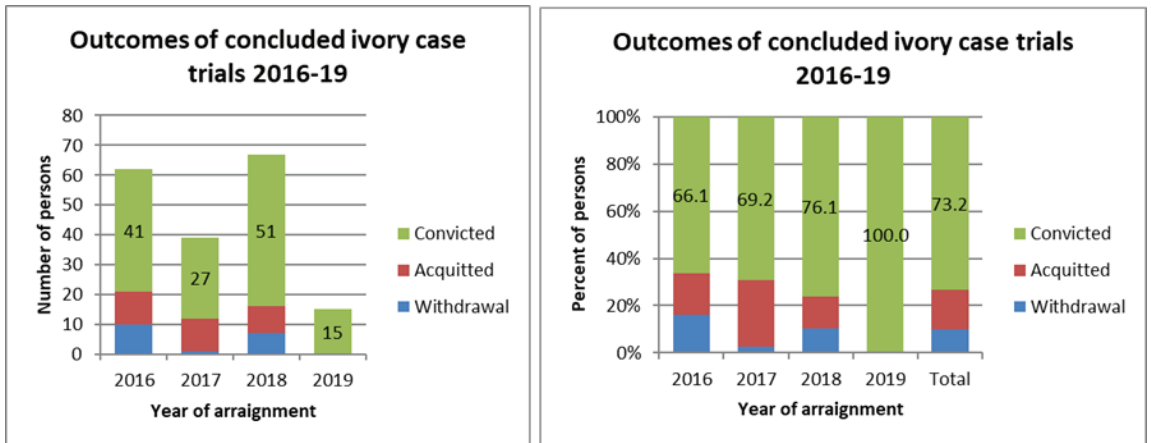


Figure 6. Outcomes of concluded trials initiated between 2016 and 2019: (a) Numbers of persons; and (b) per cent of accused persons. Where the person was accused of multiple offences, the case was counted as a conviction if the accused was found guilty on at least one charge.

Table 5. Outcomes of trials (numbers of accused persons) broken down by year and plea

Guilty plea	Convicted	Acquitted	Withdrawn	Ongoing	Total	% concluded	% convicted
2016	15	3	1	0	19	100	78.9
2018	25	2	0	0	27	100	92.6
2019	4	0	0	0	4	100	100
<b>TOTALS</b>	<b>44</b>	<b>5</b>	<b>1</b>	<b>0</b>	<b>50</b>	<b>100</b>	<b>88.0</b>

Not Guilty plea	Convicted	Acquitted	Withdrawn	Ongoing	Total	% concluded	% convicted
2016	26	8	9	57	100	43.0	60.5
2017	27	11	1	65	104	37.5	69.2
2018	26	7	7	79	119	33.6	65.0
2019	11	0	0	38	49	22.4	100
<b>TOTALS</b>	<b>90</b>	<b>26</b>	<b>17</b>	<b>239</b>	<b>372</b>	<b>35.8</b>	<b>67.7</b>

Note: All defendants in ivory trials initiated in 2017 pleaded not guilty.

whose trials were concluded ranged between 100% in 2019 (15 persons) to 66.1% (41 out of 62 persons) in 2016. The falling proportion of acquittals and withdrawals between trials started in 2016 and 2019 suggests that longer-running trials are less likely to result in convictions, as might be expected.

To assess the effect of a plea (guilty or not guilty) on the outcomes of trials, we analysed outcomes of trials broken down by pleas (Table 5). Results show that the main effect of pleading not guilty is to increase the length of the legal process. More surprisingly, not all persons who pleaded guilty were convicted. Overall, about two-thirds of people pleading not guilty in concluded trials from 2016–2018 were found guilty. Notably, a guilty verdict was recorded in 100% of the small number of concluded trials from 2019. This suggests that the effectiveness of prosecutions is improving, although it may in part reflect the fact that short trials are more likely to lead to a guilty verdict.

**Sentencing**

Our records provide details of sentencing of 134 persons convicted of ivory trafficking in trials brought to court in 2016–2019. Most of these persons (87%) were sentenced to a fine with jail if the fine was not paid (Fig. 7). A small but

significant number of convicted persons (7%) were sentenced to a jail sentence without the option of a fine.

