



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITUI**

**MISC.CRIMINAL REVISION NO.10 OF 2019**

**BERNARD MBUVI MASAMBIA..... APPLICANT**

**VERSUS**

**REPUBLIC OF KENYA.....RESPONDENT**

**RULING**

1. **Benard Mbuvi Masamia**, the **Applicant** herein, was charged with 2 counts *vide* Mutomo Senior Resident Magistrate's Court **Criminal Case No.34 of 2019** namely (a) Count I. Being in possession of Wildlife Trophy contrary to **Section 95** of the Wildlife Conservation and Management Act. The particulars as per the charge sheet presented were that on 22<sup>nd</sup> January 2019 at about 1.00 am at Mutomo Sub location of Mutomo Location in Mutomo Sub County within Kitui County, the **Applicant** was found in possession of

(a) Wildlife Trophy to wit two pieces of Elephant Tusks weighing 25 Kilograms with a street value of Kshs.2.4 Million without a permit.

(b) Count II. Dealing in Wildlife Trophy contrary to Section 84 (i) as read with Section 92 of the Wildlife Conservation and Management Act. The particulars are that on 22<sup>nd</sup> day of January 2019 at about 1.00 am at Mutomo Sub location of Mutomo Location, Mutomo Sub County within Kitui County the Applicant was found in possession of Wildlife Trophy to wit two pieces of Elephant tusks weighing 25 Kilograms with a street value of Ksh.2.4 Million without a permit.

2. The **Applicant** pleaded guilty to both counts and was convicted on his own plea and sentenced as follows:-

**a. In Count I – a fine of Ksh.1 Million in default 5 years imprisonment.**

**b. In Count II. A fine of Ksh.1 Million in default to serve 5 years imprisonment. Both sentences were ordered to run consecutively.**

3. The **Applicant** has moved this court for revision of his sentence on the grounds that the total of 10 years prison sentence or a fine of 2 Millions Shillings was harsh. He has asked this court for leniency.

4. This Court called for the lower court file in order to satisfy itself on the correctness, legality and propriety of the sentence this court also needed to check on the regularity of the proceedings of the lower court.

5. I have perused through the proceedings of the lower court and noted that the **Applicant** pleaded guilty to both counts and the facts read over to him in the language he fully understood. The plea taken was therefore unequivocal. The **Applicant** has not raised any issue on the way the plea was taken and this court is satisfied that he understood the charge and the facts read over to him.

6. This court has looked at the way the prosecution cited the law violated by the **Applicant** and finds that there is some misdescription because instead of The Wildlife Conservation And Management Act, 2013 (or No.47 of 2013), the charge sheet misdescribed the Act as "*The Wildlife Conservation and Management Act Cap 276 of 2013*". Of course there is no statute in the Laws of Kenya with such citation but the misdescription is however insignificant and curable under **Section 382** of the Criminal Procedure Code because that error in the charge sheet did not occasion a failure of justice to the **Applicant**.

7. This court has however noted at the same time some defect on the 2<sup>nd</sup> Count. There is duplicity on the particulars of the charge in both the 1<sup>st</sup> and 2<sup>nd</sup> Count as contained in the charge sheet. The Provisions of Section 134 of the Criminal Procedure Code provides that an offence disclosed in a charge sheet should be specified with necessary particulars. This enables an accused person plead to a charge with clarity of mind as stipulated under **Article 50(2) (b)** of the **Constitution**. Furthermore, **Section 135 (2)** of the Criminal Procedure Code provides that

where more than one offence is founded on the same facts, a description of each offence so charged shall be set out in a separate paragraph or a Count. The particulars described in the second count in my view rendered the 2<sup>nd</sup> Count defective for duplicity because the same set of particulars are also in support of the 1<sup>st</sup> Count. You cannot have the same set of particulars in two different counts.

8. Secondly this court finds that the trial court ought to have imposed the sentence to run concurrently instead of consecutively given that the offences were committed in the same transaction at the same time and place.

9. In the premises, this court finds that the Application for review is merited. The conviction and the sentence meted out against the **Applicant** on 22<sup>nd</sup> January 2019 is set aside in regard to the 2<sup>nd</sup> count is set aside.

10. The conviction and sentence in respect to the 1<sup>st</sup> count is upheld which means the **Applicant** shall now pay a fine of Ksh.1 million or serve 5 years imprisonment in default.

**Dated, Signed and Delivered at Kitui this 19<sup>th</sup> day of January , 2021.**

**R. K. LIMO**

**JUDGE**