



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT VOI**

**HCCRA No.99 of 2017**

**BETWEEN**

**FELIX ENDESI.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(Being an appeal from the Judgment of Hon. G. K. Kimanga RM**

**at Principal Magistrate's Court in Taveta CR. Case No.240 of 2017**

**delivered on 7th November/December 2017)**

**J U D G M E N T**

1. The Court has before it an appeal against conviction and sentence. The Appellant Felix Endesi was convicted by the Resident Magistrate in Taveta of 2 Charges namely that:

(1) "On the night of 22nd June 2017 at around 0000hours at Longotiro in Rombo area within Kajiado County, with another not before Court was found in possession of meat of wildlife species namely giraffe weighing 297 Kgs without authorization";

(2) "Being unlawful present in Kenya contrary to Section 53(1)(j) as read with Section 53(2) of the Kenya Citizenship and Immigration Act"

2. The Charge Sheet was amended on 7th November 2017. It records the facts on which the Charge II is founded as;

"FELIX ENDESI on 22nd day of June 2017 at around 0000 hours at Lengovito in Rombo area within Kajiado County was found being unlawful present in Kenya without a valid pass or passport and being a Tanzanian National.

3. The Appellant filed a Petition of Appeal on 19th December 2017. In it he states he wishes to appeal against sentence. The Grounds of Appeal are that:

4. (1) He is the sole breadwinner of his family with two dependant children

(2) He is the only male child in his extended family and has elderly parents and siblings dependant on him

(3) In the circumstances of the case, a custodial sentence of 10 years is unduly "harsh, severe and manifestly excessive"

(4) He prays the Court will reduce or slash the conviction or whichever

(5) In the event his appeal may find merit he would like to be present

(6) He is a first offender with no criminal records whatsoever

5. The Appeal was admitted for Hearing by Hon J. Kamau J. on 12th February 2018. The Lower Court File having been received on the

same day. On 17th July 2018, the Appellant filed a Notice of Motion Application seeking leave to amend his Grounds of Appeal. At the same time he filed his written submissions. The Appellant also states his Submissions were delayed because he was not provided with the proceedings of the lower court in time.

6. The Written Submissions raise new grounds namely that:

- (1) The Appellant was not provided with an advocate for the trial, thereby violating his constitutional rights;
- (2) That the meat belonged to his passenger who jumped off his motorcycle and ran away.
- (3) The Appellant was a layman in law and did not know the consequences of the charge
- (4) The Appellant was not informed of the Charge nor the evidence against him by the Prosecution
- (5) The Appellant did not have a fair trial because the trial magistrate did not consider his defence evidence which he gave in mitigation that he was the sole bread winner in a family of 4, children of a single parent.
- (6) The Appellant would like the Court to "revisit the whole evidence and come-up with a new conclusion".

7. The Respondent's Submissions, on behalf of the State were filed on 1st October 2018. Those submissions reiterate that the Appellant was charged and convicted with the offence of being in possession of the meat of a species of wildlife namely a giraffe.

8. In relation to the issue of assigning Counsel, the Respondent submits that the Appellant's constitutional rights were not infringed because the right to provision of state funded legal representation as enshrined in Article 50 CoK is a progressive right however there are at present there is no financial framework for the provision of such save for capital offences. The Respondent also relies on the Court of Appeal Decision of David Macharia Njoroge vs The Republic Criminal Appeal (although the citation given appears to be for a date before the first instance decision). In its decision the Court of Appeal held that the failure to provide state funded legal representation could fall foul of Article 50 CoK if that failure resulted in "substantial injustice", which the Court did not define but suggested could be ascertained from international treaties. However, the right is only available to Kenyan Citizens and the Appellant has admitted that he is not one.

9. Although the Appellant does not specifically refer to witness statements, in his complaint of not knowing the charge against him, the Respondent's Submissions refer the Court to the typed proceedings which show that on 6th July 2017 the trial court directed that the Prosecution to provide witness statement. Thereafter on 26 July 2017 the trial was adjourned because the statements had not been supplied. On 27 July 2017 the prosecution informed the Trial Court that the statements had been provided to the Appellant and it was only after that, the trial was fixed for hearing on 15 August 2017.

