



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT LODWAR

LODWAR HIGH COURT CRIMINAL APPEAL NO. 62 OF 2016

NAWATON EPETET APPELLANT

VERSUS

REPUBLIC RESPONDENT

AND

LODWAR HIGH COURT CRIMINAL APPEAL NO. 65 OF 2016

EKENO MARAKA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(An appeal from conviction and sentence in original Lodwar PMCR 357/2011 delivered on 3/6/2014 by T NZYOKI Senior Resident Magistrate)

JUDGMENT

The two appeals Lodwar **H.C.CR Appeal No.63/2016** and Lodwar **H.C CR. Appeal 65/2016** have been consolidated as they all arise from the original Lodwar **PMCR 357/2011**. The appellants Ekeno Maraka and Nawaton Epetet were jointly charged with the offence of unlawful possession of Game trophy contrary to section **39(3) (b)** of the Wildlife Conservation and Management **Act Cap 376** laws of Kenya.

The particulars of the offence are that on the 24th day of May, 2011 at around 6.am at Kalomngorok village in Katilu division of Turkana South District within Turkana County were jointly found in possession of Government trophy to wit two elephant tusks all weighing 10 kilogram valued at **Kshs.30,000/=**.

In count 2 they were charged with offence of failing to make a report to obtain possession of Government trophy **C/S 39(3) (a)** as read with section **39(3) (b)** of the wildlife conservation and management Act cap **376** of the laws of Kenya.

The particulars of the offence are that on the 24th day of May, 2011 at around 6.00am at Kalemngorok village of Katilu division in Turkana South District of the Turkana County failed to report Kenya Wildlife Service possession of two elephant tusks weighting 10kilogram the property of the Government of Kenya.

Both appellants pleaded guilty to the charge, facts were explained to court which facts they admitted as

being true and were consequently convicted on own plea of guilty and sentenced to serve eight (8) years imprisonment.

The appellants were dissatisfied with the conviction and sentenced and filed this appeal. Appellants basically raised similar grounds of appeal which they submit that they pleaded guilty to the charge but urge this court to consider their mitigation and in particular that they are first offenders, have family responsibilities and pledge not to repeat the offence.

At the hearing of the appeal Mr. Kimanthi learned prosecuting counsel pointed out to the court that the sentence of 8 years imposed on the appellants was unlawful. He submitted that the punishment for the offence in 2011 when the offence was committed under the Act was a fine of KShs. **10,000/=** or a term of imprisonment not exceeding 12 months. He therefore conceded the appeal on sentence.

The appellants pleaded guilty to the charge, whereupon they were convicted. By virtue of section 348 of the criminal procedure Code; they cannot appeal against conviction but can address the court on the legality or severity of sentence (see section 348 criminal procedure code). The only issue the appellants are raising in this appeal is the severity of sentence and that they had mitigation circumstances which the court ought to have taken into account in sentencing them.

The appellants were charged with the offence of being in possession of a Government trophy **C/section 39(3) (b)** of the Wildlife Conservative and Management **Act cap 376 Laws of Kenya (Revised 2009)**.

39 (2) Any person who by any means obtains possession of a Government trophy shall forthwith make a report thereof to an authorized officer and shall hand the trophy over to the authorized officer

3) (a) any person who fails to make a report required by section 2 or

(b) Is unlawfully in possession of or unlawfully deals in any Government trophy shall be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to imprisonment for a term not exceeding twelve months or to both”

Clearly therefore the maximum punishment for an offence under section **39 (3) (b)** is a fine of Shs. **10,000/=** or imprisonment for a maximum of twelve months. The trial magistrate imposed a term of imprisonment of (8) years. Nowhere in the section is that sentence provided for. The sentence is in my view an illegal sentence. I therefore agree with Mr. Kimanthi that the sentence is illegal and this court has a duty to set it aside, which I hereby do.

I notice that the appellants were convicted and sentenced on 3/6/2011. They have served 5 years imprisonment already and have served 4 years above the maximum sentence of imprisonment of twelve months. I hereby direct that the appellant **NAKAWOTON EPETET** and **EKENO MARAKA** to be released forthwith unless otherwise lawfully detained.

Dated and signed at Lodwar this 10th day of September, 2016.

S N RIECHI

JUDGE