REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 38 OF 2015

VENANT MWACHANYA……..…….... APPELLANT

VERSUS

REPUBLIC……....…… RESPONDENT

(From original conviction and sentence in Criminal Case Number 953of 2013 in the Senior Principal Magistrate's Court at Voi delivered by Hon S.M. Wahome (SPM) on 27th October 2014)

JUDGMENT

INTRODUCTION

1. The Appellant, Venant Mwachanya and his Co-accused Bryan Nyambu, were tried and convicted by Hon S.M. Wahome, Senior Principal Magistrate Voi Law Courts for the offence of being in possession of government trophy without a certificate of ownership contrary to Section 42(1) (b) of the Wildlife Conservation and Management Act Cap 376 (Laws of Kenya), failing to make a report of being in possession of government trophy contrary to Section 39(3)(a) of the Wildlife Conservation and Management Act Cap 376 (Laws of Kenya) and dealing in government trophy without a dealer's license contrary to Section 43(4)(a) of Wildlife Conservation and Management Act Cap 376 (Laws of Kenya). Each Accused person was fined a sum of Kshs 30,000/= in each count or in default, to serve two (2) years' imprisonment.
2. The particulars of the charge were that :-

COUNT I

"On 7thday of December 2013 at around 1330 hrs at Maweni Estate, Voi Township of Taita Taveta county, jointly with others not before the court were found in possession of Government trophies namely two (2) elephant tusks weighing 10 kilogram's (sic) **with a street value of Kshs 250,000/= and two (2) python skins with a street value of Kshs 20,000/= without a certificate of ownership."**

COUNT II

"On 7th day of December 2013 at around 1330 hrs at Maweni Estate, Voi Township of Taita Taveta county, jointly with others not before the court failed to make a report of being in possession of Government trophies namely two (2) elephant tusks weighing 10 kilogram's (sic) **with a street value of Kshs 250,000/= and two (2) python skins with a street value of Kshs 20,000/= to an authorised officer."**

COUNT III

"On 7th day of December 2013 at around 1330 hrs at Maweni Estate, Voi Township of Taita Taveta county, jointly with others not before the court were found dealing in Government trophies namely two (2) elephant tusks weighing 10 kilogram's (sic) **with a street value of Kshs 250,000/= and two (2) python skins with a street value of Kshs 20,000/= without a dealer's license."**

3. Being dissatisfied with the said judgment, on 16th July 2015, the Appellant filed Mitigation Grounds of Appeal. The grounds of appeal were:-

1. **THAT he was too remorseful and therefore sought leniency.**
2. **THAT he was a layman in law and therefore sought that the court consider his state of health as he suffered from gastro infection "ulcers" and a dilapidating "heart problem." (sic)**

4. On 3rd March 2016, the court directed the Appellant to file his Written Submissions. Instead, he filed Mitigation Grounds of Appeal on 17th March 2016. The grounds were as generally as follows:-

1. **THAT he was a first offender and a layman and had he known the consequences of committing such an offence, he would never have done so.**
2. **THAT he was the sole breadwinner of his aged mother, his father having died while he was in prison and that his continued incarceration would only cause her mother to suffer as his sisters were all married.**
3. **THAT he promised not to commit the offence again as he was now a reformed man who had acquired skills in masonry and construction which would assist him to be a law abiding citizen who will adhere to the law at all given times.**

5. The State's Written Submissions were dated and filed on 21st March 2016.
6. When the matter came up in court on 21st March 2016, both counsel for 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. As can be seen from the Appellant's Mitigation Grounds of Appeal, he did not challenge the fact that the Prosecution had proved its case to the required standard. No value then would be added in setting out the facts of the case as 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 sentence and instead direct that the sentence he was given run concurrently and he be put on a non-custodial sentence.
10. In its Written Submissions, the State sympathised with the Appellant's health condition which it said could be managed well in prison which was well equipped and that in any event, he could be taken to hospital if his condition persisted.
11. The State further submitted that the sentence the Appellant was given was commensurate with the offence he had been charged and convicted with and that he was lucky that he was charged under the old Wildlife Act and that if he had been charged under the new Wildlife Act, he would have

been sentenced to more than five (5) years imprisonment.

12.In Section 39 of the Wildlife (Conservation and Management) Act (hereinafter referred to as "the Repealed Act"), it was stated as follows:-

(2) Any person who by any means obtains possession of a Government trophy shall forthwith make a report thereof to an authorized officer and shall hand the trophy over to such officer.

(3)Any person who—

(a) fails to make a report required by subsection (2) of this section; or

(b) is unlawfully in possession of, or unlawfully deals in, any Government trophy, shall be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to imprisonment for a term not exceeding twelve months, or to both such fine and imprisonment.

