



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**APPELLATE SIDE**

**CRIMINAL APPEAL NO 494 OF 1977**

**THOMAS WAKITATA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant was convicted by one of the Resident Magistrates in Nairobi on two counts of being in possession of game trophies without also being in possession of a certificate of ownership in respect thereof, contrary to section 42(1)(b) of the Wildlife (Conservation and Management) Act (hereinafter referred to as “the Act”), and was sentenced as follows: on the first count, to a fine of Shs 6000 for the first colobus monkey skin and Shs 3000 for each of the other five (a total of Shs 21,000) or to six months’ imprisonment in default; and on the second count to a total fine of Shs 30,000 or to nine months’ imprisonment in default for the twelve skins found. Both terms of imprisonment to run concurrently. The animal skins were forfeited to the Kenya Government.

According to the appellant’s petition of appeal, he was fined a total of Shs 51,000 or, in default to fifteen months’ imprisonment; but this must clearly be wrong in view of the fact that the magistrate had expressly ordered the sentences to run concurrently.

The trophies described in the first count of the charge were of animals listed in Part II of the First Schedule to the Act and those described in the second count of the charge of animals listed in Part III of the First Schedule to the Act. Under the general penalty provided by section 42(1)(b) of the Act, an offender is liable to a fine not exceeding Shs 10,000 or to imprisonment for a term not exceeding three years, or to both such fine and imprisonment for such an offence. However, section 56(2) of the Act then goes on to state as follows:

Upon the conviction of any person for an offence against this Act which relates to more than one animal or trophy the Court *may* inflict an additional punishment in respect of each animal or trophy after the first of a fine not exceeding Shs 6000, or one-half of the fine prescribed by this Act for such offence, whichever is the less.

We have emphasised the word “may” because we are of the view that it gives a discretion to a Court whether or not to impose separate fines for additional animals or trophies. This is to be contrasted with somewhat similar provisions in section 47(2) and (3) of the Wild Animal Protection Act (which was repealed by the present Act, which came into force on 13th February 1976 by Legal Notice 38/760) where the word “shall” was used regarding penalties for additional animals, which the Court of Appeal for East Africa has held to be a mandatory sentence (see *Hassan v The Republic* [1975] EA 221).

However, whatever the maximum sentence laid down for an offence, a magistrate cannot exceed, his own jurisdiction in passing sentence (see *Hassan v The Republic (supra)*, *Shikwaya v The Republic* [1970] E A 399), unless there is an express provision in any law authorising him to do so notwithstanding his normal power of sentencing. For example, under the Exchange Control Act, a first-class magistrate is specifically empowered to impose imprisonment not exceeding ten years or a fine not exceeding Shs 200,000, or both, and in default of payment of the fine a default sentence of up to ten years' imprisonment can also be imposed.

However, in the Act before us, no such power is vested in the magistrate and we have to fall back to the Criminal Procedure Code, section 7(2) of which provides, *inter alia*, that a first-class magistrate (which includes a resident magistrate) may not impose a fine exceeding Shs 10,000. However, by virtue of section 14(2) of the same Code, a magistrate may impose on any person at one trial consecutive sentences or fines which amount in the aggregate to twice the amount which the Court is competent to impose. In other words, the maximum total fine which the Resident Magistrate could impose in respect of both the counts of the charge was Shs 20,000. It would appear that subsequent to the passing of sentence in this case, the trial magistrate realised that she had exceeded her jurisdiction, and she very properly brought it to the attention of this Court, so that an order in revision could have been made had the appellant not appealed.

However, before we deal with the sentence, we consider it pertinent to make the following observations which arise directly out of the record before us. (1) Sentences in default of payment of a fine cannot be made to run concurrently (see *The Republic v Ofunya* [1970] EA 78). (2) Where separate fines are imposed, an omnibus default sentence of imprisonment cannot be imposed. Separate default sentences must be passed for each non-payment of fine. (3) The maximum default sentence of imprisonment which can be imposed for non-payment of anyone amount of fine is six months' imprisonment by virtue of section 28(2) of the Penal Code, unless there is an express provision to the contrary. (4) It is normally an exercise in futility to impose heavy fines without ascertaining whether an offender has the capability or ability to pay the same. (5) Under section 52(1) of the Act, where a person is convicted of a forfeiture offence, the Court shall order the trophy, etc, to be forfeited unless it considers for reasons to be recorded that it would be unjust to do so. "Forfeiture offence" is defined in the definition section (section 2) of the Act as an offence which is so designated by any of the provisions of this Act creating offences. Surprising as it is, offences under section 42 of the Act have not been designated as "forfeiture offences" (although offences under section 40 are so designated). Hence the magistrate had no power to order forfeiture. However, we would add that, by virtue of section 39(1)(d) of the Act, any animal or trophy in respect of which a breach of any of the provisions of the Act or the rules thereunder has been committed automatically becomes a Government trophy and the property of the Government and, accordingly, a forfeiture order is not necessary in any event.

The magistrate sentenced the appellant to a total of nine months' imprisonment in default of payment of fines, and since there is no application for enhancement of the sentence, we are of the view that we should not increase it as that would prejudice the appellant, who has had no opportunity to show cause against it. Therefore, in order of appeal, we set aside the sentences passed by the magistrate, including the order for forfeiture, and substitute the following sentences:

Count 1: Fine Shs 10,000, or in default four and a half months' imprisonment.

Count 2: Fine Shs 10,000, or in default four and a half months' imprisonment.

Total: Fine of Shs 20,000, or in default nine months' imprisonment.

To this extent only the appeal succeeds.

*Appeal allowed in part*

**Dated at Nairobi this 10<sup>th</sup> day of October 1977**

**S.K SACHDEVA**

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**JUDGE**