REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL REVISION NO 5 OF 2015

MAHAT SANGWEYHEI KEDHIYE……..……..... APPLICANT

VERSUS

REPUBLIC …… RESPONDENT

RULING

INTRODUCTION

1. Being aggrieved by conviction on both counts and sentence that was meted upon him on 29th April 2015 by the Trial Magistrate, Hon W. K. Kitur in **Cr Case No 365 of 2015 Republic vs Mahat Sangweyhei Kedhiye** at Taveta Law Courts, the Applicant moved the court for a revision of the sentence by a letter that was dated 1st September 2015 and filed on the same date,.
2. The Respondent had been charged with entering a national park contrary to Sections 102(1)(a) and 102(3) of the Wildlife Conservation and Management Act 2013. The counts were as follows:-

COUNT I

On the 13th day of August 2015 at around 6.40 am at Salaita and Tsavo West National Park within Taita Taveta County entered the said National Park without authorisation.

COUNT II

On the 13th day of August 2015 at around 6.40 am at Salaita and Tsavo West National Park within Taita Taveta County entered the said National Park with about 50 heads of livestock.

3. In respect of Count I, the Applicant was found guilty and fined a sum of Kshs 250,000/= and in default to serve two (2) years' imprisonment and Kshs 70,000/= and in default to serve five (5) months imprisonment in respect of Count II.
4. His Written Submissions were dated and filed on 29th September 2015. He relied on the cases of **Kengeles Holdings Ltd vs Republic [2009] eKLR**, **Josephat Shikuku vs Republic [2010] eKLR**, **Mary Katisya vs Republic [2014] eKLR** and **Benson Mwenda vs Republic [2005] eKLR** in support of his case.
5. In its Written Submissions dated 6th November 2015 and filed on 10th November 2015, the Respondent argued that the Applicant ought to have come to this court by way of an appeal and not by revision as the same did not fall within the principles of a Revision, which were that, in a revision, the court should only satisfy itself as to the correctness, legality or propriety of any finding, sentence or order.
6. It placed reliance on the provisions of Section 364(1)(5) of the Criminal Procedure Code that

provides as follows:-

"When an appeal lies from a finding, revision or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed."

7. The court considered the case of **Charles Gitau vs Republic [2008] eKLR** that the Respondent relied upon and found the same to have been distinguishable from the facts of this case. What this court understood to have been the purport of the holding in that case was that a court could exercise powers conferred on it by Section 361 and 361(3) of the Criminal Procedure Code to disturb a finding, sentence or order where the issue had been presented as a revision instead of an appeal.
8. It did appear to this court that the Applicant was clear that it was seeking a revision due to the duplicity of the charges that were preferred against him, a fact that was admitted by the Respondent. His argument was that it was illegal for the Respondent to have charged him with both counts as Count I could only be sustained if he was found in the park without the cows.
9. Further, he submitted that the evidence adduced in court showed that he had entered the park for purposes of grazing and not for poaching where the fine was a sum that was not less than Kshs 200,000/= or in default not less than two (2) years imprisonment. It was his additional argument that livestock could only enter the park with someone hence it was erroneous for the Respondent to have charged him with both counts. He therefore urged the court to quash the sentence as he had wrongly been charged with Count I.
10. In respect of the issue of being charged on two (2) counts, the Respondent referred the court to the provisions of Sections 134 and 135 of the Criminal Procedure Code to argue that the elements of Count I were clearly stated that the Applicant entered the National Park without authorisation and adduced evidence to prove the same. As regards Count II, the Respondent submitted that its elements were that the Applicant entered the National Park with livestock without authorisation.
11. It was its contention that these two (2) counts were independent of each other and could stand on their own set of facts. It stated that Parliament had intentionally put both offences in the Wildlife Conservation and Management Act as a person could enter into a national park without livestock but with intention to poach.
12. It compared the two (2) counts to a person who had been charged with burglary and stealing. It referred the court to the case of **Reuben Nyakango Mose & Another vs Republic [2013] eKLR** where the Court of Appeal held that the offences of burglary and stealing could be combined in the same charge for the reason that a person who breaks into a house would ordinarily have an ulterior motive of stealing.
13. Section 362 of the Criminal Procedure Code Cap 75 (Laws of Kenya) provides as follows:-

"The High Court may call and examine any record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded, and as to the regularity of any proceedings of any such court."