13.Section 42 (1) of the Repealed Act provided as follows:-

(1) Save as otherwise provided by this Act, any person who is in possession of any trophy, or of any ivory or rhinoceros horn of any description, without also being in possession of a certificate of ownership in respect thereof shall be guilty of a forfeiture offence and—

(a) if that person is the holder of a dealer's licence under section 43, be liable to a fine not exceeding thirty thousand shillings or to imprisonment for a term not exceeding five years, or to both such fine and imprisonment; or

(b) in any other case, be liable to a fine not exceeding ten thousand shillings or to imprisonment for a term not exceeding three years, or to both such fine and imprisonment.

14.Section 43(4) of the Repealed Act stipulates as follows:-

Any person who—

(a) not being the holder of a dealer's licence, carries on the business of a dealer; or

(b) being the holder of a dealer's licence, fails to comply with any condition to which the licence is subject, shall be guilty of an offence and liable to a fine not exceeding twenty thousand shillings or to imprisonment for a term not exceeding five years, or to both such fine and imprisonment.

15.Notably, the Appellant was charged under the Repealed Act despite the coming into force the Wildlife Conservation and Management Act, 2013 where the penalty was higher as was correctly pointed out by the State. Section 95 of the said Act in which he would probably have been charged under 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 <u>not less than</u>(emphasis court) **one million shillings or imprisonment for a term <u>not less that</u>**(emphasis court) **five years or to both such imprisonment and fine."**

16.The Prosecution proceeded to charge the Appellant under the Repealed Act. He must therefore benefit from the Prosecution's error. Having being found guilty on all three (3) Counts on the Repealed Act, the Appellant was liable to a fine **<u>not exceeding ten thousand shillings</u>**(emphasis court) or to imprisonment for a term not exceeding three years, or to both such fine and imprisonment in respect of Count I.

17. On Count II, the Appellant was liable to a fine **not exceeding ten thousand shillings** (emphasis court) or to imprisonment for a term not exceeding twelve months, or to both such fine and imprisonment. On Count III, he was liable to a fine **not exceeding twenty thousand shillings**(emphasis court) or to imprisonment for a term not exceeding five years, or to both such fine and imprisonment.
18. An appellate court must restrain itself from interfering with the discretion of a trial court unless of course it can be shown that the sentence of such a court was illegal or unlawful. This was a position that has been re-stated in several cases- See **Kenneth Kimani Kamunyu Vs Republic [2006] eKLR where the Court of Appeal** reiterated this principle and stated that an appellate Court can only interfere with the sentence if it is illegal or unlawful.
19. It is clear from the above that maximum the Learned Trial Magistrate herein would have found the Appellant liable to pay was a fine of Kshs 10,000/= for Count I, Kshs 10,000/= for Count II and Kshs 20,000/= in respect of Count III. Evidently, the Learned Trial Magistrate erred in law in finding the Appellant liable to pay a fine of Kshs 30,000/= on each Count as the same was not provided for under the law.
20. Under the circumstances herein, the finesimposed on the Appellant were indeed excessive and had no legal basis. They were unlawful and illegal and cannot therefore be left undisturbed as was submitted by the State. This court therefore has legal basis to interfere with the same.
21. Going further, the Learned Trial Magistrate stated that in default of payment of the fines, the Appellant was to serve two (2) years imprisonment. This was in line with the provisions of Section 12 of the Criminal Procedure Code Cap 75(Laws of Kenya) that stipulate that:-

"Any court may pass a lawful sentence combining any of the sentences which it is authorized by law to pass."

22. However, the Learned Trial Magistrate did not indicate whether the imprisonment was to run concurrently or consecutively. Perhaps, it is due to this ambiguity that led the Appellant to seek that his sentence run concurrently and not consecutively. The State did not submit on this issue leaving the court to grapple with the question as to whether the Appellant had been poised to serve his sentence concurrently. It is on that basis that this court deemed it fit to address the said issue as the same had been raised by the Appellant in his Mitigation Grounds of Appeal.
23. Section 14 of the Criminal Procedure Code provides as follows:-

> **"(1) Subject to sub-section (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 therefor 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.**

2. **In the case of consecutive sentences, it shall not be necessary for the court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to impose on conviction of a single offence, to send the offender for trial before a higher court.**
3. **Except in cases to which section 7 (1) applies, nothing in this section shall authorize a subordinate court to pass, on any person at one trial, consecutive sentences:-**

a. **of imprisonment which amount in the aggregate to more that fourteen years or twice the amount of imprisonment which the court in the exercise of its ordinary jurisdiction, is competent to impose whichever is less; or**
b. **of fines which amount in the aggregate to more than twice the amount which the court is so competent to impose."**

24. Section 7 (1) of the Criminal Procedure Code stipulates that:-

a. **a subordinate court of the first class held by a chief magistrate, senior principal magistrate,**

principal magistrate or senior resident magistrate may pass any sentence authorized by law for any offence triable by that court.

b. **a resident magistrate may pass any sentence authorizedunder section 278, 308(1) or 322 of the Penal Code or under the Sexual Offences Act, 2006**

c. In the case **Peter Mbugua Kabui Vs Republic[2016] eKLR** (Supra), the Court of Appeal addressed its mind to the question of concurrent and consecutive sentences when it stated as follows:-

"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."

