REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL REVISION NO. 5 OF 2017

REPUBLIC…….…….…..APPLICANT

VERSUS

1. JAMES MWENDA MURIUNGI

2. JAMES MUNGAI KIMANI

3. PEREZ KISMEI KISIPAN…….…..RESPONDENTS

(Being revision arising from Kajiado **Chief Magistrate's Court Criminal Case No. 453 of 2016 presided by Hon. Kasera P.M)**

RULING

This application for revision was referred to this court by the Senior Prosecution Counsel vide a letter filed in court dated 2/5/2017. In his letter made under the provisions of Article 165 (3), (6) and (7), Article 159 (1) and (2), Article 50 (1) and (9) of the Constitution of Kenya as read together with section 362 and 364 of the Criminal Procedure Code Cap 75 of the Laws of Kenya. The applicant seeks the following orders;

1. THAT the Honourable Court be pleased to order a stay of the entire judgement and sentence against the accused persons in Kajiado Criminal Case No. 453 of 2016 pending the hearing and determination of this revision application.

2. THAT the Honourable Court be pleased to order the accused persons to be remanded at Kajiado Prison pending the hearing and determination of the instant revision application.

3. THAT the Honourable Court be pleased to revise, review, vary and/or set aside the sentence of a fine of Ksh.30,000/= in default one (1) year imprisonment passed against the accused herein in count one (1) and count two (2) in the Kajiado Chief Magistrate's Court Criminal Case No. 453 of 2016.

4. THAT the Honourable Court be pleased to substitute the sentence of a fine of Kshs.30,000/= in default one (1) year imprisonment passed against the accused herein in count one (1) and count two (2) in the Kajiado Chief Magistrate's Court Criminal Case No. 453 of 2016 with a fine as prescribed by the law under section 98 of the Wildlife Conservation and Management Act, 2013.

There are four grounds in the petition for revision dated 2nd May 2017. The first two respondents were charged with two (2) counts of offences under section 98 of the Wildlife Conservation and Management

Act, 2013. That upon full trial the two were found guilty and sentenced to a fine of Ksh.30,000 in default to a custodial sentence of one (1) year imprisonment on each count.

Secondly, that the learned magistrate erred in law by departing from the provisions of section 98 of the Wildlife Conservation and Management Act, 2013 and the provisions of section 66(1) of the Interpretation and General Provisions Act Cap 2 and section 12 of the Criminal Procedure Act (Supra) by imposing a lesser fine than that the law provides for in the Wildlife Conservation and Management Act.

Thirdly, the provisions of section 98 of the Wildlife Conservation and Management Act, 2013 are couched in mandatory terms which limit the court discretion to only pass the mandatory minimum sentence set by parliament.

Fourth, that while passing sentence the learned trial magistrate did not appreciate the intention of parliament in legislating for minimum sentences of a fine of Ksh.200,000/= or imprisonment for a term of not less than one year or both such fine and imprisonment.

Fifth; that for the interest of justice the orders of the trial magistrate are improper, illegal and incorrect and the same ought to be revised by this court.

The petition for revision was served upon the respondents who opted to make oral submissions at the hearing.

Background:

The respondents were jointly indicted and arraigned before the magistrate court on 31/5/2016 with the following counts;

> **COUNT 1: Hunting for bush meat trade contrary to section 98 as read with section 105 of the Wildlife Conservation and Management Act, 2013.**
>
> **The brief facts being that on the 30th day of March, 2016 at 14.30 hrs in Olturoto area within Kajiado County hunted a wildlife species namely zebra using motorcycle registration No. KMDP 281S and 2 knives in contravention of the Act**
>
> **COUNT 2: Being in possession of wildlife meat contrary to section 98 of the Wildlife Conservation and Management Act, 2013.**
>
> **The particulars of the charge being that on the 30th day of March, 2016 at 14.30 hrs Olturotoarea, within Kajiado County the respondents jointly were found in possession of meat of a wildlife species namely one zebra carcass without a permit.**

The record shows that in the course of the trial the 1st and 2nd respondents changed their plea of not guilty to that of guilty. The learned trial magistrate went through the procedure of admitting the plea of guilty with corresponding facts presented by the prosecution counsel. In consideration of the matter a plea of guilty was entered and each of the respondents convicted on their own plea. The learned trial magistrate sentenced each of the respondents to a fine of Kshs.30,000 on each count and in default to one year imprisonment. The sentences ordered were to run concurrently.

Being dissatisfied with this order the learned prosecution counsel Mr. Akula for the state sought intervention of this court by way of revision.

