



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION No. 488 & 489 of 2017

PETER EKAI MORUNGALE.....1ST APPLICANT

MUTHUI REUBEN WACHIRA.....2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING.

1. Peter Ekai Morungale and Muthui Reuben Wachira brought the present applications by way of Notice of Motion filed on 18th October, 2017 pursuant to the Section 362 of the Criminal Procedure Code. They seek revisions of their respective sentences. The applications are supported by identical supporting affidavits, sworn on 12th October, 2017 by the Applicants. The applications have been consolidated for purposes of this ruling because they are similar in all respects.

2. The Applicants were jointly charged in Kibera Chief Magistrate's Court in Criminal Case No. 3510 of 2015 with two counts. In count 1 they were charged with being in possession of wildlife trophies contrary to Section 95 as read with Section 92 of the Wildlife Conservation and Management Act, 2013. It was alleged that on 17th day of August 2013 at around 1100hrs within Karen Shopping Centre in Nairobi were jointly found in possession of wildlife trophies, to wit; 6 pieces of elephant ivory worked into sculptures all weighting 6 kgs with a street value of Kshs. 600,000/- without a permit. In count 2 they were charged with dealing in wildlife trophies contrary to Section 84(1) as read with Section 92 of the Wildlife Conservation and Management Act. It was alleged that on 17th day of August, 2013 at around 1100hrs at Karen Shopping Centre in Nairobi were jointly found dealing in wildlife trophies, to wit; 6 pieces of elephant ivory worked into sculptures all weighting 6 kgs with a street value of Kshs. 600,000/- without a dealers' licence.

3. At the conclusion of the trial the learned magistrate in her judgment found each of the Applicants guilty in respect to each of the counts. In sentencing however she passed a singular blanket sentence in the following words:

“Each of the accused is sentenced to pay a fine of Kshs. 1,000,000/- or serve 5 years in jail.”

The sentence was passed on 13th September, 2013.

4. This was an illegality as the court ought to have pronounced sentences in respect of each of the counts. Furthermore, each of the sentences carries a distinct penalty and so a blanket penalty was not illegal but also irregular.

5. Section 95 of the Act under which the first offence was charged provides a penalty of a fine of not less than Kshs. 1,000,000/= or imprisonment for a term of not less than 5 years or to both such imprisonment and fine. Section 84(1) on the other hand does not provide a penalty for count II. The penalty for offences relating to licences and permits are found in Section 91. In the respect of the instant case subsection (d) applies. The same reads:

“Any person who for purposes of obtaining, whether for himself or another, the issue of a licence or permit:-

(d)Knowingly contravenes any condition or requirement of a licence or permit, commits an offence and shall be liable upon conviction, to a fine of not less than two hundred thousand shillings or imprisonment of not less than one year or to both such fine and imprisonment.”

6. It is gainsaid that a person charged under Section 84(1) with operating as a trophy dealer without a licence should be punished under Section 91(d) of the Act. Although Count II did not state the penalty section the learned trial magistrate was obligated to make a finding on where the sentence for the offence was provided and proceed to pass it.

7. Both counts were also charged in addition to the main provisions under Section 92 of the Act. The provision is titled “**Offences Relating to Endangered and Threatened Species**”. A reading of the substance of the provision clearly indicates that only the penalty is provided for offences relating to endangered and threatened species. The learned magistrate in her judgment found that she could not pass a sentence under Section 92 because the High Court had held that the provision does not create offences relating to endangered animals and species. The learned magistrate relied on the case of **Mutisya Kiema v. Republic[2014] eKLR** a judgment of learned Kasango, J. She delivered herself as follows:

“Although the Appellant was charged with an apparently more serious offence, it is my view that the Wildlife Conservation and Management Act, 2013 as it is now, does not clearly create the offence relating to endangered species or their trophies. It only provides for punishment for the same. This court shall therefore invoke Section 179 of the Criminal Procedure Code and reduce the offence that the Appellant was charged with under both Sections 92 and 95 of the Wildlife Conservation and Management Act, 2013 to offence under Section 95 only. It is my considered view that unless and until the Act is amended to create the offences restricted to endangered species, suspects should be charged under section 95 of the Act only.”

A glance at the charges and their particulars clearly discloses the exact charge and the elements of the offence. Section 92 only enhances penalty where the offence or offences relate to endangered animals and species. The Act at its Sixth Schedule enunciates all the endangered, vulnerable and protected animals, an elephant being one of them. Therefore, where any of the offences relates to any of the animals indicated in the Sixth Schedule the charge must in addition to the part providing for the offence charge together with Section 92 of the Act. What this means is that although each of the respective counts carry their distinct punishment, having regard that they relate to an endangered animal under the Sixth Schedule, the penalty to be imposed must be as provided under Section 92.

The only error arising in drafting Section 92 is the title given to it. Therefore, once the section is provided in a charge it, behooves the court to refer to the Schedule where endangered species are indicated. In my view then, the learned trial magistrate was obligated to pass the sentence under Section 92. I add a rider that probably Parliament can go back to the drawing board so that it can rename the title to Section 92. In lieu thereof, it may be stated as a proviso to any provision where applicable. But the mere fact that its title does not accord with the wording of the body does not lessen the fact that a sentence ought to have been passed under it.

8. Having made the above observation, it is now the onerous task of this court to correct the illegality meted by the trial court, first, of not passing sentence in both counts and secondly, of passing the wrong sentence.

Section 92 provides as follows:

1. “Any person who commits an offence in respect of an endangered or threatened species or in respect of any trophy of that endangered or threatened species shall be liable upon conviction to a fine of not less than twenty million shillings or imprisonment for life or to both such fine and imprisonment.”

9. The use of the word liable gives the court a window to exercise discretion in sentencing. That is to say that the court may opt to fine a reasonable amount as well as impose a reasonable jail term or still provide both fine and jail term depending on the circumstances of the case. In the instant case, the Applicants were considered first offenders. The value of the goods was Kshs. 600,000/-. The court must in addition take into account that they dealt in, and were in possession of, trophies of an endangered animal. A balancing act must be exercised so that justice is served in the preservation of our wildlife. The sentence must also serve as a deterrence. I find that in the circumstances, a jail term of five years in respect to each of the counts is reasonable, which I hereby pass. The sentences shall run concurrently from the date of the sentence.

10. I take into account that each of the Applicants was in custody for one year and 26 days prior to the conviction. The sentence having been passed on 13th September, 2017 means that they have in addition been in custody for eight months and 15 days. Cumulatively, they have been in custody for 1 year, 9 months and 11 days which period I order be reduced from the sentence. It is so ordered.

DATED and DELIVERED this 30th day of May, 2018.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. 1st Applicant present in person.
2. 2nd Applicant present in person.
3. Miss Sigei for the Respondent.