



# **WILDLIFE, FORESTRY AND FISHERIES OFFENCES IN KENYA**

**“Points to Prove” – a Guide for Prosecutors and Investigators  
including Sample Charges and Standard Operating  
Procedures**

2019  
3<sup>rd</sup> Edition





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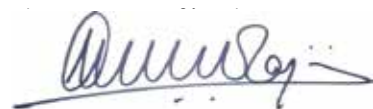
## FOREWORD BY THE DIRECTOR OF PUBLIC PROSECUTIONS

The Office of the Director of Public Prosecutions, Kenya (ODPP) has long recognised that wildlife and forestry crime is a form of organised transnational crime, requiring strong investigations and robust prosecutions. Having instituted the 1<sup>st</sup> Interagency Forum on Wildlife Related Crimes in 2013 which brought together key agencies, the ODPP, together with Kenya Wildlife Service, the National Police Service, the Kenya Revenue Authority, Department of Immigration Services, Attorney General's Office, and Judiciary worked together to develop the first edition of the *Rapid Reference Guide To Wildlife Crime*, designed and initiated by Shamini Jayanathan, Barrister-at-Law with the British High Commission. Encompassing all relevant offences under existing laws at the time of publication in 2015, this was intended to be a quick reference guide for investigators and prosecutors alike.

That this guidance is now in its third edition and additional volumes are being developed to include forestry and marine crime and even fisheries offences, is testament to its utility. This is further borne out by this model being replicated across the continent and even further afield.

I am proud to be associated with this Rapid Reference Guide that will undoubtedly continue to serve as a valuable resource to investigators and prosecutors and I wish to commend its use to all of the stakeholders involved in the fight to protect Kenya's natural heritage.

With grateful acknowledgement to my team within the ODPP, the Kenya Wildlife Service, the United Nations Office of Drugs and Crime and Space for Giants in their tireless efforts to keep abreast of the developments in this important and increasingly complex area of crime.



**Noordin Haji**

Director of Public Prosecutions

Development of this Guide was spearheaded by the Office of the Director of Public Prosecutions in partnership with the United Nations Office on Drugs and Crime, the Africa Wildlife Foundation, Space for Giants and counted with the participation of various stakeholders from Government of Kenya and Civil Society organizations:



**UNODC**

United Nations Office on Drugs and Crime



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## NOTES/KEY CONTACTS

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# BEST PRACTICE GUIDANCE ON INVESTIGATION AND PROSECUTION OF WILDLIFE CRIMES

## SECTION A: PREAMBLE

1. **Article 157** of the Constitution of the Republic of Kenya provides for the establishment of the Office of the Director of Public Prosecution (ODPP). **Article 157 (6)(a)** provides that the ODPP shall exercise State powers of prosecution and may institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed<sup>1</sup>.
2. **Article 243** of the Constitution of the Republic of Kenya provides for the establishment of the National Police Service. **Section 35** of the National Police Service Act provides for the functions of the Directorate of Criminal Investigations which include, among others, undertake investigations on serious crimes including terrorism, detection and prevention of crime, apprehension of offenders, and perform any other function conferred on it by any other written law.
3. **Section 107** of the Wildlife Conservation and Management Act 2013 ('the Act') provides for delegated powers of prosecution to be afforded to officers of the Kenya Wildlife Service. Part XIII of the same Act provides for powers of investigation, arrest and enforcement to authorised officers of the Kenya Wildlife Service. For Kenya Forestry Service, investigative powers are contained in Part VIII of the Forest Conservation Management Act 2016; for Kenya Fisheries Service, those powers are contained in Part XIII, XIV and XV of the Fisheries Management and Development Act 2016.
4. In order to ensure efficiency of investigations and prosecution of wildlife, forestry and fisheries crimes, there is need to have close cooperation between the ODPP and other agencies involved in the detection, investigation and prosecution of such crimes. This includes partners in the Kenya Revenue Authority, Immigration Services, Kenya Coastguard Service and others.
5. The objectives of the Best Practice Guide within this guidance are to ensure effective coordination between ODPP and other agencies in relation to these crimes.

## SECTION B: CONSULTATION WITH THE ODPP WHERE POWER OF PROSECUTION IS DELEGATED

Where an authority is exercising a delegated power of prosecution, the following cases should only be conducted by that authority after consultation with the ODPP. This is because most authorities that exercise such powers are limited to one statute and these crimes may cut across many laws.

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<sup>1</sup> Section 5 (2)(a) the Office of the Director of Public Prosecutions Act.

1. **In any matter involving a CITES Appendix 1 species or species listed in Schedule 6 of the WCMA.**
2. For all other wildlife, forestry or fisheries crime, consultation must be sought if **any one** of the following criteria is present:
  - (i) Where the suspect is a foreign national or of unknown nationality;
  - (ii) Where the suspects are three or more in number and the I.O. considers it may be an 'organized crime';
  - (iii) Where any of the suspect(s) are serving or retired state or public officer(s), including serving/ex-members of the disciplined services and armed forces;
  - (iv) The species (including fisheries) in question is for export or import or transit or concerns a CITES listed item in the context of export/import or transit;
  - (v) Where there is use of any firearm in the commission of the crime;
  - (vi) In cases where poison is used, the use of that poison is of such scale or concern as to merit the involvement of the ODPP;
  - (vii) Where there is an intelligence profile concerning the suspect;
  - (viii) Where the suspect is reasonably suspected to be a beneficiary of proceeds of crime or there is suspicion of money laundering linked to wildlife, forestry or fisheries crime;
  - (ix) Where in the course of investigations there is an incident of obstruction of justice;
  - (x) Where the suspect is a repeat offender in the context of wildlife, forestry or fisheries crime;
  - (xi) Where the suspect is a public or influential figure in his/her community;
  - (xii) Where the investigation and prosecution of the crime will involve transnational cooperation;
  - (xiii) Where the offence involves foreign diplomatic missions, international bodies and/or multinational bodies;
  - (xiv) Where the offence involves elements of cybercrime;
  - (xv) Any other offence that the agencies would wish to refer to the ODPP for advice.

### **THE ODPP TO AUTHORISE CHARGE IN ALL OF THE ABOVE CASES**

Following authorization of charge, the ODPP may retain the conduct of the prosecution of that case or exercise delegated powers of authority to another relevant agency.

**Amendment/Discontinuance of Charges:** subsequent alteration or discontinuance of said charge by a delegated authority **must** be done in consultation with the ODPP.

## SECTION C: BEST PRACTICE GUIDANCE ON INVESTIGATIONS AND PROSECUTIONS

### 1. LIAISON BETWEEN AUTHORITIES

- (i) The ODPP will ensure that a liaison person is appointed in each County Office who will act as a point of contact for the agencies in those Counties. The Investigating Officer (I.O.) will bear responsibility for ensuring contact is made with that liaison officer to arrange a face to face consultation, telephone conference or request for written advice depending on the circumstances of the case.
- (ii) The ODPP liaison officer in each county shall identify the appropriate contact point in Kenya Wildlife Service, Kenya Forestry Service, Kenya Fisheries Service, Kenya Immigration Department and Kenya Revenue Authority, National Intelligence Service and the Kenya Police Service.

### 2. PRE-ARREST CONFERENCE BETWEEN ODPP AND INVESTIGATORS

Where an arrest is being contemplated under section B above, the ODPP and the I.O. will ensure that a pre-arrest conference is held as soon as possible after notification from the I.O. to the ODPP. The Prosecutor will offer the required advice that may include:

- (i) Possible offences to charge;
- (ii) Lines of enquiry to take;
- (iii) Admissibility of evidence;
- (iv) Potential need for expert evidence;
- (v) Possible legal applications e.g. restraint of assets or applications for mobile phone data records;
- (vi) Identification of issues and applications relevant to witness protection and public interest immunity;
- (vii) How to obtain evidence from abroad (Mutual Legal Assistance - MLA);
- (viii) How evidence should be presented in court;
- (ix) Whether a parallel financial investigation is merited, or the case may call for potential involvement of the Financial Reporting Centre (FRC) and/or Ethics and Anti-Corruption Commission (EACC) and/or Asset Recovery Agency (ARA). If so, the ODPP will, without delay, direct contact with those agencies in order to take forward the financial aspect of investigation;
- (x) Evidential and legal consequences of a proposed investigative technique;
- (xi) Setting a timetable for disclosure of evidence and subsequent meetings to review;
- (xii) That the Prosecution Counsel and the I.O. will ensure that they regularly conference for purpose of discussing progress of investigations;
- (xiii) Consideration of bail and or any other applications.

### 3. POST-ARREST CONFERENCE

- (i) In cases where an arrest is made in the absence of any prior consultation with the ODPP in relation to an offence under this Guidance, the following shall occur:
  - a) At first appearance the charge shall be authorised by the ODPP or a further remand sought for further investigation;
  - b) Where no charge is laid at first appearance or where a not guilty plea is entered at that first appearance, a post-arrest conference shall be held within five days between the I.O. and the ODPP and any other interested agency concerned with the investigation.
- (ii) Advice may include all matters listed in paragraph 2 above.

## SECTION D: CONDUCT OF INVESTIGATIONS AND BEST PRACTICE SECURING EXHIBITS

The Investigating Officer should:

Secure the exhibits

- (i) The first officer at the scene of crime shall recover and ensure safety of exhibits and must prepare an inventory and hand over to Investigating Officer who shall ensure the exhibit's chain of custody is maintained in the Chain of Custody Form and as per that authority's procedures for management of crime scenes;
- (ii) Investigating Officer shall ensure that the exhibits are properly labelled and kept in separate bags, kits, envelopes or containers to prevent contamination;
- (iii) The Investigating Officer shall ensure safe custody and proper recording of the exhibit in an Exhibit register;
- (iv) Where a firearm or ammunition is seized, the police shall be immediately informed to assist the investigation;
- (v) The Investigating Officer shall determine exhibits that require expert examination, complete the Exhibit Memo Form and forward them to the appropriate expert examining body without delay;
- (vi) The Investigating Officer shall collect the expert report together with the exhibit from the expert, and keep them in safe custody until their production in court;
- (vii) Where a suspect is in custody, the Investigating Officer should inform the expert and request an early preliminary report;
- (viii) Where there is a documentary exhibit that does not require expert opinion, the Investigating Officer shall keep copies in the file and produce the originals in court;
- (ix) Perishable items must be preserved appropriately, or photographs taken by the scenes of crime officer who must then provide a certificate of authenticity and ensure he is available for trial;<sup>2</sup>

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<sup>2</sup> See later section on pre-trial conference.

- (x) Only a court may determine when an exhibit may be released to an interested party;
- (xi) Exhibits shall be stored wherever possible with the authority responsible for the investigation of that case. Wherever an officer hands over responsibility for an exhibit to another officer, he shall record the time, date and name of that officer and the handover in the occurrence book. That new officer shall bear the same responsibility and duty on any subsequent handover;
- (xii) In any case where any exhibit is lost or misappropriated or altered or manipulated in any way or at any time, the ODPP shall direct a robust investigation with a view to identifying and charging the responsible party.

## SECTION E: STATEMENTS FROM THE SUSPECT

- (i) Should the suspect make any voluntary verbal statement before arrest, the I.O. should record those statements in a charge and cautionary statement for the prosecutor;
- (ii) At the time of arrest, the I.O. should inform the suspect of his right to silence and caution him appropriately before inviting the suspect to consider making a formal statement. This should also be recorded in the charge and cautionary statement;
- (iii) If any confession is to be relied upon, it must have been obtained in accordance with the Evidence Act (Confession Rules 2009).

## SECTION F: FINGERPRINTS

As a matter of best practice, the I.O. should seek to ensure that fingerprints are taken for all suspects arrested in relation to wildlife, forestry and fisheries related offences e.g. by requesting the police to take prints wherever a suspect is taken to a police station. If refused, the I.O. can ask the prosecutor to seek an order from the court to have the suspect returned to the station so that prints can be taken.

## SECTION G: WITNESS STATEMENTS

Any witness statement taken in a case should:

- (i) Have the telephone number, residential or work address of witnesses shall NOT be recorded *within the body* of the statement unless relevant to the commission of the offence. This is to avoid inadvertent disclosure of the witness' whereabouts to the defendant or his accomplices;
- (ii) Have Contact details recorded only in the 'List of Witnesses' and must remain in the file;
- (iii) address how the witness' evidence assists in establishing the offence against the accused with particular consideration of the 'points to prove' for individual offences;

- (iv) Whilst taking a statement, the officer shall enquire as to 'dates to avoid' for the witness availability for any future trial. These dates to avoid shall be clearly endorsed on the 'List of Witnesses'.

## SECTION H: BAIL (SEE ALSO ANNEX)

The issue of bail is key. Failure to give proper consideration to bail may result in cases being lost due to interference with witnesses or failure to attend trial. Equally, remanding accused persons who could have been properly bailed places an unnecessary strain on public resources.

- (i) The I.O. must give early consideration to the issue of bail;
- (ii) The I.O. must not assume that every case demands a remand in custody;
- (iii) The I.O. having regard to the factors set out below, must give consideration to issues of bond, security and conditions that may be attached to bail;
- (iv) The I.O. must set out his proposal on bail or remand in writing and attach to the file;
- (v) Where a remand in custody is sought, the I.O. **must complete an affidavit** in advance of plea.

## SECTION I: CHARGES

The I.O. shall propose relevant charges and draft the charge sheet. This is not binding upon the ODPP.

## SECTION J: CONDUCT OF THE CASE AT COURT

### ON BAIL

Where bail is granted, and the prosecutor is dissatisfied, the prosecutor shall:

- (i) Immediately notify the court of the intention to seek review;
- (ii) Seek a stay on release of the suspect pending review.

Where bail is not opposed, the prosecutor shall give further consideration to appropriate conditions that may be attached such as regular reporting. He/she will notify the I.O. of any conditions attached to bail.

### ON PRE-TRIAL CONFERENCE

Following a plea of 'not guilty', the prosecutor of the case shall request a pre-trial mention/conference with the court, with prosecution and defence to attend. This will be in order to:

- (i) Set a timetable for service of evidence and notify if any further evidence is to be obtained and served;
- (ii) Confirm witness availability;

- (iii) Inform the court of potential difficulties in proceeding on the anticipated trial date;
- (iv) Inform the court where a court visit is required to view an exhibit;
- (v) Inform the court that photographs will be used for bulky exhibits and ascertain any objection;
- (vi) Confirm the requirement for expert witnesses and seek admission/agreement if possible;
- (vii) Address any issues relating to legal representation of the defendant;
- (viii) Inform the court of issues relating to perishable items and consider the acceptable method of production before the court;
- (ix) Address the release of exhibits to their owners and clarify obligation of owners to return to the court with exhibit as and when required;
- (x) Alert the court on issues regarding forfeiture applications and any other ancillary orders that may be sought post-conviction such as deportation, unclaimed assets and identification of appropriate agency to which forfeiture may be made.

The prosecution shall provide a copy of the evidence to be relied upon (only) to the judge presiding over the pre-trial mention/conference in advance of the hearing.

## **SECTION K: DISPOSAL OF EXHIBITS DURING TRIAL – PERISHABLE GOODS**

In relation to wildlife products that are subject to ‘speedy and natural decay’, see s110 (2) (a) WCMA regarding destruction or disposal without a court order. For example, where exhibits are liable to rot and cannot be moved before a case comes to court for first appearance e.g. a buffalo carcass in the bush – the I.O. should take photographs and exhibit in accordance with the guidance on digital evidence included herein. If there is a question over whether the carcass is identifiable as a particular species, a sample should be taken to the forensic lab at KWS. The carcass can then be left.

Where the exhibit can be moved and brought to court, but is liable to rot before trial, the I.O. should alert the prosecutor to apply for the evidence in relation to the exhibit to be admitted for the court to record in evidence at the first appearance. Then the prosecutor should seek a disposal order. The I.O. should make sure the item is photographed before it is finally disposed of.

In relation to fisheries crime, see s166 of the Fisheries Management and Development Act 2016 that allows for the sale of the seized goods (fish) and the deposit of the proceeds of sale into a suspense account of the Service pending a court order. If that sale is not possible, the DG may dispose of the fish by destruction. However, if the exhibits are going to be needed for the purposes of trial, photographs should be taken, forensic evidence if necessary obtained, and all other means taken to ensure admissibility at trial. Taking one sample for preservation may be advisable.

For offences under the Forest Conservation and Management Act, there are no express provisions in the Act; accordingly, samples should be taken, photographs and exhibit chain of custody maintained for any sample retained.

## **SECTION L: DISPOSAL OF EXHIBITS AFTER TRIAL**

Upon conviction, the prosecutor should always seek forfeiture of the exhibit(s) in the case.

In relation to wildlife products, see s105 WCMA. KWS is the receiver of the order. Prosecutors can also seek costs of disposal under s105 (2). This is relevant also to items used in the commission of an offence such as a motor vehicle where the cost of transferring ownership can be claimed by the prosecutor upon conviction.

For forestry, the Kenya Forestry Service under s68 (1) (c) in relation to offences where there is removal, injury or damage of forestry produce.

For fish products, Kenya Fisheries Service can seek forfeiture under s186.

Where disputed, see s389 A of the Criminal Procedure Code for the procedure to be followed.

## **SECTION M: OTHER ORDERS UPON CONVICTION**

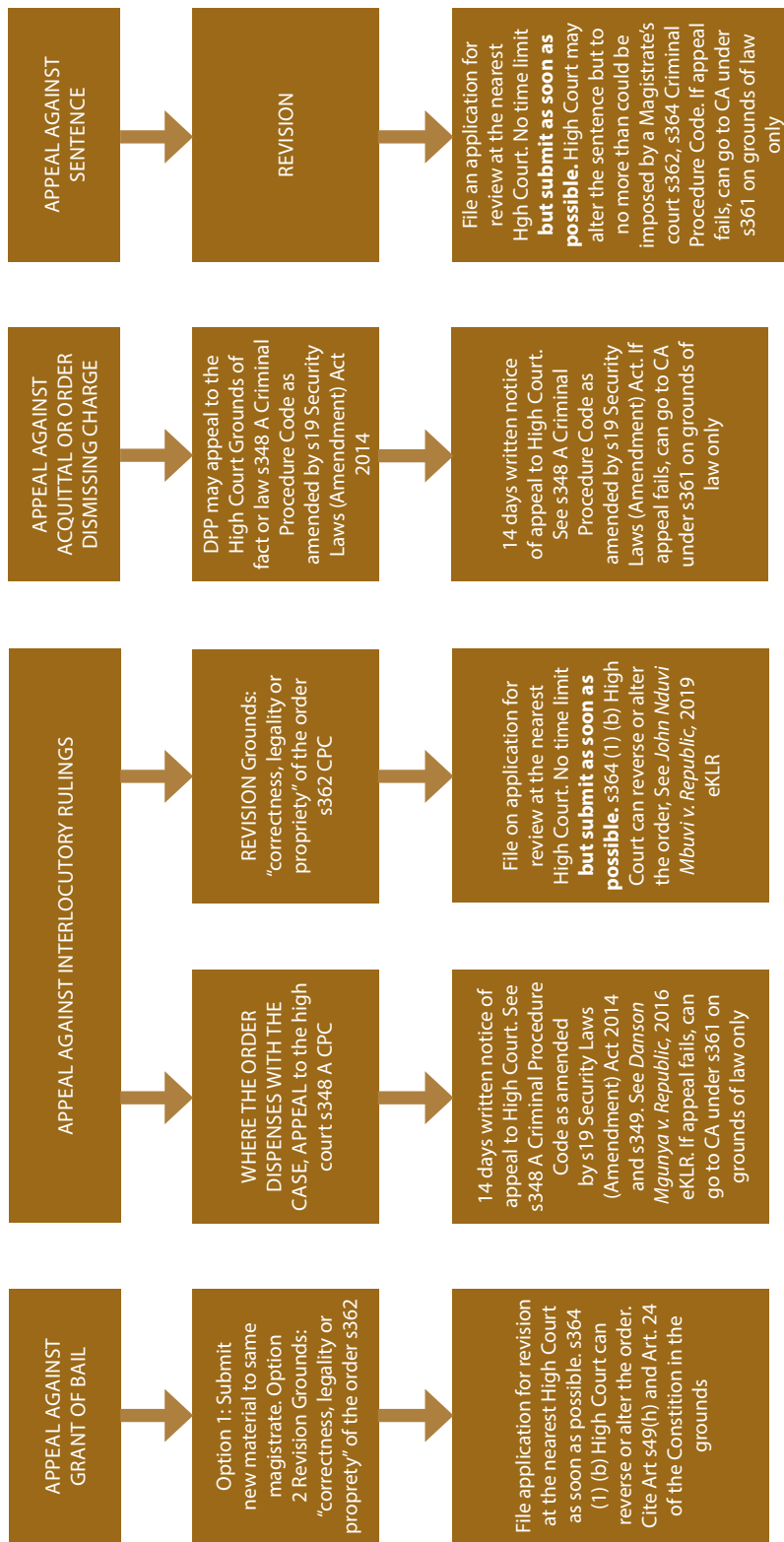
Upon sentence of a foreign national to a term of imprisonment, the prosecutor shall be responsible for informing the immigration point of contact as to the anticipated date of release. The immigration authorities shall bear responsibility for contacting prison authorities to ensure that the suspect is deported from a place of custody without delay.

Prosecutors should consider other ancillary orders available such as revocation of permits, compensation, restitution, etc. See the RRG on the specific offences for guidance.

## **SECTION N: APPEALS**

See the prosecution appeal pathway on the next page.

# PROSECUTION APPEAL PATHWAYS - KENYA



If revision is unsuccessful, DPP can seek an appeal to CA on ground of law only under s361 CPC and Art. 164(3) (a) Constitution. 14 days to file. See *Eliud Waweru Wambu v. Rep*, 2019 eKLR

# EXPERT EVIDENCE – RELEVANT PROVISIONS AND GUIDANCE ON EXPERT AND DIGITAL EVIDENCE

## EVIDENCE ACT CAP 80 - EXPERTS

### 77. REPORTS BY GOVERNMENT ANALYSTS AND GEOLOGISTS

(1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.

(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.

### 48. OPINIONS OF EXPERTS

(1) When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions.

(2) Such persons are called experts.

**Note:** It is **NOT** a requirement that all experts must be government analysts. A 'government analyst' enjoys the presumption of his office and qualifications, while a non-government expert is subject to proof.

Accordingly, statements by **ANY** expert **MUST** address:

- (i) **Qualifications and experience;**
- (ii) **Methodology used;**
- (iii) **Basis for conclusion;**
- (iv) **Address continuity and preservation of exhibits received by that expert.**

## SECURITY LAWS (AMENDMENT) ACT 2014 - DIGITAL EVIDENCE

31. The Evidence Act is amended by inserting the following new section immediately after section 78 -

78 A (1) In any legal proceedings, electronic messages and digital material shall be admissible as evidence.

(2) The court shall not deny admissibility of evidence under subsection (1) only on the ground that it is not in its original form.

(3) In estimating the weight, if any, to be attached to electronic and digital evidence, under subsection (1), regard shall be had to:

- (a) the reliability of the manner in which the electronic and digital evidence was generated, stored or communicated;
- (b) the reliability of the manner in which the integrity of the electronic and digital evidence was maintained;
- (c) the manner in which the originator of the electronic and digital evidence was identified; and
- (d) any other relevant factor.

(4) Electronic and digital evidence generated by a person in the ordinary course of business, or a copy or printout of or an extract from the electronic and digital evidence certified to be correct by a person in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self-regulatory organization or any other law or the common law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract.

### NOTE:

- (i) The SLAA opens the door to use of technology in criminal trials;
- (ii) Digital evidence may now be produced by any member of the public or company/institution provided the court is satisfied on the criteria set out above;
- (iii) Copies are admissible;
- (iv) This would require care to be taken to include certain ingredients in every statement exhibiting digital evidence to ensure admissibility at trial.