The amount of fine to be paid was typically KES 1 million (about USD 10,000), or an alternative of a minimum five years imprisonment, as stipulated under Section 95 of the Act. Smaller and larger fines were also commonly imposed, up to a maximum of KES 20 million for single offences in 2016, 2017 and 2018 (Table 6). Jail terms generally ranged from one to five years or occasionally 10 years (with or without a fine); except in four cases from 2016, when three persons were sentenced to 15 years, one to 20 years, and six to life imprisonment. These heavier sentences

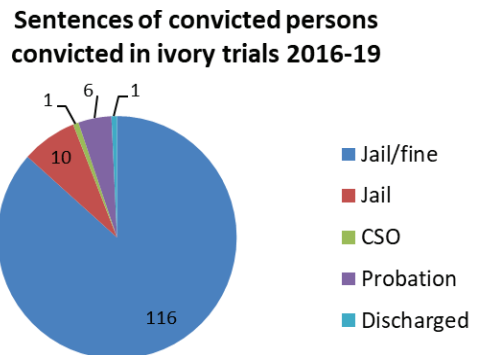


Figure 7. Types of sentences imposed on persons convicted of ivory crimes in cases brought before court in 2016–2019. Figures indicate numbers of persons. CSO = community service order.

possibly reflect the influence of capacity building initiatives for the judiciary which got underway in this year.

There was no consistent relation between the amount of the fine and the length of the corresponding jail sentence: for example, there are instances of a KES 1 million fine in lieu of 15 years’ imprisonment, and a KES 2 million fine in lieu of 12 months’ imprisonment. Nor was there a consistent relationship between the amount of the fine and the weight of seized ivory, which could

be considered an indication of the seriousness of the crime. In cases from 2016, one convicted person was fined KES 50,000 in the case of a seizure of 59 kg ivory, while four persons received fines of KES 20 million and another total fines of KES 23 million in two cases involving 5 kg and 3 kg ivory, respectively. In cases from 2018, fines of KES 21 million were imposed on two persons in a case involving 1.8 kg ivory, while eight persons received fines of KES 1 million (USD 8,270) in four cases all involving more than 60 kg ivory. Fig. 8 illustrates this disconnect.

Table 6. Fines imposed in lieu of jail sentences, for ivory crimes in cases brought to court in 2016–2019. Values are in millions of Kenya shillings (KES 1 million = USD 10,000)

	2016	2017	2018	2019	TOTAL
No. of fines issued	34	25	45	12	116
Total fines	154.05	72.30	60.43	16.00	302.78
Average fine	4.53	2.89	1.34	1.33	2.61
Max fine	23.00 <sup>a</sup>	20.00	21.00 <sup>b</sup>	3.00	23.00
Median fine	1.00	1.00	1.00	1.00	1.00

<sup>a</sup>Fined KES 20 million for dealing in a wildlife trophy, plus KES 3 million for possession of trophy

<sup>b</sup>Fined KES 20 million for transporting a wildlife trophy plus KES 1 million for possession of wildlife trophy

