

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 49 OF 2014

BONIFACE NGUGI WANJIRU ACCUSED

VERSUS

REPUBLIC RESPONDENT

(From the original conviction and sentence in Criminal case No. 209 of 2014 of the Senior Principal Magistrate's court at Limuru before N. Makau, Resident Magistrate.)

RULING

Boniface Ngugi Wanjiru was charged before the Senior Principal Magistrate at Limuru with the offence of being in possession of a game trophy contrary to Section 95 of the Wildlife and Conservation Management Act No. 47 of 2013. It was alleged in the particulars of the charge that on 21st March, 2014 at Gatamaiyu Trading Centre, Kiambu County he was found in possession of a game trophy, to wit one piece of an elephant skin without a permit. The record shows he pleaded guilty to the charge and upon conviction he was sentenced to pay a fine of Kshs. 10,000/= in default to serve one year imprisonment.

The original court file has been forwarded to this court, I believe under Section 363 (2) of the Criminal Procedure Code for revision since the sentence imposed was below the minimum prescribed by the law. Section 95 of the Act provides that upon conviction the accused person is liable to a fine of not less than Ksh.1 million or imprisonment for a term of not less than five years or both such imprisonment and fine. It is clear therefore that, the sentence imposed by the learned trial magistrate was way below the prescribed penalty.

On perusing the record however, I noted that the alleged game trophy was not identified or produced in court as evidence when the prosecutor stated the facts to the court. Further, no report was made or produced to confirm that what the accused person was found with was a game trophy related to an elephant skin. That was a grave omission and fatal to the prosecution case.

The accused was unrepresented and whatever transpired was prejudicial to him. In mitigation the accused said that he picked the subject matter thinking it was a Maasai stick. It is the officer who told him it was an elephant skin. Having said so, it was clear that his plea was not unequivocal and at that point, the learned trial magistrate should have entered a plea of not guilty.

The learned counsel for the Republic concedes but asks for a retrial. An order for a re-trial would generally be made where interests of justice demand. It should not be made where prejudice may be occasioned to an accused person. In the instant case, it was not the mistake of the accused person that the alleged trophy was not produced. If a retrial were to be ordered the prosecution would have an opportunity to fill the gaps that exist on the record. That is prejudicial to the accused. I decline to order a retrial.

From the date the accused was arrested to date is a period of three months. He has suffered incarceration for a charge that was not proved before the learned trial magistrate. Accordingly, the proceedings before the learned trial magistrate are hereby set aside in their entirety and the accused released forthwith unless otherwise lawfully held.

SIGNED DATED and DELIVERED in court this **25th** day of June **2014**.

A.MBOGHOLI MSAGHA

JUDGE