REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

CRIMINAL REVISION NO.E001 OF 2020

IN THE MATTER OF SECTION 362 AND 364 OF THE CRIMINAL PROCEDURE CODE

AND

IN THE MATTER OF THE CHUKA CHIEF MAGISTRATE'S CRIMINAL CASE NO. 973 OF 2017

BETWEEN

OFFICE OF THE PUBLIC PROSECUTION.....APPLICANT

VERSUS

M'ANDAKA MBIUKI.....1ST RESPONDENT

PATRICK MUTHURI KINYAMU.....2ND RESPONDENT

LUKA NJAGI.....3RD RESPONDENT

R U L I N G

This matter arises from the conviction and sentence of the accused persons in ***Criminal Case No. 973/2017 before the Chief Magistrate's Court at Chuka.***

The background of the case is that the three accused persons were charged with the offence of being in possession of Wildlife Trophies contrary to **Section 95 of the Wildlife Conservation and Management Act**. The accused were also charged with a second count of dealing with Wildlife Trophies relating to an endangered species without a permit contrary to **Section 95 of the Wildlife Conservation and Management Act 2013**. It was alleged that on the 28th November 2017 the three accused persons were found in possession of and dealing with 14 elephant tusks weighting 58 kilograms at Lenana Hotel in Chogoria Town without a permit issued under the Act and the trophies for which they had no permit issued under the Act relates to an endangered species as specified under **Schedule 6 of the Act.**

1. When the accused persons were arraigned in court, they denied the charges. A full trial was conducted before the Chief Magistrate and he proceeded to render his Judgment on 1st September 2020. The accused were convicted on the 1st count and they were each ordered to pay a fine of Kshs.1,00,000/- or serve one year imprisonment in default. With regard to the second Count the trial magistrate found that there was no evidence tendered to prove that the accused were dealing in wildlife trophies and there was no sufficient evidence to show who the buyers were or that they had offered the Tusks for sale. They were therefore acquitted the 2nd count. The State was dissatisfied with the sentence and moved to this court under a certificate of urgency seeking orders *inter-alia* that the sentence be set aside and an appropriate sentence be meted out in the circumstances. The application was based on the grounds that the sentence meted out was illegal and manifestly too low when compared with the offence charged. It is also argued that the trial magistrate failed to consider that the tusks were from an endangered species and the amount recovered was of significant weight, that is to say 58 kilogrammes. The applicant further submits that under **Section 92 of the Wildlife Conservation** and **Management Act** the fine to be imposed should not be less than twenty million of a jail term of life imprisonment or both. The applicant contends that the elephant in issue known as Loxodonta Africana is listed as an endangered species in **Schedule 6 of the Act.** It is their contention that the purpose of the Act is to conserve wildlife and therefore the charges should have attracted a more serious punishment. The application is supported by the affidavit of Jane Maari sworn on 28th September 2020 and reiterates the grounds in support of the application. The application proceeded by way of oral submissions. For the applicants it was submitted that the sentence is illegal and unlawful. They urged the court to revise the sentence. Their major contention is that the trial magistrate failed to consider that the trophies were from an endangered species and as a result failed to impose the appropriate sentence which is provided at **Section 92 of the Act** as amended in the year 2018 and was applicable at the time when the accused

person were charged. The applicants further submitted that the right of appeal arises from conviction or acquittal. They argued that the applicant can only appeal from an acquittal which is not the case as they are challenging the sentence.

2. For the accused/respondents it is submitted that the prayer sought are under this court's jurisdiction in **Section 362 and 364 of the Criminal Procedure Code** which states that the court exercises discretion and should not entertain matters which could have been handled on appeal. That under **Section 364(5)** the prayers sought are not available.

Analysis and determination

I have considered the application, the grounds in support and the submissions in support and the submissions. I have also perused the proceedings before the trial magistrate. The application is brought under **Section 362 and 364 of the Criminal Procedure Code** and any other enabling provision of the law. **Section 362 of the Criminal Procedure Code** provides:-

> **"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."**

The section donates the power to this court to review proceedings before the sub-ordinate court and satisfy itself as to the correctness, legality or propriety of any finding sentence or order as to the regularity of any proceedings of any such court. The power to enhance the sentence is donated under **Section 364 of the Criminal Procedure Code** which provides:

> **"Powers of High Court on revision**
>
> **(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—**
>
> **(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;"**

