REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO E002 OF 2020

RUWA MWANGOLO RUWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1) The Appellant Ruwa Mwangolo Ruwa was accused with the offence of dealing in a specified endangered live wildlife species without a permit or other lawful exemption contrary to Section 92 (3) as read with Section 105 of the Wildlife Conservations and Management Act 2013.

2) The particulars are that Ruwa Mwangolo Ruwa on the 1st day of September 2020 at around 19:30 hrs at Likoni area near Co-operative Bank within Mombasa County jointly with 2 others were found dealing in a life wildlife species namely one life pangolin while in a vehicle Registration KCX 348 C packed in a two yellow jerricans inserted in a white manila sack. That being a species that is endangered under appendix (1) of the convention of the international trade of endangered species and at the time of doing so did not have a permit or other lawful exemption enacted under the Act.

3) The Appellant and his 2 co-accused were also charged with the offence of being in possession of a specified endangered live wildlife species without a permit or other lawful exemption contrary to Section 92 (4) of the Wildlife Conservation and Management Act of 2013.

4) The Appellant together with his co-accused were convicted on their own plea of guilty and fined kshs 300,000/= each in each count in default to serve 2 years imprisonment.

5) The Appellant was aggrieved by the sentence and he appealed on the following grounds;-

1. That the Learned trial Magistrate failed to consider the Appellants mitigation particularly that he had a large family under his care hence passed an extremely harsh and excessive sentence in the circumstances.

2. That the Learned trial Magistrate failed to appreciate that the Appellant had no previous records and no material existed to demonstrate the likelihood of the Appellant commiting another offence.

3. That the Learned trial Magistrate failed to consider the presentencing report so as to inform her on the Appellants background.

4. The Learned trial Magistrate misdirected herself in imposing custodial sentence and hefty fine

not intadem with the existing economic realities in the nation occasioned by among other factors the COVID – 19 pendemic.

6) The Appellant urged the court to allow his appeal.

7) This appeal was canvassed by way of written submissions.

8) However the court learnt that appellants counsel passed on and LSK Mombasa was to confirm who had been assigned the deceased counsel's matters but it didn't materialize.

9) The Appellant in his submissions said that the trial Magistrate failed to consider his mitigation and the fact that he didn't have previous criminal records and also failed to consider pre-sentence report and arrived at an excessive sentence.

10) The Respondent's on the other hand submitted that the trial court took into account the Appellants mitigation and the fact that he was a 1st Offender and exercised her discretion judiciously owing to the fact that the Appellant had stamped with the endangered species and failed to report to Kenya Wildlife Service Offices at Shimoni.

11) The Respondent argued that sentence was lenient owing to the nature of the offence which has a mandatory sentence of not less than 3 years.

12) Having considered the grounds of appeal and submissions and have re-evaluated the record of the lower court as mandated of the 1st Appellant court in the case of **Kiilu and Another versus Republic (2005) IKLR 174** the issues for determination are:-

1. Whether the sentence was harsh and excessive.

2. Whether the trial court considered the Appellants Mitigation and the fact that he was a 1st Offender as well as the Presentence Report.

13) I have perused the sentencing proceedings and found that the trial Magistrate factored in the Appellants mitigation, the fact that Appellant was a 1st Offender as well as the pre-sentence Report and that is why instead of imposing a sentence of 3 years imprisonment in Count 1 as provided for by Section 92 (3) of the Act she passed a sentence of 300,000/= fine in default 2 years imprisonment.

14) The trial Magistrate also imposed a fine of 300,000/= in default 2 years imprisonment instead of a fine of not less than 3 million shillings or a term of imprisonment of not less than 5 years on both such fine and imprisonment.

15) I do however find that having tampered justice with mercy there was no justification to impose similar sentence in each count when the offences in the 2 counts were committed in one transaction.

16) In the circumstances I do find and substitute the sentence in Count II to a discharge under Section 35 (1) of the Penal Code as the penalty in Count I is sufficient punishment.

17) The appeal against sentencing is therefore successful to the extent that sentence in Count I is upheld whereas sentence in Count II is substituted with a discharge under section 35 (1) of the penal code. Appellant may appeal within 14 days. Orders accordingly.

DATED, SIGNED AND DELIVERED ONLINE THROUGH MS TEAMS, THIS 9TH DAY OF DECEMBER, 2021

LADY JUSTICE A. ONG'INJO

JUDGE

IN THE PRESENCE OF:-

OTOLO – COURT ASSISTANT.

MR. MULAMULA FOR RESPONDENT.

APPELLANT- PRESENT IN PERSON.

HON.LADY JUSTICE A. ONG'INJO

JUDGE