



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CRIMINAL DIVISION

CRIMINAL REVISION NO. 351 OF 2019

LESIT, J

JAMES MUTURI NDUNGU.....RESPONDENT

VERSUS

REPUBLIC.....APPLICANT

(Being an appeal from the original conviction and sentence by Hon. F. Mutuku, SPM dated 15th July 2019 in Kibera Chief Magistrate Criminal Case No. 529 of 2014)

RULING

1. The Applicant **JAMES MUTURI NDUNGU** and **GIBSON KARIUKI MUKURI** were the 2nd and 1st accused persons respectively in the trial court where they faced two counts of offences. They were convicted of count 1 which was the offence of Being in Possession of Wildlife Trophy contrary to **Section 95** of the **Wildlife Conservation and Management Act 2013**, to wit 22 kilograms of 18 pieces of elephant ivory with street value of KShs.2.2 million.
2. Both were sentenced to a fine of KShs.3 million or in default 3 years' imprisonment each. None of them was able to afford the fine.
3. When this matter came up for hearing, which was through skype, James Muturi informed the court that he was tried with a co-accused Gibson who was also present with him in prison. The court thus heard both Applicants as each had filed applications for Revisions. James Muturi's application is Criminal Revision No. 351 of 2019 while Gibson Kariuki's Criminal Revision is No. 354 of 2019.
4. For purposes of this ruling James Muturi is hereinafter referred to as the 1st Applicant while Gibson Kariuki will be referred to as the 2nd Applicant.
5. The 1st Applicant in his address urged the court to forgive him for the offence he committed. On humanitarian grounds he urged that he was the sole bread winner of his family. Further that he left his wife six months pregnant and has had no chance to see his baby. He urged the court to consider ordering his sentence to run with effect from the date of his arrest in view of Covid-19. He said he had been in jail for five years and that he was sentenced to 5 years' imprisonment.
6. The 2nd Applicant on his part urged court to order that his sentence runs from the date of arrest. He urged that he was 32 years unmarried man at time of arrest. He urged that he was in custody for 1 year 4 months and that in July 2019 he was sentenced to 5 years. None of the Applicants were serving 5 years. They were mistaken.
7. Ms Akinyi, Learned Prosecution Counsel submitted that the applications were both opposed. She urged that the Applicants had in their possession wildlife trophies of two critically endangered animals, elephant and hippopotamus. Counsel urged that the sentence was appropriate and deterrent enough and ought not to be disturbed.
8. The Applicants were convicted under **section 95** of the **Wildlife Conservation and Management Act No. 47 of 2013**. That section provides that anyone convicted under that section shall be liable on conviction 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 imprisonment.
9. The Learned Trial Magistrate opted to impose a fine against each of the Applicants. Having chosen to do so then, the fine imposed has to comply with **section 28** of the **Penal Code**. Under **section 28(1)(b)** the trial court has discretion to determine what sentence to impose **"where the offence is punishable with a fine or a term of imprisonment, the imposition of a fine or a term of imprisonment shall be a matter for the discretion of the court."** The Magistrate's discretion to impose a fine cannot be faulted.

10. **Section 28(2)** gives maximum fixed default sentences for various fines. The trial court may give any default term but should not exceed those specified under this section, subject only to there not being express provisions in any written law relating thereto. In this case **The Wildlife Conservation and Management Act 2013** does not specify default sentences.

11. For a fine of KShs.3 million the maximum default sentence applicable is 12 months' imprisonment. The default sentence prescribed by the trial court does not meet the legal requirement. Consequently, I set aside the default sentence imposed of 3 years' imprisonment and substitute it with 12 months' imprisonment. The Applicants should either pay the fine imposed or serve 12 months' imprisonment in default from the date of sentence in the lower court, which is 23rd July, 2019.

DATED IN NAIROBI THIS 25TH DAY OF MAY, 2020.

LESIT, J

JUDGE

SIGNED AND DELIVERED THIS 28TH DAY OF MAY, 2020.

BY HON. JUSTICE JAMES WAKIAGA

JUDGE

SIGNED