



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NUMBER 88 OF 2014

NGO HONG QUAN..... APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate's court at Makadara Cr. Case No. 1634 of 2014 delivered by Hon. T. Okello, SPM on 31st March, 2014).

JUDGMENT

The Appellant herein was charged with being in possession of game trophy contrary to **Section 95 of the Wildlife Conservation and Management Act 2013**. The particulars of the offence were that on the 13th March, 2014 at departure gate number 12 screening point in Jomo Kenyatta International Airport within Nairobi county, was found in possession of worked ivory namely two ivory pendants, one warthog ivory and two leopard claws weighing 0.03 kgs valued at Kshs. 6,520/= without permit.

The Appellant was convicted on his own plea of guilty. He was sentenced to pay a fine of Kshs. 2 million in default serve six years imprisonment. The exhibits were ordered forfeited to the State through Kenya Wildlife Services. It was also ordered that his passport be released to him. He was dissatisfied with both the conviction and sentence and on 17th July, 2014, filed a Petition of Appeal. He emulated the following grounds of appeal:

- 1. That the trial magistrate erred in law and fact by not appreciating the evidence of the Appellant.**
- 2. That the evidence of the prosecution was contradictory and did not support the charge against the Appellant.**
- 3. That the charges against the Appellant were defective in total and plea of guilty entered was unequivocal.(probably meant to read equivocal)**
- 4. That no known offence has been disclosed as having been committed by the Appellant by the evidence disclosed by the prosecution witness.**
- 5. That no loss or damages have been occasioned by the acts of the Appellant**

The appeal was canvassed before me on 24th April, 2017. The Appellant appeared in person during which

time he informed the court that he would pursue the appeal only against the sentence. He also informed the court that he would address it in Kiswahili language and that he did not need a Vietnamese interpreter. He urged the court to reduce the sentence or altogether set him free. He informed the court that he bought the trophies as ornaments in Angola as gifts for his family. At the time of his arrest, he was on transit from Angola to Vietnam. He did not know that it was illegal in Kenya to be in possession of ivory or leopard claws which were only intended as ornaments. He urged the court to consider that he had been in jail for the last three years and was willing to be repatriated to his home country, Vietnam.

Learned State Counsel Miss Atina partly conceded to the appeal. She submitted that the Appellant having pleaded guilty and not wasted the court's time ought to have been granted the minimum sentence provided by the law which was a fine of Kshs. 1 million or an imprisonment of five years. She had no objection to the court substituting the current sentence with the minimum provided.

I have accordingly considered the appeal as well as the respective submissions. I am alive to the fact that sentencing is always in the discretion of the trial court. However, in exercising the discretion, the court must give regard to the circumstances of the case, the seriousness of the offence, the disposition of the accused, the blame worthiness of the accused and the past record of previous convictions of the accused, amongst other considerations. Further, under **Section 354 (3)(b) of the Criminal Procedure Code**, this court in exercising its appellate jurisdiction in an appeal against sentence, may **increase or reduce the sentence or alter the nature of the sentence**.

Where a minimum sentence is provided, the trial court has no option but to impose the minimum but depending on the circumstances of the case may enhance the sentence. The Appellant herein was a first offender and pleaded guilty instantly. He therefore did not waste the court's time. In my view then, in exercising the discretionary powers in sentencing, and having regard to the circumstances of the case, the court ought to have imposed the minimum sentence. Nevertheless, this case presents a unique situation whereby the Appellant is a foreigner and is willing to be repatriated to his home country. Having regard that the sentence was passed on 31st March, 2014, it is clear he has been in prison for a period of three years which has served as a sufficient deterrence. I also take into consideration that the value of the trophies he was in possession of was not high.

Accordingly, I partially allow this appeal. I order that the Appellant has served sufficient sentence and is hereby forthwith set free. He shall be repatriated to his home country, Vietnam. He shall be released to Industrial Area Police Station, Immigration Department for purposes of processing him for repatriation. It is so ordered.

DATED AND DELIVERED THIS 27TH DAY OF APRIL, 2017.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

- 1. Appellant in person.*
- 2. Miss Sigei for the Respondent.*