### Fines vs. weight of ivory seizures

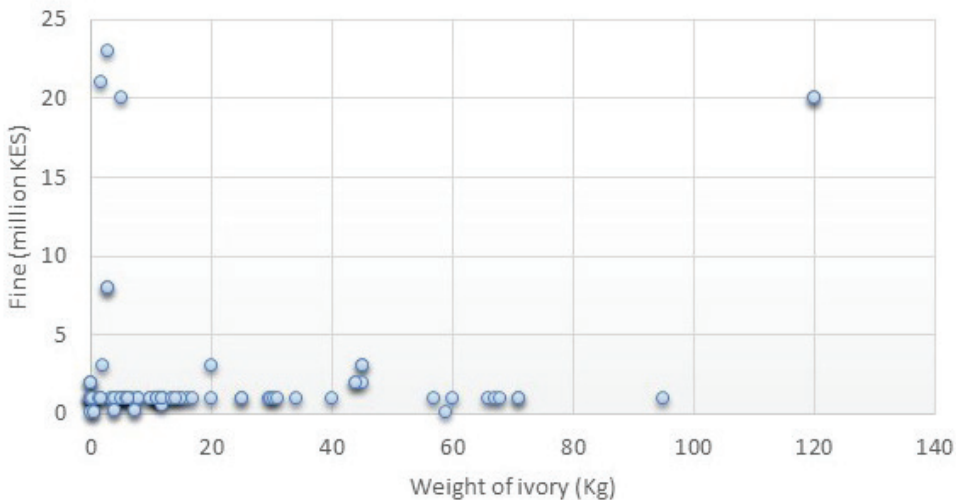


Figure 8. Comparison of fines following conviction with weights of ivory seizures in 83 concluded ivory trials during 2016–2019. If fines were proportional to the weight of ivory seizures, the dots would form a diagonal line from bottom left to top right. Note: only cases are shown; thus, for example, a case where four accused persons received an identical fine is represented by a single dot.

## Discussion

The amount of seized ivory presented in Kenyan courts during 2016–2019 is striking, especially since elephant deaths caused by poaching for ivory were declining during this period: Based on public statements by KWS, elephant deaths from poaching declined from 386 in 2013 to less than 100 per year in 2016–2018 and just 34 in 2019<sup>7</sup>. We estimate that around 6,500 kg of ivory were presented at trials analysed in this report. UNODC uses an estimated average tusk weight of 5 kg per tusk or 10 kg per elephant (UNODC 2016); in which case 6,500 kg of ivory would correspond to 650 elephants. The average weight of ivory pieces in the court records was 4.42 kg. However, since many of these “pieces of tusk” were presumably not whole tusks, the average weight of the tusks contained in the mainly small seizures coming before Kenyan courts was almost certainly greater than that of tusks in the large shipments analysed by UNODC. Given that not all cases were captured by courtroom monitors, and that, based on our comparative analysis of BLF data, some seizures may not have led to trials in courts, it is not inconceivable that 10 tonnes of ivory were seized by law enforcement agencies in 2016–2019. This in turn represents an unknown fraction of the total amount of ivory handled by traffickers during this four-year period.

It is clear that very large amounts of raw ivory were “on the move” in Kenya during 2016–2019, considerably more than could be accounted for by reported deaths from poaching. Other possible sources of seizures that took place in Kenya include elephants poached outside Kenya, and ivory stolen from stockpiles in Kenya or in other countries. The courtroom data provides no information on this point. Further information on the provenance of seized ivory could potentially be obtained through interrogation of suspects; identification of markings from government

stockpiles<sup>8</sup>; or through (expensive) scientific analysis, using DNA testing to match individual tusks to known populations of elephants (Wasser et al. 2018, 2022), and/or isotope analysis, which provides information of isotopic make-up of the diet which can be matched to likely feeding areas (Cerling et al. 2007).

The evidence on distribution of cases suggests that they were the result of arrests at different points in the supply chain: in elephant ranges where the elephant is poached, in Nairobi, and in transit to Mombasa. Cases in Nairobi involved not only seizures of trinkets at JKIA, but also larger seizures in the city; most of the latter cases were heard in the court in Kibera. It is notable that no cases came to court involving large seizures in Mombasa after 2016. Likewise, seizures of trinkets at JKIA declined markedly after 2016.

These results highlight the difficulty recognized by others in estimating law enforcement adequacy (Hauenstein et al. 2019). At the most basic level, details on numbers and types of arrests are usually not clear. Do falling numbers of arrests indicate success in deterring poaching, or less effective law enforcement, or both? Moreover, to make an effective contribution to reducing illegal trade in ivory, law enforcement efforts should aim to clamp down on both poaching and cross-border trafficking of ivory from other countries, as highlighted by evidence from DNA analysis revealing the interconnectedness of the transnational trade in illegal ivory (Wasser et al. 2018, 2022). The scarcity of information on the provenance of seized ivory makes it difficult to distinguish between progress on these two fronts.

With the above provisos, some elements of “adequate” law enforcement are indicated by our results. These include: an effective legal framework; field operations that, in addition to deterring poaching, have the capacity to not only detect illegal activity and apprehend offenders, but also provide the evidence required for their prosecution; and courts that reach the correct verdicts in a timely manner and impose sentences proportional to the crime. From this perspective, the results presented here highlight several issues.

