



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIVASHA**  
**CRIMINAL REVISION NO. 15 OF 2017**

*(From Original Conviction and Sentence in Criminal Case No. 1733 of 2014 of the Chief Magistrate's Court at Naivasha)*

**REPUBLIC.....APPLICANT**

**-VERSUS-**

**JAMES VICTOR MWANGI KAGUNDA.....RESPONDENT**

**REVISION OF SENTENCE**

1. The Director of Public Prosecutions by his letter **Ref ODPP/NVS/ADV/(125)** dated 24<sup>th</sup> May, 2017 has reported the above stated lower court matter to this court, seeking revision of the sentence. I have called for and perused the subject file, namely, Naivasha Chief Magistrate's **Criminal Case Number 1733 of 2014, Republic –Versus- Ali Adan Ali & 2 Others**, as empowered to do under Section 362 of the Criminal Procedure Code.

2. In the subject case, three accused persons were jointly charged with two offences under the Wildlife Conservation and Management Act of 2014. At the end of the trial the 3<sup>rd</sup> Accused therein, namely, **James Victor Mwangi Kagunda** was convicted on the second count, which was Being in possession of a Government Trophy contrary to Section 95 of the Wildlife Conservation and Management Act.

3. The particulars stated that on 17<sup>th</sup> September, 2014 at Magumu area along Nairobi – Naivasha Highway he was found in possession of eight (8) pieces of elephant tusks without authority from the Kenya Wildlife Service. Upon conviction, he was said to be a first offender and after receiving his mitigation, the trial court stated in its final order on sentence that:

**“I have carefully considered the plea by 3<sup>rd</sup> convict in mitigation and also that he is a first offender. I have also considered the manner in which the offence was committed. I have appraised myself with the law applicable herein and penalty prescribed for an offence of this nature.**

**I order that he pays a fine of Ksh.1,500,000/= (One Million Five Hundred Thousand) in default to serve 12 months (twelve) imprisonment.”**

4. The said sentence is the subject of the revision request by the DPP. The DPP takes issue with the default sentence and terms it illegal, in view of the provisions of Section 95 of the Wildlife Conservation and Management Act. The Section provides as follows:

**“Any person who keeps or is found in possession of a wildlife trophy or deals in wildlife**

**trophy, or manufactures any item from a 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 not less than one million shillings or imprisonment for a term of not less than five years or to both such imprisonment and fine.”**

5. The Section clearly prescribes a mandatory minimum fine of Kshs 1 million and a minimum imprisonment term of five years. It also envisages the imposition of both fine and imprisonment against offenders.

6. In the instant case, the trial magistrate imposed a fine of Shs 1,500,000/= and in default, a sentence of 12 months imprisonment. The DPP considers the default prison term illegal. Having considered the provisions of Section 95 of the Wildlife Conservation and Management Act, I do concur with that sentiment. It was not open to the trial magistrate to impose a term of imprisonment below the minimum term set in the Act, whether the prison sentence was in default of fine or not. The Section does not envisage a default sentence below the minimum of five years imprisonment.

7. In so acting, the trial magistrate may have relied on the provisions of Section 28 of the Penal Code, and particularly Subsection 2 thereof which states: -

**“In the absence of express provisions in any written law relating thereto, the term of imprisonment or detention under the Detention Camps Act ordered by a court in respect of the non-payment of any sum adjudged to be paid for costs under section 32 or compensation under section 31 or in respect of the non-payment of a fine or of any sum adjudged to be paid under the provisions of any written law shall be such term as in the opinion of the court will satisfy the justice of the case, but shall not exceed in any such case the maximum fixed by the following scale-**

*Amount Maximum period*

**Not exceeding Sh. 500 ... .. 14 days**

**Exceeding Sh. 500 but not**

**exceeding Sh. 2,500 ... .. 1 month**

**Exceeding Sh. 2,500 but not**

**exceeding Sh. 15,000 ... ..3 months**

**Exceeding Sh. 15,000 but not**

**exceeding Sh.50,000 ... ..6 months**

**Exceeding Sh. 50,000 12 months”**

8. It is clear however that the provisions of Section 28 (1) and (2) of the Penal Code apply where there is no **“express provision in written law relating”** to the fine and corresponding imprisonment term in default, prescribed under any written law. In other words, where a mandatory minimum sentence is provided for in the written law creating an offence, the above Section of the Penal Code is not applicable.

9. Section 95 of the Wildlife Conservation and Management Act provides expressly for a minimum sentence by way of fine of Shs 1 million, (default) imprisonment term of 5 years, or a mixture of both. The trial magistrate therefore erred by ordering that in default of the fine imposed, the Accused **James Victor Mwangi Kagunda** would serve 12 months imprisonment.

10. The default sentence meted out is illegal therefore. Invoking the powers of revision vested in this

court under Section 364 of the Criminal Procedure Code, I do hereby set aside the default sentence of twelve (12) months imprisonment and substitute therefor a sentence of 5 (five) years imprisonment. The proper sentence therefore is that 3<sup>rd</sup> Accused **James Victor Mwangi Kagunda** is ordered to pay a fine of Shs 1,500,000/= or in default serve 5 (five) years imprisonment. The Deputy Registrar is directed to issue an Amended Committal Warrant in this connection.

**Written and signed at Naivasha this 20<sup>th</sup> day of June, 2017.**

**C. W. MEOLI**

**JUDGE**