The issue before this court therefore is whether in the circumstances of this case the application for revision ought to be allowed on the grounds advanced by the applicant.

I have heard the submissions by learned counsel and the reply by the respondents. The trial court record has also been perused vis viz the impugned order.

As a point of entry, let me first set out the applicable law relating to applications of this nature.

Section 362 of the Criminal Procedure Code provides for the power of revision to the High Court over the subordinate court to call for the record and examine it for purposes of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.

The High Court in exercising its power is guided by section 364 of the Criminal Procedure Code which provides interalia that:

> **"(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes into its knowledge the High Court may:**
>
> > **a. In the case of a conviction, exercise any of the powers conferred or as a Court of Appeal by section 354, 357 and 358, and may enhance the sentence.**
> >
> > **b. In the case of any other order other than an order of acquittal alter or reverse the order.**
>
> **(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard, either personally or by an advocate in his own defence provided that this section shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned."**

The provisions under section 362 as read with section 364 confer a kind of supervisory jurisdiction envisaged under Article 165 (6) and (7) of the Constitution which provides as follows:

> **"The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi judicial function:**
>
> **(7) For the purposes of Clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in Clause (6) and may make any order or give any directions it considers appropriate to ensure the fair administration of justice."**

My reading of these provisions on revisional jurisdiction is more to do with a supervision confined to the issues of law to correct an error, or illegality likely to occasion a miscarriage of justice. Section 362 of the code provides in summary the grounds for revisions as to where the order, sentence or proceedings of the subordinate court are irregular, incorrect, illegal or tainted with impropriety.

In view of the above provisions the court has to bear in mind the procedure stipulated under section 354, 357 and 358 of the Criminal Procedure Code to make the necessary orders being challenged by an applicant as it applies in this case.

With this background it is important to consider section 382 of the CPC which provides as follows:

> **"Subject to the provisions herein before contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgement or other proceedings before or during the trial or in nay inquiry or other proceedings under this code, unless the error, omission or irregularity has occasioned a failure of justice provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the**

proceedings."

The main objection by the applicant for consideration by this court is to determine whether the sentence of a fine of Ksh.30,000/= in respect of each count against each of the respondent was regular, legal, correct or proper in law. The impugned sentence arises from the provisions of section 98 of the Wildlife Conservation and Management Act 2013. The two counts the respondents were charged with jointly are within section 98 and the corresponding penalty prescribed on conviction to be a fine of not less than two hundred thousand shillings or to imprisonment of a term of not less than one year or to both such fine and imprisonment.

In consideration of the matter as deduced from the record the learned trial magistrate was satisfied that the plea was unequivocal and did convict each of the respondents accordingly, with respect to sentence the learned trial magistrate imposed a sentence of Ksh.30,000 on each count in default, one (1) year imprisonment against the 1st and 2nd respondent.

The question therefore this court must delve into is whether the learned trial magistrate was right in passing a sentence of a fine of Ksh.30,000 in place of the minimum of Kshs.200,000 provided for under section 98 of the Act.

The importance of sentencing in administration of criminal justice cannot be over emphasized. It is regarded as the face of justice in punishing crime and a future alternative deterrent for the prospective offender of law.

The legal issue on the role of sentencing in the administration of criminal justice has been considered in various authorities whose principles I find applicable to this case:

In the case of ***Republic v James Henry Sargeant [1974] 60 Cr. Appeal 74 at 77*** the court observed that:

> **"The classical principles of sentencing are summoned up in four words: retribution, deterrence, prevention and rehabilitation. Any judge who comes to sentence ought always to have those four classical principles in mind and to apply them to the facts of the case to see which of them has the greatest importance in the case with which he is dealing."**

In another case ***Republic v Howells [1999] 1ALL ER 50 at 54*** Lord Bingham C.J held interalia as follows;

> **"Courts should always bear in mind that criminal sentences are in almost every case intended to protect the public, whether by punishing the offender or reforming him and others, or all of these things. Courts cannot and should not be unmindful of the important public dimension of criminal sentencing and the importance of maintaining public confidence in the sentencing system."**

It is against this background trial judges are called upon to exercise discretion which involves an onerous task to ensure that not only to do justice to each case but inspire confidence in criminal justice delivery.

In the Judiciary Sentencing Policy Guidelines it was observed that there exist notable disparities, lack of uniformity and certainty in offences with sentences of more or less similar facts and circumstances. It was further stated that this has contributed to the negative perception against the judiciary as a law enforcement agency.

