



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.E007 OF 2020

(An Appeal arising out of the conviction and sentence of Hon. Ombewa (PM) delivered 29th May 2020 in Kibera Law Court Criminal Case No.464 of 2020)

DAVID NDENGA SANIGO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, David Ndenga Saningo, was charged with the offence of **being found with wildlife trophy** contrary to **Section 95(a) of Wildlife Conservation and Management Act (2013)**. The particulars of the offence were that on 27th May 2020, at Rangau-Ongata Rongai, in Kajiado County, the Applicant was found in possession of a wildlife trophy, namely one ostrich egg shell without a permit. When the applicant was arraigned before the trial Magistrate Court, he pleaded guilty to the charge. He was sentenced to pay a fine of Kshs.1,500,000/- or in default serve two years imprisonment. The Applicant was unable to pay the fine. He is serving the default sentence. Aggrieved by the decision, the Applicant move the court by way of an application for revision seeking the setting aside of the conviction and sentence.

In his application, the Applicant essentially complained that the plea of guilty that was recorded by the trial magistrate was not unequivocal. The Applicant explained that the particulars presented by the prosecution to support the charge did not meet the legal threshold to establish such charge. The Applicant further stated that it was not clear from the facts recited by the prosecution whether the exhibit presented to court was an ostrich egg shell or was an actual ostrich egg.

It was in that regard that the Applicant was of the firm view that the plea of guilty that was recorded by the trial magistrate's court was equivocal and therefore the conviction ought not stand in the circumstances.

Mr. Brigide Chepkoech, learned counsel for the Applicant amplified these facts when she made her submission before the court. She relied on several decided cases in support of the Applicant's case. She stated the Applicant, being unrepresented, was denied the right to representation by an advocate. She explained that trial court did not inform the Applicant of his constitutional right to be represented by counsel. As regard the plea of guilty being equivocal, learned counsel relied on the case of **Alexander Lukoye Malika vs. Republic. [2015] eKLR** where the Court of Appeal held that:

“A court may only interfere with a situation where an accused person has pleaded guilty to a charge where the plea is imperfect, ambiguous or unfinished such that the trial court erred in treating it as a plea of guilty. Another situation is where an accused plead guilty as a result of mistake or misapprehension of facts. An Appellate Court may also interfere where the charge laid against an accused person to which he has pleaded guilty disclose no offence known in law. Also where upon admitted facts the Appellant could not in law have been convicted of the offence charged.”

She therefore urged the court to allow the application for revision, quash the conviction and set aside the sentence that was imposed on the Applicant.

Ms. Ndombi for the State opposed the application. She submitted that the plea of guilty that was recorded was proper. The charge was read to the Applicant. He understood the charge because the charge was read to him in a language that he understood. Upon the plea of guilty being recorded, the facts in support of the charge were read to the Applicant. The Applicant confirmed that he was indeed found in possession of an ostrich egg. Learned Prosecutor stated that the plea of guilty that was recorded by the trial magistrate was unequivocal and should therefore be upheld by the court. As regard whether the Applicant ought to have been informed of the right to be represented by counsel, Ms. Ndombi submitted that the duty to inform the court that an accused person wishes to be represented by counsel is placed upon

the accused person. In the present case, the Applicant did not inform the court that he wished to be represented by counsel. She therefore urged the court to disallow the application for revision in its entirety as it lacked merit.

This court has carefully considered the rival submission made by the counsel for the parties to this application for revision. It was clear from the submission made that the issue for determination by this court is whether the plea of guilty that was recorded in respect of the Applicant by the trial court was unequivocal. **Section 207** of the **Criminal Procedure Code** provides the procedure to be followed when such plea is recorded.

Section 207 states thus:

“(i) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement;

“(ii) If the accused admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly or possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to be sufficient cause to the contrary:

Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.”

In **John Mwendo Musau vs. Republic [2013] eKLR** the Court of Appeal held that:

“(5) On this argument we wish to state that we have outlined the procedure before the trial court at the time of taking plea. The legal principles to be applied in plea taking were well communicated in the locus classicus case of Adan vs. Republic [1973] EA 445 where the court held:

“(i) The charge and all the essential ingredients of the offence shall be explained to the accused in his language or in a language he understands.

“(ii) The accused’s own words should be recorded and if they are on admission, a plea of guilty should be recorded.

“(iii) The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts.

“(iv) If the accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of pleas entered.

“(v) If there is no change of plea a conviction should be recorded and a statement of facts relevant to the sentence together with the accused’s reply should be recorded.”

We want to add here that if the accused wishes to change his plea or in mitigation says anything that negates any of the ingredients of the offence he has already admitted and has been convicted for, the court must enter a plea of not guilty.

That is to say that, an accused person can change his plea at any time before sentence. The procedure as laid out in Adan vs. Republic (Supra) is also provided under section 207 of The Criminal Procedure Code”.

In the present application, having perused the proceedings of the trial magistrate’s court, this court formed the considered opinion that the plea of guilty that was recorded in respect of the Applicant was equivocal. Why do I say this? According to the charge sheet, the Applicant was found in possession one ostrich “egg shell” without a permit which was said to be contrary to **Section 95(d)** of the **Wildlife Conservation and Management Act**. In the proceedings, after the plea of guilty was recorded, it was indicated that the Applicant was indeed found in possession of an ostrich “egg”... In fact the prosecutor stated that the Applicant was found with “one whole ostrich egg”. The egg was produced in court as Prosecution Exhibit No. 2. However later in the proceedings, the prosecution indicated that he had sent the “egg” or the “eggshell”, whatever the case may be, for analysis to determine if indeed the item was an ostrich egg or egg shell.

At the time the plea of guilty was recorded, the prosecutor had not received the report in respect of the same. That being the case, on what basis did the trial magistrate reach the verdict that the Applicant was found in possession of wildlife trophy? The prosecutor was not an expert to tell the court that the item he produced as an exhibit was an ostrich egg. It is also clear that the proceedings as recorded is ambiguous on whether the item that was tendered in evidence was an “egg” or “egg shell”. In his mitigation, the Applicant stated that he had been in possession of the “egg shell” for a period of over 25 years. Evidently, the facts stated by the prosecution to establish that charge was incongruous. The facts as stated by the prosecution did not support the charge. The plea of guilty that was recorded by the trial magistrate was therefore equivocal. Consequently, therefore, the Applicant has made a case for this court to interfere with the conviction and sentence in exercise of its revisionary jurisdiction under **Section 362 and 364** of the **Criminal Procedure Code**.

The conviction of the Applicant is hereby quashed. The sentence imposed upon him is hereby set aside. Following the Court of Appeal decision of **Joseph Kekuya Lelantile & Another vs. Republic [2000] eKLR**, this is a suitable case for re-trial. The Court of Appeal cited with approval the case of **Fatehali Manji vs. Republic [1965] EA. 343** and **M’kanake vs. Republic [1973] EA 67** where the above courts held that a retrial may be ordered when the interest of justice so dictates. In the present application, this court notes that the Applicant has

been in prison for a period of four (4) months. This is not an inconsiderable period of time that precludes this court from making an order of retrial. The maximum custodial sentence that the Applicant may incur should he be convicted in the retrial is far more serious than the period he has already served.

The Applicant shall take a fresh plea before the Kibera Chief Magistrate's Court on 24th September 2020 before another Magistrate other than Hon. Ombewa, Principal Magistrate. It is so ordered.

DATED AT NAIROBI THIS 22ND DAY OF SEPTEMBER 2020

L. KIMARU

JUDGE