



REPUBLIC OF KENYA



**Mazera v Republic (Criminal Appeal E012 of 2022)
[2023] KEHC 2459 (KLR) (17 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2459 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E012 OF 2022
FG MUGAMBI, J
MARCH 17, 2023**

BETWEEN

MDOE NDURYA MAZERA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the decision of Hon. S. Ogot, SRM dated 24th November 2021 in Criminal Case No 25 of 2020 at the Senior Resident Magistrates Court at Msambweni)

JUDGMENT

1. Mdoe Ndurya Mazera, the appellant herein was charged with the following offences. Count I with the offence of dealing in wildlife trophies of an endangered species without a permit or other lawful exemptions contrary to section 92(2) read with section 105(1)(a) of the [Wildlife and Conservation and Management Act](#), 2013. The particulars of the charge were that on January 17, 2020 at about 1930hrs at Kibaoni in Lungalunga sub-county within Kwale county he was found dealing in wildlife trophies namely 89 scales of pangolins with a street value of Kshs 250,000/= being trophies of an endangered species listed under [CITES](#) (Appendix 1) concealed in a white sack with green stripes and ferried on a motor cycle registration [particulars withheld] Haojin make, red in colour without a permit or other lawful exemption under the [Act](#).
2. On count II he was charged with being in possession of wildlife trophies of an endangered species without a permit or other lawful exemption contrary to section 92(4) as read with section 105(1)(a) of the [Wildlife and Conservation and Management Act](#), 2013. The particulars of the offence were that on the January 17, 2020 at around 1930hrs at at Kibaoni in Lungalunga sub-county within Kwale county he was found in possession of wildlife trophies namely 89 scales of pangolins with a street value of Kshs 250,000/= being trophies of an endangered species listed under [CITES](#) Appendix 1 concealed in a white sack with green stripes and ferried on a motor cycle registration [particulars withheld] Haojin make, red in colour without a permit or other lawful exemption under the [Act](#).



3. During trial the prosecution called three (3) witnesses. PW1, an officer from KWS Mombasa attached to special unit performing wildlife crime duties was part of the team that laid an ambush on the appellant by posing as interested buyers. The appellant fell for the bait and met the officers to transact. The witness stated that he was in the team that seized the pangolin pieces and also saw the motorcycle that was believed to have been used by the appellant. PW1 signed the inventory form after the seizure together with other witnesses and the accused person.
4. PW2 was also an officer of KWS Mombasa. She posed as the buyer in the transaction. The appellant got to the agreed location at 7:30pm aboard a motor cycle. He walked to PW2 and asked if she was waiting for someone and then went on to confirm that he was the one and they had a conversation. He picked the pangolin scales from the motor cycle and got into the car where PW2 was, allegedly to negotiate the price. PW2 opened the sack and saw the scales. They agreed on a price and PW2 signaled the KWS officers who waylaid the appellant in the process of the transaction. PW2 then introduced herself as a KWS officer. She signed the inventory alongside PW1 and the accused and arrested the appellant.
5. PW3, a KWS ranger attached at Lunga Lunga was the investigating officer in the case. He was in the sting operation as well and in an unmarked vehicle close to the scene. When PW2 signaled that it was time to take down the appellant, he and others introduced themselves to the appellant as KWS officers. They asked the appellant what he was carrying. They opened the bag and saw the pangolin scales. The appellant did not have a permit and he was arrested. PW3 signed the inventory.
6. The appellant was put to his defence. It was his case that he was a bodaboda rider. He stated that on that day, he had ferried a passenger on the motorbike who had luggage. The passenger ordered him to stop next to the vehicle where PW2 was, and take some luggage to the people in the car and he did. He states that he got arrested when he delivered the luggage.
7. The trial court found the appellant guilty on the two counts and sentenced him to serve seven (7) years on the first count and on the second count, he was sentenced to a fine of Kshs 3,000,000/= or in default, to serve five (5) years.
8. The appellants appeal on the sentence is premised on two grounds as stated in his amended grounds of appeal filed on January 20, 2023. The grounds are that:
 - i. The learned trial magistrate erred in law and fact by failing to see that the offences were committed in the same transaction.
 - ii. The learned trial magistrate erred in law and fact by failing to consider that the sentences ought to have ran concurrently.
9. As the first appellate court it is the duty of this court to analyze and re-evaluate the evidence which was before the trial court and come to its independent conclusions on that evidence without overlooking the conclusions of the trial court. (See *Okeno v. Republic* [1972] EA. 32). Against this background, I have considered and reassessed the evidence by both parties, before the trial court. I have also taken into account the written submissions and authorities cited by both in the appeal. The gist of this appeal is whether the sentences meted on the appellant ought to run concurrently or consecutively.
10. For purposes of count I, section 92(2) provides as follows:

A person who, without permit or exemption issued under this Act, deals in a wildlife trophy, of any critically endangered or endangered species as specified in the Sixth Schedule or listed under *CITES* Appendix I, commits an offence and shall be liable upon conviction to a term of imprisonment of not less than seven years.



And for purposes of count II, section 92(4) provides that:

Any person without permit or exemption issued under this Act is in possession of any live wildlife species or trophy of any critically endangered or endangered species as specified in the Sixth Schedule or listed under *CITES* Appendix I, commits an offence and shall be liable upon conviction to a fine of not less than three million shillings or a term of imprisonment of not less than five years or both such fine and imprisonment.

11. In the case of *Peter Mbugua Kabui v Republic* [2016] eKLR the Court of Appeal considered the place of concurrent and consecutive sentences. Citing with approval from the case of *Sawedi Mukasa s/o Abdulla Aligwaisa* [1946] 13 EACA 97, the then Court of Appeal for Eastern Africa in a judgment read by Sir Joseph Sheridan stated that the practice is where a person commits more than one offence at the same time and in the same transaction, save in very exceptional circumstances, to impose concurrent sentences. That is still good practice.
12. The court of appeal went on to state that

As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment.
13. I have also read the learned trial magistrate's position on the mandatory minimum sentences provided for in the law for the two counts. Before sentencing the appellant, the learned magistrate stated as follows:

... the provisions of these sections are couched in mandatory terms. Section 92(2) states that a person guilty of that offence shall be liable to imprisonment for a term of not less than seven (7) years. Meaning that a person convicted under this section must be imprisoned for a term of seven (7) years or more; nothing less. There is no provision for a fine either or any other form of punishment. For this reason, the accused is sentenced to seven (7) years imprisonment on count I.
14. On count II the learned trial magistrate observed as follows:

The law in this case provides for options for an accused person and allows the option of a fine or imprisonment, but sets the minimum sentence and fine meaning that a court is bound at the very least to imprison a convict under this section to prison for a term of 5 years or get him to pay a minimum fine of Kshs 3,000,000/= or both. Nothing less than this will do.
15. With respect, the jurisprudence on discretion in sentencing is now settled. Provisions of the law that purport to take away the court's discretion in sentencing have been declared unconstitutional. The case before this court was not an exception. The learned trial magistrate based her sentence on the mandatory minimum sentence provided for in the statute books. These blanket sentences leave no room for the court to consider specific circumstances. I find that the sentence was excessively harsh under the circumstances. The basis of the sentences may have caused an injustice on the appellant.



16. In the case of *Benard Kimani Gacheru v Republic* (2002) eKLR, the Court of Appeal dealt with the issue of powers of the High Court on the issue of revision of sentences passed by the lower court. In the case of Court of Appeal held;

“It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless 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. Even if the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence, unless anyone of the matters already stated is shown to exist.”

17. The upshot of this is that I allow the appeal on sentencing and sentence the appellant as follows:

Count No. 1: The Appellant shall serve 3 years in jail.

Count No. 2: The Appellant shall serve 3 years in jail.

The sentences shall run concurrently.

**SIGNED, DATED AND DELIVERED AT NAIROBI IN OPEN COURT (VIRTUALLY) THIS 17TH
DAY OF MARCH 2023**

F. MUGAMBI

JUDGE