As outlined in the Introduction, the 2013 Act was

<sup>7</sup>There is no official published data for these years. These figures are from Poaching Facts ([www.poachingfacts.com](http://www.poachingfacts.com)) and the following newspaper article: <https://www.npr.org/2020/08/14/902177466/some-good-news-an-elephant-baby-boom-in-one-kenyan-national-park>

<sup>8</sup>As in the case of seizures in different parts of Africa that were shown to have come from Burundi government stockpiles (see for example <https://intpolicydigest.org/the-enterprise-the-burundi-stockpile-and-other-ivory-behind-the-extradition/>)

a great improvement compared to the 1997 Act that it replaced, and the 2019 amendments helped fix some problems in the drafting of the new Act. But ambiguities remain, especially regarding sentencing. The variations in sentencing reported here reflect a lack of oversight over judicial approaches to sentencing that cuts across the entire range of criminal offences. Moreover, a court decision in 2015<sup>9</sup> called into question the lawfulness of mandatory sentences and, by extension, minimum terms. The defence counsel in wildlife crime trials could argue that, until the issue was resolved, magistrates should ignore the minimum term set by statute. These and other inconsistencies mean that the intention of parliament regarding sentencing can be superseded by the judiciary with little comeback. This situation where ‘anything goes,’ limits the effectiveness of the law.

Comparison of NGOs’ field data on arrests with the list of cases brought to court suggests that not all arrests lead to criminal trials. Arrests may not be followed through to prosecution for a variety of reasons, such as insufficient evidence, corruption, poor handling of evidence and failure of arresting officers to properly lodge statements. The same range of reasons could account for the differences between amounts of ivory reported as seized and amounts stated on the corresponding charge sheets (according to NGO field staff). Based on conversations with magistrates and prosecutors during trainings, continuity in the handling of exhibits is a particular cause for concern, and the likely reason for a significant number of failed prosecutions (S. Jayanathan pers. obs. November 2021).

Concerns regarding procedural irregularities are reinforced by numerical analysis of the outcomes of trials (Table 5). Court records show that in almost all cases of acquittals and withdrawals the accused persons (including those who pleaded guilty) were arrested in possession of ivory. Since “unauthorized possession” of ivory is a crime, in accordance with Section 95 of the Act until 2019 and Section 92 thereafter,

prosecutors in these cases did not have to prove that accused persons were engaged in dealing in tusks. There is scant evidence of the reasons for these acquittals and withdrawals in the court records. Corruption, either by bribing the magistrate or the prosecutor, or by bribing and/or threatening witnesses, is one possible reason. Based on personal observation and engagement with the judiciary in a professional capacity, others include: 1) faulty charging by prosecutors, although to a decreasing extent between 2016 and 2019 (see Box 2); 2) challenges involved securing admissible evidence, including the handling of exhibits; 3) lack of continuity due to staff turnover of prosecutors and transfer of judicial officers mid-trial; and 4) poor active case management by judicial officers and the culture of adjournments that exists within the criminal courts of Kenya. This is a topic that clearly merits further investigation. Studies could draw on records from the appeals court, which provide details of procedural issues that are not available from a perusal of court records (see Box 2).

The length of the trials was another notable feature of ivory trials highlighted by our data. As shown in Table 5, the trials of less than half of defendants who pleaded not guilty in 2016 had been concluded when our monitors perused the court records in 2020. The existence of a small number of very long running high-profile trials (listed in WildlifeDirect n.d.[b]) may give the impression of a system that is at breaking point. In fact, the length of ivory trials, most of which take between six months and three years (excluding small numbers concluded rapidly after guilty pleas) is in line with the average length of all trials in Kenyan courts, which the Judiciary estimates at 2.5–3 years<sup>10</sup>. This compares with UK averages of 212 days in Adult Magistrates Courts, and 939 days for summons cases in the Crown Court (Department of Justice 2021).

The data analysed in this paper provides scant information on the fate of those arrested in a real, physical sense rather than in purely legal terms. Our data on bail and bond suggests that significant numbers of people are being held in custody for extended periods of time awaiting trial. For example, we have no record of bail or bond being granted to 16 defendants in ongoing trials from 2016. On the other hand, there are cases of persons accused of very serious crimes

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<sup>9</sup>Francis Karioko Muruatetu and Another vs the Republic of Kenya; Katiba Institute and five others (Amicus Curiae) Supreme Court of Kenya Petition No. 15 & 16 (Consolidated) of 2015 [2021] eKLR.

