



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL REVISION NO. 164 OF 2020

THE DIRECTOR OF PUBLIC PROSECUTIONS.....APPLICANT

VERSUS

JUSTINE KADZOMBA CHARO.....RESPONDENT

Coram: Hon. Justice R. Nyakundi

Mr. Alenga for the applicant

The respondent in person

JUDGMENT

The respondent **Justine Kadzomba Kazungu** was initially charged with the offence of dealing in meat of wildlife species contrary to Section 98 (1) of Wildlife Conservation and Management Act 2013. The particulars of the offence as encapsulated in the charge sheet were that on the 23rd June, 2020, the respondent was found dealing in wildlife meat namely 17 pcs of dik dik carcasses weighing approximately 76 Kilograms, 2 pieces of hare carcasses, two sacks (green and white), panga, knife and 1 Kg of maize flour without permit from Director General Kenya Wildlife Service.

The respondent pleaded guilty to charges levelled against him by the prosecution. The Court called for a presentence report from the office of probation to determine sentence. The same was produced on the 02.07.2020 before the Court after which the applicant was sentenced to six months CSO at Bore Singwa Chief's Office. In the instant matter the applicant feels that the Learned trial Magistrate erred in Law by imposing an illegal sentence. They cited the wildlife species contrary to Section 98 (1) of the Wildlife Conservation and Management Act 2013 (Revised Edition 2018) which provides that:

“any person who, without permit or exemption issued under this Act, deals with the carcasses or meat of any wildlife species, commits an offence and shall be liable on conviction to imprisonment for a term not less than three years.”

The Learned counsel for the prosecution, **Ms. Njoki**, argues that the lower Court erred in Law by meting out an illegal sentence. **Ms. Njoki** asks the Court to enhance the sentence if justice is to be done.

Submissions

The respondent holds the view that the request as filed by the prosecution does not essentially seek to serve any substantive justice but rather it is an attempt to correct an error allegedly done by the Hon. Magistrate who passed the sentence and he vehemently oppose the revision on the sentence on the following grounds:

As regards the charge sheet, he asserted that he was charged and pleaded guilty to the offence of:

“Dealing in wildlife meat contrary to Section 98 (1) of the Wildlife Conservation and Management Act, 2013.”

But herein the prosecution hereby requests the Court to enhance the sentence meted and in the letter, they have cited a different section of the Law:

“Dealing in wildlife meat contrary to Section 98 (1) of the Wildlife Conservation and Management Act, 2013 (Revised Edition

2018).”

The respondent’s contentions that by reading the Section on the charge sheet, the Court was properly guided. The proceedings do not show that the charge sheet was amended nor does it show that the Honourable Magistrate was informed and or guided as to existence of a Revised Edition of the Wildlife Conservation and Management Act, 2013 which is the Wildlife Conservation and Management Act, 2013 (Revised Edition 2018). It is therefore believable that her consideration was based on the provision of the Section of the former Act which states:

“A person who engages in hunting for bush-meat trade, or is in possession of or is dealing in any meat of any wildlife species, commits an offence and shall be liable on conviction to a fine of not less than two hundred thousand shillings or to imprisonment for a term not less than one year or to both such fine and imprisonment.”

He added that the above Section was read and explained in a language that he understands and he accordingly, pleaded guilty. Further, that the Honourable Magistrate exercised her discretion and having considered all factors in the presentencing report and my mitigation, rightly handed the Community Service order it is probable that had the charge sheet been amended to reflect the new Section and charges read out and explained, the Court might not have arrived at the same sentence as it did. The current Section reads:

“Any person who, without permit or exemption issued under this Act, deals in the carcass or meat of any wildlife species commits an offence and shall be liable on conviction, to imprisonment for a term of not less than three years.”

