



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL 65 OF 2018

KAHINDI LUO KAPEPO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal seeking sentence revision against the sentence in the Principal Magistrate Court at Garsen criminal case 104 of 2017, Hon. E. Kadima (RM) dated 30th May 2017)

JUDGEMENT

1. The Appellant was charged with the offence of being in possession of wildlife trophy contrary to section 95 of the Wildlife Conservation and Management Act (WCMA) No. 47 of 2013.
2. The particulars of the offence were that on the 4th May 2017 at Hurara village in Tama Delta Sub-County within Tana River County, the Appellant was unlawfully found in possession of wildlife trophy namely two horns of a wildlife animal namely a buffalo and a piece of hide of a warthog without a permit from the Director of Wildlife Services Kenya.
3. When arraigned in court on 9th May 2017, the Appellant denied the charge. However, when the case came up for hearing on the 30th May 2017, the Appellant changed his plea and admitted the charges against him. A plea of guilty was entered and the learned trial magistrate sentenced him to pay a fine of Ksh. 1,000,000/- or in default to be imprisoned for three years.
4. Aggrieved by the said sentence, the Appellant on 4th October 2017 filed a Notice of Motion application seeking leave to be allowed to file an appeal out of time, together with his petition of appeal. The application was allowed and the petition of appeal was deemed duly admitted.
5. On 24th October 2019 when the matter came up for hearing the Appellant filed four amended grounds of appeal and his written submissions. The grounds of appeal were to the effect that he sought a reduction of sentence as he was the sole breadwinner for his family and he was remorseful and promised not to repeat the offence.
6. During the hearing the Appellant submitted that he was remorseful and asked to be given a second chance as he had undergone several rehabilitation programmes in prison which would assist him in society. He relied on the case of **John Kalama Chea vs Rep. CR App No. 94 of 2017**.
7. The Appellant further submitted that he was the sole breadwinner for his family and that his family was under great financial strain since his arrest. Finally, he asked for mercy stating that he had just completed his previous sentence.
8. Mr. Mwangi, learned counsel for the Respondent, through oral submissions opposed the appeal in its entirety. He submitted that the Appellant was a repeat offender who had been previously convicted for possession of narcotics and for possession of wildlife trophy. Finally, counsel submitted that the Appellant had not given evidence or referrals to prove he was reformed. Mr. Mwangi asked the court to let the sentence run its full course.
9. I have considered the grounds of appeal and the submissions by both parties. It is clear that the appeal is against sentence only.
10. It is well established that sentencing is at the discretion of the trial court and an appellate court can only interfere with the sentence under very specific circumstances as was emphasized by the Court of Appeal in **Benard Kimani Gacheru vs Republic [2002] eKLR** where it stated that:-

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, any one of the matters already stated is shown to exist.”

11. In this case, the Appellant was convicted on his own plea of guilty for being in possession of wildlife trophies. He was sentenced under section 95 of the WCMA which provides for the penalty for possession of wildlife trophies in the following the following terms:-

“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.

12. The Appellant was sentenced to pay a fine of Ksh. 1,000,000/- and in default to serve a term of 3 years imprisonment. A reading of the penal section however, shows that a mandatory minimum sentence is provided as demonstrated by use of the term “not less than”.

13. The Court of Appeal in **Caroline Auma v. Republic Criminal Appeal no 65. Of 2014 (2014) eKLR** while discussing mandatory sentences pronounced thus:-

“... It should be noted that sentencing is an exercise of judicial discretion, and therefore provisions which provide for mandatory sentence compromise that discretion, and are the exception rather than the rule. Thus, where applicable the mandatory sentence must be expressed in clear and unambiguous terms...

....”

14. Guided by the above decision, it is manifest that the fine imposed on the Appellant was the mandatory minimum. However, the sentence of 3 years imprisonment was less than the mandatory minimum sentence of 5 years as prescribed in the Act. This begs the question whether the sentence should be enhanced.

15. The **Judiciary’s Sentencing Policy Guidelines 2016** were issued to guide courts in issuing appropriate sentences. Paragraph 7.18 of the guidelines encourage courts to issue non-custodial sentences unless the objectives of sentencing cannot be achieved. Other factors to be considered when deciding whether to impose a custodial or a non-custodial sentence is the criminal history of the offender. Paragraph 7.19 of the guidelines states that:-

Taking into account the seriousness of the offence, first offenders should be considered for non-custodial sentences in the absence of other factors impinging on the suitability of such a sentence. Repeat offenders should be ordered to serve a non-custodial sentence only when it is evident that it is the most suitable sentence in the circumstance.

16. Furthermore, where the Court is determining a suitable custodial sentence the court should consider the aggravating and mitigating circumstances. **See paragraph 23.4.** One of the aggravating circumstances is previous conviction particularly where a pattern of repeat offending is disclosed.

17. In the instant case, the learned magistrate in sentencing the Appellant took into account that he was a repeat offender, which was an aggravating factor. He sentenced the Appellant to 3 years imprisonment in default of the fine. This term as I have stated before was below the mandatory sentence of 5 years. I am however conscious that sentencing is at the discretion of the trial court and that an appellate court should be slow to interfere with it. I have also considered the provisions of **Section 354 (3) (b)** of the **Criminal Procedure Code** which gives this court the discretion to interfere with a sentence.

18. In the circumstances of this case however, the appellant has pleaded with the court to reduce his sentence or place him on non-custodial sentence. He has submitted strongly that he has reformed. I can do no better than to rely on the judgment of the Court of Appeal in **Evans Wanjala Wanyonyi v Republic [2019] eKLR** to find that I need not enhance the sentence.

19. On reduction of sentence however, I observe that though the Appellant has served a substantial part of his sentence, he was a repeat offender. In the end I find no merit in the appeal. It is dismissed.

20. Orders accordingly.

Judgment dated delivered and signed at Malindi on this 29th day of November, 2019.

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R. LAGAT KORIR

JUDGE

In the presence of:

S. Pacho Court Assistant

Appellant present in person

Mr. Nyoro holding brief for Mr. Mwangi for Respondent