REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO.33 & 34 OF 2014

(Appeal from the judgment of Hon. MUNYENDO (RM) dated and Delivered

on 4TH APRIL 2014, in the original Kilgoris PM Criminal Case No.263 of 2014)

LUCAS AWILI ……..……..……1ST ACCUSED

KENNEDY ONDERA…….....……2ND ACCUSED

VERSUS

REPUBLIC …….....……PROSECUTION

JUDGMENT

1. The Appellants herein **LUCAS AWILI** and **KENNEDY ODERA** were charged with the offence of being in possession of snares contrary to **Section 102 (1) (f)** of the **Wildlife Conservation and Management Act, 2013.**

2. The particulars of the charge were that on 10th March, 2014 at Kilae area in Transmara District of Narok County, jointly were found in possession of three snares.

3. Plea was taken before the lower court on 11th March, 2014 when both the appellants pleaded **NOT GUILTY** to the charge and were granted **bond of Kshs. 200,000/=** with a surety of a similar amount.

4. On 3rd March, 2014, when the matter came up for mention, the appellants requested the court to read for them the charges afresh when both of them pleaded guilty in the said charge of being in possession of snares contrary to **Section 102 (1) (f) of the Wildlife Conservation and Management Act** and they were subsequently convicted on their own plea of guilty and sentenced to each serve 5 years imprisonment.

5. The appellants have now appealed against both the conviction and sentence. They have each filed identical petitions of appeal in which they have set down the following grounds of appeal.

> **1. THAT, the appellant's rights under article 50 (2) of the constitution of the Republic of Kenya were violated and therefore, the appellant was not accorded affair trial.**
>
> **2. THAT, the decision of the learned magistrate was made without jurisdiction and that the decision made was based on beliefs an anticipation not warranted by the evidence on records.**

3. THAT, before and at the trial, there was a material irregularity in the failure of the prosecutors to disclose to the defense all the relevant evidence which it was under a duty to disclose.

4. THAT, I pray to be furnished with the certified true copy of the lower court proceedings to assist me in submissions, supplementing or otherwise of the already tendered grounds.

6. At the hearing of the appeal, Miss Mochama for the state conceded to the appeal and submitted that plea taken by the appellants was not unequivocal since when the facts of the charge were read out to the appellants, they qualified their plea of guilty by stating that the snares they were in possession of were to be used to trap animals that were destroying their crops in their farms.

7. According to Miss Mochama, the appellants had, through their explanations on the purpose for which they had the snares, retracted their guilty plea as it was not clear if the appellants were caught with the snares within a wildlife protected area or not.

8. Miss Mochama added that under those circumstances, the plea was not unequivocal and the magistrate at that juncture ought to have entered a plea of not guilty.

9. Miss Mochama recommended that the case be referred back to lower court for a fresh trial on a plea of not guilty.

10. The appellants who were unrepresented, on their part, stated that the sentence was too harsh and pleaded for leniency.

11. This being a first appeal, the court is still under an obligation to peruse the entire proceedings and evidence before the lower court and to arrive at its own independent conclusion as to whether the conviction was sound and therefore the sentence lawful. ***See Pandya –vs- R [1957] E.A. 336***. In this appeal however, the appellants were convicted on their own guilty plea meaning that a full trial was not conducted. I will therefore scrutinize the record to see whether or not the plea was unequivocal.

12. From the proceedings of the lower court, after the facts were read out to the appellants, they responded as follows:-

"1st Accused: - The facts are true. We were putting the snares in the farm."

"2nd Accused: The facts are correct. We had the snare. We trap animals that destroy our crops."

13. From the above responses, it is clear to me that the appellants qualified/justified their plea of guilty in a manner that suggested that they had recanted their plea of guilty. The facts of the case did not disclose if the appellants had the snares at their farms or within the wildlife protected areas.

14. **Section 102 (1) (f) of the Wildlife Conservation and Management Act 2013** states as follows:

"102 (1) Any person who-

(f) conveys into a protected area or is found within a protected area in possession of any firearm, ammunition, arrow, spear, snare, trap or similar device without authorization; 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 2 years or to both such fine and imprisonment."

15. A reading of the above section reveals that for the offence of being in possession of snares to hold, it must be shown that the possession was in or within a protected area.

16. The record of the lower court creates doubt as to whether the appellants were found with the snares in

their farms or within the wildlife protected area. In the result I find that the plea of guilty was recanted and was therefore not unequivocal. I therefore quash the conviction and sentence.

17. The prosecutions counsel M/s Mochama, while conceding the appeal, suggested that the case should be referred back to the lower court for a retrial. The question that now arises is; having quashed the conviction, should I order a retrial? I do not think so. It is my considered view that a retrial will greatly prejudice and cause an injustice to the appellants.

18. In ***Fatehali Manji –vs- Republic [1964] E.A 481*** the Court of Appeal stated as follows:

> **"even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered, each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person."**

19. In the instant case, I find that the appellants have been in prison since 14th March, 2014 when they were convicted. Furthermore before their conviction, they were in remand custody since 11th March, 2014 when they first took their plea. As matters stand now, they have served a substantial part of their **5 years** sentence and if they were guilty of the offence charged, I believe that they have received sufficient correction and rehabilitation. It is therefore my considered view that it would be prejudicial for the appellants if they were to be tried afresh considering the time they have served in prison.

20. Consequently, I hereby order that the appellants be set free unless otherwise lawfully held.

Dated, signed, and delivered in open court at Kisii this 22nd day of March, 2016.

HON. W. OKWANY

JUDGE

In the presence of:

- Mr. Otieno for the State
- Omwoyo Court clerk