

SOUTH AFRICA / JUDGMENT

Mfana Ignitius Kubai v S (923/2023)

[2024] ZASCA 123; 2024 (2) SACR 595 (SCA) (30 August 2024)

[2024] ZASCA 123

COURT

Supreme Court of Appeal

BEFORE

Mokgohloa, Smith, Unterhalter, Mjali, Dippenaar

CASE / FILE NUMBER

923/2023

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FLYNOTES:

CRIMINAL

– Poaching – Sentence –

Illegal

hunting of rhino – Endangered species – High court

increasing sentence imposed – Appeal –

High court paid

no regard to degrees of seriousness – Determined to impose

maximum penalty – Gave no weight to

substantial and

compelling circumstances – Multiple misdirections –

Maximum sentence not appropriate –

First offender –

Recognition of time spent in custody – Appeal upheld –

Limpopo Environment Management

Act 7 of 2003, s 117(1)(a).

THE

SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 923/2023

In the matter between:

MFANA IGNITIUS KUBAI

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: Mfana Ignitius Kubai v The State (923/2023)

[2024] ZASCA 123 (30 August 2024)

Coram: MOKGOHLOA, SMITH and UNTERHALTER JJA and MJALI and DIPPENAAR AJJA

Heard: 16 August 2024

Delivered: 30 August 2024

Summary: Criminal law – sentence – rhino poaching – maximum sentence –

s 117(1)(a) of the Limpopo Environment Management Act 7 of 2003 – accounting for time spent in custody.

ORDER

On appeal from: Limpopo Division of the High Court, Thohoyandou (Phatudi and Tshidada JJ sitting as court of appeal):

1 The appeal is upheld.

2 The order of the high court is set aside and substituted with the following:

‘The sentence imposed by the regional court on the appellant is set aside and substituted with the following:

- (i) The accused, Mfana Ignitius Kubai, is sentenced to a term of imprisonment of 9 years;
- (ii) The carcass of the rhinoceros is forfeited to the Environmental Management Authority in terms of s 118(1)(a) of the Limpopo Environmental Management Act 7 of 2003;
- (iii) The fire arm and knife used in connection with the unlawful hunting are forfeited to the Environmental Management Authority.’

Unterhalter JA (Mokgohloa and Smith JJA and Mjali and Dippenaar AJJA concurring):

Introduction

[1] The appellant, Mr Kubai, together with two other accused, were arraigned in the Regional Court held at Makhado (the regional court) on various charges, including the illegal hunting of rhino. He was convicted on the charge of illegal hunting in contravention of s 31(1)(a) of the Limpopo Environmental Management Act 7 of 2003 (LEMA), and sentenced to 11 years of imprisonment by the regional court. Mr Kubai was granted leave to appeal to the Limpopo Division of the High Court, Thohoyandou (the high court) in respect of the sentence imposed. The high court gave notice to Mr Kubai to show cause why it should not, on appeal, increase the sentence imposed by the regional court. Having heard the appeal, the high court did just that, and imposed, upon Mr Kubai, a sentence of 15 years'

imprisonment. By way of special leave to appeal, Mr Kubai appeals the sentence imposed by the high court.

[2] The high court considered itself to be bound to interfere with the sentence imposed by the regional court. The high court found that the regional court had sentenced Mr Kubai in terms of s 276(1)(b) of the Criminal Procedure Act 51 of 1977 (the CPA), rather than under the penalty provision of s 117(1)(a) of LEMA. This, the high court reasoned, was an error that required correction, and the consideration afresh of an appropriate sentence. It thought the sentence of 11 years imprisonment to be 'shockingly inappropriate'. The high court found that Mr Kubai had been involved in rhino poaching cases in 2008; that he had found 'his niche in rhino poaching'; that rhinoceros are specially protected wild animals under LEMA; that the statistics indicated that Limpopo had the highest incidence of rhino poaching; and that the protection and preservation of the environment required that the illegal poaching of rhino should exact serious punishment. Whether or not Mr Kubai was a first offender, his offence required the imposition of the maximum period of imprisonment permitted under LEMA, and thus the high court set aside the sentence imposed by the regional court, and sentenced Mr Kubai to '15 years of direct imprisonment as envisaged in terms of s 117 of LEMA'.

[3] Counsel for Mr Kubai submitted that there was no legal error of the kind relied upon by the high court to justify its intervention. Nor was the imposition of the maximum period of imprisonment by the high court warranted. Mr Kubai was a first offender. In 2008, he had assisted the police to arrest a foreign national suspected of complicity in rhino poaching. That should not have been held against Mr Kubai, much less permit of his being considered an experienced rhino poacher. Furthermore, the high court was influenced by misleading evidence as to the incidence of rhino poaching and the financial losses caused thereby. Mr Kubai was sentenced to the maximum custodial sentence in terms of LEMA, as if a repeat offender, when he was not. He had contributed to society by running a business that employed people. The high court had also failed to take account of the time that Mr Kubai had been held in custody from the date of his arrest until the date he was admitted to bail

(some 2 years and 3 months). It was submitted that, upon a proper consideration of all of these matters, and acknowledging that rhino poaching is an offence of considerable seriousness, a prison sentence of 8 years was the appropriate sentence.

