



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT VOI**  
**CRIMINAL APPEAL NO 23 OF 2015**

**SAID MSAGHA MWALUKUMBI.....APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**(From original conviction and sentence in Criminal Case Number 69 of 2014 in the Senior Principal Magistrate's Court at Voi delivered by Hon E.M. Kadima(RM) on 11<sup>th</sup> December 2014)**

**JUDGMENT**

**INTRODUCTION**

1. The Appellant, Said Msagha Mwalukumbi, was tried and convicted by Hon E.M. Kadima, Resident Magistrate Voi Law Courts for the offence of being in possession of wildlife trophy without a permit contrary to Section 95 of the Wildlife Conservation and Management Act, 2013 (Laws of Kenya) as read with Section 92 of the Wildlife Conservation and Management Act. He was fined a sum of Kshs 1,000,000/= or in default, to serve five (5) years' imprisonment.
2. The particulars of the charge were that :-

**COUNT I**

**On the 23<sup>rd</sup> day of January 2014 at around 1820hrs at Distar Hotel in Voi town within Taita Taveta County jointly (sic) were found in possession of wildlife trophies namely three (3) elephant tusks weighing 2.5 kgs with a street value of Kshs 25,000/= without a permit.**

**COUNT II**

**On the 23<sup>rd</sup> day of January 2014 at around 1820 hrs at Distar Hotel in Voi town within Taita Taveta County jointly (sic) were found dealing in wildlife trophies namely three (3) elephant tusks weighing 2.5 kgs with a street value of Kshs 25,000/= without a permit.**

3. Being dissatisfied with the said judgment, on 20<sup>th</sup> March 2015, the Appellant filed a Petition of Appeal in which he had listed the following Mitigation Grounds of Appeal:-
  1. **THAT he was too remorseful.**
  2. **THAT he begged leniency despite the offence.**
  3. **THAT he prayed that the honourable court do consider his state of health which was weak in**

**comparison to five years sentence. (sic)**

4. **THAT he had ulcers (sic) problem which put him in trouble one after the other. (sic)**

4. On 3<sup>rd</sup> March 2016, this court directed the Appellant to file and serve his Written Submissions. However, he did not do so but instead on 17<sup>th</sup> March 2016, he filed another set of Mitigation Grounds of Appeal which were as follows:-

1. **THAT he was a first offender and a layman on issues appertaining to the law hence he stood to benefit from the least severe penalty as provided for by the Constitution.**
2. **THAT he was the sole breadwinner of his young family and at the moment, his wife was jobless and his continued detention meant that his family would continue suffering.**
3. **THAT he promised not to repeat the offence again and that he was a reformed man, born again, a law abiding citizen who had acquired grades and skills in carpentry and joinery which would assist him earn a living so that he could help his family.**
4. **THAT he prayed that he be put on non-custodial sentence.**

5. The State's Written Submissions were dated and filed on 21<sup>st</sup> March 2016.

6. When the matter came up in court on 21<sup>st</sup> March 2016, both the Appellant and the State asked the court to rely on their respective Written Submissions in their entirety. This Judgment is therefore based on the said Written Submissions.

### **LEGAL ANALYSIS**

7. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

**“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour”.**

8. However, 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. No value then would be added in analysing the evidence that was adduced during trial.

9. The question that this court was being asked to consider and determine was whether or not the Appellant had advanced good reasons to persuade it to set aside the aforesaid penalty and instead substitute it with a non-custodial sentence.

10. This court had due regard to the provisions of Section 95 of the Wildlife Conservation and Management Act under which the Appellant was charged and convicted. The same stipulates as follows:-

**“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 permit issued under this Act or is exempted in accordance with any other provision of this Act, commits an offence and shall be liable to a fine of not less than(emphasis court) **one million shillings or imprisonment for a term not less than(emphasis court) **five years or to both such imprisonment and fine.”******

11. It is evident that the Trial Magistrate had the option of sentencing the Appellant to five (5) years imprisonment and also to fine him the sum of Kshs 1,000,000/=. He, however, adopted the more lenient option and fined him Kshs 1,000,000/= or in default, to serve five (5) years imprisonment.

12. The court agreed with the submissions by the State that the section under which the Appellant was charged and convicted is couched in mandatory terms. It does not give a trial court discretion in respect of the sentence it can mete out or the amount of fine it can give.

13. In the same breathe, an appellate court has no jurisdiction to interfere with the finding of a trial

court unless it can be shown that the sentence that was given by such a trial court was manifestly excessive or it was unlawful.

14.The Appellant did not demonstrate that the number of years of imprisonment or the fine that was imposed by the Trial Court were unlawful or manifestly excessive. It is unfortunate that he was remorseful or unwell as he contended.In view of the minimum sentence and fine given in Section 95 of the Wildlife Conservation and Management Act, this court’s hands are tied and cannot set aside the penalty that the Learned Trial Magistrate gave him and substitute it with a non-custodial sentence.

**DISPOSITION**

15.For the foregoing reasons, this court hereby declines to quash the sentence or fine that was meted upon the Appellant by the Trial Court and instead affirms the same imposed on him as they were both lawful. However, as the Trial Court did not make a finding on Count II as it ought to have done, this court hereby directs that the same be kept in abeyance.

16.The upshot of this court’s judgment, therefore, is that the Appellant’s Appeal lodged on 20<sup>th</sup> March 2015 was not merited and the same is hereby dismissed.

17.It is so ordered.

**DATED and DELIVERED at VOI this 28<sup>th</sup> day of April 2016**

**J. KAMAU**

**JUDGE**

In the presence of:-

Said Msagha Mwalukumbi.....Appellant

Gioche.....for State

Ruth Kituva– Court Clerk