

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 42 OF 2018

JOHN NJERU NYAGA alias JOHN KARIUKI WANGITHI.....APPELLANT

VERSUS

REPUBLIC.....REPUBLIC

(Appeal against the sentence by Hon. A.G. Kibiru (C.M.) in Machakos Chief Magistrates Court Criminal Case No. 781 of 2016 delivered on 13th November, 2017)

JUDGEMENT

1. The appellant was charged and convicted for the offence of engaging in hunting for Bush meat trade contrary to section 98 as read with section 105 of the Wildlife Conservation and Management Act of 2013 and sentenced to three (3) years imprisonment.

2. Aggrieved by the said conviction and sentence the appellant lodged this appeal. What is raised in the appellant's appeal and submissions is essentially mitigation and not grounds of appeal. The appellant has expressed that he is remorseful and has stated that he is a first offender. That he has parental responsibility and urged this court to exercise its discretion to set aside the sentence as meted upon him and be granted non-custodial sentence. The appellant was convicted in **Machakos Chief Magistrates Court Criminal Case No. 793 of 2016** for similar charges and urged this court that the sentence in the said suit be ordered to run concurrently with those in **Machakos Chief Magistrates Court Criminal Case No. 781 of 2016**.

3. The appellant here does not appeal against the conviction and has only submitted on the sentence. Under the said circumstance, I find no need to delve into the facts of the case. The appellant specifically urged that the sentence in the mentioned cases do run concurrently.

4. The particulars of the charge the appellant faced and for which he was convicted was that the appellant on 12th August, 2016 at Portland area within Machakos County, was found in possession of 2 bows, 18 poisonous arrows, 10 arrow sticks, 4 knives, 2 sharpening files, 1 machete and 1 weighing scale for purposes of hunting wildlife for bush meat trade in contravention of the said Act. In **Criminal Case No. 793 of 2016** he was charged with the same offence but whose particulars were that the appellant on 28th December, 2015 at Game Ranch area within Machakos County, was found in possession of poisonous arrows for the purposes of hunting wildlife for bush meat trade in contravention of the said Act. Clearly, the two are different transactions whose sentences cannot run concurrently.

5. Sentencing is normally at the discretion of the trial court. An appellate court should therefore be slow in interfering with the said discretion unless there are reasonable grounds to do so. If an accused person commits a series of offences at the same time in a single act, a concurrent sentence should be given. If separate and distinct offences are committed in different criminal transactions, despite the counts being in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment.

6. The Court of Appeal in **William Kimani Ndichu v. Republic [2015] eKLR** observed as follows with regard to the meaning of the phrase same transaction thus:

“The former Court of Appeal has defined the phrase “same transaction” in Rex v Saidi Nsabuga s/o Juma and another (1941) 8 EACA 81 and revisited it again in Nathani v R (1965) EA 777, where the court said that the proper construction of the phrase “same transaction” is that:-

“If a series of acts are so connected together by proximity of time, criminality or criminal intent, continuity of action and purpose or by the relation of cause and effect as to constitute one transaction, then the offences constituted by these series of acts are committed in the course of the same transaction.””

Applying the test, the offences the appellant herein faced cannot be said to have arisen from the same transaction bearing in mind the fact the same were committed on different dates. The sentence cannot therefore run concurrently.

7. The trial court in metting the sentence considered the appellant's mitigation. Although the appellant claims to be a first offender, he is not. In view of that, I find him to be a menace to wildlife. Giving him a non-custodial sentence would be doing an injustice to the ecosystem. In the end, this appeal has no merit and therefore fails. The appeal is dismissed. The sentence by the trial court is affirmed.

It is so ordered.

Dated and delivered at Machakos this 9th day of April, 2019.

D.K.KEMEI

JUDGE