



**Kyengo v Republic (Criminal Appeal E018 of 2023)
[2024] KEHC 17204 (KLR) (21 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 17204 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E018 OF 2023
TM MATHEKA, J
JUNE 21, 2024**

BETWEEN

JOSEPH MUTUKU KYENGO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment of Hon. B.N. Ireri –
SPM Makindu CMCR E478 of 2022 delivered on 11/01/2023)*

JUDGMENT

1. The appellant Joseph Mutuku Kyengo was charged together with Patrick Musumba Mule in Makindu MCCRC E478/22 with the following charges:

Count 1: Entering into a protected area contrary to section 102(1) (a) of the [Wildlife Conservation and Management Act](#) 2013. Particulars were that on the 4th day of July 2020 at around 0200hrs in Komboyo airstrip area inside Tsavo West National Park within Makueni County the accused persons were found together with another not in court to have entered the said park without a permit at GPS coordinates 37m 0401838 UTM 9695073 from the Director General of Kenya Wildlife Service.

Count II: Conveying weapons into a protected area contrary to section 102 (F) of the [Wildlife Conservation and Management Act](#) 2013 and the particulars were that on the 4th day of July 2022 at around 0200 hrs at Komboyo airstrip area within Tsavo West National Park in Makueni County the accused persons were found together with another not in court to have conveyed weapons namely slashers (2), knives (2), 4 torches one with a siren (hunting apparatus) without authorization.

Count III: Killing a Wildlife Species without a permit contrary to section 95(a) of the [Wildlife Conservation and Management Act](#) 2013. Particulars being that on the 4th day



of July 2022 at Komboyo airstrip area inside Tsavo West National Park within Makueni County the accused persons were found together with another not in court to have killed a wildlife species namely Dik dik (five) without a permit from the Director General KWS.

Count IV: Dealing in the Carcass of a wildlife species contrary to section 98(1) of the *Wildlife Conservation and Management Act* 2013. The particulars were that on the 4th day of July 2022 at around 0200 hrs at Komboyo airstrip area inside Tsavo West National Park within Makueni county the accused persons were found together with another not in court dealing in the carcass of wildlife species namely Dik dik (five) carcass without authorization from the Director General KWS.

2. Both pleaded guilty to the charge on 5/7/2022.
3. The facts of the case were not ready as the State did not have “the report” or “the exhibit”. The matter was mentioned on 15/8/22, 29/8/22, 17/10/22 when the charge sheet was amended for the date of the offence to read 21/07/2020. Further mentions were on 24/10/2022, 14/11/2022, 21/11/2022, 19/11/2022 and 20/12/2022.
4. On 29/12/2022 is when the facts were read to the accused persons –these were stated by the learned prosecutor thus;

On 03/07/2022 at 2pm KWS officers of Tsavo National Park Dennis Kipkigon got information of suspects who were hunting wild animals. They laid a trap near Komboyo airstrip and they were headed to Komboyo. On 04/07/2022 at 2:00 am they saw a spot light torch and inside the park where they spotted the accused persons inside the park on GPS coordinates 37M040138UTM 9695073 who had luggage’s and they took possession of the luggage and the accused had no permit from KWS director. They were found in possession of 5 dik dik carcasses. They had 4 torches, siren and the two were arrested and charged. I produce the photographs of the dik dik carcass exhibit 1(a) (b) and the certificate as exhibit 2. The four torches as exhibit 3, 2 slasher exhibit 2, knives exhibit 5 and 5 sacs as exhibit 6 and inventory as exhibit 7. The accused were arrested and charged. Certificate of destruction exhibit 8 and report exhibit 9(a) (b).

5. The record shows that the accused pleaded guilty to the facts and were each convicted on their own plea of guilty. The prosecutor stated that they were first offenders. They pleaded for leniency.
6. The court sought a pre-sentence – on 11/01/2023 the court stated –

I have considered the pre-sentence report. The accused persons are depicted to be threats to wildlife conservation. ICtherefore, find non-custodial sentence inappropriate in the circumstances. Therefore: In counts I and II each accused is fined Ksh. 200,000/= in default 2 years in jail in each. In count III each accused is sentenced to five years in jail each.

In count IV each accused persons is sentenced to 3 years in jail.

7. Aggrieved Joseph Mutuku Kyengo of filed this appeal which was consolidated with that of Patrick Musumba Mule against the sentence a total of 12 years’ imprisonment. He submits as follows: -
 1. That the court did not consider that he was a 1st offender and that he was persuaded by his co accused to visit a protected area.
 2. That he pleaded guilty because he was caught red handed by KWS officers.



