



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL REVISION NO. 16 OF 2018

REPUBLIC.....APPLICANT

VERSUS

JACKSON MUTUKU MAWEU.....RESPONDENT

RULING

BRIEF FACTS OF THE CASE

Before me is an application by the Director of Public Prosecution vide a letter dated 5th April, 2018, expressed under Articles 2(5) & (6), 165(6)&(7), 157(6)(c),(9),(11), 159(1),50(1); section 362 and 364 of the Criminal Procedure Code; section 99 of the Wildlife Conservation and Management Act, 2013 and items 22 of the second schedule of the East African Community Customs and Management Act, 2004.

The applicant prays for this Honourable court to invoke its supervisory jurisdiction over the subordinate courts and call for the record in Kajiado Chief Magistrate's court criminal case no. 28 of 2017. The applicant prays for the following orders;

- 1. The Honourable court be pleased to grant an interim conservatory order staying the proceedings and order issued on the 23rd October 2017 directing the Kenya wildlife service to facilitate the exportation of the items listed in the charge sheet and the affidavit of the owner as the items were purchased elsewhere in south Africa pending the hearing and determination of this application.**
- 2. The Honourable court be pleased to grant interim conservatory order staying the proceedings and order issued on the 23rd October 2017 directing that Kenya through Kenya wildlife service does not have the right to confiscate the said items listed in the charge sheet and the affidavit of the owner pending the hearing and examination of this application.**
- 3. The Honourable court be pleased to review, vary, revise and/or set aside of the proceedings, rulings and orders by the Hon M. Kasera issued on the 23rd October 2017 and direct the said orders are irregular and unlawful.**
- 4. The Honourable court be pleased to review, vary, revise and/or set aside of the proceedings, rulings and orders by the Hon M. Kasera issued on the 26th March 2018 and direct the said orders are irregular and unlawful.**
- 5. The Honourable court be pleased to order that the issue of exportation and/or forfeiture of the said of the items listed in the charge sheet and the affidavit of the owner Oglia Maria Marues Rocha Velho be canvassed once the same have been produced as exhibits and once the Kajiado Chief Magistrate Criminal Case No. 28 of 2017 is determined on merit.**
- 6. The Honourable court be pleased to order that the Kajiado Chief Magistrate's court criminal case No 28 of 2017 proceed before any other magistrate's other than Hon M. Kasera (P.M.)**

The above orders are premised on the following grounds:

- 1. The case is yet to proceed and the said items are prosecution exhibits as such any release of the same would jeopardize the prosecution case as the items have not been produced in court as exhibits.**
- 2. The order directing the release of the items amounts to interference with the statutory and constitutional mandate of the DPP on the conduct of the prosecution.**
- 3. The owner Oglia Maria Marues Rocha Velho did not obtain the requisite permit from Kenya wildlife service to enable her export the said items through Kenya as such it would be an offence and an abuse of the power and law by Kenya wildlife**

service to facilitate the illegal exportation.

4. Kenya wildlife service is mandated under the convention on trade in Endangered species of wild flora and fauna which is a source of law in Kenya under article 2(5) and (6) of the constitution of Kenya, 2010 which mandates that any trade in crocodile trophies/ products in Kenya the owner must obtain a permit.

5. The East African Community Customs Management Act 2004, part 22 of the second schedule declares the items in the charge sheet as prohibited goods as they are products from endangered species under CITES as such KWS is bound to ensure that the objects of the said treaties are enforced.

6. Section 99 of the Wildlife Conservation and Management Act 2013 prohibits importing, exporting, re-exporting and/or introducing any specimen of wildlife species into an/or from Kenya without permit issued under the said Act.

7. Kenya wildlife service cannot issue permits for such wildlife specimen as the ones listed in the charge sheet, which originated outside Kenya (from South Africa) without the permits from the designated government authorities from the country of origin.

Jackson Mutuku Maweu, a clearing and forwarding agent at BeeGee Key Investments limited, sworn a replying affidavit on 8th December, 2018 in opposition to the application dated 5th April, 2018. He deponed that he was assigned to clear luggage that was impounded at the Namanga Customs Border Point, the luggage had the following contents; 24 porcelain caps, 3 treated Zebra skins and 1 treated giraffe skin. He was advised by KRA customs officer that the items require an import/export permit. He avers that he had no known knowledge of the contents in the luggage, he was not the owner and the true owners of the luggage were; Olga Marques and Irineu Boff, Brazilian nationals. He was arraigned in court on 9th January 2017 and entered a plea of not guilty. Due to the matter's want of prosecution the principal magistrate proceeded to issue an ex-parte ruling directing Kenya wildlife service to facilitate exportation of items listed in the charge sheet to the owner as the said item were brought from South Africa.