He therefore argued that the prosecution cannot therefore claim there was an error on the sentence when indeed I was charged with a non-existent Section of the said Act and the Magistrate being guided by what was before her, and through her discretion, rightly handed the community service sentence. The correction of that error cannot be done by way of Revision, because if the charge sheet is to be amended to accordingly read as per the Revised Edition, he would not have the opportunity to plead to the Section. He invited this Court to **Kajiado High Court Criminal Revision No. 11 of 2017 – Joshua Njiri v Republic** where the Court adeptly handled the issue of a faulty charge sheet.

On the question of discretion, the respondent relied on the Kenya Judiciary Sentencing Policy Guidelines which direct Magistrates on how to best give sentences to convicted offenders. He added that Courts have also been given discretion to consider handing non-custodial sentences where circumstances warrant. In part the guidelines read:

“the sentence meted out must be proportionate to the offending behavior. The punishment must not be more or less than is merited in view of the gravity of the offence. Proportionality of the sentence to the offending behavior is weighted in view of the actual, foreseeable and intended impact of the offence as well as the responsibility of the offender.”

It is his position that the Honourable Magistrate having made a conviction, was guided by the same principles in the policy book and the available sentence as per the charge sheet Section was one that she could replace with a community service order and she did so. The policy book reads:

“Section 3 of the Community Service Orders Act limits the imposition of community service orders to two scenarios; first, whether an offence is punishable with imprisonment that does not exceed three years. Second, where an offence is punishable with imprisonment exceeding three years but where the Court determines that a sentence of three years or less would be imposed.”

The Community Service Orders Act No. 10 of 1998 reads:

“(1) Where any person is convicted of an offence punishable with

(a). imprisonment for a term not exceeding three years, with or without the option of a fine; or

(b). imprisonment for a term exceeding three years but for which the Court determines a term of imprisonment for three years or less, with or without the option of a fine, to be appropriate, the Court may, subject to this Act, make a community service order requiring the offender to perform community service.”

In light of the foregoing, the respondent is of the view that even if the charge sheet had been drafted correctly and with the right Section, the Court still had jurisdiction to give a non-custodial sentence. There was jurisdiction conferred by the Community Service Orders Act No. 10 of 1998 and discretion to hand the Community Service sentence. The respondent referred the Court to **S v Malgas 2001 (1) SACR 469 (SCA) at para 12** where it was held that:

“A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial Court, approach the question of sentence as if it were the trial Court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial Court... However, even in the absence of material misdirection, an appellate Court may yet be justified in interfering with the sentence imposed by the trial Court. It may do so when the disparity between the sentence of the trial Court and the sentence which the appellate Court would have imposed had it been the trial Court is so marked that it can properly be described as “shocking”, “startling or disturbingly inappropriate.”

The respondent therefore submitted that the Honourable Magistrate within the confines of the Law and that the Court exercised its discretion in handing the community service sentence. He lamented that the proceeding indicate that all circumstances and factors were considered

before the sentence. He is adamant that there was no miscarriage of justice whatsoever, hence the sentence is correct, legal and appropriate.

On the question of mitigation, he stated that his mitigation was well captured and put into consideration by the Honourable Magistrate. He added that the Court was guided by the pre-sentencing report presented before sentencing was done. Further, that the Court also looked at the nature of the offence and appreciated that he was a first offender. In addition, he stated that the Court had actual basis to give the non-custodial sentence.

On the question of Covid-19, he argued that it is in public domain that the Court operations have been affected by the ravaging corona virus disease. Further that the pandemic has not spared any part of the country – including prisons. The Court considered the pandemic and took a judicial notice and captured in the proceedings that:

“taking to considerations that prisons are also not admitting convicts due to the current covid pandemic which endangers public safety.”

In the respondent’s view, that was an informed decision by the Court having considered the danger posed by the disease and causing an unnecessary exposure to other inmates, decided to use its discretion in favour of my safety. In that regard, the respondent feels that the ends of justice were met when the community service sentence was handed on me. Lastly, the respondent argued that there will be great prejudice occasioned to him that this Court interfering with the current sentence. He has already started executing the sentence as per the terms of the Community Service Order Act 1998 and he feels that it would not be in the interest of justice if the Court were to enhance the sentence. Further, in view of the fact that there could be a case of misinformation on the correct section to be applied on this offence, and the fact that there was no amendment to show that he was charged with an offence under the Revised Edition of the Wildlife Conservation and Management Act, he urged the Court to dismiss the Revision request.

