

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI

CRIMINAL DIVISION

CRIMINAL REVISION NO.884 OF 2018

ISAAC MBUGUA MBURUAPPLICANT

VERSUS

REPUBLICRESPONDENT

RULING

The Applicant, Isaac Mbugua Mburu was convicted of the offence of **being found in possession of wildlife trophy** contrary to **Section 95** as read with **Section 105** of the **Wildlife (Conservation and Management) Act**. The prosecution was able to establish to the satisfaction of the court that the Applicant was unlawfully found in possession of 149 kilograms of elephant tusks in circumstances that indicated that he was offering the same for sale. He was sentenced to serve eight (8) years imprisonment on 11th July 2018. The Applicant was aggrieved by this sentence. He has applied to this court to have the said sentence revised. He pleads that the period of three (3) years and five (5) months that he was in remand custody be taken into consideration in the application. He therefore urged the court to accordingly revise the custodial sentence that was imposed on him.

During the hearing of the application, Mr. Bosire for the Applicant urged the court to take that period into consideration. He also pleaded with the court to consider that the Applicant was a young man who deserved another chance at life. The period that he had been in prison is sufficient punishment. He urged the court to consider the application favourably and allow the same. Ms. Kimaru for the State opposed the application. She submitted that the Applicant was found in possession of elephant tusks in circumstances that indicated that he was offering the same for sale. Whereas she acknowledge that the Applicant had been in lawful custody since 23rd January 2015, she was of the view that the custodial sentence that was meted on the Applicant was lawful and should not be disturbed.

This court has carefully considered the rival submission made by the parties to this application. When the trial court sentenced the Applicant to serve the custodial sentence, it was exercising judicial discretion. The Court of Appeal in **Ahmad Abolfathi Mohammed & Another –vs- Republic Criminal Appeal No. 135 of 2016** (unreported) held at Page 25 thus:

“As what is challenged in this appeal regarding sentence is essentially the exercise of discretion, as a principle this Court will normally not interfere with exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive. In Bernard Kimani Gacheru v. Republic, Cr App No.188 of 2000 this Court stated thus:

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, any one of the matters already stated is shown to exist.”

In the present application, the Applicant was sentenced to serve a custodial sentence of eight (8) years imprisonment. **Section 95** of the **Wildlife (Conservation and Management) Act** states that anybody found in possession of wildlife trophy or anyone found dealing in wildlife trophy, shall, upon conviction, be fined a sum of Kshs.1 million or be sentenced to serve a term of imprisonment of not less than five years or both such imprisonment and fine. In the present application, it was clear to the court that the Applicant was sentenced to serve a custodial sentence that fitted the crime. Where the trial court chooses to impose a custodial sentence beyond the minimum sentence provided by the law, the court must state the aggravating circumstances that persuaded it to give a harsher sentence than the minimum custodial sentence provided by the law. In the present case, it was clear to the court that the trial court did apply the correct principles of the law when it sentenced the Applicant to serve the custodial sentence. The size of the elephant tusks that was recovered from the Applicant was such that a harsher deterrent sentence was called for.

However, this court noted that it was apparent that the trial court did not take into account the period that the Applicant was in remand custody prior to his conviction. The Applicant was in remand custody for a period three (3) years and five (5) months prior to his conviction on 11th July 2018. This period ought to have been taken into account in accordance with **Section 333(2)** of the **Criminal Procedure Code**. This court shall take into account that period. Taking into consideration the fact that the Applicant is entitled to remission, this court is of the view that the Applicant has served his sentence and paid his just debts to the society.

For the above reasons, this court finds merit with the Applicant’s application. The custodial sentence imposed on the Applicant is therefore commuted to the period already served. The Applicant is ordered set at liberty forthwith and released from prison unless otherwise lawfully

held. It is so ordered.

DATED AT NAIROBI THIS 26TH DAY OF FEBRUARY 2020

L. KIMARU

JUDGE