REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL 189 OF 2014

JULIUS CHACHA……..……...……
APPELLANT

VERSUS

REPUBLIC……..……RESPONDENT

(An appeal arising out of the sentence of G.M. Mutiso, Ag. PM in Criminal Case No. 1650 of 2014 delivered on 29th September 2014 in the Principal Magistrate's Court at Makindu)

JUDGMENT

The Appellant pleaded guilty to two offences of setting fire to vegetation in a wildlife protected area and entering a national park contrary to sections 102(1)(b)and 102(1)(a) of the Wildlife and Management Act 2013 respectively in the trial Court. The Appellant had been found at the location of the fire was at Chyulu National Park by Kenya Wildlife Service patrol officers. The trial magistrate while noting that the Wildlife and Management Act 2013 provides for minimum sentences sentenced the Appellant to a fine of Kshs 200,000/= and in default imprisonment for two years for the first offence, and likewise a fine of Kshs 200,000/= and two years' imprisonment in default for the second offence, which sentences were to run consecutively.

The Appellant being aggrieved appealed the sentence meted by the trial magistrate. His main grounds of appeal as stated in his Petition and Ground of Appeals filed in Court on 8th October 2014 and oral submissions made in Court during the hearing of the appeal were that he was a first offender and was remorseful for having committed the offences. The Appellant was unrepresented during the appeal.

Mr Mamba, the learned counsel for the State opposed the appeal and submitted that the Appellant was convicted on his own plea of guilty, and that the trial court was properly guided by the provisions of the Wildlife and Management Act 2013 which provides for minimum sentences for the offences committed. He however was of the view that the sentences of imprisonment ought to have run concurrently and not consecutively.

I have considered the arguments made by the Appellant and the State, and find that the issue for determination by the court is whether the sentence meted out to the Appellant is illegal or unlawful, harsh or excessive as provided for under the Wildlife and Management Act 2013 or in any other statute, and whether the sentence is amenable to reduction. The principles upon which an appellate Court will act in exercising its discretion to review or alter a sentence imposed by the trial court were settled in the case of **Ogolla s/o Owuor, (1954) EACA 270** wherein the Court of Appeal stated as follows:

"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or

overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263)."

In the case of ***Shadrack Kipkoech Kogo –v- R****, **Eldoret Criminal Appeal No.253 of 2003,** the Court of Appeal stated thus:-*

"sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka –vs- R. (1989 KLR 306)"

In the instant appeal, it is not in dispute that the Appellant was charged with two separate counts under section 102 (1) (a) and (b) of the Wildlife and Management Act 2013 which provides as follows:

"(1) Any person who-

(a) enters or resides in a national park or reserve otherwise than under licence, permit or in the course of his duty as authorized officer or a person lawfully employed in the park or reserve, as the case may be;

(b)sets fire to any vegetation in any wildlife protected area or allows any fire lighted by himself or his servants to enter a wildlife protected area;….

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 two years or to both such fine and imprisonment."

It is noted from the said provisions that the two offences the Appellant was convicted of each attract a minimum sentence of a fine of Kshs 100,000/= or imprisonment of two years upon default. Sentencing is in the discretion of the court but where a minimum penalty is provided, the sentencing court cannot deviate from the provisions of the law. In the case of **David Kundu Simiyu –Vs- Republic, Criminal Appeal No.8 of 2008 at Eldoret, the Court of Appeal** held, with respect to the minimum sentences provided under the Sexual Offences Act, that:-

"Those are minimum sentences and parliament appears to give no discretion to the court's to impose sentences below those specified as the minimum. The provisions accord the prime objectives of the act which is prevention and protection from harm, from unlawful sexual act."

In the circumstances, I am unable to vary the minimum sentence provided by the law in the present appeal.

This finding notwithstanding, I however note that in addition to imposing the minimum sentence, the trial Court ordered that the two sentences were to run consecutively**.** *Section 14* of the *Criminal Procedure Code* provides for circumstances in which a court can direct sentences to run concurrently or consecutively 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."

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 and/or 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. In ***Ondiek – v- R (1981) KLR 430,*** it was also stated by the Court that the practice is that if a person commits more than one offence at the same time in the same transaction save in exceptional circumstances, the sentences imposed ought to run concurrently. Likewise in ***Nganga – v- R, (1981) KLR 530***, the High Court held that concurrent sentences should be awarded for offences committed in one criminal transaction.

Further, in **R.V.Nathani (1965) EA 777** it was held that for different acts to make up one transaction, it must be inherent in them that from the very beginning of the earliest act the other acts should either be in contemplation, or necessarily arise therefrom, or from the very nature of the transaction in view, form component parts of one whole. Concurrent sentences ought therefore to be exclusively imposed for related offences which arise from a series of incidents connected with each other.

In the present appeal I find that given that the since the two offences committed by the Appellant arose from the same transaction of entering the park and were committed on the same day, there was an error by the trial magistrate in his decision to have the two imprisonment sentences run consecutively and not concurrently. The Appellants appeal therefore succeeds only to the extent that the order that the two imprisonment sentences for the two offences committed by the Appellant are to run consecutively is set aside, and substituted by an order that the imprisonment sentences of two years for each offence that shall run concurrently. The substituted sentences shall take effect from 29th September 2014 when the Applicant was sentenced by the trial court.

I am alive in this regard to the fact that the Appellant has already served 10 months of his sentence, and also note that this Court is empowered to order that a term of imprisonment of less than 3 years be served by way of community service under the Community Service Orders Act (Chapter 93 of the Laws of Kenya). Section 3(1) of the Community Service Orders Act provides as follows in this regard:

"(1) Where any person is convicted of an offence punishable with—

(a) imprisonment for a term not exceeding three years, with or without the option of a fine; or

(b) imprisonment for a term exceeding three years but for which the court determines a term of imprisonment for three years or less, with or without the option of a fine, to be appropriate, the court may, subject to this Act, make a community service order requiring the offender to perform community service."

After the hearing of the appeal, this Court called for a report on the Appellant by the probation office, and notes from the community service orders report filed in Court on 20th July 2015 that the Appellant is aged 18 years, is a first offender, remorseful and had promised not to re-offend. Further, that his home report was positive and that his family, community and a named organization was willing to support his rehabilitation and supervision on a non-custodial sentence. The Appellant was found to be suitable for a non-custodial sentence and it was recommended that he serves a community service sentence at Kuku Primary School.

This Court accordingly orders that that the unexpired term of the Appellant's sentence be commuted to be served by way of community service at Kuku Primary School, and the Appellant shall forthwith be set free under the supervision of a Community Service Officer unless otherwise lawfully held.

It is so ordered.

DATED AT MACHAKOS THIS 21ST DAY OF JULY 2015.

P. NYAMWEYA

JUDGE