



**Ndungu v Republic (Miscellaneous Application E161 of 2024)
[2025] KEHC 3108 (KLR) (5 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3108 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS APPLICATION E161 OF 2024
SM MOHOCHI, J
MARCH 5, 2025**

BETWEEN

DAVID MAINA NDUNGU APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Application before Court is seeking the Court to call for and examine the record in Nakuru MCCR No E1472 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. His application is supported by his affidavit 29th August 2024.

2. The Applicant was arraigned on the 28th June 2024 and charged with two counts together with other accused for the following offences;

Count 1

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

The Particulars were that on the 27th day of June, 2024 at around 1500 hours at Vietnam area Nakuru West Sub-County within Nakuru County at GPS Co-ordinates 37M 0173985 UTM 99632337 he was 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

Count 2:



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 Cap376 Laws Of Kenya

The Particulars were that, on the 27th day of June, 2024 at around 1500hrs, at Vietnam areas in Lake Nakuru National Park, Nakuru West Sub County within Nakuru County at GPS Co-ordinates 37M 0173985 UTM 99632337 he was found jointly with others not before Court, undertaking extractive activity namely fishing and was in possession of two (2) fishing nets, one sacks and nine (9) pieces of fresh fish with street value of 4500ksh without a permit from the Director General, Kenya Wildlife Service.

3. The Applicant pleaded guilty and was sentenced to a fine of Kshs 200,000/- on each count and upon default to serve imprisonment of two years on each count. The sentences were to run Consecutively.
4. This Court had directed that it being a criminal revision is a judge matter without need of arguments by either the Applicant or the Respondent and that the Court shall upon receipt of the Trial Court file peruse the same with a view of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed.

Issue for determination

5. 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

6. The High Court power of revision is set out in Article 165 which provides:
 - (6) 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.
7. 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.
8. 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.

9. Article 165 of *the Constitution* bestows supervisory jurisdiction over Subordinate Courts and Tribunals.
10. The Applicant contends that the sentence is irregular in that the conviction was on a main count and an alternative charge.
11. This Court has examined the trial record and finds the Applicant was not charged with any alternative count and that the two counts are independent of one another and finds no fault in the conviction on both counts.
12. While the Applicant mitigated and was to be treated as a 1st offender the Court proceeded to impose the sentence and order the same to run consecutively.
13. The trial magistrate did not provide any reason for the punitive nature of this order.
14. 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.
15. The Trial Court ought to have afforded the Applicant a hearing in mitigation.
16. In this instance the Applicant was 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.
17. This Court finds this case fit for Revision and orders that the sentence of the Trial Court be revised.
18. I have noted that the Applicant has been in custody for eight (8) months now. I believe that the time spent in prison has been sufficient to teach him any lesson that the Trial Court intended them to learn.
19. 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 Applicant shall serve remainder of his sentence while on probation. Terms will be explained to him.

It is so ordered.

**SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAKURU ON THIS 5TH MARCH
2025**

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MOHOCHI S.M

JUDGE

