



MALAWI JUDICIARY

SENTENCING GUIDELINES

for Wildlife Crime in Malawi



October 2017
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PART A

I. FOREWORD

Malawi's National Parks and Wildlife (Amendment) Act 2017 came into force in January 2017. This amended Act significantly increases the penalties for wildlife crime. The option of a fine is removed for the most serious offences against endangered species and the maximum custodial penalty is extended to 30 years, comparable with the highest wildlife crime tariffs in Africa.

This is a landmark moment for combating wildlife crime in Malawi. The new penalty provisions provide for significantly longer sentences, which enables the Judiciary to impose sentences commensurate with the seriousness of wildlife crime offences.

Wildlife crime is now widely recognised as a serious crime, often involving criminal syndicates. Due to the high value of some wildlife products such as ivory, rhino horn and animal skins, wildlife crime is often associated with significant financial crime such as money laundering, as well as offences such as corruption, conspiracy and possession of illegal firearms.

The United Nations recognises the seriousness of wildlife crime and has called upon Member States to take appropriate action to improve the criminal justice pathway for wildlife crime. On 25th July 2013, Resolution 2013/40 'Crime Prevention and Criminal Justice Responses to Illicit Trafficking in Protected Species of Wild Fauna and Flora'¹ was adopted by the Economic and Social Council of the United Nations and encouraged member States:

"... to make illicit trafficking in protected species of wild fauna and flora involving organized criminal groups a serious crime, as defined in... the United Nations Convention Against Transnational Organized Crime...and strongly encourages Member States to strengthen, where necessary, their national legal and criminal regimes and law enforcement and judicial capacity, consistent with international legal obligations, to ensure that relevant criminal laws, including appropriate penalties and sanctions, are available to address illicit trafficking in protected species of wild fauna and flora".

In September 2017, the UN reaffirmed its commitment to combatting wildlife crime by adopting a Resolution on 'Tackling Illicit Trafficking in Wildlife':²

The General Assembly: Urges Member States to take decisive steps at the national level to prevent, combat and eradicate the illegal trade in wildlife, on both the supply and demand sides, including by strengthening their legislation and regulations necessary for the prevention, investigation, prosecution and appropriate punishment of such illegal trade, as well as by strengthening enforcement and criminal justice responses, and to increase the exchange of information and knowledge among national authorities as well as among Member States and international crime authorities, and Calls upon Member States to make illicit

¹ https://www.unodc.org/documents/commissions/CCPCJ/Crime_Resolutions/2010-2019/2013/ECOSOC/Resolution_2013-40.pdf

² United Nations, Treaty Series, vol. 2225, No. 39574

trafficking in protected species of wild fauna and flora a serious crime, in accordance with their national legislation and as defined in article 2, paragraph (b) and article 3.1, paragraph (b), of the United Nations Convention against Transnational Organized Crime,

and Encourages Member States to make use, to the greatest extent possible, of legal instruments available at the national level to tackle illicit trafficking in wildlife, including through legislation related to money-laundering, corruption, fraud, racketeering and financial crime;

Malawi is both a source and a transit country for illegal wildlife products. Malawi's geographical position, previously weak legislation and weak enforcement capacity has resulted in traders in neighbouring countries exploiting Malawi to illegally export ivory, rhino horn, pangolin scales, turtle shells and timber by mail and plane, or by road, to the ports on Africa's southern and eastern coasts and on to Asia.

The *Sentencing Guidelines for Wildlife Crimes in Malawi Courts* have been developed to support the Judiciary in determining appropriate sentences for wildlife crime. The Guidelines outline the purpose of sentencing and provide a detailed guide to the penalty provisions in the Act. The Appendices provide a step-wise sentencing template and a list of potential aggravating and mitigating factors for wildlife offences.

The Guidelines were developed through a participative process at '*The National Parks and Wildlife (Amendment) Act 2017 and the Role of the Judiciary in Combating Wildlife Crime in Malawi*' *Judiciary Symposium*, which was held at Makokola Retreat, Mangochi Malawi, 19th – 21st April 2017. Participants included Supreme and High Court judges, magistrates and wildlife experts from the Department of National Parks and Wildlife. The Guidelines Committee used the approved outputs from the Symposium as a basis for these Guidelines.

I commend the development of these *Sentencing Guidelines for Wildlife Crimes in Malawi Courts*, which should be followed by all courts handling such matters. It is my hope that this tool will support our courts to deliver consistent sentences, commensurate with the seriousness of wildlife crimes, to ensure the conservation of our natural heritage.

A handwritten signature in black ink, appearing to read 'A. Nyirenda', written over a large, light-colored oval shape.

The Honourable Justice AKC Nyirenda, SC
The Chief Justice of The Republic of Malawi
October 2017

II. INTRODUCTION

In 2017 Malawi amended its wildlife laws³. This is in line with the international recognition of the vulnerability of wildlife and in an attempt to conserve the different wildlife species as the illicit wildlife trade has increasingly become a lucrative business. Due to its lenient laws and penalties for wildlife crimes, Malawi has hitherto been used as a transit point for international wildlife crimes. Further, some of Malawi's wildlife has suffered the threat of extinction due to lack of laws that could provide for meaningful penalties for offenders who commit such crimes. In the 2017 amendment, penalties for wildlife offences have been revisited. The corresponding expectation is that the courts shall apply the new law in a manner that shall create a more robust and effective law enforcement regime capable of reversing the perception that Malawi is soft on wildlife crimes.⁴