For photos/videos taken by anyone (does not have to be a gazetted scene of crime officer), the statement must address:

- (i) Ownership of device;
- (ii) Make and particulars of the device;
- (iii) A statement that the device was in good condition at the time of recording the information whether by photo/video or other;
- (iv) Presence at the scene, time, date, place and that he/she used the device to capture the information;
- (v) The information was stored in that device and that device remained in good working order;
- (vi) The time and place when he revealed it to the I.O.;
- (vii) What he/she did with the image/digital recording in between;
- (viii) At what point was the device handed over in its original form **or**
- (ix) If he/she sent a digital copy to the I.O. to print or exhibit, confirmation that he observed the copy and confirms that it is the same as that contained in his device;
- (x) If he/she shared the information he/she should state.

This does NOT require that the owner to hand over his phone to the custody of the police until trial, IF the above requirements are adhered to.

On business records e.g. telecoms printouts of call logs or banking statements, make sure the statement includes the following points:

- (i) He/she made **regular use** of the computer in the **ordinary course of business** of that organisation;
- (ii) At the time of recording the relevant information, the computer was **operating properly** and that if there was any defect, it would not have affected its accuracy;
- (iii) There was **no interference** between what was recorded by the computer/device and what is now being produced;
- (iv) If a copy, that copy is **certified** by the person producing it as **accurate**.

**GUIDELINE IN DRAFTING AFFIDAVIT IN OBJECTION TO GRANT OF BAIL – TO BE  
ATTACHED TO THE PROSECUTION FILE**

**SUMMARY OF THE CASE (BRIEF FACTS) (Attach a copy of cover report)**

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**COMPELLING REASONS TO WITHHOLD BAIL**

Likelihood that the accused will fail to appear – factors to consider:

- (i) The nature of the charge or offence and the seriousness of the punishment to be awarded if the applicant is found to be guilty (cite the relevant section(s)), consider value of any item seized:

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- (ii) The strength of the prosecution case against the accused person/nature of evidence on which the suspect has been arrested:

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- (iii) Community ties (foreign or unknown nationality, immigration to be notified and supporting evidence obtained); holds no confirmed place of residence, employment, children/family ties:

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- (iv) Accused failure to surrender to bail on previous occasion (provide criminal case no. & court):

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**Likelihood that the accused will interfere with witnesses and/or the investigation**

(v) Likelihood of Interference with prosecution witnesses e.g. proximity of address/ community/relationship to any witness:

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(vi) The inquiries that have been made by the police in relation to the offence and any further inquiries proposed to be made (including whether information given by the Accused has led to discovery of evidence or arrest of another person in relation to other offence):

**Note:** detail may be kept to a minimum to preserve integrity of investigation

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**Likelihood that the accused will commit an offence while on release**

(vii) The character and antecedents of the accused (e.g. criminal record and/or material yet to be recovered and believed to be in possession of the accused), other pending prosecution:s

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**That detention is necessary for the accused’s own protection**

(viii) Officer’s view based on views in the community and/or other indicators of possible harm to the accused if released:

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(ix) The security of the accused if released on bail (the views of the officer and/or community directly or indirectly affected):

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**NOTE:** Annex a copy of a draft affidavit sworn by the Investigating Officer

**NOTE:** Previous convictions should accompany every file

# SENTENCING GUIDANCE FOR PROSECUTORS



*“Prosecutors are speaking not just on the part of the State, but on the part of future generations when it comes to wildlife, forestry and fisheries crime”.*

## GENERAL GUIDANCE ON SPECIES FOR SENTENCING SUBMISSIONS

This section is aimed at guiding prosecutors in formulating their submissions when it comes to the sentencing exercise. It is not meant to be prescriptive, and prosecutors should feel free to select the relevant points as they see fit as well as do their own research.

### BEFORE LOOKING AT OFFENCE/SPECIES SPECIFIC SUBMISSIONS, PROSECUTORS SHOULD CONSIDER WHICH AGGRAVATING FEATURES ARE APPLICABLE

Consider whether:

- The species is a particular driver of tourism or other economic benefit to Kenya;
- The offence against the protected species also took place within a protected area;
- The accused is a public official charged with the duty of protecting Kenya's natural resources and heritage, or involved law enforcement or military officials in the commission of the offence;
- The commission of the offence involved international elements;
- The offence involved a group of persons acting in the execution or furtherance of a common purpose, in which the accused played a leadership role;
- The offence was planned or meticulously premeditated and executed;
- The offence was committed for commercial purposes with a high value;
- Where damage has been caused, cost of clean-up/restoration/rebuilding is significant;
- The offence involved a high degree of sophistication in execution such as the use of poisoning, illegal weaponry or explosives, concealment of trophies, or corruption of others;
- A protected species was actually killed;
- A law enforcement officer was killed or injured during the execution of the offence;
- Death or injury to any human;
- The offence involved a large number of protected species;
- The offence caused significant damage to the environment or a community (e.g. pollution);
- The offence caused significant financial loss to a community;
- The offence brought disrepute to a government agency or the national government;
- The offence posed a high risk to public health;
- The offence has inflamed community tension and conflict.

## ON WILDLIFE CRIME

### OVERVIEW OF POACHING AND TRANSNATIONAL ORGANISED CRIME

- The illegal wildlife trade is valued at USD 20 billion per year, ivory and rhino horn constitute an important component of this trade;
- Over 1,000 rangers have lost their life in the last 10 years protecting wildlife across the world. This must be taken seriously.
- Wildlife crime is undermining economic development, security and destabilizing fragile ecosystems;
- Criminal syndicates conduct sophisticated planning, have access to significant finances, access to trade routes and work in collusion with corrupt member of civil society;
- Criminal syndicates are stockpiling ivory and rhino horn, speculating on the future extinction of elephants and rhinos to maximize financial returns;
- Tourism, largely based on Kenya's wildlife, is estimated to grow to 5.2% of Kenya's GDP. Wildlife crime significantly jeopardises Kenya's economic growth from tourism.

### SPECIES-SPECIFIC SUBMISSIONS

#### ELEPHANTS

- In **1980** Africa had an estimated population of **1.3 million elephants**;
- In **2017**, the continental population is estimated at just **415,000 elephants** (ref: The Great Elephant Census (GEC) in 2017);
- Between 2007 – 2014, a total of **144,000 elephants** were illegally killed for their ivory (**20,000 per year**) – this represents a decline of approximately **30%** across the continent;
- Protecting Kenya's wildlife takes a heavy toll on public resources and exposes rangers to severe risk of injury or death from ruthless poachers;
- Elephants contribute a vital role to the Kenya landscape, creating watering holes, germinating seeds, enriching the soil, maintaining grasslands and contributing to the integrity of the ecosystem;
- Elephants are a huge draw for tourism in this country;
- Elephants are known to be emotional creatures that live in close-knit family structures. They look after their young, they mourn their dead. It takes a female elephant two years to give birth. They can live for up to 70 years. Older elephants remember where watering holes and migratory routes are – when they are poached, this knowledge is lost and increases the changes of delinquency in younger elephants and more conflict with humans as they don't know where to go;
- Elephants are often immobilised with spears or bullets and their tusks hacked out of their face sometimes whilst they are still alive.

## RHINOCEROS

- There are approximately **4,200 black rhinos** and **20,500 white rhinos** left in Africa;
- In 1970 there were approximately **70,000 black rhinos** in Africa;
- Between 2013 – 2015, on average **1,200 rhinos were poached** across Africa per year and a total of **5,940 since 2008** (ref: Rhino Conservation Botswana);
- If poaching rates continue across Africa, black rhinos may become extinct by 2025;
- Kenya has a total population of approximately **540 black rhinos**. Kenya saw the death of the last male Northern White Rhino – we are seeing extinction before our eyes;
- Rhinos are slow to reproduce, breeding only once every 4 or 5 years and producing only one calf at a time;
- Rhino horn may fetch up to USD 65,000 per kilo in consumer countries in the Far East;
- The taking of a horn from a rhino is often extremely brutal. Poachers will often break the back of a rhino to prevent it running away, and in order to avoid detection through the use of a bullet, poachers will use a machete or a chainsaw to hack off the face of the rhino, whilst it is still alive. Rhinos can live for hours in extreme pain before it eventually dies;
- Normal lifespan is 50 years.

## GIRAFFES

- There are **4 distinct species of giraffe** and **5 subspecies** currently recognised;
- The giraffe is an iconic species, much like the elephant and the rhino that international tourists pay to see;
- A giraffe's pregnancy lasts for 15 months. They are not fast breeders;
- The giraffe is an umbrella species, shaping and preserving ecosystems for other animals;
- Giraffe population numbers have **plummeted across Africa by nearly 40%** in the past three decades as a **result of poaching for meat**, habitat loss and habitat degradation (Ref: Giraffe Conservation Foundation). Less than 100,000 giraffes left across the entire African continent;
- Often Giraffes are poached just for their tails to be used as decorative items and as fly whisks; they are also poached for their bone marrow which is believed to be a cancer and asthma cure in some communities in Kenya and Tanzania;

## PANGOLINS

- Pangolins are **the world's most trafficked species** (REF: Nat Geo, see: <https://news.nationalgeographic.com/2016/03/1160317-pangolins-united-states-endangered-species-act/>);
- In 2016, CITES up-listed **all species of pangolin to Appendix 1** – the highest level of protection and is listed as critically endangered under Schedule 6. Kenya was among the first African countries to ratify the treaty;

- **Pangolin scales are prized** in the east for human consumption of their meat and for medicinal purposes of their scales, and also for their blood which is used as a tonic. Their meat can sell at \$350 per kilo (REF: CNN Article); quite often the animal is boiled alive in order to remove the scales easily;
- There are 4 species of pangolin in Africa;
- **Pangolins only produce a single offspring per year** making the species vulnerable to local extinction because it responds slowly to poaching pressure;
- Pangolins are particularly shy, nocturnal creatures and so hunting them takes time and skill. It makes counting them particularly challenging.

## LIONS

- The very symbol of African wildlife, **the Lion is classified as a Vulnerable Species** under threat on the International Union for the Conservation of Nature (IUCN) Red list;
- In 1900 there were an estimated 200,000 lions, **today's estimate is less than 20,000** (ref: Panthera);
- Lion populations have **decreased by over 40% in the last 20 years** (AWF);
- As top predators, the balance of our ecosystems and habitats rely on lions. Without lions, the resulting imbalance would lead our grasslands being overgrazed, and degraded;
- Lions are also one of Kenya's major tourist attractions and natural resources. The **economic value of a living lion over its life time could amount to up to \$2 Million** (based on a Botswana Savuti survey);
- The **lion bone trade** is a growing business in the far east;
- At current rates of decline, **lions can become extinct in the wild by 2050** (ref: AWF).

## BUSHMEAT - GENERALLY

- However small one case might appear, it is part of a much bigger, destructive picture that threatens not only wildlife but the health of our human populations through **zoonotic disease transmission**. E.g. Foot and Mouth disease, Anthrax and Ebola; Bushmeat is not inspected by any public health body, thus exposing the Kenyan public to health risks;
- Competition between humans and other predators for limited prey reduces the ecosystem's carrying capacity for large carnivores. E.g. lions don't have enough to eat, bringing them closer to human populations and threatening their survival;
- **Bushmeat poaching is an extremely cruel and indiscriminate practice** whereby animals are caught in snares and may die a slow and painful death;
- **Illegal bushmeat poaching** is an increasing threat that has overtaken the scale of trophy poaching;
- Bushmeat is seen as a delicacy and a cheaper alternative to other sources of protein.

## ON MARINE/FISHERIES CRIME

### SEA TURTLES

- Sea Turtles are considered ‘megafauna’ and play a very important role in the **energy and nutrient balance in the ecosystem**. The grazing of sea turtles is actually helping to reduce carbon dioxide levels in the air, directly contributing significantly to our climate;
- Sea Turtles are part of Kenya’s heritage;
- Sea Turtles are a huge lure for tourists at the coast of Kenya who come to see turtles and their hatchlings. It is one of the main reasons people visit the coast, bringing much needed revenue to the coast province;
- A Sea Turtle can take up to **35 years before it is ready to reproduce**;
- **Out of 1000 eggs that a female lays, only one will survive to maturity**. Accordingly, it is a slow process to replace poached populations.
- Many species (including those in Kenya) are listed as **critically endangered or endangered**;
- Sea Turtles are killed for their meat and the eggs laid on beaches are collected. The meat from the Green Turtle is very popular, whereas the meat from Hawksbill Turtles is toxic. Many poachers sell Hawksbill as Green Turtle meat causing consumers to get very ill and **even die**.

### ILLEGAL, UNREPORTED AND UNREGULATED FISHING (Including Prohibited Fishing Methods and Pollution)

- Unsustainable fishing pressure along the Kenya coast is leading to a gradual breakdown in the wider ecosystem. This has a knock-on effect upon livelihoods and the climate and puts at peril Kenya’s vision for a **blue economy** which is to harness the potential of our oceans, improve the lives of people and build prosperity whilst conserving the water for future generations. For an example of the knock-on effects, overfishing has reduced the number of predators of sea urchins. When sea urchin populations are allowed to flourish, they destroy entire sea grass beds that can take decades to grow back. Causing Sea Turtles lose a source of food, and the planet lose an efficient way to store carbon dioxide;
- **10 Billion Ksh are estimated to be lost** due to illegal fishing activities (REF: Food and Agriculture Organisation “State of the World Fisheries and Agriculture” 2018);
- **Illegal fishing is often only a part of wider criminal activity**. Illegal fishing has been linked to human trafficking with people being held as slaves on fishing vessels and the cartels operating them use the proceeds to fund other forms of **transnational organised crime**, such as drug trafficking and in some cases, terrorism. An example to consider: the 1998 US Embassy bombing in Nairobi where the key suspect was disguised as a fisherman, using his boat to bring in bomb-making materials;

- Illegal and unregulated fishing and coral destruction **denies livelihoods** to communities living at the coast and as Kenya strives to create and enhance her blue economy, illegal, unreported and unregulated fishing threatens not only her maritime resources but also her economic opportunities such as job creation and tourism. It represents a **loss to future generations** as well, as coral reefs can take decades to regenerate for example;
- Illegal, unreported and unregulated fishing also harms **Kenya's relationships on a regional level**, causing conflict between governments;
- It is vital to **deter** such crimes so that fishermen who operate within the law are not incentivised to break it;
- On prohibited fishing gear, factors to consider: nets- the size has been legislated upon because monofilaments and small nets result in huge numbers of 'bi-kill' i.e. fish and other marine animals that are not the target of the fishing operation. When bi-kill occurs vital marine resources are killed, causing destruction to the population;
- Smaller nets, particularly monofilament nets, get lost and eaten by larger fish, sea turtles, and birds, resulting in a slow and painful death;
- **Spear guns** cause significant damage to coral reefs and more often than not, cause injury, not death, resulting in a slow and painful death for marine life;
- **Dynamite fishing** is indiscriminate, reckless and causes damage to reefs and also endangers human life;
- **Aggregated fishing devices** need to be regulated in order to maintain sustainable fish stocks. When such devices get lost, they also pose a risk to marine traffic;
- Some **poisons** are also used in illegal fishing, causing fish to become immobilised. The use of poisons in Kenya fishery waters is reckless and endangers both marine and human life.

## ON FORESTRY RELATED CRIME

- While forest crimes are often overlooked, the illegal revenue from this organised crime dwarfs that of wildlife crime (**globally estimated at \$30-100billion/year: UN**);
- Forests play a vital role in local livelihoods, in preserving bio-diversity, supporting natural habitats and balancing our precious eco-system and climate;
- Our forests capture and store greenhouse gases, ensure water catchment, soil preservation and pollination, and home many unique and endangered species found nowhere else in the world;
- In addition to massive lost revenue, forest crimes make managing our sustainable, renewable forestry resources impossible;
- Forest crimes have a devastating impact on all aspects of life. These crimes contribute to loss of species and habitat, deforestation, desertification and other forms of environmental degradation. E.g. the Mau Forest and Dakatcha Woodlands in Kilifi have been devastated by illegal logging and charcoal burning;

- Forest crimes such as the illegal charcoal trade and illegal logging are often linked to organised crime, and the funding of terrorism, and therefore present serious risks to our stability, security and rule of law;
- Charcoal burning also presents a risk of fire within wooded areas and thus a risk to the public;
- Sandalwood trade is organized, with local youths being hired as woodcutters, transporters or middlemen. The woodcutters are at the bottom of the chain, followed by local middlemen who oversee the cutting and transportation out of the forest. The kingpins are then in charge of shipping the contraband, mostly in huge amounts, out of the country and seeking lucrative overseas markets;
- Sandalwood populations have reportedly been declining since 2002, because of the heavy exploitation for international trade. The increase in the illegal trade is on the rise throughout the country and it is alarming.



# CRITICALLY ENDANGERED AND ENDANGERED SPECIES

## SIXTH SCHEDULE (s47) - NATIONALLY LISTED CRITICALLY ENDANGERED, VULNERABLE, NEARLY THREATENED AND PROTECTED SPECIES

ALSO SEE CITES APPENDIX 1 [WWW.CITES.ORG](http://WWW.CITES.ORG)

### (A) MAMMALS

Category and Species Name	Common Name
<b>CRITICALLY ENDANGERED</b>	
Cephalophus adersi	Aders' Duiker
Diceros bicornis	Black Rhinoceros
Beatragus hunter	Hirola
Procolobus rufomitratus	Eastern Red Colobus
Cercocebus galeritus	Tana Crested Mangabey
Hippotragus equines	Roan Antelope
Hippotragus niger	Sable Antelope
<b>ENDANGERED</b>	
Ceratotherium simum simum	White Rhino
Balaenoptera borealis	Coalfish Whale
Balaenoptere musculus	Blue Whale
Equus grevyi	Grevy's Zebra
Lycaon pictus	African Wild Dog
Grammomys gigas	Giant Thicket Rat
Otomys barbouri	Barbour's Vlei Rat
Otomys jacksoni	Mount Elgon Vlei Rat
Tyhnchocyon chysopygus	Golden Rumped Elephant Shrew
Tragelaphus eurycerus isaaci	Eastern Bongo
Loxodonta Africana	African Elephant
Panthera leo	African Lion
Acinonyx jubatus	Cheetah
Hyaena Hyaena	Striped Hyena
Tragelaphus spekii	Sitatunga
Panthera pardus	Leopard
Alcelaphus buselaphus	Lelwel Hartebeest
Giraffa camelopardalis rothschildi	Rothschild's Giraffe
Hylochoerus Meinertzhageni	Giant Forest Hog

## (B) BIRDS

Category and Species Name	Common Name
<b>CRITICALLY ENDANGERED</b>	
<i>Apalis fuscicularis</i>	Taita Apalis
<i>Turdus Helleri</i>	Taita Thrush
<b>ENDANGERED</b>	
<i>Ardeola idea</i>	Madagascar Pond-Heron
<i>Falco cherrug</i>	Saker Falcon
<i>Neophron percnopterus</i>	Egyptian Vulture
<i>Otus ireneae</i>	Sokoke Scops-Owl
<i>Cisticola Aberdare</i>	Aberdare Cisticola
<i>Acrocephalus griseldis</i>	Basra Reed-Warbler
<i>Eremomela turneri</i>	Turner's Eremomela
<i>Zoothera guttata</i>	Spotted Ground Thrush
<i>Anthreptes pallidigaster</i>	Amani Sunbird
<i>Piceus golandi</i>	Clarke's Weaver
<i>Macronyx sharpie</i>	Sharpe's Longclaw
<i>Anthus sokokensis</i>	Sokoke Pitpit

## (C) REPTILES

Category and Species Name	Common Name
<b>CRITICALLY ENDANGERED</b>	
<i>Eretmochelys imbricate</i>	Hawksbill Turtle
<i>Petropedetes dutoiti</i>	Du Toit's Torrent Frog
<b>ENDANGERED</b>	
<i>Chelonia mydas</i>	Green Turtle
<i>Lepidochelys olivacea</i>	Olive Ridley
<i>Python sebae</i>	Rock Python
<i>Afraxalus sylvaticus</i>	Shimba Hills Banana Frog
<i>Hyperolius rubrovermiculatus</i>	Shimba Hills Reed Frog
<i>Afraxalus sylvaticus</i>	Forest Frog
<i>Hyperolius rubrovermiculatus</i>	Treefrog
<i>Phrynobatrachus irangi</i>	Mount Kenya Frog

#### (D) FISH

Category and Species Name	Common Name
<b>CRITICALLY ENDANGERED</b>	
Oreochromis esculentus	Singidia Tilapia
Oreochromis hunter	Lake Chala Tilapia
Oreochromis jipe	Jipe Tilapia
Oreochromis variabilis	Victoria Tilapia
Ptyochromis sp.nov.	Rainbow Sheller
Xenoclarias eupogon	Lake Victoria Deepwater Catfish
Playcypha amboniensis	Montane Dancing Jewel
<b>ENDANGERED</b>	
Alcolapia alcalicus	Magadi Tilapia
Cheilinus undulates	Giant Wrasse
Marcusenius victoria	Victoria Stonebasher
Xystichromis nuchisquamulatus	Kyoga Flameback

#### (E) TREES

Category and Species Name	Common Name
<b>ENDANGERED</b>	
Encephalartos kisambo	Voi Cycad
Osyris lanceolata	East African Sandalwood

# OFFENCES UNDER WCMA 2013

## [AS AMENDED IN 2019]

### Breaches of Management Plans, Pollution and Poisoning Offences

#### *Breaches of management plans/easements and orders*

#### **s88 Breaching a Management Plan – possible application for illegal grazing outside national parks**

**(2) (a) For National Parks, National Reserves and National Sanctuaries  
Minimum Fine: 500,000 Ksh and/or 2 Years Minimum Imprisonment**

**(2) (b) For Any Other Case, Minimum Fine: 100,000 Ksh**

POINTS TO PROVE	ANCILLARY POWERS Section 2 page 43
Identity of the accused	s105 Forfeiture
Date and Location	s108 Restraint order or other redress [Environment and Land Court]
That there was a management plan in place governing the affected area, gazetted in accordance with section 44	
Identify the terms of the management order that are relevant to the breach	
Identify how the suspect has breached the terms of that management plan	
Proof that he did so “wilfully and without reasonable cause” OR “Fraudulently altered the approved management plan”	

**Agencies:** KWS, NPS, ODPP, Judiciary

#### ***Evidence likely to include but not limited to:***

Eyewitness evidence; arresting officer, proper exhibit of the management plan by a stakeholder involved/named therein would be ideal although if gazetted, the magistrate should be able to take judicial notice of it.

Suspects knowledge that he/she was breaching the plan will have to be proved e.g. involvement of his community in development of the same, public notice (e.g. by gazette), evidence of previous warning etc.

**Notes:** this offence may be used to counter the practice of illegal grazing on land that falls outside of national parks and national reserves/sanctuaries. The high minimum penalty in this act could act as more a deterrent than that under the Trespass Act (500Ksh).

CHARGE COUNT ONE	Contravening a Management Plan, contrary to s88 of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> wilfully and without reasonable cause contravened an approved management plan by <b>[specify the breach, e.g. allowing cattle to graze]</b> at <b>[location]</b> when by virtue of <b>[insert clause]</b> of the management plan, such conduct was prohibited.

## Breaches of management plans/easements and orders

### s90 Failing/Refusing/Neglecting to Comply with a Wildlife Conservation Order or Easement

**Minimum Fine: 500,000 Ksh and/or 3 Years Minimum Imprisonment**

POINTS TO PROVE	ANCILLARY POWERS Section 2 page 43
Identity of the accused	s105 Forfeiture
Date and Location	s110 Seizure, confiscation, inspection, production
The existence of a Wildlife Conservation Order or Easement issued under WCMA	s108 Restraint order or other redress [Environment and Land Court]
That the Accused was subject to it	
Accused failed to comply or neglected or refused to comply with the terms of that order	
<b>Agencies:</b> KWS, NPS, ODPP, KFS, NEMA, Judiciary	
<b>Evidence likely to include but not limited to:</b> Eyewitness evidence, arresting officer, I.O. re: interviews, certified copy or exhibit from issuing court regarding the order and/ or easement issued, exhibited copy of the gazetted notice of the order/easement or proof of service of the same upon the accused.	

