

JOHN KANJALA AND MARTIN MBEDU AND MANWELL KANDUA v THE PEOPLE (1988 - 1989) Z.R. 108 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER, J.S., AND CHAILA, AG. J.S.
9TH FEBRUARY 1988
(S.C.Z. JUDGMENT NO. 19 OF 1988)

Flynote

Sentence - s .142, National Parks and Wildlife Act - First non-trafficking offence - Whether custodial sentence appropriate.

Headnote

The appellants, all first offenders, were charged with hunting elephant and rhinoceros and convicted and sentenced to imprisonment. The section under which they were charged stipulated a term of imprisonment on conviction. On appeal to the High Court the sentence of imprisonment was upheld. The appellants appealed. The appellants argue that they should have been charged under the appropriate section that deals with selling government trophy and which allowed the imposition of a fine as an alternative to imprisonment for the first offence and that a fine was appropriate in this case.

Held:

Where the section under which an accused should have been charged indicated that a fine can be appropriate in the case of a first offender, a minimum sentence of imprisonment is not appropriate. There were no aggravating circumstances to merit a sentence of imprisonment. Mandatory imprisonment only applies to second offenders.

Case referred to:

(1) Musonda v The People (1976) Z.R. 215

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Legislation referred to:

National Parks and Wildlife Act, Cap. 316, ss. 97, 139, 142(1), (2)

For the appellants: M. M. Imasiku, Messrs Lisulo and Company.
For the respondent: G. S. Phiri, Senior State Advocate.

Judgment

GARDNER, J.S.: delivered the judgment of the Court.

The appellants were convicted of prohibited dealing in trophies, contrary to section 97 of the National Parks and Wildlife Act; the particulars of the offence being that they, on 31st October 1986 at Kafue, jointly and whilst acting together, did by way of trade sell two pairs of rhinoceros horn without a permit. They were sentenced to three years imprisonment with hard labour, which

sentence was reduced on appeal to the High Court, with eighteen months of the sentence being suspended for a period of five years. The appellants now appeal to this Court against sentence.

Mr *Imasiku* on their behalf has drawn our attention to a case decided in this Court in which we said that where either a fine or imprisonment or both are laid down as penalties by the legislature, in the case of first offenders where there are no aggravating circumstances, a fine is appropriate and an offender should be sentenced to a fine, with imprisonment only in default: *Musonda v The People* (1). Another point raised by Mr *Imasiku* was that the penal section quoted in the charge was section 139 of the Act, which section relates to hunting, wounding or reducing into possession any elephant or rhinoceros. It was pointed out that the appropriate section in this case should be section 142 which relates to persons who have been convicted of selling prescribed trophy.

We have considered the argument put forward on behalf of the appellants and we also considered the legislation which has been enacted to deal with the prevalent and very serious offences of killing elephants and rhinoceros and selling trophy obtained from those animals. The amended section 139 of the Act provides that any person hunting, wounding or reducing into possession any elephant or rhinoceros shall be liable to imprisonment without the option of a fine for a term not exceeding ten years. The amended section 142 of the Act provides under subsection (2) that any person who is convicted of *inter alia*, selling any prescribed trophy would be liable, in the case of a first offender, to a fine not exceeding K10,000.00 or to imprisonment for a term not exceeding ten years or both, and, in the case of a second offender or subsequent offender, to imprisonment without the option of a fine for a term not exceeding ten years. In both sections 139 and 142 there is a proviso that a person guilty of trafficking in ivory or rhinoceros horns shall receive a minimum sentence of five years imprisonment. In the definition section of the Act prescribed trophy means any ivory or rhinoceros horn or any other trophy specifically prescribed.

We are satisfied that the legislature has by this amended legislation taken into account the seriousness of this type of offence, and, by prescribing that there will be imprisonment without the option of a fine for second offenders under section 142(2), has purposely indicated that a fine can be appropriate in the case of a first offender selling rhinoceros horns.

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We are further satisfied that in this case there was only one transaction, and, although we are not called upon to decide the issue, we will not regard this instance as coming within the definition of trafficking, so that a minimum sentence of imprisonment is not appropriate. We note that the learned appellant Judge on appeal to the High Court found that dealing in rhinoceros horns was an aggravating feature within the terms of our judgment in the *Musonda* case and for that reason ordered that a term of imprisonment should be imposed. As we have said, the legislature has dealt with specific instances in providing for specific sentences and we must take note of the fact that mandatory imprisonment only applies to second offenders in this type of case. We should say that we agree with Mr *Imasiku* that the original section 139 which dealt with hunting was an inappropriate section, and section 142(2) is the appropriate section to be applied in this case. For the reasons which we have given, we consider that there are no aggravating circumstances in this case to merit a sentence of imprisonment.

The appeals are allowed, the sentences are set aside and in their place we substitute sentences of a fine of K1,000.00 in respect of each appellant, in default nine months simple imprisonment in respect of each appellant.

Appeal allowed.