On the issue of the confiscated goods, the respondent avers that none of those items are endangered species under the East Africa community customs Management Act and CITES. The aforesaid confiscated goods do not fall under the category of CITES items as they did not require a special permit from their country of origin, South Africa and transit country Tanzania. The said goods are exempted under article VII of the CITES convention which the prosecution relies on to dispute the ruling of the trial magistrate. The confiscated goods were neither being imported nor exported from Kenya but were on transit to Brazil through their purchasers

The respondent prays that the court dismisses the instant revision but also issues the appropriate orders for his discharge and further that the Kenya Wildlife Service observe all protocols for safe transit of the confiscated goods to Brazil, where the owners are resident.

Ogla Maria Marues Rocha Velho a Brazilian National and the owner of the confiscated goods, deponed a statutory declaration on 24th January 2017, the deponent averred that at the point of purchasing items, she was given documents believed to be permits which would enable to travel with purchased items. On departure from South Africa she presented the items and documents to custom office at Oliver Tembo international Airport in South Africa, she was checked and given a tax refund and thereafter allowed to travel outside South Africa with the said items.

She travelled to Kenya through Isebania border point and got entry stamps. She depones that she was not aware she needed special permits to travel with the items into Kenya. She was assured permit issued in South Africa which enabled her to travel to Tanzania would also apply in Kenya. At the point of declaring the luggage to her travel agent, she did not declare the content of the said luggage hence was not aware of the process at the border point. As a consequence, no documents were left behind that proved purchase of the confiscated items and permission to travel with the same.

The respondent presented their written submissions dated 19th December 2018 and filed 21st December 2018. The respondent submitted that the applicant has no locus standi to apply for revision of the orders issued by the trial court. The applicant neither appealed the orders on time nor made an application to appeal out of time. In support of this point the respondent invoked section, 364(5) of the criminal procedure code that states, "when an appeal lies from a finding, sentence or order and no appeal is brought, no proceedings by way of revision shall be entertained at the insistence of the party who could have appealed."

On the issue of confiscated goods, he submitted that goods on transit within the East Africa community neither required an import or export permits, according to section 20(1) and 72(1) of EACCMA respectively.

The respondent urges the court to exercise discretion judiciously on revision of the orders by the trial court bearing in mind section 362 of the criminal procedure code and be guided by the following considerations; (a) the circumstances of the case, (b) rights of the accused person, (c) administration of criminal justice, (d) reasonableness. In addition, the prosecution's case does not demonstrate actus reus or mens rea to satisfy a criminal charge. The respondent did not know the contents of the goods he had been sent to clear at the customs border point and he was not found in possession of the same goods

In conclusion, the respondent submits that the orders were legal, proper and correct. The court should not exercise its discretion to revise the aforementioned orders.

Factual Background

The respondent Jackson Mutuku Maweu was charged at the Principal Magistrate's court at Kajado with being in possession of wildlife trophies contrary to section 95 as read with section 105 of the Wildlife Conservation and Management Act, 2013. Particulars of the offence

are that on the 6th day of January 2017 at customs area in Namanga, within Kajiado county was unlawfully found in possession of wildlife trophies namely: 3 treated zebra skins, 1 treated giraffe skin, 1 handbag and 24 cups without permit or other lawful exemptions granted under this Act.

Alternative charge; Dealing with wildlife trophy contrary to section 84(1) as read with section 92 of the wildlife conservation and management Act, 2013. . Particulars of the offence are that on the 6th day of January 2017 at customs area in Namanga, within Kajiado County was unlawfully dealing in wildlife trophies namely: 3 Treated Zebra Skins, 1 treated Giraffe Skin, 1 Handbag and 24 Cups without a permit or other lawful exemptions granted under this Act.

The principal magistrate issued the following orders on 23rd October 2017;

Having seen the affidavit by Ogla Maria Marques Rocha Velho indicating that the items were brought in South Africa at paragraph 6 of her affidavit and receipt from Erosha boutique (annexure 15 of the affidavit); it is hereby ordered that:

- 1. Kenya wildlife service director to facilitate exportation of the items listed on the charge sheet and affidavit to the owner as the items were purchased elsewhere in South Africa and this country does not have the right to confiscate the same.**
- 2. Mention on 6th November 2017 to confirm exportation and withdrawal of the case against the accused person.**

LEGAL ANALYSIS

The main issue for determination is whether this court should revise the orders of the principal magistrate court at Kajiado County, which is the exportation of the items listed in the charge sheet and affidavit to the owners which are the subject matter of criminal proceedings

The High court has been called upon to exercise its revisionary jurisdiction. The governing laws to exercise this authority on revisionary orders are anchored under Articles 165(6) (7) of the constitution of Kenya and sections 362, 364 of the Criminal Procedure Code.