CHARGE COUNT ONE	Failing to comply with wildlife conservation order/ easement <b>[specify]</b> contrary to s90 (a) <b>[for wildlife conservation order]</b> or s90 (b) <b>[for easement]</b> <b>[delete as appropriate]</b> of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> , failed, neglected or refused to comply <b>[delete as appropriate]</b> with a wildlife conservation order/easement <b>[delete as appropriate]</b> issued by an order dated <b>[insert date]</b> by <b>[state general particulars of the breach]</b> .

**s89 WCMA Offence Relating to Pollution of Wildlife Areas but see s95 A WCMA**  
**Minimum Fine: 2,000,000 Ksh and/or 5 Years Minimum Imprisonment**

POINTS TO PROVE	ANCILLARY POWERS Section 2 page 43
<p>Identity of the accused</p> <p>Date and Location</p> <p>Identify the hazardous substance, or pollutant <b>or</b>:</p> <p>Identify the 'waste' or 'oil'</p> <p>That substance was discharged</p> <p>That the accused was responsible for the discharge</p> <p>The area into which it was discharged is a 'wildlife conservation area' i.e. protected by law (see definitions under the Act, Annex A)</p> <p>Effect on the wildlife conservation area was to pollute to an extent that was detrimental to that area</p>	<p>s89 (2) (a) pay the full cost of clean-up of the habitat and ecosystem and removal of the pollutant</p> <p>s89 (2) (b) clean up the polluted habitats and remove the effects of pollution to the satisfaction of the Service</p> <p>s89 (3) the court may direct the polluter to contribute to a wildlife conservation activity as compensation, restoration or restitution</p>
<p><b>Agencies:</b> KWS, NPS, ODPP, Judiciary</p>	
<p><b>Evidence likely to include but not limited to:</b></p> <p>Eyewitness evidence, arresting officer government analyst <b>or</b> expert evidence confirming the nature of the substance and its effect – see s77 and s48 of the Evidence Act and Annex C of this guide. The report <b>does not have</b> to be government analyst, rather under s77 there is a presumption that a person purporting to be a government analyst has the necessary qualifications. Care must be taken then with any other expert under s48 to ensure the statement stipulates his qualifications, experience, methodology used and conclusions and basis for conclusions in a detailed way.</p> <p>I.O. re: interviews, photographs.</p>	

CHARGE COUNT ONE	Pollution of a wildlife area, contrary to s89 of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> wilfully and without reasonable cause discharged a hazardous substance, pollutant, waste or oil <b>[delete as appropriate]</b> in a wildlife conservation area.

<b>s95 A Poisoning of Wildlife Species</b> <b>Minimum Fine: 5,000,000 Ksh and/or 5 Years Minimum Imprisonment</b>	
POINTS TO PROVE	ANCILLARY POWERS Section 2 page 43
<p>Identity of the accused</p> <p>Date and Location</p> <p>Identify the substance used/discharged</p> <p>That the accused used/discharged that substance</p> <p>That effect of that substance was to poison <b>any</b> wildlife species</p> <p>The accused did so, knowingly or recklessly</p> <p>This offence is <b>not</b> limited to protected areas.</p> <p>Note: "recklessly" means that the risk of poisoning wildlife species was reasonably foreseeable, and the accused went on to take that risk when in all the circumstances it was unreasonable to do so</p>	<p>s105 Forfeiture</p> <p>s108 Restraint order or other redress [Environment and Land Court]</p> <p>s110 Seizure, confiscation, inspection, productions</p> <p>Wildlife species includes animals, plants and aquatic species</p>
<p><b>Agencies:</b> KWS, Fisheries, NPS, ODPP, FRC, ARA, Judiciary, NIS, NEMA, Government Chemist</p> <p>Mutual Legal Assistance may be necessary – ODPP, AGO</p>	
<p><b>Evidence likely to include but not limited to:</b></p> <p>Eyewitness evidence, arresting officer, I.O. photographs and a national museum report or government analyst report or expert report on the nature of the substance used and its potential effect.</p> <p>See Annex C on the issue of expert reports. It is not a requirement that only a government analyst can give expert evidence. Any expert may do so but must cite his qualifications, experience, methodology and basis for conclusions. Further he must satisfy the court as to the integrity of any exhibit and continuity in relation to receipt and return to and from the I.O.</p>	
CHARGE COUNT ONE	Poisoning a wildlife species, contrary to s95A of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> knowingly or recklessly used a substance, namely <b>[identify the substance]</b> whose effect was to poison a wildlife species namely <b>[identify the species and number if applicable]</b> .

**s91 Offences Relating to Licences/Permits – Dishonesty and Breaches**

**Minimum Fine: 200,000 Ksh and/or 1 Year Minimum Imprisonment**

POINTS TO PROVE	ANCILLARY POWERS Section 2 page 43
<p>Identity of the accused</p> <p>Date and Location</p> <p>s91 (a) The accused:</p> <ul style="list-style-type: none"> <li>made a statement or representation <b>and</b></li> <li>that statement was false <b>and</b></li> <li>he/she knew or was reckless as to whether the statement/representation as false; <b>and</b></li> <li>he did so for the purposes of receiving a permit or licence for himself or another</li> </ul> <p>s91(b) The accused:</p> <ul style="list-style-type: none"> <li>furnished a document or information</li> <li>on another</li> <li>that document or information was false <b>and</b></li> <li>the accused knew was reckless as to whether the document or information he submitted was false <b>and</b></li> <li>he did so for the purposes of receiving a permit or licence for himself or another</li> </ul> <p>s91(c) The accused:</p> <ul style="list-style-type: none"> <li>'used' a licence or permit <b>and</b></li> <li>that licence or permit was false, <b>or</b> was invalid or had been falsified <b>or</b></li> <li>that license/permit had been altered without authorisation <b>and</b></li> <li>the accused knew or was reckless as to whether that licence or permit was false or falsified/invalid/altered</li> </ul> <p>The accused</p> <ul style="list-style-type: none"> <li>Had a valid licence or permit <b>and</b></li> <li>Contravened a condition or requirement of that licence or permit <b>and</b> knew he was so doing</li> </ul>	<p>s105 Forfeiture</p> <p>s108 Restraint order or other redress [Environment and Land Court]</p> <p>s110 Seizure, confiscation, inspection, productions</p>
<p><b>Agencies:</b> KWS, NPS, ODPP, FRC, ARA, Judiciary, NIS. Mutual Legal Assistance may be necessary – ODPP and Kenya Central Authority</p>	
<p><b>Evidence likely to include but not limited to:</b></p> <p>Eyewitness evidence, exhibits officers, arresting officer, I.O, expert witness e.g. on handwriting.</p> <p>Evidence of authorisation or lack of from KWS.</p>	

**Note:** s91(a) and (b) allow you to prosecute where the permit/license was obtained for a third party. What matters is that the suspect was acting dishonestly for the purposes of obtaining that permit/license.

For the other offences, the purpose is for anything in connection with this Act. Any offence relating to alteration/forgery or breach for purposes other than those connected with this Act can only be prosecuted under ordinary penal code offences or using other relevant legislation.

CHARGE COUNT ONE	Obtaining a licence or permit by making a false statement or false representation, contrary to s91(a) of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> for the purpose of obtaining a licence/permit <b>[delete as appropriate]</b> for him/herself/another <b>[delete as appropriate]</b> , knowingly or recklessly made a false statement/false representation <b>[delete as appropriate]</b> , namely <b>[give particulars of the statement/representation]</b> to an issuing authority namely Kenya Wildlife Service.
CHARGE COUNT ONE	Obtaining a licence or permit by furnishing a false document or false information (delete as appropriate) contrary to s91 (b) of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> for the purpose of obtaining a licence/permit <b>[delete as appropriate]</b> for him/herself/another <b>[delete as appropriate]</b> , knowingly or recklessly furnished a document or information <b>[delete as appropriate]</b> that was false, namely <b>[give particulars of the document/information in question]</b> to an issuing authority, namely Kenya Wildlife Service.
CHARGE COUNT ONE	Using a false/invalid/altered (delete as appropriate) permit/license (delete as appropriate) without authorisation, contrary to s91 (c) of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> , <i>Option 1:</i> knowingly or recklessly used a false/falsified/invalid <b>(delete as appropriate)</b> licence/permit <b>[delete as appropriate]</b> or <i>Option 2:</i> knowingly or recklessly used a license/permit <b>[delete as appropriate]</b> that had been altered without authorisation.
CHARGE COUNT ONE	Contravening a condition or requirement of a license or permit (delete as appropriate), contrary to s91 (d) of the Wildlife Conservation or Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> , knowingly contravened a condition or requirement of a license or permit that had been issued to him by Kenya Wildlife Service by <b>[give particulars of the breach]</b> .

**s93 (a) Knowingly Introducing an Invasive Species into a Wildlife Conservation Area**  
**s93 (b) Failing to Comply with Measures Set by the Cabinet Secretary under this Act**  
**Minimum Fine: 300,000 Ksh and/or 1 Year Minimum Imprisonment**

POINTS TO PROVE	ANCILLARY POWERS Section 2 page 43
<p>Identity of the accused</p> <p>Date and Location</p> <p>Identify the invasive species see Schedule 7, Annex D</p> <p>The accused had knowledge that that it was an invasive species</p> <p>The accused was responsible for introducing the invasive species into an area <b>and</b></p> <p>That area was a wildlife conservation area OR</p> <p>Identify measures issued by the Cabinet Secretary AND</p> <p>Evidence of failure of the Accused to comply with the same</p>	<p>s105 Forfeiture</p> <p>s108 Restraint order or other redress (Environment and Land Court)</p> <p>s110 Seizure, confiscation, inspection, productions</p>
<p><b>Agencies:</b> KWS, NPS, ODPP, FRC, ARA, Judiciary</p>	
<p><b>Evidence likely to include but not limited to:</b>  Eyewitness evidence, arresting officer, I.O. re: interviews, gazette notice of CS measures.</p>	

CHARGE COUNT ONE	Introducing an invasive species into a wildlife conservation area, contrary to s93 (a) of the Wildlife Conservation or Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> , knowingly introduced an invasive species, namely <b>[identify the species]</b> into a wildlife conservation area, namely <b>[identify]</b> .

CHARGE COUNT ONE	Failure to comply with measures issued by the Cabinet Secretary, contrary to s93 (b) of the Wildlife Conservation or Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> , knowingly contravened measures that had been issued by the Cabinet Secretary on <b>[specify date]</b> in that he/she <b>[give particulars of breach]</b> .

**s92 Offences regarding Critically Endangered or Endangered Species**

**Killing/Injuring or attempts to so do: Minimum 5 years, no option of a fine**

**Dealing in trophies – Minimum 7 years, no option of a fine**

**Dealing in live species – Minimum 3 years, no option of a fine**

**Possession – Minimum 5 years imprisonment and/or minimum 3 million Ksh**

**Manufacture of trophies – Up to life imprisonment and/or minimum 10 million Ksh**

POINTS TO PROVE	ANCILLARY POWERS Section 2 page 43
Identity of the accused	s105 Forfeiture
Date and Location	s108 Restraint order or other redress [Environment and Land Court]
That the species falls under CITES Appendix 1 or Schedule 6 of the WCMA 2013	
The accused killed, injured, tortured or molested that species OR attempted to do any of the above	<b>Key definitions:</b>
<b>or</b>	<b>Trophy:</b> bone claw, egg, feather, hair, hoof, skin, tooth, tusk of <b>any</b> animal <b>and</b> any bark, branch, leaf, sip or extract of ANY plant species, or any other durable portion, whether processed, added to or changed which is recognisable as such
The accused was 'dealing' in a trophy of that species	
<b>or</b>	
The accused was 'dealing' in that live wildlife species	<b>Dealing:</b> applies to trophies <b>and</b> live species means 'to sell, purchase, distribute, barter, give, receive, supply, cut, carve polish, preserve, clean, mount prepare or transportation or conveying or to <b>be in possession</b> <b>with intent to supply</b> to another or to an act in preparation of any of the above
<b>or</b>	
The accused was in position of a live wildlife species or a trophy of that kind	
<b>or</b>	
The accused was manufacturing item from a trophy of such a species	
<b>and</b>	
In all of the above, the accused acted without any permit or exemption under the Act	

**Agencies:** KWS, NPS, Fisheries, ODPP, FRC, ARA, Judiciary, NIS, Mutual Legal Assistance may be necessary – ODPP and AGO

**Evidence likely to include but not limited to:**

Eyewitness evidence, arresting officer, I.O. photographs and a national museum report or government analyst report or expert report on the nature of the species or trophy – see Annex C on the issue of expert reports. It is not a requirement that only a government analyst can give expert evidence.

Any expert may do so but must cite his qualifications, experience, methodology and basis for conclusions. Further he must satisfy the court as to the integrity of the exhibit and continuity in relation to receipt and return to and from the I.O.

**On possession:** It is necessary to prove knowledge of possession of an article, not necessarily the nature of the article but the ODPP should advise on the legal aspect of this. Knowledge can be implied if not in physical possession but issues such as the degree of control over the item are important. E.g. If a suspect is caught in possession of a bag, he is deemed to be in possession of the contents of that bag. If an item is found in his car, he is deemed to be in possession of any item found in that car. Where you have more than one suspect in a car, evidence such as exactly where the item was found in the car will be vital – who would have had access? Was it in the boot? The passenger or driver’s side foot-well? The driver’s door? The glove compartments? Fingerprint evidence may be necessary, and continuity of exhibit handling will be vital.

**On possession with intent to supply to another:** quantity will be relevant as well as the packaging and any evidence of money transfers or mobile communications e.g. on text or WhatsApp.

CHARGE COUNT ONE	Killing/injuring/torturing or molesting <b>[or “Attempting to ...”]</b> <b>[delete as appropriate]</b> a specified critically endangered/endangered <b>[delete as appropriate]</b> wildlife species without a permit or other lawful exemption, contrary to s92 (a) of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> killed/injured/tortured/molested <b>[delete as appropriate]</b> a wildlife species namely <b>[identify number and type of species]</b> , that being a species that is critically endangered/endangered <b>[delete as appropriate]</b> under Schedule 6 of this Act/under Appendix 1 of the Convention of International Trade of Endangered Species of Wild Fauna and Flora <b>[delete as appropriate]</b> and at the time of doing so, did not have a permit or other lawful exemption granted under this Act.

CHARGE COUNT ONE	Dealing in a wildlife trophy of a specified critically endangered/endangered species, without a permit or other lawful exemption, contrary to s92 (2) of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> was dealing in a wildlife trophy namely <b>[identify the nature of the trophy and specify the conduct that amounts to ‘dealing’ within the definition]</b> , that being a trophy of a species that is critically endangered/endangered <b>[delete as appropriate]</b> under Schedule 6 of this Act/under Appendix 1 of the Convention of International Trade of Endangered Species of Wild Fauna and Flora <b>[delete as appropriate]</b> and at the time of doing so, did not have a permit or other lawful exemption granted under this Act.

CHARGE COUNT ONE	Dealing in a specified critically endangered/endangered <b>[delete as appropriate]</b> live wildlife species, without a permit or other lawful exemption, contrary to s92 (3) of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> was dealing in a live wildlife species namely <b>[identify the quantity and type of the species and specify the conduct that amounts to dealing within the definition]</b> , that being a species that is critically endangered/endangered <b>[delete as appropriate]</b> under Schedule 6 of this Act/under Appendix 1 of the Convention of International Trade of Endangered Species of Wild Fauna and Flora <b>[delete as appropriate]</b> and at the time of doing so, did not have a permit or other lawful exemption granted under this Act.
CHARGE COUNT ONE	Being in possession of a specified critically endangered/endangered <b>[delete as appropriate]</b> live wildlife species/wildlife trophy <b>[delete as appropriate]</b> without a permit or other lawful exemption, contrary to s92 (4) of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> was found in possession of a live wildlife species/trophy <b>[delete as appropriate]</b> namely <b>[identify the quantity and type of the species/trophy]</b> , that being a species that is critically endangered/endangered <b>[delete as appropriate]</b> under Schedule 6 of this Act/under Appendix 1 of the Convention of International Trade of Endangered Species of Wild Fauna and Flora <b>[delete as appropriate]</b> and at the time of doing so, did not have a permit or other lawful exemption granted under this Act.
CHARGE COUNT ONE	Manufacturing an item from a specified critically endangered/endangered wildlife trophy, without a permit or other lawful exemption, contrary to s92 (5) of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> manufactured an item <b>[identify the item e.g. a bangle]</b> from a wildlife trophy namely <b>[identify the nature of the trophy]</b> , that being a trophy of a wildlife species that is critically endangered/endangered <b>[delete as appropriate]</b> under Schedule 6 of this Act/under Appendix 1 of the Convention of International Trade of Endangered Species of Wild Fauna and Flora <b>[delete as appropriate]</b> and at the time of doing so, did not have a permit or other lawful exemption granted under this Act. without a permit or other lawful exemption granted under this Act.

**s95 Offences in Relation to Wildlife Species and Trophies That Do Not Fall Under CITES Appendix 1 or Schedule 6 of the WCMA**

**Minimum Fine: 1,000,000 Ksh and/or Minimum 12 months Imprisonment**

**e.g. Sea Shells, Possession of Crabs, Fish etc.**

POINTS TO PROVE	ANCILLARY POWERS Section 2 page 43
<p>Identity of the accused</p> <p>Date and Location</p> <p>The accused killed, injured, tortured or molested that species OR attempted to do any of the above <b>or</b></p> <p>The accused was 'dealing' in a trophy of that species <b>or</b></p> <p>The accused was 'dealing' in that live wildlife species <b>or</b></p> <p>The accused was in position of a live wildlife species or a trophy of that kind <b>or</b></p> <p>The accused was manufacturing item from a trophy of such a species <b>and</b></p> <p>In all of the above, the accused acted without any permit or exemption under the Act</p>	<p>s105 Forfeiture</p> <p>s108 Restraint order or other redress [Environment and Land Court]</p> <p>s110 Seizure, confiscation, inspection, productions</p> <p><b>Key definitions:</b></p> <p><b>Trophy:</b> bone claw, egg, feather, hair, hoof, skin, tooth, tusk of ANY animal AND any bark, branch, leaf, sip or extract of ANY plant species, or any other durable portion, whether processed, added to or changed which is recognisable as such</p> <p><b>Dealing:</b> applies to trophies <b>and</b> live species means 'to sell, purchase, distribute, barter, give, receive, supply, cut, carve polish, preserve, clean, mount prepare or transportation or conveying or to <b>be in possession with intent to supply</b> to another or to an act in preparation of any of the above</p>
<p><b>Agencies:</b> KWS, NPS, ODPP, FRC, ARA, Judiciary, NIS. Mutual Legal Assistance may be necessary – ODPP and AGO</p>	
<p><b>Evidence likely to include but not limited to:</b></p> <p>Eyewitness evidence, arresting officer, I.O. photographs and a national museum report or government analyst report or expert report on the nature of the trophy – see Annex C on the issue of expert reports. It is not a requirement that only a government analyst can give expert evidence.</p> <p>Any expert may do so but must cite his qualifications, experience, methodology and basis for conclusions. Further he must satisfy the court as to the integrity of the exhibit and continuity in relation to receipt and return to and from the I.O.</p> <p><b>On possession and possession with intent to supply – see notes under s92 above</b></p>	

CHARGE COUNT ONE	Killing/injuring/torturing or molesting <b>[or “Attempting to”]</b> <b>[delete as appropriate]</b> a wildlife species without a permit or other lawful exemption, contrary to s95 (a) of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> killed/injured/tortured/molested/attempted to kill/injure/torture/molest <b>[delete as appropriate]</b> a wildlife species namely <b>[identify number and type of species]</b> , without a permit or other lawful exemption granted under this Act.
CHARGE COUNT ONE	Dealing in a wildlife trophy without a permit or other lawful exemption, contrary to s95 (b) of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> was dealing in a wildlife trophy namely <b>[identify the nature of the trophy and specify the conduct that amounts to ‘dealing’ within the definition]</b> , and at the time of doing so, did not have a permit or other lawful exemption granted under this Act.
CHARGE COUNT ONE	Dealing in a live wildlife species, without a permit or other lawful exemption, contrary to s95 (c) of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> was dealing in a live wildlife species namely <b>[identify the quantity and type of the species and specify the conduct that amounts to ‘dealing’ within the definition]</b> , without a permit or other lawful exemption granted under this Act.
CHARGE COUNT ONE	Being in possession of a live wildlife species/wildlife trophy <b>[delete as appropriate]</b> without a permit or other lawful exemption, contrary to s95 (d) of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> was found in possession of a live wildlife species/wildlife trophy <b>[delete as appropriate]</b> namely <b>[identify the quantity and type of the species/trophy]</b> , without a permit or other lawful exemption granted under this Act.
CHARGE COUNT ONE	Manufacturing an item from a wildlife trophy, without a permit or other lawful exemption, contrary to s95 (e) of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> manufactured an item <b>[identify the item e.g. a bangle]</b> from a wildlife trophy namely <b>[identify the nature of the trophy]</b> without a permit or other lawful exemption granted under this Act.

## Bushmeat Offences

### *Bushmeat-related offences*

#### **s97 Subsistence Hunting of a Species That Is Not Critically Endangered or Endangered Under Schedule 6 or CITES**

**Minimum Fine: 30,000 Ksh and/or 6 Months Minimum Imprisonment**

POINTS TO PROVE	ANCILLARY POWERS Section 2 page 43
Identity of the accused	s110 Seizure, confiscation, inspection, productions
Date and Location	s105 Forfeiture
The accused was in the process of 'hunting' or had hunted	Definitions:
If already in possession of a hunted species identify the species	"Subsistence hunting" means hunting for the purposes of daily consumption by an individual or their direct dependents
That hunting was for the purposes of feeding himself or his immediate dependants	

**Agencies:** KWS, NPS, ODPP, Judiciary

#### ***Evidence likely to include but not limited to:***

Eyewitness evidence, arresting officer, I.O. expert witness.

The **quantity** of the bush meat (if found) is highly relevant to establishing the purpose – whether for subsistence or for trade [see s98]. I.O. may have to establish the accused's family set up to establish if the number of dependants and whether that bushmeat found is of a quantity proportionate to a case of 'subsistence' hunting only.

CHARGE COUNT ONE	Engaging in hunting for the purposes of subsistence, contrary to s97 of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> was engaged in hunting of an animal namely <b>[identify animal]</b> for the purposes of subsistence.

**s98 (1) Dealing in the Carcass or Meat of Any Wildlife Species**

**Minimum Imprisonment: 3 Years**

**This Can Apply to Fish, Reptiles, Birds and Mammals**

POINTS TO PROVE	ANCILLARY POWERS Section 2 page 43
Identity of the accused	s105 Forfeiture
Date and Location	s108 Restraint order or other redress [Environment and Land Court] e.g. an injunction
Identify the carcass or meat (i.e. which species? If critically endangered or endangered, consider s92)	s110 Seizure, confiscation, inspection, production
The accused was 'dealing' in relation to that meat	<b>Dealing:</b> applies to trophies <b>and</b> live species means 'to sell, purchase, distribute, barter, give, receive, supply, cut, carve polish, preserve, clean, mount prepare or transportation or conveying or to <b>be in possession with intent to supply</b> to another or to an act in preparation of any of the above
Absence of any lawful authorisation	

**Agencies:** KWS, NPS, ODPP, Judiciary

***Evidence likely to include but not limited to:***

Eyewitness evidence, arresting officer, I.O. expert evidence to identify the meat as that of a 'wildlife species as opposed to a cow or goat.

On possession with intent to supply, the quantity will be important. Large quantities are indicative of trading as would be storage facilities (e.g. a cool-box/freezer); evidence of transportation, M-PESA records/presence of cash/notebooks of customers/money owed.

CHARGE COUNT ONE	Dealing in the carcass or meat of a wildlife species, contrary to s98 (1) of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> was dealing in the carcass or meat of a wildlife species, namely <b>[identify quantity and species and the conduct that amounted to 'dealing' within the definition]</b> without authorisation.

