



REPUBLIC OF KENYA



**Republic v Kamau & another (Revision Case E022 of 2023)
[2023] KEHC 21599 (KLR) (19 June 2023) (Revision)**

Neutral citation: [2023] KEHC 21599 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
REVISION CASE E022 OF 2023
DO CHEPKWONY, J
JUNE 19, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

JUDITH WANGUI KAMAU 1ST RESPONDENT

JOSEPH KAMAU WANJAU 2ND RESPONDENT

*(Application for revision of the decision of the Hon Boaz Ombewa,
SPM vide Kahawa Chief Magistrate's Court Criminal Case No
E040 of 2022, R –vs- Judith Wangui Kamau & Joseph Kamau.)*

REVISION

1. The Prosecution filed an application for revision dated February 9, 2023 pursuant to Sections 362 and 364, both of the *Criminal Procedure Code*. The application is supported by the grounds on its face and the Supporting Affidavit of No 231794 CI Charles Inoti sworn on February 9, 2023.
2. The prosecution seeks revision of the decision of the Hon Boaz Ombewa, SPM vide Kahawa Chief Magistrate's Court Criminal Case No E040 of 2022, R v Judith Wangui Kamau & Joseph Kamau Wanjau which issued on January 9, 2023.
3. According to the prosecution, the trial court released wildlife trophies namely 62 sacks of aloe weighing approximately five tones and valued at Kshs.4,500,000/= to the Respondents who had been charged, convicted and sentenced for 12 months on probation for the offence of Dealing with Wildlife Trophies contrary to Section 95(b) of the *Wildlife Conservation and Management Act, 2013* as amended in 2019.
4. The prosecution holds that when the sentence was passed by the trial court, the prosecution Counsel made an application for forfeiture of the wildlife trophies to the state. Instead, the court issued an



order for the release of the wildlife trophies to the Respondent which is contrary to Section 105 of the *Wildlife Conservation and Management Act, 2013*. The prosecution argues that the trial court erred in holding that the Respondents had used their money to purchase the trophy and that it was not illegal to possess them despite having convicted them for dealing with the wildlife trophies.

5. It is the prosecution's contention that the Respondents did not produce any license to give the trial court the liberty to release the wildlife trophies back to the Respondents and therefore the application for revision should be allowed.
6. The Application has been opposed through a Notice of Preliminary Objection dated March 5, 2023 and the Replying Affidavits of Joseph Kamau Wanjau and Judith Wangui Kamau both sworn on March 5, 2023.
7. The Respondents argue that the application is ill-advised and lack merits as it offends the mandatory provisions of Section 364 (5) of the Criminal Procedure Code. According to the Respondents the legal recourse for the application was to file an appeal under Section 347 (2) of the *Criminal Procedure Code*.
8. The Respondents argue that the court considered the provisions of Section 105(1) of the *Wildlife Conservation and Management Act* on forfeiture which is only permissive and not mandatory. It is their contention that the trial court exercised its discretion and issued a release order after ascertaining that the wildlife trophies are legal properties of the accused persons and there was no reason of forfeiting them.
9. The Respondents argue that they are prejudiced by lack of release of their wildlife trophies which they acquired legally and they ought to be released to them. They therefore seek to have the application dismissed.
10. On June 14, 2023, the court directed parties to canvass the application by way of written submissions. The parties have filed their respective submissions in support of their position. The Applicant's submissions are dated June 13, 2023, while the Respondent's submissions are dated April 24, 2023. The court does not wish to reiterate the same but will be considered in the analysis and determination.

Analysis and Determination

11. A Notice of Preliminary Objection having been raised, it is pertinent that the same be addressed as it may have the effect of disposing off the application if it is found successful. The aspect of Preliminary Objection was discussed in the case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors* [1969] EA 696 which held:-

“----a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.

In the same case Sir Charles Newbold, P. stated:-

“ a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of Preliminary Objections does nothing but



unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

12. In this case, the argument raised in the Preliminary Objection is whether the proper approach to this court should have been through an appeal or a revision.
13. The powers of revision are donated to court by Sections 362 and 364 of the [Criminal Procedure Code](#). Section 362 provides that:-

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“(362) Power of High Court to call for records

The High Court may call for 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”.

Section 364 thus provides as follows:-

“[364]. Powers of High Court on revision

- (1) 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 its 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 sections 354, 357 and 358, and may enhance the sentence;
 - (b) in the case of any other order other than an order of acquittal, alter or reverse the order.
 - (c) in proceedings under Section 203 or 296(2) of the [Penal Code](#), the [Prevention of Terrorism Act](#), the [Narcotic Drugs and Psychotropic Substances \(Control\) Act](#), the [Prevention of Organized Crimes Act](#), the [Proceeds of Crime and Anti-Money Laundering Act](#), the [Sexual Offences Act](#) and the [Counter-Trafficking in Persons Act](#), where the subordinate court has granted bail to an accused person, and the Director of Public Prosecution has indicated his intention to apply for review of the order of the court, the order of the subordinate court may be stayed for a period not exceeding fourteen days pending the filing of the application for review.
- (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:

Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.