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<sup>10</sup><https://www.seej-africa.org/commentary/wildlife-crime-how-to-identify-a-corrupted-ivory-trafficking-trial/>

Two defendants arrested in possession of five pieces of elephant tusk weighing 17 kg were charged with “possession of wildlife trophy” under Section 95 of the WCMA (2013) and of “dealing in wildlife trophy” under Section 84 the Act. At the trial, case number 297/2018 at Kehancha magistrate’s court, the defendants were acquitted of the first count but convicted of the second count and sentenced to a KES I million (USD 10,000) or five years in prison. In February 2020, the court of appeal at Migori ordered the convictions to be thrown out. The judge ruled that the charge sheet was defective since it was invalid to file charges for the same crime under both Sections 84 and 95 of the Act. He argued that “one must be either a dealer (so as to be charged under Section 84(1) of the WCMA) or not a dealer (so as to be charged Section 95 of the WCMA). An accused person cannot be both at the same time.” He further noted that the charge of dealing was not proved, adding however that “the Appellants would have been easily found guilty had they been charged with only the first count” [possession].

The judge’s conclusions are questionable. There is nothing wrong in principle in charging dealing with possession as an alternative charge; it is quite common in drugs cases, for example. Moreover, the judge failed to note that suspects cannot be correctly charged under Section 84 at all, since this section of the Act describing dealing does not stipulate a corresponding penalty and therefore in law does not create an offence. The case highlights the potential for ambiguities in the formulation of the law and procedural uncertainties to hamper efficient law enforcement. Combined charges under Sections 95 and 84 of the Act were very common in 2016 and 2017; however, the proportion of defendants charged under Section 84 was much lower by 2019 (Fig. 4), possibly a consequence of improved case handling by prosecutors following training by NGOs and the UNODC.

Box 2. Case study of a successful appeal against conviction.

being released on bail and bond during extended periods, giving them the opportunity, not only to escape, but also potentially to interfere with witnesses and evidence. Moreover, court records do not show how many of the 116 persons sentenced to jail or fine for ivory crimes served a jail sentence and how many paid the fine. The almost ubiquitous practice among magistrates of sentencing convicted persons to a fine, with jail only as a default option, even for the most serious crimes, is cause for concern. One of the conclusions highlighted as alarming by authors of the original 2014 report was that “only 4% of [all] offenders convicted of wildlife crimes went to jail” (Kahumbu et al. 2014, p 5). Our data for 2016–2019 shows that the proportion of mandatory jail sentences for those convicted of *serious offences*, i.e. those involving ivory, was still only 7% of total convictions. For comparison, baseline surveys conducted by Space for Giants found that 4.5% and 13% of those convicted of wildlife crimes received jail sentences in Namibia and Botswana, respectively (Space for Giants n.d. [a,b]). The situation was

very different in Zimbabwe’s Kaza region, where 25.8% of all those convicted of wildlife crimes, and 96% of those convicted of elephant-related crimes, were sent to jail (Space for Giants n.d.[c]). Clearly there is scope for more in-depth comparative analysis.

More generally, the lack of overall consistency in sentencing is worrying, since it is important for justice to be seen to be done, through the imposition of sentences proportional to the crimes committed. In this respect, much effort has been devoted in recent years to training magistrates on the seriousness of such crimes and the use of the (non-binding) sentencing guidelines in the Rapid Reference Guide. Future studies may provide evidence of a trend towards more consistent sentencing in more recent wildlife trials. However, that there is still some way to go was highlighted by the outcome of a recent long running case, where two defendants were sentenced to a mere two years in jail, after a nine-year trial, for the trafficking of nearly four tonnes of ivory (Jayanathan 2022).

The failure of Kenyan prosecutors to convict suspected high-level traffickers, and especially the overturning, on appeal, of the landmark conviction in the notorious “Feisal case”, has been widely reported

and analysed (Morris 2018). The fact that only one other “high-level” trial has resulted in conviction (Jayanathan 2022) has been interpreted as showing that while the law is effective against petty criminals, those guilty of serious crimes are able to evade justice in Kenyan courts. Corruption is often identified as a key component of these disappointing outcomes<sup>11</sup>.

