

AMENDMENTS TO KENYA'S WILDLIFE LAWS

The passage of the Statute Law (Miscellaneous Amendments) Act 2019, which came into force on the 4th January 2019, represents a more sophisticated, nuanced approach to criminal offences in the field of conservation. This is a welcome step as the Wildlife Conservation Management Act 2013 (WCMA 2013) held many gaps that made prosecution difficult. The life imprisonment clause that was lauded by so many was rendered defunct shortly after the passage of the 2013 Act. As a result, charging of offences for critically endangered and endangered species fell into a 'catch all' provision that did not adequately address the types of criminality involved and was limited to trophies only. Although the original set of amendments proposed to the Ministry numbered over sixty pages (nearly a new Act in itself), the Ministry responsible has clearly prioritised the passage of certain provisions over others. As far as criminal prosecutions are concerned, the following are now in force:

DEFINITIONS: The definition of '**dealing**' has been expanded to include not just trophies but also live species and expands the criminal conduct to specifically include 'possession with intent to supply'. For those experienced in prosecutions, this is a welcome addition. It should enable a more consistent approach on decisions on whether to charge an offence of simple 'possession' or 'dealing', something that has caused problems with prosecutions as observed in the course of court monitoring and mentoring conducted by Space for Giants. The definition of '**trophy**' has also been expanded to include species of plants – this again is welcome given that the Forestry Conservation and Management Act of 2016 is particularly weak on CITES protected plant species. The application of WCMA offences to matters involving, for example, sandalwood, is no longer open to debate. Finally, **subsistence hunting** has now been more carefully defined.

OFFENCES: The WCMA 2013 did not actually capture the offence of killing or injuring an animal. The offences of 'sports hunting' under that Act were largely defunct. The amendments now capture and define the different types of criminality involved in poaching and trafficking and, importantly, differentiate on sentencing. Further, it offers different sentences for critically endangered and endangered species, as compared to all other classifications of wildlife species and further addresses the issue of trophy offences vs. offences involving live animals.

A. CITES Appendix 1/ Critically Endangered/Endangered Species Offences –



Section 92

Killing/molesting/injuring/attempts: Minimum 5 years, *no fine*.

Dealing in a wildlife trophy: Minimum 7 years, *no fine*.

Dealing in a live species: Minimum 3 years, *no fine*.

Possession of a live species or trophy: Minimum 3 million Ksh and/or minimum 5 years.

Manufacturing an item from a trophy: Minimum 10 million Ksh and/or up to life imprisonment.

This separation of criminal conduct is a more sophisticated and welcome addition to the current legal framework. The heavier sentences for dealers and manufacturers reflect their role in the chain of criminality. The poacher, though still facing a term of imprisonment, is deserving of a lesser penalty than the man or woman who has incentivised him to hunt and is providing the means for trafficking. By offering various penalties that reflect the different types of criminality, accused persons may be more incentivised to engage with the new plea bargaining policy issued by the ODPP. The removal of the option of a fine for certain offences should put a stop to sentencing practice that allow the rich to walk away from punishment whilst the poor and disenfranchised suffer the consequences of their own exploitation.

B: Species that are not CITES Appendix 1/Critically Endangered or Endangered:

Section 95

For the same criminal behaviours identified above in s92, the penalty is lowered where the wildlife in question does not fall into CITES Appendix 1 or the relevant Schedule 6 of the Act: Minimum of not less than 1 million Ksh and/or not less than 12 months imprisonment.

C: Poisoning: Section 95A

This is now a stand-alone offence for knowingly or recklessly using poison whose effect is to poison any wildlife species. The penalty is a minimum of 5 million Ksh and/or a minimum of 5 years imprisonment.

D: Bush-meat Offences – Section 98

Dealing in bushmeat: Minimum 3 years, *no fine*.

Purchasing bushmeat (including eggs): Maximum 1 million Ksh and/or up to 12 months imprisonment.

This is an improvement on the previous s98 given the new definition of dealing and elevation of penalties. It also for the first time penalises the buyer. Since bushmeat hunting a growing threat to wildlife in Kenya, this is an important addition.

E: Import/Export Offences – Section 99

Firstly, these offences have been expanded to apply not just to ‘wildlife species’ but also ‘wildlife products’. Crucially, criminal conduct now extends to any person, agent or corporate entity that knowingly or recklessly aids or abets the illegal importation or exportation of such items. This can impact import/export agents who fail to conduct due diligence on their shipments. Where such entities are considered a ‘designated non-financial business’ under money laundering legislation, a failure to conduct ‘know your customer’ checks could also be subject to charge. The penalties for import and export under s99 have also been elevated significantly and would apply to agents also convicted under this section:

CITES Appendix 1/Critically Endangered and Endangered Species: Minimum 100 million Ksh and/or minimum 20 years imprisonment.

All Other Species: Minimum 20 million Ksh and/or minimum of 10 years imprisonment.

These import/export offences would apply to plant products under the current definition of ‘wildlife’.

F: Illegal Grazing and Other Offences – Section 102

Illegal residence/entry has been extended to ‘protected areas’. A new offence of charcoal burning in a protected area is now included and illegal extractive activity has been extended from marine protected areas to *all* protected areas. The penalties remain the same.

Crucially, the offence of illegal grazing is no longer limited to national parks but applies to all ‘protected areas’. The accused must have a permit or ‘written permission’ from the authority responsible. This is a significant step towards enhancing habitat protection. The WCMA 2013 states “protected area means a clearly defined geographical space, recognized, dedicated and managed through legal or other effective means to achieve long term conservation of nature with associated ecosystem services and cultural values”. Conservancies and other recognised bodies may now be afforded greater protection given that the penalty for illegal grazing is up to 100,000Ksh and/or up to six months imprisonment under the WCMA 2013.

Furthermore, under the 2013 Act an employer or principal would be liable for an offence committed by an employee or agent e.g. an owner of livestock could be held responsible for an offence of illegal grazing committed by another. The applicable sentence under s103 is now articulated as being up to ten million Ksh and/or up to five years imprisonment.

OTHER CHANGES

Kenya Wildlife Services is now defined as a ‘uniformed and disciplined’ service and can collect “levies” as well as revenue and charges under s7. Composition of the Board of Trustees has changed to include five representatives with both local and international technical experience specified areas. The qualifications for a Director General have been altered under s11.

County Wildlife Conservation and Compensation Committees have been replaced with “Wildlife Conservation Committees” (s18) & the functions reduced.

A Wildlife Conservation Trust Fund has been established with a governing body whose composition and functions are set out under a new s23.

Finally, for compensation claims, the species in respect of which compensation for death or injury can be claimed has been amended to remove “poisonous snakes, sharks, stone fish, whales, sting rays and wild pigs’.

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