



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL REVISION NO.170 & 169 OF 2016

ANDRIANWATOAVINA RIJAWIAINA.....1ST APPLICANT

BOBAHERI FALY HOUSSEN.....2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The lower court file in Makadara Criminal Case No. 264 of 2016 was forwarded to this court pursuant to Section 362 and 364 of Criminal Procedure Code so that the court can satisfy itself as to the legality, correctness and regularity of the sentence passed. The two Applicants were jointly charged with being in possession of wildlife species contrary to **Section 99 of the Wildlife Conservation and Management Act 2013**. It was alleged that on 22nd January, 2016 at Jomo Kenyatta International Airport Terminal 1C were jointly found in possession of two live tortoises without a permit. They were both convicted on their own plea of guilty. They were each sentenced to pay a fine of Kshs. 1 million or serve two years imprisonment. In addition, the court ordered that the two reptiles be handed over to Kenya Wildlife Services and that depending on whether they adapt to the local climate, they could be returned to Madagascar, the country of origin or be kept in Kenya. The Applicants' passports and boarding passes were to be returned to them upon completion of the sentence.

Each of the Applicants filed separate revision applications but they were argued jointly. The ruling herein is also consolidated and affects both Applicants. In their respective Chamber Summons filed on 15th September, 2016, they urged the court to revise the sentence and more particularly set them free as they were remorseful. They canvassed in court that they were misled into committing the offence and that the tortoises were meant for a Chinese national in Vietnam. They were arrested while on transit to Vietnam. They also pleaded for lenience as both came from poor backgrounds and have immediate and extended families to take care of. In addition, they told the court that upon release from prison they were ready to meet their own cost of travelling back to Madagascar.

Learned State Counsel, Miss Sigei opposed the application stating that the Applicants were given the minimum sentence under Section 99 of the Wildlife Conservation and Management Act. They must serve the minimum sentence after which they shall return to their home country.

I have considered the respective submissions. Both Applicants were charged under Section 99 of the

Wildlife Conservation and Management Act. For purposes of this application the relevant parts of the provision are Sub-sections (1),(2)(d) and (3). The same provide as follows:

(1) No person shall trade in, import, export, re-export or introduce any specimen or a wildlife species into or from Kenya without a permit issued by the Service under this Act.

(2) Without prejudice to the generality of the foregoing, no person shall-

(d) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of paragraphs (b) and (c);

(3) Any person who contrives any provisions of this section commits an offence and shall be liable upon conviction for category A wildlife to a fine of not less than ten million shillings or to imprisonment for not less than five years and for other wildlife categories to a fine of not less than one million shillings or to imprisonment of not less than two years or to both such imprisonment and fine.

Subsection (3) is couched in mandatory terms such that any person found guilty of any of the offences specified is liable to the minimum penalties prescribed. In respect of the Applicants, having been found with reptiles, are animals falling under category (c) of the wildlife species in which case they were liable to a fine of not less than 1 million or to imprisonment of not less than two years or to both such imprisonment and fine. The Applicants were lucky that they escaped with only the minimum penalties. Besides, they were also lucky that the trial court did not impose both the fine and the custodial sentence. They were given the option of either paying the fine or serving the jail term.

I wish to emphasize that the stiff sentences under the Wildlife Conservation and Management Act were legislated with a view to conserving our depleting wildlife. In as much as the Applicants had imported into the country the reptiles, the stiff penalties applies to such instances so as to discourage importation of wildlife from other countries as wildlife world over is considered as heart of economic growth to any particular country. In the circumstances and unfortunately, notwithstanding that the Applicants are remorseful or are willing to meet the cost of their repatriation, they must first serve the sentence.

In the end, I do not find any irregularity or incorrectness or illegality with the sentence passed by the learned magistrate to warrant a revision. This application must then fail and the same is dismissed.

DATED AND DELIVERD THIS 23RD DAY OF NOVEMBER, 2016

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. 1st Applicant in person.
2. 2nd Applicant in person.
3. M/s Kimiri for the Respondent.