Prosecutions for most wildlife crimes are done in the magistrate courts. It is therefore critical for such courts to be fully conversant with issues of sentencing so as to impose meaningful sentences for wildlife crimes. The challenge, however is that the courts of magistracy lack tools that can aid them in coming up with meaningful sentences. Besides, these courts cannot easily access binding precedents from the superior courts. As a result there are inconsistencies in penalties for similar offences. The process for arriving at a particular sentence is also unclear. These Sentencing Guidelines are intended to cure these challenges. According to High Court decisions of **Rep-v-Fly** Confirmation Case No. 199 of 2013 and **Rep-v-Keke** Confirmation Case No. 404 of 2010 these guidelines are relevant to all sentencing courts; where a court disregards them it should provide clear justification in its sentencing decision. Indeed, the law has empowered our Chief Justice to come up with appropriate guidelines to inform the exercise of certain judicial discretions. In such a scenario all affected courts should pay careful attention to the guidelines; see also **Rep-v-Gomani** [1997] 2 MLR 77 where the High Court criticised a subordinate court for failing to follow similar guidelines from the Chief Justice.

³ National Parks and Wildlife Act (Cap 66:07) of the Laws of Malawi. LRO 11 of 2017.

⁴ Illegal Wildlife Trade Review, Malawi by *Waterland, Vaughan, Jurisic* (May 2015)

A. THE PURPOSE OF SENTENCING

The purposes of sentencing include the following:

- Retribution
- Deterrence
- Incapacitation
- Rehabilitation of offender
- Restitution/Restoration
- Conservation of the Wildlife and Ecosystem

In sentencing a particular offender, courts apply any one or a combination of these purposes. Consideration includes the circumstances of the offence; the offender; and the public interest. Ultimately, the sentence should be aimed at promoting respect for the law, and to promote a just, peaceful and safe society.

1. RETRIBUTION

The primary aim of criminal law is to punish the offender for a wrong done. This is important particularly for offences of the nature under discussion.

The Wildlife Act was enacted to protect endangered species and the ecosystem for the benefit of the people around the parks and the country at large; it also aims to preserve our unique heritage and ecosystem for future generations.⁵ Accordingly, it was observed in the case of **Rep-v-Maria Akimu** Revision Case No. 9 of 2003 that the threat posed to the unique species and ecosystem from the selfish conduct of wildlife offenders must be punished appropriately.

2. DETERRENCE

Deterrence in sentencing describes the imposition of harsher or longer sentences on an offender for purposes of preventing reoffending in the particular offender or other potential offenders contemplating similar or any other offences. In deterrence, the aim of punishment is to instill fear for the consequences of breaking the law in the mind of the offender or those contemplating crime.

Justice Twea (as he then was) captured the principle well in **Rep-v-Chilemba Elias** Conf. Case No.354 of 1999 when he stated that:

*“Courts should, when passing sentences be guided by public interest. **The object is not only to punish the offender but also to be to hope to prevent the crime.** Punishment should not be so negligible as to encourage would be offenders who may wish to gain from criminal activities.”*

⁵ Section 27 of the Act states the aims of the statute as (among others) “... to preserve selected examples of biotic communities of Malawi and their physical environment; to protect areas of aesthetic beauty and of special interest; to preserve the population of rare, endemic, and endangered species of wild plants and animals; ...”

In this regard it is hoped that stiff imprisonment sentences and heavy fines would serve deterrent purposes especially considering the ecological value of the endangered species and the fact that some of them are irreplaceable. Putting it in context, Mwaungulu J (as he then was) in **Rep-v-Maria Akimu** emphasised that:

“...The National Parks and Wildlife Act manifests the legislature’s intention to protect endangered species and the ecosystem for the benefit of the people directly around the national park and the country. The legislation preserves our unique heritage and ecosystem. It is sound sentencing policy to ensure that the threat to these species and the ecosystem from the conduct of the defendant and all who, locally and internationally, are a menace, are punished appropriately. It is contrary to the public interest that the conduct displayed in this matter should be punished by a fine alone without imprisonment. If fines are the only punishment, all our efforts may fail...”

At the time the case of *Maria Akimu* was decided, both punishments of a fine as well as imprisonment were so negligible that it was felt that Malawi was condoning wildlife crimes. Since then cases such as **Hope Kapalamula and others-v-Rep**, Crim. Appeal No. 187 of 2016 and **Rep-v-John Sakala and others**, Conf. Case No. 2451 of 2016 have reaffirmed the sentencing approach that prefers a meaningful immediate custodial term for these offences.

3. INCAPACITATION (PROTECTION OF THE SOCIETY)

Incapacitation is basically aimed at preventing reoffending by a repeat offender. It is aimed at protecting the public from such reoffenders. In theory, an established pattern of offending raises the likelihood of reoffending. Incapacitation is therefore generally influenced by previous conduct of the offender. The imprisonment of the offender is intended to render him unable to commit further crime against the society for the period of his incarceration.

Section 11 of the Criminal Procedure and Evidence provides for powers of certain courts to pass sentences of imprisonment for the protection of the public from reoffenders in the following manner:

Where a person, who is not less than twenty-one years of age—

(a) is convicted by the High Court or by a Resident Magistrate’s court or by a court of a magistrate of the first grade of an offence punishable with imprisonment for a term of five years or more; and

(b) has been convicted on at least three previous occasions, since he attained the age of eighteen years, of offences punishable with imprisonment for a term of five years or more; and

(c) has been sentenced on at least two previous occasions to imprisonment, other than a suspended sentence which has not taken effect, the court may, if satisfied that it is expedient for the protection of the public that he should be detained in custody for a substantial time, pass, in lieu of any other sentence, a sentence of imprisonment for a term of not less than five nor more than fourteen years, as the court may determine.

