REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO. E012 OF 2020

(Appeal against conviction and sentence in Criminal Case No.

570/2018 of the Principal Magistrate's Court at Taveta: Hon. B. S. Khapoya on 18/12/2019)

ROBERT KISENGESE.....APPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

JUDGMENT

1. The Appellant, **ROBERT KISENGESE KIMII** was charged with the offence of being in possession of a wildlife trophy contrary to Section 95 as read with Section 105 of the Wildlife Conservation and Management Act 2013.

2. The particulars are that on 17/10/2018 at around 1200 hours at Taveta Airstrip in Taveta town within Taita Taveta County, he was found in possession of a wildlife trophy of a critically endangered species namely twelve pieces of pangolin scales and one piece of worked elephant tusk on motor cycle registration No. KMDK 960P without a permit.

3. On Count 2 he was charged with the offence of dealing in wildlife trophy contrary to Section 84(1) as read with Section 92 of the Wildlife Conservation and Management Act 2013. It is stated that on 17/10/2018 at around 1200 hours at Taveta Airstrip in Taveta town within Taita Taveta County, the accused person was found dealing in a wildlife trophy of a critically endangered species without a permit.

4. The Appellant was convicted and sentenced to serve a jail term of 3 years in Court No. 1, and life sentence in Count No. 2.

5. Being dissatisfied with the Judgment the Appellant filed the current appeal based on grounds that the learned trial court erred in law and fact by not considering that the prosecution failed to prove recognition beyond reasonable doubt; that the trial court erred in law and in fact in that having expressly found out that the people who could have informed the court the identity of the owner of the ivory therein did not testify; that it was manifestly unjust for the trial court to, only in the case of the Appellant, assume that the very same ivory (which the court did not know whose the owner) miraculously belonged to the Appellant; that the trial court erred in law and in fact in that the circumstances surrounding the case failed to establish how the ivory landed at the scene and how the same was removed.

6. As such, the Appellant avers that the trial court erred in that it failed to realize that the said two crucial facts rendered the purported chain of evidence against the Appellant totally unreliable. In other words the chain had no beginning and the same crumbled right from the start; that the trial court erred in law and in fact in that it generally found out a number of crucial witnesses for the prosecution were shaky and not believable; that the trial court erred in law and in fact in that the sentence imposed by the trial court against the Appellant of imprisonment for a term of life imprisonment plus the imposition of a 3 year sentence is illegal; that the trial court erred in law and in fact in that the conviction and sentencing imposed was totally against the weight of evidence that had been presented before the court of law and that the trial court erred in law and in fact in that the aforesaid sentence was wholly unjustified and totally unwarranted.

7. The Appellant avers that the trial court flippantly dismissed the strong mitigating circumstances and proceeded to make its own political views which clearly showed that the court was more interested in pleasing the political class as opposed to doing justice to the parties that were before it.

8. However, when the appeal came up for hearing on 8/3/2021 the Appellant submitted that he had abandoned the appeal on conviction and would only urge the appeal on sentence. He submitted that the sentence of 3 years for Count No. 1, and sentence of life for Cunt No. 2 were illegal and unreasonable; that he has old parents to take care of and that his children are destitute.

9. **Ms. Mukangu**, learned prosecutor, did not object to the review of sentence noting that the trial Court had not afforded the Appellant chance to mitigate. However, counsel submitted that the offence committed was serious and that the Appellant should be jailed to between 5 and 10 years for Count No. 2.

10. During the trial, the Appellant stated that he was a first offender and pleaded for leniency. However, the Court rejected his mitigation and jailed him for 3 years and life imprisonment for Counts 1 and 2 respectively.

11. Section 95 of Wildlife Conservation and Management Act 2013 states:

> **"Any person who keeps or is found in possession of a wildlife trophy or deals in a wildlife trophy or manufactures any item from a trophy without a permit issued under this Act or exempted in accordance with any other provision of this Act, commits an offence and shall be liable upon conviction to a fine of not less than one million shillings or imprisonment for a term of not less than five years or both such imprisonment and fine."**

12. Section 92 states:

> **"Any person who commits an offence in respect of an endangered or threatened species or in respect of any trophy of that endangered or threatened species shall be liable upon conviction to a fine of not less than twenty million shillings or imprisonment for life or to both such fine and imprisonment."**

13. While the sentence under Section 95 of the Act appears to be reasonable, the sentence under Section 92 is mandatory fine of not less than Shillings 20 million, or imprisonment for life or both such fine and imprisonment.

14. Under the decision in **Francis Karioko Karioko Muruatetu & Another v Republic [2017] eKLR,** this Court has the jurisdiction to interfere with the mandatory sentence. In this matter the sentence appears quite irrational, and does not even consider the value of the items found in possession of the Appellant. I find that the sentence provided by law is excessive, but the same can be moderated by mitigation by the Appellant. This mitigation was not possible as the same served no purpose under the mandatory nature of the sentence.

15. In that regard, I allow the appeal in sentencing and sentence the Appellant as follows:

Count No. 1: The Appellant shall serve 2 years in jail from the date of arrest.

Count No. 2: The Appellant shall serve 10 years in jail from the date of arrest.

The sentences shall run concurrently.

Right of Appeal in 14 days.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 13TH DAY OF MAY, 2021.

E. K. O. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Petitioner in person

Ms. Wanjohi holding brief Ms. Mukangu for DPP

Ms. Peris Court Assistant