



**Wambui & another v Republic (Criminal Revision E017 & E020 of 2023  
(Consolidated)) [2023] KEHC 19291 (KLR) (29 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19291 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CRIMINAL REVISION E017 & E020 OF 2023 (CONSOLIDATED)**

**GL NZIOKA, J  
JUNE 29, 2023**

**BETWEEN**

**PETER MWANGI WAMBUI ..... 1<sup>ST</sup> APPLICANT**

**JOSEPH MAINA WAMBUI ..... 2<sup>ND</sup> APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The applicants were arraigned before the Chief Magistrate's Court at Naivasha charged vide Criminal Case No E1476 of 2022, with the offence of conveying hunting apparatus contrary to section 102 (1) (f) of the *Wildlife Conservation and Management Act*, 2013 and hunting for bush meat trade contrary to section 98 (1) of the *Wildlife Conservation and Management Act*, 2013. The particulars of each charge are as per the charge sheet.
2. They pleaded guilty and were convicted and sentenced to serve a term of one (1) year imprisonment on each count and the sentences ordered to run consecutively.
3. However, by an applications filed in court they seeks for sentence review that the sentence be reduced and/or converted into a non-custodial sentence.
4. The applications are supported by a document labelled 'memorandum of revision' and his affidavit wherein they states they are first offenders and pleaded guilty to the charges. They are remorseful and have learnt to be a law abiding citizen.
5. Further, they come from a poor family background and are the sole breadwinner of their families. That they are not appealing but applying for sentence review and seeks the court leniency.
6. However, the respondent filed submissions opposing the applications and argued that the sentence by the trial court was lenient and therefore the court should not interfere with the sentence. Reliance was



placed on the case of *Bernard Kimani Gacheru vs Republic Criminal Appeal No 188 of 2020* where it was held that an appellate court should not interfere with the sentence of the trial court unless a material factor was overlooked or the sentence is excessive.

7. The Probation Department filed sentence review reports for both applicants as directed by the court.
8. With regard to the 1<sup>st</sup> applicant, Peter Mwangi Wambui, that indicates he is 26 years old and the 2<sup>nd</sup> born out of four (4) siblings and his parents are separated. That, he dropped out in class 7 due to lack of school fees and was employed in a hotel at Wanjohi and later as a farm hand at Olkalao. He relocated to Gilgil where he was engaged in masonry prior to his arrest.
9. The applicant stated that he gone with some tools to Marula Conservancy to look for a post to repair a fence when he was arrested. However, he has learnt his lesson and pleaded for leniency. His mother supported his release on community service stating that the applicant had learnt his lesson. Similarly, the area Assistant Chief was not opposed to the applicant being released on community rehabilitation.
10. The Kenya Wildlife Services, the complainant, was opposed to a non-custodial sentence since the offence has a negative effect on wildlife conservation. At Prison, the applicant is engaged in masonry at the Catholic Church that is under construction and is of good conduct.
11. The Probation officer indicates that the applicant is willing to cooperate in the rehabilitation process and recommends the applicant be placed on community service at Gatare Primary School.
12. In regard to the 2<sup>nd</sup> applicant, Joseph Maina Wambui, indicates the applicant's father is unknown while his mother is deceased and he lives with his maternal grandmother. That he is 26 years old and the 3<sup>rd</sup> born out of four (4) siblings. That, he is single and has no children. He dropped out in class 3 due to lack of school fees and was employed as a herder. Later he engaged in farming, masonry and casual job prior to his arrest.
13. The applicant stated that he gone with some tools to Marula Conservancy to look for a post to repair a fence when he was arrested. However, he has learnt his lesson and pleaded for leniency. His maternal grandmother supported his release on community service stating that the applicant had learnt his lesson. Similarly, the area Assistant Chief was not opposed to the applicant being released on community rehabilitation.
14. The Kenya Wildlife Services, the complainant, was opposed to a non-custodial sentence since the offence has a negative effect on wildlife conservation. At Prison, the applicant is engaged at the farm and is of good conduct.
15. The Probation officer indicates that the applicant is willing to cooperate in the rehabilitation process and recommends the applicant be placed on community service at Gatare Primary School.
16. I have considered the applications in the light of the material before court and I note that, the law that guides the revisionary power of the High Court is provided for under sections 362 of the *Criminal Procedure Code* (herein 'the Code'), which states as follows:

' The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.'



