

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL REVISION CASE NO. 220 OF 2020

TITUS MOSINGI MOWAIWA.....1ST APPLICANT

ERICK MOSINGI.....2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. **Titus Mosingi Mowaiwa 1st Applicant** and **Erick Mosingi 2nd applicant** were charged with, “*Being in possession of Wildlife trophy contrary to section 95 of the Wildlife Conservation and Management Act 2013*”. The particulars of the offence are, On the 17th day of July 2017 at Nyacheki Market Nyacheki location in Nyamache Sub-County within Kisii County jointly were found in possession of Wildlife trophies namely Elephant bone and a Serval Cat skin in contravention of the Act.

2. On the 2nd June 2020 the 1st and 2nd applicant filed a Notice of Motion dated the 28th May 2020 seeking to have the sentence reviewed. In their joint affidavit in support of the application they depone that they were convicted on 26th February 2020 and each fined Kshs. 100,000/- in default to serve 12 months imprisonment on each count. They claim that the trial magistrate erred in law by convicting them on two counts instead of one count as he never looked at the amended charge sheet, the 2nd count does not exist. That the trial magistrate did not consider the probation report which recommended a non-custodial sentence. That the 1st applicant is the father of the 2nd applicant and that the 1st accused lost his wife and his children are staying with relatives. That 1st accused lost a daughter and her burial is yet to be done as they are awaiting his release from prison. That the 1st accused is diabetic he has contract more diseases from serving the sentence and he cannot afford to pay the fine. That the court should use its discretion and review the sentence imposed.

3. The applicants’ case was heard and they were each convicted and sentenced to a fine of 100,000/- in default 12 months’ imprisonment on count 1 & 2, sentences to run consecutively. From the court proceedings the applicants were first charged in court on the 18th July 2017 with 2 counts of ***Being in possession of wildlife trophy relating to endangered species without a permit contrary to section 95 as read with section 92 of the Wildlife Conservation and Management Act 2013***. This was count no.1. The 2nd count was ***Being in possession of wildlife trophy without a permit contrary to section 95 of the Wildlife Conservation and Management Act 2013***. This charge sheet is cancelled. Further in the court proceedings there is charge of “***Being in possession of Wildlife trophy contrary to section 95 of the Wildlife Conservation and Management Act 2013. The particulars of the offence are, On the 17th day of July 2017 at Nyacheki Market Nyacheki location in Nyamache Sub-County within Kisii County jointly were found in possession of Wildlife trophies namely Elephant bone and a Serval Cat skin in contravention of the Act.*** This charge sheet is dated the 27th March 2018. This is the date the hearing began. As per the proceedings of 27th March 2018 the 1st charge sheet was amended to have just one count as stated in this paragraph. The offence the applicants were being tried for was being in possession of wildlife trophy. Hon. Ateya heard some of the witness and thereafter Hon. Mikoyan proceeded with the hearing. In his judgment dated the 6th December 2019 he made a finding that each applicant was guilty as charged and convicted each contrary to section 215 of the CPC Cap 75 Law of Kenya. On the date of sentence, the 17th December 2019 he sentenced each applicant to a fine of 100,000/- in default 12 months in jail on count no. 1 & 2. This was a clear error as the trial magistrate failed to notice that his judgment refereed to just one charge and not two. It was therefore wrong for the trial magistrate to impose a fine on a 2nd charge that did not exist. I therefore set aside the fine imposed of Kshs. 100,000/- in default 12 months imprisonment for count no. 2. I also set aside the order that the sentences were to run consecutively.

4. The applicants seek a review of the sentence. Section 92 of the Wildlife Conservation and Management Act provides that, “***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.*** The penalty isto the tune of twenty million or imprisonment for life or both fine and imprisonment. The fine of Kshs. 100,000/- in default 12 months is a very lenient sentence. The trial court noted that the probation report was favorable however the court noted that wildlife trophy required a deterrent sentence. I agree with the trial court. I therefore decline to review the fine of Kshs. 100,000/- in default 12 months imprisonment. Conviction and sentence are affirmed. The sentence on count no 2 is set aside as the charge did not exist.

Dated, signed and delivered at KISII this 17th day of September 2020

R.E. OUGO

JUDGE

In the presence of:

Titus Mosingi Mowaiwa 1st Applicant

Erick Mosingi 2nd Applicant

Mr. Otieno Senior Prosecution Counsel Office of the DPP

Ms. Rael Court Assistant