



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL REVISION CASE NO. 210 OF 2019

LESITT, J

FRANCIS KINYUA MAINA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an application for Revision from the decision of Chief Magistrate's Court,

Criminal Case No.2053 of 2016, Kibera Court, HON. B. OJOO SPM)

RULING ON REVISION

1. The Applicant has invoked the Revision jurisdiction of this court, vide a **Notice of Motion** application brought under **Article 50(2)** of the Constitution and **section 362** and **364** of the **Criminal Procedure Code**. He asks for **ORDERS** and states thus:

(1) That I am the above inmate at the Nairobi Remand

(2) That I was found guilty of BEING IN POSSESSION OF WILDLIFE TROPHY contrary to section 95 of the Wildlife Conservation and Management Act 2013 and subsequently sentenced to 5 years imprisonment with an option of a fine of Kshs. 1,000,000/-.

(3) That I pray this court to review my sentence of five years and also reduce the current fine. I pray this court finds it prudent to consider a non-custodial sentence in view of the reasons explained in the supporting affidavit.

2. The application is supported by two grounds to the effect that the Applicant is a family man whose incarceration is affecting his family, and that he was a first-time offender. The application is also supported by an affidavit sworn by the Applicant in which he sets out the brief circumstances of his trial in the magistrates' court. I have considered the same.

3. The Applicant was convicted by the magistrates' courts Kibera on the 8th of July, 2019 for the offence of being in possession of wildlife trophy contrary to **section 95** of the **Wildlife (Conservation and Management) Act of 2013**. The offence attracts a sentence of a fine of one million Kenya shillings or five years imprisonment. The Applicant was sentenced to five years imprisonment that he seeks to be revised by this court.

4. The Applicant urged the court to reduce his sentence and pass a lenient one on the basis he had a young family and he was the sole breadwinner, and that he also took care of his mother who was sickly and depended on him for her treatment and livelihood.

5. The learned prosecution counsel Mrs. Kimaru for the State was not opposed to the application in light of case of **Francis Karioko Muruatetu & another v Republic [2017] eKLR**, which she urged provides guidance to the court. Counsel stated that more so for the reason the street value of the trophies the Applicant was found with was Ksh. 800,000/=.

6. The Applicant chose not to file an appeal in his case but to file an application for revision. That was within his right as provided under the **Constitution of Kenya, Article 50(2) provides:**

“If convicted, one has a right to appeal or apply for review by a higher court as prescribed by law.”

7. **Sections 362 of the Criminal Procedure Code** provides for the powers of the high court ‘to call for records of the lower courts to satisfy 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 the lower court’. While **section 364** of the **CPC** spells out the power of the high court on revisions. That is the jurisdiction the Applicant has invoked in this application.

8. Having invoked the Revision powers of the court, the Applicant did not need to argue the matter or even appear in court. **Section 365** of the **CPC** is clear about that. It provides that no party has a right to be heard whether in person or by an advocate before the High Court when exercising its powers of revision. There is a proviso that the High Court may hear any party or his advocate. What that means is that the power of revision need not be exercised in a formal hearing set up, as in a court or chamber. Neither need it be through a formal application.

9. Turning now to the matter at hand, the duty of this court is to satisfy itself as ‘to the correctness, legality, or propriety of any finding, sentence or order recorded or passed’. The Applicant was found guilty of possession of a wildlife trophy. The penalty for that offence is prescribed as follows- ‘shall be liable to a fine of not less than one million shillings or a term of imprisonment of not less than twelve months or to both such fine and such imprisonment.’

10. The learned trial magistrate sentenced the Applicant to a fine and an imprisonment term. The fine being one million shillings. The fine order was in tandem with the relevant legal provision. Contrary to the State’s submission, the amount of fine is not based on the value of the trophy.

11. The learned trial magistrate was entitled to order for both a fine and a term of imprisonment so long as it complied with the law. The intention of the trial magistrate is not clear whether she intended to have the Applicant serve both an imprisonment and also pay a fine. It could be either way.

12. **Section 28(2)** of the **Penal Code** prescribes default sentences for all fines, where the respective legislation does not provide any. It provides as follows:

“In the absence of express provisions in any written law relating thereto, the term of imprisonment or detention under the Detention Camps Act (Cap. 91) ordered by a court in respect of the non-payment of any sum adjudged to be paid for costs under section 32 or compensation under section 31 or in respect of the non-payment of a fine or of any sum adjudged to be paid under the provisions of any written law shall be such term as in the opinion of the court will satisfy the justice of the case, but shall not exceed in any such case the maximum fixed by the following scale—

Amount	Maximum period
Not exceeding Sh. 500	14 days
Exceeding Sh. 500 but not exceeding Sh. 2,500	1 month
Exceeding Sh. 2,500 but not exceeding Sh. 15,000	3 months
Exceeding Sh. 15,000 but not exceeding Sh. 50,000 ...	6 months
Exceeding Sh. 50,000	12 months

13. In the case of the Wildlife Act, no default sentences are prescribed. Thus **section 28(2)** of the **Penal Code** applies.

14. In this case therefore the default sentence ordered for the fine option was irregular, illegal and a mistake. This court’s jurisdiction to revise the sentence has crystallized. The maximum default sentence is twelve months imprisonment. The court could not have ordered for more. However, the trial court had the power to order for both imprisonment and fine.

15. In the result, I revise the trial magistrate’s order on sentence, by setting aside the order of a fine of Kshs. One million in default five years imprisonment, and in substitution order for a fine of Kshs. one million in default twelve months imprisonment together with an imprisonment term of twelve months imprisonment. The prison terms will run consecutively.

16. The Applicants sentence should be rectified accordingly.

DATED AT NAIROBI THIS 10TH DAY OF MARCH, 2020

LESIT, J.

JUDGE