The scope of the sentencing guideline is largely to assist the court while exercising discretion to balance the various factors to come up with the possible outcome. This policy guideline though not adequate is a key milestone to provide a framework on sentencing for trial courts.

In the present case the appellate court in considering the sentences on appeal or revision should not loose sight of these principles.

On the question raised by the applicant, counsel for the state I think it is worthwhile to set out the legal commentary governing an appellate court jurisdiction. The scope of intervention is provided for in the dicta discussed in the case of ***Joram Ogalo S/O Owuor v Republic [1954] 24 EACA 70*** where the stated principles to be satisfied are:

> **i. That the sentencing trial judge made a wrong decision as to the proper factual basis for the sentencing.**
>
> **ii. Second there has been an error on the part of the trial judge in appreciating the material before him or her.**
>
> **iii. Thirdly, that the sentence was wrong in principle.**
>
> **iv. Fourth, the sentence imposed was manifestly excessive or inadequate."**

See also ***Wanjema v Republic [1971] EA 493.***

In the instant case I have perused the record and also considered section 382 of the CPC and the guiding principles in the case of ***Owuor & Wanjema (Supra)*** as to the powers of the appellate court in respect of sentence passed by a trial court. I agree with the prosecution counsel that there were no exceptional factors to have occasioned the learned trial magistrate to depart from the provisions of section 98 of the Act which creates the offences accused persons were charged with and the subsequent minimum penalty provided for the offence.

This court further takes judicial notice that the wildlife related offences more specifically wanton killing of wild animals in the recent past has increased exponentially. The economic contribution in terms of GDP of our wildlife as one of the lead sector foreign exchange earner cannot be underscored. The inadequacy of the old Wildlife Conservation Act regime to punish criminals who had pitched tent in our game parks to unlawfully poach wild animals for trade captured both the national and international community. It was time to prevent the catastrophe hence the enactment of the new laws by parliament.

One of the factors identified contributing to motivate criminals was the lenient sentences in our statute governing Wildlife Conservation and Management Act. The penalty provided for was not only lenient proportionate to the offence committed but the courts within the country exercised discretion in a manner which failed to punish offenders by enforcement of the law. The imbalance on disparity and disproportionate in sentencing called for a review of the legislation to re-enact the present Wildlife Conservation and Management Act 2013. The Act is to guide the country in wildlife conservation and in matters dealing with offences identified against culprits who are caught up to have breached the provisions of this Act.

One key provision as regards offences is the creation of minimum sentences which takes away the discretion of the trial court in the event an offender has been found guilty and convicted of an offence under the Act. I have taken the trouble to set out these matters which are appraised from the law and the record before me to demonstrate an apparent lack of conviction by the learned magistrate to take note of the law and nature of the offence which has been rampant in recent years. Learned trial magistrate did not have the luxury of discretion at her disposal to pass partial sentence prescribed under section 98 of the Wildlife Conservation Act 2013 (Supra) and ignore the rest of the provisions. Clearly there is a misdirection of the law on the part of the trial magistrate which occasioned a failure of justice as the sentence was manifestly inadequate as it relates to a fine of Ksh.30,000/= in place of the Ksh.200,000 set out in the law. Parliament cannot have intended that the provisions of section 98 of the Act (Supra) could be subverted and ignored at the whims of the court.

In the instant application under the provisions of section 354 (g) (iii) of the CPC and the principles cited above in the ***(Owuor and Wanjema Case (Supra)***. The sentence by the learned trial magistrate is illegal, incorrect and improper. It is also at variance with the provision of section 98 of the Act. I have come to the conclusion that there are no exceptional circumstances both in law and fact advanced by the

respondents to persuade this court not to interfere with the sentences of a fine of Ksh.30,000. However in this case I have weighed the facts, the gravity of the offence subject matter of this revision. I am of the considered view that in order to meet the ends of justice this court not only has to set aside the sentence but order for its enhancement. The crime and other attendant circumstances prevail in favour of the action to comply with section 98.

As a result this revision is allowed and the sentence of a fine of Ksh.30,000 imposed by the magistrate court is hereby set aside and enhanced to a fine of Kshs.200,000 on each count as provided for under section 98 of the Wildlife Conservation and Management Act 2013 against the 1st and 2nd respondent. The sentences imposed in the event of default to serve a term of one year imprisonment on each count.

Sentences are ordered to run concurrently.

That is the order of this court.

Dated, read and signed in open court at Kajiado this 15th day of May, 2017.

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R. NYAKUNDI

JUDGE

In the presence of:

Mr. Akula for the Director of Public Prosecutions

Respondents present

Mr. Leonard Court Assistant