REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
ZOMBA DISTRICT REGISTRY

CONFIRMATION CASE NUMBER 31 OF 2021
(Criminal Case No. 372 of 2020 in the First Magistrate Court sitting at Liwonde)

THE REPUBLIC

VERSUS

GANIZANI MOYENDA

Coram: ***Honourable Justice Violet Palikena-Chipao***
Mr.Msume/Mkweza, of Counsel for the State
Mr. Z. Ndeketa, of Counsel for the Defendant
Mboga(Ms), Official Interpreter and Court Clerk

ORDER ON CONFIRMATION

The offender, Ganizani Moyenda was charged in the Senior Resident Magistrate Court sitting at Liwonde with offences of illegal entry into a protected area without permit and being found in possession of listed species contrary to sections 32 as read with section 108; and section 86(1) as read with section 110B (b) of the National Parks and Wildlife Act respectively. He was convicted and sentenced to 4 years imprisonment for first count and 6 years imprisonment for second count. The convict was convicted on his own plea of guilty. Upon review, reviewing judge set down the matter to consider enhancement of the sentence on account of age of the victim

The state is of the view that the sentence is indeed on the lower side and it should be enhanced to a sentence between 10 -15 years. It was argued that there are more aggravating factors in the case and that a sentence of 6 years was on the lower side for possession of 25kgs of ivory. The State cited the case of ***Republic v. Esau Billy and Lloyd Shaibu 2017*** where it was indicated the court sentenced Esau Billy to 18 years and Lloyd Shaibu to 8 years. When it was brought to the attention of the State that the sentence of 4 years for first count is actually the maximum

This is not to say that the court cannot impose both a fine and imprisonment. The case of ***Republic v. Maria Akimu Revision Case No. 9 of 2003*** whilst holding that where the sentencing provision provides for both fine and imprisonment, the court should afford the offender an opportunity to pay a fine first, went further to hold that there will be cases where the court would have to impose both a fine an imprisonment. This is what the court said;

> *Mr. Mwenefumbo thought, correctly in my view, that in as much as section 110 of the National Parks and Wildlife Act provides for a fine and imprisonment, the court should, as the lower Court did, not impose a prison sentence but afford the defendant the option of paying a fine. This proposition has the support of many decisions of this Court and the Supreme Court. The principle bases on that where there is such an option courts must, particularly for first offenders, allow the defendant to mend his ways by avoiding prison sentence. On the other hand the legislature will include a fine and imprisonment as a claw back or a way of preventing the offender from reaping from, benefiting by or enabled with the financial proceeds of the crime. In such situation the court could impose a fine together with imprisonment. Sentencing courts should be more willing to do so in cases where there is a prospect of domestic or international trafficking. Moreover the general principle that Mr. Mwenefumbo relies on is subject to the consideration that, in an appropriate case, the court could impose imprisonment. Where, therefore, the prison sentence is the appropriate way of dealing with the offence, the court can impose it though the legislature prescribed a fine with imprisonment.*

In the ***Maria Akimu Case,*** the court having considered all the factors concluded that this was an appropriate case for imposition of both a fine and imprisonment. In the present case, the State gave no justification for imposition of both fine and imprisonment. The State simply argued that the fines must always be imposed. Without justification for imposition of a fine in addition to the imprisonment and in the absence of any other authority, the Court finds no justification for the proposition. As already said 4 years is on the higher side for a first offender who pleaded guilty. It is reduced to 2 years. We are mindful that the court should have first given the convict the option of a fine. However it is considered that the convict entered the park with the sole intention of extracting ivory from the dead elephant. His entry therefore was not only illegal for lack of permit but was also for purposes of furthering another offence of possession of ivory. In the circumstances, a prison sentence was deserved.

On the second count, a sentence of 6 years was imposed. The state cited the cases of ***Republic v. Esau Billy and Lloyd Shaibu 2017*** and ***Republic v. Fanesi Dickson Criminal Case No. 136 of 2017.*** It was stated that in the latter case a sentence of 6 years was imposed for possession of 0.742kgs of ivory. In the case of ***Republic v. Esau Billy and Lloyd Shaibu 2017*** it was indicated the court

mitigating factors. The only mitigating factors are that the convict is a first offender and that he pleaded guilty to the charge. Bearing in mind the starting point and considering that the aggravating factors, the courts finds that indeed six years imprisonment was on the lower side. It is set aside and substituted with 8 years imprisonment effective from the date of 15th November, 2020.

Pronounced in Open Court this 24th Day of **June, 2021**.

Violet Palikena-Chipao

JUDGE