



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO. E022 OF 2021

(CONSOLIDATED WITH CRIMINAL REVISION NO. E326 OF 2021)

BAVON MUKOKO LILUNGU....1ST APPLICANT

WAMBUA MBITHI2ND APPLICANT

VERSUS

REPUBLICRESPONDENT

RULING

1. **Bavon Mukoko Lilungu**, 1st Applicant, and **Wambua Mbithi alias Toto**, 2nd Applicant, respectively, were charged with three counts:

Count 1: Dealing in Wildlife Trophy Contrary to **Section 95** of the Wildlife Conservation Management **Act, 2013**. Particulars of the offence being that on the 7th day of June 2017 at Jomo Kenyatta International Airport in Nairobi within Nairobi County, jointly with others not before the court dealt in Wildlife trophy to wit 100kg of Pangolin scales with a street value of Kshs.6,000,000/= without a permit from the director of Kenya Wildlife service.

Count 2: Making a False Declaration Contrary to **Section 203 (b)** of East African Community Customs Management Act, 2004. Particulars of the offence being that on the 2nd day of June 2017 at Jomo Kenyatta Airport in Nairobi County, jointly made a false declaration on column 10 of custom entry **No. 2017JKA3481844** dated 2nd, June 2017 in the description of the goods by describing it as wood carving of Giraffe and Elephant while the actual goods ought to have been declared in the said Custom entry was a Pangolin scale weighing 100kg destined for South Korea.

Count 3: Forgery of stamp Contrary to **Section 352 (a)** of the Penal Code. Particulars of the offence being that on an unknown date between 2nd and 6th, day of June 2017, unlawfully and with intent to defraud Kenya Revenue Authority, jointly made stamp impression on custom entry No. 2017JKA3481844 dated 2nd June, 2017 purporting it to be a genuine and valid stamp impression made by Kenya Revenue Authority verification officer 1 of custom office export section JKIA.

2. They were taken through full trial, found guilty, convicted on all the three (3) counts and sentenced as follows:

Count1: Fined Ksh.1,000,000/- or to serve one-year imprisonment.

Count2: Fined Ksh.100,000/- or to serve one (1) year imprisonment.

Count3: Fined Ksh.40,000 or to serve six (6) months imprisonment. The wildlife trophies were forfeited to the Kenya Wildlife Services.

3. The applicants have approached this court through a Notice of Motion seeking review of the sentences meted out.

4. The 1st appellant seeks revision of the remainder of the sentence so as to benefit from a non-custodial sentence. His application is based on grounds that his family of a wife and four (4) children who solely depend on him financially have suffered immensely and his nine (9) years old daughter who suffers from sickle cell anemia requires special treatment.

5. The 2nd appellant called upon this court to reduce the sentence to a fine of Ksh.400,000/- that his brother can afford to pay so as to secure his freedom. In a supporting affidavit he averred that he underwent surgery of the stomach and is on special diet in prison. That he is an orphan who provides for his siblings and he is remorseful for his action.

6. During hearing of the application, the applicants reiterated what is stated in the application.

7. In response, the Respondent through learned counsel, Ms. Chege, opposed the application. She urged that the applicants approached the court through **Section 362 and 364** of the Criminal Procedure Code (CPC). That both applicants were found trafficking in critically endangered species, made false declaration and forged stamps. That the court applied the law as provided therefore there was no illegality, incorrectness as to the finding.

8. I have considered the application, affidavits in support and rival submissions of all parties. The jurisdiction of this court to revise orders of the subordinate court is provided for in **Section 362** of the CPC that provides thus:

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.

9. The power of the High Court as provided is limited to correcting irregularities and illegalities that are not in accordance with the fact and even orders that are contrary to the law. In the case of *Joseph Nduvi Mbuvi -vs- Republic (2019) eKLR Odunga. J.* was of the following view:

“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.”

10. **Section 364** of the CPC provides:

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.*

11. This means that where a subordinate court passes a sentence which is illegal or irregular, then this court is seized of Jurisdiction to unsettle it. But, where grounds raised ought to have been brought through an appeal then the High Court would not exercise supervisory jurisdiction as envisaged by **Section 362** of the CPC.

12. **Section 95** of the Wildlife Conservation and Management

Act, 2013 provides thus:

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 to both such imprisonment and fine.

13. **Section 203 (b)** of the East African Customs Management

Act 2004 provides thus:

A person who, in any matter relating to the Customs —

(c) When required in accordance with this Act to answer any question put to him or her by an officer, refuses to answer such question or makes any false or incorrect statement in reply thereto; commits an offence and shall be liable on conviction to imprisonment for a term not exceeding three years or to a fine not exceeding ten thousand dollars.

14. **Section 352 (a)** of the Penal Code provides that: **Any person who—**

a. Forges any stamp, whether impressed or adhesive, used for the purposes of revenue or accounting by any Government department; Government, with intent that another use shall be made of such stamp or any part thereof; is liable to imprisonment for seven years.

15. Prior to sentencing the offenders, the trial court sought an input of the probation officer who carried out a social inquiry and filed pre-sentence reports. Mitigating factors advanced by the applicants were considered. The court specifically stated that it took into account time spent in custody by the applicants, this was in compliance with **Section 333 (2)** of the C.P.C.

16. Sentences meted out on all the three (3) counts were legal.

There having been no illegality, or incorrectness this court has absolutely no reason to interfere with the trial court's decision.

17. In the result, the applications lack merit. Accordingly, both applications are dismissed.

18. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY, THIS 15TH DAY OF NOVEMBER, 2021

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Court Assistant – Mutai

Applicants

Ms. Kibathi - ODPP