



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NUMBER 89 OF 2014**

**HOANG CONG THANH.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(Being an appeal from the original conviction and sentence in the Chief magistrate's Court at Makadara Cr. Case No. 1139 of 2014 delivered by Hon. T. Okello, SPM on 14<sup>th</sup> April, 2014).*

**JUDGMENT**

The Appellant was charged with being in possession of wildlife trophies contrary to Section 95 of the Wildlife Conservation and Management Act, 2013. The particulars were that on the 22<sup>nd</sup> day of February, 2014 at Kenya Airways luggage sorting area, Jomo Kenyatta International Airport within Nairobi County was found in possession of worked ivory of wildlife trophies namely five worked elephant ivory bangles and eight worked elephant ivory pendants weighing 0.2 kgs valued at Kshs. 140,000/= without a permit.

The Appellant was convicted on his on plea of guilty. He was sentenced to pay a fine of Kshs. 2,000,000/= in default serve five years imprisonment. In addition, the exhibits were ordered forfeited to Kenya Wildlife Service. He was dissatisfied with both the conviction and sentence and he preferred the instant appeal. In his Petition of Appeal filed on 17<sup>th</sup> July, 2014, he emulated the grounds of Appeal as follows:

- 1. That the trial magistrate erred in law and fact by not appreciating the evidence of the Appellant.**
- 2. That the evidence of the prosecution was contradictory and did not support the charge against the Appellant.**
- 3. That the charges against the Appellant were defective in total and plea of guilty entered was unequivocal.(probably meant to read equivocal).**
- 4. That no known offence has been disclosed as having been committed by the Appellant by the evidence disclosed by the prosecution witness.**
- 5. That no loss or damages have been occasioned by the acts of the Appellant.**

The appeal was canvassed before me on 26<sup>th</sup> April, 2017. The Appellant who was in person submitted that he would pursue the appeal only against the sentence. He faulted the sentence as being harsh and excessive in that the court failed taking into account that he had been given the trophies by a friend to take to his family as a gift. At the time of his arrest, he was on transit from Angola to Vietnam. He urged the court to take into account that he had been in jail for three years and three months during which time he had learnt his lesson not to commit a similar offence again. He also informed the court that he was ready to be repatriated to his home country, Vietnam.

Learned State Counsel, Miss Sigei partly conceded to the appeal. She urged the court to take into account that since the Appellant pleaded guilty, the minimum sentence provided by the law was sufficient.

I have accordingly considered the appeal as well as the respective submissions. I am alive to the fact that sentencing is always in the discretion of the trial court. However, in exercising the discretion, the court must give regard to the circumstances of the case, the seriousness of the offence, the disposition of the accused, the blameworthiness of the accused and the past record of previous convictions of the accused, amongst other considerations. Further, under **Section 354 (3)(b) of the Criminal Procedure Code**, this court in exercising its appellate jurisdiction in an appeal against sentence, may **increase or reduce the sentence or alter the nature of the sentence**.

Where a minimum sentence is provided, the trial court has no option but to impose the minimum but depending on the circumstances of the case may enhance the sentence. The Appellant herein was a first offender and pleaded guilty instantly. He therefore did not waste the court's time. In my view then, in exercising the discretionary powers in sentencing, and having regard to the circumstances of the case, the court ought to have imposed the minimum sentence. Nevertheless, this case presents a unique situation whereby the Appellant is a foreigner and is willing to be repatriated to his home country. Having regard that the sentence was passed on 14<sup>th</sup> April, 2014, it is clear he has been in prison for a period of three years and two weeks which has served as a sufficient deterrence. I also take into consideration that the value of the trophies he was in possession of was not high.

Accordingly, I partially allow this appeal. I order that the Appellant has served sufficient sentence and is hereby forthwith set free. He shall be repatriated to his home country, Vietnam. He shall be released to Industrial Area Police Station, Immigration Department for purposes of processing him for repatriation. It is so ordered.

***DATED AND DELIVERED THIS 3<sup>RD</sup> DAY OF MAY, 2017.***

***G.W.NGENYE-MACHARIA***

***JUDGE***

***In the presence of:***

- 1. Appellant present in person.*
- 2. Ms. Nyauncho for the Respondent.*