REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

HCCR. CR APP NO. 124 OF 2019

KARIM EZEKIEL KILUMILE.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

Being an appeal against the decision in CR. Case No. 109 of 2019 at SRM Court

at Msambweni dated and delivered on 17th September 2019

JUDGMENT

1. The Appellant was charged with the offence of being in possession of wildlife trophy contrary to section 95 (d) as read with section 105 (1) (a) of the Wildlife Conservation and Management Act, 2013 in count I and in count II, he was charged with the offence of import of wildlife product without a permit contrary to section 99 (1) as read with section 99 (3) (b) and 105 (1) (a) of the Wildlife Conservation and Management Act, 2013.

2. The particulars to the first count were that Karim Ezekiel Kilumile on the 10th day of September, 2019 at around 1500hrs at Lunga Lunga border within Kwale County was found in possession of wildlife trophies namely 201 pieces of dried butterflies packaged in envelopes and 20 guinea fowl skins wrapped in black polythene paper valued at Ksh. 60,000/= without a permit or other lawful exemptions under the said Act.

3. The particulars to the second count were that Karim Ezekiel Kilumile on the 10th day of September, 2019 at around 1500hrs at Lunga Lunga border in Kwale County imported wildlife trophies namely 201 pieces of dried butterflies packaged in envelopes and 20 guinea fowl skins wrapped in black polythene paper valued at Ksh. 60,000/= without a permit or other lawful exemptions under the said Act.

4. The Appellant on being arraigned in court pleaded guilty when the charge was read to him and also when the facts were read to him. He was consequently fined Ksh. 1, 000, 000/= in default 2 years imprisonment in count I and Ksh. 20, 000, 000/= in default 10 years imprisonment in count II.

5. Being aggrieved by the sentence imposed on him, the Appellant preferred this instant appeal on the amended grounds of appeal which sought to orders:

i. That the learned trial court magistrate erred in law and facts by giving the Appellant a harsh and excessive sentence.

ii. That the learned trial court magistrate erred in law and facts by failing to consider the Appellant's mitigation address that the Appellant was a first offender.

iii. That the learned trial court magistrate erred in law and facts by failing to find that no valuation certificate whose importance cannot be gain said as it concurs the awkward position the court is put into the second-guessing of the value was not produced in court.

iv. That the trial magistrate erred in law and fact by failing to consider that the fine imposed was high and excessive basing on the value of the wildlife product.

v. That the trial magistrate erred in law and fact by failing to consider that the sentence meted on the Appellant on the two counts were to run concurrently as the offences were committed during a single transaction.

6. This appeal was canvassed by way of written submissions of both the Appellant and the Respondent where the Appellant argued that there was no valuation certificate tendered into evidence despite its importance in ascertaining the exact value of the items found in the Appellant's possession. According to him, this failure to present the valuation certificate by the Kenya Wildlife Services put the court in an awkward situation of guessing the value of the subject matter and that the fine of Ksh. 1, 000, 000/= in count I and Ksh. 20,000,000/= in count II was harsh and excessive.

7. The Appellant also went to great lengths to elucidating the purpose of sentencing and the manner in which it should be undertaken by citing a total of 8 cases which spoke to the same. In his submissions, the Appellant stated that the case of **Josiah Mutua Mutunga and Another v. Republic (2019) eklr** sets out the role of sentencing, wherein it was held that

> **"one of the purposes of punishment is to ensure an offender is adequately punished. A further purpose of punishment is to denounce the conduct of the offender."**

8. This submission by the Appellant was buttressed by his plea to the court that this appeal be allowed on the basis that he had served almost 1 year and 8 months in prison since his sentence. Further to this, Appellant submitted that he was a first-time offender who pleaded guilty and did not waste the court's time. He therefore urged the court to consider the time served as sufficient punishment.

9. Also central to the Appellant's submission was in regard to the unfettered discretion of courts in imposing sentences except for instances where the court acted on some wrong principle or overlooked some material factors or issued a sentence that was manifestly excessive as held in the case of **Macharia v. Republic (2003) EA** 599. It was the Appellant's submission that a similar position was held in the case of **Bernard Kimani Gacheru v. Republic (2002) eKLR** where the Court of Appeal held that sentencing is a matter that rests in the discretion of the trial court and that following the decision of the Supreme Court of Kenya in the Francis Muruatetu case, courts' hands were no longer tied by the provisions of mandatory minimum sentences.

