



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CRIMINAL REVIEW NO.E014 OF 2021

JOSEPH MWANZIA MUSYOKA.....APPLICANT

VERSUS

STATE.....RESPONDENT

RULING

1. The Applicant, **JOSEPH MWANZIA MUSYOKA** is vide an undated application filed on **21st September, 2021** seeking for revision of sentence meted against him in **Voi Principal Magistrate's Criminal Case No.990 of 2019**.

2. According to the Applicant, he was charged with the offence of dealing in carcasses of wildlife species contrary to **Section 98(1) as read with Section 105** of the **Wildlife Conservation and Management Act, 2013, Laws of Kenya**.

The particulars were that:-

“On 25th day of September, 2019 at around 0700 hrs at Taita Area in Galana Ranch within Kilifi County, the Applicant was found with others not before court ferrying carcasses of wildlife species namely; Forty four (44) fresh dikdik carcasses wighing approximately 132 Kgs using Motor Bike Registration No.KMEV 347J and KMEV 427J without a permit or any other lawful exemption”.

3. The Applicant was arraigned in court on **26th September, 2019** whereby he pleaded guilty to the said charge and was convicted and sentenced to serve five (5) years imprisonment.

4. Aggrieved by this sentence, the Applicant has invoked this court's supervisory jurisdiction and is seeking that it calls for the record of the lower court and satisfy itself as to the correctness, legality, regularity and propriety of the sentence that was meted against the Applicant without an option of a fine.

5. The Applicant has stated that the trial Magistrate failed to address herself to the exceptional circumstances surrounding the case together with his mitigation hence passed a sentence which is excessively harsh and premature.

6. The Applicant has also contended that he is fully rehabilitated and will never repeat the crime he was convicted of. He says that he is remorseful and asks for forgiveness and leniency.

7. Further, the Applicant prays that he be considered for the minimum sentence for the offence he was convicted for and that the remaining period of his sentence be converted into a non-custodial sentence so he can support his family.

8. On the hearing day, **24th September, 2021**, the Applicant orally reiterated the grounds in his affidavit and added that his child who is still very young, suffers from Asthma, thus needs him.

9. The prosecution responded by prosecuting the application orally through **Mr. Chirchir**, counsel for the State who contested the Application.

10. In his submissions, **Mr. Chirchir** stated that the Applicant has almost done a three year period of his sentence so that if remission is included, he will soon be released. He also submitted that the minimum sentence statutorily provided for, for the offence the Applicant was charged with is three (3) years and hence the five (5) year sentence that was meted against him was not harsh in view of the number of dikdiks that were involved, which is a threat to wildlife. On the issue of a non-custodial sentence being considered, the counsel for the State

submitted that the Probation Report on the Applicant was unfavourable. He urged the court to dismiss the application.

11. To determine the Applicant's application, I have carefully read through the grounds upon which it is premised, submissions by both parties and the record of proceedings of the trial court. The application invokes this court's revisional jurisdiction under **Section 362 as read with Section 364 of the Criminal Procedure Code**, which provision clothe the court with the power to call for and examine the record of proceedings of the lower court to satisfy itself as to the correctness, legality, regularity or propriety of any findings, sentence, or order recorded or passed by the trial court and the regularity of the proceedings leading to the impugned order or finding and once satisfied, make appropriate orders.

12. To start with, I wish to appreciate the provision of law under which the Applicant was charged. The offence against the Applicant is provided for under **Section 98(1)** of the **Wildlife Conservation and Management Act, 2013**, which states:-

“[98]. A person who engages in hunting for bushmeat trade, or is in possession of or is dealing in any meat of any wildlife species, commits an offence and shall be liable on conviction to a fine of not less than two hundred thousand shillings or to imprisonment for a term not less than one year or to both such fine and imprisonment”.

13. Other conditions antecedent to the penalty are provided for under **Section 105** of the same Act as:-

105. (1) The court before which a person is charged for an offence under this Act or any regulations made there-under may, in addition to any other order –

(a) upon the conviction of the accused; or

(b) if it is satisfied that an offence was committed notwithstanding that no person has been convicted of an offence, order that the wildlife trophy, motor vehicle, equipment and appliance, livestock or other thing by means whereof the offence concerned was committed or which was used in the commission of the offence be forfeited to the Service and be disposed of as the court may direct.

(2) In making the order of forfeiture under subsection (1) the court may also order that the cost of disposing of the substance, motor vehicle, equipment, appliance, livestock or any other thing provided for in that subsection be borne by the person convicted there-under.

(3) The court may further order that any licence, permit or any authorization given under this Act, and to which the offence relates, be cancelled.

14. From the reading of **Section 98** of the **Wildlife Conservation and Management Act**, the penalty for any person found guilty and convicted for an offence thereunder is a fine of not less than Two Hundred Thousand Shillings or to imprisonment for a term not less than one year or to both such fine and imprisonment.

15. The Applicant having been sentenced to serve five (5) years

imprisonment, I agree with his deposition that the trial Magistrate failed to address herself to the provisions of the law and passed a sentence that is excessively high, premature and unlawful in total disregard of the provisions of the law. This must be corrected by this court.

16. It is worth noting that the Applicant was sentenced on **8th October, 2019** hence, has so far served a period of two (2) years imprisonment, which is most unfortunate but not for this court's determination in the circumstances of the application before it.

17. I thus proceed to find the sentence imposed against the Applicant by the trial court incorrect and illegal, hence same should and is hereby set aside.

18. The Applicant be and is hereby set free, unless lawfully held.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 25th DAY OF NOVEMBER, 2021.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Chirchir counsel for State

Applicant in person - present

Court Assistant -M/S Bancy