**s98 (2) Purchasing the Carcass or Meat or Eggs of Any Wildlife Species**

**Minimum Fine: 1,000,000 Ksh and/or 1 Year Maximum Imprisonment**

**This Can Apply to Fish, Reptiles, Birds and Mammals**

POINTS TO PROVE	ANCILLARY POWERS Section 2 page 43
Identity of the accused	s105 Forfeiture
Date and Location	s108 Restraint order or other redress [Environment and Land Court] e.g. an injunction
Identify the carcass or meat or eggs [i.e. which species? If critically endangered or endangered, consider s92]	s110 Seizure, confiscation, inspection, production
The accused was purchasing or had purchased that meat, carcass or eggs	
<b>Agencies:</b> KWS, NPS, ODPP, Judiciary	
<p><b><i>Evidence likely to include but not limited to:</i></b></p> <p>Eyewitness evidence, arresting officer, I.O. expert evidence to identify the meat as that of a 'wildlife species' as opposed to a cow or goat.</p> <p>Evidence of any M-PESA or other cash transaction e.g. eye witness from investigative officers to establish the purchase. Both dealer and buyer should be apprehended and separately interviewed.</p>	

CHARGE COUNT ONE	Purchasing the carcass or meat or eggs <b>[delete as appropriate]</b> of a wildlife species, contrary to s98 (2) of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> purchased the carcass or meat or eggs <b>[specify which and quantity]</b> of a wildlife species, namely <b>[identify species]</b> .

## Import/Export Offences and Failure to Comply

### Import/export offences

#### **s99 Illegal Import/Export/Introduction of a Wildlife Species or Wildlife Product**

**If Critically Endangered/Endangered Under Schedule 6 or CITES –  
Minimum 100,000,000 Ksh and/or Minimum 20 Years Imprisonment**

**For All Other Species Or Trophies – Minimum 20,000,000 Ksh and/or  
Minimum 10 Years Imprisonment**

**See s103 for Corporate Liability under the WCMA Section of this Guide**

POINTS TO PROVE	ANCILLARY POWERS Section 2 page 43
<p>Identity of the accused</p> <p>Date and Location</p> <p>Identify the wildlife specimen or product in question.</p> <p>The absence of a permit allowing any of the activities below <b>and</b></p> <p>The accused knowingly</p> <p>a) Imported/introduced that species into or out of Kenya <b>or</b></p> <p>Exported or Re-Exported <b>or</b></p> <p>b) Took that species within Kenya OR upon Kenya's territorial waters <b>or</b></p> <p>c) Took that species on to the high seas <b>or</b></p> <p>d) Was in possession of or was selling/delivering/ carrying/transporting or shipping by any means any species that had been carried on high seas or within Kenya's territorial waters <b>or</b></p> <p>e) Had Delivered/received, carried transported or shipped that species within Kenya <b>and</b></p> <p>Was doing so for commercial purposes <b>or</b></p> <p>f) Was selling or offering that species for sale in a commercial transaction within or outside Kenya <b>or</b></p> <p>h) The Accused was acting in violation of the rules and regulations that govern that particular species</p>	<p>s105 Forfeiture</p> <p>s108 Restraint order or other redress [Environment and Land Court] e.g. an injunction</p> <p>s110 Seizure, confiscation, inspection, production</p>

**Agencies:** KWS, NPS, ODPP, Judiciary, Ports Authority, Maritime Police, KRA, Customs, Immigration. Mutual Legal Assistance may be required – ODPP and AGO. Kenya Fisheries Service and Kenya Forestry Service may also be valuable partners depending on the nature of the commodity, where and how it was seized etc.

***Evidence likely to include but not limited to:***

First lines of enquiry will be with the supplier for the pro forma invoice or invoice, any sale agreement, any deposit for transfer of funds prior to shipping; as well as the shipping line for the bill of lading and the captain of the vessel for the master copy of the manifest, to compare with the KRA copy of the manifest.

CHARGE COUNT ONE	Taking a wildlife specimen/wildlife product <b>[delete as appropriate]</b> within Kenya or Kenya's territorial waters <b>[delete as appropriate]</b> without a permit, contrary to s99 (2) (b) as read with s99 (3) (a)/s99 (3) (b) <b>[delete as appropriate depending on status of species]</b> of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> took a wildlife specimen/wildlife product, namely <b>[identify nature and quantity of species involved]</b> to a place within Kenya <b>[state location]</b> or within territorial waters of Kenya <b>[give particulars]</b> without a permit issued by the Kenya Wildlife Service.
CHARGE COUNT ONE	Importing/exporting <b>[delete as appropriate]</b> a wildlife specimen/wildlife product <b>[delete as appropriate]</b> without a permit contrary to s99 (2) (a) as read with s99 (3) (a)/s99 (3) (b) <b>[delete as appropriate depending on status of species]</b> of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> was engaged in the importing/exporting <b>[delete as appropriate]</b> of a wildlife specimen/wildlife product namely <b>[identify nature and quantity of species involved]</b> without a permit issued by the Kenya Wildlife Service.
CHARGE COUNT ONE	Possessing/selling/delivering/carrying/transporting/shipping <b>[delete as appropriate]</b> a wildlife specimen/wildlife product <b>[delete as appropriate]</b> without a permit, contrary to s99 (2) (d) as read with s99 (3) (a)/s99 (3) (b) <b>[delete as appropriate depending on status of species]</b> of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> was in possession of/ was engaged in selling/sold/delivering/carrying/transporting/shipping <b>[delete as appropriate]</b> a wildlife specimen, namely <b>[identify nature and quantity of species involved]</b> taken from within Kenya/ taken from the territorial waters of Kenya/ taken upon the high seas <b>[delete as appropriate]</b> without a permit issued by the Kenya Wildlife Service.  <b><i>[and if necessary, add: "and that animal was an endangered or threatened species as specified under Schedule 6 of this Act"]</i></b>

CHARGE COUNT ONE	Taking a wildlife specimen/wildlife product <b>[delete as appropriate]</b> upon the high seas without a permit, contrary to s99 (2) (c) as read with s99 (3) (a)/s99 (3) (b) <b>[delete as appropriate depending on status of species]</b> of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> took a wildlife specimen/wildlife product, namely <b>[identify nature and quantity of species involved]</b> upon the high seas <b>[give particulars if possible e.g. grid references]</b> without a permit issued by the Kenya Wildlife Service.
CHARGE COUNT ONE	Engaging in commercial activity concerning a wildlife specimen or wildlife product <b>[delete as appropriate]</b> without a permit, contrary to s99 (2) (e) as read with s99 (3) (a)/s99 (3) (b) <b>[delete as appropriate depending on status of species]</b> of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> delivered/received/ carrying/transported/shipped <b>[delete as appropriate]</b> , by county commerce <b>[specify]</b> a wildlife specimen/wildlife product, namely <b>[identify nature and quantity of species involved]</b> for commercial purposes, without a permit issued by the Kenya Wildlife Service.
CHARGE COUNT ONE	Selling/offering for sale <b>[delete as appropriate]</b> a wildlife specimen/wildlife product <b>[delete as appropriate]</b> for commercial purposes, within or outside Kenya <b>[specify]</b> , contrary to s99 (2) (f) as read with s99 (3) (a)/s99 (3) (b) <b>[delete as appropriate depending on status of species]</b> of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> , sold/offered to sell <b>[delete as appropriate]</b> , a wildlife specimen/wildlife product, namely <b>[identify nature and quantity of species involved]</b> to another for commercial purposes, without a permit issued by the Kenya Wildlife Service.
CHARGE COUNT ONE	Violating Rules and Regulations pertaining to a listed wildlife species contrary to s99 (2) (h) as read with section s99 (3) (a)/s99 (3) (b) <b>[delete as appropriate depending on status of species]</b> of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> , knowingly violated rules and regulations pertaining to a listed wildlife species, namely <b>[identify nature and quantity of species involved]</b> by <b>[give particulars of the regulations breached]</b> .

**s99 (4) Knowingly or Recklessly Aiding or Abetting an Offence Relating to Import/Export of Wildlife Specimens or Wildlife Products**

**If Critically Endangered/Endangered Under Schedule 6 or CITES – Minimum 100,000,000 Ksh and/or Minimum 20 Years Imprisonment**

**For All Other Species or Trophies – Minimum 20,000,000 Ksh and/or Minimum 10 Years Imprisonment**

POINTS TO PROVE	ANCILLARY POWERS Section 2 page 43
Identity of the accused	s105 Forfeiture
Date and Location	s108 Restraint order or other redress [Environment and Land Court] e.g. an injunction
Identify the wildlife specimen or product in question	
Identify the criminality under s99 (2) that has occurred	s110 Seizure, confiscation, inspection, production
Identify how the accused assisted/aided/abetted that offence	
That the accused did so 'knowingly' or 'recklessly'	

**Agencies:** KWS, NPS, ODPP, Judiciary, Ports Authority, Maritime Police, KRA, Customs, Immigration

***Evidence likely to include but not limited to:***

Evidence from customs, the documentary evidence relating to a consignment and correspondence entered into between the accused and others involved in the enterprise will be relevant alongside other evidence such as financial records. This offence could be used against agents, ports and borders officers and brokers as an example and is potentially extremely powerful. Failure to conduct 'due diligence' checks may amount to 'recklessness'.

CHARGE COUNT ONE	Knowingly or recklessly aiding and abetting an offence under s99 (2) of the Wildlife Conservation Management Act 2013 as read with s99 (3) (a)/s99 (3) (b) <b>[delete as appropriate depending on status of species]</b> of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> , knowingly or recklessly aided and abetted <b>[delete as appropriate]</b> , an offence under s99 (2) of the Wildlife Conservation Management Act 2013, namely <b>[identify the nature of the offence, for example: the export of a wildlife product without a permit issued by the Kenya Wildlife Service]</b> .

<p><b>s100 False Claims for Compensation</b></p> <p><b>Minimum Fine: 100,000 Ksh and/or 6 Months Minimum Imprisonment</b></p>	
POINTS TO PROVE	ANCILLARY POWERS Section 2 page 43
<p>Identity of the accused</p> <p>Date and Location</p> <p>The accused made a claim for compensation re: wildlife damage <b>or</b></p> <p>The accused made a statement concerning wildlife damage</p> <p>That claim/statement was made to the Wildlife Conservation and Compensation Committee or Kenya Wildlife Service <b>and</b></p> <p>That statement/claim was false <b>and</b></p> <p>The Accused knew it was false</p>	<p>s105 Forfeiture</p> <p>s108 Restraint order or other redress [Environment and Land Court]</p> <p>s110 Seizure, confiscation, inspection, production of documents</p>
<p><b>Agencies:</b> KWS, NPS, ODPP, Judiciary</p>	
<p><b>Evidence likely to include but not limited to:</b></p> <p>Eyewitness evidence, documentary evidence of the claim (correctly exhibited if in writing), arresting officer, I.O.</p> <p>It is possible an expert on handwriting evidence would be required but costs should be considered bearing in mind the size of the claim involved. If payment has been affected charge for obtaining money by false pretence and giving false information to a public officer under the relevant provisions of the penal code.</p>	
CHARGE COUNT ONE	Making a false claim or false statement in relation to compensation contrary to s100 of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<p><b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> made a claim/statement <b>[delete as appropriate]</b> to the Wildlife Conservation and Compensation Committee/Kenya Wildlife Service <b>[delete as appropriate]</b> in respect of wildlife damage claim for <b>[give brief particulars of the claim]</b> knowing or having reason to believe that the information was false.</p>

**s101 Failing to Comply with a Reasonable Order Issued by an Authorised Officer**

**Minimum Fine: 100,000 Ksh and/or 6 Months Minimum Imprisonment**

POINTS TO PROVE	ANCILLARY POWERS
	Section 2 page 43
<p>Identity of the accused</p> <p>Date and Location</p> <p>Proof that a requirement or demand was given to the accused</p> <p>Proof that the officer involved was an authorised officer and that his demand/requirement was lawful <b>and</b></p> <p>The accused failed to comply <b>or</b></p> <p>The accused obstructed a person <b>and</b></p> <p>That person was acting in the execution of his duties under this Act</p>	<p>s105 Forfeiture</p> <p>s108 Restraint order or other redress [Environment and Land Court]</p> <p>s110 Seizure, confiscation, inspection, production</p>
<b>Agencies:</b> KWS, NPS, ODPP, Judiciary, NEMA	
<p><b>Evidence likely to include but not limited to:</b></p> <p>Eyewitness evidence; arresting officer, I.O. This offence is aimed primarily at those obstructing KWS who are going about their duties.</p>	

CHARGE COUNT ONE	<p>Failing to comply with a lawful requirement or demand contrary to section s101 (a) of the Wildlife Conservation and Management Act 2013.</p> <p><b>or</b></p> <p>Obstructing a person in the execution of his power or duty contrary to s101 (b) of WCMA.</p>
PARTICULARS OF OFFENCE	<p><b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> having been issued with a lawful requirement or demand, namely <b>[identify the demand]</b> failed to comply with the said requirement or demand without reasonable excuse <b>or</b></p> <p><b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> wilfully obstructed <b>[name of the officer]</b> from executing his power or duties under this Act by <b>[specify act that constitutes obstruction]</b>.</p>

# OFFENCES IN PROTECTED AREAS

## Illegal Entry, Setting Fire, Logging, Cultivating, and Burning Charcoal Offences

### Offences in protected areas

#### s102 (a) Entering or Residing in a National Park or Reserve Without Permission

**Minimum Fine: 200,000 Ksh and/or 2 Years Minimum Imprisonment**

POINTS TO PROVE	ANCILLARY POWERS Section 2 page 43
Identity of the accused	s105 Forfeiture
Date and Location	s108 Restraint order or other redress [Environment and Land Court]
The area is a national park or reserve under Schedule 11 of the Act <b>and</b>	s110 Seizure, confiscation, inspection, production
The accused entered or resided there <b>and</b>	
He had no permit to so do <b>or</b>	
If an authorised person or employed by that protected area, he was not acting in the course of his duty	

**Agencies:** KWS, NPS, ODPP, Judiciary, KMA, KFS, NEMA

#### **Evidence likely to include but not limited to:**

Eyewitness evidence, arresting officer, I.O. statement from KWS confirming the status of the area as a national park/reserve.

Witnesses from relevant conservancies or/and county government, photographs. Answers on interview.

This provision only applies to national parks or reserves as listed in the Eleventh Schedule. It may be used to prosecute those employed by the Service who enter into parks/reserves whilst off duty and without making appropriate payment/obtaining authority.

CHARGE COUNT ONE	Entering/residing in <b>[delete as appropriate]</b> a protected area without a licence or permit contrary to s102 (1) (a) of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> , on the <b>[date]</b> , at <b>[location]</b> being a national park/reserve <b>[delete as appropriate]</b> , entered into/resided <b>[delete as appropriate]</b> therein without a permit.

**s102 (b) Setting/Causing Fire to Vegetation in a Wildlife Protected Area.**

**Minimum fine 200,000Ksh and/or Minimum 2 Years Imprisonment**

POINTS TO PROVE	ANCILLARY POWERS Section 2 page 43
Identity of the accused	s105 Forfeiture
Date and Location	s108 Restraint order or other redress [Environment and Land Court]
The area is a 'wildlife protected area' <b>and</b>	s110 Seizure, confiscation, inspection, production
The accused either set fire to vegetation within <b>or</b>	
The accused allowed a fire that he or his 'servant' set to enter a wildlife protected area	

**Agencies:** KWS, NPS, ODPP, Judiciary, KMA, KFS, NEMA

***Evidence likely to include but not limited to:***

Eyewitness evidence, arresting officer, I.O. statement from KWS confirming the status of the area as a national park/reserve.

Witnesses from relevant conservancies or/and county government, photographs. Answers on interview.

A protected area is defined as a 'clearly defined geographical space, recognised, dedicated and managed through legal or other effective means to achieve long term conservation of nature with associated ecosystem services and cultural values' (see definitions under the Act). Accordingly, conservancies may fall within this even if regulations governing their status have not yet been finalised provided they represent an area managed through 'other effective means' under the above definition. The purpose of the area in question will be key in establishing it as one that falls within this provision.

CHARGE COUNT ONE	Causing fire within a wildlife protected area, contrary to s102 (b) of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> being a wildlife protected area, set fire to vegetation within that area <b>or</b> allowed a fire lighted by him/his servant <b>[delete as appropriate]</b> to enter that wildlife protected area.

<b>s102 (c) Carrying out Logging in a National Park or Reserve</b> <b>Minimum Fine: 200,000 Ksh and/or 2 Years Minimum Imprisonment.</b>	
POINTS TO PROVE	ANCILLARY POWERS Section 2 page 43
Identity of the accused	s105 Forfeiture
Date and Location	s108 Restraint order or other redress [Environment and Land Court]
The area is a national park or reserve (see eleventh Schedule at annex D) <b>and</b>	s110 Seizure, confiscation, inspection, production
The accused carried out 'logging' within	
<b>Agencies:</b> KWS, NPS, ODPP, Judiciary, KMA, KFS, NEMA	
<b>Evidence likely to include but not limited to:</b> Eyewitness evidence, arresting officer, I.O. statement from KWS confirming the status of the area as a national park/reserve.  Witnesses from relevant conservancies or/and county government, photographs. Answers on interview.  This only applies to National Parks or Reserves, not private conservancies or any other protected area. Accordingly, offences of 'criminal damage' may have to suffice if this is conducted outside of a Schedule 11 area.	
CHARGE COUNT ON	Carrying out logging within a National Park/Reserve <b>[delete as appropriate]</b> contrary to s102 (c) of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> , on the <b>[date]</b> , at <b>[location]</b> being a National Park/ Reserve, carried out logging within that area.

<b>s102 (d) Cultivating Land within a National Park or Reserve</b> <b>Minimum Fine: 200,000 Ksh and/or 2 Years Minimum Imprisonment</b>	
POINTS TO PROVE	ANCILLARY POWERS Section 2 page 43
Identity of the accused	s105 Forfeiture
Date and Location	s108 Restraint order or other redress [Environment and Land Court]
The area is a national park or reserve (See Eleventh Schedule, Annex D) <b>and</b>	s110 Seizure, confiscation, inspection, production
The accused cleared and cultivated land within	
<b>Agencies:</b> KWS, NPS, ODPP, Judiciary KMA, KFS, NEMA	
<b>Evidence likely to include but not limited to:</b> Eyewitness evidence, arresting officer, I.O. statement from KWS confirming the status of the area as a national park/reserve.  Witnesses from relevant conservancies or/and county government, photographs. Answers on interview.  This only applies to National Parks or Reserves, not private conservancies or any other protected area. Accordingly, offences of 'criminal damage' may have to suffice if this is conducted outside of a schedule 11 area.	

CHARGE COUNT ON	Cultivating land within a national park/reserve <b>[delete as appropriate]</b> contrary to s102 (d) of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> , on the <b>[date]</b> , at <b>[location]</b> being a National Park/ Reserve <b>[delete as appropriate]</b> , cleared and cultivated land within that area.

<p><b>s102 (1) (da) Burning Charcoal in Any Protected Area</b></p> <p><b>Minimum Fine: 200,000 Ksh and/or 2 Years Minimum Imprisonment</b></p>	
POINTS TO PROVE	ANCILLARY POWERS Section 2 page 43
<p>Identity of the accused</p> <p>Date and Location</p> <p>The area is a protected area which means: 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".</p> <p>Accordingly, see both the Eleventh Schedule at Annex D of this guide and also KWS records of conservancies, sanctuaries and other 'protected areas' that are not listed within the statute <b>and</b></p> <p>Identify that the fuel was 'charcoal'</p> <p>The accused burned that charcoal therein</p>	<p>s105 Forfeiture</p> <p>s108 Restraint order or other redress [Environment and Land Court]</p> <p>s110 Seizure, confiscation, inspection, production</p>
<p><b>Agencies:</b> KWS, NPS, ODPP, Judiciary KMA, KFS, NEMA</p>	
<p><b>Evidence likely to include but not limited to:</b></p> <p>Eyewitness evidence, arresting officer, I.O. statement from KWS confirming the status of the area as a national park/reserve.</p> <p>Witnesses from relevant conservancies or/and county government, photographs. Answers on interview. GPS coordinates may be helpful.</p> <p>Also consider charges of 'criminal damage' under the penal code depending on extent of harm.</p> <p>A protected area is defined as a 'clearly defined geographical space, recognised, dedicated and managed through legal or other effective means to achieve long term conservation of nature with associated ecosystem services and cultural values' (see definitions under the Act). Accordingly, conservancies may fall within this even if regulations governing their status have not yet been finalised provided they represent an area managed through 'other effective means' under the above definition. The purpose of the area in question will be key in establishing it as one that falls within this provision.</p>	
CHARGE COUNT ON	Burning charcoal within a protected area contrary to s102 (da) of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> , on the <b>[date]</b> , at <b>[location]</b> being a protected area within the meaning of the Act, burned charcoal therein.

## Removal, Weapons, and Extractive Activities Offences

### Offences in protected areas

#### s102 (e) Wilful Damage/Removal of Objects Within a Wildlife Protected Area

**Minimum Fine: 200,000Ksh and/or 2 Years Minimum Imprisonment**

POINTS TO PROVE	ANCILLARY POWERS Section 2 page 43
Identity of the accused	s105 Forfeiture
Date and Location	s108 Restraint order or other redress [Environment and Land Court]
The area is a 'wildlife protected area' <b>and</b>	s110 Seizure, confiscation, inspection, production
The accused wilfully damaged any object <b>and</b>	
That object was of geological, prehistoric, archaeological, historic, marine or other scientific interest <b>or</b>	
He removed or attempted to remove the same	
<b>Agencies:</b> KWS, NPS, ODPP, Judiciary, KMA, KFS, NEMA	
<b>Evidence likely to include but not limited to:</b>	
Expert evidence as to the value/interest of the object in question is key.	
Eyewitness evidence, arresting officer, I.O. statement from KWS confirming the status of the area as a wildlife-protected area is desirable.	
Witnesses from relevant conservancies or/and county government, photographs. Answers on interview.	
GPS coordinates will be helpful.	
A protected area is defined as a 'clearly defined geographical space, recognised, dedicated and managed through legal or other effective means to achieve long term conservation of nature with associated ecosystem services and cultural values' (see definitions under the Act). Accordingly, conservancies may fall within this even if regulations governing their status have not yet been finalised provided they represent an area managed through 'other effective means' under the above definition. The purpose of the area in question will be key in establishing it as one that falls within this provision.	

CHARGE COUNT ON	Wilful Damage/Removal <b>[delete as appropriate]</b> of an object within a wildlife protected area, contrary to s102 (e) of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> being a wildlife protected area, wilfully damaged/removed/attempted to remove <b>[delete as appropriate]</b> an object of geological/prehistoric/archaeological/historic/marine/scientific <b>[delete as appropriate]</b> namely <b>[identify the object]</b> by <b>[give particulars of the act]</b> .

<p><b>s102 (f) Conveying Weapons into a Protected Area</b></p> <p><b>Minimum Fine: 200,000Ksh and/or 2 Years Minimum Imprisonment</b></p>	
POINTS TO PROVE	ANCILLARY POWERS Section 2 page 43
<p>Identity of the accused</p> <p>Date and Location</p> <p>The area is a 'protected area' <b>and</b></p> <p>The accused conveyed into that area OR was found in possession of:</p> <p>A firearm, ammunition, arrow, spear, snare, trap or similar device <b>and</b></p> <p>He had no authorisation to so do</p>	<p>s105 Forfeiture</p> <p>s108 Restraint order or other redress [Environment and Land Court]</p> <p>s110 Seizure, confiscation, inspection, e.g. in relation to any vehicle used to convey; the weapon itself etc</p>
<p><b>Agencies:</b> KWS, NPS, ODPP, Judiciary</p> <p><b>Evidence likely to include but not limited to:</b></p> <p>Eyewitness evidence, arresting officer, I.O. statement from KWS confirming the status of the area as a protected area is desirable.</p> <p>Witnesses from relevant conservancies or/and county government, photographs. Answers on interview. Expert evidence may be needed to identify the weapon.</p> <p>GPS coordinates will be helpful.</p> <p>On possession, see page 21.</p> <p><b>As to meaning of protected area, see previous pages</b></p> <p>If a Firearm or Ammunition, charge under Firearms Act or even under Prevention of Terrorism Act as amended by the Security Laws (Amendment) Act, depending on the nature of the firearm. The penalties are higher than allowed for under WCMA. Consult with ODPP.</p>	
CHARGE COUNT ON	Conveying of/Possession of a weapon into a protected area, contrary to s102 (f) of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> , on the <b>[date]</b> , at <b>[location]</b> being a protected area, was found in possession of/conveyed into that protected area <b>[delete as appropriate]</b> a device, namely <b>[identify]</b> without authorization.

