



**Ekudongoi v Director of Public Prosecutions & another (Miscellaneous Criminal
Petition E006 of 2024) [2025] KEHC 3898 (KLR) (17 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3898 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
MISCELLANEOUS CRIMINAL PETITION E006 OF 2024**

LN MUTENDE, J

MARCH 17, 2025

**IN THE MATTER OF ARTICLES 2(1), 3(1), 10, 19, 20, 21, 22, 23, 25, 27(1),
(2), (4), 28, 29(A) (F), 50 AND 165, 258 AND 259 OF THE CONSTITUTION**

AND

**IN THE MATTER OF INTERPRETATION OF THE MANDATORY PROVISIONS
UNDER THE WILDLIFE AND CONSERVATION MANAGEMENT ACT, 2013**

AND

**IN THE MATTER OF SECTION 179, 216 AND
329 OF THE CRIMINAL PROCEDURE CODE**

AND

IN THE MATTER OF SECTION 23 OF THE GENERAL INTERPRETATION ACT

AND

IN THE MATTER OF KENYA JUDICIARY SENTENCING POLICY GUIDELINES

BETWEEN

SAMUEL AMNA EKUDONGOI PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

THE HON ATTORNEY GENERAL 2ND RESPONDENT



JUDGMENT

Introduction

1. The Petitioner was indicted for being in possession of wildlife trophy contrary to Section 95 of the Wildlife (Conservation Management) Act, 2013 and dealing in wildlife trophy contrary to Section 84(1) as read with Section 92 of the Wildlife (Conservation Management) Act, 2013.
2. After full trial he was convicted and sentenced to pay a fine of Kshs.1,000,000/- and in default to serve five (5) years imprisonment on the first count; and, on the second count he was fined Kshs.20,000,000/- and in default to serve life imprisonment.
3. Aggrieved, he preferred an appeal to the High Court which was dismissed. Hence todate the Petitioner has been incarcerated for nine (9) years.

Petitioner's Case

4. The gravamen of the Petitioner is that he was charged with an offence not provided for in Section 92 of the Wildlife (Conservation Management) Act, 2013, which is a violation of his rights under Article 50(n) of *the Constitution* of Kenya.
5. That having been charged with two (2) counts he was entitled to benefit from the less severe punishment under Section 95 of the Wildlife (Conservation Management) Act, 2013 in view of the lacuna in Section 92 of the Wildlife Conservation Management Act, 2013 which is in violation of Article 50(2) (p) of *the Constitution*.
6. That imposition of the mandatory minimum sentence of life imprisonment as provided for under Section 92 of the Wildlife (Conservation Management) Act, 2013 violated the Petitioner's constitutional rights to include the right to human dignity as mandated under Article 28 of *the Constitution*.
7. Therefore, the Petitioner seeks;
 - a. A declaration that the provisions of Section 92 of the Wildlife (Conservation Management) Act, 2013 and the mandatory minimum sentence of life imprisonment imposed by the learned trial magistrate in Nyahururu CM Criminal Case No. 241 of 2015 violated the Petitioner's rights to human dignity and fair hearing under Article 28 and 50 of *the Constitution*.
 - b. A declaration that Section 92 of the Wildlife (Conservation Management) *Act No. 47 of 2013* is unconstitutional and therefore invalid for violating rights and fundamental freedoms in the Bill of Rights.
 - c. An order to issue quashing the sentence or fine of Kshs.20,000,000/- and in default life imprisonment imposed on the Petitioner on 6th May, 2015 and upheld by the High Court on 10th April, 2018.
 - d. An order for resentencing to issue and the court to declare the sentence so far served by the Petitioner as sufficient punishment and the Petitioner to be released from prison forthwith.



Respondents' Case

8. The Respondent did not file any response to the petition despite leave having been granted. They however filed submissions.

Submissions

9. The Petition was disposed through written submissions.

Petitioner's Submissions

10. On the question of jurisdiction it is urged that the court has the discretion to determine the matter. That by the Petitioner being charged under Section 84(1) as read with Section 92 of the Act does not create an accurate charge thus the Petitioner could not adequately prepare for his defence. Reliance is placed on *Mutisya Kiema v Republic* [2014] eKLR where Kasango J stated that;
 14. While Section 95 of the Act deals with offences relating to wildlife trophies and trophy dealing generally, Section 92 is restricted to offences in respect of endangered or threatened species or their trophies only. Section 3 of the Act defines both "endangered species" and "threatened species" as any wildlife species specified in the Fourth Schedule of the Act. The Fourth Schedule of the Act however deals with provisions as to public consultations and does not contain a list of endangered species. Instead, Section 47 of the Act provides that "The species of wildlife set out in the Sixth Schedule are declared to be critically endangered, vulnerable, nearly threatened and protected species." The list of endangered or threatened species is therefore found in the Sixth Schedule to the Act.
 15. The particulars of count one indicate that the Appellant was charged with being in possession of an elephant tail. African elephant is listed in the Sixth Schedule to the Act as one of the endangered species. The Appellant was therefore charged with an offence relating to a trophy of an endangered species.
 16. The question then is, shouldn't the Appellant have been charged under Section 92 of the Act only? After a careful reading of Section 92 of the Act, I notice that it is more of a punishment provision rather than a penal provision. In other words, the section only provides for the punishment for the offences in respect of endangered species or their trophies but does not itself create the offence. I say so because section 92 only provides for punishment "where a person commits the offence in respect of an endangered or threatened species or in respect of any trophy of that endangered or threatened species" but does not make provision for the circumstances under which a person is deemed to have committed the said offence. In the case of *Zhang Chunsheng* (supra) Mbogholi, J. stated that section 92 of the Act is ambiguous and does not state the relevant offences. The learned judge observed that:

"The Act should have set out the offences relating to those species so that the investigators, prosecutors, accused and courts are clear of what they are dealing with".
 19. The *Wildlife Conservation and Management Act*, 2013 came into effect on 10th January this year and perhaps its provisions are still being tested. It appears that the intention of the drafters of the Act was to create a severer punishment for offences relating to endangered species. However, they only made provision for punishment in section 92 but omitted to create the



offence itself. Perhaps it is time to address the glaring lacuna as was observed by Mbogholi, J. in the Zang Chunsheng (supra), which observation I reiterate herein that:

“The *Wildlife Conservation and Management Act*, 2013 is a step in the right direction; but the Act requires some polishing to ensure the intended purpose is achieved. I strongly recommend the observations I have made herein be brought to the attention of the relevant authorities for appropriate action.”

11. Also, *Martipei Parmaya v Republic* [2017] eKLR
12. That the provision of Section 92 of the Act is ambiguous and thus offends the provisions of Article 50(2) (b) & (c) of *the Constitution*, hence the Petitioner ought to have benefited from a lesser severe punishment as provided by *the Constitution* under Article 50(2) (p).
13. That the trial court ought to take into account aggravating and mitigating circumstances which accords an accused person the right to a fair hearing as enshrined in Article 50 of *the Constitution*.
14. In the result the Petitioner calls upon this court to find and hold that Section 92 of the Act as commenced on 10/11/2014 is unconstitutional as it offends the provisions of fair hearing and the right to human dignity.

1st Respondent’s Submissions

15. It is submitted that the jurisdiction of the High Court is provided for under Article 165 of *the Constitution* which includes unlimited original jurisdiction in criminal and civil matters; jurisdiction to enforce the bill of rights, appellate jurisdiction interpretative jurisdiction; any other jurisdiction original or appellate conferred on it by legislation and supervisory jurisdiction as expounded in criminal matters under Section 362 – 364 of the *Criminal Procedure Code*, on revision following some irregularity in proceedings of the lower court.
16. that the court has no jurisdiction to review the decision of a court of concurrent jurisdiction. That the rule of the thumb is that superior courts cannot sit in review/appeal/petition over decisions of their peers of equal and competent jurisdiction. That once the High Court delivered judgment in Criminal Appeal No. 95 of 2017 it became functus officio which calls for dismissal of the petition.

Analysis and Determination

17. I have considered rival arguments. The High Court derives jurisdiction from Article 165 of *the Constitution* which provides thus;
 - (1) There is established the High Court, which—
 - (a) shall consist of the number of judges prescribed by an Act of Parliament; and
 - (b) shall be organized and administered in the manner prescribed by an Act of Parliament.
 - (2) There shall be a Principal Judge of the High Court, who shall be elected by the judges of the High Court from among themselves.
 - (3) Subject to clause (5), the High Court shall have--
 - (a) unlimited original jurisdiction in criminal and civil matters;
 - (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;



- (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
 - (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of--
 - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
 - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - (iv) a question relating to conflict of laws under Article 191; and
 - (e) any other jurisdiction, original or appellate, conferred on it by legislation.
- (4) Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.
- (5) The High Court matters--
- (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
 - (b) falling within the jurisdiction of the courts contemplated in Article 162 (2).
- (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
- (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.
18. According to Article 22(1) as well as Article 23(1) of *the Constitution* the High Court has power to determine whether a right or fundamental freedom as enshrined in the Bill of Rights has been denied, violated, infringed or threatened.
19. In this petition it is not outrightly stated how the rights of the Petitioner were violated. The court is called upon to interpret the provision of the law as stipulated by Wildlife (Conservation Management) Act, 2013 (Act) that is deemed to be unconstitutional.
20. Arguments raised by the Petitioner were not raised during trial. He was discontented with the decision of the trial court and opted to appeal. Article 50(2) (q) of *the Constitution* provides thus;
- (2) Every accused person has the right to a fair trial, which includes the right--
 - (q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.



21. The Petitioner exercised a right of appeal as provided. The argument raised on appeal included the allegation that; the charge was defective and the fundamental rights were violated. The court interrogated Section 84 (1) and Section 92 of the Act that is in issue in the instant petition and reached a decision hence dismissing the appeal as it found the sentences lawful as provided.
22. The instant petition, externally it is well couched as a petition but having an in depth look at it seems to be an appeal that is not explicitly identified as such it is disguised. The argument raised is intended to effectively challenge the decision of a court of concurrent jurisdiction. As correctly pointed out by learned counsel for the 1st Respondent, this court is functus officio. The High Court having concluded its duty would have no further authority to reopen the case.
23. The doctrine of “functus officio” was clearly stated in *Telcom Kenya Ltd v John Ochanda* (2014) eKLR. The court delivered itself thus;

“Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered a final decision.
24. In the upshot, I find the petition being incompetent as the court lacks jurisdiction. Consequently, the same is dismissed.
25. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 17TH DAY OF MARCH, 2025.

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L.N. MUTENDE

JUDGE