Issues for determination

I have read the application for revision, the submission filed by both parties as well as the record of proceedings, and matter in question is whether the sentence imposed by the Learned Magistrate is illegal. I am alive to the principles guiding interference with sentencing by the appellate Court were properly, in my view, set out in **S v Malgas {2001} (1) SACR 469 (SCA) at para 12** where it was held that:

“A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial Court, approach the question of sentence as if it were the trial Court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court However, even in the absence of material misdirection, an appellate Court may yet be justified in interfering with the sentence imposed by the trial Court. It may do so when the disparity between the sentence of the trial Court and the sentence which the appellate Court would have imposed had it been the trial Court is so marked that it can properly be described as “shocking”, “startling” or “disturbingly inappropriate.”

The sentence provided for the offence of dealing in meat of wildlife species contrary to Section 98 (1) of Wildlife Conservation and Management Act 2013 is a minimum of imprisonment for a term of three years. However, after a varied considerations, the Learned trial Magistrate sentenced to six months CSO at Bore Singwa Chief’s Office. The prosecution counsel have impugned the said sentenced as per Act. On the other hand, the respondent argues that the sentence was imposed on the basis of the former act, which is Wildlife Conservation and Management Act, 2013 and not Wildlife Conservation and Management Act, 2013 (Revised Edition, 2013) hence the sentence of three years cannot stand.

Firstly, the respondent’s contention that he was charged, pleaded guilty and sentenced in terms of the former Act as opposed to the Revised Edition of 2018 is absurd. The offence herein was committed after the enactment of the Revised Edition of 2018, hence the Law applicable in the time the offence was committed. Further, the charge sheet alludes to the offence of dealing in meat of Wildlife Species contrary to Section 98 (1) of Wildlife Conservation and Management Act 2013. There is no way that could have been the former Act since the former Act does not encapsulate Section 98 (1) but only Section 98. The fact that the prosecution left out the phrase “Revised Edition, 2018” does not amount to a defective charge since the presumption is that he was charged in terms of the Act in operation.

Secondly, on the argument made by the Learned counsel for prosecution that the sentence imposed by the Learned trial Magistrate is illegal. I am of the view that the sentence was made after a careful consideration of circumstances surrounding the matter as well as other factors outside the ambit of the case such as the ravaging Covid – 19 pandemic. The impugned sentence was made pursuant to a pre-sentence report which is one of the way in which Courts are enlightened concerning additional information related to the matter. The Learned Magistrate also considered the respondent’s mitigation as well as taking into consideration the fact that prisons are also under threat due to the current Covid-19 pandemic which endangers the safety of other prisoners. This was necessary to reduce the risk of the spread of the said disease. Apart from that, I am guided by **Justice Odunga in Simon K Kimori v Republic**, where the Judge cites and says:

“The approach to be adopted in determining an appropriate sentence where a minimum sentence is prescribed was set out in S v Malgas 2001 (2) SA 1222 SCA 1235 paragraph 25 as follows:

“What stands out quite clearly is that the Courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip service to, the Legislature’s view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed.”

In view of the foregoing, I find that the Learned Magistrate was well within his discretionary powers to impose an appropriate sentence depending of the peculiar circumstances of the instant matter. I therefore, find no misdirection in terms of sentencing on the part of the

Learned trial Magistrate and neither did I find any other plausible reason to vacate the sentence in question.

The upshot of this matter is that the application for revision filed by the Learned Counsel for prosecution lacks merit, and the same is hereby dismissed. The sentence imposed by the Learned trial Magistrate shall stand.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 27TH DAY OF NOVEMBER 2020

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R. NYAKUNDI

JUDGE