- (3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.
- (4) Nothing in this Section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.
- (5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.

14. The distinction of the jurisdiction of appeals and revision was discussed in the case of *Republic v Samuel Gathuo Kamau* [2016] eKLR, where the Court held:-

[15]. "... supervisory jurisdiction may be exercised as may be provided by law – by way of appeal, revision, etc. It does not include any perceived power to make a decision on behalf of a subordinate court which that court ought to make. In the case of appeals, the supervisory power is exercised in respect to conviction, sentence, acquittal (Sections 347, 348 and 348A of the *Criminal Procedure Code*). As to revision, the supervisory jurisdiction is exercised in respect to findings, sentences, orders and regularity of any proceedings. See Article 165(7) of *the Constitution* and Sections 362 and 364 of the Criminal Procedure Code."

15. The distinction was also discussed in the case of *Republic v James Kiarie Mutungei* [2017] eKLR which stated,

"The rationale of the High Court as a revisionary authority can be initiated by an aggrieved party, or suo moto made by the court itself, call for the record relating to the order passed or proceedings in order to satisfy itself as to the legality, or propriety, correctness of the order in question. The scope of the revision therefore is more restrictive in comparison with the appellate jurisdiction which requires the high court to rehear the case and evaluate the evidence in totality by the lower court to come with a decision on merits ... In considering similar provisions under the Indian Criminal Procedure Code ... the Supreme Court in the case of *Sriraja Lakshmi Dyeing Works -vs- Pangaswamy Chettair* (1980) 4 SCC 259 said as follows:

"The conference of revisional jurisdiction is generally for the purpose of keeping tribunal subordinate to the revising tribunal within the bounds of their authority to make them act according to law, according to the procedure established by law and according to well defined principles of justice. Revisional jurisdiction as ordinarily understood with reference to our statutes is always included in appellate jurisdiction but not vice versa."

16. Guided by the law and the findings in the decision cited above, the court finds that the approach to the court through a revision as opposed to an appeal in the instant case is proper and lawful as the court is only required to consider the legality, correctness and propriety of any finding, sentence and subsequent orders or irregularity of the proceedings. It is not required to analyse or re-evaluate and determine the case to reach an independent decision as contemplated in the case of appeals. In view of this, this Court finds that the Preliminary Objection as raised lacks merit and the same is dismissed.



17. Moving back to the application at hand, it is not in dispute that the Respondents were charged, tried and convicted for the offence of Dealing with Wildlife Trophies contrary to Section 95(b) of the [Wildlife Conservation and Management Act, 2013](#) as amended in 2019 which states:-

“Any person who, without a permit or exemption granted under this Act in relation to a species not specified under Section 92

- a) ...
- b) deals in a wildlife trophy,
- c)) ...
- d) ...
- e) manufactures any item from a wildlife trophy , commits an offence and shall be liable on conviction to a fine of not less than one million shillings or imprisonment for a term of not less than 12 months or to both such imprisonment and fine.”

18. It is also not in contention that the law on forfeiture is enshrined under Section 105 of the [Wildlife Conservation and Management Act, 2013](#) which states:-

105. (1) The court before which a person is charged for an offence under this Act or any regulations made there-under may, in addition to any other order –

- (a) upon the conviction of the accused; or
 - (b) if it is satisfied that an offence was committed notwithstanding that no person has been convicted of an offence, order that the wildlife trophy, motor vehicle, equipment and appliance, livestock or other thing by means whereof the offence concerned was committed or which was used in the commission of the offence be forfeited to the Service and be disposed of as the court may direct.
- (2) In making the order of forfeiture under subsection (1) the court may also order that the cost of disposing of the substance, motor vehicle, equipment, appliance, livestock or any other thing provided for in that subsection be borne by the person convicted there-under.
- (3) The court may further order that any licence, permit or any authorization given under this Act, and to which the offence relates, be cancelled.

19. What is in contention here is:-

- a. Whether the trial Court’s order of releasing the Aloe (wildlife trophy), the subject matter herein to the Respondents was illegal, incorrect, or as a result of irregular proceedings; or
- b. Whether the trial Court was well within its discretionary powers to order for the release of the said Aloe.

20. Indeed, the provisions of Section 105(1) of the [Wildlife Conservation and Management Act, 2013](#) by the use of the word “may” are clearly permissive in nature, by which a Magistrate/Judge may be at liberty to exercise discretion by either ordering for forfeiture or release of property or money. This



is because a Magistrate and Judge are endowed with vast discretionary powers as to the sentence they select to mete out in each case.