<p><b>s102 (g) Undertaking Extractive Activity in a Protected Area</b></p> <p><b>Minimum Fine: 200,000 Ksh and/or 2 Years Minimum Imprisonment</b></p>	
POINTS TO PROVE	ANCILLARY POWERS Section 2 page 43
<p>Identity of the accused</p> <p>Date and Location</p> <p>The area is a protected area which 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”. Accordingly, see both the Eleventh Schedule at Annex D of this guide and also KWS records of conservancies, sanctuaries and other ‘protected areas’ that are not listed within the statute</p> <p>The accused was conducting extractive activity within e.g. this could be used to address fishing in a marine reserve</p> <p>Absence of any authorisation</p>	<p>s105 Forfeiture</p> <p>s108 Restraint order or other redress such as injunction [Environment and Land Court]</p> <p>s110 Seizure, confiscation, inspection, production of documents</p>
<p><b>Agencies:</b> KWS, NPS, ODPP, Judiciary, NEMA, Telecoms, Banking</p>	
<p><b>Evidence likely to include but not limited to:</b></p> <p>Expert evidence, possibly from industry experts, may be necessary.</p> <p>Eyewitness evidence, arresting officer, I.O. statement from KWS confirming the status of the area as a marine protected area and absence of authorisation is desirable. Photographs. - Investigations into the company (if there is one) may be vital. Answers on interview. GPS coordinates will be helpful.</p>	
CHARGE COUNT ON	Undertaking extractive activity in a protected area, contrary to s102 (g) of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> , on the <b>[date]</b> , at <b>[location]</b> carried out extractive activity in a marine protected area, namely <b>[identify]</b> without authorisation.

<b>s102 (h) Undertaking Related Activity in a Wildlife Protected Area Without Authorisation</b> <b>Minimum Fine: 200,000 Ksh and/or 2 Years Minimum Imprisonment</b>	
POINTS TO PROVE	ANCILLARY POWERS Section 2 page 43
Identity of the accused	s105 Forfeiture
Date and Location	s108 Restraint order or other redress [Environment and Land Court]
The area is a 'wildlife-protected area' <b>and</b>	s110 Seizure, confiscation, inspection, production
The Accused was conducting activity related to any of the offences within s102	
Absence of any authorisation	
<b>Agencies:</b> KWS, NPS, ODPP, Judiciary, NEMA, Telecoms, Banking	
<b>Evidence likely to include but not limited to:</b> Expert evidence, possibly from industry experts, may be necessary.  Eyewitness evidence, arresting officer, I.O. statement from KWS confirming the status of the area and absence of authorisation. Photographs.  Investigations into the company (if there is one) may be vital. Answers on interview.	
CHARGE COUNT ON	Undertaking activity without authorisation in a wildlife protected area, contrary to s102 (h) of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> , on the <b>[date]</b> , at <b>[location]</b> carried out activity, namely <b>[identify activity]</b> in a wildlife protected area, namely <b>[identify]</b> without authorisation.

<b>s102 (2A) Illegal Grazing in a Protected Area</b> <b>Maximum Fine: 100,000 Ksh and/or 6 Months Maximum Imprisonment</b>	
POINTS TO PROVE	ANCILLARY POWERS Section 2 page 43
<p>Identity of the accused</p> <p>Date and Location</p> <p>The area is a protected area which 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". Accordingly, see both the Eleventh Schedule at Annex D of this guide and also KWS records of conservancies, sanctuaries and other 'protected areas' that are not listed within the statute</p> <p>The Accused entered that area with livestock</p> <p>Absence of a permit or written authorisation from the body responsible for that protected area</p> <p>This offence can apply to conservancies, sanctuaries and other areas that fall within the above definition</p>	<p>s105 Forfeiture</p> <p>s108 Restraint order or other redress [Environment and Land Court]</p> <p>s110 Seizure, confiscation, inspection, production</p> <p><b>See also s103 below regarding liability of the owner of such livestock</b></p> <p><b>See also page 87 and 88</b></p>
<b>Agencies:</b> KWS, NPS, ODPP, Judiciary, NEMA	
<p><b>Evidence likely to include but not limited to:</b></p> <p>Eyewitness evidence, arresting officer, I.O. statement from KWS confirming the status of the area and the absence of authorisation. Photographs. Answers on interview.</p> <p>GPS coordinates will helpful.</p> <p><b>Note:</b> this no longer applies only to national parks. Conservancies/sanctuaries are now protected under this provision and accordingly illegal grazing on the same is covered.</p> <p>On charging, if you specify a precise number of livestock, this may be problematic at trial on the issue of proof. Photographs or agreement of the accused/answers on interview/witness statements addressing the number will be necessary. However, it is acceptable to avoid specifying the exact numbers if that proves impossible. The offence can be established by even one animal being grazed illegally.</p>	
CHARGE COUNT ONE	Entering a protected with livestock, contrary to s102 (2) as read with s102 (3) of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> entered into a protected, namely <b>[identify]</b> with livestock namely <b>[identify nature and if possible, numbers of livestock]</b> without authorisation from the body responsible for that area.

**s103 (1) Failure of a Director/Officer of a Body Corporate to Exercise Due Diligence, Efficiency and Economy to Ensure Compliance with this Act**

**s103 (5) Maximum Fine:10,000,000 Ksh and/or 5 Years Maximum Imprisonment**

POINTS TO PROVE	ANCILLARY POWERS Section 2 page 43
<p>Identify the company, including the directors or officers of that body</p> <p>Identify the offence that has been committed e.g. an extractive activity under s102 by that body corporate</p> <p>That the accused was a director or officer of that corporate body</p> <p>That the director/officer either had knowledge or <b>ought</b> reasonably to have known of the commission of the offence</p> <p><b>and</b></p> <p>He/she failed to exercise due diligence, economy or efficiency to ensure compliance</p>	<p>s105 Forfeiture</p> <p>s108 Restraint order or other redress from the [Environment and Lands Court]</p> <p>s110 Seizure, confiscation</p> <p><b>Production and copying of relevant documents under s110 e.g. company accounts, correspondence, rules, regulations and SOPs</b></p>

**Agencies:** KWS, NPS, ODPP, Judiciary KMA, AG; Companies House, Telecoms, Banking

***Evidence likely to include but not limited to:***

This will require details of the regulations within the company to establish a failure in due diligence/oversight and to firmly establish that the directors/partners etc. must or ought to have known of the offence e.g. emails/correspondence etc. This will require using ancillary powers to obtain disclosure of such records.

CHARGE COUNT ONE	Failing to exercise due diligence as a body corporate contrary to s103 (1) of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> being a director/officer <b>[delete as appropriate]</b> of a body corporate that committed an offence under this Act namely <b>[specify the offence]</b> , failed to exercise due diligence, efficiency and economy to ensure compliance with this Act.

**s103 (2) Failure of a Partner/Officer of a Partnership to Exercise Due Diligence, Efficiency and Economy to Ensure Compliance with this Act**

**s103 (5) Maximum Fine: 10,000,000 Ksh and/or 5 Year Maximum Imprisonment**

POINTS TO PROVE	ANCILLARY POWERS Section 2 page 43
<p>Identify the partnership in question</p> <p>Identify the offence that has been committed e.g. an extractive activity under s102 by that partnership</p> <p>That the accused was a partner or officer of that body</p> <p>That the partner/officer either had knowledge or OUGHT reasonably to have known of the commission of the offence</p> <p><b>and</b></p> <p>He/she failed to exercise due diligence, economy or efficiency to ensure compliance</p>	<p>s105 Forfeiture</p> <p>s108 Restraint order or other redress from the [Environment and Lands Court]</p> <p>s110 Seizure, confiscation</p> <p>Production and copying of relevant documents under s110 e.g. company accounts, correspondence, rules, regulations and SOPs</p>

**Agencies:** KWS, NPS, ODPP, Judiciary KMA, AG; Companies House, Telecoms, Banking

***Evidence likely to include but not limited to:***

This will require details of the regulations within the partnership to establish a failure in due diligence/oversight and to firmly establish that the partners etc. must or ought to have known of the offence e.g. emails/correspondence etc. This will require using ancillary powers to obtain disclosure of such records.

CHARGE COUNT ONE	Failing to exercise due diligence as a partner contrary to s103 (1) of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> being a partner/officer <b>[delete as appropriate]</b> of a partnership that committed an offence under this Act namely <b>[specify the offence]</b> , failed to exercise due diligence, efficiency and economy to ensure compliance with this Act.

<p><b>s103 (4) Employer's Liability for an Offence Committed by an Employee/Agent</b>  <b>s103 (5) Maximum Fine: 10,000,000 Ksh and/or 5 Years Maximum Imprisonment</b></p>	
POINTS TO PROVE	ANCILLARY POWERS Section 2 page 43
Identify the employment/agent relationship in question	s105 Forfeiture
Identify the offence that has been committed e.g. illegal grazing	s108 Restraint order or other redress from the[Environment and Lands Court]
That the other person has been convicted of that offence	s110 Seizure, confiscation
That person was an employee or agent of the accused	Production and copying of relevant documents under s110 e.g. company accounts, correspondence, rules, regulations and SOPs
That the offence was committed in the course of that person's employment or agency	
<p><b>Agencies:</b> KWS, NPS, ODPP, Judiciary KMA, AG; Companies House, Telecoms, Banking</p>	
<p><b>Evidence likely to include but not limited to:</b></p> <p>This may require evidence of a contract of employment/agency that in turn may require using ancillary powers to obtain disclosure of such records. It is a defence to show that the offender was acting against express or standing directions given by the accused person, but the onus shall be on the accused to prove he gave those directions and was ignored.</p> <p>This can be a particularly powerful provision to use against the owners of livestock who are illegally grazing in protected areas.</p>	
CHARGE COUNT ONE	Being an employee/principal of another who committed an offence under this Act, contrary to s103 (4) of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> being an employer/principal of another, namely <b>[identify the offender]</b> , prescribed a course of action under the terms of that employment/agency with <b>[give the name of the offender]</b> which resulted in an offence, namely <b>[identify the offence]</b> being committed under this Act.

# FORESTRY CRIME IN KENYA



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# INTRODUCTION

Many crimes that occur in Kenya’s forests can be prosecuted under the Wildlife Conservation Management Act (WCMA), 2013, as amended in 2019, as the definition of ‘trophy’ has been expanded to include plants. The application of the WCMA is not limited to endangered or critically endangered species and nor is it limited to protected areas. **Accordingly, s92 and s95 offences should always be considered first as the penalties are stronger.** Similarly, when it comes to import or export of tree products, use the WCMA. The Forest Conservation and Management Act (FCMA), 2016, makes no mention of CITES and does not provide for illegal exportation or importation of tree and plant products.

## CHOOSING THE CHARGE

Certain species of tree and plants are endangered or critically endangered. The WCMA has been amended to include plant and tree species under both Schedule 6 of the WCMA and CITES. Prosecutors must look at all the options available, noting that the ancillary orders may be particularly powerful.

This guidance covers the key offences under the FCMA that should be referred to for additional offences where it appears there may be administrative or procedural offences committed. Immigration Act offences should also be considered and applied where relevant - see s53 (1) (j) Kenya Citizenship and Immigration Act.

## PROTECTED SPECIES UNDER SCHEDULE 6, WCMA 2013

ALSO SEE CITES [WWW.CITES.ORG](http://WWW.CITES.ORG)

Endangered	Vulnerable
Voi Cycad	Red Stinkwood
East African Sandalwood	Meru Oak
	Camphor
	Parasol Tree
	Rat Aloe
	Tana River Poplar

## OFFENCES RELATED TO ILLEGAL LOGGING UNDER THE FCMA *(see also Trespass Offences)*



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**s64 (1) (a) Felling, Cutting, Taking, Burning, Injuring or Removing Any Forest Produce Without A Permit or License or Management Agreement**

**Maximum Fine: 100,000 Ksh and/or 6 Months Maximum Imprisonment**

**See s95 or s92 WCMA Especially Where Offence is in A Protected Area**

**Also See s102 WCMA Extractive Activities in A Protected Area**

POINTS TO PROVE	ANCILLARY POWERS
<p>Identity of the accused person(s)</p> <p>Date and location of offence</p> <p>Location is a 'public' forest under s30 (2) and 30 (3) or a 'provisional' forest declared under s35 of this Act</p> <p>Identify the forest produce in question (quantity and if possible, species)</p> <p>"Forest produce" includes bark, animal droppings, beeswax, canes, <b>charcoal</b>, creepers, earth, fibre, firewood, frankincense, fruit, galls, grass, gum, honey, leaves, flowers, limestone, moss, murrum, soil, myrrh, peat, plants, reeds, resin, rushes, rubber, sap, soil, seeds, spices, stones, timber, trees, water, wax, withies and such other things as may be declared by the Cabinet Secretary to be forest produce for the purpose of this Act</p> <p>"Timber" is any tree that has been felled or which has fallen, as well as cut wood or logs</p> <p>That the forest produce was removed, felled, cut, burned or 'injured'</p> <p>Absence of authority to so do</p>	<p>s68 (1) Upon conviction, forfeiture of any forest produce seized to the owner of the forest</p> <p>s68 (1) (a) Court may order compensation to the forest owner, upon conviction</p> <p>s68 (1) (b) Court may order the principal or employee of the accused to pay compensation, upon conviction</p> <p>s68 (1) (c) Forfeiture to the Service of any vehicle tool or equipment used in the commission of the offence</p> <p>Is deportation relevant? See s53 (1) (j) Kenya Citizenship and Immigration Act</p>

**Agencies:** KFS, KWS, ODPP, NPS, KMFRI (species identification), NEMA, Immigration Services if relevant, ARA

***Evidence likely to include but not limited to:***

Eyewitness evidence, possible expert evidence, exhibits, arresting officer, I.O. re: interviews, photographs.

GPS coordinates or map may be helpful in confirming the location and/or a gazette notice confirming the status of the land.

Chain of custody is crucial.

Were any vehicles used? Implements? Quantity and whether the forestry produce was in transit at the time of apprehension. Any other items recovered from the accused will be relevant as well as whether any accomplices were involved or whether the accused was operating under instruction from another.

If the accused is a foreign national, his immigration status should be explored e.g. any deportation orders in place? Mutual legal assistance may be required.

CHARGE COUNT ONE	Felling/cutting/burning/injuring/removing <b>[delete as appropriate]</b> forest produce from a public/provisional forest <b>[delete as appropriate]</b> without permit, license or management agreement, contrary to section 64 (1) (a) as read with s64 (2) of the Forest Conservation and Management Act No 34 of 2016.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> , being a public/provisional forest <b>[delete as appropriate]</b> fell, cut, took, removed forest produce without a licence, permit or management agreement.

**s64(1) (f) Clearing, Cultivating or Breaking Up Land in a Public or Provisional Forest for Cultivation or Any Other Purpose**

**Maximum Fine: 100,000 Ksh and/or 6 Months Maximum Imprisonment**

POINTS TO PROVE	ANCILLARY POWERS
Identity of the accused	s68 (1) (a) Court may order compensation to the forest owner for any damage to forest produce, upon conviction
Date and location of offence	s68 (1) (b) Court may order the principal or employee of the accused to pay compensation, upon conviction
Location is a 'public' forest under s30 (2) and 30 (3) or a 'provisional' forest declared under s35 of this Act	s68 (1) (c) Forfeiture to the Service of any vehicle tool or equipment used in the commission of the offence
That the accused cleared/cultivated or broke up the land	
That he did so for the purposes of cultivation or any other purpose	
Lack of any license, permit or management agreement (statement must address all three)	

**Agencies:** KFS, KWS, ODP, NEMA, NPS

**Evidence likely to include but not limited to:**

Eyewitness evidence; arresting officer, expert witness I.O. re: interviews, photographs and GPS coordinates and/or a gazette notice confirming the status of the land.

For the 'purposes of cultivation', evidence of seedlings/cutting/planting equipment should be preserved and properly exhibited.

CHARGE COUNT ONE	Breaking up/clearing/cultivating land in a public/provisional <b>[delete as appropriate]</b> forest without a license, permit or management agreement, contrary to s64 (1) (f) as read with s64 (2) of the Forest Conservation and Management Act No 34 of 2016.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> , being a public/provisional forest <b>[delete as appropriate]</b> , cleared/cultivated/broke up land <b>[delete as appropriate]</b> for the purposes of cultivation, without a licence, permit or management agreement.

**s64 (1) (k) Possession of or Bringing/Introducing Chain Saws or Logging Tools or Equipment Within a Public or Provisional Forest Without Authority**

**Maximum Fine: 100,000 Ksh and/or 6 Months Maximum Imprisonment**

POINTS TO PROVE	ANCILLARY POWERS
Identity of the accused	s68 (1) (a) Court may order compensation to the forest owner for any damage to forest produce, upon conviction
Date and location of offence	s68 (1) (b) Court may order the principal or employee of the accused to pay compensation, upon conviction
Location is a 'public' forest under s30 (2) and 30 (3) or a 'provisional' forest declared under s35 of this Act	s68 (1) (c) Forfeiture to the Service of any vehicle tool or equipment used in the commission of the offence
Items such as chainsaws or other logging tools or equipment were found within that area	
That the accused was in possession of or responsible for the bringing of those items into the forest area	
Absence of any license, permit or management agreement	

**Agencies:** KWS, KFS, ODPP

**Evidence likely to include but not limited to:**

Eyewitness evidence; arresting officer, I.O. re: interviews, photographs exhibit the chainsaws and/or other logging equipment.

GPS coordinates useful or gazette notice (gazette notices only in relation to provisional forests).

CHARGE COUNT ONE	Possessing/Bringing/introducing a chain saw/logging tool or equipment in a public/provisional forest <b>[delete as appropriate]</b> without authority contrary to s64 (1) (k) as read with s64 (2) of the Forest Conservation and Management Act No 34 of 2016.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> , being a public/provisional forest <b>[delete as appropriate]</b> was in possession of/ introduced/brought therein <b>[delete as appropriate]</b> chainsaw/logging tools/equipment <b>[delete as appropriate and specify]</b> therein without a licence, permit or management agreement.

<b>s67 (3) Operating a Sawmill Contrary to Rules</b> <b>Maximum Fine: 1,000,000 Ksh and/or 3 Years Maximum Imprisonment</b>	
POINTS TO PROVE	ANCILLARY POWERS
Identity of the accused Date and location of offence That the accused was operating a sawmill Identify the particular rule or rules that should apply to the operation of that sawmill Identify the way in which the rules were breached	s68 Revocation of license s68 (1) forfeiture of forest produce to the 'owner' of the forest – see s30 and the definitions under s2 (1) (a) Court may order compensation to the forest owner, upon conviction. s68 (1) (b) Court may order the principal or employee of the accused to pay compensation, upon conviction s68 (1) (c) Forfeiture to the Service of any vehicle tool or equipment used in the commission of the offence depending on the extent of the breach
<b>Agencies:</b> KFS, County Government, ODPP	
<b>Evidence likely to include but not limited to:</b> Eyewitness evidence; possible expert evidence, exhibits officers, arresting officer, I.O. re: interviews, photographs.	
CHARGE COUNT ONE	Operating a sawmill in contravention of rules issued under the Act, contrary to s67 (3) of the Forest Conservation and Management Act No 34 of 2016.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> , operated a sawmill therein in contravention of the rules governing sawmill operations in that <b>[identify the nature of the breach]</b> .

<b>s65 (c) Concealing, Destroying, Removing a Tree Stump Without Authority</b> <b>(including attempts to do any of the above)</b> <b>Maximum Fine: 500,000 Ksh and/or 3 Years Maximum Imprisonment</b>	
POINTS TO PROVE	ANCILLARY POWERS
Identity of the accused Date and location of the offence That the offence took place in a national or county forest as defined in the Act Identify the tree stump That the accused attempted or did in fact conceal, destroy or remove a tree stump Absence of lawful authority	s68 (1) (c) Forfeiture of any tool or equipment used in the commission of the offence
<b>Agencies:</b> KFS, ODPP	
<b>Evidence likely to include but not limited to:</b> Eyewitness evidence; possible expert evidence, exhibits officers, arresting officer, I.O. re: interviews, photographs. GPS may be helpful. Any data analysis from any mobile phone.	

CHARGE COUNT ONE	Concealing/destroying/removing <b>[delete as appropriate]</b> or attempting to conceal/destroy/remove <b>[delete as appropriate]</b> a tree stump without lawful authority contrary to s65 (c) of the Forest Conservation and Management Act No 34 of 2016.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> , being a national/county forest <b>[delete as appropriate]</b> concealed/destroyed/removed <b>[delete as appropriate]</b> a tree stump or part thereof without lawful authority.

**s67 (8) (c) Cultivating Narcotic Plants in a Forest Area****Maximum Fine: 3,000,000 Ksh and/or 10 Years Maximum Imprisonment****Note: The cultivation would have involved clearing land and possible illegal logging in some form. Consider additional charges**

POINTS TO PROVE	ANCILLARY POWERS
<p>Identity of the accused</p> <p>Date and location of the offence</p> <p>That the location is a 'forest area' within the meaning of the Act</p> <p>Identification of the type of plant and expert evidence as to the type of narcotic that can be extracted from that species</p> <p>That the accused was responsible for the act of cultivating that plant, as cultivation is defined in the 2004 Act (see below)</p> <p>Need a definition of 'narcotic' – use the penal code</p> <p>Consider charges under the Narcotic and Psychotropic Substances Act No.4 of 1994</p>	<p>s68 (1) (c) Forfeiture of the tools or equipment used in the commission</p> <p>s68 (2) Court can order the accused to remove the enclosures/crops etc., although the 'crops' should be forfeited and not returned to the accused</p>
<b>Agencies:</b> KFS, ODPP, CID (Narcotics), KEFRI, Government Chemist, NMK	
<b>Evidence likely to include but not limited to:</b> <p>Eyewitness evidence; arresting officer, I.O. re: interviews, photographs, expert evidence as to the type of plant and its uses.</p> <p>Evidence of 'cultivation'.</p> <p>Used for 'bhang' or marijuana.</p> <p>Mobile phone analysis and GPS coordinates may be useful.</p>	

CHARGE COUNT ONE	Cultivating a narcotic plant within a forest, contrary to s67 (8) (c) of the Forest Conservation and Management Act No 34 of 2016.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> , that being a <b>[specify the nature of the forest]</b> cultivated a species of plant namely <b>[insert species]</b> capable of producing a narcotic substance.

<b>s64 (1) (i) Constructing a Road or Path Within a Public or Provisional Forest Without Authority</b> <b>Maximum Fine: 100,000 Ksh and/or 6 Months Maximum Imprisonment</b>	
POINTS TO PROVE	ANCILLARY POWERS
Identity of the accused Date and location of offence Location is a 'public' forest under s30 (2) and 30 (3) or a 'provisional' forest declared under s35 of this Act That the accused was constructing or had constructed a path or road within that forest Lack of any license, permit or management agreement (statement must address all three)	s68 (1) (a) Court may order compensation to the forest owner for any damage to forest produce, upon conviction s68 (1) (b) Court may order the principal or employee of the accused to pay compensation, upon conviction s68 (1) (c) Forfeiture to the Service of any vehicle tool or equipment used in the commission of the offence
<b>Agencies:</b> KFS, ODPP, NPS, County Government	
<b>Evidence likely to include but not limited to:</b> Eyewitness evidence, arresting officer, I.O. re: interviews, photographs, exhibits. Construction of a road can be done in many ways, evidence of equipment found, level of destruction, etc. will be relevant. Width and length of the road or path may be relevant. GPS coordinates also helpful.	
CHARGE COUNT ONE	Constructing a road or path within a public/provisional <b>[delete as appropriate]</b> forest without authority, contrary to s64 (1) (i) as read with s64 (2) of the Forest Conservation and Management Act No 34 of 2016.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> , being a public/provisional forest <b>[delete as appropriate]</b> constructed a road or path therein without a licence, permit or management agreement.