Article 165(6) and (7) of the Constitution stipulates as follows;

Article 165(6) ***“The High court has supervisory jurisdiction over the subordinate courts and over any person body or authority exercising a judicial or quasi-judicial function, but not over a superior court.”***

(7) “For the purpose of clause 6 the High Court may call for the records of any proceedings before any subordinate court.”

In addition, section 362 and 364 of the Criminal Procedure Code provides as follows;

362. Power of High Court to call for records

“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.”

364. 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—

(b) In the case of any other order other than an order of acquittal, alter or reverse the order.

(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:

(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.

In the present case, there were no proceedings instituted against the respondent. The principal magistrate issued an order on 23rd October 2017. From the foregoing provisions of the constitution and statutory law we can ascertain that the High court has jurisdiction to examine the order emanating from the subordinate court and satisfy itself as to the correctness, legality or propriety of the order in accordance to section 362 of the Criminal Procedure Code.

This point was supported in the case of Livingstone Maina Ngare vs Republic (2011) eKLR, wherein the court opined that,

“The High Court should exercise its jurisdiction if satisfied that any findings, sentence or order recorded or passed; or the regularity of any proceedings of any subordinate court to the High Court did not meet the required standards of correctness, legality and propriety.”

Of interest in this case is section 364 (b) of the Criminal Procedure Code, which clothes the High Court with power in the case of an order other than that of an acquittal to alter or revise the order. This assertion was further espoused in the following judicial decision;

Public Prosecutor vs. Muhari Bin Mohat Jani and Another 1996 4 LRC 728, 734-5 cited in DPP vs. Samuel Kimichu

“The object of revisionary powers of the High court is to confer upon the High court a kind of “paternal or supervisory jurisdiction” in order to correct or prevent a miscarriage justice. In a revision, the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered within the interest of justice....if we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion....this discretion, like all other judicial discretions ought, as far as practicable to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case.”

I respectfully disagree with the respondent’s contention that the applicant does not have locus standi to apply for revision orders, the respondent further invoked section 364(5) of the Criminal Procedure Code to buttress his point. There is no set time line in bringing an application for revision hence the applicant has locus standi to bring this application. This aforesaid section was discussed in depth, in the case of **R vs Ajit Singh S/O Vir Singh 1957 EA 822,824 cited by Wesley Kiptui Ruto vs R Criminal Revision No2 of 2012**; the court opined as follows;

“I find that the revisionary jurisdiction exists in cases of all orders, interlocutory or final, of the subordinate court save that an order of acquittal may not be revised to an order of conviction. Moreover, the court may exercise its jurisdiction to revise an order suo moto despite existence and your exercise of right of appeal by the party who brings the matter requiring revision to the attention of the court by application for revision or otherwise.

The construction of this sub section 364 (5) is not free from difficulty, the opening words appear to indicate that it is concerned with cases where a right of appeal presently exists; but the last three words seem to imply that is the right of appeal had existed and if the party aggrieved has not taken advantage of that right while it existed then proceedings by way of revision shall not be entertained at his instance.

We are of the opinion that sub section 5 is not intended to preclude the Supreme Court from considering the correctness of a finding, sentence or order merely because the facts of the matter have been brought to its notice by a party who has or had a right of appeal. We do not think this sub section is intended to derogate from the wide powers conferred by section 362 and 364; to hold that sub section 5 has that effect would mean that this court is powerless to disturb a finding sentence or order which is manifestly incorrect- for instance in the case of conviction where no offence known to the law has been proved- merely because the aggrieved party, who might well be an ignorant person has not exercised a right of appeal but has asked for revision and thus brought the matter to the notice of the court. In our judgment the court can, in its discretion, act suo moto even where the matter has been brought to its notice by an aggrieved party who had a right of appeal.”

We turn our gears to the subject matter hand, which is the order granted on 23rd October 2017 at the subordinate court. Discretion is to be exercised judiciously in regard to the nature of the order sought and make a decision whether the order is manifestly incorrect or has resulted in a miscarriage of justice.

The threshold for the principal magistrate’s order to be revised is if it occasioned substantial injustice. I will be guided by the case of **Dr. Aman Wahid Kiborou vs. The Attorney General and another civil application no 70 of 1999 UR**. As cited in the case of **R vs. Hammond Anderson Kwesi and 3 others 2017 Eklr**, the court observed as follows:

“That a review should be carried out when and where it is apparent that:

First there is manifest error on the face of the record which resulted in a miscarriage of justice. The applicant would therefore be required to prove very clearly that there is a manifest error apparent on the face of the record. He will have to prove further that such an error resulted in injustice.