3. That he was the sole bread winner of his family therefore his imprisonment was causing them untold suffering – yet he was supporting them by doing casual jobs.
8. He seeks non-custodial sentence/reduced sentence. That he is HIV +ve and on medication.
9. The Prosecution submitted on the following issues –
 2. Whether custodial sentence is proper in this case
 3. Whether the jail term is fair and proportionate
 4. Whether this court should review or vary the sentence.
10. Citing the provisions of the *Wildlife Conservation and Management Act* 2013, the Prosecution submits that the sentences meted were legal as they are provided by the statute. Secondly that the court considered the pre-sentence reports and found the appellant was a risk to wildlife and his release on non-custodial sentence would be anathema as the appellant posed a threat to wildlife conservation. It was argued that the sentence was in line with guideline 7:19(5) of the Sentencing Guidelines:

“... where there is evidence that the offender is likely to pose a threat to the community, a non-custodial sentence may not be the most appropriate.
11. It was further submitted that the sentences were fair and proportionate. Reliance was made on Benson Nkaramata Sakita vs- Republic, Republic –vs- Howells 1999 1 ALL ER. 50 which emphasized the need to find a balance between the interests of an accused person and public interest. The court held as follows:

“... courts should always bear in mind that criminal sentences are in almost every case intended to protect the public, whether by punishing the offender or reforming him and others, or all of these things. Courts cannot and should not be unmindful of the importance public dimension of criminal sentencing and the importance of maintaining public confidence in the sentencing system ...”.

That the court was also guided by paragraph 23.4, 23.9(1) and 23.9(2) of the Sentencing Policy Guidelines.
12. It was argued that there was no basis for this court to review the sentences as the trial court had acted in exercise of its judicial discretion and that this court can only interfere with the sentence if it is illegal, manifestly oppressive. The prosecution relied on Benson N, Karamata Sakita –vs- Republic (supra)

“The principles upon which appellate court will act in exercising of its jurisdiction to review sentences are firmly established .. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless as was said in James –vs- Republic 19 EACA 147, “it is evident that the judge has acted upon some wrong principles or over looked some material factor. To this, we would also add a third criteria, namely that the sentence is manifestly excessive in view of the circumstances of the case”.
13. The Wildlife Conservation & Management Act Cap 376 is an Act of Parliament to provide for the protection, conservation, sustainable use and management of wildlife in Kenya and for connected purposes. It came into force on 10/1/2014.



14. I have looked at the provisions of the law upon which the sentence were meted – they provide for minimum sentences in the following terms: -

Section 95 states that a person found guilty of an offence under that section shall be liable to a fine of not less than Kshs.1 million or term of imprisonment of not less than 12 months or to both fine and imprisonment. Section 98(3) states that upon conviction – a person is liable to a fine of Kshs.1 million or a term of 12 months imprisonment or both fine and imprisonment.

Section 102(I)(h) provides that a person upon conviction is liable to a fine of not less than Ksh. 200,000/= or to imprisonment of not less than 2 years' imprisonment or to such fine and imprisonment.

15. Upon conviction, the prosecution told the court that the accused were 1st offenders.
16. The charges were all derived from the one incident where the appellants were found within the conservation area in possession of 5 carcasses of dik diks while in possession of some weapons. That fact of itself is not contested. Hence in sentencing one cannot ignore the fact that all the five counts were derived from one incident.
17. Count 1 and 2 fall under section 102 of the Act – They are about the entry into the park while bearing arms. This appears to me to be the equivalent of the *Penal Code* offence of preparation to commit a felony. By entering the park while bearing arms is an indication that the person has the intention of harming or killing wild life. That is the point I am making here.
18. However, in this case the appellants other than just entering the park while bearing arms, he completed the offence by killing five dik diks as prohibited by sections 95(a) and 98(1). The Act appears to create a difference, or is it our interpretation: that it does not matter. When you enter the park bearing arms, then you use the same arms to kill wildlife, you will be charged with all these offences.
19. I note with concern the disparity in the default sentences under section 95 – offences relating to trophies and trophy dealing and section 98 – hunting the bush meat trade – the fine is Kshs.1000000 in default 12 months' imprisonment, while under section 102 – breach of protected area regulations – the fine is 200,000/= in default 2 years' imprisonment – while under section 98(1) – there is a 3-year term of imprisonment without fine.
20. It is also noteworthy that these are minimum sentences that do not allow the trial court to take into consideration the peculiar circumstances of the offence, and the offender, the impact on the victim hence clearly tying up the hands of the Judicial Officer in the determination of the sentence.
21. The justice question here is whether these sentences – were intended to meet the principles of sentencing while balancing the public interest/whether they were meant to be merely punitive. This is because it is rare – that any of the accused persons found guilty of these offences can afford the fines and our prison (Makueni) has a sizeable population of senior citizens serving these default sentences – among younger inmates and a number of them for the offence of entry or being found inside the park.
22. Looking at the general principles set out at section 4 of the Act Cap 376

General principles

The implementation of this Act shall be guided by the following principles—

- a. Wildlife conservation and management shall be devolved, wherever possible and appropriate to those owners and managers of land where wildlife occurs;



