REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CRIMINAL APPEAL NO 41 OF 2017

JAMES KAZUNGU KONDE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case

Number 71 of 2017 in the Senior Principal Magistrate's

Court at Voi delivered by Hon M. Onkoba (SRM)

on 15th February 2017)

JUDGMENT

1. The Appellant herein, James Kazungu Konde, was jointly charged with Josephat Shida (hereinafter referred to as "the Appellant's Co-Accused") on two (2) Counts.

2. In respect of Count I, they were jointly charged with the offence of being in possession of meat of wildlife species without a permit contrary to section 98 of the Wildlife Conservation and Management Act, 2013 Laws of Kenya (hereinafter referred to as "the Act"). The particulars of this charge were that on the 28th day of January 2017 at around 0900hrs at Galana Ranch within Taita Taveta County, they were jointly found in possession of meat of wildlife species namely four (4) dik dik carcass without a permit.

3. Count II was in respect of the offence of being in possession of hunting apparatus in a protected area contrary to Section 102(1)(f) of the said Act. The particulars of this charge were that on the 28th day of January 2014 at around 0900 hrs at Galana Ranch within Taita Taveta County, they were jointly found in possession of hunting apparatus namely two (2) pangas and two (2) hinting **(sic)** horns panga **(sic)**, for the purpose of hunting.

4. When the charges were read to the Appellant and his Co-Accused on 30th January 2017, they both pleaded not guilty to the charge. On 13th February 2017, they both asked the charges to be read to them afresh whereupon they pleaded guilty to both Counts. The admitted the facts of the Charges which were read to them on 15th February 2017.

5. The Learned Trial Magistrate, Hon M. Onkoba Senior Resident Magistrate convicted the Appellant and his Co-Accused on Count I and fined them Kshs 200,000/= or in default serve one (1) year imprisonment. He also convicted them in respect of Count II and fined them Kshs 200,000/= or in default to serve two (2) years imprisonment.

6. Being dissatisfied with the said judgment, on 2nd June 2017, the Appellant filed a Notice of motion seeking leave to file his Appeal out of time which application was allowed and his Petition of Appeal deemed as having been duly filed and served. He relied on two (2) Grounds of Appeal. His Written Submissions were filed on 7th November 2017. The State's Written Submissions were dated 15th January 2018 and filed on 17th January 2018.

7. When the matter came up in court on 18th January 2018, they informed the court that they would rely entirely on their respective Written Submissions. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

8. This being a first appeal, this 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".**

9. As can be seen hereinabove, the jurisdiction of an appellate superior 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. However, where an accused person has pleaded guilty to an offence, its jurisdiction is limited to considering the legality and extent of a sentence.

10. This is in line with the provisions of Section 348 of the Criminal Procedure Code Cap 75 (Laws of Kenya) that stipulates 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."**

11. In this case, this court noted that the Appellant pleaded guilty to the offence. His admission of the two (2) Counts that had been preferred against him was reflective of his guilt. No value then would be added in analysing the evidence that was adduced during trial as this court is limited to looking at the extent and legality of the sentence that he was given only.

12. Whereas this court appreciated that its jurisdiction was limited to interrogating the extent and legality of the sentence herein, it took cognisance of the fact that this was a *pro se* trial. The Appellant represented himself during the trial in the Trial Court and was not expected to know all the finer details of the law.

13. This court therefore deemed it fair to address itself to the defectiveness or otherwise of the Charge Sheet and the legality, propriety and correctness of Count II. Indeed, a court of law has inherent powers to make such orders are as necessary for the ends of justice and to prevent the abuse the process of court. This court therefore dealt with the issues that had been raised herein under the following heads.

I. CHARGE SHEET

14. The Appellant did not raise this as a Ground of Appeal. However, he raised the issue of defectiveness of the Charge Sheet for the first time, in his Written Submissions. He argued that the Charge Sheet was fatally defective as the particulars in both Count I and Count II did not match which was contrary to the provisions of Section 134 of the Criminal Procedure Code.