Second the decision was obtained by fraud. Thirdly the applicant was wrongly deprived the opportunity to be heard. Fourth, the court acted without jurisdiction.”

The record shows that the respondent was charged with being in possession of wildlife trophies contrary to section 95 as read with section 105 of the Wildlife Conservation and Management Act, 2013. Particulars of the offence are that; on the 6th day of January 2017 at customs area in Namanga, within Kajiado county, was unlawfully found in possession of wildlife trophies namely: 3 treated zebra skins, 1 treated giraffe skin, 1 handbag and 24 cups without permit or other lawful exemptions granted under this Act.

By the respondent own assertion, virtue of paragraph 11 of his replying affidavit he was arraigned in court on 9th January 2017 and entered a plea of not guilty. He attended court on 10 separate occasions spanning one year but prosecution never proceeded to prosecute the matter. Failure to prosecute the matter prompted the Principal Magistrate to issue an ex parte ruling on 23rd October 2017 and thereafter an order was issued. The prosecution contends that the orders granted at the Principal Magistrate’s court on 23rd October, 2017 were irregular and unlawful. We have to ascertain whether the was irregular or unlawful and in the event it is did the order result in serious injustice as held in the case of **R vs. Hammond Anderson Kwesi and 3 others 2017EKLr**, where the learned judge cited the case of **Knight Glenn Jeyasingam v PP [1998] 3 SLR** from Singapore where the court held:

“The courts immediate duty is to satisfy itself as to the correctness/legality or propriety of any order passed and as to the

regularity of any proceedings of the subordinate court. However, this is not sufficient to require the intervention of the courts on revision. The irregularity or otherwise noted from the record of proceedings must have resulted in grave and serious injustice.

The principal magistrate issued the following orders on 23rd October 2017;

Having seen the affidavit by Oglá Maria Marques Rocha Velho indicating that the items were brought in South Africa at paragraph 6 of her affidavit and receipt from Erosha boutique (annexure 15 of the affidavit); it is hereby ordered that:

3. Kenya wildlife service director to facilitate exportation of the items listed on the charge sheet and affidavit to the owner as the items were purchased elsewhere in South Africa and this country does not have the right to confiscate the same.

4. Mention on 6th November 2017 to confirm exportation and withdrawal of the case against the accused person.

The applicant's contention is that the items listed in the charge sheet which are wildlife trophies namely; 3 treated zebra skins, 1 treated giraffe skin, 1 handbag and 24 cups were obtained without a permit. The items have not been produced as evidence in court; hence they could not be regarded as property of the court. The aforesaid items were supposed to be used as evidence in support of the prosecution's case. The applicant is in opposition to the release of these items, which according to the applicant it would be an interference of the statutory and constitutional mandate of the DPP on the conduct of the prosecution. Further, the prosecution argues that the items in the charge sheet are prohibited goods as they are products from endangered species, the prosecution relied on the following laws; Convention on Trade in Endangered Species of Wild Flora and Fauna (CITES), East Africa community Customs and Management Act, Wildlife conservation and management act.

Oglá Maria Marques a Brazilian national and the owner of the said items deponed a statutory declaration sworn on 21st January 2017, specifically paragraph 8, that on purchasing the items she was given documents believed to have been permits since she was informed of the said documents would enable her to travel with the said purchase items. In Paragraph 14 she explains why the permit was not presented at the border point. She avers that at the point of handing the luggage to the travel agent to transport the same, we did not declare to the travel agent the contents of the said luggage since we were not aware of the process at the border point. As a consequence we also did not leave behind the documents that proved the purchase items and the permission to travel with the same.

On examination of the annexed document, in particular annexure 4 page 14 where it is confirmed that the document is an export permit which is valid for 6 months from 1st September 2016. The zebra species is not mentioned on appendices 1 and II of CITES and are therefore not endangered species. The giraffe skin rug is a non-cite item hence no paperwork was required in accordance with Western Cape Nature, annexure 16 states that the springbok and Burchell zebra can be exported to any country without any risk of carrying infections disease or other harmful pathogens.

The applicant was of the view that the respondent violated section 92, 95 and 105 of the wildlife conservation and management Act 2013 whereby the owners were in possession of wildlife trophies which are threatened and endangered species under the Wildlife Conservation Management Act, Convention on Trade in Endangered Species of Wild Flora and Fauna (CITES), and East Africa Community Customs and Management Act.