21. However, in exercise of these powers in deciding the appropriate sentence to pass against a person, a Magistrate or Judge should be guided by the facts of the case and the general principles provided for by the statute and case law. More importantly, apart from passing sentence that reflects the crime that was committed and its proportionality to the seriousness of the offence, a Magistrate or Judge should bear in mind the basis of what the punishment imposed will achieve in future, that is to say, there must be something good that comes out of the punishment. This is based on what the aims of sentencing are, which is:-
 - a. To punish the offender (retribution).
 - b. Reduce crime by preventing the offender from committing more crimes and discouraging others from committing similar offences (deterrence)
 - c. Reform and rehabilitate offenders behaviour to prevent future crime.
 - d. Protect the public from the offender and from the risk of more crime (incapacitation).
 - e. Make the offender give something back (compensation or restorative justice (reparative)).
22. In the instant case, the Applicant found faults in the order by the trial Magistrate of releasing Wildlife Trophies namely 62 sacks of aloe to the Respondents when they had been convicted and sentenced for an offence of dealing with the same contrary to the law as provided for under Section 95(b) of the [Wildlife Conservation and Management Act, 2013](#) as amended in 2019. According to the Respondent, the provisions of Section 105(1) of the [Wildlife Conservation and Management Act, 2013](#) with respect to the issuance of either an order of forfeiture or release are permissive and not mandatory, hence the trial Court has discretion to make appropriate orders based on the material before it and there is nothing illegal, improper or incorrect in the said orders.
23. Forfeiture is defined as “the loss of property or money because of a breach of a legal obligation”. (see [Merrian Webster Dictionary](#)). The [Cambridge Dictionary](#) defines ‘forfeiture’ as “a loss of rights or property or money especially as a result of breaching a legal agreement”.
24. The definition of forfeiture in The Legal Information Institute Website (<https://www.law.cornell.edu/wex>) defines forfeiture as “loss of a right , privilege, or property without compensation as a consequence of violating the law, breaking a legal obligation, failing to perform a contractual obligation or condition or neglecting a legal duty”.
25. From all the definitions, forfeiture is a penalty for doing something wrong, hence it is part of sentence that is meted against an accused and is limited to property interests of the accused including any proceeds earned from an accused’s illegal activities (a remedy in personam)
26. According to The United States Department of Justice, ‘forfeiture’ is a critical legal tool that serves a number of compelling law enforcement purposes. Asset forfeiture is designed to deprive criminals of the proceeds of a crime, to break the financial backbone of organized criminals syndicates and drug cartels and to recover property that may be viewed to compensate victims of crime and deter crime”.
27. The aforementioned description of what forfeiture and its objectives are is what inspired the amendment of the [Wildlife Conservation and Management Act, 2013](#) in 2019 and together with the other natural resources Management Legislation seek to ensure sustainable development and inform every citizen of his or her national duty in Wildlife Conservation and Management in Kenya through the penalties set out therein.



28. It had become an issue of great concern that those who deal in Wildlife Trophies do not do it to conserve or manage wildlife or nature, but to it for monetary benefit. Furthermore, apart from the fear of the possibility of driving our wildlife to extinction and ruining the ecosystem and habitats, the vice is also feared to involve criminal networks across the country, continent and world over. It is therefore in public interest and morality to eliminate such practice by employing stern deterrent measures (penalties) against such offenders.
29. In the instant case, it is not in dispute that the Respondents were arrested, charged, tried and convicted for dealing in wildlife trophies (aloe) without a licence or documents of exemption contrary to the law as was demonstrated by the prosecution. It therefore beats logic and purpose for the trial Court to have ordered the offending subject matter (the wildlife trophies) to be released to them for the reason that they used money to purchase the same and only lacked the export licence which they were ignorant of. For heavens sake, they had been convicted for having been found in possession of the wildlife trophies without a permit or exemption document, which is an offence prescribed under Section 96(b) of the *Wildlife Conservation and Management Act, 2013*, with no exceptions.
30. With due respect to the trial Court, this Court's view is that releasing the wildlife trophies to the Respondent after finding them guilty of being in possession of it without a permit or exemption amounts to sanitizing a crime and or condoning and perpetrating an illegality, hence defeats the purpose of sentencing in criminal proceedings. Infact, if this Court were to uphold the trial Court's order of releasing the wildlife trophies issued on January 9, 2023, it would open a Pandora box or floodgates of similar claims all over our courts against the governments' objective of ensuring its socio-economic structure is not undermined and exploited through illegal trade of its flora and fauna.
31. It is therefore this Court's finding that the trial Court's conviction of the respondents and then order for the release of the wildlife trophies to them was irregular and in appropriate. This Court then proceeds to revise the said release order of January 9, 2023 and substitute it with an order of forfeiture. And for avoidance of doubt, the following orders issue:-
- a. The order issued on January 9, 2023 by the trial Court releasing Wildlife Trophies namely 62 sacks of aloe weighing approximately five tonnes and valued at Kshs 4.5 Million to the Respondents in Kahawa Chief Magistrate's Court Criminal Case No E040 of 2022, R v Judith Wangui Kamau and Joseph Kamau Wanjau be and is hereby set aside.
 - b. The Wildlife Trophies namely 62 sacks of aloe weighing approximately five tonnes and valued at Kshs.4.5 Million be and are hereby forfeited to Kenya Wildlife Service.
 - c. No orders as to costs.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 19TH DAY OF JUNE , 2023.

D. O. CHEPKWONY

JUDGE