- [4] Counsel for the State resisted this conclusion. He contended that there was no basis for us to interfere with the sentence imposed by the high court. LEMA required that sentences should deter the on-going dangers of rhino poaching that placed the species at risk. LEMA provided for a sentence of 15 years' imprisonment for the most serious of cases, and this was such a case.
- [5] I commence with the basis upon which the high court decided it must interfere with the sentence imposed by the regional court. The high court concluded that the regional court had sentenced Mr Kubai in terms of s 276(1)(b) of the CPA, and not in terms of s 117(1)(a) of LEMA. That conclusion cannot be sustained. The reasoned judgment of the regional court references s 117(1)(a) of LEMA, and determined the appropriate sentence in contemplation of the maximum term of imprisonment stipulated in this provision. While the sentence imposed on Mr Kubai is framed in terms of s 276(1)(b) of the CPA, this provision contains the proviso that it is subject to any other law. LEMA is such a law, and the regional court plainly had this legislation in mind when it sentenced Mr Kubai. I cannot fault the regional court on this score, and the high court was in error to do so.
- [6] A fair reading of the high court's judgment indicates, however, that quite apart from the formulation of the regional court's order, the high court set aside the sentence of the regional court on the basis that it was 'shockingly inappropriate'. The appeal before us engages the order made by the high court, and hence the question for us is whether we should interfere with that order. I turn to this question.
- [7] There are three features of the high court judgment that warrant scrutiny. First, the high court was much influenced by testimony given at Mr Kubai's bail application that he was involved in the commission of poaching offences (beyond the offense with which he was charged and convicted in the regional court) and the assistance rendered by him to the police in 2008 to arrest a foreign national suspected of selling rhino horns. In essence, the high court considered Mr Kubai to have fashioned a career as a rhino poacher, and hence he could not de facto be considered a first offender.
- [8] A court sentencing an offender should exercise care in reaching conclusions of this kind. The precise role of Mr Kubai in rendering assistance to the police in 2008 is far from clear. Nor does it support the conclusion that Mr Kubai is a serial offender. The high court misdirected itself on this score.

- [9] Second, the high court reasoned that, whether or not Mr Kubai was a first offender, the seriousness of his crime warranted the imposition of the maximum punishment permitted under LEMA. It was common ground before us that rhino poaching is a serious crime. While counsel for Mr Kubai levelled criticisms against the evidence led as to statistics supporting the incidence of poaching in Limpopo and the value of rhino horn, he agreed that any rhino poaching of this much endangered species is a crime of considerable gravity.
- [10] It appears from the reasoning of the high court that every rhino that is poached that results in a conviction justifies the imposition of the maximum period of imprisonment permitted by LEMA. But that is not what LEMA provides. Section 117(1)(a) stipulates for a maximum period of imprisonment. A sentencing court must give consideration to the degree of seriousness that attaches to the particular crime. If the poaching of a rhino warrants the sentence of 15 years imprisonment, what then of an accused convicted of multiple counts of rhino poaching? Is such a case not more serious? And if it is, how then is the same term of imprisonment appropriate? It may be that the time has come that every act of rhino poaching should attract a minimum sentence of 15 years, but that is not what the legislature has determined in s 117(1)(a) of LEMA. The high court paid no regard to degrees of seriousness, but was rather determined to impose the maximum penalty, and give no weight to the fact that Mr Kubai was a first offender who ran his own business. The well-known principles of application to the imposition of an appropriate punishment are not to be disregarded simply because rhino poaching is a scourge that has placed the species in peril. This too constitutes a misdirection that require our intervention.
- [11] Third, the high court failed to weigh in the balance the time that Mr Kubai had been in custody awaiting the final outcome of the proceedings. He was admitted to bail pending the outcome of his appeal from the regional court to the high court. But he had been in custody, as I understood counsel for Mr Kubai, for a period of 2 years and 3 months. While there is no rigid metric by recourse to which time in custody is to be reckoned in the imposition of a sentence, it cannot count for nothing. Yet that is what the high court, in effect, did. Mr Kubai was sentenced to 15 years imprisonment by the high court, with no allowance for the time he had spent in custody. That entails that he was given an effective sentence of 17 years and 3 months of imprisonment. A period of time in excess of the maximum allowed by LEMA. That too is a misdirection.
- [12] For these reasons, the sentence imposed by the high court cannot be allowed to stand. We must determine what sentence should have been imposed by the high court.
- [13] I consider that, save in one respect, the regional court provided a carefully balanced assessment of an appropriate punishment. Mr Kubai is a first offender. The evidence of his other involvements in poaching, and in particular the events of 2008, are too speculative to permit of recognition. However, the poaching of rhino is an offence of considerable gravity. The risk of extinction of this species is well-known and, those who would seek to profit from the poaching of rhino further contribute to this risk. They must know that poaching rhino, even as in this case, the killing of a single rhino, will warrant a lengthy custodial sentence.

[14] The maximum sentence that LEMA permits is 15 years imprisonment. That sentence is not appropriate in this case for three principal reasons. First, Mr Kubai is a first offender. There must be some leeway in the computation of a custodial sentence for an offender who is a repeat offender or who is convicted of multiple counts of rhino poaching to be given the maximum sentence allowed under LEMA. Second, and in consequence, though Mr Kubai's crime is a grave wrong, there are yet worse crimes of rhino poaching that must be taken into consideration when deciding upon a custodial sentence that has a statutory maximum. Third, and in this respect the regional court also erred, there must be recognition of time spent in custody in arriving at an appropriate custodial sentence. In this case, that period is 2 years and 3 months. A failure to do so may result in an unjust sentence that approaches or exceeds the maximum term of imprisonment.

[15] In the result, the appropriate sentence that the high court should have imposed is a term of imprisonment of 9 years, together with the forfeiture orders that were given by the regional court.

[16] In the result the following order is made:

D N UNTERHALTER

JUDGE OF APPEAL

Appearances

For the appellant: Adv P F Pistorius Instructed by: Anita Campbell Attorneys, Tzaneen Symington De Kok Attorneys, Bloemfontein For the respondent: Adv N T Mulangaphuma Instructed by: Director of Public Prosecutions, Thohoyandou Director of Public Prosecutions, Bloemfontein

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Prepared on 9 October 2026 · Esheria