Such an approach was adopted in the case of **Rep-v-Brown and others** [1995] 1 MLR 212. Thus, the High Court enhanced a sentence of 4 years imprisonment to 10 years, stating that *'although the accused were of very young ages, the offence of armed robbery deserved meaningful sentences to protect the public. If the offenders cannot be deterred, they must be kept away from society as long as possible'*.

4. REHABILITATION OR REFORMATION OF THE OFFENDER

The other aim of punishment is rehabilitation of the offender. This aim identifies causes of offending and remedial measures to curtail possibilities of future reoffending. Such measures include provision of economic skills to enable an offender to resist crime. The case of **Rep-v-Manyamba** [1997] 2 MLR 39 underscores the point that even suspended sentences are designed to give the offender an opportunity to reflect upon his conduct away from the prison with a view to reformation. Even community service orders under section 339 (2) of the CP&EC has been instituted to facilitate the reformatory element in sentencing approaches.⁶

5. RESTITUTION OR RESTORATION

Reparation, restoration or restitution aims at making right the wrong done to the victim and the society. The aim is often given effect through a reparation or compensation order which may be imposed as part of sentencing, for instance, monetary payments to the victim. Reparation also includes service to the community. For wildlife crimes, restitution would be paid to the State on behalf of the wildlife or environment. Restoration would be in the form of:

- Time and the cost of clean-up, and for medical treatment and rehabilitation of the wildlife,
- Cost of housing confiscated wild animals and plants,
- Cost of repatriation of live animals to their original location,
- Order of compensation for the harm done to the community and the nation at large (UNDOC: 2012:138).
- Compensation may also be ordered where there is environmental damage to public or private lands.

Consideration must however be given to the severity of the damage, likely pace of natural regeneration and feasibility of rehabilitation of wild animals, artificial restoration of the environment, among others. In the decision of **Hope Kapalamula and others-v-Rep** (above) the High Court confirmed on appeal the sentiments of the trial magistrate who considered the principle of inter-generational equity in analysing the impact of poaching elephants on future generations i.e. unless curbed the practice would deprive future generations any access to such rare species.

⁶ An Investigation in the Imposition and Operation of Community Service Orders on Women Offenders in Zomba, *JA Kishindo* (2012)

6. CONSERVATION OF WILDLIFE AND ECOSYSTEMS

The National Parks and Wildlife Act provides for the purpose of protected areas as being preservation of selected examples of biotic communities, protection of aesthetic beauty and preservation of populations of rare, endemic and endangered species of wild plants and animals (section 27(a), (b) and (c)). The Act also aims at regulating the hunting, the method of hunting and taking of wildlife resources so as to ensure better management of wildlife resources (sections 46 and 63). The Act also regulates commerce in wildlife with the goal of better safeguarding the resources (section 85).

This reflects similar sentencing approaches reflected in the celebrated case of **Republic v. Maria Akimu** (above) where the court considering the intention of the legislature, which is to protect endangered species, felt that a sentence of a fine without imprisonment would defeat judicial efforts to achieve the legislature's intention. The court issued the following opinion in that respect:

The National Parks and Wildlife Act manifests the legislature's intention to protect endangered species and the ecosystem for the benefit of the people directly around the national park and the country. The legislation preserves our unique heritage and ecosystem. It is sound sentencing policy to ensure that the threat to these species and the ecosystem from the conduct of the defendant and all who, locally and internationally, are a menace, are punished appropriately. It is contrary to the public interest that the conduct displayed in this matter should be punished by a fine alone without imprisonment. If fines are the only punishment, all our efforts may fail. Those involved in hunting, possessing and trafficking in these trophies are more likely well-resourced and financed to contain much earlier all our efforts in surveillance, investigation, prosecution of the crime and confiscation of trophies or their proceeds. Most cases of the magnitude of the present case must attract immediate imprisonment. (Emphasis supplied)

This sentencing approach reflects the statutory interpretation principle espoused under section 54 (2) of the General Interpretation Act and section 14 of the CP&EC which permits courts to read penalty provisions in a manner that achieves the specific aims of the law under consideration. Where appropriate, a combination of penalties may be imposed (as above) to give effect to the legislative intent to address a given mischief or other agenda. This view has been restated with new force in the case of **Hope Kapalamula and others-v-Rep**, Crim. Appeal No. 187 of 2016. According to this decision the usual reading of separating the fine from the term of imprisonment in a statute that provides for 'a fine and imprisonment' has been departed from in penalty sections of the National Parks and Wildlife Act.

B. THE PENALTY PROVISIONS IN THE WILDLIFE ACT

The penalties for offences committed under the Wildlife Act culminate in Sections 108 to 113.

The background to these provisions is in Part XI of the Act. The purpose of this part is provided in section 96. It is to control the import and export of wildlife species in order to assist in managing the wildlife resources of Malawi. It is also intended to assist in the conservation efforts that may be subject to international, regional or bilateral agreement to which Malawi is a party. The court in **Hope Kapalamula and others-v-Rep** (above) has emphasised the need for courts to impose sentences that do not undermine or negate the express intentions of the lawmakers who enacted this law.

