



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 33 OF 2019**

**KYALO NGILA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an Appeal from the conviction and sentence delivered by Hon. G. M. Mutiso (SRM) in the Principal Magistrate's Court at Makindu Criminal Case No.1006 of 2016, on 16<sup>th</sup> August, 2016)*

**JUDGEMENT**

1. On 15/8/2016 at 11 am, KWS personnel attached to Tsavo East National Park were in patrol at Ngasia area of Tsavo East National Park.
2. They saw a human footprints which led them to where appellant was. They arrested him and recovered a carcass of one dik dik, 10 shores, a panga and a spade.
3. He was escorted to Mtito Andei Police Station and later charged with two offences namely;  
**COUNT I:** Entering a National Park contrary to section 102 (1) (a) of the Wildlife Conservation and Management Act No. 47 of 2013. Particulars being that on the 15<sup>th</sup> day of August 2016 at Ngasi area at Tsavo East National Park within Makueni County not being a public officer in the course of your duty or a person lawfully employed entered the said National Park without authority.  
**COUNT II:** Found in possession of meat of wildlife species contrary to section 95 of the Wildlife Conservation and Management Act No. 47 of 2013. Particulars being that on the 15<sup>th</sup> day of August, 2016 at Ngasi area of Tsavo East National Park within Makueni County was found in possession of meat of wildlife species namely dik-dik in the said National Park.
4. When he was presented to the court on 16/8/2016 the charges were read to him and he responded that, “*Ni kweli*”. It is true in Count 1 and 2.
5. A plea of guilty was entered. The facts were read to the above effect and stated that, “I was found in the Park with items mentioned exhibits 1, 2, 3 & 4.”
6. A plea was re-entered and he was convicted on his own plea of guilty.
7. On part of the prosecution, it was stated that there was no records.
8. On his mitigation the appellant stated that he be awarded a probation sentence because his parents were old and depended on him.
9. On sentence the court noted that appellant was energetic and could earn a honest living if he is reformed and thus he was sentenced on Count I Ksh.200,000/= fine in default 3 years imprisonment. Count II Ksh.5 million fine, in default 5 years imprisonment. Both to run consecutively.
10. Being aggrieved by the aforesaid decision, the appellant lodged instant 7 grounds of appeal. However during the hearing, he abandoned other grounds and focused on the sentence. He stated that;

**(1) He was first offender.**

**(2) He was remorseful and repentant.**

**(3) He has been sole bread winner of young brother and aged parents.**

**(4) He thus sought reduction of the sentence.**

11. The provisions used to charge appellant were section 102 (1) (a) and 95 of Act No. 47 of 2013 Wildlife Conservation and Management Act which provides penalties for the offences charged.

12. Section 95 penalty provided is not less than Ksh.1 million fine and in default imprisonment for a period not less than 5 years or both.

13. Section 102 (1) (a) the penalty is not less than Ksh.200,000/= fine and in default imprisonment of a term of not less than 2 years or both.

14. The sentences imposed seem to be done in obedience of the mandatory minimum imperative imposed by the Statute herein. However the courts have held that, the Supreme case of ***Muruatetu*** with respect to mandatory sentences, apply in equal force to minimum sentences or non-optional sentences. See the case of ***Samuel Achieng Alego vs Republic [2018] eKLR.***

15. Thus the court has discretion to award a sentence lower than the minimum sentences where circumstances dictate so and being guided by Kenya Judiciary Policy Guidelines.

16. The aforesaid guidelines mandate court to reduce sentence in instances where for example appellant is a first offender and pleaded guilty to save court's time like in the circumstances of this case.

17. Taking into account the mitigation and circumstances of the case plus the fact that the appellant has already served about 3 years, it would be fair to reduce the sentence to period served.

18. Thus the court makes the following orders;

***i) The appeal on conviction is dismissed and conviction upheld.***

***ii) The appeal on sentence is set aside and reduced to the period served to date of this judgement such that the appellant shall be released forthwith unless otherwise lawfully held.***

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKUENI THIS 11<sup>TH</sup> DAY OF OCTOBER, 2019.**

.....

**C. KARIUKI**

**JUDGE**