REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 60 OF 2017

HARRISON JOSIA NG'ANG'A.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case Number 917 of 2016 in the Senior Principal Magistrate's Court at Voi delivered by Hon M. Onkoba (SRM) on 14th November 2016)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Harrison Josiah Ng'ang'a was charged with the offence of being in possession of wildlife trophy without a permit contrary to Section 95 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 12th day of November 2016 at Mwatate town around 1300 hours within Taita Taveta County, he was found in possession of wildlife trophies of an endangered animal namely three (3) pieces of elephant tusks weighing 1.7 kgs.

2. He pleaded guilty to the offence and a plea of guilty was entered. The Learned Trial Magistrate, Hon M. Onkoba, Senior Resident Magistrate fined him Kshs 1,000,000/= and in default, to serve five (5) years imprisonment.

3. Being dissatisfied with the said judgment, on 1st August 2017, he 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.

4. He filed his Written Submissions on 6th December 2017. The State's Written Submissions were dated 23rd January 2018 and filed on 24th January 2018.

5. 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

6. 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".**

7. However, where an accused person has pleaded guilty to the charges that have preferred against him, the jurisdiction of the High Court is limited to analysing the evidence that has been adduced in a trial court afresh with a view to establishing whether or not such trial court erred on fact or law or both and/or considering the legality and extent of a sentence where an accused person has pleaded guilty to an offence.

8. 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."**

9. The Appellant submitted that he pleaded guilty to the charge after being persuaded to do so by the arresting officers Kenya Wildlife Service (KWS) Rangers Corporal Rono, Ranger Kituo, Ranger Ndungu and ID Kisui and that little did he know that those were their tactics to avoid proving their case in a full trial and to please their supervisors.

10. He argued that despite pleading guilty to the charge, it was not established whether the substance he was said to have been found in possession of was ivory as the Prosecution had contended. It was his averment that the Learned Trial Magistrate ought to have taken his time and ordered that the Exhibits that were adduced as evidence in his court be taken for analysis at the Government Chemist to ascertain what they really were.

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 stated that the facts that were read to him clearly stated that he had been found in possession of elephant tusks within Mwatate and the same were adduced as exhibits in the case, which facts he stated were true.

12. It averred that there was no proof that the KWS officers made him plead guilty to the charge as he had contended and that his assertions were merely an afterthought. It therefore urged this court to dismiss the Appeal herein as it was not merited.

13. It was the considered view of this court that the Appellant's assertions that the KWS officers who arrested him persuaded him to plead guilty before the said Exhibits could be tested by the Government Analyst before he took plea were merely an afterthought and were well calculated at avoiding liability for his actions herein.

14. The Appellant's further averments that the Learned Trial Magistrate erred in not having ordered that the Exhibits be taken for analysis at the Government Chemist were also misplaced. It was the Prosecution's case and it could bring whatever evidence it wanted to rely on its case. The Learned Trial Magistrate was a neutral arbiter. He was therefore under no duty or obligation to order for the analysis of the exhibit.

15. The Appellant herein was fully aware that he had been charged with being in possession of wildlife trophy without a permit as the same was clearly set out in the Charge as having been an offence that was contrary to Section 95 of the Act. On pleading guilty, the facts that were read to him were also clear that he was found in possession of wildlife trophy without a permit.

16. 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""**

17. This court 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.

18. Turning to the issue of severity of the sentence, the Appellant contended that the penalty that was imposed upon him by the Learned Trial Magistrate was excessive and harsh and that he failed to consider his mitigation before sentencing him.

19. 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."*

20. It was its averment that Section 95 of the Act provided for a minimum fine of Kshs 1,000,000/= and a minimum default sentence of five (5) years 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.

21. Section 95 of the said Act that stipulates as follows:-

> **"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 permit issued under this Act or is exempted in accordance with any other provision of this Act, commits an offence and shall be liable to a fine of not less than**(emphasis court) **one million shillings or imprisonment for a term not less that**(emphasis court) **five years or to both such imprisonment and fine."**

22. 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 1,000,000/= and in default such court cannot sentence a convicted person to less than five (5) years imprisonment.

23. Appreciably, before the Learned Trial Magistrate read out the sentence herein, the Appellant said the following in mitigation:-

> **"I pray for pardon. I have two children who are in school. They rely on me for their upkeep."**

24. The Learned Trial Magistrate then recorded the following:-

> **"Mitigation by the accused person is duly noted…Section 95 of the Wildlife Conservation and Management Act provides for a minimum penalty to be imposed upon conviction. This courts** (sic) **fidelity being to the law, has its hands tied and must therefore impose the minimum penalty stipulated. Consequently it states the accused to pay a fine of Kshs 1,000,000 (one million) or five years in default."**

25. **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] eKLRwhere**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……""*

26. Bearing in mind the mandatory wording of Section 95 of the Act, the Learned Trial Magistrate was correct when he stated that his hands were tied and that he could only mete upon the Appellant the minimum sentence that was prescribed therein. This court noted that he imposed upon him a less harsh punishment as he still had the option of imposing upon him a fine of Kshs 1,000,000/= and also sentence him to five (5) years imprisonment.

27. Consequently, having considered the submissions by the Appellant and the State, this court noted that the Appellant did not persuade it to find that the sentence that was meted upon him by the Learned Trial Magistrate was harsh and excessive in the circumstances of the case. Indeed, it was clear to this court that the penalties that were meted upon him by the said Learned Trial Magistrate were legal and proper and that he exercised his discretion judiciously. Consequently, this court found that it could not interfere with **the Learned Trial Magistrate's discretion as it was properly exercised.**

DISPOSITION

28. The upshot of this court's decision was that the Appellant's Petition of Appeal that was lodged on 1st August 2017 was not merited and the same is hereby dismissed. The conviction and the sentence that were meted upon the Appellant by the Learned Trial Magistrate are hereby upheld.

29. It is so ordered.

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

J. KAMAU

JUDGE

In the presence of:-

Harrison Josia Ng'ang'a- Appellant

Miss Anyumba for State

Susan Sarikoki– Court Clerk