



REPUBLIC OF KENYA
HIGH COURT OF KENYA

AT VOI

CRIMINAL APPEAL NO. 7 OF 2014

MUTISYA KIEMA.....APPELLANT

-VERSUS-

REPUBLIC..... RESPONDENT

(From original Conviction and Sentence in Criminal Case No. 76 of 2014 of the Senior Principal Magistrate's Court at Voi – Hon. Nyakundi – Ag. PM)

JUDGMENT

1. The Appellant, **MUTISYA KIEMA** was charged together with another person, **KISONZO NZAU** with two counts of offences under the Wildlife Conservation and Management Act, 2013. The first count was the offence of being in possession of wildlife trophy contrary to section 95 as read with Section 92 of the Wildlife Conservation and Management Act , 2013.
2. The particulars of the offence were as follows:

“On 26th January 2014 at around 0300 hours at Kalimani area of Mtito Andei within Makueni County, jointly were found in possession of wildlife trophy namely elephant tail (switch) with a street value of Kshs. 500/- without permit.”
3. The second count was the offence of being in possession of hunting apparatus contrary to Section 102 (1) (f) of the Wildlife Conservation and Management Act, 2013. The particulars were that:

“On 26th January 2014 at around 0300 hours at Kalimani area of Mtito Andei within Makueni County, jointly were found in possession of hunting apparatus namely 2 bows, 4 poisoned arrows, a piece of poison bite, 1 axe, 2 knives and 43 wire snares.”
4. The two accused persons pleaded guilty to the two counts. They were convicted on their own plea of guilty and fined Kshs. 1,000,000/- in default to serve five years in jail for count one and Kshs. 200,000/- in default to serve one year in prison for count two.
5. The Appellant has brought this appeal through his Petition of Appeal filed on 4th February 2014. In his said Petition, the Appellant has raised seven issues which he calls “Grounds of Mitigation”. He does not challenge his conviction and sentence. He has only expressed his remorsefulness and raised factors for mitigation.
6. In summary, the Appellant stated that he is remorseful and apologetic for he did not know the

consequences of the offences he was charged with. He also stated that he is the sole breadwinner of his family and children who solely depend on him for upkeep and education. He further urged this Court to consider his age of 64 years *vis a viz* the sentence of six years passed against him. He urged the Court to consider his health as he is suffering from ulcers. In the end, the Appellant prayed as follows:

“I kindly pray the lordship court (sic) to consider my remorsefulness, age and health and either quash the conviction and set aside the sentence or reduce and shorten my jail term to enable me join my family again.”

7. As already observed, the Appellant is not challenging his conviction or sentence on the two counts. He is simply asking the court to be lenient to him after considering his mitigating factors.
8. The record shows that the Appellant had stated as follows in mitigation during his trial at the subordinate court:

“I live alone. My property may be lost. My family lives elsewhere. I urge the court to pardon me. I did not know that I had committed an offence until I was arrested.”

9. He did not mention his poor health status or that his children (who he said were living elsewhere) required him for education or daily upkeep. He did not tell the trial court that he is aged 64 years or at all talk of his old age. The issues he has raised in this appeal in mitigation are totally new and the same would not form a basis for setting aside the conviction and sentence. Nonetheless, this being a first appeal, this Court has the duty to evaluate the evidence and the proceedings before the trial court with a view to arriving at its own conclusion and findings.
10. This appeal was heard on 4th September 2014. Mr. Gioche, the

learned State Counsel who was present for the State, told court that Section 92 of the Wildlife Conservation and Management Act, 2013 “has been controversial”. Although he did not elaborate on that, the State Counsel added that section 92 of the Act had been declared illegal by Mbogholi, J. and therefore people were no longer being charged under it. The State Counsel was referring to the case **Zhang Chunsheng v. Republic: Nairobi High Court Criminal Revision No. 9 of 2014** (unreported) where Mbogholi, J. stated as follows regarding section 92 of the Wildlife Conservation and Management Act, 2013:

“The nature and types of the offences contemplated under this section have not been expressly set out...Section 92 of the Act, to say the least, is ambiguous.”

11. The learned State Counsel conceded that the charge under Section 92 was defective. The State Counsel, however prayed for a re-trial rather than acquittal.
12. Section 92 of the Wildlife Conservation and Management Act, 2013 provides as follows:

“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.”

13. Section 95 of the Wildlife Conservation and Management Act, 2013 on the other hand provides as follows:

“Any person who keeps or is found in possession of a wildlife trophy or deals in a wildlife trophy, or manufactures any item from a trophy without a permit issued under this Act or exempted in accordance with any other provision of this Act, commits an offence and shall be liable upon conviction to a fine of not less than one million shillings or imprisonment for a term of not less than five years or to both such

imprisonment and fine.”

14. While Section 95 of the Act deals with offences relating to wildlife trophies and trophy dealing generally, Section 92 is restricted to offences in respect of endangered or threatened species or their trophies only. Section 3 of the Act defines both “endangered species” and “threatened species” as any wildlife species specified in the Fourth Schedule of the Act. The Fourth Schedule of the Act however deals with provisions as to public consultations and does not contain a list of endangered species. Instead, Section 47 of the Act provides that **“The species of wildlife set out in the Sixth Schedule are declared to be critically endangered, vulnerable, nearly threatened and protected species.”** The list of endangered or threatened species is therefore found in the Sixth Schedule to the Act.

15. The particulars of count one indicate that the Appellant was charged with being in possession of an elephant tail. African elephant is listed in the Sixth Schedule to the Act as one of the endangered species. The Appellant was therefore charged with an offence relating to a trophy of an endangered species.