The offence is created in Section 98 which states that any person who imports, exports or re-exports any specimen of a protected species or listed species is guilty of an offence.

1. THE GENERAL PROVISION FOR MOST WILDLIFE RELATED OFFENCES

Section 108 provides the general penalty for a person who is convicted of an offence. This section provides different sentences for first offenders and repeat offenders. It reads as follows:

“Subject to the provisions of the Act, a person who is convicted of an offence under this Act for which no other penalty is provided shall be liable to a fine of K2,000,000 and to imprisonment for a term of four years.”

Punishing an offender under Section 108 of the Wildlife Act

A sentencer has several options when sentencing an offender under this section. The options include that:

- i. The sentencer may order a person to pay a fine of less than K2, 000, 000
- ii. The sentencer may order a person to pay the maximum fine of K2, 000, 000
- iii. The sentencer may order the person to serve a prison term of 2 years
- iv. The sentencer may order the person to pay a fine of any amount as long as the fine does not exceed K2, 000, 000 plus a custodial sentence as long as the term of imprisonment does not exceed four years

The High Court decision of **Hope Kapalamula and others-v-Rep** (above) explains that the sentencing of a fine in addition to serving a custodial sentence is permissible under the provision of the General Interpretation Act. It does not contravene any statutory rules of construction or interpretation. This is permissible because the clear intention of the provisions in the National Parks and Wildlife Act is to prevent the imposition of fines that are derisory and defeat the purpose of rendering illicit trade in wildlife specimens unprofitable to the perpetrators.

In ordering the person to serve a prison term the court may exercise its discretion to serve a custodial sentence that the court deems fit. As the court exercises this discretion, the court must remind itself of the purpose of the Act in general, the purpose of the Part in issue, as well as the purpose of the section in particular. The court must never order a penalty that will defeat the purpose of the Act, the Part and the provision. **(For a detailed process of arriving at the right sentence see attached Appendices).**

NB: Please note that similar sentencing considerations and principles apply with respect to orders under sections 109, 110, 110A, 110B and 111 as discussed above with respect to section 108.

2. FORFEITURE: THE ADDITIONAL PENALTY TO SECTION 108 OF THE WILDLIFE ACT

Section 113 of the Wildlife Act provides:

“Upon the conviction of any person of an offence under this Act where it considers forfeiture to be necessary, the court shall, notwithstanding any other written law and subject to the provisions of section 108 and in addition to any other penalty imposed, declare any specimen, domestic animal or any firearm or other weapon, trap, net, poison, material or any motor vehicle, aircraft, boat, or any other article taken by or used in connection with the commission of the offence to be forfeited to the Government.”

This means that the court can make an order that a weapon that was used to kill an animal can be forfeited. Where the person that has committed the offences had a weapon in his possession, the court can order forfeiture of the weapon. The court can also order vehicles that were used by the offenders while committing the offence of killing the protected animal and/or transporting wildlife products, can be forfeited. Thus in **Jose Manuel and 34 others-v-Rep**, Criminal Appeal No. 17 of 2017 (unreported) the High Court has confirmed extensive confiscation orders with respect to tractors, vehicles and other equipment used for large scale illegal logging of indigenous trees at Lengwe National Park in Chikwawa.

3. EMERGING SENTENCING TRENDS IN WILDLIFE OFFENCES

There are positive trends emerging from the courts in so far as sentences for wildlife crimes are concerned. Between 2012 and 2015 the average penalty for illegal possession of ivory hovered around a mere \$40 fine (i.e. about K20, 000), with hardly any imprisonment terms imposed. However in a recent decision from the CRM court in Zomba, Given Hiwa was sentenced to eight years for possession of rhino trophy; the High Court confirmed the decision. As recently as August 2017 Rumphu magistrate court sentenced Leviland Khoza Kanyimbo to 4 years imprisonment for possession of 2.5 kgs of ivory tusk and a bracelet.

In **Hope Kapalamula and others-v-Rep**, Crim. Appeal No. 187 of 2016 a 3 years imprisonment term for dealing with 8.5 kgs (charged under the old act) was confirmed on appeal. Just as in **Jose Manuel and 34 others-v-Rep**, Criminal Appeal No. 17 of 2017 immediate custodial terms were enhanced and forfeiture orders upheld on appeal for illegal logging crimes in a protected area. Even in **Rep-v-John Sakala and another**, Conf. Case No. 2451 of 2016 two offenders who were found in possession of ivory specimens worth about K22 million had a 40 months’ custodial term upheld; the court emphasising the need to remove the monetary rewards from illicit wildlife trade as a legitimate sentencing criterion.

In **Rep v. Esau Billy, Aaron Billy Masaka & Lloyd Shaibu** in 2017, the accused were charged with dealing in a government trophy (rhino horn) as contrary to Section 91(1) and Section 110(b) of the NPWA; possession of a listed species as contrary to Section 86(1) and Section 110(b); entering into a protected area without a permit as contrary to Section 32(1) and 108 of the NPWA; killing of a listed species (a rhino) as contrary to Section 35(a) and 108 of the NPWA; possession of a prohibited weapon as contrary to Section 16(2) of the Firearm Act; conveying a weapon contrary to section 33(1) of NPWA and failure to report.

They were found guilty and the court noted that the accused are first-time offenders and had pled guilty and sentenced as follows:

On the 1st count of dealing as contrary to Section 91(1) and 110 (B) of NPWA: imposes 18 years for Esau Aaron Billy, 10 years for Aaron Billy Masaka and 8 years for Lloyd Shaibu.