15. He added that he was persuaded by Kenya Wildlife Service (KWS) Officers to plead guilty to the offence as he would only be given a fine which he subsequently established was not the case when he was sentenced to prison as it became evident that they were avoiding a full trial.

16. On its part, the State submitted that the Appellant's plea was unequivocal and that the procedure for taking plea was properly followed as the Charges and facts were read to him in Kiswahili, a language that he understood as he had not informed this court that he did not understand Kiswahili. It pointed out that there was no factual proof that KWS officers persuaded him to plead guilty as he had contended.

17. It also argued that the error in the particulars of Count II was not an incurable defect by dint of Section 382 of the Criminal Procedure Code because he pleaded to the Charge and admitted the facts therein.

18. A charge sheet does not become defective merely because the evidence that has been adduced during trial does not prove the facts in such a charge sheet. If the evidence that is presented in court does not prove any offence, the trial court is obligated to acquit an accused person as envisaged in Section 210 and Section 215 of the Criminal Procedure Code Cap 75 (Laws of Kenya) as the prosecution will either have failed to demonstrate that a *prima facie* has been established or to prove its case beyond reasonable doubt.

19. If the Charge Sheet contains certain irregularities, it is curable by virtue of Section 382 of the Criminal Procedure Code that provides as follows:-

> **"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:**
>
> **Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."**

20. In this particular case, the Appellant pleaded guilty and admitted the facts after the charge was read to him in a language that he understood, Kiswahili. This was in line with the holding in the case of **Kariuki vs Republic[1954] KLR 809** that Wendoh J referred to in the case of **Fredrick Musyoka Nyange vs Republic[2012]eKLR** wherein it was held 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""

21. It was not clear to this court if the date of 24th January 2014 indicated was a typographical error because he admitted to the fact. As he did not demonstrate the prejudice that he suffered by that irregularity, this court was persuaded to agree with the State that he appeared to have understood the charges that were preferred against him.

22. This court found and held that he failed to demonstrate how the Charge Sheet was defective. It did not therefore see any merit in his argument in that regard.

II. DISCLOSURE OF OFFENCE UNDER BOTH COUNTS

23. Having said so, it is important to point out that a Charge Sheet must disclose an offence under the law. The facts that are adduced in court must in turn, prove that offence. Notably, the facts that were read to the Appellant and his Co-Accused were as follows:-

"The facts of the case are that on 28/1/2017 KWS Ranger were on routine patrol. They were Ranger Godin and Robert. While at Golana (sic) **ranch they met the two accused who were walking out of the ranch. They had hunting apparatus i.e. two pangas, two hunting horns attached to torches and 4 carcasses of dik dik. They were asked for a permit, but they did not have the same. They were arrested and escorted to KWS Headquarters in Voi. They were then charged in court…"**

24. Photographic evidence of the dik dik was adduced in the Trial Court. The Appellant admitted that he was caught with the did dik. It was therefore evident that the Prosecution adduced evidence that proved Count I. This is because Section 98 of the Act provides as follows:-

"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 offenceand shall be liable on conviction to a fine of not less than two hundred thousand shillings or to imprisonment for a term not less than one year or to both such fine and imprisonment."

25. Turning to Count II, the Appellant was charged under Section 102(1)(f) of the 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 years or to both such fine and imprisonment."

26. Evidently, there was no indication in the facts that were read to the Appellant and his Co-Accused that the area they were found with the hunting apparatus was a protected area or within a protected area. 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."

27. Having considered the facts *vis a vis* Section 102(1)(f) of the Act under which the Appellant herein was charged in respect of Count II, it was the considered opinion of this that court that despite the fine of Kshs 200,000/= and the default of serving two (2) years imprisonment was within the discretion of the Learned Trial Magistrate, the said penalty was illegal and it had no legal basis.

28. Indeed, there was no evidence that was adduced in the Trial Court to demonstrate that Galana Ranch was defined as protected areas either by way of gazettement in accordance with the Act or in the Eleventh Schedule of the said Act. Indeed, this court came to a similar conclusion in the case of **Makupa Ndege vs Republic [2016] eKLR**where this very court quashed the conviction against the appellant therein as the prosecution had not demonstrated that Wamasa or Taru Ranches were protected areas within the meaning of the Act.

