



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CRIMINAL APPEAL NO. 174 OF 2017**

**BONFACE MUEMA MUTUA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(An appeal from the conviction and sentence in Kwale CM CR. Case No. 372 of 2015 (Hon. D. Mulekyo CM) delivered on 4/5/2017)**

**J U D G M E N T**

1. **Bonface Muema Mutua (“the Appellant”)** was charged with the offence of being in possession of wildlife trophy contrary to **section 92 of the Wildlife Conservation and Management Act, 2013**. It was alleged that on 5/4/2015 at around 22.00 hours within Mwele area in Kwale County, the appellant was found in possession of a wildlife trophy namely four full pieces of elephant tusks weighing 14 kgs without a permit.

2. The appellant also faced a second count of dealing in wildlife trophy contrary to **section 95 of the Wildlife Conservation and Management Act, 2013**. It was alleged that on the 5/4/2015 at around 22.00 hrs within Mwele area in Kwale County, the appellant was dealing in wildlife trophy namely 4 pieces of elephant tusks without a permit.

3. The appellant denied the charges but after trial he was found guilty and was convicted and sentenced to pay a fine of Kshs.800,000/- in default to serve four years in each count. He has now appealed to this court against the sentence.

4. In support of his appeal, the appellant submitted that the trial court failed to specify whether the sentence was to run concurrently or consecutively. He pleaded that the same be ordered to run concurrently. He stated that he was a first offender aged 53 years old with a wife and children.

5. **Ms. Mwangeka**, Learned prosecutor opposed the appeal and submitted that there was no evidence to show that the appellant had reformed. That the trial court had considered the appellant’s mitigation before meting out the sentence. That since the appellant faced two distinct counts, the same should run consecutively. Counsel relied on **section 14 (1) of the Criminal Procedure (CPC)** and the case of **Henry Thurairira v. Republic [2017] eKLR**, in support of her submission that the sentences should run consecutively.

6. In his rejoinder, the appellant submitted that under the **Kenya Judiciary Sentencing Policy Guidelines** where offences emanate from a single transaction, the sentences should run concurrently. That there was a conflict between **section 14 (1) and 333 (2) of the CPC**.

7. I would like first to deal with the issue of the alleged conflict between **sections 14 (1) and section 333 (2) of the CPC**. There is no conflict at all. **Section 333 (2) of the CPC** provides how to compute sentences while **section 14 (1)** provides how sentences are to run in cases where there are several counts.

8. **Section 14 (1)** provides:

**“14.1 Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefore which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently”.**

9. From the foregoing it is clear that unless the court directs that the sentences are to run concurrently, they are to run consecutively if passed in a single trial such as in the present case. Sentencing is in the discretion of the court and is not to be interfered with unless it is illegal, irregular or is manifestly excessive. (See **Ogolla s/o Owuor v. Republic [1954] EACA 270**)

10. In the present case, it is not in dispute that the appellant was charged with two separate counts under the **Wildlife Conservation and**

**Management Act, 2013.** Upon conviction he was sentenced to a fine of Kshs.800,000/- in default to serve 4 years imprisonment for each count. The court did not specify if the sentences were to run consecutively or concurrently. The appellant urges the court to order that the sentence do run concurrently while the prosecution submits otherwise.

11. In the case of **PETER MBUGUA KABUI V REPUBLIC [2016] eKLR** thus: -

*“In the case of Sawedi Mukasa s/o Abdulla Aligwaisa [1964] 13 EACA 97, the then Court of Appeal for Eastern Africa in a judgment read by Sir Joseph Sheridan stated that the practice is, where a person commits more than one offence at the same time and in the same transaction, save in very exceptional circumstances, to impose concurrent sentences. That is still good practice.*

*As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment”.* Emphasis supplied.

12. In the present case, although the appellant was charged with two separate and distinct counts, they arose out of a single transaction. He was found in possession of wildlife trophy which at the same time he was dealing with. Each of the count attracts a maximum of Kshs. 1 million fine or 5 years imprisonment.

13. There are no exceptional circumstances that have been shown to exist in this case to warrant departing from the general principle enunciated by the Court of Appeal above. To my mind, this was a proper case where the sentences should have run concurrently.

14. In this regard, I allow the appeal and order that the sentences meted out to the appellant shall run concurrently.

**DATED and DELIVERED at Mombasa this 6<sup>th</sup> day of September, 2019.**

**A. MABEYA**

**JUDGE**