



**Mwando & 3 others v Republic (Miscellaneous Application  
258 of 2024) [2025] KEHC 2925 (KLR) (3 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2925 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
MISCELLANEOUS APPLICATION 258 OF 2024  
SM MOHOCHI, J  
MARCH 3, 2025**

**BETWEEN**

**BENARD KAGWE MWANDO ..... 1<sup>ST</sup> APPLICANT  
MORGAN SITIN FLORANCE ..... 2<sup>ND</sup> APPLICANT  
JAMES MOMANYI MOSETI ..... 3<sup>RD</sup> APPLICANT  
STEVEN MWANGI ..... 4<sup>TH</sup> APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The Applicants were on the 21<sup>st</sup> November 2024 arraigned and charged before the Nakuru Chief Magistrate’s Court MCCR No 2531 of 2024 with the following two charges;
  - i. Entering into a protected area without a permit or any other lawful exemption contrary to Section 102 (1) (a) as read with Section 102 (1) (h) of the Wildlife Conservation and Management Cap 376 Laws of Kenya.  
  
Particulars  
  
That on the 20<sup>th</sup> day of November, 2024 at around 0145hrshrs at Black tank area Nakuru east Sub-County within Nakuru county at GPS co-ordinates 37M 0177640 UTM 9964053 they were found jointly with others not before Court, to have entered into a protected area on foot without a permit from the Director General, Kenya Wildlife Service. AND
  - ii. Undertaking extractive activity in wildlife protected area without a permit or any other lawful exemption contrary to Section 102 (1) (g) as read with Sec 102 (1) (h) of the Wildlife Conservation and Management Cap 376 Laws of Kenya.



## Particulars

That, on the 20<sup>th</sup> day of November, 2024 at around 0145hrs, at Black Tank areas in lake Nakuru National park, Nakuru East sub county within Nakuru county at GPS co-37M 0177640 UTM 9964053 they were found with others not before Court undertaking extractive activity namely fishing and you were in possession of one improvised boat (1), two (2) pieces of sacks, four Rafting sticks without a permit from the Director General, Kenya Wildlife Service

2. The Applicants were convicted and sentenced upon plea of guilty to a fine of Kshs 200,000/- on each count and upon default to serve imprisonment of two (2) years on each count. The sentences were to run consecutively.
3. The Application before Court is seeking the Court to call for and examine the record in MCCR No 2531 of 2024 for purposes of satisfying itself as to the correctness, legality, propriety of the sentence imposed and upon such examination to review of the sentence imposed. This application is supported by a joint affidavit dated 30<sup>th</sup> August 2024 the Applicants.

## Issue for determination

4. The issue for determination is whether the applicant has established a case for revision based on the provisions of Article 165 (6) of the Constitution and under Section 362 of the Criminal Procedure Code.

## The Law

5. The High Court power of revision is set out in Article 165 which provides:
  - (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 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.
6. Section 362 of the Criminal Procedure Code, empowers the High Court to call and examine the 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 or passed and as to the regularity of any proceedings of any such subordinate Court.
7. Section 364(1) of the Criminal Procedure Code provides: -

In the case of a proceeding in a subordinate Court the record of which has been called for or which has been reported for orders or which otherwise comes to his knowledge, the High Court may” -

  - (a) in the case of a conviction, exercise any of the powers conferred on it as a Court of appeal by section 354, 357 and 358, and may enhance sentence;
  - (b) In the case of any other order other than an order of acquittal alter or reverse the order.

(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence.
8. Article 165 of the Constitution bestows supervisory jurisdiction over subordinate Courts and tribunals.



9. This Court can only disturb the exercise of discretion where it is apparent that the same was fettered.
10. The Applicants contends that the sentence is irregular in that the Court did not consider their mitigation and that the sentence was punitive.
11. This Court has examined the trial record and finds the Applicants were never afforded opportunity to mitigate and that the Court in imposing the sentence imposed the minimum sentence provided for without affording the applicants any benefits whatsoever.
12. The trial magistrate did not provide any reason for the punitive nature of the sentence.
13. In imposing the sentence, the magistrate noted that his hands were tied and the minimum sentence is prescribed in the law. This Court take a dim view of laws crafted to curtail judicial discretion that result in many petty offenders serving long sentences.
14. The trial Court ought to have afforded the Applicant a hearing in mitigation.
15. In this instance the Applicants were engaging in illegal small-scale fishing in the Nakuru lake and that any penal sanction for such conduct should be commensurate with the gravity of the offence.
16. This Court Further notes that the legal regime existing on the same conduct is conflicted and where two or more penal laws relate to the same conduct then an accused is entitled to benefit from the least penal sanction provided for, in this instance, fishing is regulated by the Fisheries Act that predates the *Wildlife Conservation and Management Act*.
17. Fisheries Act, Fisheries (General) Regulations 15. Prohibited methods of fishing provides that;

