REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 39 OF 2014

TANG TONGJIAN……..……..……. APPELLANT

VERSUS

REPUBLIC ……..……..…….RESPONDENT

(Being an appeal from the original conviction and sentence in the CM Makadara Cr. Case No. 401 of 2014 delivered by Hon. William Koech, RM on 28th January, 2014).

JUDGMENT

The Appellant herein was charged with three counts under Section 95 as read with Section 92 the wildlife Conservation and Management Act, 2013. In Count I, he was charged with being in possession of wildlife trophy in which it was alleged that on 18th day of January, 2014 at Bay no 9 screening point at Jomo Kenyatta International Airport within Nairobi Country, was found in possession of wildlife trophy namely one elephant tusk weighing 3.45 kgs valued at Kshs. 64,400/= without permit. In count II, he was charged with keeping a wildlife trophy being that on the same date at the sam place, he was found to have kept a wildlife trophy namely; one elephant tusk weighing 3.45 kg valued at Kshs. 64,400/= without a permit. In count III, he was charged with dealing in wildlife trophy in that on the same day and at the same place was found dealing in a wildlife trophy namely one tusk weighing 3.45 Kgs valued at Kshs. 64,400/= without a permit.

The appellant was convicted on his own plea of guilty. In its wisdom and correctly so, during the sentencing, the learned trial magistrate convicted the appellant only in Count I. He found and held that Counts II and III were subsumed in the first count. To that extent I agree with the trial magistrate because firstly, the facts of the case were that the Appellant was arrested at Jomo Kenyatta International Airport on 18th January, 2014 while on transit to China. It is in his luggage that the ivory tusk was recovered. Therefore, the *actus reus* exhibited from the facts of the case was one of possession. Secondly, there is no difference between 'possession' and 'keeping'. The two words can only be used inter changeably depending on the circumstances of the case. Thirdly, no evidence disclosed that the appellant was trading in the tusk.

Back to sentencing, the learned trial magistrate imposed a fine of Kshs. 20,000,000/ in default the appellant was to serve seven years imprisonment. He also ordered that the exhibit be forfeited to the state through Kenya Wildlife Service. The appellant filed Grounds of Appeal on 10th April, 2014 through which he challenged both the conviction and sentence. He challenged the court for not recognizing that he was arrested while on transit on international air space and that he was not accorded legal representation and a Chinese interpreter during plea taking which violated his right to a fair trial.

At the hearing of the appeal before me on 24th April, 2017, the appellant informed the court that he would only proceed with the appeal against the sentence. The court availed a Chinese interpreter so that he could understand the proceedings of the court. He submitted that he was remorseful, that he had young children aged 12 and 10 respectively, that he took care of his elderly parents who were aged 85 years, that he was arrested while on transit from Mozambique to China and since possessing ivory in Mozambique was not illegal, he did not expect to be arrested in Kenya and that he had learnt his lesson for the three years and three months he had been in prison. He urged the court to set him free.

Learned State Counsel Miss Atina partially conceded to the appeal. She submitted that the appellant having pleaded guilty and not wasted the court's time and being a first offender ought to have been granted the minimum sentence provided by the law.

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 blameworthiness 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 is conferred with powers where an appeal is against a sentence **to increase or reduce the sentence or alter the nature of the sentence.**

In the present case, the Appellant was charged under Section 95 of the Wildlife Conservation and Management Act 2013. The same provides that:

> ***"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 his 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."***

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 its 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. I am minded just as the learned trial magistrate noted, trading in elephant tusks has become a menace not only in our country but world over. The trade has also been of grave concern between African countries and China calling on our local jurisdiction to be stringent on the offenders. I would think that that is why the learned trial magistrate imposed such a hefty fine. But he failed to bear in mind that the appellant was a first offender and the quantity of the tusk was not as huge as to attract the hefty penalty imposed. I concur therefore with the learned State Counsel that the circumstances of this case only called for imposition of the minimum sentence provided which is a fine of Kshs. 1 million in default an imprisonment term of five years. Further, I take the considered view that owing to the quantity of the tusk and the fact that the appellant is willing to be repatriated to his home country, it serves no purpose to further incarcerate him any further at the tax payers' expense. This is further buttressed by the fact that he has already served three years and three months of his custodial sentence which I believe is sufficient sentence as a deterrent measure.

In the result, the appeal succeeds. I order that the appellant has served sufficient sentence and that he should forthwith be set free. He shall be released to Industrial Area Police Station, Immigration Department for purposes of his repatriation to his home country, China. It is so ordered

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

G.W. NGENYE-MACHARIA

JUDGE

<u>In the presence of;</u>

1. Appellant in person.

2. Miss Sigei for the Respondent.