Kipyemit v Republic (Criminal Appeal E010 of 2023)
[2023] KEHC 20277 (KLR) (20 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20277 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAHURURU

CRIMINAL APPEAL E010 OF 2023

CM KARIUKI, J

JULY 20, 2023

BETWEEN

ALEX YATICH KIPYEMIT ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Conviction and Sentence of Hon John L. Tamar, Senior Principal Magistrate in Maralal Senior Principal Magistrate's Criminal Case No. 61 of 2020)

JUDGMENT

1. The Appellant was charged with another offense of Dealing in endangered species contrary to sections 105 (a) and 105(b) of the *wildlife conservation and Management Act* No 47 of 2013, with particulars being that on the 12th day of February 2020 around 0200hrs at Lpus area along Wamba Maralal murram road in Samburu East Sub-County were jointly found transporting suspected endangered tree species namely East African Sandalwood (Osiris Lancholata) weighing approximately 1.2 tonnes with a street value of Ksh 4 million using a motor vehicle registration number KCU 228H make Toyota Land Cruiser cream in color permit from Director General Kenya Wildlife Service.

2. After the entire case concluded, the current Appellant and the accused in Count II were convicted and 17/5/2023, sentenced to serve 7 (seven) years imprisonment.

3. One John Leyiani Mereipie, convicted in count II, filed an Appeal at the High Court in Nyahururu vide High Court Criminal Appeal No E015/2022, and this court, after hearing the Appeal, found him guilty of possession under section 92(4) and being a lesser offense to dealing under section 92(4) of the *wildlife conservation and Management Act* No47 of 2013. It was thus substituted with the offense of dealing with possession thereof.

4. The court then convicted him, sentenced him to a mandatory fine of Ksh3 million, and in default to serve 5 (five) years imprisonment. Hence both Appellant and respondent submit that the present

Appellant, having been an accused in the same lower court file and having been sentenced to 7 years for a similar offense, the outcome of this Appeal may not be different from the other Appeal having been handled by the same Judge.

5. The record of the Nyahururu case High Court Criminal Appeal No E015/2022 shows that the appeal was heard, a finding made, and determination was as follows:

> " The court found that the ingredients of the offense of dealing the charge sheet were not proved beyond a reasonable doubt, but on the other hand, the offense of possession was proved to the required standard. This is in consonant with the definitions in the provisions cited in the statute under which the Appellant was charged. Thus, the consequence is whether the possession offense under section 92(4) is a lesser cognate offense than dealing under section 92(2).

Section 179 of the *Criminal Procedure Code* provides as follows:

> " 179.
>
> (1) When a person is charged with an offense consisting of several particulars, a combination of some only of which constitutes a complete minor offense, and the combination is proved. Still, the remaining particulars are not proved; he may be convicted of the minor offense, although he was not charged.
>
> (2) When a person is charged with an offense, and facts are proved which reduce it to a minor offense, he may be convicted of the minor offense although he was not charged with it.
>
> As is clear, section 179 of the Criminal Procedure Code empowers a court, in some particular special circumstances, to convict an accused person of an offense, even though he was not charged with that offense. The court contemplated by section 179 can be either the trial court or the appellate court.....The question is whether the special circumstances contemplated by section 179 existed to enable the court to convict the Appellant of an offense he was not charged with. An accused person charged with a major offense may be convicted of a minor offense if the main offense and the minor offense are cognate; that is to say, both are related or alike offenses of the same genus or species. To sustain such a conviction, the court must be satisfied with two things. First, the circumstances embodied in the major charge necessarily and, according to the definition of the offense imputed by the charge, constitute the minor offense. Secondly, the major charge has given the accused person notice of all the circumstances constituting the minor offense for which he is to be convicted. (See Robert Ndecho & Another v Rex (1950-51) EA 171 and Wachira S/O Njenga v Regina (1954) EA 398). Spry, J. explained the essence of the first consideration as follows in Ali Mohammed Hassani Mpanda v Republic [1963] EA 294 while construing the provision of the Tanzania Criminal Procedure Code equivalent to section 179 of the Kenya Criminal Procedure Code:
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> > Subsection (1) envisages a process of subtraction: the court considers all the essential ingredients of the offense charged, finds

> one or more not to have been proved, finds that the remaining ingredients include all the essential ingredients of a minor, cognate, offense (proved) and may then, in its discretion, convict of that offense. "That conclusion is reached at the judgment stage when requiring the accused person to plead afresh to the minor offense is impractical. It is a decision premised on the court's discretion based on the evidence adduced at the end of the trial." [Underlining mine].
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> The Appellant is found guilty of possession under section 92 (4) and being a lesser offense to dealing under Section 92 (2) of the Wildlife Conversation and Management Act No 47 of 2013; the court substitutes the offense of dealing with possession thereof.
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> On sentence, the Appellant is convicted and sentenced to a mandatory fine of Kshs—three million and serving five years imprisonment in default. This Appeal succeeds to that effect."

6. On 8/3/2023, the Judge at the Nanyuki High Court ordered the transfer of this Appeal to Nyahururu for hearing and determination after learning that this court had concluded the appeal of John Mereipie, a replica of the instant appeal.

7. I have perused the entire file record, the trial court proceedings, and this court record in HCCRA 15 of 2022 and find that as the Appellant in both matters acted in concert and committed the same offense, it is only fair same result in both appeals obtain in the circumstances as proposed by both appellant counsel and prosecuting counsel.

    i. The Appellant is found guilty of possession under section 92 (4) and being a lesser offense to dealing under Section 92 (2) of the Wildlife Conversation and Management Act No 47 of 2013; the court substitutes the offense of dealing with possession and convicts him thereof.

    ii. On sentence, the Appellant is sentenced to a mandatory fine of Kshs. three million and, in the alternative, to serve five years imprisonment in default. This Appeal succeeds to that effect.

DATED, SIGNED, AND DELIVERED AT NYAHURURU THIS 20TH DAY OF JULY 2023.

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CHARLES KARIUKI

JUDGE