



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 81 OF 2017**

**CHAI FAIDA KULOHA..... APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

(An appeal from the Judgment of Hon. Maundu, Chief Magistrate delivered on 7th December, 2016 in Kwale Chief Magistrate's Criminal case No. 1068 of 2016)

**JUDGMENT**

1. The appellant Chai Faida Kuloha was charged with the offence of being in possession of wildlife trophy contrary to Section 95 as read with Section 92 of the Wildlife Conservation and Management Act, No. 47 of 2013. The particulars of the charge were that on 6th December, 2016 at around 1500 hours at Mbuluni village within Kinango area in Kwale County was found in possession of wildlife trophy namely elephant tusks (4) pieces weighing 14 kgs without a permit on (sic) street value of Kshs. 400,000/=.

2. The appellant pleaded guilty to the charge. The facts were read out to him and he admitted that they were correct. He was convicted on his own plea of guilty. He was sentenced to pay a fine of Kshs. 20 Million or in default to serve 10 years imprisonment.

3. The appellant being aggrieved by the said decision filed a petition of appeal on 31<sup>st</sup> May, 2017 raising various grounds of appeal. On the 9th October, 2018, the appellant sought leave to amend his grounds of appeal and the application was allowed. The appellant filed mitigating grounds of appeal. He mitigated by stating that he has undergone rehabilitation and he will not repeat the same mistake. He further stated that he was the sole bread winner of his family as at the time he was arrested. He also stated that he was not given an opportunity to mitigate in the lower court before the sentence was passed against him. He submitted that not being given an opportunity to mitigate contravened the provisions of Sections 216 and 329 of the Criminal Procedure Code. He cited the case of **Sebastian Okweno Mrefu vs Republic**, Petition No. 151 of 2012, Kakamega High Court. The appellant indicated that he had served 2 years in custody and he urged this court to consider the sentence served so far.

4. Ms Marindah, Learned Counsel for the ODPP submitted by stating that the appellant had not challenged the conviction against him and that he was given an opportunity to mitigate. She indicated that the penalty for being found in possession of a game trophy under Section 95 of the Wildlife Conservation and Management Act is payment of a minimum fine of one Million shillings or to imprisonment to a term of not less than 5 years or to both fine and imprisonment. Counsel further submitted that the mitigation put forth by the appellant herein should have been made before the trial court. She prayed for the sentence not to be interfered with. She further stated that the sentence was commensurate with the offence.

**The issue for determination is if the sentence meted out against the appellant was excessive.**

5. Section 95 of the Wildlife Conservation and Management Act states 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 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 to imprisonment for a term of not less than five years or to both such imprisonment and fine.”*** (emphasis added).

6. Although the appellant submitted that he did not know that he had contravened the law, in Kenya such a defence does not hold water, as ignorance of the law is no defence. Section 7 of the Penal Code provides as follows:-

***“Ignorance of the law does not afford any excuse for any act or omission which would otherwise constitute an offence unless***

***knowledge of the law by the offender is expressly declared to be an element of the offence.”***

7. The lower court record shows that the appellant was given an opportunity to mitigate and he did so by stating that he was a family man who has 9 children. The said mitigation was noted. The Prosecuting Counsel informed the lower court that the appellant was a first offender.

8. I have considered the mitigation by the appellant. The tusks that were recovered weighed 14 kilogrammes. The appellant was found in possession of 2 African elephant tusks and 2 small tusks. Their value was Kshs. 400,000/=. The Hon. Magistrate imposed a fine of Kshs. 20,000,000/= against the appellant and in default thereof, he was to serve a sentence of 10 years imprisonment. This court notes the importance of protection of wildlife from poachers. The sentence meted out must however be commensurate with the offence committed. In this instance the sentence is not only meant to punish but also to rehabilitate the appellant so that he does not resort to the same crime another time, after serving sentence.

9. Having considered the circumstances surrounding this case, I am of the view that the sentence that was imposed upon the appellant was on the higher side. I hereby set aside the said sentence and substitute thereof a fine of Kshs.3,000,000/=. In default of payment of the fine, the appellant will serve 6 years imprisonment.

It is so ordered.

**DELIVERED, DATED and SIGNED at MOMBASA on this 28th day of November, 2018.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Appellant present in person

Ms Ogweni for the respondent

Mr. Oliver Musundi - Court Assistant