- b. Conservation and management of wildlife shall entail effective public participation;
 - c. Wherever possible, the conservation and management of wildlife shall be encouraged using an ecosystem approach;
 - d. Wildlife conservation and management shall be encouraged and recognized as a form of land use on public, community and private land;
 - e. Benefits of wildlife conservation shall be derived by the land user in order to offset costs and to ensure the value and management of wildlife do not decline;
 - f. Wildlife conservation and management shall be exercised in accordance with the principles of sustainable utilization to meet the benefits of present and future generations;
 - g. Benefits accruing from wildlife conservation and management shall be enjoyed and equitably shared by the people of Kenya.
23. It is evident that there is a justice gap – that requires an approach that not only includes imprisonment when offences are committed but sentences that enable the perpetrators especially of the minor forms of these offences to learn from their mistakes and to embrace wildlife conservation. When people who must own their heritage, are involved in its protection understand that to conserve the same is to preserve their own lives, and those of generations to come, they too will protect with their own lives. We must avoid at all costs the situation where it would appear that we are preserving this for others, to come and see and earn us foreign exchange. It must go beyond that and punishment alone, however severe, cannot inculcate the values that our Constitution guides us to, at Article 10, and as encompassed in its preamble with regard to our heritage.
24. This law provides for Community Wildlife Conservation Committees whose functions are set out at Vs.19 ...shall be to—
- a. review and recommend payment of compensation on claims resulting from loss or damage caused by wildlife;
 - b. develop and implement, in collaboration with the Service and Community Wildlife Associations, mechanisms for mitigation of human wildlife conflict;
 - c. bring together relevant stakeholders to harness participation in conservation and management programmes of wildlife; and
 - d. perform such other functions as the Service may require or delegate to it.
25. In the spirit of Article 159(2) (c) of *the Constitution*, on Alternative Justice System Mechanisms, these committees could be empowered to deal with some of the cases that end up in court and as part of (c) bringing together relevant stakeholders to harness participation in conservation and management programmes of wildlife.
26. That said it appears to me that the charging of the appellants with the numerous offences arising from one specific incident, while within their discretion, was an over kill on the part of the Prosecution.
27. To begin with, the blind application of mandatory minimum sentences is frowned upon by our jurisprudence as sentences that cause injustice – they give no room to the trial court to deal with each case according to the circumstances – there is no difference between a first offender and a repeat



offender, who causes great harm and one who causes little harm – one who merely enters the park and one who enters and causes harm and destruction.

28. Section 98 (1) provides for a term of not less than 3 years’ jail term for a person who deals in the carcass or meat of any wildlife species without permit. The term Deal is defined at section 3 of the Act.

“deal” means—

- a. to sell, purchase, distribute, barter, give, receive, administer, supply, or otherwise in any manner deal with a trophy or live species;
- b. to cut, carve, polish, preserve, clean, mount or otherwise prepare a trophy or live species;
- (c) to transport or convey a trophy or live species;
- d. to be in possession of any trophy or live species with intent to supply to another; or
- e. to do or offer to do any act preparatory to, in furtherance of, or for the purpose of, an act specified above;

29. The minimal facts merely reveal that the appellants were found within the park in possession of five carcasses of dik dik. There is no fact that brings the appellant within the purview of the definition of dealing; – nothing in the facts establishes the offence of dealing as defined by law. It is my view that that charge was not established by the facts and when the appellant pleaded guilty to the facts – the trial court ought to have noted that the same did not support the charge contrary to section 98(1). Hence the conviction and sentence on this one is unsustainable, and is hereby quashed and set aside respectively.

30. Section 95 of killing the wildlife species, 102 of entering into the park carrying weapons, were established by the facts. On count III – the minimum sentence is a fine of Kshs.1000,000/= in default 12 months’ imprisonment. There was no justification for the sentence of five years’ imprisonment for a first offender on the charge under s. 95.

31. With respect to the offences under s. 102 it is evident that whatever the appellant was charged with emanated from the same action. He entered the park while conveying or in possession of weapons

32. It is my considered view that ultimately the appeal on sentence must succeed.

33. In that event the sentences are revised as follows:

For count I: the fine of Ksh 200,000/= in default two years’ imprisonment For count II: The fine of 200,000/= in default two years’ imprisonment

For count III – the fine of Kshs.1000,000/= in default 12 months’ imprisonment. Default sentences to run consecutively with effect from 4/7/2022.

DATED, SIGNED AND DELIVERED IN OPEN COURT ON 21/6/2024

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA

JUDGE

Present: Appellant, Mr. Kazungu, Prosecutor, Ms. Elizabeth Court Administrator paragraphing distorted by the system



THE JUDICIARY OF KENYA.

MAKUENI HIGH COURT

HIGH COURT DIV

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