



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NANYUKI**  
**CRIMINAL APPEAL Nos. 29 & 30 OF 2019**  
**(CONSOLIDATED)**

1. SIMON GICHUKI WARUTA

2. EVANS MACHARIA NJERU.....APPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

**(Appeal from original Conviction and Sentence in Nanyuki CM Criminal Case No 232 of 2016 – L Mutai, CM)**

**J U D G M E N T**

1. The Appellants herein were convicted in Counts III and IV of, respectively, **conspiracy to commit a felony** contrary to **section 393** of the **Penal Code**, and **killing a rhinoceros with intent to steal its horns** contrary to **section 289** of the same Code. On 24/07/2019 they were each sentenced to, respectively two (2) and five (5) years imprisonment in the two counts, to run concurrently. Though they appealed against both conviction and sentence, they each abandoned their appeal against conviction and urged only the appeal against sentence, particularly the sentence in Count IV.

2. The 1<sup>st</sup> Appellant was not represented by counsel in the appeal; the 2<sup>nd</sup> Appellant was. I have considered all the submissions made in respect to sentence.

3. As for the sentence of 2 years imprisonment in Count III, the Appellants having been sentenced on 24/07/2019, they have already served that sentence. A sentence of imprisonment that has already been served cannot be recalled. The appeal in respect to the sentence in Count III has thus been overtaken by the event of the sentences being already served. That appeal is hereby dismissed.

4. Regarding the sentence in Count IV, it is useful to set out the offence as enacted in section 289 of the Penal Code, which states –

***“289. A person who kills any animal capable of being stolen with intent to steal the skin or carcass, or any part of the skin or carcass, is guilty of an offence and is liable to the same punishment as if he had stolen the animal.”***

The particulars of the offence in Count IV were that in

***“...the night of 22<sup>nd</sup> and 23<sup>rd</sup> February 2016 at Ol-Pajeta Ranch in Laikipia County, jointly with others not before court, they killed a black rhinoceros with intent to steal its horns, and did steal its two horns, with a street value of KShs 6 million, the property of Kenya Wildlife Service.”***

5. The question that immediately comes to mind is, whether a black rhinoceros is capable of being stolen. **Section 267** of the Penal Code sets out in detail **“things capable of being stolen”**. **Subsection (3)** of the section states –

***“Every tame animal, whether tame by nature or wild by nature and subsequently tamed, which is the property of any person, is capable of being stolen.”***

It was not alleged in the particulars of Count IV that the black rhinoceros killed was tame. This court can take judicial notice of the fact that black rhinoceroses are wild by nature, and that they are of a kind which is ordinarily found in a condition of natural liberty in Kenya.

6. This takes us to **subsection (5)** of the same section 267 which provides -

***“(5) Animals wild by nature, of a kind which is ordinarily found in a condition of natural liberty in Kenya, which are the property of any person, are capable of being stolen while they are in confinement, and while they are being actually pursued after escaping from confinement, but not at any other time.”***

**Subsection (6)** provides what constitutes a state of confinement –

***“(6) An animal wild by nature is deemed to be in a state of confinement so long as it is in a den, cage, sty, tank or other small enclosure, or is otherwise so placed that it cannot escape and that its owner can take possession of it at pleasure.”***

It was not alleged in the particulars of Count IV that the black rhinoceros killed was in a state of confinement as defined in subsection (6) above.

6. Finally, **subsection (7)** of section 267 provides -

***“(7) Wild animals in the enjoyment of their natural liberty are not capable of being stolen, but their dead bodies are capable of being stolen.”***

The black rhinoceros killed in Count IV was an animal wild by nature and of a kind which is ordinarily found in a condition of natural liberty in Kenya. It was not in a state of confinement as defined by law. It was not capable of being stolen.

7. The charge in Count IV was thus fatally defective in that the particulars alleged did not disclose the offence charged. Though the appeal against conviction was abandoned, it would be wrong to permit a conviction upon a fatally defective charge to stand.

8. I will in the event quash the conviction in Count IV and set aside the sentence imposed. The Appellants shall be set at liberty forthwith unless otherwise lawfully held as they have already served the sentence of two (2) years imprisonment in Count III. It is so ordered.

**DATED AND SIGNED AT NANYUKI THIS 28<sup>TH</sup> DAY OF JULY 2021**

**H P G WAWERU**

**JUDGE**

**DELIVERED AT NANYUKI THIS 29<sup>TH</sup> DAY OF JULY 2021**