**s64 (1) (I) Damaging, Altering, Shifting, Removing, or Interfering with a Beacon, Boundary Mark, Fence Notice or Notice Board**

**Maximum Fine: 100,000 Ksh and/or 6 Months Maximum Imprisonment**

POINTS TO PROVE	ANCILLARY POWERS
<p>Identity of the accused</p> <p>Date and location of offence</p> <p>Location is a 'public' forest under s30 (2) and 30 (3) or a 'provisional' forest declared under s35 of this Act</p> <p>Identify the beacon, boundary mark, fence notice or notice board in question</p> <p>That the accused damaged/altering/shifted/removed or otherwise interfered with it</p> <p>He/She had no authority to so do i.e. no license, permit or management agreement</p>	<p>s68 (1) (c) Forfeiture to the Service of any vehicle tool or equipment used in the commission of the offence</p>
<p><b>Agencies:</b> KFS, ODPP, NPS, KWS, Ministry of Lands Survey Department</p>	
<p><b>Evidence likely to include but not limited to:</b></p> <p>Eyewitness evidence, arresting officer, I.O. re: interviews, photographs, GPS coordinates or gazette notice in relation to a provisional forest.</p> <p>Expert witness such as a surveyor.</p>	

CHARGE COUNT ONE	Damaging/Altering/Shifting/Removing/Interfering <b>[delete as appropriate]</b> with a beacon, boundary mark, or fence notice or notice board <b>[delete as appropriate]</b> within a public/provisional forest <b>[delete as appropriate]</b> , without authority, contrary to s64 (1) (I) as read with s64 (2) of the Forest Conservation and Management Act No 34 of 2016.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> , being a public/provisional forest <b>[delete as appropriate]</b> , interfered with/ damaged/altering/moved/shifted/removed <b>[delete as appropriate]</b> a beacon, boundary mark, fence notice or notice board <b>[delete as appropriate]</b> therein, without a licence, permit or management agreement.

<p><b>s65 (a) Marking or Unlawfully Affixing a Mark on Forest Produce</b>  <b>Maximum Fine: 500,000 Ksh and/or 3 Years Maximum Imprisonment</b>  <b>If Detected During Transit of Produce: Consider s95 or s92 WCMA (Dealing/Possession)</b></p>	
POINTS TO PROVE	ANCILLARY POWERS
<p>Identity of the accused</p> <p>Date and location of offence</p> <p>Identify the forest produce in question</p> <p>That a mark has been affixed to the produce</p> <p>That the accused is responsible for affixing that mark</p> <p>That mark is ordinarily used by the Service or County Department responsible for forestry</p> <p>The accused did not have authority of either body to so do</p>	<p>s68 (1) (c) Forfeiture of any tool or equipment used in the commission of the offence</p>
<p><b>Agencies:</b> KFS, NPS, ODPP</p>	
<p><b>Evidence likely to include but not limited to:</b>  Eyewitness evidence, possible expert evidence or evidence from the Service regarding the nature and use of the mark, exhibits officers, arresting officer, I.O. re: interviews, photographs.</p>	
CHARGE COUNT ONE	Unlawfully Marking/ Affixing a mark <b>[delete as appropriate]</b> upon forest produce, contrary to s65 (a) of the Forest Conservation and Management Act No 34 of 2016.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> , marked/ affixed <b>[delete as appropriate]</b> an official Forestry Service mark upon forest produce without lawful authority.

## FIRE UNDER FCMA AND WCMA



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**s64 (1) (d) Smoking, Kindling, Carrying or Throwing Fire, Match or Lighted Material Within a Public or Provisional Forest Without Authority**

**Maximum Fine: 100,000 Ksh and/or 6 Months Maximum Imprisonment**

**See Also: s67 (2) Wilfully Setting a Fire (Higher Penalty)**

POINTS TO PROVE	ANCILLARY POWERS
Identity of the accused	s68 (1) (c) Forfeiture to the Service of any vehicle tool or equipment used in the commission of the offence
Date and location of offence	s68 (1) (a) Court may order compensation to the forest owner for any damage to forest produce, upon conviction.
Location is a 'public' forest under s30 (2) and 30 (3) or a 'provisional' forest declared under s35 of this Act	s68 (1) (b) Court may order the principal or employee of the accused to pay compensation, upon conviction
That the accused was smoking within that location <b>and</b> there was a notice prohibiting the same <b>or</b>	
That the accused kindled, carried or 'threw down' a fire or match or other lighted material within that location <b>AND</b> there was a notice prohibiting smoking	
Lack of any license, permit or management agreement (statement must address all three)	
<b>Agencies:</b> KFS, KWS, ODPP, NEMA (impact statement), NPS	
<b>Evidence likely to include but not limited to:</b>	
Arresting officer, I.O. re: interviews, photographs, exhibits.	
GPS coordinates also helpful and/or a gazette notice confirming the status of the land.	
Exhibit cigarettes/cigarette butts/lighters/matches etc.	

CHARGE COUNT ONE	Smoking/Kindling/Carrying Or Throwing Down a fire or lighted material in a <b>[public/provisional [delete as appropriate]]</b> forest without authority contrary to s64 (1) as read with s64 (2) of the Forest Conservation and Management Act No 34 of 2016.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> , being a public/provisional forest <b>[delete as appropriate]</b> being an area where smoking was prohibited by notice, smoked, kindled, carried or threw a fire, match or lighted material <b>[delete as appropriate and if a lighted material, define as far as possible]</b> .

### s64 (1) (i) Setting a Fire to Grass, Undergrowth or Forest Produce in a Public or Provisional Forest

**Maximum Fine: 100,000 Ksh and/or 6 Months Maximum Imprisonment**

**Consider the WCMA instead as higher penalty applies**

POINTS TO PROVE	ANCILLARY POWERS
Identity of the accused	s68 (1) (a) Court may order compensation to the forest owner for any damage to forest produce, upon conviction
Date and location of offence	s68 (1) (b) Court may order the principal or employee of the accused to pay compensation, upon conviction
Location is a 'public' forest under s30 (2) and 30 (3) or a 'provisional' forest declared under s35 of this Act	s68 (1) (c) Forfeiture to the Service of any vehicle tool or equipment used in the commission of the offence
That the accused set a fire therein to grass, undergrowth or any forest produce <b>or</b>	
Assisted another to so do	
Lack of any license, permit or management authority (statement must address all three)	
Also consider s67(2) malicious or deliberate setting of fire	

**Agencies:** KFS, ODPP, NPS, NEMA (Impact), KWS

**Evidence likely to include but not limited to:**

Gazette notice confirming status of the forest and GPS coordinates.

Eyewitness evidence, arresting officer, I.O. re: interviews, photographs, exhibits, proximity of the accused to the fire, materials in the possession of the accused e.g. a matchbox, charcoal, cigarettes etc.

If the officers do not actually see him/her start the fire, then all of the circumstantial evidence needs to be carefully recorded in the statements.

**Consider charges of:** Malicious Damage to Property, contrary to s339 of the Penal Code; or causing fire to crops under cultivation (so only applicable to KFS plantations) under s334 of the Penal Code, and consider WCMA where it involves a national park or area covered under s102 (b) of WCMA (min 200,000 Ksh or minimum 2 years or both).

CHARGE COUNT ONE	Setting or assisting another to set <b>[delete as appropriate]</b> fire within a public/provisional <b>[delete as appropriate]</b> forest without authority, contrary to s64 (1) (j) as read with s64 (2) of the Forest Conservation and Management Act No 34 of 2016.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> , being a public/provisional forest <b>[delete as appropriate]</b> set a fire/assisted another to set a fire <b>[delete as appropriate]</b> to grass/undergrowth/forest produce namely <b>[delete as appropriate and specify if possible the quantity or area and species]</b> therein without a licence, permit or management agreement.

**s67 (2) Setting a Fire in a Forest****Maximum Fine: 100,000 Ksh and/or 1 Year Maximum Imprisonment****Also Consider s102 (b) WCMA (Higher Penalty) and s334 Penal Code (14 years)**

POINTS TO PROVE	ANCILLARY POWERS
Identity of the accused	s68(1) (a) Court may order compensation to the forest owner, upon conviction
Date and location of offence	s68 (1) (b) Court may order the principal or employee of the accused to pay compensation, upon conviction
That the location in question was a public, provisional, community or private forest	s68 (1) (c) Forfeiture to the Service of any vehicle tool or equipment used in the commission of the offence
That the accused wilfully or maliciously set a fire therein	

**Agencies:** KFS, ODPP, NPS, NEMA (Impact), KWS**Evidence likely to include but not limited to:**

Eyewitness evidence, possible expert evidence, exhibits officers, arresting officer, I.O. re: interviews, photographs, GPS coordinates if location is crucial to proof of the breach.

Proximity of the accused and any materials that the accused had in his possession will be relevant to proving that the accused set the fire.

Extent of damage will be relevant to sentencing so an expert report may be necessary.

Gazette notice re: status of the land.

CHARGE COUNT ONE	Setting a fire in a forest <b>[specify the nature of the forest]</b> , contrary to s67 (2) of the Forest Conservation and Management Act No 34 of 2016.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> , that being a public/provisional/community/private forest <b>[delete as appropriate]</b> wilfully/maliciously <b>[delete as appropriate]</b> set a fire therein.

## TRESPASS OFFENCES UNDER THE FCMA



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**s64 (1) (b) Being or Remaining in any Public/Provisional Forest Between 7PM and 6AM**

**Maximum Fine: 100,000 Ksh and/or 6 Months Maximum Imprisonment**

POINTS TO PROVE	ANCILLARY POWERS
<p>Identity of the accused</p> <p>Date and location of offence</p> <p>Location is a 'public' forest under s30 (2) and 30 (3) or a 'provisional' forest declared under s35 of this Act.</p> <p>That the accused was in the forest</p> <p>That the time he was found was between 7pm and 6am</p>	

**Agencies:** ODPP, KWS, KFS

***Evidence likely to include but not limited to:***

Eyewitness evidence, possible expert evidence, exhibits, arresting officer, I.O. re: interviews, photographs.

GPS coordinates may be helpful in confirming the location and/or a gazette notice confirming the status of the land.

Consider if they are in possession of any axes, power saw, pangas, vehicles or logging equipment or firearm or with accomplices and whether other offences might be in play i.e.

**why** is the accused in the forest at that time? What other crimes were being committed? If found with logging equipment for example, consider s64 (1) (k). If he entered using a vehicle, NTSA may be useful regarding proof of ownership.

CHARGE COUNT ONE	Being in a public/provisional <b>[delete as appropriate]</b> forest without authority, contrary to s64 (1) (b) as read with s64 (2) of the Forest Conservation and Management Act No 34 of 2016.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> , being a public/provisional forest <b>[delete as appropriate]</b> between 7pm and 6am without a licence, permit or management agreement.

**s64 (1) (g) Entry into a Closed Public or Provisional Forest Without Authority**

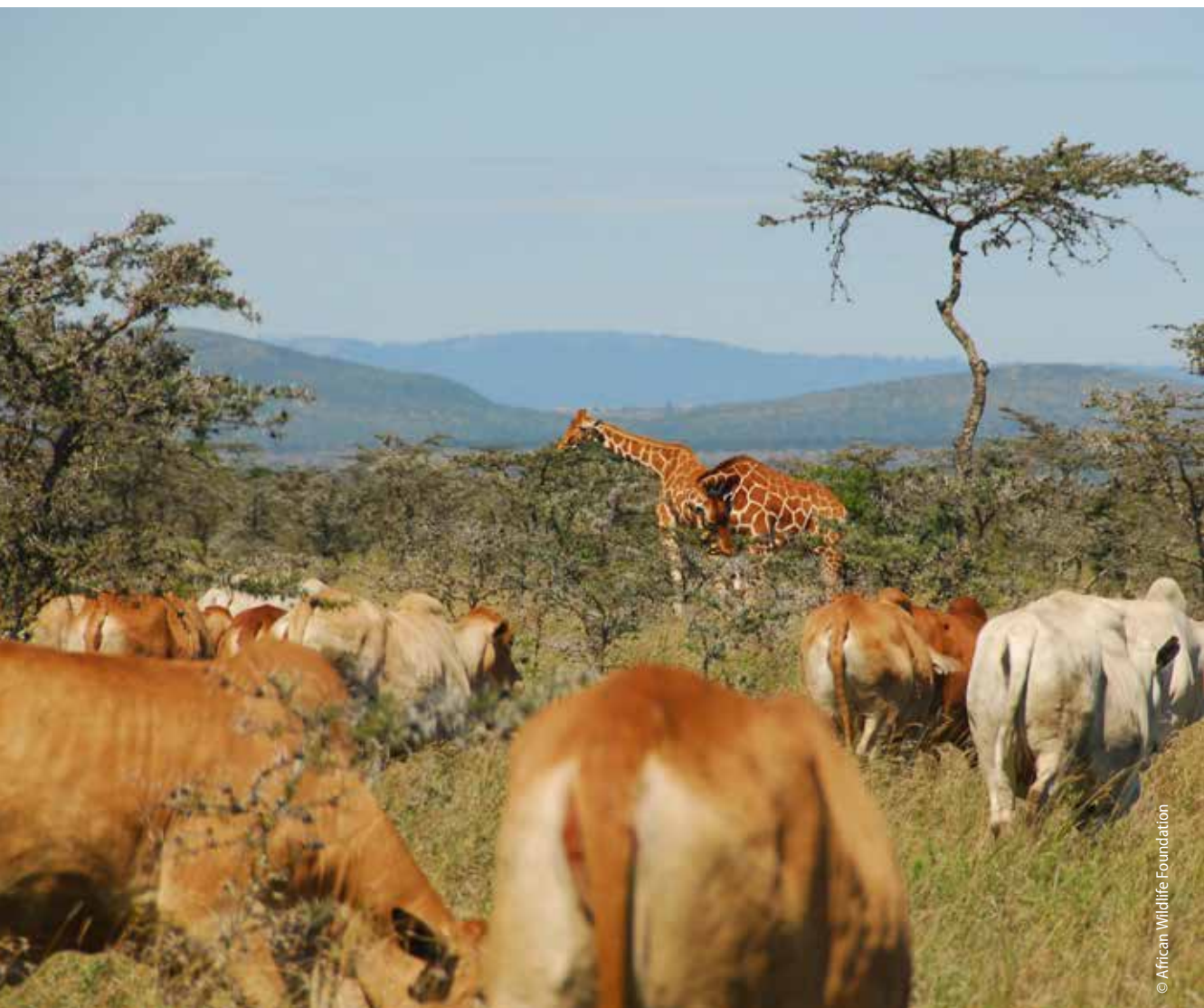
**Maximum Fine: 100,000 Ksh and/or 6 Months Maximum Imprisonment**

POINTS TO PROVE	ANCILLARY POWERS
<p>Identity of the accused</p> <p>Date and location of offence</p> <p>Location is a 'public' forest under s30 (2) and 30 (3) or a 'provisional' forest declared under s35 of this Act</p> <p>That forest or a part of that forest was closed off (e.g. fence or signage)</p> <p>That the accused entered into that closed area</p> <p>Lack of any license, permit or management agreement (statement must address all three)</p>	
<p><b>Agencies:</b> KWS, KFS, ODPP</p>	
<p><b><i>Evidence likely to include but not limited to:</i></b></p> <p>Eyewitness evidence, arresting officer, I.O. re: interviews, photographs, GPS coordinates exhibits.</p> <p>Statements of the arresting officer must be clear on the prohibited area in which the accused was found.</p> <p>Evidence of how the area was closed off e.g. by fencing or signage.</p>	

CHARGE COUNT ONE	Entering into a closed public/provisional <b>[delete as appropriate]</b> forest without license, permit or management authority <b>[delete as appropriate]</b> , contrary to s64 (1) (g) as read with s64 (2) of the Forest Conservation and Management Act No 34 of 2016.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> , being a public/provisional forest <b>[delete as appropriate]</b> , entered an area therein that was closed, without a license, permit or management agreement.

# OFFENCES RELATING TO LIVESTOCK UNDER FCMA

*(Also consider offences under s102 WCMA if the forest is a  
'protected area')*



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<b>s64 (1) (e) De-Pasturing or Allowing Livestock Within a Forest</b> <b>Maximum Fine: 100,000 Ksh and/or 6 Months Maximum Imprisonment</b>	
POINTS TO PROVE	ANCILLARY POWERS
<p>Identity of the accused</p> <p>Date and location of offence</p> <p>Location is a 'public' forest under s30 (2) and 30 (3) or a 'provisional' forest declared under s35 of this Act</p> <p>"Depasturing" means to allow an animal to graze on pasture (Oxford Dictionary meaning)</p> <p>That livestock/animals were grazing within the boundaries of that forest</p> <p>That the accused was responsible for allowing the livestock or any other animal to graze</p> <p>Lack of any license, permit or management agreement (statement must agree absence of all three)</p> <p>Note the presumption under s67 (5) that any livestock found in a forest shall be deemed to be there under the authority of the owner as well as the person actually in charge</p>	<p>s68 (1) (a) Court may order compensation to the forest owner for any damage to forest produce, upon conviction</p> <p>s68 (1) (b) Court may order the principal or employee of the accused to pay compensation, upon conviction</p> <p>s67 (6) suggests a power to seize and detain livestock seized for an offence under s64 (1) (e). <b>That livestock can then be sold at auction if not claimed within seven days and the proceeds would go to the Service.</b></p> <p>s389 A Criminal Procedure Code allows for forfeiture upon conviction (where no other law provides) regarding the livestock</p>
<b>Agencies:</b> KFS, KWS, NPS, ODPP, Children's department, Immigration services and NEMA	
<b>Evidence likely to include but not limited to:</b> <p>Eyewitness evidence, expert witnesses, arresting officer, I.O. re: interviews, photographs, exhibits, GPS coordinates helpful.</p> <p>Any other items recovered from the accused will be relevant as well as whether any accomplices were involved.</p> <p>If the accused is a foreign national, his/her immigration status should be explored e.g. any deportation orders in place?</p> <p>If the accused is a child, consider the Children Act and prosecution of the parents.</p> <p><b>Where animals are found on their own and an owner comes later to identify, evidence of that identification should be captured e.g. by video recording or photographs so call the scenes of crime officer, or other authorised officer. Where the officer is not a gazetted SOCO, use the guidance on digital evidence in this booklet.</b></p>	

CHARGE COUNT ONE	Allowing livestock to graze within a public/provisional forest <b>[delete as appropriate]</b> without authority contrary to s64 (1) (e) as read with s64 (2) of the Forest Conservation and Management Act No 34 of 2016.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> , being a public/provisional forest <b>[delete as appropriate]</b> allowed livestock, namely <b>[identify type and number]</b> to graze therein without a licence, permit or management agreement.

**s64 (1) (c) Erecting a Building or Livestock Enclosure in a Forest Without Authority**

**Maximum Fine: 100,000 Ksh and/or 6 Months Maximum Imprisonment**

POINTS TO PROVE	ANCILLARY POWERS
Identity of the accused	s68 (1) (c) Forfeiture to the Service of any vehicle tool or equipment used in the commission of the offence
Date and location of offence	s68 (2) Upon conviction, the court may order the accused to remove the building, enclosure within a period to be specified
Location is a 'public' forest under s30 (2) and 30 (3) or a 'provisional' forest declared under s35 of this Act	s68 (1) (a) Court may order compensation to the forest owner, upon conviction
That a building or enclosure had been erected within the boundaries of that forest	s68 (1) (b) Court may order the principal or employee of the accused to pay compensation, upon conviction
That the accused was responsible for the building or erecting of that livestock enclosure	
Lack of any license, permit or management agreement (statement must address all three)	
If livestock is found within, consider charges under s64 (1) (e) and the powers of impounding under s67 (6)	

**Agencies:** KFS, KWS, ODPP

***Evidence likely to include but not limited to:***

Eyewitness evidence, arresting officer, I.O. re: interviews, photographs, exhibits.

GPS coordinates also helpful and/or a gazette notice confirming the status of the land.

Give a full description of the nature of the building or livestock enclosure including the materials used.

Consider other crimes e.g. is he/she felling forest produce to construct the livestock enclosure in which case consider an offence under s64 (1) (a) as an additional charge.

Any other items recovered from the accused will be relevant as well as whether any accomplices were involved.

If the accused is a foreign national, his immigration status should be explored e.g. any deportation orders in place?

CHARGE COUNT ONE	Erecting a building or livestock enclosure within a public/provisional <b>[delete as appropriate]</b> forest without authority contrary to s64 (1) (c) as read with s64 (2) of the Forest Conservation and Management Act No 34 of 2016.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> , being a public/provisional forest <b>[delete as appropriate]</b> erected a building or livestock enclosure therein without a license, permit or management agreement.

## GRAZING OFFENCE UNDER WCMA



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<p><b>s102 (2A) Illegal Grazing in a Protected Area</b></p> <p><b>Maximum Fine: 100,000 Ksh and/or 6 Months Maximum Imprisonment</b></p>	
POINTS TO PROVE	ANCILLARY POWERS
<p>Identity of the accused</p> <p>Date and Location</p> <p>The area is a protected area which 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”</p> <p>Accordingly, see both the Eleventh Schedule at Annex D of this guide and also KWS records of conservancies, sanctuaries and other ‘protected areas’ that are not listed within the statute</p> <p>The accused entered that area with livestock</p> <p>Absence of a permit or written authorisation from the body responsible for that protected area</p>	<p>s105 Forfeiture</p> <p>s110 Seizure, confiscation, inspection, production</p> <p>s108 Restraint order or other redress from the [Environment and Lands Court]</p> <p><b>See also s103 WCMA regarding liability of the owner of such livestock</b></p>
<p><b>Agencies:</b> KWS, NPS, ODPP, NEMA</p>	
<p><b>Evidence likely to include but not limited to:</b></p> <p>Eyewitness evidence, arresting officer, I.O. statement from KWS confirming the status of the area and the absence of authorisation. Photographs. Answers on interview.</p> <p>Note: this no longer applies only to national parks. Conservancies/sanctuaries are now protected under this provision and accordingly illegal grazing on the same is covered.</p> <p>On charging, if you specify a precise number of livestock, this may be problematic at trial on the issue of proof. Photographs or agreement of the accused/answers on interview/witness statements addressing the number will be necessary. However, it is acceptable to avoid specifying the exact numbers if that proves impossible. The offence can be established by even one animal being grazed illegally.</p>	
CHARGE COUNT ONE	Entering a protected area with livestock, contrary to s102 (2) as read with s102 (3) of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> entered into a protected, area namely <b>[identify]</b> with livestock namely <b>[identify nature and if possible, numbers of livestock]</b> without authorisation from the body responsible for that area.

