



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL APPEAL NO. 36 OF 2014**

1. SAID FARA ABDI ..... 1ST APPELLANT  
2. SAREI KHALIF ..... 2ND APPELLANT  
3. MOULID BOCHA .....3RD APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

*(From original Conviction and Sentence in Criminal Case No. 72 of 2014 of the Senior Principal Magistrate's Court at Voi – Hon. Nyakundi - PM)*

**JUDGMENT**

The three Appellants above mentioned were each fined Ksh. 200,000/= in default to serve one (1) year Imprisonment on the 1st Count of entering a National park contrary to Section 102(1)(a) of the Wildlife Conservation and Management Act.

In the second each was fined Ksh. 100,000/= in default one (1) year imprisonment.

In the third Count each was discharged for lack of a report from Nema. They have now lodged this appeal on the grounds that they did not understand Swahili language and secondly, that the Sentence meted to them was harsh and excessive in the circumstances of the case.

A perusal of the lower Court file shows that the three pleaded guilty to the charges and were Convicted on their own plea.

The plea was taken in Kiswahili language to which they replied “*Ni kweli*” in Kiswahili language. The facts were read to them and they admitted that they were true.

They also admitted the third count but the learned trial magistrate discharged them for lack of a report from NEMA.

In his submissions before the Court Counsel for the Appellants Mr. Amari contends that in the proceedings in the lower Court the coram omits a Court clerk.

He further submits that the interpretation was in Somali language and that they did not understand Somali language as one is an Orma and the others Wardei by tribe.

A perusal of the petition of appeal. Ground one reads,

***“The learned trial magistrate erred in law and fact by Convicting and Sentencing the appellants to two (2) years or in the alternative a fine of Kenya Shillings Three Hundred Thousand without taking into account that the appellants never understood the charges facing them for they are not well versed with either English or Kiswahili languages, which medium the charges were read to them”.***

As argued above, the record of proceedings shows that the plea was taken in Swahili language and the Appellants replied in Swahili language. In the case of Adan –Vs- Republic 1973 E.A 445 it was held,

***“The charge and all the essential ingredients of the offence should be explained to the Accused in his language or in a language he understands.***

- ii. ***the Accused own words should be recorded and if they are an admission a plea of guilty should be recorded;***
- iii. ***the prosecution should then immediately state the facts and the Accused should then be given an opportunity to dispute or explain the facts or to add any relevant facts***
- iv. ***If the Accused does not agree the facts or raises any question of his guilt his reply must be recorded and change of plea entered***
- v. ***If there is no change of plea a Conviction should be recorded and a statement of the facts relevant to Sentence together with the Accused's reply should be recorded”.***

In the present case the three appellants were charged in the first Court with the offence of entering a National Park contrary to Section 102 (1) (a) of the Wildlife Conservation and Management Act.

In the second Count they were charged with entering a National Park with livestock contrary to Section 102 (3) of the management Act 2013 Laws of Kenya.

In the third Count with using the environment and natural resource and Wasteful and destructive means contrary to measures prescribed under 140(2) of the Environment Management and Co-ordination Act.

As stated earlier the learned trial magistrate discharged them for lack of a report from NEMA.

Section 102 (1) of the Act provides,

***“ Any person who enters or resides in a national Park or reserve otherwise than under licence, permit or in the course of his duty as authorized officer or a person lawfully employed in the park or reserve as the case may be commits an offence and is liable on Conviction to a fine of not less than Two Hundred Thousand Shillings or to imprisonment of not less than two (2) years or to both such fine and imprisonment”.***

The facts before the lower Court were read thus,

***“The facts are that yesterday on 23/1/2014 KWS officers were on a major patrol within Tsavo East National park to flush out cattle that had been introduced to the park unlawfully. Around 13:00 hours, the Accused persons were found near Majapa Ndovu grazing 260 cattle. They were arrested and escorted by KWS officers to Voi police station where they were charged with the offence before the Court”.***

These are the facts that were read to the Accused persons and they answered that they were true. A reading of these facts show that they only relate to the offence of entering a National park contrary to

section 102 (1) (a) of the Wildlife Conservation and Management Act.

The charge under Section 102 (1) of the Act requires that it be shown that the Appellants had no licence, permit or were not authorized officers.

The facts that were read to the appellant did not indicate the above. In a nutshell they did not disclose the offence envisaged under Section 102 (1) of the Act. However, I am satisfied that they did disclose the offence of entering into a National Park with livestock contrary to Section 102 (2) as read with Section 102 (3) of the Act.

The Conviction on the first Court is accordingly quashed and the Sentence is set aside.

As relates to the 2nd Count each Accused person was fined Ksh. 100,000/= in default one (1) year Imprisonment. Section 102 (3) of the Act is the punishment Section and it provides,

***“Any person who contravenes subsection (2) commits an offence and is liable upon Conviction to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding six months”.***

It can be deduced from the above that while the fine of Ksh. 100,000/= imposed on the Appellants was legal the Sentence of one year Imprisonment in default was not, as the section provides for a term not exceeding six (6) months Imprisonment.

The Sentence on the second Count is therefore substituted with a fine of Ksh. 100,000/= in default six (6) months imprisonment for each of the three Accused persons. In the event that they have served the six (6) months imprisonment to be set at liberty unless otherwise lawfully held.

**Judgment delivered dated and signed this 5th day of June, 2014.**

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**M. MUYA**

**JUDGE**

**5TH JUNE, 2014**

**In the presence of:-**

Counsel for the Defence Mr. Omari

Learned Counsel for the State Mr. Ayodo

The Appellants present

Court clerk Musundi

**M. MUYA**

**JUDGE**

**Court:** Copies of the Judgment to be furnished to the Director of Public Prosecution and the Defence.

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**M. MUYA**

**JUDGE**

**5th JUNE, 2014**