REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 61 OF 2017

HAMISI MWEMBE…….……..……... APPELLANT

VERSUS

REPUBLIC…… RESPONDENT

(**From original conviction and sentence in Criminal Case Number 224 of 2017 in the Senior Principal Magistrate's Court at Voi delivered by Hon M. Onkoba (SRM) on 24th April 2017)**

JUDGMENT

INTRODUCTION

1. The Appellant herein, Hamisi Mwembe was jointly charged with Mnazi Nyai, (hereinafter referred to as "his Co-Accused") on two (2) Counts. Count I was in respect of the offence of subsistence hunting contrary to Section 97 of the Wildlife Conservation and Management Act, 2013 (Laws of Kenya) hereinafter referred to as "the Act"). The particulars of the charge were that on the 24 thday of April 2017 at around 0230 hrs at Rukinga Ranch within Taita Taveta County, they were found to have hunted wildlife species namely four (4) dik diks for subsistence purposes.

2. Count II related to the offence of conveying hunting apparatus into a national park contrary to Section 102(1)(f) of the said Act. The particulars of this charge were that on the aforesaid date, time and place, they were found in a protected area with 1 knife, 2 torches, one torch mounted with a siren and I panga for purposes of hunting.

3. They both pleaded guilty to the offences and a plea of guilt was entered. In respect of Count I, the Learned Trial Magistrate, Hon M. Onkoba, Senior Resident Magistrate fined each of them Kshs 50,0000/= and in default, to serve six (6) months imprisonment. With respect to Count II, he fined each of them Kshs 200,000/= and in default to serve two (2) years imprisonment. However, he did not indicate whether the sentences were to run concurrently or consecutively.

4. Being dissatisfied with the said judgment, on 1st August 2017, the Appellant herein filed an application seeking leave to file his appeal out of time, which application was allowed and the Petition of Appeal deemed as having been duly filed and served. He relied on two (2) Grounds of Appeal.

5. He filed his Written Submissions on 5th December 2017. The State's Written Submissions were dated 23rd January 2018 and filed on 24th January 2018.

6. When the matter came up in court on 24th November 2017, both he and the State asked this court to deliver its Judgment based on their respective Written Submissions. The decision herein was therefore based on the said Written Submissions.

LEGAL ANALYSIS

7. In a first appeal, the High Court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

> **"On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".**

8. However, where an accused person has pleaded guilty to the charges that were preferred against him, the jurisdiction of the High Court is limited to considering the legality and extent of a sentence. In this case therefore, this court could not consider Grounds of Appeal Nos (2),

(3) and (5) of the Appellant's Petition of Appeal. It could only entertain Amended Ground of Appeal No (4) that raised the issue of harshness and severity of the sentence that was meted upon him by the Learned Trial Magistrate.

9. This is in line with the provisions of Section 348 of the Criminal Procedure Code Cap 75 (Laws of Kenya) that the State relied upon. The said Section provides as follows:-

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

10. The Appellant submitted that he pleaded guilty to the charge after being persuaded to do so by the arresting officers Evans Mwachoki and Daudi Deko after they realised that he was naïve and did not know about the court processes. He stated that little did he know that those were their tactics to avoid proving their case in a full trial and to please their supervisors.

11. On its part, the State was emphatic that the charges were read to the Appellant in a language that he understood, Kiswahili, and he pleaded guilty. It asserted that the facts that were read to him clearly stated that he had been found in possession of four (4) dik diks carcasses and hunting apparatus which were a panga, two (2) torches and a knife which were tendered in court as Exhibits.It therefore urged this court to dismiss the Appeal herein as it was not merited.

12. It was the considered view of this court that the Appellant's assertions that the officers who arrested him took advantage of his naivety were merely an afterthought and were well calculated at avoiding liability for his actions herein. He was fully aware that he had been charged with two (2) offences as the same were clearly set out in the Charge because after pleading guilty, the facts that were read to him and he also admitted that the same were correct.

