



**REPUBLIC OF KENYA**

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

**CRIMINAL REVISION NO. 223 OF 2018**

**REPUBLIC.....APPLICANT**

**V E R S U S**

**PATRICK MBAARU M'KAIREBA.....RESPONDENT**

**RULING**

The prosecution filed an application seeking to review the ruling vide **Wang'uru Criminal Case No. 56 of 2017** dated 26/04/2018. The ruling held that only special prosecutors are appointed to prosecute cases under the **Wildlife Conversation and Management Act, 2013**. That the prosecutors are gazetted and the letter dated 06/02/2018 produced in court did not confer authority to the state counsel to prosecute the matter.

According to the prosecution, the accused was charged with offence of dealing with wildlife trophy contrary to **Section 92 of the Wildlife Conversation and Management Act, 2013** which provides:

*Any person who commits an offence in respect of an endangered or threatened species or in respect of any trophy of that endangered or threatened species shall be liable upon conviction to a fine of not less than twenty million shillings or imprisonment for life or to both such fine and imprisonment.*

The matter was being handled by a prosecutor from Kenya Wildlife Service but she was moved to another division. Therefore the KWS granted the office of the Director of Public Prosecutions permission to take over and prosecute the matter.

**Section 157 (6) of the Constitution** provides:

*The Director of Public Prosecutions shall exercise State powers of prosecution and may—*

*a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;*

*b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and*

*c) subject to clauses (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).*

These are the prosecutorial powers given to the Director of Prosecution.

**Section 107 of the Wildlife Conversation and Management Act, 2013** provides:

*1) The Director of Public Prosecutions may, in accordance with the Office of the Director of Public Prosecutions Act, 2013 (No. 2 of 2013) and this section, designate special prosecutors to prosecute wildlife offences under this Part.*

*2) Notwithstanding the provisions of subsection (1), the Director of Public Prosecutions may, either on his or her own or on application of an authorised officer, delegate his or her prosecutorial powers to such authorised officer to prosecute offences under this Act.*

As provided under **Article 157 (6) of the Constitution**, the DPP can take over and continue any criminal proceedings commenced in any court (other than a court martial) therefore this includes matter falling under the **Wildlife Conversation and Management Act**. The powers of the Director of Public Prosecutions with regard to matters of criminal are wide and donated under the Constitution the Wildlife Act cannot

curtail this powers.

In addition, **Section 107 of the Wildlife Conversation and Management Act, 2013** the wording is “**may**” and it does not state that only gazetted prosecutors can handle the matters involving KWS. The prosecutor therefore had the authority to handle the matter. It should also be noted that the Director of Public Prosecutions had the powers to prosecute the case as such the fact that there was a special prosecutor did not diminish the power of the Director of Public Prosecutions to prosecute. The power of the gazette prosecutor is a power donated by the Director Public Prosecutions and if for whatever reason he is not able to prosecute, the Director of Public Prosecutions can still take over the prosecution.

The trial Magistrate was wrong to state that only prosecutors Kenya Wildlife related matters. Such finding contravenes the provisions of Article 157 of the Constitution which gives prosecutorial powers to the Director of Public Prosecutions. The letter dated 6/2/2018 the Acting Director General of Kenya Wildlife Service granted the office of the Director of Public Prosecutions permission to take over the above criminal case. The letter was brought to the attention of the trial Magistrate. Even if there was no such communication, the Director of Public Prosecutions has the mandate to take over the prosecution. Article 157(b) of the Constitution is very clear on this. Furthermore Article 157(a) provides:

***“The powers of the Public Prosecutors may be exercised in person or by sub-ordinate officers acting in accordance with general or special instructions.”***

For these reasons I find that the ruling of the trial Magistrate was wrong. He failed to appreciate the powers of the Director of Public Prosecutions as provided under **Article 157** and contradicted the provision. Article 2(1) & 4 of the Constitution provides:

***“This Constitution is the Supreme Law of the Republic and binds all persons and all State organs at both levels of Government.”***

***(4) Any law, including any customary law that is inconsistent with this Constitution is void to the extent of the inconsistency, and any Act or omission in contravention of this Constitution is invalid.”***

This court has supervisory jurisdiction over sub-ordinate Court as provided under **Article 165(6) of the Constitution**. Which states –

***“The High court has supervisory jurisdiction over the sub-ordinate courts and over any person, body or authority exercising a Judicial or Quasi-Judicial function, but not over a superior Court.”***

This powers are exercised by the High Court ‘*interalia*’ through revision of orders of the Sub-ordinate Courts. Section 364 of the Criminal Procedure Code Cap 75 of the Law of Kenya makes provision on the orders which High Court may make. **Section 364(b)** provides:

***“In the case of proceedings in a sub-ordinate Court the record of which has been called for or which has been reported for orders or which otherwise comes to its knowledge the High Court may –***

***In the case of any other order other than an order of acquittal, alter or reverse the order.”***

**In Conclusion:**

I find that the ruling of the trial Magistrate was wrong and had no legal basis. I order that:

- a) The ruling of the trial Magistrate dated 8/2/2018 is reviewed and set aside.
- b) The Office of the Director of Public Prosecutions to proceed and take over the prosecution of the case to its final determination.

**Dated at Kerugoya this 3<sup>rd</sup> July 2018.**

**L. W. GITARI**

**JUDGE**