



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 11 OF 2020**

**ANTHONY SIVA RULINGA .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(An appeal from the Judgment of Hon. E. Mutunga Senior Resident Magistrate written on 21<sup>st</sup> May 2019 and delivered on 6<sup>th</sup> day of June 2019 by Hon. R. Amwayi SRM in Mombasa Law Courts Criminal Case No. 283 of 2018.)*

**J U D G M E N T**

1. The Appellant Anthony Siva Rulinga filed the appeal herein against the decision of Hon. Mutunga SRM in Mombasa CMC CR. Case No. 283 of 2018 where he was convicted for the offence of being in possession of wildlife trophy contrary to Section 95 of the Wildlife Conservation and Management Act of 2013.
2. The particulars to the charge were that Anthony Siver Rulinga on the 21<sup>st</sup> February 2018 at around 0930hrs at Tawakal Bus stage Bondeni area within Mombasa County was found in possession of wildlife trophies namely; one piece of elephant tusk weighting 3.4kgs & 3 python skins all with street value of Kshs.440,000/= without a permit.
3. The prosecution called 5 witnesses in support of their case that the appellant was found in possession of wildlife trophy, intelligence information was that he was travelling at night from Nairobi to Mombasa aboard passenger bus known as Tawakal. PW 1, PW 2 & PW 3 Dennis Kawa, Sgt. Hamisi Chuma and Cleophas Ariaga went to lay trap at Bondeni and PW 2 posed as a buyer and when he established that the appellant had the wildlife trophy he signaled his colleagues who went and introduced themselves as KWS officers and arrested the appellant.
4. An inventory of the recovered trophies was duly prepared and signed by PW 1, PW 2 & PW 3. PW 4 Senior Scientist with Museums of Kenya examined the Ivory and python skins and identified them positively as wildlife trophy. PW 5 took photographs of the exhibits and produced them as exhibits 11, 12 & 13.
5. When placed on his defence, the appellant in his sworn statement testified that he was from Likoni headed to Serena and he passed through Huduma Centre and went to a hotel. That he found a man and a lady in the hotel where he ate food for 200/= and left. That the man who sat with the lady held his neck and asked what he was doing with his wife. That he was pushed, he fell down and lost his shoes. That when the lady called Hamisi, he was arrested by 4 men including Hamisi who beat him and made him to board a motor vehicle that took him to KWS Offices and later to Central police station where he was charged.
6. Based on the prosecution and defence evidence the appellant was convicted and fined Kshs. 1,000,000/= in default to serve 5 years' imprisonment.
7. The Appellant was aggrieved by the conviction and sentence and he filed grounds of appeal which he amended on 6<sup>th</sup> May 2021 as follows:-
  - i. That he begged for non-custodial sentence so that he may be in a position to serve the remaining term while looking after his family.**
  - ii. That he was a 1<sup>st</sup> offender and begged for forgiveness.**
  - iii. He said he had been in jail for 3 years and promised to be law abiding given chance of rejoining the society.**

**iv. That he is sole bread winner of his family and hence a continued stay behind bars will ruin the lives of his family; hence he prayed for leniency.**

**v. That spiritual rehabilitation programs in prison have helped him change positively and thus given a chance to join society he promised to never get involved in criminal acts.**

**vi. That sentencing policy guidelines paragraph 7:11 of 2016 be taken into consideration for he had spent a duration of about 11 ½ months in remand.**

8. The appellant's grounds of appeal constituted mitigation for a non-custodial sentence rather than appeal against conviction and sentence and he urged the court to consider his mitigation and quash the conviction and set aside sentence for reasons that he was a 1<sup>st</sup> offender and sole bread winner to his family. He also urged the court to consider his remand period in the sentence.

9. The Respondent's submissions urged the court not to reduce sentence considering weight and depth of the offence he committed which penalty is provided as a fine of not less than Kshs.1,000,000/= or a term of imprisonment of not less than 12 months or to both fines and imprisonment.

10. It was argued that the impact of trafficking in Wildlife trophy had terribly affected Kenyan elephant population and even led to extinction of some species.

11. Having considered the evidence on record for the prosecution and defence in the lower court as well as the judgment of the trial court and in consideration of the grounds of appeal and submissions on the sentence, this court is to consider whether sentence passed by the trial court was lawful and whether the appellant's mitigation was considered and whether they can be considered now to revise and/or set aside sentence.

12. Section 95 of the Wildlife Conversation and Management Act of 2013 provides for a fine of not less than Kshs. 1,000,000/= or a term of imprisonment of not less than 12 months or both. The trial Magistrate sentenced the appellant to a fine of Kshs. 1,000,000/= in default 5 years' imprisonment without explaining why the period of imprisonment which is a default sentence was enhanced from 12 months to five years.

13. The appellant had been in remand custody from 22.2.2018 to 6.06.2019 when he was sentenced and it is the view of this court that the sentence by the trial Magistrate was excessive and harsh. The appellant has been in custody for a period of 3 years and 3 months when he ought to have been jailed for only 12 months in default of payment of fine of Kshs. 1,000,000/=.

14. In the circumstances his appeal on sentence is allowed and he should be set at liberty forthwith unless otherwise lawfully detained.

Orders accordingly.

Right of appeal 14 days.

**Dated, signed and delivered** in open court/Microsoft Teams at Mombasa this **08<sup>th</sup>** day of **June, 2021**.

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

**In the presence of:**

**Court Assistant: Ogwel**

**Appellant:**

**Respondent Counsel:**

**Appellant's Counsel:**