



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI
CRIMINAL APPEAL NO 45 OF 2016

RAMADHAN HUSSEIN..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From original conviction and sentence in Criminal Case Number 247 of 2015 in the Senior Resident Magistrate’s Court at Taveta delivered by Hon W.K. Kitur (RM) on 2nd September 2015)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Ramadhan Hussein, was charged with three (3) Counts. Count I was in respect of entering a national park contrary to Section 102(1)(a) of Wildlife Conservation and Management Act, 2013. Count II was in respect of undertaking extracting activity in a marine protected area contrary to the aforesaid Section. Count III related to being unlawfully present in Kenya contrary to Section 53(2) of the Kenya Citizenship and Immigration Act.
2. He was tried and convicted on all Counts by Hon W.K. Kitur(RM). He sentenced him to pay a fine of Kshs 300,000/= or in the alternative to serve three (3) years’ imprisonment in respect of Count I, a fine of Kshs 200,000/= or in default to serve two (2) years imprisonment in respect of Count II and a fine of Kshs 50,000/= or in default to serve three (3) months imprisonment in respect of Count III. All the sentences were to run concurrently.
3. Particulars of the three (3) Counts were as shown hereinbelow.

COUNT I

“On the 28th day of June 2015 at about 0820 hrs at Lake Jibe in Tsavo West National Park within Taita Taveta County, entering the said National Park without authority from the management.”

COUNT II

“On the 28th day of June 2015 at about 0820 hrs at Lake Jibe in Tsavo West National Park within Taita Taveta County, was found fishing in the said Lake Jibe which was within Tsavo West National Park without authority.”

COUNT II

“On the 28th day of June 2015 at around 1315 hrs at Taveta Police Station within Taita Taveta County, you being a Tanzanian National, was found being unlawfully in Kenya without a valid pass or passport.”

4. Being dissatisfied with the said judgment, on 17th November 2016, the Appellant filed a Notice of Motion application seeking leave to file his appeal out of time. The said application was allowed and the Petition of Appeal deemed to have been duly filed and served. His Grounds of Appeal filed on 2nd September 2016 were as follows:-

1. THAT he was the sole breadwinner of his family and currently had three (3) children who depended on him.

2. THAT he was the only boy child in his extended family and his elderly parents and siblings depended on him.

3. THAT in view of the circumstances of the case, the custodial sentence of (sic) 3 years was harsh, severe and excessive.

4. THAT he begged that this court reduce the conviction, slash conviction (sic) or whichever the court would deem fit.

5. THAT he was not awarded remission to the three (3) years he was serving.

5. On 30th November 2016, this court directed the Appellant to file and serve his Written Submissions. His Written Submissions which were in both English and Kiswahili were filed on 6th January 2017. The State's Written Submissions were dated and filed on 7th February 2017.

6. When the matter came up in court on 22nd February 2017, both the Appellant and the counsel for the State asked this court to deliver its Judgment based on their respective Written Submissions, which they did not highlight but relied on the same in their entirety. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

7. As can be seen from the Appellant's Mitigation Grounds of Appeal, he was not challenging the fact that the Prosecution had proved its case to the required standard. His substantive submission was that the sentence that was meted upon him by the Learned Trial Magistrate was harsh, severe and excessive.

8. The State conceded that the Learned Trial Magistrate erred when he convicted the Appellant on Count II as the same specifically prohibited a person from entering the national park without authority. It had nothing to do with undertaking extraction activity. This court agreed with the State on this submission that the said sentence was illegal and ought to be set aside.

9. As can be seen hereinabove, the Appellant was fined Kshs 50,000/= or in default to serve three (3) months' imprisonment in respect of Count III. As all the sentences were to run concurrently and he has already served the same, this court is unable to interfere with the same.

10. Turning to Count I, it was correct as the State submitted that the penalty under Section 102(1)(a) of the Wildlife Conservation and Management Act was a fine of not less than Kenya Shillings Two Hundred Thousand (Kshs 200,000/=) or in default to serve two (2) years imprisonment or to both a fine and imprisonment.

11. The said Section provides as follows:-

“Any person who-

1.(a) enters or resides in a national park or reserve otherwise than under licence, permit or in the course of his duty as authorized officer or a person lawfully employed in the park or reserve as the case may be...commits an offence and is liable on conviction to a fine of not less than two hundred thousand shillings or to imprisonment of not less than two years or to both such fine and imprisonment.

12. The Learned Trial Magistrate was therefore within the law when he fined the Appellant Kenya Shillings Three Hundred Thousand (Kshs 300,000/=) or in default to serve three (3) years imprisonment. However, he also had discretion to consider the prevailing circumstances at the material time with a view to determining if he could mete out the minimum sentence.

13. The Appellant was a first offender. He was found with a knife, rungu, fishing net, yellow bucket, oar and fish. There was nothing on record to demonstrate that he should not to have benefitted from the minimum sentence in line with the Sentencing Policy of the Judiciary.

14. Meting the harsh sentence upon the Appellant on the ground that the offence of fishing at Lake Jipe, which was erroneously indicated in the Charge Sheet as Lake Jibe, was rampant would be a travesty of justice on the part of his part as he would be bearing the consequences of other fishermen who he had no dealing or relationships with.

15. Accordingly having considered the Appellant's Petition of Appeal, his Written Submissions and those of the State, this court found itself in agreement with the Appellant the sentence in respect of Count I was excessive in the circumstances of the case herein and ought to be reduced.

16. In the circumstances foregoing, Grounds of Appeal Nos (3) and (4) were merited and are hereby allowed.

DISPOSITION

17. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 17th November 2016 was partly successful.

18. The same is hereby allowed in respect of Count II that was clearly illegal and had no legal basis. In that respect, this court hereby quashes the conviction and sets aside the sentence that was meted upon the Appellant by the Trial Court in respect of Count II.

19. In respect of Count I, this court hereby sets aside the fine of Kenya Shillings Three Hundred Thousand (Kshs 300,000/=) or in default the three (3) years imprisonment and replace the same with a fine of Kenya Shillings Two Hundred Thousand (Kshs 200,000/=) or in default the Appellant to serve two (2) years imprisonment.

20. This court hereby directs that the period the Appellant remained in custody to wit from 29th June 2015 when he took plea and until 2nd September 2015 when he was convicted by the Learned Trial Magistrate be taken into account while computing his sentence and that he be deported to his country, Republic of Tanzania, forthwith upon his release.

21. It is so ordered.

DATED and DELIVERED at VOI this 20th day of April 2017

J. KAMAU

JUDGE

In the presence of:-

Ramadhan Hussein - Appellant

Miss Anyumba - for State

Josephat Mavu- Court Clerk