16. The question then is, shouldn't the Appellant have been charged under Section 92 of the Act only? After a careful reading of Section 92 of the Act, I notice that it is more of a punishment provision rather than a penal provision. In other words, the section only provides for the punishment for the offences in respect of endangered species or their trophies but does not itself create the offence. I say so because section 92 only provides for punishment “where a person commits the offence in respect of an endangered or threatened species or in respect of any trophy of that endangered or threatened species” but does not make provision for the circumstances under which a person is deemed to have committed the said offence. In the case of **Zhang Chunsheng** (supra) Mbogholi, J. stated that section 92 of the Act is ambiguous and does not state the relevant offences. The learned judge observed that:

“The Act should have set out the offences relating to those species so that the investigators, prosecutors, accused and courts are clear of what they are dealing with”.

17. The Act does not provide for what exactly amounts to the offence relating to the endangered species. It is therefore not possible to tell what an accused person does or fails to do so that the person is said to have committed an offence relating to endangered species. In my view, it is legally untenable to charge a person under Section 92 of the Act only and the Appellant could not have been charged under that section alone. Perhaps that is why he was charged under both Section 92 and 95 of the Act.

18. However, it would pose a great legal challenge to the court when a person is charged under both sections 92 and 95 of the Act because the two sections provide different penalties for the respective offences under them. While section 95 provides for a fine of not less than one million shillings or imprisonment for a term of not less than five years or both, Section 92 provides for a fine of not less than twenty million shillings or imprisonment for life or to both. It would therefore be uncertain which sentence to pass in a case where a person is charged with offences under both Sections.

19. The Wildlife Conservation and Management Act, 2013 came into effect on 10th January this year and perhaps its provisions are still being tested. It appears that the intention of the drafters of the Act was to create a severer punishment for offences relating to endangered species. However, they only made provision for punishment in section 92 but omitted to create the offence itself. Perhaps it is time to address the glaring lacuna as was observed by Mbogholi, J. in the **Zang Chunsheng** (supra), which observation I reiterate herein that:

“The Wildlife Conservation and Management Act, 2013 is a step in the right direction; but the Act requires some polishing to ensure the intended purpose is

achieved. I strongly recommend the observations I have made herein be brought to the attention of the relevant authorities for appropriate action.”

20. What then should have been the consequence of charging the Appellant with an offence under both Sections 92 and 95 of the Act? Should the charge under count one have been rendered defective? I do not think so. Section 179 of the Criminal Procedure Code, Cap. 75 of the Laws of Kenya provides for the conviction of an accused person for a lesser offence than that which the person is charged with. That section provides that:

“(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.”

21. Although the Appellant was charged with an apparently more serious offence, it is my view that the Wildlife Conservation and Management Act, 2013 as it is now, does not clearly create the offences relating to endangered species or their trophies. It only provides for punishment for the same. This court shall therefore invoke Section 179 of the Criminal Procedure Code and reduce the offence that the Appellant was charged with under both Sections 92 and 95 of the Wildlife Conservation and Management Act, 2013 to offence under Section 95 only. It is my considered view that unless and until the Act is amended to create the offences restricted to endangered species, suspects should be charged under section 95 of the Act only.

22. Section 95 of the Wildlife Conservation and Management Act, 2013, as already observed, provides for a sentence of a fine of not less than one million shillings or imprisonment for a term of not less than five years or both. The Appellant was sentenced as per that section. He has raised issues in mitigation and asked the court to be lenient on him. Some of the issues he has raised were not raised before the trial Court. Be that as it may, the sentence passed against the Appellant was the minimum sentence provided in law. He cannot therefore say that the trial magistrate was harsh. I therefore find no reason to interfere with the conviction and sentencing under count one.

23. On count two, the Appellant was charged under Section 102 (1) (f) of the Wildlife Conservation and Management Act, 2013 which provides that:

(1) Any person who-

(a)...

(b)...

(c)...

(d)...

(e)...

(f) conveys into a protected area or is found within a protected area in possession of any firearm, ammunition, arrow, spear, snare, trap or similar device without authorization;

(g)...

(h)...

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 years or to both such fine and imprisonment.” (emphasis added)

24.The Act defines a “protected area” as **“a clearly defined geographical space, recognized, dedicated and managed through legal or other effective means, to achieve long- term conservation of nature with associated ecosystem services and cultural values”**.

25.The charge sheet did not indicate whether “Kalimani area” where the Appellant was arrested is a protected area for purposes of the Wildlife Conservation and Management Act, 2013 or not. In my view, that was a major component of the charge that the prosecution ought to have clearly stated for the offence under count two to succeed. Article 50(2) of the Constitution of Kenya, 2010 provides that one of the elements of the right to a fair trial is a right of the accused **“to be informed of the charge, with sufficient detail to answer it.”** The failure by the prosecution to state either in the charge or the particulars of the offence or even in the facts read out in court that Kalimani area was a protected area under the Act, in my view, left a gaping hole in the charge that the Appellant could not have sufficiently answered to it. His plea of guilt on this Court was therefore equivocal. For this reason, the conviction under count two shall be quashed and the sentence set aside.

26.In conclusion therefore and in regard to this Court’s findings on the

provisions of Section 92 the lower Court’s conviction and sentence on Count one are hereby upheld. The conviction and sentence in respect to Count two are respectively quashed and set aside.

It is so ordered.

Judgment by:-

MARY KASANGO

JUDGE

In the presence of:-

..... for Appellant

..... for Respondent

DATED and DELIVERED at VOI this 8TH day of OCTOBER, 2014.

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JUDGE