



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO. 136 OF 2013

BIEMEI CHENAPPLICANT

VERSUS

REPUBLICRESPONDENT

RULING

1. Before me is an application for revision brought by way of two letters dated 26th August 2013 and 29th August 2013 respectively. The Applicant is seeking review of the orders of the trial Court in the **Chief Magistrates Court at Makadara, PCR Case No. 3038 of 2013** dated 22nd August 2013.
2. The Applicant was charged with three Counts of offences under the **Wildlife (Conservation and Management) Act, Chapter 376** of the **Laws of Kenya**, namely: being in possession of game trophies without certificate ownership contrary to **Section (42(1)(b))**, dealing in game trophy without a dealer's license contrary to **Section 43(4)** and failing to report possession of game trophy contrary to **Section 39(3)(a)**. The Applicant was convicted on her own plea of guilty in all three counts and sentenced to serve 8 months imprisonment in **Count I**, 15 months' imprisonment in **Count II** and 8 months' imprisonment in **Count III** respectively.
3. The Application is based on the ground that the trial Court imposed custodial sentences without considering the option of fine as provided for by the law. The other reason advanced in support of the Application is that the Applicant, being of Chinese origin has been unable to adjust to the prison conditions in Kenya particularly the diet resulting, in the deterioration of her health and is therefore in need of urgent medical attention. Further, the Applicant states that as a consequence of her incarceration, her children have been left destitute.
4. Mr. Swaka, learned Counsel for the Applicant urged the Court to revise the custodial sentence since the **Wildlife (Conservation and Management) Act** also provides for the sentence of a fine for the charges. Learned Counsel urged the Court to take into account the fact that the Applicant saved Court's time by electing to plead guilty when she had the opportunity to prolong the trial. Counsel reasoned that the public policy is that such an accused person should be treated leniently. He added that it was wrong for the trial Court to impose a custodial sentence to use the Applicant as deterrence to others. Mr. Swaka expressed that the Applicant was remorseful and was willing to be deported back to China and banned from entering Kenya. He also stated that the Applicant suffers from a heart ailment.

5. Mr. Kadebe, the learned Counsel for the state opposed the Application on grounds that the Applicant was convicted on her own plea of guilt having understood the charges read to her. Counsel submitted that the trial Court had the discretion to impose any of the sentencing options provided by the law, by prescribing a fine, committing the accused person to custody or imposing both the fine and the imprisonment term.
6. Mr. Kadebe submitted that the trial Court had, in imposing a custodial sentence, appropriately taken into account the guilty mind of the Applicant, the subsisting poaching of elephants in the country and the mitigation proffered by the Applicant. Therefore, the sentence was justified and legal. Counsel also challenged the assertion that the Applicant needs medical attention since no evidence was presented as proof. Emphasizing that the law as prescribed must be respected, Counsel urged the Court to uphold the sentencing orders of the lower Court.
7. In response, Mr. Swaka urged that the Court has the option of imposing a fine as it is provided for in the law adding that the sentence as imposed was harsh. He asserted that the sentence of a fine and deportation would serve a better purpose of reforming the Applicant and would be less costly to the state.
8. This Court has jurisdiction under the **Criminal Procedure Code** to review the orders of the lower Court. The scope of revision proceedings is prescribed in **Section 362** of the **Criminal Procedure Code**. This provision empowers the Court to determine:

“the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.”

9. None of the respective Counsels submitted before me on the appropriateness of the Application before me. It is not every order of the lower Court that can be challenged by way of a revision. **Section 364(5)** of the **Criminal Procedure Code** limits the instances when revision can be invoked. It provides that,

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

10. The Applicant has not challenged the conduct of proceedings. In fact, the Applicant was convicted on her own plea of guilt. The proper channel for the Applicant to ventilate issues challenging the sentence was by way of an appeal since this is a matter the Applicant could have appealed. The Applicant is therefore, by this Application, inviting me to consider a matter that ought to be dealt with in appeal proceedings. On this sole basis, this Court is under no obligation to entertain the issues raised in the Application.
11. Assuming that Application was properly before Court, I will consider the issues raised by the parties. Learned Counsel for the Applicant opined that the sentence imposed by the trial Court was harsh. The sentences prescribed in the law for the charges facing the Applicant allow for either the imposition of a fine, an imprisonment term or both. Considering the severity of the charges facing the Applicant, I do not find the sentence imposed excessive. There has been increased concern in the country over the growing poaching of wild animals particularly elephants. Furthermore, the value of the ivory beads recovered from the Applicant was estimated at Kshs. 1,221,088. The fines imposed by the law, are between Kshs. 10,000 and 20,000 respectively. An imposition of the sentence of a fine alone would, in my view, not reflect the gravity of the charges against the Applicant.
12. The reasons advanced for consideration of a fine instead of a custodial sentence do not hold. While I acknowledge that the Applicant is truly remorseful for her conduct, the interest of public policy demands that persons convicted of offences serve the sentences imposed according to the law. As the Court noted in the case of ***Eliphaz Riungu v. Republic Misc. Application No. 472 of***

1996 (unreported)

“we think that public interest demands that whatever goes on in a criminal trial should be in the interest of justice.....justice demands that the guilty be appropriately punished and the innocent be left free...”

13. Furthermore, an appellate Court will not interfere with the discretion of a trial Court on the sentences imposed or orders issued unless they are demonstrably illegal or manifestly harsh in the circumstances of the particular case. By opting to impose a custodial sentence without the option of a fine, the trial Magistrate acted within her discretion. The sentences imposed are not demonstrably harsh or manifestly excessive. The sentences imposed by the trial Court are within the law which provides for maximum custodial sentences of up to 3 years in Count I, 5 years in Count II and 5 years in Count III respectively. The High Court, may under **Section 354** of the **Criminal Procedure Code**, upon being satisfied that there are sufficient reasons alter a sentence imposed by the trial Court. This power must be exercised judiciously. As it was held in ***Macharia v Republic***, [2003] KLR 115,

“The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence. The Court will not ordinarily interfere with the discretion exercised by a trial judge, unless, as was said in James v Republic [1950] EA 147, “it is evident that the judge has acted upon some wrong principle or overlooked material factors.”

14. I therefore find no basis for interfering with the orders of the trial Court except to add that the sentences shall run concurrently. The Application is therefore dismissed.

SIGNED DATED and DELIVERED in open court this 5th day of September 2013.

L. A. ACHODE

JUDGE