



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL CASE NO. E006 OF 2020

(From original conviction and sentence in Cr. Case No. 305/2017 by Hon. O. Momanyi PM)

REPUBLIC.....PROSECUTOR

-VERSUS-

BENSON KIGEN KOECH.....ACCUSED

RULING

1. The court is moved via **Article 165 Constitution of Kenya and Section 362 Criminal Procedure Code** by State wide letter dated 19/11/2020 which is as follows;
2. *The Republic humbly requests that you call for the proceedings in court file **Nyahururu CMCR 305/2017; Republic v Benson Kigen Koech** for purposes of satisfying yourself as to the correctness, legality or propriety of the forfeiture order in regard to elephant tusks made by Hon. O. Momanyi, Senior Resident Magistrate in Court 4 through the judgment delivered on 13/07/2020 by Hon. J.H.S. Wanyanga, Senior Resident Magistrate.*
3. **The Application for revision is based on the following grounds;**
4. *That the accused person was charged with being in possession of Wildlife Trophy contrary to **Section 95 of the Wildlife Conservation Management Act, 2013.***
5. *That he faced a second count of dealing in Wildlife Trophy contrary to **Section 84(1) as read with Section 92 of the Wildlife Conservation and Management Act, 2013.***
6. *That the prosecution called five (5) witnesses and produced seven (7) exhibits in support of their case.*
7. *That a date for ruling on case to answer was set and the accused was put on his defence in both counts.*
8. *That the accused person was subsequently acquitted under **Section 215 Criminal Procedure Code** in both counts vide a judgment delivered on 13/07/2020.*
9. *That the Honourable Magistrate made a forfeiture order in regard to Exhibit 1B which was the elephant tusk and ordered that the elephant tusk which was released to Kenya Wildlife Service Nyahururu through the investigating officer be handed over to the National Museums of Kenya.*
10. *That the said order was improper as it offends the provisions of **Section 105 of the Wildlife Conservation and Management Act No. 47 of 2013** as the same is clear that wildlife trophies ought to be forfeited to Kenya Wildlife Service.*
11. *That the said forfeiture order should be revised or altered and be substituted with an order that Exhibit 1B which is an elephant tusk be forfeited to Kenya Wildlife Service for safe custody.*
12. *Reasons wherefore the prosecution requests this Honourable Court to call for the above lower court file and satisfy yourself as to the legality, propriety or correctness of the order of forfeiture in regard to the elephant tusks made therein.*
13. **Analysis and determination**
14. **Section 105 of the Wildlife Conservation and Management Act No. 47 of 2013 (1) stipulates that, 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.

15. The court, in *Republic vs. Samuel Gathuo Kamau [2016] eKLR*, considered the distinction between the two jurisdictions, where he said:

“... 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 (section 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.”

16. . In *Republic vs. James Kiarie Mutungei [2017] eKLR* added to the discussion on the distinction between the two by saying:

“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.”

17. The court in *Republic vs. John Wambua Munyao & 3 others [2018] eKLR*, weighed in on what criminal jurisdiction entails when it stated that:

“31. ... the powers of revision under section 362 of the Criminal Procedure Code are only to be invoked to enable this Court satisfy 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 subordinate court ...

18. the revisionary jurisdiction of the High Court should only be invoked where there are glaring acts or omissions but should not be a substitute for an appeal. In other words, parties should not argue an appeal under the guise of a revision ...”

19. After considering the constitutional and statutory provisions on appellate and revisionary powers of the High Court, as well the judicial pronouncements thereon, I take the view that an appeal is broader than a revision, and that a revision is subsumed in an appeal.

20. A person who approaches a court on revision is only asking the court to take a rather narrow look at the proceedings of the trial court where the focus ought to be on the regularity or propriety or correctness of the proceedings conducted or the decision arrived at. In other words, the challenge is more or less on the regularity or correctness or propriety of the process rather than on the merits the final determination of the trial court.

21. I have perused the trial court record and found that the Magistrate made a forfeiture order in regard to Exhibit 1B which was the elephant tusk and ordered that the elephant tusk which was released to Kenya Wildlife Service Nyahururu through the investigating officer be handed over to the National Museums of Kenya.

22. That the said order was improper as it offends the provisions of Section 105 of the Wildlife Conservation and Management Act No. 47 of 2013 as the same is clear that wildlife trophies ought to be forfeited to Kenya Wildlife Service.

1. Thus the said forfeiture order aforesaid is revised or altered and be substituted with an order that Exhibit 1B which is an elephant tusk be and is hereby forfeited to Kenya Wildlife Service for safe custody.

Dated, Signed and Delivered at NYAHURURU this 4th day of March, 2021.

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CHARLES KARIUKI

JUDGE

PRESENT:

Rugut – State Counsel

No appearance for Accused

Court Assistant - Henry