On the count of possession of listed species as contrary to Section 86(1) and Section 110(b) of NPWA: 18 years for Esau Aaron Billy, 10 years for Aaron Billy Masaka and 8 years for Lloyd shaibu.

On the 3rd count of killing of a listed species (rhino) as contrary to Section 35(a) Esau Billy was given an 18 months custodial sentence, 4th count of possession of prohibited weapon as contrary to Section 16(2) of the Firearm Act Esau Billy was given an 18 months custodial sentence.

On the 5th count of conveying a weapon contrary to Section 33(1) of the NPWA, Esau Billy was given 18 months custodial sentence.

On the failure to report, Aaron Billy Masaka was given a 30 months custodial sentence and Lloyd Shaibu 18 months custody. The sentences are to run concurrently with effect on the date of sentence.

Ancillary order: The court ordered that the forfeited rhino horn be returned to the Malawi Government for disposal, and the firearm and ammunition be forfeited to the Malawi Police Service for disposal and the fridge to be given to Liwonde National Park for usage.

PART B

III. APPLICATION OF GUIDELINES TO SPECIFIC OFFENCES

STAGE ONE: Determine which of the **6 Punishment Provisions** is applicable to the Offence under consideration. **Ensure the correct offence has been listed according to the species type** i.e. 'listed' species are the most highly protected (this includes elephants, rhinos, lions, leopards, pangolins and several other species as referred to in the Species Schedule with the Act).

STAGE TWO: Consider the **Minimum and Maximum Penalties** to appreciate the seriousness of the crime in the eyes of the law.

STAGE THREE: Recognise the proposed sentencing **Starting Point** for that category of offence

STAGE FOUR: Factor into the Starting Point any **Mitigating or Aggravating Features** of the offence/offender/society/victim.

STAGE FIVE: Determine (tentative) Sentence; Compare result with proposed Starting Point. If necessary revisit Stage Four again.

STAGE SIX: Prepare a **Reasoned Sentencing Order** (especially) explaining any deviation (up or down) from the Starting Point.

APPENDIX 1: WILDLIFE CRIMES SENTENCING TEMPLATE (SUMMARY)

STAGE ONE:	Determine which of the 6 Punishment Provisions (Sec 108 to Sec 111) below is applicable to the Offence under consideration:
STAGE TWO:	Consider the Minimum and Maximum Penalties to appreciate the seriousness of the crime in the eyes of the law
STAGE THREE:	Recognize the proposed sentencing Starting Point for that category of offence
STAGE FOUR:	Factor into the Starting Point any Mitigating or Aggravating Factors of the offence/offender/society/victim
STAGE FIVE:	Determine (tentative) Sentence; Compare result with proposed Starting Point . If necessary revisit Stage Four again.
STAGE SIX:	Prepare a Reasoned Sentencing Order (especially) explaining any deviation (up or down) from the Starting Point.

APPENDIX 1: WILDLIFE CRIMES SENTENCING TEMPLATE (DETAILS OF EACH STAGE)

STAGE 1: Select Section: 108 / 109 /110/110A / 110 B / 111											
Sec. 108 Offences		Sec. 109 Offences		Sec. 110 Offences		Sec. 110A Offences		Sec. 110B Offences		Sec. 111 Offences	
All Other Offences (about 54 in Total) (See Appendix 3)		Sec. 109 (a) Sec. 109 (b)		Sec. 110 (a) Sec. 110 (b)		Sec. 110A (a) Sec. 110A (b) Sec. 33 (1) Sec. 35 (c) Sec. 38		Sec. 110B (a) Sec. 110B (b) Sec. 110B (c)		Sec. 98 (a) Sec. 98 (b) Sec. 99	
STAGE 2: Consider minimum and maximum penalties under the selected section											
Min.	Max.	Min.	Max.	Min.	Max.	Min.	Max.	Min.	Max.	Min.	Max.
Fine ≤K2m	4yrs IHL + K2m fine	Fine ≤K2m	4yrs IHL + K2m fine	Fine ≤K5m	10 yrs. IHL + K5m fine	Fine ≤K15m	30 yrs IHL + K15m fine	No option of a fine	30 yrs IHL	No option of a fine	30 yrs IHL
STAGE 3: Recognise Starting Point for offence											
K50, 000 1 year IHL		K50,000 fine 1 year IHL		K500, 000 15 months IHL		K2m fine and 3 yrs IHL <i>Note that the fine should not be less than the value of the seized item</i>		6 years IHL		6 years IHL	
STAGE 4: Consider Mitigating / Aggravating factors											
See Appendix 4 (a) for mitigating/aggravating factors		See Appendix 4 (b) for mitigating/aggravating factors		See Appendix 4 (c) for mitigating/aggravating factors		See Appendix 4 (d) for mitigating/aggravating factors		See Appendix 4 (e) for mitigating/aggravating factors		See Appendix 4 (f) for mitigating/aggravating factors	

