



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL REVISION NO.158 OF 2019**

**KASENGU KILOTU.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The Applicant, Kasengu Kilotu was convicted of three counts under the **Wildlife (Conservation and Management) Act**. In the first count, he was convicted of **being found in possession of government trophies** contrary to **Section 42(1)(b)** as read with **Section 52(1)**. In the second count he was convicted of **dealing in government trophies without a dealer's licence** contrary to **Section 43(4)(a)** as read with **Section 52(1)**. He was finally convicted of **failing to make a report of obtaining government trophies** contrary to **Section 39(3)(a)**. The prosecution was able to establish that the Applicant was found in possession of four (4) pieces of elephant tusks weighing 8 kilograms with a street value of Kshs.800,000/- in circumstances that clearly pointed to the fact that the Applicant intended to sell the same. In respect of the first count, the Applicant was sentenced to serve two (2) years imprisonment. In respect of the second count, the Applicant was sentenced to serve two (2) years imprisonment. In respect of the third count, the Applicant was sentenced to serve one (1) imprisonment. The sentences, meted out on 19<sup>th</sup> March 2019, were ordered to run concurrently. It should be noted that the Applicant was convicted on the basis of charges laid under the above **Act** before the same **Act** was amended and thereby imposed severe custodial sentences.

In his submission before court, the Applicant stated that he was remorseful and regrets the decision that led to his incarceration. In the period that he has been in prison, he had learnt his lesson. He has learnt that crime does not pay. He will be a law abiding citizen if released. He was the sole breadwinner of his family who depended on him. He promised not to commit any criminal offence again. Ms. Chege for the State opposed the application. She urged the court to take note of the fact that elephants from which the tusks were obtained from, were declared to be critically endangered species. It is on that basis the Kenya Government is at the forefront of advocating for a complete ban of trade in ivory. Learned counsel submitted that it is persons such as the Applicant that are responsible for the decline in number of the elephants due to their promotion of the trade in elephant tusks. She urged the court not to interfere with the custodial sentence that was imposed, noting that the same fitted the crime.

This court has carefully considered the rival submission made by the parties to this application. This court is aware that when the trial court sentenced the Applicant it was exercising judicial discretion. The Court of Appeal in **Ahmad Abolfathi Mohammed & Another –vs- Republic Criminal Appeal No. 135 of 2016** (unreported) held at Page 25 thus:

*“As what is challenged in this appeal regarding sentence is essentially the exercise of discretion, as a principle this Court will normally not interfere with exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive. In **Bernard Kimani Gacheru v. Republic, Cr App No.188 of 2000** this Court stated thus:*

*“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, any one of the matters already stated is shown to exist.”*

In the present application, it was clear to this court that the trial court properly exercised its sentencing discretion. This court discerned no improper consideration of other factors not relevant to the case. The custodial sentences that were meted out on the Applicant were legal. They fitted the crime. This court is not oblivious of the fact that acts similar to that which the Applicant committed is what is contributing to the depletion of our wildlife through illegal trade of game trophy. It is in that regard that the custodial sentences imposed on those convicted have since been made severe to deter those who may be tempted to engage in the activity.

For the above reasons, the application for reduction of custodial sentence made by the Applicant lacks merit and is hereby dismissed. It is so ordered.

**DATED AT NAIROBI THIS 6<sup>TH</sup> DAY OF FEBRUARY 2020**

**L. KIMARU**

**JUDGE**