13. In the case of **Fredrick Musyoka Nyange vs Republic[2012]eKLR,** Wendoh J associated herself with the procedure for taking plea that was set out in the case of **Kariuki vs Republic[1954] KLR 809**as follows:-

> **""2. The manner in which a plea of guilty should be recorded is:**
>
> **(a) the trial magistrate or judge should read and explain to the accused the charge and all the ingredients in the accused's language or in a language he understands;**
>
> **(b) he should then record the accused's own words and if they are an admission, a plea of guilty should be recorded;**
>
> **(c) the prosecution may then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;**
>
> **(d) if the accused does not agree to the facts or raises any question of his guilt his reply must be recorded and a change of plea entered but if there is no change of plea, a conviction should be recorded together with a statement of the facts relevant to sentence and the accused's reply – Adan v Republic [1973] EA 445""**

14. This court also fully associated itself with the procedure of taking plea and found that the procedure that was adopted by the Learned Trial Magistrate before the Appellant took his plea was fully adhered to. There was no ambiguity both in the manner the Appellant pleaded to the charge and admitted the facts that were read to him in a language that he understood, Kiswahili. He did therefore not demonstrate that there was any flaw in the manner that he pleaded to the Charge and admitted the facts therein.

15. Turning to Ground of Appeal No (1) of the Petitioner's Petition of Appeal relating to the severity and harshness of the sentence as aforesaid, the Appellant contended that the penalty that was imposed upon him by the Learned Trial Magistrate on Count I was fair. However, he submitted that the sentence that he meted upon him under Count II was excessive and harsh. He referred this court to the case of **Cr Case No 277 of 2017 Republic vs Emmanuel Musyi Voi** where the same Learned Trial Magistrate fined the accused person therein Kshs 100,000/= and in default to serve one (1) year imprisonment for a similar offence.

16. On its part, the State was emphatic that the Learned Trial Magistrate exercised his discretion properly when he fined the Appellant instead of fining and sentencing him. It placed reliance on the case of **Shadrack Kipchoge Kogo vs Republic** (citation not given) where the Court of Appeal rendered itself as follows:-

> ***"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."***

17. It was its averment that Section 97 of the Act provided for a minimum fine of Kshs 30,000/= and a minimum default sentence of six (6) months and that a trial court could impose both penalties. It pointed out that the Learned Trial Magistrate considered the Appellant's mitigation that he was a first offender and imposed a fine only and a default sentence and that in any event, the Appellant was not contesting the penalty that was imposed upon him under Count I.

18. Section 102(1) (f) of the said Act that stipulates as follows:-

> **"Any person who conveys into a protected area or is found within a protected area in possession of any firearm,**

ammunition, arrow, spear, snare, trap or similar device without authorization commits an offence and is liable on conviction to a fine of not less than two hundred thousand shillings or to imprisonment of not less than two (2) years or to both fine and imprisonment."

19. The import of the penalty therein is that upon a conviction under Section 95 of the Act, a Trial Court cannot fine a person less than Kshs 200,000/= and in default such court cannot sentence a convicted person to less than two (2) years imprisonment. The Learned Trial Magistrate therefore exercised his discretion judiciously by fining the Appellant and giving a default sentence instead of fining and sentencing him at the same time.

20. In considering the question whether or not this court could interfere with the Learned Trial Magistrate's decision on sentence of the Appellant herein, this court had due regard to the case of Kenneth Kimani Kamunyu Vs Republic [2006] eKLR where Makhandia J (as he then was) referred to the case of ***Sayeka vs Republic (1989) KLR 306,*** where the principles upon which an appellate court acts when dealing with appeals on sentence were re-hashed. The Court of Appeal in that case rendered itself as follows:-

""…… The appellate court will not ordinarily interfere with the discretion exercised by the lower court unless it is evident that the lower court has acted upon some wrong principles or overlooked some material factors or the sentence is manifestly excessive in the circumstances of the case……" Further in the case of STEPHEN ONDIEKI NYAKUNDI VS. REPUBLIC, CA NO. 91 OF 2005 (UNREPORTED) the Court of Appeal held "that the court can only interfere with the sentence if it is shown to be unlawful……""

21. Having said so, it was worthy of note that the facts of the case herein that were read to the Appellant after he pleaded guilty to the both Counts. It did appear to this court that the facts related to Count I only and did not disclose any offence under Section 102(1)(f) of the Act.

