



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**HIGH COURT CRIMINAL REVISION NO. 162 OF 2020**

**JOSEPH MUTISYA MWANGANGI .....APPLICANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**RULING**

1. **Joseph Mutisya Mwangangi** the Applicant was charged with the offence of being in **possession of wildlife trophies contrary to section 92(4) of the wildlife conservation and management Act 2013.**

The facts were that on the 6<sup>th</sup> day of June 2019 at around 2230 hrs, at Miale lodge room C10 in Emali town of Nzau district within Makueni county the Applicant was found in possession of wildlife trophies namely two (2) pieces of worked ivory and elephant tusks being of an endangered species, weighing approximately one kilogram (1kg) each with estimated street value of Kshs.200,000/= contrary to section 92(4) of the Wildlife Conservation and Management Act 2013.

2. He was arraigned in court on 20<sup>th</sup> June 2019 when the charge was read to him and he pleaded guilty. The facts were then read to him and he confirmed them to be true. He was subsequently convicted and sentenced to a fine of Kshs.3,000,000/= in default five (5) years imprisonment.

3. He has filed this application for review pursuant to section 362, 364 (B) and section 333(2) of the Criminal Procedure Code which provide as follows:

**Section 362:** The High Court may call for 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.

**Section 364 (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 –

**Section 364 (1) (b)** in the case of any other order other than an order of acquittal, alter or reverse the order.

4. This application is opposed by the State through learned counsel Mr. James Kihara.

5. The Applicant was charged under section 92(4) of the Wildlife Conservation and Management Act which is non-existent. Section 92 provides that:

**Section 92**

“Any person who commits an offence in respect of an endangered or threatened species or in respect of any trophy of that endangered or threatened species shall be liable upon conviction to a fine of not less than twenty million shillings or imprisonment for life or to both such fine and imprisonment.”

6. On the other hand, **section 95** of the said Act provides:

“Any person who keeps or is found in Possession of a wildlife trophy or deals in a wildlife trophy, or manufactures any item from a trophy without a permit issued under this Act or exempted in accordance with any other provision of this Act, commits an offence and shall be liable upon conviction to a fine of not less than one million shillings or imprisonment for a term of not less than five years or to both such imprisonment and fine”. (*Emphasis mine*)

7. The Applicant having been found in possession of Wildlife trophies (*2 pieces of worked ivory of elephant tusks*) ought to have been charged under section 95 and NOT the non-existent section 92(4) of the said Act.

8. The fine under section 95 is indicated as Kshs. One million or imprisonment of not more than five (5) years or both.

9. I therefore find that the Applicant was charged under a non-existent provision of the Law, and the conviction is unsafe. Secondly he has been in prison for fifteen (15) months having failed to pay the fine of Kshs. three (3) million.

10. I have therefore under section 364 Criminal Procedure Code examined the record herein and I am satisfied that the errors made by the trial court go to the root of the charge and the conviction and sentence cannot be left to stand. I find that he has been sufficiently punished and cannot be taken for re-trial.

**Order:** The conviction is quashed and the sentence set aside. The Applicant shall be released forthwith unless otherwise lawfully held under a separate warrant.

Orders accordingly.

*Delivered, signed & dated this 22<sup>nd</sup> day of September 2020, in open court at Makueni.*

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**H. I. Ong'udi**

**Judge**