APPENDIX 2: JURISDICTION OF DIFFERENT CLASSES OF MAGISTRATE COURTS IN WILDLIFE CRIMES

Class of Court	Jurisdiction Limits (s. 14, CP&EC)		Application of Sec. 108		Application of Sec. 109		Application of Sec. 110		Application of Sec. 110A		Application of Sec. 110B	Application of Sec. 111
	Fine	Jail	Fine	Jail	Fine	Jail	Fine	Jail	Fine	Jail	Jail Term	Jail Term
RM	Unlimited	21yr	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes (up to 21yr)	Yes (up to 21yr)	Yes (up to 21yr)
FGM	Unlimited	14yr	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes (up to 14yr)	Yes (up to 14yr)	Yes (up to 14yr)
SGM	K200,000	10yr	K200,000	Yes	K200,000	Yes	Yes (up to K200, 0000)	Yes	Yes (up to K200,000)	Yes (up to 10yr)	Yes (up to 10yr)	Yes (up to 10yr)
TGM	K150,000	3yr	No	No	No	No	No	No	No	No	No	No
4th GM	K100,000	1 yr	No	No	No	No	No	No	No	No	No	No

The NPWA has a maximum custodial sentence of 30 years, which is beyond the jurisdiction of any Subordinate Court. However, offences under the NPWA can be heard from the second-grade Magistrate Court and above (See section 13 of the CP&EC). Where a Magistrate is considering imposing a sentence beyond their jurisdiction, the convict should be committed to the High Court or to another Subordinate Court of a higher grade than itself for sentence. For example, an FGM or SGM can hear a wildlife case involving ivory trafficking all the way to a finding of guilt and entering a conviction, if they are considering a sentence beyond 14 yrs and 10 yrs respectively, they are to commit the said convict(s) to the High Court or to another Subordinate Court of a higher grade than its own, strictly for purposes of sentencing. It is **not necessary** at law for the FGM or SGM in that instance to transfer the file to a higher court before actually hearing the matter (See sections 13 and 14 of the CP&EC).

A Resident Magistrate can hear all cases under the NPWA, and where the Resident Magistrate is considering a sentence beyond their jurisdiction, i.e., above 21 years, again the convict(s) should be committed to the High Court solely for sentencing. It is **not necessary** at law for the Resident Magistrate to transfer the file to the High Court before hearing the matter. (See sections 13 and 14 of the CP&EC).

APPENDIX 3: LIST OF OFFENCES PUNISHED UNDER SECTION 108

PROVISION	DESCRIPTION OF OFFENCE	PROVISION	DESCRIPTION OF OFFENCE
Section 15 (a)	Obstruction of Officer	Section 66 (1) (a)	Possessing/preparing prohibited substance for/in connection with hunting/taking any protected/endangered/listed species
Section 15 (b)	Withholding information	Section 66 (1) (b)	Making/preparing/using any excavation/enclosure/fence or device for killing/wounding protected/endangered/listed species
Section 15 (c)	Willful giving of false information	Section 68	Prohibition of hunting during hours of darkness
Section 16 (a)	Altering official records	Section 70 (1) (a)	Discharging any weapon at any protected/endangered/listed species within 50 meters of any m/vehicle/boat/aircraft
Section 16 (b)	Altering official documents	Section 70 (1) (b)	Use of vehicle to stampede protected/endangered/listed species
Section 30 (3)	Failure to comply with temporary management permit	Section 70(1) (c)	Prohibition of use of aircraft or radio communication to locate any protected/endangered/listed species for hunting
Section 32 (1)	Entering/residing.....in a protected area	Section 71 (1) (a)	Contravening regulations prohibiting use of domestic animals to hunt protected/endangered/listed species
Section 34	Wrongful disposal of litter in a protected area	Section 71 (1) (b)	Contravening regulations controlling use of domestic animals to hunt protected/endangered/listed species
Section 35 (a)	Hunting/taking wild plant/animal or domestic/cultivated plant into a protected area	Section 72 (1) (a)	Contravening regulations controlling use of baits/decoys/calling devices etc. to bring protected/endangered/listed species near hunters
Section 35 (b)	Taking/destroying object of interest	Section 72 (1) (b)	Contravening regulations controlling how substances/devices may be lawfully used in hunting
Section 35 (d)	Conveying wild animal into a protected area	Section 72 (1) (c)	Contravening regulations banning/controlling hunting near salt licks/waterholes etc.
Section 35 (e)	Conveying domestic animal into a protected area	Section 72 (1) (d)	Contravening regulations specifying procedures to follow upon killing animal with licence
Section 37 (1)	Wrongful introduction of any plant species into a protected area	Section 76 (1)	Transferring ownership of carcass of protected/endangered/listed species killed to another person without authority
Section 41(2) (a)	Contravening Regulations for travelling/keeping of any vessel/vehicle in a protected area	Section 76 (2)	Failure to take appropriate steps to report killing of protected/endangered/listed species [under sections 74 and 75] due to threat posed by animal
Section 41 (2) (b)	Contravention of regulations for prohibition/regulation of lighting camp/picnic fires in a protected area	Section 78 (1)	Failure to report killing of protected/endangered/ listed species through error or accident
Section 41 (2) (c)	Contravention of regulations for fees for entry or any services in a protected area	Section 79 (1)	Failure to kill a wounded protected/endangered/listed species
Section 41 (2) (d)	Contravention of regulations for prohibition/control of low flying aircraft over a protected area	Section 79 (3)	Failure to report entrance of wounded protected/endangered/listed species into protected area

