Situma & 2 others v Republic (Criminal Appeal 145 of 2023) [2024] KEHC 5976 (KLR) (28 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5976 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIBERA

CRIMINAL APPEAL 145 OF 2023

DR KAVEDZA, J

MAY 28, 2024

BETWEEN

ROSE KHAYANGA SITUMA .... 1ST APPELLANT

SHIKUKU ROBERT WAFULA .... 2ND APPELLANT

SILVANIS KIOKO NGULA .... 3RD APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the conviction and sentence of the Hon. Kuto PM in Kibera CM Criminal Case No.663 of 2020)

JUDGMENT

1. The Appellants herein, were charged before Kibera Criminal Case No.663 of 2020 with the offence of dealing in wildlife trophy without a permit contrary to section 92(2) of the *Wildlife Conservation and Management Act,* 2013. The particulars were that the appellants and another, on 18 July 2020 at around 1600 hrs at Nyayo Stadium Stage along Langata Road in Nairobi West within Nairobi County were dealing in Wildlife Trophies namely: one (1) piece of elephant tusk weighing 2.8 kgs inside a red bag concealed with a black polythene paper, green carrier bag and a sisal sack and one piece of leopard skin inside a blue, red and white stripped manila carrier bag, all with a street value of Kshs.300,000/= without a permit.

2. Upon the charge being read over to the appellants, they pleaded not guilty but subsequently changed their plea to guilty. The appellants were then convicted on own plea of guilty and sentenced to serve 7 years imprisonment.

3. This appeal is restricted to the sentence imposed. According to the appellants, there were no aggravating factors to compel the trial court to impose on them the said sentence. It was further

submitted that the trial court did not consider the peculiar circumstances of the case that the street value of the recovered trophies was low and further, that the trial court did not consider the appellants' mitigation. In support of their case, the appellants relied on *Hussein Wanjala Wekesa v Republic* (2021) eklr and Criminal Appeal No. E007 of 2021, J*umaa Mangundu Ndeka v Republic*.

4. In opposing the appeal, it was submitted on behalf of the Respondent that the grounds of appeal raised by the appellants do not warrant interference of the sentence imposed by the trial court. According to the Respondent, sentencing is a discretion of the trial court and such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles.

5. During sentencing the court must take into account all relevant factors eschew all extraneous or irrelevant factors. It was submitted that the appellate court would only be entitled to interfere with the sentence imposed by the trial court if it is demonstrated that the sentence imposed is not legal or it is so harsh and excessive to amount to miscarriage of justice, and or that the court acted upon wrong principles, or if the court exercised its discretion capriciously. According to the Respondent, the trial court took into account all relevant factors before sentencing the appellants and thus there would be no reason for this court to interfere with such sentence. The Respondent submitted that the appeal ought to be dismissed, and both the conviction and sentence of the trial court upheld. Reliance was placed on *Benard Kimani Gacheru v Republic* (2002) eKLR and the Sentencing Policy Guidelines, 2016.

6. In this appeal, the appellants are only aggrieved with the sentence. It is therefore important to set out the circumstances under which an appellate court interferes with sentence. The principles guiding interference with sentencing by the appellate Court were well set out in *S v . Malgas* 2001 (1) SACR 469 (SCA) where it was held that:

> " A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate."

7. In this case, the appellants were charged under section 92(2) of the *Wildlife Conservation and Management Act*, 2013 which provides as follows:

> " (2) A person who, without permit or exemption issued under this Act, deals in a wildlife trophy, of any critically endangered or endangered species as specified in the Sixth Schedule or listed under CITES Appendix I, commits an offence and shall be liable upon conviction to a term of imprisonment of not less than seven years."

8. I note that the main ground of appeal revolves around the trial court not taking into account the mitigation by the appellants and the fact that they pleaded guilty before imposing the minimum sentence of 7 years. The learned magistrate's view in imposing the sentence was influenced by the fact that section 92(2) is coined in mandatory terms with a minimum sentence. Indeed, a cursory look at the sentencing proceedings shows that the Court did not mention anything about the fact that the appellants had pleaded guilty and were first time offenders. These, however, were factors which the

trial court was bound to take into account in favour of the appellants and weigh them against those that supported a severe sentence.

9. Sentence is essentially a discretionary matter for the trial court but in exercising that discretion, the trial court must take into account all the relevant factors and leave out all irrelevant ones. The appellate court would only be entitled to interfere with the exercise of such discretion where it is shown that that the court whose discretion is impugned, has either not taken into account a relevant factor, or taken into account an irrelevant factor, or that short of these, the exercise of the discretion is plainly wrong. In this case, the trial court appears not to have taken into account the fact that the appellants pleaded guilty and saved the court's precious time, as well as the fact that the appellants were first time offenders. The trial court's failure to take these factors into account gives this court the right to interfere with the sentence imposed on the appellants.

10. Despite section 92(2) of the *Wildlife Conservation and Management Act*, 2013 being coined in mandatory terms, the Supreme Court in *Francis Karioko Muruatetu & Another v . Republic* [2017] eKLR. It is now trite that the discretion of the court in sentencing should not be entirely taken away by the legislature.I have perused the record of the trial court and nowhere did the learned magistrate give recognition of the fact that the appellants pleaded guilty to the charge therefore saving court's time. The learned trial magistrate did not also recognize that the appellants' were first offenders. The court gave more weight to the seriousness of the charge and the need to pass a deterrent sentence. In so doing so, I find that the learned trial magistrate overlooked material factors which dictated a less severe sentence than the one imposed.

11. In those circumstances I find that the sentence of seven (7) years imprisonment was excessive and manifestly harsh since the appellants' pleaded guilty, and were first offenders. Accordingly, I allow the appeal and substitute the sentence of 7 years imposed on the appellants with that of four (4) years to run from 20 July 2020 when the appellants were first arraigned in court.

It is so ordered.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 28TH DAY OF MAY 2024

____

D. KAVEDZA

JUDGE

In the presence of:

Adoyo for the Appellants

Appellants' Present

Ms. Tumaini for the Respondent

Joy Court Assistant

Kibera High Court Criminal Appeal No. 145 of 2023 Page **2** of **2**