The contention by the respondents that the applicants should have filed an appeal and that the they cannot be granted the orders is not sound and cannot be sustained. This is because the right of appeal granted to the Director of Public Prosecution in criminal trials can only be exercised in two situations, that is, in the event of an acquittal or against an order for refusal or dismissal of a charge. This is provided under **Section 348 A of the Criminal Procedure Code** which provides:-

> **"348A. Right of appeal against acquittal, order of refusal or order of dismissal**
>
> **(1) When an accused person has been *acquitted on a trial held by a subordinate court or High Court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge,* has been made by a subordinate court or High Court, the Director of Public Prosecutions may appeal to the High Court or the Court of Appeal as the case may be, *from the acquittal or order* on a matter of fact and law.**
>
> **(2) If the appeal under subsection (1) is successful, the High Court or Court of Appeal as the case may be, may substitute the acquittal with a conviction and may sentence the accused person appropriately.**
>
> **[Act No. 13 of 1967, s. 3, Act No. 12 of 2012, Sch, Act No. 19 of 2014, s. 19.]"**

This emanates from the fact that in criminal trial the Director of Public Prosecution is the prosecutor who aims to have convictions from Successful prosecutions. It is not expected that he would challenge such convictions on appeal. The respondents are not candid in submitting that the applicant should have appealed the decision. The applicant can move this court to review the sentence which they consider too lenient, illegal or irregular based on the offence charged and the sentence provided where the trial ended in a conviction. In the case of ***Director of Public Prosecution- v- Peter Mcharo Kombo & Another [2018] eKLR*** , it was stated:-

> **" The trial subject of the intended appeal ended in a conviction and the DPP is only aggrieved by the sentence imposed thereof which is considered too lenient for the offences in the charge. There being no "acquittal, order of refusal or order of dismissal", there is no right of appeal for the DPP. The convicted person may, of course, appeal the decision under section 347 of the Criminal Procedure Code.**
>
> **….With respect, the Respondents are unwittingly right in referring to the remedy of review being available rather than an appeal."**

I agree with this holding and I find that the application is properly before this court. The respondent failed to challenge other grounds in the application. The court is left to determine the question as to whether sentencing should have been under **Section 92 of the Act** or whether the trial Magistrate proceeded correctly as provided under **Section 95** of the Act. The accused were charged under **Section 95** of the **Wildlife Conservation and Management Act 2013**. There were convicted and the trial magistrate proceeded to impose the sentence.

> **" 95.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."

On the other hand,

"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.

It is noteworthy that there is no specific offence under this former section 92 and that would explain why the accused persons were specifically charged under section 95 of the Act pre-amendment ie number 47 of 2013."

Section 95 provides for a sentence of a fine of not less than one million or imprisonment for a term of not less than five years or to both such imprisonment and fine. **Section 92** provides for fine of Ksh.20,000,000/- and above, imprisonment for life or both fine and imprisonment.

Amin J (Voi High Court) in **JAMES MAKERE DULLU V REPUBLIC [2020] EKLR** held that the decision of the magistrate in granting a 20 year sentence was in order as the court took into consideration the fact that the elephant was endangered, which was a ***"further aggravating feature"*** affecting the sentencing even though the charge was under a different section of the Act but they were to be read together.

This court has discretion in sentencing. Although the accused were not charged under **Section 92 of the Act**, the wording of the section states that any person who commits an offence in respect of endangered or threatened species- and prescribes a sentence. Possession of such trophies is an aggravating factor. The victim impact statement which was presented before the trial magistrate clearly stated that the trophies were from an endangered and threatened species. The trial magistrate did take into consideration the aggravating factor that the tusks were from an endangered species. The fine imposed was the bare minimum and the sentence of one year imprisonment was not deterrent. **Schedule- 6** of the Act lists Loxodonta Africana- African Elephant as critically endangered, vulnerable and nearly threatened and protected species. The punishment is prescribed under **Section 92**. The accused were not charged under **Section 92**. I however note that considering the sentence under **Section 92** the sentence imposed by the trial magistrate, it was very lenient compared to the punishment prescribed for the offence. I agree with the applicant that the trial magistrate failed to consider the extra aggravating factor. If it had considered the factors, it would have imposed a more severe sentence.

Under **Section 95** an accused person is liable upon conviction to a fine or imprisonment or to both such imprisonment and fine. I will review the sentence imposed by the trial magistrate and set it aside. I sentence the accused persons to pay a fine of Kshs.1,000,000 in default one year imprisonment and in addition to serve six years imprisonment each. The sentence to run from 22nd September 2020.

Dated, signed and delivered at Chuka this 17th day of December 2020.

L.W. GITARI

JUDGE