



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL APPEAL NO 18 OF 2019

GILBERT MUTHOMI MAJIRA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original Conviction and Sentence dated 29/11/2018 in Nanyuki CM Criminal Case No.648 of 2017 – L Mutai, CM)

J U D G M E N T

1. The Appellant in this appeal, **GILBERT MUTHOMI MAJIRA**, was convicted after trial of keeping a wildlife trophy contrary to **section 95** of the **Wildlife Conservation and Management Act, 2013** (the Act). It was alleged in the charge that on 07/05/2017 at about 10.30 hours at **Central Park** ground area of Nanyuki Town within Laikipia County, he was found keeping one live juvenile baboon which he was using for public photography using a Sony camera S/N 4815185 without a permit. He was sentenced as follows -

“Accused fined KShs 1,000,000/00 and in default to serve 5 years imprisonment.”

2. The Appellant appealed against both conviction and sentence. However, at the hearing of the appeal his learned counsel informed the court that he would urge only the appeal against sentence, and he did that. He submitted that the default sentence was patently illegal in view of the provisions of **section 28(2)** of the **Penal Code**. Learned prosecution counsel for the Respondent readily conceded the appeal against sentence upon the same ground.

3. Section 95 of the Act provides as follows-

“95. Any person who keeps or is found in possession of 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.”

4. It is immediately clear that a trial court has three options in sentencing under this section –

- a) **It may fine the offender not less than KShs 1 million; OR**
- b) **It may imprison the offender for a term of not less than five years; OR**
- c) **It may both fine and imprison the offender.**

This is a discretion found in many criminal statutes, including the Penal Code, and a casual perusal of the Penal Code, for instance, will readily confirm it.

5. In the present case, the trial court chose the first option; that is, it fined the Appellant KShs 1 million and imposed a **default** sentence in the event that he failed to pay the fine. The court did **not** take the second option and imprison the Appellant for a term of five years. **Nor** did it take the third option and sentence the Appellant to **both** a fine and imprisonment. It only fined the Appellant KShs 1 million and imposed a payment-default sentence of five years imprisonment.

6. The limits of default sentences are set out in **section 28(2)** of the Penal Code as follows –

“In the absence of express provisions in any written law relating thereto, the term of imprisonment or detention under the Detention Camps Act ordered by a court in respect of the non-payment of any sum adjudged to be paid for costs under

section 32 or compensation under section 31 or in respect of the non-payment of a fine or of any sum adjudged to be paid under the provisions of any written law shall be such term as in the opinion of the court will satisfy the justice of the case, but shall not exceed in any such case the maximum fixed by the following scale –

(Emphasis Supplied).

<u>Amount</u>	<u>Maximum Period</u>
Not exceeding Shs 500.....	14 days
Exceeding Shs 500	
but not exceeding Shs 2,500.....	1 month
Exceeding Shs 2,500 but	
not exceeding Shs 15,000.....	3 months
Exceeding Shs 15,000 but not	
exceeding Shs50,000.....	6 months
Exceeding Shs 50,000.....	12 months”

7. In the present case therefore, the maximum term of imprisonment that the trial court could have imposed upon the Appellant **in default** of payment of the fine was 12 months. The term of five (5) years imprisonment it imposed was thus unlawful and must be set aside. It is hereby set aside, and a term of imprisonment for 12 months in default of payment of the fine substituted therefor. It is so ordered.

8. The appeal against sentence therefore succeeds to the extent set out above.

DATED AND SIGNED AT NANYUKI THIS 30TH DAY OF OCTOBER 2019

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 31ST DAY OF OCTOBER 2019