



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL APPEAL NO. 69 OF 2015

HENRY THURANIRAAPPELLANT

Versus

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in Nanyuki Chief Magistrate's Court Criminal Case No. 333 of 2014 By Hon. E.BETT Senior Resident Magistrate on 11th September 2015).

JUDGMENT

1. **HENRY THURANIRA MBOROKI**, the appellant herein, was convicted on **two counts** before the Nanyuki Chief Magistrate's Court. on the first count the appellant was charged with the offence of carrying out logging in a National Park of indigenous species, (**red cedar**) **Contrary to Section 102 (1) (c) of the Wildlife Conservation and Management Act Cap 376**. On the second count appellant was charged with the offence of entering into a National Park without authority Contrary to Section 102 (1) (a) of Cap 376. On conviction on both those counts the trial court sentenced the appellant to a fine of Ksh. 200,000 and in default to serve 2 years imprisonment in respect to the first count and similar sentence in respect to the second count.

2. The appellant being aggrieved of those sentences filed this present appeal. In support of his appeal against sentence the appellant present mitigation. He submitted that he was a first offender, he has school going children, he has reformed while in prison and that he attained grade III test in carpentry and joinery and can therefore be self-reliant.

3. Learned Counsel Mr. Tanui the Principal Prosecution's Counsel opposed the appeal on the basis that the sentence the trial court passed against the appellant was the sentence set out in **Cap 376**. Learned Counsel however noted that the trial court failed to state whether the sentences for both counts were to run concurrently or consecutively.

4. Section 102 of Cap 376 provides that when one is convicted, as was the appellant, on subsection (1)(a) and (1) (c) such one is liable to a fine of not less than Ksh. 200,000 or imprisonment of not less than 2 year or to both such fine and imprisonment.

5. I have considered the provisions of Section 102 (1) (a) and (c). The sentence for those Section 102 (1) (a) (c) is to be found in Section 102 (h) as reproduced above. The said Section 102 (h) provides that on conviction one is liable to sentenced as set out above. The use of the word '**liable**' does not connote mandatory sentence which a court should sentence one who is convicted. The trial court still maintains discretion. This is what stated in the case: **ARTHUR MUYA MURIUKI V REPUBLIC [2015] eKLR viz:**

“The phrase used in penal statutes (i.e. shall be liable to) was judicially construed by the East African Court of Appeal in Opoya vs Uganda (1967) E.A 752 where the court said at page 754 paragraph B:-

“It seems to us beyond argument the words “shall be liable to” do not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed the court might not see fit to impose it”.

6. Even though the sentence set out in that Section 102 (h) is not mandatory, as can be seen from the above decided case, I am of the view that there is no basis for interfering with the sentence of the trial court. That sentence is not excessive in the circumstances. What the appellant did, in logging cedar trees, is to contribute to the environmental degradation of this country. Such an act not only affects this generation but generations to come. It is because of that that I find the sentence of the appellant was well deserved.

7. Second issue to consider is whether this court should order that the sentences for the two counts should run either consecutively or currently. It has been stated that it is good practice where a trial court sentences one in a case where the convictions are of several offences of the same transaction to order the sentences to run concurrently. This is what was stated in the case: **PETER MBUGUA KABUI V REPUBLIC [2016] eKLR thus:**

In the case of Sawedi Mukasa s/o Abdulla Aligwaisa [1946] 13 EACA 97, the then Court of Appeal for Eastern Africa in a judgment read by Sir Joseph Sheridan stated that the practice is where a person commits more than one offence at the same time and in the same transaction, save in very exceptional circumstances, to impose concurrent sentences. That is still good practice.

As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment.

8. It is however important to note that **Section 14 of the Criminal Procedure Code** provides that unless the court directs that sentences should run concurrently they shall run consecutively. **Section 14 (1)** is in the following terms.

14. (1) Subjects to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefore which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently

9. The trial court did not state that the sentences on the two counts would run concurrently. It follows that they shall run consecutively.

10. **In the end the appellant’s appeal against sentence fails. The trial court’s sentence is confirm save that the sentence on both count shall run consecutively.**

Dated and Delivered at Nanyuki this 2nd August 2017

MARY KASANGO

JUDGE

Coram

Before Justice Mary Kasango

Court Assistant: Njue

Appellant: Henry Thurania Mboroki

For state:

Language

COURT

Judgment delivered in open court

MARY KASANGO

JUDGE