29. In view of this finding, this court did not find it necessary to analyse the omission by the Learned Trial Magistrate of how the sentences under the two (2) Counts ought to have run. Suffice it to state that the Learned Trial Magistrate erred in failing to indicate that the sentences ought to have run concurrently. Let as it is, it can cause great prejudice to a convicted person as there is a tendency for prison authorities to adopt running of sentences consecutively.

III. SENTENCE

30. Grounds of Appeal Nos (1) and 2 were dealt with under this head.

31. The Appellant contended that it was erroneous for the Trial Court to have meted upon him a harsh sentence that was excessive in the circumstances since he was a first time offender. He referred this court to the case of **Emmanuel Charo Karisa vs Republic [2017] eKLR** where this very court reduced the sentence from four (4) years to two (2) years imprisonment. He therefore urged this court to allow his Appeal.

32. On its part, the State referred this court to the case of ***Shadrack Kipchoge Kogo vs Republic, Eldoret Criminal Appeal No 253 of 2003*** **(quoted in *Arthur Muya Muriuki vs Republic* (2015) eKLR)** where the Court of Appeal stated the following on principles of sentencing:-

> ***"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."***

33. It pointed out that the minimum sentence the Learned Trial Magistrate could have imposed on the Appellant under Section 98 of the Act was a fine of Kshs 200,000/= or in default one (1) year imprisonment and that under Section 102 (1)(f) of the said Act, the minimum fine he could have imposed on the Appellant was Kshs 200,000/= or in default to serve two (2) years imprisonment.

34. It was therefore its submission that the Learned Trial Magistrate acted within his discretion when he imposed upon him a fine and in default, imprisonment, because he had the option of fining and imprisoning him at the same time. It, however, faulted the said Learned Trial Magistrate for having failed to indicate how the sentences were to run. It opined that as the offences occurred during the same transaction, then the sentences on Count I and Count II ought to have run concurrently.

35. In view of the fact that this court found and held that the Prosecution did not demonstrate that the Appellant and his Co-Accused committed the offence under Count II herein, this court did not find it necessary to address itself to the correctness or otherwise of the said sentence.

36. Turning to Section 98 of the said Act, the same provides a minimum sentence. The mitigation by a convicted person accords him a fair hearing on sentencing as the trial court has the option of sentencing him to both fine and imprisonment as can be seen from the wordings that he **"shall be liable to a fine of not less than**(emphasis court) **two hundred thousand shillings or imprisonment for a term not less than**(emphasis court) **oneyear or to both such imprisonment and fine."**

37. Having considered the mitigation, the Learned Trial Magistrate fined the Appellant herein Kshs 200,000/= and in default to serve one (1) year imprisonment. He did not mete out to him both a fine and imprisonment. The Appellant was therefore accorded a fair trial. This court did not therefore see any merit in interfering in the sentence that was meted upon him in respect to Count I.

38. Grounds of Appeal Nos (1) and 2 were only successful in respect of Count II.

DISPOSITION

39. For the foregoing reasons, the Appellant's Petition of Appeal that was lodged on 21st February 2017 was partly successful. As can be seen hereinabove, as the Prosecution did not demonstrate any offence under Count II, this court hereby quashes the Appellant's conviction and sets aside the sentence in this regard as the same were unlawful.

40. In respect to Count I, this court hereby upholds the conviction and sentence against the Appellant as they were lawful and fitting. However, as he has since completed his default sentence of one (1) year imprisonment by the time of delivery of the decision herein, this court hereby orders that he be set free forthwith unless held or detained for any other lawful reason.

41. It is so ordered.

DATED and DELIVERED at VOI this 20th day of April 2018

J. KAMAU

JUDGE

In the presence of:-

James Kazungu Konde-Appellant

Miss Anyumba for State

Josephat Mavu– Court Clerk