Gakuya v Republic (Criminal Appeal E090 of 2023)
[2025] KEHC 7630 (KLR) (4 June 2025) (Judgment)

Neutral citation: [2025] KEHC 7630 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E090 OF 2023

AK NDUNG'U, J

JUNE 4, 2025

BETWEEN

JAMES MUTHEE GAKUYA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from original Sentence in Nanyuki CM
Criminal Case No E106 of 2023– L.G. Nyaga RM)

JUDGMENT

1. The Appellant, James Muthee Gakuya, was convicted after trial of dealing in the carcass or meat of a wildlife species contrary to section 98(1) of the *Wildlife Conservation and Management Act* 2013. The particulars were that on 23/01/2023 at Kandara shopping centre in Kieni East Sub-county within Nyeri County was found dealing with wildlife species meat namely Dik Dik meat to wit 1.9kg without a permit. On 26/10/2023, he was sentenced to three (3) years imprisonment.

2. Vide a petition of appeal filed on 06/11/2023 he raises the following grounds;

    i. That the learned magistrate erred by failing to note that the case was not proved beyond any reasonable doubt.

    ii. The learned magistrate erred by not appreciating that he was a first offender.

    iii. The learned magistrate erred by failing to note that the sentence meted upon him was manifestly harsh, excessive and exorbitant.

    iv. That he is a father of four children and the sole breadwinner.

    v. That he is remorseful and prays for a non-custodial sentence.

3. His submissions centred on sentence. He urged the court to relook into the sentence and substitute the same with a lesser punitive sentence; that he is remorseful and has learnt his lesson and vowed not to repeat such an offence; that he did not appreciate the crime and he informed the court that he shared the meat with members of the public; that he is the sole breadwinner and his family was left destitute since his wife is jobless; that he was a first offender and he prayed for a non- custodial sentence under Community Service Order or probation.

4. The Respondent's counsel in opposing the appeal filed written submissions. He noted that the first ground in the Appellant's petition of appeal raised an issue of conviction but also noted that the Appellant did not argue on this issue in his submissions. On the sentence, he submitted that the power of this court to interfere with the sentence is limited and can only be exercised if it is established that sentence is manifestly excessive in the circumstances of the case or that the trial court overlooked some material factor or took into account some wrong material or acted on a wrong principle of law. That even if this court feels that the sentence is excessive, harsh or exorbitant, these alone are not sufficient grounds for interfering with the discretion of the trial court unless any of the matters already stated is shown to exist. Reliance was placed on the case of S vs Malgas 2001 (1) SACR 469 (SCA), Shadrack Kipkoech Kogo vs R Eldoret Criminal Appeal No. 253 of 2003 and Bernard Kimani Gacheru vs Republic (2000) eKLR. It is submitted that the Appellant did not demonstrate any of the above reasons for this court to interfere with the sentence.

5. It is urged that the court considered the Appellant's mitigation and the fact that cases of such nature were rampant in that area. The court also considered the principles of sentencing and observed that retribution and deterrence were necessary in the circumstances.

6. This is an appeal against the sentence only. I have considered the submissions by the parties. I have also read through the record of the trial court.

7. The Appellant was accused of contravening the provisions of Section 98(1) of the *Wildlife Conservation and Management Act*, 2013 which provides thus;

> " Any person who, without permit or exemption issued under this Act, deals in the carcass or meat of any wildlife species commits an offence and shall be liable on conviction, to imprisonment for a term of not less than three years."

8. The Appellant was sentence to 3years imprisonment. This is the sentence provided in law.

9. The principles guiding interference with sentencing by an appellate Court were properly, in my view, set out in S vs. Malgas 2001 (1) SACR 469 (SCA) at para 12 where it was held that:

> " A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate"

10. Similarly, in Mokela vs. The State (135/11) [2011] ZASCA 166, the Supreme Court of South Africa held that:

> " It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served."

11. Closer home, the Court of Appeal of East Africa in the case of Ogolla s/o Owuor vs. Republic, [1954] EACA 270, pronounced itself on this issue as follows:-

> " The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."

12. Where the sentence is manifestly excessive, an appellate court assumes the jurisdiction to interfere with the sentence of a trial court. (See R - v- Shershowsky (1912) CCA 28TLR 263).

13. In our jurisdiction the law has been settled by the Court of Appeal in the case of Shadrack Kipkoech Kogo - vs - R. Eldoret Criminal Appeal No.253 of 2003 where the court stated;

> " sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka – vs- R. (1989 KLR 306)"

14. A reading of the record of the trial court, and specifically the court's sentiments at sentencing stage which were eloquently summed up in an elaborate ruling shows that the court considered the applicable law, the circumstances of the case and the Appellant's mitigation. In line with the law as summed up in the precedents above, no infraction whatsoever is established by the Appellant that would warrant this court to interfere with the sentence.

15. The upshot is that the appeal herein lacks merit and is dismissed.

DATED SIGNED AND DELIVERED THIS 4TH DAY OF JUNE, 2025.

A.K. NDUNG'U

JUDGE