REPUBLIC OF KENYA

THE HIGH COURT AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO. E039 OF 2021

DANIEL KARANJA MUCHEMI.....APPLICANT

-VS-

REPUBLIC.....RESPONDENT

RULING

1. Daniel **Karanja Muchemi,** the Applicant, was convicted and sentenced in Kibera Criminal Case No 1513 of 2019 for the offence of dealing with a wildlife trophy of a specified critically endangered species without a permit contrary to **Section 92 (2)** of the Wildlife Conversation and Management Act, 2013.

2. Following the conviction, the applicant was sentenced to serve 5 years imprisonment.

3. Through a chamber summons, he seeks review of the sentence. The application is supported by an affidavit deposed by the applicant where he avers that he is remorseful for the offence and that his incarceration has affected his family financially and psychologically. That he has five (5) children who are school going and two have been adopted by his sick sister.

4. That the sentence is illegal, the statutory sentence under section 92 of the Wildlife Management & Conservation Act is a fine of Ksh.1,000,000/- or 12 months imprisonment. That the default sentence was also irregular, illegal and a mistake which this court should exercise its power to revise and further, take into account time spent in custody pursuant to section 333(2) of the Criminal Procedure Code.

5. The Respondent through Ms. Ndombi, learned Counsel for the State opposed the application. She urged that that the applicant ought to have filed an appeal against the sentence since revision is effected where there is an illegality, impropriety or where the court used improper principles. That the applicant who dealt with 5 pieces of rhino horn weighing 515 grams was not a first offender, having committed a similar offence and was sentenced in Narok Court to serve 6 years imprisonment for a similar charge in Narok CMCR Case No. 1513 of 2019.

6. In a rejoinder, the applicant sought an order directing the sentence meted out by the Narok Court to run concurrently with the one passed by Kibera court.

7. The facts of the case were that the applicant was found on the 18th November,2019 at 1030hours, jointly with others outside Nomad hotel opposite Shell petrol station within Eastleigh while dealing with specified critically endangered wildlife trophy namely 5 pieces of rhino horn weighing 515 grams of street value Ksh. 515,000/=. At the outset the applicant pleaded not guilty but in the course of the trial changed plea and admitted having committed the offence. In mitigation the applicant stated that he was the sole breadwinner of his young family, that his mother is diabetic and that incarceration would cause his children to drop out of school. He prayed for a different sentence from imprisonment and the sentence to run from the date of arrest.
The trial court's presentencing notes indicate that the court considered the sentence in the earlier case and the applicant's mitigation. That the offence was serious but the applicant admitted the offence and saved the court's time and sentenced him to serve 5 years imprisonment as per the minimum sentence provided in the law.

8. I have considered the application, affidavit in support, and rival submissions by both parties. The jurisdiction of this court to review a sentence meted out by a subordinate court is provided for by **Section 362** of the Criminal Procedure Code which provides that:

> ***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.***

9. This court has power to review the sentence of the subordinate court. However, that power is limited to reviewing determinations arrived

at erroneously or where the court acted

on some illegality. The court is also guided by renowned principles of the appellate court on setting aside sentences.

10. It is trite that the court cannot set aside the trial court's sentence unless the court is satisfied that the subordinate court acted on wrong principles or overlooked some material factors. In the case of ***Ogolla s/o Owuor –Vs- Reginum [1954] EACA 270*** the Court of Appeal held that:

> ***"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263)." See also Omuse - v- R (supra) while in the case of Shadrack Kipkoech Kogo - vs - R., Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus :-***
>
> ***sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka –vs- R. (1989 KLR 306)"***

11. The provisions of Section 92 of the Wildlife Conservation and Management Act 2013 enact that:

> ***"Any person who commits an offence in respect of an endangered or threatened species or in respect of any trophy of that endangered or threatened species shall be liable upon conviction to a fine of not less than twenty million shillings or imprisonment for life or to both such fine and imprisonment."***

12. Rhinos form part of the world's most endangered species. The exhibits/specimen were analyzed and proven to be fragments of the white rhino horn. The lower court considered the gravity of the offence and imposed a five-year sentence that was lenient considering the penalty provided for the offence. The court also exercised its discretion during sentencing by considering that the applicant admitted the charges before judgement. The court further considered the period spent in remand custody.

13. The fact that the applicant was also serving a previous sentence meant that he had a past record for dealing with endangered species. The court could not exercise its discretion in favour of the applicant for a lesser sentence.

14. The applicant prays that the sentence in Narok Chief Magistrate's Court runs concurrently with the current sentence. However, he did not raise that issue before the trial court and those facts are not on the lower courts record.

15. The sentencing policy guidelines also provide that the power to order sentences to run concurrently is the province of the trial court. *Paragraph 7.13 and 7.14 of the sentencing guidelines provide:*

> ***Where the offences emanate from a single transaction, the sentences should run concurrently. However, where the offences are committed in the course of multiple transactions and where there are multiple victims, the sentence should run consecutively.***
>
> ***7.14 The discretion to impose concurrent or consecutive sentences lies in the court.***

16. It is notable that the earlier sentence meted out in the Narok Criminal Court resulted from a matter that was of a different transaction which did not have any nexus to the offence before this court, the provisions of Section 12 of the Criminal Procedure Code do not apply to the two cases.

17. As afore stated, this court's power is limited to determining any legality, irregularity or impropriety, jurisdiction that is distinguished from appellate power of this court which allows the court to determine issues on merit and also question the lower courts discretion.

18. In the case of ***Vincent Echesa Okote –Vs- Republic [2019] eKLR*** the court held that:

> ***"…. An appeal is broader than a revision, and that a revision is subsumed in an appeal. A person who approaches a court on revision is only asking the court to take a rather narrow look at the proceedings of the trial court where the focus ought to be on the regularity or propriety or correctness of the proceedings conducted or the decision arrived at. In other words, the challenge is more or less on the regularity or correctness or propriety of the process rather than on the merits the final determination of the trial court."***

18. **Section 364(5**) of the CPC reads as follows:

> **(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.**

In the case of ***Republic-Vs- Mark Lloyd Steveson [2016] eKLR*** Ngugi J held that:

> ***" … In my view, the correct reading of the section is that a party who has a right of appeal cannot "insist" on invoking the High Court's power of review; in other words, such a party does not have a right to have the court review the decision s/he is aggrieved of. The only sure way to have such grievances heard and considered as a matter of right is through an appeal."***

19. In instant case the trial court acted within the appropriate principles and did not occasion any injustice or proceed on any irregularity to enable this court intervene.

20. In the result, the application lacks merit, therefore, it is dismissed.

21. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY,

THIS 29TH DAY OF NOVEMBER 2021

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Court Assistant – Mutai

Applicant

Mr. Mutuma - ODPP