10. The Respondent also submits that the proceedings show that on 7th November the Appellant admitted to Count I, therefore he cannot rely on a ground where he claims to have insufficient time to prepare for the trial. Further **Section 348** of the **Criminal Procedure Code** provides:

No Appeal shall be allowed in the case of an accused who has pleaded guilty and has been convicted on that plea by a subordinate court except as to the extent or legality of sentence"

11. On the question of sentence, the Respondent's Submissions refer the Court to **Section 98 of the Wildlife Conservation and Management Act 2013** which provides: "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 of not less than one year or to both such fine and imprisonment".

12. The Respondent concedes that the sentence of 10 years imprisonment is excessive and relies on the authority of Shadrack Kipchoge Kago vs Republic, Eldoret Criminal Appeal No. 253 of 2003 (2015) eKLR where the Court of Appeal said:

"Sentencing is essentially an exercise of the trial court and for the court to interfere, it must be shown that in passing sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of these the sentence was so harsh and excessive that an error in principle must be inferred".

The concession made by the State is based on the "fact" that it is clear the Appellant was a first offender. The fact that the meat belonged to an animal which is endangered, gives rise to the submission that it was within the Magistrate's discretion to hand down a sentence greater than the minimum term.

13. The Appellant was given leave to respond to those submissions but chose not to do so.

14. In so far as the Appeal relates to an appeal against conviction, that appeal is dismissed. The Proceedings show clearly that the Appellant had the original charge read to him and he pleaded not guilty. Thereafter the witness statements were provided to him and the charge amended. They were read to him in Swahili and his response was that it was true. In the circumstances, this Court cannot interfere with the conviction which stands.

15. In relation to the sentence, it is said he has no previous conviction, but where is the evidence? He is a national of Tanzania and there is nothing in the record that shows any inquiries were made of that Country. Is a simple assertion enough? In the circumstances, his previous

offending or the lack thereof, can be neither mitigation nor an aggravating feature. The Act provides for a custodial sentence of at least 12 months. The facts of this case are that the Appellant had in his possession the meat of an animal classified as wildlife. Therefore the sentence must be custodial. The animal killed was an endangered species. That is an aggravating factor. The Appellant was found following a report about poachers inside a Game Park. The Appellant was found and arrested inside Tsavo West Game Park. That is a further aggravating factor. He did not have a permit to be in the Game Park. The Appellant travelled from Tanzania to carry out his mission. He did so without the appropriate documentation. He conspired with others to kill an animal inside the game park. He came equipped for that enterprise. He was armed with a panga and a motor bike. Those are also aggravating factors. The fact that he was abandoned by his accomplice does not mean that he was innocent as he now suggests, it means that they were both fully aware of the consequence of what they were doing and one managed to escape.

16. The meat the Appellant was found with was the hindquarters of a mature giraffe. The photographs show that it still had the skin and tail attached. There are some communities that attach value to the tail for use eg as a fly whisk. There were others involved which points to a commercial venture in the trade of bush meat. That too is an aggravating factor.

17. The function of punishment following a criminal conviction can be aimed towards, retribution and/or rehabilitation and/or deterrence to others. In this case, it seems to the Court that given the fact that the offence was committed inside a Game Park that the sentence given must act as a deterrent. In addition, the sentence must signify the revulsion of society at crime committed. The Appellant has expressed no remorse and therefore whatever sentence is given there is unlikely to be any rehabilitation.

18. The Court takes the view that a sentence of 10 years is excessive in the circumstances. In setting a sentence, this Court has taken into account the scheme of the Wildlife Conservation and Management Act 2013 and the sentencing tariff applied in particular to Sections 98 (at least 12 months), Section 102(1)(f) and (h) not less than 2 years and/or a fine, Section 99 (not less than 5 years for Category A) Section 101. The offences described in each of those Sections relate to a part of the activity the Appellant engaged in and admitted to.

19. In the circumstances, this Court finds that a custodial sentence is appropriate for Count I. Taking into account the scheme of the Act this Court resolves that the appropriate sentence is 5 years with no option for the payment of a fine.

**Disposal :**

**Appeal against conviction - dismissed**

**Appeal against sentence: Sentence reduced to 5 years custody.**

Order accordingly,

**FARAH S. M. AMIN**

**JUDGE**

**Delivered, Dated and Signed at Voi this the 22nd day of January 2019**

**In the Presence of:**

Court Clerk: Josephat Mavu

Appellant : Felix Endesi in Person

Respondent: Ms Anyumba