The aforesaid sections of the Wildlife Conservation and Management Act states the following:

Section 92 provides that, "***Any person who commits an offence in respect of endangered or threatened species or in respect of any trophy of that endangered or threatened species shall be liable upon conviction to a fine not less than 20 million shillings or life imprisonment or both.***

Section 95 "***Any person who keeps or is found in possession of wildlife trophy or deals in wildlife trophy or manufactures any item from a trophy without permit issued under this Act or exempted with any other provisions of this Act commits an offence and shall be liable upon conviction to a fine not less than one million shillings or imprisonment for a term not less than 5 years or to both such imprisonment and fine.***"

Section 105(1) "***The court by which a person is charged for an offence under this Act or any regulation made there under may in addition to any other order-***

a).....

(b) if it is satisfied that an offence was committed notwithstanding that no person has been convicted of an offence, order that the wildlife trophy.....or other thing by means whereof the offence concerned was used in the commission of the offence be forfeited to the service and be disposed off as the court may direct.....

Section 99 states as follows;

Import and export of wildlife species

(1) No person shall trade in, import, export, re-export or introduce any specimen of a wildlife species into or from Kenya without a permit issued by the service under this Act.

(2) Without prejudice to the generality of the foregoing, no person shall:-

- (a) Import any such species into, or export any such species from Kenya,
- (b) Take any such species within Kenya or Kenya's territorial waters;
- (c) Take any such species upon the high seas;
- (d) Possess, sell, deliver, carry, transport, or ship in county commerce, by any means whatsoever and in the course of a commercial activity, any such species;
- (e) Deliver, receive, carry, transport, or ship in county commerce, by any means whatsoever and in the course of a commercial activity, any such species
- (f) Sell or offer for sale in commercial transaction within or outside Kenya any such species;
- (g) Product of listed species, or
- (h) Violate any rules and regulations pertaining to such listed species.

The following are the definitions of threatened, endangered species and trophy in accordance to section 2 of the Wildlife Conservation and Management Act, 2013.

Threatened species is defined in section 2 means any wildlife species specified in the fourth schedule to this Act or declared under any other written law or specified in appendices of the CITES.

Endangered species means any wildlife specified in the fourth schedule of this Act or declared as such by any other written law or wildlife specified in appendices of CITES.

Trophy means any wildlife species alive or dead and any bone, claw, egg, feather, hair, hoof, skin, tooth, tusk or other durable portion whatsoever of that animal whether processed added or charged by the work of man or not, which is recognizable as such.

In the instant case, an analysis of the listed items on the charge sheet was conducted by Mr. Ogeti Mwebi, a senior research scientist and head of Osteology section at the National Museum of Kenya, he presented his report vide a letter dated 16th January 2017, he made the following observations;

Examination of the exhibits showed characteristics a heavily pigmented skin with regular brown blotches surrounded by a light/dirty white coloured ring) consistent with a giraffe skin. Comparison of the exhibit with museum specimens at the National Museum of Kenya skin collections indicated that the fur colour pattern closely resembled that of the giraffe (giraffa camelopraddis). The fur on its dorsal and neck part has the characteristics somewhat rounded blotches of the southern giraffe Giraffa C. Giraffa.

Examination of exhibit B1 a tanned skin with black, grey and white stripes ... showed characteristic that resembled the northern plains zebra Equus q. Quagga. A closer examination of the stripe patterns and their general morphology indicated that differed slightly from the northern plains zebra. They instead followed the characteristic grey (shadow) stripes between the broad black stripes and a black dorsal pattern of a Burchell's Zebra Equus Quagga Burchelli.

In conclusion, the exhibits described above are one of skin of a giraffe, three skins of the southern plains zebra and 24 ceramic cups."

Upon examination of CITES lists of endangered and threatened species under faunas, specifically mammals, the zebra (zebra equus quagga quagga) and the giraffe (giraffe camelopards) are not listed amongst the threatened or endangered species.

The applicant further contends on the fourth ground that any trade in "..... crocodile trophies / products in Kenya the owner must obtain a permit." The respondent was not charged with possession of crocodile trophies or products in Kenya hence this ground fails.

The prosecution application, specifically the grounds adduced fails to envisage section 362 as read with 364 of the Criminal Procedure Code, Laws of Kenya. The principal magistrate in my opinion rightfully granted the order issued on 23rd October 2017. Due to the failure by the prosecution to prosecute the matter, the court should not aid an indolent applicant. It would be manifestly incorrect to disturb the order of the principal magistrate.

Dated, signed and delivered in open court at Kajiado this 31st day of January, 2019.

.....

R. NYAKUNDI

JUDGE

Representation:

Meroka for the applicant

Respondent