## COMMON OFFENCES RELATED TO ILLEGAL GRAZING INCIDENTS

(Not Exhaustive)

Offence	Legislation	Penalty
MALICIOUS DAMAGE	s339 Penal Code	Max 5 years
RESISTING/OBSTRUCTION OF AN OFFICER IN LAWFUL EXECUTION OF DUTY	s103 National Police Service Act 2011	Max 10 years/1 Million Ksh
COMMON ASSAULT E.g. push/shove, no injury	s250 Penal Code	Max 1 year
ASSAULT OCCASIONING ACTUAL BODILY HARM E.g. bruise, thick lip, black eye	s251 Penal Code	Max 5 years
THREATS TO KILL	s223 Penal Code	Max 10 years
FIREARMS OFFENCES	s4/s4 A Firearms Act	Varies between 5-10 yrs/7 to 14 or life
MOVING CATTLE BETWEEN DISTRICTS	s17 (4) Animal Diseases Act	Max 30,000 ksh or 12 months
STOCK THEFT	s278 as read with s268 Penal Code	Max 14 years
FAILING TO PRODUCE ID CARD	s10 Registration of Persons Act	Max 50,000 Ksh or 2 months
POSSESSING AN ID CARD BELONGING TO ANOTHER	s14 (1) (f) Registration of Persons Act	Max 200,000 Ksh or 18 months
MAKING A FALSE REPRESENTATION REGARDING AN ID CARD	s14 (1) (b) Registration of Persons Act	Max 200,000 Ksh or 18 months

# CHARCOAL RELATED OFFENCES UNDER THE FCMA AND WCMA



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## BURNING CHARCOAL UNDER THE WCMA – PROTECTED AREAS

### *Burning charcoal in a protected area*

<b>s102 (1) (da) Burning Charcoal in Any Protected Area</b> <b>Minimum Fine: 200,000 Ksh and/or 2 Years Minimum Imprisonment</b>	
POINTS TO PROVE	ANCILLARY POWERS
<p>Identity of the accused</p> <p>Date and Location</p> <p>The area is a protected area which 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”</p> <p>Accordingly, see both the Eleventh Schedule at Annex D of this guide and also KWS records of conservancies, sanctuaries and other ‘protected areas’ that are not listed within the statute <b>and</b></p> <p>Identify that the fuel was ‘charcoal’</p> <p>The accused burned that charcoal therein</p>	<p>s110 Seizure, confiscation, inspection, production</p> <p>s105 Forfeiture</p>
<b>Agencies:</b> KFS, ODPP, KWS, NEMA, NPS	
<p><b>Evidence likely to include but not limited to:</b></p> <p>Eyewitness evidence, arresting officer, I.O. statement from KWS confirming the status of the area as a national park/reserve. Witnesses from relevant conservancies and/or county government, photographs. Answers on interview.</p> <p>Also consider charges of ‘criminal damage’ under the penal code depending on extent of harm.</p> <p>When referring to the above definition of “protected area”, conservancies may fall within this even if regulations governing their status have not yet been finalised provided they represent an area managed through ‘other effective means’ under the above definition. The purpose of the area in question will be key in establishing it as one that falls within this provision.</p>	
CHARGE COUNT ONE	Burning charcoal within a protected area contrary to s102 (1) (da) of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> being a protected area within the meaning of the Act, burned charcoal therein.

## CHARCOAL OFFENCE UNDER THE FCMA

### *Making/possession of charcoal*

#### **s67 (1) (e) Making or Being in Possession of Charcoal in a Forest or Farmland**

**Maximum Fine: 50,000 Ksh and/or 6 Months Maximum Imprisonment**

POINTS TO PROVE	ANCILLARY POWERS
<p>Identity of the accused</p> <p>Date and location of offence</p> <p>That there was charcoal</p> <p>That the accused was in possession or in the process of making it <b>and</b></p> <p>That the area in question was either a national forest, county forest, provisional forest, community forest, private forest or farmland</p> <p>Absence of lawful of authority from the Chief Conservator of Forests</p> <p><b>Note:</b> the offence under s64 e.g. on page 65 (burning forest produce) have a higher penalty</p> <p><b>Note:</b> the Charcoal Regulation Rules and possible alternative offences where the accused is found OUTSIDE of the above areas. Still in force according to the transitional provisions under s77</p>	<p>s68 (1) (a) Court may order compensation to the forest owner for any damage to forest produce, upon conviction</p> <p>s68 (1) (b) Court may order the principal or employee of the accused to pay compensation, upon conviction</p> <p>s68 (1) (c) Upon conviction forfeiture to the Service of any vehicle tool or equipment used in the commission of the offence</p>

**Agencies:** KFS, ODPP, NPS, KWS, KEFRI

#### ***Evidence likely to include but not limited to:***

Eyewitness evidence, possible expert evidence, exhibits officers, arresting officer, I.O.  
re: interviews, photographs, GPS coordinates if location is crucial to proof of the breach.

**Quantity of charcoal may be relevant to sentencing. Accordingly, an expert report may be necessary to assess damage to the environment.**

CHARGE COUNT ONE	Making/Being in possession of charcoal in a forest/farmland [ <b>specify nature of the forest</b> ], contrary to s67 (1) (e) of the Forest Conservation and Management Act No 34 of 2016.
PARTICULARS OF OFFENCE	[ <b>Name of the accused</b> ] on or about the [ <b>insert date</b> ] at [ <b>location</b> ], being a [ <b>identify the nature of the forest area or farmland under the Act</b> ] was found in possession/making [ <b>delete as appropriate</b> ] a quantity of charcoal [ <b>insert quantity if possible</b> ] without lawful authority.

## MISCELLANEOUS OFFENCES UNDER FCMA



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**s65 (e) Counterfeiting or Issue of a License Without Lawful Authority****Maximum Fine: 500,000 Ksh and/or 3 Years Maximum Imprisonment****Also consider charges under the Penal Code for where the license is actually used**

POINTS TO PROVE	ANCILLARY POWERS
<p>Identity of the accused</p> <p>Date and location of the offence</p> <p>Identify the document in question (license or other document)</p> <p>That the accused issued that document <b>and</b> that he had no authority to issue that license</p> <p><b>or</b></p> <p>The accused produced a licence <b>and</b> that license was counterfeit <b>and</b> the accused knew that it was counterfeit</p>	

**Agencies:** KFS, NPS, ODPP**Evidence likely to include but not limited to:**

Eyewitness evidence, exhibits officers, expert such a document examiner, arresting officer, I.O. re: interviews, photographs, the license number or document must be properly exhibited. Expert evidence may be required to prove it was a counterfeit. Seizure of any tools used to produce counterfeit license.

CHARGE COUNT ONE	Counterfeiting a document/Issuing a licence/document without lawful authority <b>[delete as appropriate]</b> contrary to s65 (e) of the Forest Conservation and Management Act No 34 of 2016.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> , knowingly issued a license or any other document <b>[delete as appropriate and specify]</b> without lawful authority/that was counterfeit <b>[delete as appropriate]</b> .

**s67 (1) (b) Failure to Comply with the Terms and Conditions of a License****Maximum Fine: 50,000 Ksh and/or 6 Months Maximum Imprisonment**

POINTS TO PROVE	ANCILLARY POWERS
<p>Identity of the accused</p> <p>Date and location of offence</p> <p>That a license was issued under this Act</p> <p>The terms of the license</p> <p>That those terms were breached and how</p>	

**Agencies:** KFS, NPS, ODPP, County government***Evidence likely to include but not limited to:***

Eyewitness evidence, possible expert evidence, exhibits officers, arresting officer, I.O. re: interviews, photographs, GPS coordinates if location is crucial to proof of the breach (or gazette notice).

Details of the particular license that has been breached.

Note: many licenses and permits do not specify conditions e.g. monthly fuel license, grazing licences, etc.

CHARGE COUNT ONE	Failing to comply with the terms or conditions of a license, contrary to s67 (1) (b) of the Forest Conservation and Management Act No 34 of 2016.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> , failed to comply with a license issued by the Service, namely <b>[identify the license, the terms and the nature of the breach]</b> .

**s65 (b) Interfering with a Forestry Service Stamp, Mark, License or Document****Maximum Fine: 500,000 Ksh and/or 3 Years Maximum Imprisonment**

POINTS TO PROVE	ANCILLARY POWERS
<p>Identity of the accused</p> <p>Date and location of offence</p> <p>Identify the stamp, mark, sign, license, permit, document</p> <p>Confirmation that the stamp, mark, sign, license, permit or document was lawfully issued under the authority of this Act</p> <p>That the accused altered, obliterated, removed or defaced the same or destroyed or removed any part of a tree bearing the same</p>	
<b>Agencies:</b> KFS, ODPP, Document examiner, NPS, KWS	
<b>Evidence likely to include but not limited to:</b> Possible expert evidence (e.g. a document examiner), exhibits officers, arresting officer, I.O. re: interviews, photographs, exhibits.	

CHARGE COUNT ONE	Altering/Obliterating/Removing/Defacing <b>[delete as appropriate]</b> a lawfully issued stamp, mark, sign, license, permit, document <b>[delete as appropriate]</b> , without lawful authority contrary to s65 (b) of the Forest Conservation and Management Act No 34 of 2016.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> , without lawful authority altered/obliterated/removed/defaced <b>[delete as appropriate]</b> mark/stamp/sign/license/permit/document <b>[delete as appropriate]</b> that had been lawfully issued under the Forest Conservation and Management Act No 34 of 2016.

<b>s67 (1) (c) Failure to Comply with a Lawful Requirement or Demand by a Forest Officer</b> <b>Maximum Fine: 50,000 Ksh and/or 6 Months Maximum Imprisonment</b>	
POINTS TO PROVE	ANCILLARY POWERS
<p>Identity of the accused</p> <p>Date and location of offence</p> <p>That a forest officer issued a requirement or demand to the accused</p> <p>That demand or requirement was lawful under s62 of the Act</p> <p>That the accused wilfully failed to comply i.e. he heard the command and refused/failed to comply without reasonable excuse</p>	
<b>Agencies:</b> KFS, NPS, ODPP	
<b>Evidence likely to include but not limited to:</b> Eyewitness evidence, exhibits, arresting officer, I.O. re: interviews, photographs	

CHARGE COUNT ONE	Failing to comply with the lawful demands of a forest officer, contrary to s67 (1) (c) of the Forest Conservation and Management Act No 34 of 2016.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> , having been issued with a lawful demand under s62 of the Forest Conservation and Management Act No. 34 of 2016, namely <b>[outline the demand]</b> by a forest officer namely <b>[insert name and service number]</b> , wilfully failed to comply.

<b>s67 (1) (d) Wilfully Obstructing an Authorised Forest Officer</b> <b>Maximum Fine: 50,000 Ksh and/or 6 Months Maximum Imprisonment</b>	
POINTS TO PROVE	ANCILLARY POWERS
Identity of the accused Date and location of offence That the forest officer was acting within powers under s62 That the forest officer identified himself/herself as a Forest Officer That the accused wilfully obstructed that officer in the execution of his/her duties	
<b>Agencies:</b> KFS, NPS, ODPP	
<b>Evidence likely to include but not limited to:</b> Eyewitness evidence; exhibits, arresting officer, I.O. re: interviews, photographs	
CHARGE COUNT ONE	Obstruction of a forest officer, contrary to s67 (1) (d) of the Forest Conservation and Management Act No 34 of 2016.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> , wilfully obstructed <b>[outline the demand]</b> a forest officer namely <b>[insert name and service number]</b> , in the lawful execution of his duties.

*Offences relating to forestry officers (uniform)*

<p><b>s65 (d) Wearing a Uniform or Mark of a Service Officer</b></p> <p><b>Maximum Fine: 500,000 Ksh and/or 3 Years Maximum Imprisonment</b></p>	
POINTS TO PROVE	ANCILLARY POWERS
<p>Identity of the accused</p> <p>Date and location of the offence</p> <p>That the accused was wearing a uniform or part of a uniform or other mark or badge</p> <p>That uniform/mark/badge is only issued to employees of the Service</p> <p>The accused was not, at the time, an employee of the Service</p> <p><b>Note:</b> on the aspect of 'holding oneself out as an employee of the Service' this was deemed too vague for charge</p>	
<p><b>Agencies:</b> KFS, NPS, ODPP</p>	
<p><b><i>Evidence likely to include but not limited to:</i></b></p> <p>Eyewitness evidence, exhibits such as the uniform worn, witnesses to the accused presenting himself as KFS, arresting officer, I.O. re: interviews, photographs, exhibits.</p>	
CHARGE COUNT ONE	Wearing a uniform, or part of a uniform or badge or other mark <b>[delete as appropriate]</b> of the Service without lawful authority contrary to s65 (d) of the Forest Conservation and Management Act No 34 of 2016.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> , wore a uniform, badge or mark or part thereof issued to the Service, without lawful authority.

**s64 (1) (h) Collecting Honey or Beeswax in a Public or Provisional Forest Without Authority**

**Maximum Fine: 100,000 Ksh and/or 6 Months Maximum Imprisonment**

POINTS TO PROVE	ANCILLARY POWERS
<p>Identity of the accused</p> <p>Date and location of offence</p> <p>Location is a 'public' forest under s30 (2) and 30 (3) or a 'provisional' forest declared under s35 of this Act</p> <p>That the accused was engaged in collecting honey or beeswax therein – by hanging on any tree or elsewhere (specify) other than tree, a barrel or other receptacle and/or otherwise entered into that forest with equipment (identify)</p> <p>For the purposes of collecting honey and/or beeswax</p> <p>Lack of any license, permit or management agreement (statement must address all three)</p>	<p>s68 (1) (c) Forfeiture to the Service of any vehicle tool or equipment used in the commission of the offence</p>

**Agencies:** KFS, NPS, ODPP, KWS

***Evidence likely to include but not limited to:***

Eyewitness evidence, arresting officer, I.O. re: interviews, photographs, GPS coordinates.

Evidence that the accused was engaged in collecting honey will include evidence that he/she was hanging a honey barrel or other receptacle or was in possession of any equipment that had been designed to collect honey or beeswax.

Consider the timing of the offence and whether additional charges are there e.g. being in a forest at night.

CHARGE COUNT ONE	Collecting honey in a public/provisional <b>[delete as appropriate]</b> forest, without authority contrary to s64 (1) (h) as read with s64 (2) of the Forest Conservation and Management Act No 34 of 2016.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> , being a public/provisional forest <b>[delete as appropriate]</b> was engaged therein in the collection of honey or beeswax, without a licence, permit or management agreement by <b>[specify the activity namely – hanging barrels, collecting, entering with equipment, being in the forest]</b> .

**s67 (8) (a) Introducing Exotic Genetic Material or an Invasive Species to a Forest Area**

**Maximum Fine: 3,000,000 Ksh and/or 10 Years Maximum Imprisonment**

**Also consider offences under the s93 WCMA**

POINTS TO PROVE	ANCILLARY POWERS
<p>Identity of the accused</p> <p>Date and location of the offence</p> <p>That the location is a 'forest area' within the meaning of the Act</p> <p>Identify the nature of the genetic material or invasive species</p> <p>That the accused was responsible</p> <p>Check the definitions for invasive species or 'exotic' genetic material</p>	<p>s68 (1) Upon conviction, forfeiture of any forest produce seized to the owner of the forest</p> <p>s68 (1) (a) Court may order compensation to the forest owner, upon conviction, if forest produce was damaged in the operations</p> <p>s68 (1) (b) Court may order the principal or employee of the accused to pay compensation, upon conviction</p> <p>s68 (1) (c) Forfeiture to the Service of any vehicle tool or equipment used in the commission of the offence.</p>
<p><b>Agencies:</b> KFS, KWS, KMFRI, ODPP, NEMA (Impact)</p>	
<p><b><i>Evidence likely to include but not limited to:</i></b></p> <p>Eyewitness evidence, arresting officer, I.O. re: interviews, photographs, exhibits, expert witness testimony likely to be necessary as to what is an invasive species or 'exotic' genetic material, as well an assessment of the damage done or anticipated.</p> <p>GPS coordinates useful or gazette notice.</p>	

CHARGE COUNT ONE	Introducing genetic material/an invasive species in a forest area, contrary to s67 (8) (a) of the Forest Conservation and Management Act No 34 of 2016.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> , that being a forest area, introduced therein an exotic genetic material/invasive species namely <b>[identify the type]</b> .

**s66 Quarrying and Re-Vegetation of a Forest Area****Maximum Fine: 1,000,000 Ksh and/or 2 Years Maximum Imprisonment****Recommendation s46 needs to create an offence**

POINTS TO PROVE	ANCILLARY POWERS
Identity of the accused Date and location of the offence That the location was a 'forest area' under the Act That the land had been quarried or had undergone or was undergoing re-vegetation	s68 (1) (c) Forfeiture of the vessels, tools or equipment used in the commission of the offence
<b>Agencies:</b> KFS, ODPP, KMFRI	
<b>Evidence likely to include but not limited to:</b> Eyewitness evidence, possible expert evidence, exhibits officers, arresting officer, I.O. re: interviews, photographs, exhibits of the machinery used.	

CHARGE COUNT ONE	Illegal quarrying/revegetation <b>[delete as appropriate]</b> in a forest area, contrary to s66 of the Forest Conservation and Management Act No 34 of 2016.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> , that being a forest area under this Act, engaged therein in activities relating to quarrying/revegetation <b>[delete as appropriate]</b> without lawful authority.

**s67 (8) (b) Dumping Solid, Liquid, Toxic or Other Waste in a Forest Area**  
**Maximum Fine: 3,000,000 Ksh and/or 10 Years Maximum Imprisonment**

POINTS TO PROVE	ANCILLARY POWERS
Identity of the accused	s68 (1) forfeiture of any forest produce seized to the owner of the forest, upon conviction
Date and location of the offence	
That the location is a 'forest area' within the meaning of the Act	s68 (1) (a) Court may order compensation to the forest owner, upon conviction, if forest produce was damaged in the operations
Identify the nature of the waste	
If toxic, then prove it was so	s68 (1) (b) Court may order the principal or employee of the accused to pay compensation, upon conviction
That it was dumped within that forest area	
That the accused was responsible	
Consider NEMA's involvement	s68 (1) (c) Forfeiture to the Service of any vehicle tool or equipment used in the commission of the offence
<b>Note:</b> the act suggests a forest manager can authorise such dumping. This requires amendment as it goes against the spirit of the Act	
<b>Agencies:</b> KFS, KWS, NEMA, ODPP, NPS	
<b>Evidence likely to include but not limited to:</b> Eyewitness evidence, arresting officer, I.O. re: interviews, photographs, exhibits, expert witness such as a government analyst on the nature of the waste and possibly involve NEMA to conduct an assessment of the damage done.	

CHARGE COUNT ONE	Dumping waste in a forest area, contrary to s67 (8) (b) of the Forest Conservation and Management Act No 34 of 2016.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> , that being a forest area, dumped waste namely <b>[identify the nature of the waste e.g. toxic]</b> .

<b>s67 (1) (a) Failure to Comply with the Provisions of the Act</b> <b>Maximum Fine: 50,000 Ksh and/or 6 Months Maximum Imprisonment</b>	
POINTS TO PROVE	ANCILLARY POWERS
Identity of the accused Date and location of offence This would appear to be a 'catch all' offence where breaches are not criminalised elsewhere	Potentially all ancillary powers could apply depending on the nature of the breach and whether damage was done
<b>Agencies:</b> KFS, ODPP, NPS	
<b>Evidence likely to include but not limited to:</b> Eyewitness evidence, possible expert evidence, exhibits officers, arresting officer, I.O. re: interviews, photographs, GPS coordinates if location is crucial to proof of the breach.	
CHARGE COUNT ONE	Failing to comply with <b>[insert provision]</b> contrary to s67(1) (a) of the Forest Conservation and Management Act No 34 of 2016.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> , failed to comply with <b>[insert the breach with specific reference to the provisions involved]</b> .

# MARINE AND FISHERIES CRIME IN KENYA



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# INTRODUCTION

Many crimes that occur in Kenya's lakes, rivers and other waterways can be prosecuted under the Wildlife Conservation Management Act (WCMA), 2013, as amended in 2019. This is not limited to endangered or critically endangered species and nor is it limited to protected areas.

The **Fisheries Development and Management Act** (FDMA) is also an important tool in the fight against illegal fishing and exploitation of Kenya's growing blue economy.

## Choosing the Charge

Certain species of tree and plants are endangered or critically endangered. The WCMA has been amended to include plant species under both Schedule 6 of the WCMA and CITES, and so s92 and s95 offences should always be considered first as the penalties are stronger. Where offences occur in mangroves or within forests, the Forest Conservation and Management Act of 2016 can be considered.

Prosecutors must look at all the options available and in particular, the ancillary orders may be particularly powerful. For example, where in addition to the capture or killing of endangered marine life, the accused is in breach of fisheries law such as the use of unauthorised fishing vessels or fishing without a license or using mesh nets of a size that is illegal, the selection of charges should utilise both sets of law.

This Guidance does not include every single offence under the FDMA; rather the offences have been extracted as being those that are either most common in the experience of law enforcement at the Kenyan coast, or are seen as areas that have the potential to develop into a problem such as the growing industry in aquaculture. The FDMA as a whole should always be referred to for additional offences where it appears there may be administrative or procedural offences committed. Immigration Act offences should also be considered and applied where relevant.

Only a robust and consistent application of available powers can render the commission of marine and fisheries crime an expensive exercise for those who might be tempted to destroy Kenya's marine heritage and damage its growing blue economy.

## SENTENCING FACTORS AND IMPACTS TO CONSIDER

**Note: Upon Conviction, consider the following factors in making submissions. The Prosecutor has a significant role to play in sentencing and should draw the courts attention to relevant factors.**

### Useful Definitions Under The Wildlife Conservation and Management Act, 2013

*The following have been extracted from the main Act. For more definitions, see the WCMA 2013.*

**Marine Park** means a protected marine area where no fishing, construction work or any disturbance is allowed unless with written permission of the Director-General;

**Marine Protected Area** means any park or reserve covering the area of intertidal or sub-tidal terrain, together with its overlying water and associated flora, fauna, historical and cultural features, which has been reserved by law, and includes any dry land found within the gazetted boundary;

**Marine Reserve** means a marine protected area where subsistence fishing is permitted;

**Trophy** includes any bone, claw, egg, feather, hair, hoof, skin, tooth, or tusk of any animal, and for any species of plant, any bark, branch, leaf, log, sap or extract and includes any other durable portion whatsoever of that animal or plant whether processed, added to or changed by the work of man or not, which is recognizable as such;

**Wildlife** means any wild and indigenous animal, plant or microorganism or parts thereof within its constituent habitat or ecosystem on land **or in water**, as well as species that have been introduced into or established in Kenya;

**Wildlife Conservation Area** means a tract of **land, lake or sea** that is protected by law for purposes of wildlife and biological diversity conservation and may include a national park, national reserve, game reserve or sanctuary;

**Wetlands** means areas of marsh, fen, peat land, or water, whether natural or artificial, permanent or temporary, with water is static or flowing, fresh, brackish, salt, including areas of marine water the depth of which does not exceed six meters at low tide;

**Weapon** means a tool, implement, firearm, ammunition or any item that may be used to injure or kill a wild animal for any reason;

**Threatened Ecosystem** means an ecosystem of high biodiversity value or habitat of endangered or endemic species that is under threat of degradation;

**Poaching** means illegal hunting, illegal capturing and illegal harvesting of **any** wildlife but does not include the control of species widely and commonly regarded as pests or vermin, as listed in a schedule of this

### Species Covered Under The Legislation

Under Schedule 6 of WCMA, many species relevant to marine crime are covered. CITES now has application under national law according to the amended sections 92 and s95 and s99 of the amended WCMA 2013 as well as Article 2 of the Constitution of Kenya. The following lists some of the species covered under WCMA but refer to the Act for the full list.

**Critically endangered species** includes: Hawksbill Turtle, Du Toit's Torrent Frog, The Signidia Tilapia, Lake Chala Tilapia, Jipe Tilapia, Victoria Tilapia, Rainbow Sheller, Lake Victoria Deepwater Catfish, Montane Dancing Jewel;

**Endangered species** includes: Coalfish Whale, Blue Whale, Green Turtle, The Magadi Tiliapia, The Giant Wrasse, Victoria Stonebasher And Kyoga Flameback;

**Threatened species** includes: Crevice Tortoise, Turkana Mud Turtle, Montane Toad;

**Vulnerable species** includes: Humpback Whale, Dugong, Sperm Whale, Spotted Neck Otter, Grey Nurse Shark, Bigeye Tuna, Whale Shark, Porcupine Ray, Oceanic Whitetip Shark, Great White Shark, Bowmouth Guitar Fish, Black-Botched Stingray, Giant Guitarfish and more;

**Protected species** includes: the Black Turtle, Loggerhead Turtle, Leatherback Turtle. Yellow Bellied Hinged Terrapin.

## USEFUL DEFINITIONS UNDER THE FISHERIES MANAGEMENT AND DEVELOPMENT ACT 2016

*The following have been extracted from the main Act. For more definitions, see the Fisheries Management and Development Act 2016 (FMDA).*

**Artisanal fisheries** small scale traditional fisheries that may be carried out for subsistence or commercial purposes in which the owner is directly involved in the day-to-day running of the enterprise and relatively small amounts of capital are used;

**Artisanal fishing vessel** any local fishing vessel, canoe or undecked vessel with a length overall of not more than ten meters, which is motorized or not motorized by an outboard or inboard engine not exceeding forty horsepower, or powered by sails or paddles, but does not include decked or undecked semi-industrial fishing vessels or vessels used for recreational fishing;

**Authorised officer** means a fisheries officer, a disciplines officer of the service and any person appointed by the Board under s18 of the Act;

**Dealing in fish** means collecting, transporting, storing, transshipping, buying, selling fish or fish products for the purposes of trade;

**Industrial fishing vessel** means a decked fishing vessel with an overall length of twenty meters or greater and with an inboard engine;

**Fish** means any marine or aquatic animal or plant, living or not and processed or not, and any of their parts and includes any shell, coral, reptile **and marine mammal**;

**Fish processing** means any process that adds value to or preserves fish and includes the cutting up, dismembering, cleaning, sorting, icing, freezing, drying, chilling, salting, gutting, smoking, canning or any other action taken to alter the shape, appearance or form of fish from that in which the fish is when first taken from its natural habitat.