22. The facts were as follows:-

"The facts are that on 24/4/2017 at around 2.30 pm at Rukinga Ranch Wildlife Works Officers led by Evans Muchoki were on patrol within the ranch, They had been tipped by the public of some hunters. They intercepted the two accuseds (sic) **and sought to find out what the accused were carrying. They found four carcasses of Dik dik, a panga, 2 torches, one mounted in a siren and a knife. The accused didn't have a permit to be in the part with the apparatus and also hunting dik diks. They were arrested and taken to Voi Police Station. They were charged in court. I have the panga (PE NO 1), Knife (PE NO 2), two torches (PE NO 3), hunting horn/siren (PE NO 4), 4 did dik carcasses (PE NO 5 (a), (b), (c) and (d)."**

23. Notably, a "protected area" is defined in Section 3 of the Act as follows:-

"a clearly defined geographical space, recognized, dedicated and managed through legal or other effective means, to achieve long-term conservation of nature with associated ecosystem services and cultural values."

24. There was no indication whatsoever in the facts that the Appellant and his Co-Accused were arrested in a protected area. In fact, the facts only stated that Rukinga Ranch Wildlife Works officers were on patrol within the Ranch, which was not proven to have been a protected area within the meaning of Section 3 of the Act so as to constitute an offence under Section 102(1)(f) of the Act.

25. Accordingly, having considered the submissions by the Appellant and the State, this court found and held that whereas the Learned Trial Magistrate's hands were tied in regard to the penalty that he could have meted upon the Appellant, the fine of Kshs 200,000/= and the default of serving two (2) years imprisonment was illegal and it had no legal basis. This court could therefore have interfered in the sentence that he meted upon him.

26. The above notwithstanding, it was the considered view of this court that it could interfere with the said Learned Trial Magistrate's decision relating to Count II for the reason that there was no evidence that was presented before him demonstrating that Rukinga Ranch was a protected area either by way of gazettement in accordance with the Act or in the Eleventh Schedule of the said Act.There was therefore reason in this court interfering with his penalty in respect of Count II as no offence appeared to have been established.

27. Going further, this court also took the view that the Learned Trial Magistrate erred in not directing how the sentences he meted upon the Appellant were to run, a fact that was also pointed out by the State. The ambiguity had great potential of causing the Appellant great injustice and prejudice had he not appealed. Indeed, there was a possibility of the prison authorities interpreting the Learned Trial Magistrate's decision as having intended that the sentences to have run consecutively more so, because he had imposed upon him fines on both Counts.

28. This court was of the considered opinion that consecutive sentences herein even if fines had been imposed on the different Counts would have been erroneous as both offences were said to have been committed in one transaction.

29. In the case **Peter Mbugua Kabui Vs Republic[2016] eKLR** (Supra), the Court of Appeal addressed its mind to the question of concurrent and consecutive sentences when it stated as follows:-

"In the case of Sawedi Mukasa s/o Abdulla Aligwaisa [1946] 13 EACA 97, the then Court of Appeal for Eastern Africa in a judgment read by Sir Joseph Sheridan stated that the practice is where a person commits more than one offence at the same time and in the same transaction, save in very exceptional circumstances, to impose concurrent sentences. That is still good practice. As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a

consecutive term of imprisonment."

30. In a nutshell, this court found that **the Learned Trial Magistrate's discretion in Count II was not properly exercised** and it could interfere with the same**.**

DISPOSITION

31. The upshot of this court's decision was that the Appellant's Petition of Appeal that was lodged on 1st August 2017 was partially successful and the same is hereby allowed. As the Appellant pleaded guilty to Count I, his conviction was upheld as the same was lawful.

32. However, this court hereby quashes his conviction under Count II as no offence was discernible from the facts that were presented before the Trial court despite him having pleaded guilty to the same. Consequently, this court also hereby sets aside the sentence that was meted upon him by the Trial Court as the same was unlawful and had no legal basis.

33. As the Appellant has already served his imprisonment sentence for almost eleven (11) months, which sentence ought to have been for six (6) months under Count I, this court hereby orders that he be set free forthwith unless he be held or detained for any other lawful reason.

34. It is so ordered.

DATED and **DELIVERED** at **VOI** this **8th**day of **March** 2018

J. KAMAU

JUDGE

In the presence of:-

Hamisi -Appellant

Miss Anyumba for State

Susan Sarikoki– Court Clerk