Section 41 (2) (e)	Contravention of regulations providing for rules for persons in a protected area	Section 79 (4)	Failure to report entrance of wounded protected/endangered/listed species into private land to owner thereof
Section 41 (2) (f)	Contravention of regulations for prohibition/control of commercial enterprises within a protected area	Section 79 (5)	Failure to comply with landowner's decision to kill wounded animal following subsection (4) report
Section 41 (2) (g)	Contravention of regulations for efficient management of protected areas	Section 80 (1)	Failure to report wounding of any dangerous animal upon failure to recapture within 24 hours of wounding
Section 47 (1)	Prohibition against hunting/taking any protected/endangered/listed species	Section 80 (2)	Failure by officer to take action upon receipt of wounded animal
Section 60 (1) (a)	Failure to have in person a hunting licence whilst taking any animal/plant	Section 82 (a)	Molesting/provoking wild animals
Section 60 (1) (b)	Failure to produce licence for inspection upon request by officer	Section 82 (b)	Molesting/provocation likely to result in provocation/harassment/destruction
Section 60 (1) (c)	Failure to keep record in prescribed form of all game species hunted/taken during validity of licence	Section 83	Causing unnecessary/undue suffering of any wild animal whether or not in wild or in captivity
Section 62 (2)	Chasing/driving/employing any weapon against protected/endangered/listed species without a licence	Section 93 (a)	Conducting business as a professional hunter without licence
Section 64	Causing fire for purposes of hunting/taking any wild animal/plant	Section 93 (b)	Advertising oneself as a professional hunter
Section 65	Hunting any dependent young or a female accompanied by dependent young of any protected/endangered/listed species	Section 93 (c)	Soliciting contracts/commissions in capacity of professional hunter
		Section 93 (d)	Assisting another to hunt protected game species except as a guide, tracker or porter

APPENDIX 4(a): TABLE OF AGGRAVATING AND MITIGATING FEATURES FOR OFFENCES UNDER SEC 108

Responsibility and Harmfulness	Aggravating Factors	Mitigating Factors
<ul style="list-style-type: none"> • Type of species involved • Quantity of the species • Tourism or other economic benefit of species to Malawi • Transnational nature of offence • Group action and level of participation of the offender • Level of concealment of the species • Possession is as a result of other offences • Crime committed for commercial purposes 	<ul style="list-style-type: none"> • Group action • Injury to persons or property • Scene of Crime • Inconvenience to the public • The number of protected species, endangered species or listed species affected by the offender’s conduct • The injury or harm caused by the offender • Premeditation • High prevalence of the offence in the community in which it was committed 	<ul style="list-style-type: none"> • First offender • Pleaded guilty (evidence of remorse) • Age • Time already spent in custody • Cooperation with law enforcers • Offender was involved through coercion or intimidation • No actual protected species was affected by the offender’s conduct

APPENDIX 4 (b): TABLE OF AGGRAVATING AND MITIGATING FEATURES FOR OFFENCES UNDER SEC 109

Responsibility and Harmfulness	Aggravating Factors	Mitigating Factors
<ul style="list-style-type: none"> • Degree of harm to the species (killed, wounded) • Offence took place in a protected area • Tourism or other economic benefit of species to Malawi • Transnational nature of offence • Group action • Use of poison, explosives, automatic or semi-automatic weapon • Injury to or death of forest/wildlife/law enforcement officer in execution of offence • Crime committed for commercial purposes • Offence poses high risk to public health • Particular medicinal, educational or aesthetic value of forestry produce or other species • In forestry crime, destructive or indiscriminate method of felling trees • Accused is a public officer charged with the duty of protecting natural resources or is a law enforcement officer or a military official or judicial officer 	<ul style="list-style-type: none"> • Species actually killed or seriously wounded • Offence took place in a protected area • Species is a particular driver of tourism or other economic benefit to Malawi • Commission of offence is part of wider operation that crosses international borders • Accused acted in concert with others. • Poison or dangerous weapons used to access the species • Injury to or death of wildlife/forest/law enforcement officer in execution of offence • Crime committed for commercial purposes. • Offence poses high risk to public health • In case of forests, the forest or species has particular medicinal, educational or aesthetic value • In forestry crime, destructive or indiscriminate method of felling trees • Accused is a public officer charged with the duty of protecting natural resources or is a law enforcement or a military or judicial officer. • Previous convictions • Offence committed whilst on bail • Significant planning involved – evidence of organised crime • Concealing/attempt to conceal the evidence • Established evidence of community or wider impact • Failure to comply with previous court orders • Involvement of others through coercion or intimidation • Offence is clearly a commercial/large scale/organised crime operation • High prevalence of offence in a particular community in which it was committed 	<ul style="list-style-type: none"> • First offender • Pleaded guilty (evidence of remorse) • Age • Cooperation with law enforcers (and proof that evidence led to a successful arrest/intel which was used in the investigation) • No injury inflicted on animal • Offender was involved through coercion or intimidation • Purpose was for subsistence for the offender and his immediate family only • In case of possession, ignorance of offender that he was in possession of the item in issue

APPENDIX 4 (c): TABLE OF AGGRAVATING AND MITIGATING FEATURES FOR OFFENCES UNDER SEC 110

Responsibility and Harmfulness	Aggravating Factors	Mitigating Factors
<ul style="list-style-type: none"> • Degree of harm caused by the weapons, traps, explosives or poison • The offence took place in a protected area • Premeditation of the possession or use of the weapons, traps, explosives and poison • The offence poses high risk to public health • Accused is a public officer charged with the duty of protecting wildlife 	<ul style="list-style-type: none"> • Wildlife species actually killed or seriously wounded owing to the offence • The offence took place in a protected area • The affected species is a particular driver of tourism or other economic benefit to Malawi • The accused acted in concert with others • There was injury to or death of wildlife officer in execution of offence • Crime committed for commercial purposes • Offence poses high risk to public health • Accused is a public officer charged with the duty of protecting natural resources • Previous convictions • Offence committed whilst on bail • Significant planning involved • Concealing/attempt to conceal the evidence • Established evidence of community or wider impact • Failure to comply with previous court orders • High prevalence of offence in a particular community in which it was committed 	<ul style="list-style-type: none"> • Plea of guilty (evidence of remorse) • Age • Time already spent in custody • Evidence of genuine remorse • Previous good character • Serious medical condition requiring urgent, intensive long-term treatment • Little or no planning • Small quantity of species • Offender was involved through coercion or intimidation • Purpose was for subsistence for the offender and his immediate family only • In case of possession, ignorance of offender that he was in possession of the item in issue

