



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

CRIMINAL APPLICATION NO. E146 OF 2021

TORINYO OLE MAKOSI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

Background

1. The Applicant herein, was charged with Hunting Wildlife for bush meat trade contrary to **Section 98(1)** of the **Wildlife Conservation and Management Act (Act No. 47 of 2013)**. The particulars were that on the 20th day of December, 2020 at Suswa area in Naivasha sub- County within Nakuru County jointly with others not before court, hunted and killed one warthog while using pangas and dogs.
2. The Applicant pleaded guilty and was convicted on his own plea of guilty and consequently sentenced to one-year imprisonment on 06/05/2021.
3. The Applicant lodged the instant application in which he seeks a revision of his sentence in what he dubbed 'Sentence Review Grounds' with a supporting affidavit filed on 31/08/2021.
4. He pleads for leniency on the following grounds, namely: That he pleaded guilty to the charge; that he was remorseful and was now a law abiding citizen; that he suffers from a chronic disease; that he was only 19 years at the time he committed the offence and that he has undertaken farming in the reform journey which he wishes to engage in when he leaves prison.
5. The Application was heard on 7th December, 2021 when the Applicant submitted that the period of 5 months and 6 days he spent in remand custody be considered, that his wife just gave birth and that he is the sole breadwinner of the family. He heightened that he was due for release upon completion of the sentence on 6th January 2022.
6. Learned prosecutor, Ms. Maingi did not oppose the application for review. She submitted that the offence is rampant and hopes that the Applicant had reformed as he had informed the court.

Determination

7. **Section 362** of the **Criminal Procedure Code** provides for the power of the High Court to conduct revisions on orders issued by the Magistrates' Courts. Under the provision, this Court has the power to call 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.
8. The question now arising herein is, ***does the sentence passed by the trial court warrant a review?*** The orders which the Court can issue are provided for under Section 364 of the Criminal Procedure Code which reads:

“(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may-

(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;

(b) in the case of any other order other than an order of acquittal, alter or reverse the order.

(c) in proceedings under [Section 203](#) or 296 (2) of the Penal Code, the Prevention of Terrorism Act, the Narcotic Drugs and Psychotropic Substances (Control) Act, the Prevention of Organized Crimes Act, the Proceeds of Crime and Anti-Money Laundering Act, the Sexual Offences Act and the Counter-Trafficking in Persons Act, where the subordinate court has granted bail to an accused person, and the Director of Public Prosecution has indicated his intention to apply for review of the order of the court, the order of the subordinate court may be stayed for a period not exceeding fourteen days pending the filing of the application for review.

(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:

Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

(3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.

(4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.

(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.”

9. The Appellant was convicted under **Section 98(1) of the Amended Wildlife Conservation and Management Act, 2013**. I have looked through the Statute. The same does not provide for a **sub-section (1) of Section 98**. I have noted that there was **Wildlife Conservation and Management (Amendment Bill, 2020)** effected vide **Kenya Gazette Supplement No. 217 (Senate Bill No.30) of 4th December, 2020**. This proposed a number of amendments to the Act but Section 98 was not amongst them. What this implies is that the Applicant ought to have been charged basically under **Section 98** of the Act which provides for offences relating to subsistence of hunting. It reads thus:

“A person who engages in hunting for bush meat 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 imprisonment for a term not less than one year or to both such fine and imprisonment.”

10. The Applicant herein was sentenced to the maximum sentence provided. It is trite law that unless for very good reason or where the law provides for a mandatory sentence a court should not be quick to impose the maximum sentence. Further, a reading of this provision is clear that by the use of the word *“liable”* it gives the court the discretion to impose an appropriate sentence premised on the circumstances of the case.

11. In the present case, the Applicant pleaded guilty and thus saved the court’s time. The record does however show that the Applicant at the time of conviction concede that he had another ongoing case in the Magistrate’s Court No.1 at Naivasha about arrows which was ongoing being Criminal Case No. 99 of 2020. Interestingly, in that case the Applicant’s name was David Karanja which he conceded was himself. However, since the latter case had not been concluded, the court has no basis of regarding him as a repeat offender.

12. I have perused the entire record in the case herein and I note that the Applicant was not accorded an opportunity to mitigate, which if he had the court probably have imposed a lighter sentence.

13. In addition to the mitigating factors he has tendered herein, the Judiciary Sentencing and Policy Guidelines at paragraph 23.8 provides for mitigating factors that a court should consider in imposing a lenient sentence. They are:

a. A great degree of provocation.

b. Commitment to repairing the harm caused by the offender’s conduct as evidenced by actions such as compensation, reconciliation and restitution prior to conviction.

c. Negligible harm or damage caused.

d. Mental illness or impaired functioning of the mind.

e. Age, where it affects the responsibility of the individual offender.

f. Playing of a minor role in the offence.

g. Being a first offender.

h. Remorsefulness.

i. Commission of a crime in response to gender-based violence.

j. Pleading guilty at the earliest opportunity and cooperation with the prosecution and the police.

14. I have also noted that a Probation Officer's Report dated 29th December, 2020 was filed which recommended an alternative sentence to imprisonment, which again the trial court did not take into account. The Applicant was touted as a young man then aged 25 years, was the sole bread winner to his family, had no established criminal record, had expressed remorse and was willing to do reparative work.

15. Under **Section 4 the Probation of Offenders Act, Cap 64, Laws of Kenya**, a court may place an offender under probation upon conviction having regard to factors such as -youth, character, antecedents, home surroundings, health or mental condition of the offender, nature of the offence, any extenuating circumstances in which the offence was committed.

16. All the above factors combined lead me to conclude that this is a suitable case in which the Applicant was entitled to a much more lenient sentence. This is not however to say that the court does not recognize the grave consequences of depleting our wildlife through hunting. Whilst bearing in mind the cardinal importance of our wildlife, the same should also be balanced against the scales of serving rehabilitative purpose of punishment. The Applicant being a young man and was a first offender who has demonstrated remorse should be accorded an opportunity to reform through other means other than imprisonment.

17. All the same, having been arrested on 20th December, 2020 means that he is on the sunset days of his jail term. He has learnt his lesson. I should release him to go home and enjoy his Christmas.

18. In sum, I find that the Applicant has served sufficient sentence. I order that he be forthwith set free unless otherwise held.

19. It is so ordered.

DATED AND DELIVERED AT NAIVASHA THIS 16TH DAY OF DECEMBER, 2021

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:-

1. Applicant in person

2. Miss Maingi for the Respondent

2.

Court

Assistant:

Ms.Ogutu