



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION- MILIMANI COURT

CRIMINAL REVISION NO. E316 OF 2020

FRANCIS KIREGA MACHARIA.....APPLICANT

VERSES

REPUBLIC.....RESPONDENT

RULING

1. **Francis Kirega Macharia**, the Applicant, who was jointly charged with: **1. John Mwangi Macharia 2. Stephen Omondi Owino 3. Enoka Othim Abol 4. Seline Atieno Oyengo**; in the lower court has moved this court for review of sentence passed following the conviction and sentence for the offence of being in possession of Wildlife Trophy contrary to **Section 95** as read with **Section 105** of the Wildlife Conservation and Management Act (Act).

2. The application which is brought pursuant to the provisions of **Section 362** of the Criminal Procedure Code (CPC) seeks an order of this court quashing the fine imposed and thereby invoking provisions of **Section 28** of the Penal Code. The applicant also calls upon this court to invoke the provisions of **Section 333 (2)** of CPC so as to release him under **Section 35** of the Penal Code as the time he has been in custody has deprived him of liberty.

3. The application is premised on grounds that: the applicant spent five (5) months in remand custody which was not discounted from the meted out sentence; the fine be quashed as he cannot pay it; he is remorseful, therefore, the time served be considered as adequate to make him to be discharged either absolutely on set conditions.

4. In an affidavit in support of the application, the applicant deposed that at the outset he denied the charges but subsequently changed plea, and was sentenced to serve five (5) years imprisonment or pay a fine of Kshs. 1,000,000/- that he abandoned his right of appeal under **Section 348** of the CPC hence can only approach the court through review or variation of the meted out sentence, hence the application.

5. The applicant canvassed the application through written submissions. He submitted that he has spent four (4) years in custody and therefore seeks discharge of part of the sentence since he is remorseful having been influenced by bad company, but, he has undergone spiritual development and obtained Technology Certificates. He faulted the trial court for not considering sentencing policy guidelines and **Section 28** of the Penal Code.

6. The Respondent did not file any replying affidavit but responded orally through Ms. Ndombi, learned State Counsel, who urged that the period spent in custody of 5 months be considered, but the sentence meted out was within the law.

7. Looking at the background of the matter, the applicant and four others were found in possession Wildlife Trophies namely, three (3) pieces of Elephant tusks weighing 25 Kgs at a street value of Kshs. 2.5 million without a permit.

8. Upon considering evidence before the court, the applicant, **John Mwangi Macharia** and **Stephen Omondi Owino** were found guilty and convicted while their co-accused were acquitted, hence the impugned sentence. John Mwangi Macharia paid the fine while Stephen Omondi Owino approached the court through an application for revision in **HC. Criminal Review No. 54 of 2019** where Ngenye Macharia J. found the term of three (3) years that he had served sufficient and set him free.

9. My duty to discharge my supervisory jurisdiction is to consider the legality, correctness and propriety of the order or the sentence in issue. (See **Section 362** of the CPC).

The applicant was sentenced pursuant to **Section 95** of the Act that provides thus:

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.

This court has been called upon to invoke the provisions of **Section 28** of the Penal Code that provides thus:

“Where a fine is imposed under any law, then in the absence of express provisions relating to the fine in that law the following provisions shall apply—

(a) Where no sum is expressed to which the fine may extend, the amount of the fine which may be imposed is unlimited, but shall not be excessive;

(b) In the case of an offence punishable with a fine or a term of imprisonment, the imposition of a fine or a term of imprisonment shall be a matter for the discretion of the court; CAP. 63 Penal Code [Rev. 2012] [Issue 1] P6-25

(c) In the case of an offence punishable with imprisonment as well as a fine in which the offender is sentenced to a fine with or without imprisonment, and in every case of an offence punishable with fine only in which the offender is sentenced to a fine, the court passing sentence may, in its discretion—

(i) Direct by its sentence that in default of payment of the fine the offender shall suffer imprisonment for a certain term, which imprisonment shall be in addition to any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of sentence; and also

(ii) Issue a warrant for the levy of the amount on the immovable and movable property of the offender by distress and sale under warrant: Provided that if the sentence directs that in default of payment of the fine the offender shall be imprisoned, and if such offender has undergone the whole of such imprisonment in default, no court shall issue a distress warrant unless for special reasons to be recorded in writing it considers it necessary to do so.

10. The applicant was sentenced pursuant to a statute with express provisions of the law relating to a fine to be imposed. The court was therefore mandated to use its discretion. Therefore the sentence imposed was lawful.

11. In meting out the sentence the court was required to consider the principle of proportionality as discussed in the case of *Hoare Vs. the Queen (1989) 167 CLR* where the court stated that:

“That a basic principle in sentencing law is that a sentence of imprisonment imposed by the court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in light of its objective circumstances.”

12. The court considered mitigating factors as the applicant was an elderly man but it noted the nature of the offence and public notoriety and its impact to the country and the need to protect wildlife heritage, a matter of public interest.

13. The law provides for an option of imprisonment and/or both fine and imprisonment. Having opted to impose a fine, though the applicant failed to raise the sum, an injustice was not occasioned.

14. The applicant complains that Section 333(2) of the CPC was not considered. The alluded to provision of the law provides that;

333(2) Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection

1. Has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

15. In the case of *Ahamad Abolfathi Mohammed and Another Vs. Republic (2018) eKLR* the Court of Appeal held that:

“By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. “Taking into account” the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the

conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person.”

16. The applicant was arrested on 29th February 2016, it was not specified that in event the offender were to serve the imprisonment term, time spent in custody was to be considered. I therefore correct that error. The applicant having been incarcerated since 29th February 2016, he has served a sentence of five years and 8 months which is more than the duration he ought to have been in custody.

17. In the premises the application is allowed. The applicant shall be released forthwith unless otherwise lawfully held.

18. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY, THIS 21ST DAY OF OCTOBER, 2021

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Court Assistant – Mutai

Ms. Chege for ODPP

Applicant