



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL REVISION NO. 1 OF 2011

APPLICANTS

KOYET LEMUSINI

LEMANYARA JACOBO

TATOYA KILASI

SENDEU SAMBO OLJONI

ROPILI KESURUMO

-VERSUS-

REPUBLIC RESPONDENT

RULING

By their letter dated 4th January 2011 **MESSRS GUNGA MWINGA & COMPANY ADVOCATES** have sought a revision of the decision of the learned District Magistrate II in DMCC 783/2010. In that case the five accused persons namely:

- (1) KOYET LEMUSINI
- (2) LEMANYARA JACOBO
- (3) TAYOTA KILASI
- (4) SENDEU SAMBO OLJONI
- (5) ROPILI KESURUMO

faced four counts. They entered a plea of guilty to Count Nos. 2 & 4 which read as follows:

COUNT NO. 2

“ENTERING A NATIONAL PARK CONTRARY TO SECTION 13(a) OF WILDLIFE

CONSERVATION AND MANAGEMENT ACT CAP 376 LAWS OF KENYA”

COUNT NO. 4

“ENTERING A NATIONAL PARK ELSEWHERE THAN A PLACE APPROVED BY THE DIRECTOR AS AN ENTRANCE CONTRARY TO REGULATION 5(a) as read with REGULATION 9 OF THE WILDLIFE CONSERVATION AND MANAGEMENT ACT CAP 376 LAWS OF KENYA”

The learned trial magistrate recorded the pleas of guilty and proceeded to sentence each of the five accused persons as follows:

§ Count No. 2 – A fine of Kshs.30,000/- or serve 3 years in jail

§ Count No. 4 – A fine of Kshs.30,000/- or serve 3 years jail.

In exercise of the powers of review granted to the High Court, I have perused the record of the lower court proceedings and I note certain glaring anomalies. On 22nd December 2010 the charges were read out to the accuseds and they pleaded guilty to Count No. 2 and 4. The facts were not read out to the accused as is required by law. Instead the prosecutor merely stated:

“May the particulars be as per the charge sheet on count 2 and 4. May the accuseds be treated as first offenders”

Firstly to declare facts to be ‘*as per charge sheet*’ does not fulfil the legal requirement that the facts be read out and explained to the accuseds. The record indicates the presence of a Masai interpreter at the time of plea. There is no indication that the facts were translated into Masai for the benefit of the accuseds. Secondly none of the accuseds indicated whether or not they accepted those facts as true. Thirdly the learned trial magistrate did not record a conviction against any of the accuseds as is required by S. 207(2) of the Criminal Procedure Code which provides:

“207(2) If the accused person admits the truth of the charge his admission shall be recorded as nearly as possible in the words used by him and the court shall convict him and pass sentence upon”

The terms of S. 207(2) are mandatory that upon a plea of guilty the court **shall** render a conviction against the accused person. This was not done in this case. The trial magistrate merely proceeded to impose sentence. A sentence imposed in the absence of a conviction is a nullity. Furthermore the court did not accord each accused the opportunity to mitigate as required by law. All the record indicates is:

“Mitigation – none”

This is improper. The magistrate ought to have called upon each accused to make a statement in mitigation **before** imposing her sentence. There is no indication from the record that this procedure was followed. Finally I find that the pleas of the five accused in respect to Count No. 2 and 4 were not taken in accordance with law and/or procedure. This renders the sentences imposed in respect of those two counts null and void and I hereby quash the purported convictions of the 5 accused on Count Nos. 2 and 4 **ONLY**. The subsequent sentences imposed with respect to Count No. 2 and Count No. 4 **ONLY** are hereby set aside. For the avoidance of doubt orders of the trial court with respect to Count Nos. 1 and 3 are not affected by this revision and therefore remain valid and enforceable.

Dated and Delivered at Mombasa this 22nd day of February 2011.

**M. ODERO
JUDGE**