



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL REVISION NO. 351 OF 2018**

**FROM ORIGINAL CONVICTION & SENTENCE IN**

**CRIMINAL CASE NO. 562 OF 2014**

**OF THE SENIOR PRINCIPAL MAGISTRATE'S COURT**

**AT MARIAKANI**

**JACKSON KONDE CHALO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING ON REVISION**

1. In this revision, the Applicants prayer is that the sentence meted against him be set aside varied or any other order deemed fit by the court be granted, on the basis that the term of imprisonment of five years without the option of a fine was very harsh.

2. That being his only prayer, I will not in this review seek to delve into the propriety, irregularity or legality of the proceedings judgment and conviction but only consider whether the sentence meted was reasonable or too harsh.

3. The applicant was charged with two counts of being in possession of and dealing in game trophies contrary to section 95 and 84(1) as read with sections 92 and section 105 of the wildlife conservation Act, 2013. As concerns sentence meted against the Applicant, the relevant law to be considered are Section 95 for Court I and Section 92 for count II. Those provisions are worded as follows:-

**“92.Offences relating to endangered and threatened species 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.”**

**95. Offences relating to trophies and trophy dealing 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.”**

4. Section 92 provided maximum and not minimum sentences as the only ones allowed. In such circumstances the courts discretion in sentencing is not ousted. Therefore for count II the trial court had the option to give an imprisonment sentence of up to life of the accused with or without a fine of not less than twenty million [Kshs.20,000,000/=] .

5. To the contrary section 95 prescribed a minimum sentence and hence the court had no discretion to impose a lesser sentence for count I. that count attracted a fine of not less than one million or imprisonment for a period of not less than five years or to both such fine and imprisonment.

6. After conviction the prosecution disclosed that the two accused person would be treated as first offenders and the accused person said in mitigation asked for forgiveness on the basis that he had a family which relied on him.

7. The law and policy in sentencing in that where the law provide for a fine or imprisonment or both then unless the court for good reasons

decides to give both, the accused person has a right to be given an option of a fine. In *Annis Muhidin Nur vs Republic, High Court Criminal Appeal No. 98 of 2001, Mwera, J*, as he then was, stated the relevant policy in sentencing, most appropriately:

**“... unless circumstances obtain which irresistibly [impede] a trial Court from imposing a fine first where the law provides for a fine in default of a prison term, the option of a fine must be visited first. This is a sound and tested principle in the art of sentencing ...”**

8. Accordingly, when the trial court opted to mete out an imprisonment sentence without the option of a fine, there was an error and thus an improper sentence which can only be viewed as too harsh. Harsh only to the extent that it denied the appellant his option of a fine.

9. To that extent, I revise the sentence on Count I and sentence the Applicant to a fine of Kenya Shilling one million and in default to serve a term of imprisonment of five(5) .

10. On Count II, as well, the first line of sentence should have been the fine the law circumscribe at a sum not less than twenty million [Kshs.20,000,000.00] or imprisonment of a life term or to both such fine and imprisonment.

11. Here again the trial court did not grant to the Applicant the law provided benefit and option of paying a fine in place of imprisonment. To that extent the sentence was unfair and improper and avails itself to be revised.

12. As much as the law provides a prison sentence equal to life, I interpret the words “liable to imprisonment for life” to set a maximum sentence and the court even on revision is entitled to exercise a discretion to give any sentence shorter than life sentence. That is the meaning I get from Section 26 of the Interpretation and General Provisions Act and Section 26 of the Penal Code. The Sections provide:-

#### **S.66(1) Interpretation And General provisions Act.**

**Where in a written law a penalty is prescribed for an offence under that written law that provision shall, unless a contrary intention appears, mean that the offence shall be punishable by a penalty not exceeding the penalty prescribed.**

**(2) Where in any written law more than one penalty is prescribed for an offence, the use of the word “and” shall, unless a contrary intention appears, mean that the penalties may be inflicted alternatively or cumulatively.**

#### **Section 26 (2) of the Penal Code**

**“Save as may be expressly provided by the law under which the offence concerned is punishable, a person liable to imprisonment for life or any other shorter period may be sentenced to any shorter term.”**

12. Those provisions were interrupted by the Court of Appeal in

*Daniel Kyalo Mwema vs Republic [ 2009] eKLR* as follows:-

**“The last observation we want to make is that the phrase as used in Penal statutes was judicially construed by the predecessor of this Court in *Opoya vs. Uganda* [1967] EA 752 where the Court said at page 754 paragraph B:**

**“It seems to us beyond argument the words “shall be liable to” do not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed the court might not see fit to impose it”.**

**We respectfully adopt that construction which conforms with the opinion of Mr. Kaigai and which is supported by our preceding observations. We have no doubt that the sentences of 10 years imprisonment and 20 years imprisonment prescribed in Section 3 (2) (a) of the Act for the possession of *cannabis sativa* are the maxima and that the court can lawfully impose any shorter term of imprisonment.”**

13. All in all, I do revise the sentence by meted against the Applicant by giving to the Applicant the right in the option of a fine provided by law. I now met out sentence as follows:-

#### **Count I**

**Each accused is fined a sum of Kenya Shillings One Million [Kshs.1,000,000.00] and in default to serve five(5) years imprisonment.**

#### **Count II:**

**Each accused is fined the sum of Kshs Twenty Million [Kshs.20,000,000.00] and in default to serve a prison sentence of five(5) years.**

14. The prison sentences shall run concurrently with effect from the date of the Judgment by the trial court.

Dated and delivered at **Mombasa** this **30<sup>th</sup>** day of **August 2018**.

**P.J.O. OTIENO**

**JUDGE**