25. In the said case, the Court of Appeal found that the appellant therein had committed different offences on different dates and as a result, Achode J who heard the appeal was correct in upholding the Trial Court's holding that the sentence the Appellant was to serve was to run consecutively.

26. On his part, in the case of **George Mwangi Chege & 2 others v Republic [2004] eKLR** , Khamoni J (as he then was) rendered himself as follows:-

"….where more than one sentence of imprisonment are imposed without specifying whether the sentences will run consecutively or concurrently, Section 333(2) of the Criminal Procedure Code will apply so that every one of those sentences is-

"deemed to commence from, and to include the whole

of the day of, the date on which it was pronounced"

with the result that:-

(**a) If the sentences are in one trial and are pronounced on the same date, they definitely run concurrently.**

(b) If the sentences are in different trials and are pronounced on the same date, they also run concurrently.

(c) If the sentences are in one trial but are pronounced on different dates, the sentences will run concurrently only to the extent of the balance of the formerly pronounced sentence is yet to be served so that if at that time the latter pronounced sentence is longer than the remainder of the formerly pronounced sentence, then the latter pronounced sentence, following the end of the formerly pronounced sentence, will be served consecutive to the formerly pronounced sentence.

I**n other words, the prison sentences will run concurrently only**

to the extent of the duration of service of the two sentences coinciding.

(**d) If the sentences are in different trials and are pronounced on different dates, the prison sentences will run concurrently only to the extent of the duration of service of the two sentences coinciding. Otherwise the sentences will run consecutively."**

27. This principle was also expounded in the cases of **Ng'ang'a vs Republic (1981) KLR 530** and **Ondiek vs Republic (1981) KLR 430** where the common thread was that concurrent sentences should be awarded for offences committed in one criminal transaction unless exceptional circumstances prevail.
28. In the instant case, the sentence the Learned Trial Magistrate imposed upon the Appellant was to run concurrently as the same never fell within the confines of Section 278, 308(1) or 322 of the Penal Code, the offences having been committed on the same day and arising from the same transaction and there being no exceptional circumstances that would warranted the sentence to run consecutively.
29. It was also the firm finding of this court that that the total maximum amount of fine the Learned Trial Magistrate could have imposed on the Appellant for the offences he was charged with was a sum of Kshs 40,000/=. Bearing in mind that the default sentence for a fine of Kshs 40,000/= under Section 28 of the Penal Code would be imprisonment to not more than six (6) months, the imprisonment of two (2) years in default of payment of the fine seemed manifestly excessive but appreciably, the period of imprisonment in default of fine was under the Wildlife Conservation and Management Act.
30. Be that as it may, the penalty in default of paying the fine under Count I and Count II was imprisonment of twelve (12) months which were to run concurrently. Serving two (2) years' imprisonment on each of those two (2) counts consecutively was clearly unlawful and illegal.
31. However, if the Learned Trial Magistrate had intended that the Appellant was to serve two (2) years' imprisonment in default of payment of the fine, then that would only have been under Count III where imprisonment provided was for a term not exceeding five years. Sentences under Count I and Count II ought to have been kept in abeyance as he serves the two (2) years' imprisonment.
32. Accordingly, having considered the Appellant's Mitigation Grounds of Appeal, the State's Written Submissions and the facts of this case, this court found and held that this was a proper case for it to re-state how the Appellant was to serve his sentence in default of payment of the fine. He has since served one and a half (1½) and does not appear to have been given any remission of his sentence which could have led him to approach this court as a last resort.
33. It is good and proper practise for a trial court to indicate how sentences are to run where an accused person has been convicted on more than one (1) count to avoid any ambiguity. The ambiguity of how the sentence was to run must therefore be read in favour of the Appellant herein, which in any event is the correct position of the law.

DISPOSITION

34. For the foregoing reasons, this court hereby allows the Appellant's Petition that was lodged on 16th July 2015 on the extent of the sentence only but affirms the conviction as he never paid the fines that were imposed on him.
35. However, as the Appellant has already served one and a half (1½) years' imprisonment, the court hereby directs that he set free forthwith unless he be held for any other lawful cause.
36. It is so ordered.

DATED and DELIVERED at VOI this 28th day of April 2016.

J. KAMAU

JUDGE

In the presence of:-

Venant Mwachanya……. Appellant

Gioche ……...……..…...for State

Ruth Kituva– Court Clerk