14. In this regard, the court considered the provisions of Section 102 of the Wildlife Conservation and Management Act, 2013 vis-à-vis the evidence that was adduced in court. The same stipulates as follows:-

"Any person who-

1.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… 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.

2. No person shall enter into a national park with any livestock for any purpose without

authorization.

3. Any person who contravenes subsection (2) commits an offence and is liable upon conviction to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding six months.

15. According to both PW 1 and PW 2, the Applicant was arrested when he had about fifty (50) cows. The photo of the said cows was marked Exhibit 1. In particular, PW 2 stated as follows:-

"…We came across cows and on getting closer, we saw two people and all they (sic) **tried to run away, but we arrested only the accused…"**

16. As was rightly submitted by the Respondent, each charge could stand on its own set of facts. However, a charge under Section 102(3) of the Wildlife Conservation and Management Act appeared to be less serious than the offences contemplated under the provisions of Section 102(1)(a) of the Wildlife Conservation and Management Act.
17. Firstly, the punishment for an offence under Section 102(3) of the Wildlife Conservation and Management Act was much lower than that which could be meted out under Section 102(1)(a) of the said Act. Secondly, Section 102(4) of the said Act gives a window allowing for grazing in the national park connoting that it is not all gloom for herders.
18. Indeed, Section 102(4) of the said Act provides as follows:-

"The Cabinet Secretary shall make guidelines in consultation with the Service with respect to accessing national parks for purposes of grazing and watering of livestock in times of drought and other natural disasters."

19. It was clear from the evidence that was adduced in the trial court that the primary reason the Applicant was in the National Park was to graze his cattle and not for any other reason. If there was any other reason, the Prosecution did not demonstrate the same before the trial court. The Wildlife Conservation and Management Act has a specific provision for an offence of entering the National Park with animals. If a person commits an offence that contains all elements, he ought to be charged under that offence only.
20. Indeed, the Applicant would suffer double jeopardy and great prejudice if the court was to allow convictions on both charges to stand undisturbed. He would suffer very serious consequences if he was to be convicted under the provisions of Section 102(1)(a) of the Act. Section 102(3) of the Act is clear that entry without authorisation is contemplated under Section 102(1)(a) of the Wildlife Conservation and Management Act. If the Applicant had entered the park on a different mission other than to graze cattle, then he ought to or should have been charged with having committed an offence contrary to the provisions of Section 102(1)(a) of the Act.
21. The analogy of burglary and stealing that was proposed by the Respondent is a completely different scenario as both offences have to be combined to prove that a person has committed both burglary and stealing. That is not to say that a person cannot be charged either with burglary and stealing only if that is what is obtaining at any given moment. The court therefore found itself in agreement with the Applicant that there was a duplicity of charges when he was charged under the two (2) counts herein.
22. Having said so, it was clear from the evidence that was adduced by the Prosecution that the Trial Magistrate did not ignore the Applicant's defence that he had entered the park to look for cows and that he did not know that he was in the park as he had contended.
23. In fact, the Trial Magistrate observed that the same was full of denial and that the Applicant intended to use the same to absolve himself from the offences that were facing him. The argument of lack of *mens rea* on the part of the Applicant cannot be introduced at this stage of revision. It ought to have been raised in the first instance in the trial court. The court therefore found this argument to have been irrelevant in the circumstances of the case herein and rejected the same.
24. Bearing in mind the circumstances of the case herein, the court found and held that the conviction and sentence of the Applicant in respect of Count I was illegal as the Applicant could competently be charged under Section 102(3) of the said Act. In respect of Count II, the court found and held

that that the sentence that was imposed on the Applicant was not high or excessive as the same was within the law. The court was thus not satisfied that there was any justification to interfere with the decision of the Learned Trial Magistrate as the same was correct, legal and proper.

DISPOSITION

25. In the circumstances foregoing, the court found the Applicant's application for Revision to have been meritorious only in part. For the aforegoing reasons, Count I is hereby quashed and/or set aside. As regards Count II, the court declines to quash and/or set aside the same but instead affirms the said conviction and sentence.
26. It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 30th day of November 2015

J. KAMAU

JUDGE

In the presence of:-

Mwanyumba h/b for Muthami…….. Applicant

Sirima…… Respondent

Simon Tsehlo– Court Clerk