10. The final limb of the Appellant's submission was in regard to the failure of the trial magistrate to order the sentences to run concurrently, therefore occasioning a miscarriage of justice. The Appellant cited the case of **Peter Mbugua Kabui v. Republic (2016)** where it was held that

> "**…**if an accused person commits a series of offences at the same time, in a single act or transaction, a concurrent sentence should be given."

11. As such, the Appellant urged this court to made an order to the effect that the sentence in count I and count II run concurrently.

12. The Respondent relied on its submissions dated 15th September, 2021 wherein it was submitted that no evidence ought to have been presented in court by the prosecution by virtue of the fact that the Appellant had pleaded guilty. Instead, the facts of the offence to which the plea of guilty ought to be read. The Respondent submitted that this was duly done and dispense with as per the requirements of the law. The Respondent further submitted that wildlife trophies were not marketable in Kenya and that no valuation would have been possible.

13. The Respondent equally denied the allegations of the trial court's failure to consider the Appellant's mitigation and made reference to page 4 line 13 of the proceedings where the trial court had considered the Appellant's mitigation before sentencing. It was therefore submitted that the sentence handed to the Appellant was safe and within the law.

14. The Respondent submitted that sections 95 and 99 of the Wildlife Conservation and Management Act, 2013 under which the Appellant was convicted provide for a minimum mandatory sentence and that the learned trial magistrate gave a justifiable, fair and correct sentence as per the given circumstance. It was also its position that section 14 of the Criminal Procedure Code speaks to the serving of sentences consecutively unless the court directs that the punishments shall run concurrently. That the Sentencing Policy Guideline state that sentences for offences emanating from a single transaction shall be rendered to run concurrently. Ideally, the Respondent submitted that the discretion to impose concurrent or consecutive sentence lay in the court and that such determination would be depend on the circumstances of the case. The Respondent urgent the court to dismiss this appeal wholly.

15. This being a first appeal, this court is called upon to apply itself to the facts and relevant laws as held in the case of **Okeno v. Republic (1972)** and make its own determination on the matter before it.

16. The issue for determination is whether the sentence against the Appellant was excessive.

17. The value of wildlife trophies that the Appellant was found in possession of was ksh. 60, 000/= only and it is the considered view of this court that sentences must be commensurate with the offence committed and the meaning of 'liable to imprisonment to life' in my view means the maximum sentence and the court ought to have exercised its discretion to pass a sentence that was appropriate in the circumstances. This position was held in the case of **Opoya v. Uganda (1967) EA 752** which was cited with approval by the Court of Appeal in **Daniel Kyalo Mwema v. Republic (2009) eKLR** as follows:

> **"it is seems to us beyond argument the words- shall be liable to, do not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion o fthe court. in other words, they are not mandatory but provide a maximum sentence only and while the liability existed, the court might not see fit to impose it."**

18. In consideration of the fact that the Appellant was a first offender, in consideration that he pleaded guilty without subjecting the court to the rigours of trial and in consideration of the value of the wildlife trophy found in his possession, this court finds that a fine of Ksh. 100, 000/= in default 12 months imprisonment in count I and Ksh. 200, 000/= in default 24 months imprisonment in count II will be sufficient

punishment for the offences the Appellant committed.

19. The appeal therefore succeeds, the sentence against the Appellant is set aside and substituted with a fine of Ksh. 100, 000/= in default 12 months imprisonment in count I. In count II the Appellant is fined Ksh. 200, 000/= in default 24 months imprisonment. The sentences to run consecutively from 17th September, 2019.

20. Orders accordingly.

Dated, signed and **delivered** in **Open Court/online** through **MS TEAMS**, this **12th** day of **November 2021**

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of:-

Ogwel- Court Assistant

Mr. Mulamula for Respondent

Appellant – present in person

Hon. Lady Justice A. Ong'injo

Judge