APPENDIX 4 (d): TABLE OF AGGRAVATING AND MITIGATING FEATURES FOR OFFENCES UNDER SEC 110A

Responsibility and Harmfulness	Aggravating Factors	Mitigating Factors
<ul style="list-style-type: none"> • Degree of harm caused by the weapons, traps, explosives or poison • The offence took place in a protected area • Premeditation of the possession or use of the weapons, traps, explosives and poison • The offence poses high risk to public health • Accused is a public officer charged with the duty of protecting wildlife 	<ul style="list-style-type: none"> • Wildlife species actually killed or seriously wounded owing to the offence • The offence took place in a protected area • The affected species is a particular driver of tourism or other economic benefit to Malawi • The accused acted in concert with others • There was injury to or death of wildlife officer in execution of offence • Crime committed for commercial purposes • Offence poses high risk to public health • Accused is a public officer charged with the duty of protecting natural resources • Previous convictions • Offence committed whilst on bail • Significant planning involved • Concealing the evidence • Wider impact on community • Failure to comply with previous court orders • High prevalence of offence in a particular community in which it was committed 	<ul style="list-style-type: none"> • First offender • Pleaded guilty (evidence of remorse) • Evidence that the offender was a mere courier (not mastermind) and not privy to planning or owner of vehicles/buildings used to commit the crime/coordinating payments etc. • Cooperation with law enforcers and evidence leads to an arrest/use of supplied intelligence in the case. • No injury inflicted on animal • Offender was involved through coercion or intimidation • Purpose was for subsistence for the offender and his immediate family only • In case of possession, ignorance of offender that he was in possession of the item in issue

APPENDIX 4 (e): TABLE OF AGGRAVATING AND MITIGATING FEATURES FOR OFFENCES UNDER SEC 110B

Responsibility and Harmfulness	Aggravating Factors	Mitigating Factors
<ul style="list-style-type: none"> • Degree of harm to the species (killed, wounded) • Offence took place in a protected area • Tourism or other economic benefit of species to Malawi • Transnational nature of offence • Group action • Use of poison, explosives, automatic or semi-automatic weapon • Injury to or death of forest officer in execution of offence • Crime committed for commercial purposes • Offence poses high risk to public health • Accused is a public officer charged with the duty of protecting natural resources or is a law enforcement officer or a military official or judicial officer • Nature of the breach • Impact of the breach on wildlife • Benefit derived from the breach • Whether the breach was intentional or not 	<ul style="list-style-type: none"> • Species actually killed or seriously wounded • Offence took place in a protected area • Species is a particular driver of tourism or other economic benefit to Malawi • Commission of offence is part of wider operation that crosses international borders • Accused acted in concert with others • Poison or dangerous weapons used to access the species • Injury to or death of forest officer in execution of offence • Crime committed for commercial purposes • Offence poses high risk to public health • In case of forests, the forest or species has particular medicinal, educational or aesthetic value • In forestry crime, destructive or indiscriminate method of felling trees used • Accused is a public officer charged with the duty of protecting natural resources or is a law enforcement or a military or judicial officer • Previous convictions • Offence committed whilst on bail • Significant planning involved • Concealing/attempt to conceal the evidence • Established evidence of community or wider impact • Failure to comply with previous court orders • Involvement of others through coercion or intimidation • Offence is clearly commercial/large scale operation • High prevalence of offence in relevant community 	<ul style="list-style-type: none"> • First offender • Pleaded guilty (evidence of remorse) • Evidence that the offender was a mere courier (not mastermind) and not privy to planning or owner of vehicles/buildings used to commit the crime/coordinating payments etc. • Cooperation with law enforcers • Offender was involved through coercion or intimidation • Purpose was for subsistence for the offender and his immediate family only • In case of possession, ignorance of offender that he was in possession of the item in issue

APPENDIX 4 (f): TABLE OF AGGRAVATING AND MITIGATING FEATURES FOR OFFENCES UNDER SEC 111

Responsibility and Harmfulness	Aggravating Features	Mitigating Features
<ul style="list-style-type: none"> • Type of species involved • Quantity of the species • Tourism or other economic benefit of species to Malawi • Transnational nature of offence • Group action and level of participation of the offender • Level of concealment of the species • Possession is as a result of other offences • Crime committed for commercial purposes 	<ul style="list-style-type: none"> • Group action • Vulnerable victim • High prevalence • Injury to persons or property • Scene of Crime • Inconvenience to the public 	<ul style="list-style-type: none"> • First offender • Pleaded guilty (Evidence of Remorse) • Evidence that the offender was a mere courier (not mastermind) and not privy to planning or owner of vehicles/buildings used to commit the crime/coordinating payments etc. • Cooperation with law enforcers