17. However, the section should be read together with section 364 of the Code which provision states as follow: -

- ' (1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—
- (a) In the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;
  - (b) In the case of any other order other than an order of acquittal, alter or reverse the order.
- (2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence: Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.
- (3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.
- (4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.
- (5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.'

18. Pursuant thereto, the power will only be exercised where, the impugned sentence is either incorrect, illegal or improper. Thus the objective of revisionary jurisdiction is to set right a patent defect or error of jurisdiction or law. This jurisdiction will only be invoked where the decision under challenge is; grossly onerous, there is no compliance with the provisions of the law, or the finding re-ordered are based on no evidence, or material evidence is ignored or judicial discretion is exercised arbitrarily or perversely.

19. Offences: a) Conveying hunting apparatus contrary to section 102(1) (f) of the *Wildlife Conservation and Management Act*, 2013 (herein 'the Act'), b) Hunting for bush meat Trade contrary to section 98(1) of the Act

20. Each accused pleaded guilty on both counts and convicted accordingly.

21. Sentence imposed as follows

1<sup>st</sup> count: Each to serve one year imprisonment.

2<sup>nd</sup> count: Each to serve one year imprisonment. The sentence to run consecutively.

22. The sentence provided by the law on each count is as follows

1<sup>st</sup> count- a fine of not less than 200,000 or imprisonment of not less than 2 years or both

2<sup>nd</sup> count- an imprisonment of not less than three years.



23. From the aforesaid, the sentence meted out of one year on each count is unlawful and incorrect or improper as it is below the minimum sentence therefore it is set aside accordingly and substituted with a minimum sentence of two (2) years for the 1<sup>st</sup> count and three (3) years for the 2<sup>nd</sup> count.
24. Be that as it were section 98 provides for an offence of relating to hunting of bush meat. It refers specifically to hunting in carcass or meat. In the instant matter, the particulars of the charge reads that
- ' On October 9, 2022, at around 11.30 hours at Marula Conservancy, GPS Co-ordinates 37m020216 UTM 9941695, within Naivasha Sub-county of Nakuru County jointly with another not before the court, were found to have hunted a Zebra using a foot snare, without a license'
25. The provisions of section 137 of the Criminal Procedure Code in particular sub-section a (iii), which states: -
- ' After the statement of the offence, particulars of the offence shall be set out in ordinary language, in which the use of particulars of an offence which are required to be given in a charge or information, nothing in this paragraph shall require more particulars to be given than those so required;'
26. An accused person cannot be convicted on the particulars that do not support any charge known under the law. From the aforesaid particulars, the charge is not supported by the facts. It is not clear whether the subject Zebra was alive or dead. As such particulars of the charge must comply with the charge.
27. In that, case, each applicant is given the benefit of doubt on the conviction and sentence on count 2 and declare that, the charge is defective for want of proper particulars.
28. Furthermore, I note that although the pre-sentence reports availed are positive, the law having provided for minimum sentence, the court is bound to apply the same. In that case each applicant will serve a custodial sentence of two (2) years with effect from October 11, 2022 when they were arraigned in court.
29. It is so ordered

**DATED, DELIVERED AND SIGNED ON THIS 29<sup>TH</sup> DAY OF JUNE 2023**

**GRACE L. NZIOKA**

**JUDGE**

**In the presence of**

Applicants present virtually

Mr. Atika for the Respondent

**Ms Ogutu-Court assistant=**