The true picture is almost certainly more complicated than this. Our courtroom data provides no evidence that, in the period 2016–2019, cases involving larger amounts of ivory were less likely to end in conviction. On the other hand, there are some discrepancies in the courtroom data that could be explained as instances of corruption, especially the handful of cases referred to above where persons convicted of possession of large amounts of ivory received very light sentences (Fig. 8) and, possibly, the results of our rudimentary triangulation of courtroom data with data on seizures from BLF, indicating that not all those arrested in possession of ivory are brought to trial. Developing this approach, by comparing data from multiple sources, may be the best way to provide more conclusive evidence on the prevalence of corruption, and the extent to which it influences the outcomes of wildlife crime trials.

The period covered by our study was one of rapid change in the Kenyan legal system. In 2011, the appointment of a new Chief Justice, Willy Mutunga, heralded a much needed but slow reform of the judicial sector, which at the time of his appointment held over a million cases in backlog, reflecting a chronic lack of funding and other necessary resources (Government of Kenya 2010; Mutunga 2011). By 2013, Kenya’s prosecution service still numbered only around 160 prosecutors for the entire country and police prosecutors were still conducting most prosecutions, including wildlife crime cases (Kahumbu et al. 2014). An important milestone in the prosecution of wildlife crimes was the creation of a dedicated Wildlife Crime Prosecution Unit (WCPU) within the Office of the Director of Public Prosecutions (ODPP)

in 2014. By 2019 all wildlife crime cases were prosecuted by the ODPP and, at the time of writing, the prosecution service has swelled to around 900 prosecutors. The results presented here provide some evidence that capacity building efforts may be leading to more effective prosecutions, namely: fewer errors in charging between 2016 and 2019; fewer failures to convict where suspects pleaded guilty, and the 100% conviction rate in 2019.

Going forward, steps are being taken to reduce delays in criminal courts and, in partnership with UNODC, to develop more prescriptive sentencing guidelines. The latter, if adopted, should pave the way to more consistency in sentencing and a more robust approach to prosecution appeal against lenient sentences.

## **Conclusion**

The courtroom monitoring data analysed in this study, although incomplete and faulty in some respects, provide valuable insights into the workings of the Kenyan judicial system. One key lesson learned is the importance of including experts in data collection and analysis in investigative teams from the start, as well as legal specialists. However, some mistakes were perhaps unavoidable considering the sheer volume of data collected. Our paper considers fewer than 250 cases of wildlife crime out of the more than 2,000 records of cases that were collected and logged by courtroom monitors between 2016 and 2019. This hugely ambitious national monitoring programme was complemented by in-depth case tracking of important cases, involving large seizures of ivory. For future studies, we suggest that intermediate scale studies incorporating data from multiple sources may be the best way to assess “law enforcement adequacy”, including success in tackling corruption, in relation to ivory poaching and trafficking. Such studies would focus on a selected subset of cases for which reliable information on arrests and seizures is available, following them from the moment of arrest through to imposition of the sentence in the form of payment of a fine or serving of a jail term. If possible, they should also include scientific analysis to determine the provenance of seized ivory, as well as taking account of related data on elephant mortality and HEC, to provide a contextualized picture of the law enforcement process.

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<sup>11</sup>See for example: <https://www.seej-africa.org/commentary/wildlife-crime-how-to-identify-a-corrupted-ivory-trafficking-trial/>

The courtroom monitoring data analysed in this study highlights some weaknesses in handling of wildlife crime cases by the Kenyan Judiciary, including faulty charging, deficient evidence handling, and inconsistent sentencing. However, our results also suggest how improving legal processes can provide greater protection for wildlife. By creating stronger prosecution services and a more efficient judiciary, leading to faster trials and consistency in sentencing, the risk of corruption is mitigated, and the efficiency of the criminal justice system enhanced. For this to occur, a key requirement is commitment by the government to invest in improving the criminal justice system, enabling digitization, performance management, and a centralized intake of cases. Government lawyers need to be paid well to attract and retain professional expertise. However, it should not be forgotten that the cases reviewed here represent only a very small part of illegal ivory trafficked in Kenya during this period. Effective law enforcement in the courts is just one part, albeit a crucial one, of the comprehensive strategy required to end the illegal wildlife trade.

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