“ Any person who uses any explosives, poisonous or noxious substances or electric shock device for the purpose of killing, stunning, or disabling fish so as to render them more easily caught shall be guilty of an offence and liable to a fine not exceeding twenty thousand shillings or to imprisonment for a term not exceeding one year or to both”
18. Fisheries (General) Regulations 16. Receiving fish in respect of which offence has been committed:

“ Any person who for purposes of trade and commerce receives or retains any fish knowing or having reason to believe that an offence under this Act has been committed in respect of that fish shall be guilty of an offence and liable to a fine of not less than five thousand shillings and not exceeding five hundred thousand shillings or to imprisonment for a term of not less than six months and not more than two years or to both.
19. Section 41 Fisheries Act, provides for Fishing in inland waters:
  - (1) No person shall fish in the inland and territorial waters of Kenya except—(a) a citizen of Kenya; or
    - (b) a non-citizen of Kenya holding a valid sport fishing licence or trout licence; or
    - (c) a resident of Kenya or other persons recognized by the Director by notice in the Gazette as persons who traditionally fish in Kenya fishery waters.
  - (2) Any person contravening this regulation shall be guilty of an offence and liable to a fine not exceeding twenty thousand shillings or imprisonment for a term not exceeding two years or to both.
20. Section 42 Fisheries Act, provides for Landing of fish:



1. No person, other than a sport fisherman, shall land any fish at any point except at a fish landing station and for purposes of this regulation, the fish landing stations shall be those specified in the Fourth Schedule.
  2. Any fisherman who lands fish at a fish landing station shall—
    - a. at the request of a fisheries officer, cause the fish to be weighed by the officer; and
    - b. keep or store the fish in a hygienic manner pending sale.
  3. No fisherman or fish dealer shall have in his possession for sale, any fish which is unfit for human consumption.
  4. Where a fisheries officer is satisfied that fish in possession of a fisherman or trader is unsuitable for human consumption on account of its poor state of preservation or of its toxic nature, he shall refuse the sale and may impound the fish; or demand production of a certificate issued by a fisheries officer or public health officer confirming suitability of the fish, for human consumption, before allowing the sale.
  5. Where the certificate of suitability referred to in paragraph (4) is not produced for up to forty-eight hours, the fisheries officer may order the fish destroyed and the Government shall not be held liable.
  6. Any person contravening this regulation shall be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to imprisonment for a term not exceeding six months or to both.
21. The principle 3.1 of ‘proportionality’ as is provided for under Sentencing Police Guidelines is grounded within the concept of just deserts and is embraced by common law. In *Hoare v The Queen* (1989) 167 CLR 348, it was stated that;
- “a basic principle in sentencing law is that a sentence of imprisonment imposed by the Court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in light of its objective circumstances.”
22. Its apparent that small scale illegal fishing can be prosecuted under the Fisheries Act which then would attract a penal sanction far less than what is thus provided for under the *Wildlife Conservation and Management Act*. By preferring the instant charges, the Applicants were deprived off the opportunity to benefit from a less severe penal sanction imposed under the Fisheries Act for the same criminal conduct.
23. Article 50 (1) of the *Constitution* of Kenya upholds the right to have a fair determination of a matter. Fairness demands that the sentence imposed should neither be excessive nor less than is merited. See for instance *Caroline Auma Majabu v. Republic* Criminal Appeal No. 65 of 2014 [2014] eKLR where a sentence of life imprisonment and a fine of Kshs.1,000,000 for having been found in possession of heroin worth Kshs.700 was found to be excessive.
24. Bearing in mind that the High Court is bound by the decisions of the Court of Appeal as far as sentencing is concerned, this Court is the considered view that where a trial Court openly expresses frustration as to its fettered discretion this Court could disturb such a penalty imposed and exercise its discretion to impose a sentence proportionate to the offence.
25. This Court finds this case fit for Revision and orders that the sentence of the trial Court be revised.



26. I have noted that the applicant has been in custody for Four (4) months now.
27. In exercise of the powers of the Court under Article 165 (6) and (7) of the *Constitution* and Section 362 of the *Criminal Procedure Code* (CPC). I review the sentence and order that the Applicants shall
28. Each Applicant Pay a fine of Kshs 20,000/- on each charge, and upon default, shall serve an imprisonment of Six (6) months on each charge to run concurrently. Terms will be explained to him.

It is so ordered.

**SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAKURU ON THIS 3<sup>RD</sup> MARCH 2025.**

**MOHOCHI S.M**

**JUDGE**