**Fishing** means:

- (a) Searching for or taking of fish;
- (b) The attempted searching for or taking of fish;
- (c) Engaging in any other activity which can reasonably be expected to result in the locating or taking of fish;
- (d) Placing, searching for or recovering any fish aggregating device or associated equipment including radio beacons;
- (e) Any operation on Kenya fishery water or on the high seas in support of or in preparation for any activity described in paragraphs (a), (b), (c) or (d);

- (f) Use of an aircraft which is related to any activity described in paragraphs (a), (b), (c) or (d), except for flights in emergencies involving the health or safety of a crew member or the safety of a vessel, but does not include aquaculture or the transportation of fish;

**Kenya fishery waters** includes all maritime zones declared in the Maritime Zones Act, Cap. 250 internal waters, Lakes, riverine systems and any other waters including intertidal, inland and riverine over which Kenya exercises or claims jurisdiction;

**Master** means any person in command or in charge of apparently in command of the vessel, aircraft or vehicle but does not include a pilot on board a vessel solely for the purposes of navigation;

**Operator** means any person responsible for the operations of directs or controls a vessel including the owner, charterer and master of the vessel.

#### **Notes on Definitions and the use of WCMA 2013 (as amended)**

There is no definition of “endangered or threatened species” under the Fisheries Management and Development Act 2016. Accordingly refer to WCMA and CITES, the latter being expressly referenced under the amendments to WCMA in 2019.

A **marine mammal** is a warm-blooded species that gives birth to live young such as dolphins, whales, dugongs all of which can be found in Kenyan waters.

#### **Notes on Agencies**

With the introduction of the Kenya Coast Guard, there are now even more agencies involved in safeguarding Kenya’s waters. These include the Kenya Maritime Authority (mainly concerned with ensuring safe maritime passage), the Kenya Ports Authority, Kenya Wildlife Service (for marine national parks, reserves and other ‘protected areas’ under the WCMA), Kenya Forest Service (for mangroves and forest-protected areas that comprise bodies of water) and the Kenya Navy.

**Note that when the Navy are involved** in an arrest in Kenya waters, their evidence may be vital. In securing attendance of witnesses from the Navy, communications must be mindful of the chain of command in order to ensure trial attendance.

## OFFENCES RELATING TO FISHING GEAR UNDER FDMA



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**s42 Using a Prohibited Fishing Gear/Using a Prohibited Fishing Method**

**Industrial fishing – Maximum Fine: 5,000,000 Ksh and/or 3 Years  
Maximum Imprisonment**

**Artisanal Fishing – Maximum Fine: 100,000 Ksh and/or 3 Months  
Maximum Imprisonment**

POINTS TO PROVE	ANCILLARY POWERS
<p>Identity of the accused</p> <p>Date and location of offence</p> <p>Identify the prohibited method or fishing gear:</p> <p>(1) (a) unauthorised fishing gear</p> <p>(b) any unauthorised fish aggregating device</p> <p>(c) a trawl net or other net the mesh of which is less in stretched diagonal length than the prescribed mesh size</p> <p>(d) the method of pair trawling for fishing</p> <p>(e) monofilament net for fishing;</p> <p>(f) more than one net at a time for fishing with trawl net</p> <p>(g) attachments to any trawl net except as may be prescribed</p> <p>(h) a gill net where the mesh when stretched in diagonal length is less than 45 millimetres. This applies to nets that are drifting or set in any river or body of water forming part of the riverine system.</p> <p>(i) a seine net the mesh of which is less than forty-five millimetres in stretched diagonal length;</p> <p>(j) a beach seine net for fishing;</p> <p>(k) a seine net in any body forming part of the riverine system</p> <p>(l) firearms or other electrical shock devices for fishing including stunning, disabling or killing fish or in any way rendering fish to be caught easily</p> <p>(m) such other gear as may be prescribed or prohibited by regulations established under section 42 of the Act</p> <p>(2) (a) On industrial fishing, cannot use any net or mesh which is</p> <p>(a) less than 60 millimetres in stretched diagonal length for the meshes forming the cod-end of the net for demersal trawl nets;</p>	<p>s186 Forfeiture, upon conviction, anything used in connection with the commission of the offence. This includes, the vessel itself, fish or fish product, storage facility and, where fish has been sold under s166, the proceeds of sale</p> <p>s 187 Any vessel or other property or security forfeited under this Act becomes the property of the State and can be retained, leased or sold by the State</p> <p>s 188 Deprivation of monetary benefits, upon conviction, the court can inquire into pecuniary benefit acquired or saved by the accused (summarily and without pleadings) and, upon reliable expert evidence, impose a fine equal to the court's finding of that pecuniary benefit, in addition to any other maximum penalty imposed</p> <p>s 189 Costs incurred by State, upon conviction, the court can order the operator and charterer of a fishing vessel to jointly and severally bear the cost or expenditure incurred in connection with prosecution, seizure of a fishing vessel (including cost of pursuit of the vehicle) and repatriation of the master or crew of any vessel seized</p>

<ul style="list-style-type: none"> <li>(b) less than 45 millimetres in stretched diagonal length for meshes in the cod end for catching shell fish</li> <li>(c) less than 45 millimetres in stretched diagonal length for seine nets</li> <li>(d) where trawl nets are use, where the sides of the net are LESS than the mesh of the cod-end</li> </ul> <p>(3) For industrial fishing, using bottom trawl methods in coastal waters of less than 15 metres in depth.</p> <p>(4) For either industrial or artisanal fishing, no using any net across any river from bank to bank so as to form a barrier</p> <p>(5) using or carrying with intention any explosive, shock device, poison or noxious substance</p>	<p>s 191 Upon conviction, court can order restitution for any loss or damage caused by the accused, in addition to any fine. This includes the cost of detection, investigation and prosecution of the offence as well as detention and storage of any item</p> <p>s 195. Banning order 5 years ban from boarding or remaining on board any vessel within Kenyan fishery waters</p>
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**Agencies:** KWS, Kenya Fisheries Service, NPS, ODPP, NEMA, (particularly in relation to the damage caused by monofilament nets), ARA

***Evidence likely to include but not limited to:***

Certificate evidence (s172) and presumptions regarding admissibility.

Certificate as to location of evidence (s175) and GPS coordinates also recommended.

Electronic location evidence re: mobile transceiver unit (s176).

Photographic evidence and presumptions on admissibility regarding time and place photo was taken (s177).

Expert evidence may be required e.g. to establish use of a poison or noxious substance. **s194 – each day of a continuing offence shall be considered a separate offence – relevant for drafting of charges.**

s42 (6) – where explosive, shock device, poison or noxious substance is found on a fishing vessel, it shall be **presumed that its purpose was to fish illegally** under s42.

CHARGE COUNT ONE	Using of prohibited fishing gears/using a prohibited fishing method <b>[delete as appropriate]</b> in contravention of s42 (insert relevant sub-section) as read with s42 (7) of the Fisheries Management and Development Act (35 of 2016).
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> , used a prohibited fishing gear or used a prohibited fishing method <b>[delete as appropriate]</b> namely <b>[insert particulars or description of the fishing gear or method]</b> .

**s43 (1) Causing Damage, Destruction to and Interference with Fishing Gear, Vessels or Persons**

**Maximum Fine: 500,000 Ksh and/or 1 Year Maximum Imprisonment**

**When a Human Life is Lost: Up To 10 Years Imprisonment and/or  
Up to 1,000,000 Ksh**

**Compensation Under Civil Law Also Applicable – Claim Within 3 Years**

**When There Is Conflict Between Fishermen. Also Consider Penal Code Offences of  
Malicious Damage, Assault, Reckless Endangerment.**

POINTS TO PROVE	ANCILLARY POWERS
Identity of the accused	s186 Forfeiture, upon conviction, anything used in the connection with the commission of the offence. This includes, the vessel itself, fish or fish product, storage facility and, where fish has been sold under s166, the proceeds of sale
Date and location of offence	
That the accused was using a vessel	s187 Any vessel or other property or security forfeited under this Act becomes the property of the State and can be retained, leased or sold by the State
Whilst doing so, he destroyed, damaged or interfered with fishing gear or a vessel	s188 Deprivation of monetary benefits, upon conviction, the court can inquire into pecuniary benefit acquired or saved by the accused (summarily and without pleadings) and, upon reliable expert evidence, impose a fine equal to the court's finding of that pecuniary benefit, in addition to any other maximum penalty imposed
That fishing gear or vessel did not belong to the accused or was not used by him or in any way associated with his vessel	s 189 Costs incurred by State, upon conviction, the court can order the operator and charterer of a fishing vessel to jointly and severally bear the cost or expenditure incurred in connection with prosecution, seizure of a fishing vessel (including cost of pursuit of the vehicle) and repatriation of the master or crew of any vessel seized
Ownership of the damaged vessel or gear	s191 Upon conviction, court can order restitution for any loss or damage caused by the accused, in addition to any fine. This includes the cost of detection, investigation and prosecution of the offence as well as detention and storage of any item
The accused caused that damage wilfully or negligently <b>or</b>	s 195 Banning order 5 years ban from boarding or remaining on board any vessel within Kenyan fishery waters
He caused injury to another person who was in another vessel or in the Kenya fisheries waters	

**Agencies:** KWS, Kenya Fisheries Service, NPS, ODPP, NEMA, ARA, Kenya Coastguard, Kenya Maritime Authority (e.g. for identification of the vessel)

**Evidence likely to include but not limited to:**

Certificate evidence (s172) and presumptions regarding admissibility.

Certificate as to location of evidence (s175) and GPS coordinates also recommended.

Electronic location evidence re: mobile transceiver unit (s176).

Photographic evidence and presumptions on admissibility regarding time and place photo was taken (s177).

Expert evidence may be required e.g. to establish use of a poison or noxious substance. s194 ***each day of a continuing offence shall be considered a separate offence*** – relevant for drafting of charges.

CHARGE COUNT ONE	Causing damage, destruction to and interference with fishing gear/vessel <b>[delete as appropriate]</b> contrary to s43 (1) of the Fisheries Management and Development Act (35 of 2016) as read with s43 (4).
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> , wilfully and negligently caused damage, destruction to and interference with fishing gear and/or vessel belonging to another.

CHARGE COUNT ONE	Causing injury to another whilst in Kenya fishery waters, contrary to s43 (1) of the Fisheries Management and Development Act (35 of 2016) as read with s43 (4) <i>(and s43 (5) where death occurs)</i> .
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> , wilfully and negligently caused injury/death <b>[delete as appropriate]</b> to another in Kenya fishery waters.

**s44 Leaving or Abandoning Objects in the Sea**

**Industrial Fishing – Maximum Fine: 500,000 Ksh and/or 3 Years  
Maximum Imprisonment**

**Artisanal Fishing – Maximum Fine: 50,000 Ksh and/or 3 Months  
Maximum Imprisonment**

**A Common Scenario Occurs Whereupon Upon Being Sighted,  
Fishermen Dump Their Gear**

POINTS TO PROVE	ANCILLARY POWERS
Identity of the accused	s186 Forfeiture, upon conviction, anything used in the connection with the commission of the offence.
Date and location of offence	This includes, the vessel itself, fish or fish product, storage facility and, where fish has been sold under s166, the proceeds of sale
Identify the objects left in the sea	s187 Any vessel or other property or security forfeited under this Act becomes the property of the State and can be retained, leased or sold by the State
Those objects were capable of adversely affecting fish or marine organisms by enmeshing, trapping, or catching fish OR	s188 Deprivation of monetary benefits Upon conviction, the court can inquire into pecuniary benefit acquired or saved by the accused (summarily and without pleadings) and, upon reliable expert evidence, impose a fine equal to the court's finding of that pecuniary benefit, in addition to any other maximum penalty imposed
Those objects were capable of impeding harvest operations or damaging harvest gear OR	s189 Costs incurred by State, upon conviction, the court can order the operator and charterer of a fishing vessel to jointly and severally bear the cost or expenditure incurred in connection with prosecution, seizure of a fishing vessel (including cost of pursuit of the vehicle) and repatriation of the master or crew of any vessel seized
Those objects were capable of endangering vessels	s191 Upon conviction, court can order restitution for any loss or damage caused by the accused, in addition to any fine. This includes the cost of detection, investigation and prosecution of the offence as well as detention and storage of any item
The accused left or abandoned those objects	s195 Banning order 5 years ban from boarding or remaining on board any vessel within Kenyan fishery waters
There were no circumstances that rendered it necessary to so do	

**Agencies:** KWS, Kenya Fisheries Service, NPS, ODPP, NEMA, Kenya Coastguard, Navy, and where the dumping causes danger to other maritime users, KMA may be important. If Kenya Navy are witnesses, bear in mind chain of command when it comes to securing court attendance.

***Evidence likely to include but not limited to:***

It is necessary to evidentially link the object to the accused e.g. any identifying marks, eye witness statements on dumping, photographs on surveillance. Items that are not marked would reveal a breach of fisheries general regulations 1991 revised in 2012 (s44 and s60). Seek advice from Kenya Fisheries Service.

Certificate evidence (s172) and presumptions regarding admissibility.

Certificate as to location of evidence (s175).

Electronic location evidence re: mobile transceiver unit (s176).

Photographic evidence and presumptions on admissibility regarding time and place photo was taken (s177).

CHARGE COUNT ONE	Leaving or abandoning objects in the sea in contravention of s44 (1) as read with s44 (2) of the Fisheries Management and Development Act (35 of 2016).
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> , left or abandoned objects in the sea namely <b>[insert the nature of the object or objects]</b> .

<b>s110 Failing to Mark or Identify a Fish Aggregating Device</b> <b>Maximum Fine: 100,000 Ksh and/or 10 Years Maximum Imprisonment</b>	
POINTS TO PROVE	ANCILLARY POWERS
<p>Identity of the accused</p> <p>Date and location</p> <p>That the accused was operating a fishing vessel</p> <p>That the accused had deployed a fish aggregating device</p> <p>That the accused failed to mark/identify the device in a clear manner namely that the device did not have the name of the owner <b>and</b> the name of the vessel from which it was deployed <b>or</b></p> <p>The device was not equipped with a radar reflector whereby the lights would be visible from a distance of one nautical mile</p>	<p>s186 Forfeiture, upon conviction, anything used in the connection with the commission of the offence. This includes equipment used in the offence</p> <p>s187 Any vessel or other property or security forfeited under this Act becomes the property of the State and can be retained, leased or sold by the State</p> <p>s188 Deprivation of monetary benefits, upon conviction, the court can inquire into pecuniary benefit acquired or saved by the accused (summarily and without pleadings) and, upon reliable expert evidence, impose a fine equal to the court's finding of that pecuniary benefit, in addition to any other maximum penalty imposed</p> <p>s191 Upon conviction, court can order restitution for any loss or damage caused by the accused, in addition to any fine. This includes the cost of detection, investigation and prosecution of the offence as well as detention and storage of any item</p>
<b>Agencies:</b> KWS, Kenya Fisheries Service, NPS, ODPP, Kenya Coastguard, Kenya Navy	
<b>Evidence likely to include but not limited to:</b> <p>Exhibit the device.</p> <p>If the device IS marked but the reflector is inadequate, evidence from an experience fisheries officer or coastguard officer or naval officer will be required to confirm that it would not be visible from one nautical mile. If Navy, remember the chain of command when communicating about witness requirements and attendance at court.</p> <p>Certificate evidence (s172) and presumptions regarding admissibility.</p> <p>Certificate as to location of evidence (s175) and GPS coordinates recommended.</p> <p>Photographic evidence and presumptions on admissibility regarding time and place photo was taken (s177).</p> <p><b>s194 – each day of a continuing offence shall be considered a separate offence</b> – relevant for drafting of charges.</p>	

CHARGE COUNT ONE	Failing to mark a fish aggregating device contrary to s110 (1) of the Fisheries Management and Development Act (35 of 2016).
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> , while being the operator/owner of a vessel, deployed a fish aggregating device, that was not marked with both the name of the owner and the name of the vessel from which it was deployed.

CHARGE COUNT ONE	Deploying a fish aggregating device without the proper radar reflectors, contrary to s110 (1) of the Fisheries Management and Development Act (35 of 2016).
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> , while being the operator of a vessel, deployed a fish aggregating device that was not equipped with a radar reflector that would enable it to be visible from a distance of one nautical mile

## OFFENCES RELATING TO ENDANGERED SPECIES AND SEA MAMMALS UNDER WCMA



# LIST OF CRITICALLY ENDANGERED AND ENDANGERED SPECIES

## SIXTH SCHEDULE (s47) of the WILDLIFE CONSERVATION MANAGEMENT ACT 2013

NATIONALLY LISTED CRITICALLY ENDANGERED, VULNERABLE, NEARLY THREATENED  
AND PROTECTED SPECIES (SEE ALSO CITES APPENDIX 1 AT [WWW.CITES.ORG](http://WWW.CITES.ORG))

### (A) MAMMALS

Category and Species Name	Common Name
<b>CRITICALLY ENDANGERED</b>	
Cephalophus adersi	Aders' Duiker
Diceros bicornis	Black Rhinoceros
Beatragus hunter	Hirola
Procolobus rufomitratus	Eastern Red Colobus
Cercocebus galeritus	Tana Crested Mangabey
Hippotragus equines	Roan Antelope
Hippotragus niger	Sable Antelope
<b>ENDANGERED</b>	
Ceratotherium simum simum	White Rhino
Balaenoptera borealis	Coalfish Whale
Balaenoptere musculus	Blue Whale

### (B) REPTILES

Category and Species Name	Common Name
<b>CRITICALLY ENDANGERED</b>	
Eretmochelys imbricate	Hawksbill Turtle
Petropedetes dutoiti	Du Toit's Torrent Frog
<b>ENDANGERED</b>	
Chelonia mydas	Green Turtle
Lepidochelys olivacea	Olive Ridley
Python sebae	Rock Python
Afraxalus sylvaticus	Shimba Hills Banana Frog
Hyperolius rubrovermiculatus	Shimba Hills Reed Frog
Afraxalus sylvaticus	Forest Frog
Hyperolius rubrovermiculatus	Treefrog
Phrynobatrachus irangi	Mount Kenya Frog

### (C) FISH

Category and Species Name	Common Name
<b>CRITICALLY ENDANGERED</b>	
Oreochromis esculentus	Singidia Tilapia
Oreochromis hunter	Lake Chala Tilapia
Oreochromis jipe	Jipe Tilapia
Oreochromis variabilis	Victoria Tilapia
Ptyochromis sp.nov.	Rainbow Sheller
Xenoclarias eupogon	Lake Victoria Deepwater Catfish
Playcypha amboniensis	Montane Dancing Jewel
<b>ENDANGERED</b>	
Alcolapia alcalicus	Magadi Tilapia
Cheilinus undulates	Giant Wrasse
Marcusenius victoria	Victoria Stonebasher
Xystichromis nuchisquamulatus	Kyoga Flameback

**Note: Use scientific species name for offences concerning fish to avoid, for example, all Tilapia in Lake Victoria being classified as critically endangered.**

## s92 Offences Regarding Critically Endangered or Endangered Species or CITES Appendix 1

**Killing/Injuring or Attempts to Do So – No Option of Fine and Minimum of 5 Years**

**Dealing in Trophies – No Option of Fine and Minimum 7 Years**

**Dealing in Live Species – No Option of Fine and Minimum 3 Years**

**Possession – Minimum 3,000,000 Ksh and/or Minimum 5 Years**

**Manufacture of Trophies – Minimum 10,000,000 Ksh and/or  
Up to Life Imprisonment**

POINTS TO PROVE	ANCILLARY POWERS Section 2 page 43
<p>Date and Location</p> <p>That the species falls under CITES Appendix 1 or Schedule 6 of the WCMA 2013.</p> <p>The accused killed, injured, tortured or molested that species OR attempted to do any of the above <b>or</b></p> <p>The accused was 'dealing' in a trophy of that species <b>or</b></p> <p>The accused was 'dealing' in that live species <b>or</b></p> <p>The accused was in possession of a live species or a trophy of that kind <b>or</b></p> <p>The accused was manufacturing item from a trophy of such a species <b>and</b></p> <p>In all of the above, the accused acted without any permit or authorisation</p>	<p>s110 Seizure, confiscation, inspection, productions</p> <p>s105 Forfeiture</p> <p>s108 Restraint order or other redress (Environment and Land Court)</p> <p><b>Key definitions:</b></p> <p><b>Trophy:</b> bone claw, egg, feather, hair, hoof, skin, tooth, tusk of <b>any</b> animal <b>and</b> any bark, branch, leaf, sip or extract of <b>any</b> plant species, or any other durable portion, whether processed, added to or changed which is recognisable as such</p> <p><b>Dealing:</b> applies to trophies AND live species means 'to sell, purchase, distribute, barter, give, receive, supply, cut, carve polish, preserve, clean, mount prepare or transportation or conveying or to <b>be in possession with intent to supply</b> to another or to an act in preparation of any of the above</p>
<p><b>Agencies:</b> KWS, NPS, Fisheries, ODPP, FRC, ARA, Judiciary, NIS. Mutual Legal Assistance may be necessary – ODPP and Kenya Central Authority</p>	
<p><b>Evidence likely to include but not limited to:</b></p> <p>Eyewitness evidence, arresting officer, I.O. photographs and a national museum report or government analyst report or expert report on the nature of the species or trophy.</p>	

See Annex C on the issue of expert reports. It is not a requirement that only a government analyst can give expert evidence. Any expert may do so but must cite his qualifications, experience, methodology and basis for conclusions. Further he must satisfy the court as to the integrity of the exhibit and continuity in relation to receipt and return to and from the I.O.

**On possession:** It is necessary to prove knowledge of possession of an article, not necessarily the nature of the article but the ODPP should advise on the legal aspect of this. Knowledge can be implied if not in physical possession but issues such as the degree of control over the item are important. E.g. If a suspect is caught in possession of a bag, he is deemed to be in possession of the contents of that bag. If an item is found in his car, he is deemed to be in possession of any item found in that car. Where you have more than one suspect in a car, evidence such as exactly where the item was found in the car will be vital – who would have had access? Was it in the boot? The passenger or driver’s side foot-well? The driver’s door? The glove compartments? Fingerprint evidence may be necessary, and continuity of exhibit handling will be vital.

**On possession with intent to supply to another** – Quantity will be relevant as well as the packaging and any evidence of money transfers or mobile communications e.g. on text or Whatsapp.

### *Dealing in a trophy*

CHARGE COUNT ONE	Dealing in a wildlife trophy of a specified critically endangered/endangered species <b>[delete as appropriate]</b> , without a permit or other lawful exemption, contrary to s92 (2) of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> was dealing in a wildlife trophy namely <b>[identify the nature of the trophy and identify the nature of the conduct that amounts to ‘dealing’ under the definition]</b> , that being a trophy of a species that is critically endangered/endangered <b>[delete as appropriate]</b> under Schedule 6 of this Act/under Appendix 1 of the Convention of International Trade of Endangered Species of Wild Fauna and Flora <b>[delete as appropriate]</b> and at the time of doing so, did not have a permit or other lawful exemption granted under this Act.

### *Killing/hunting/torturing/molesting*

CHARGE COUNT ONE	Killing/injuring/torturing or molesting (or “Attempting to”) <b>[delete as appropriate]</b> a specified critically endangered/endangered <b>[delete as appropriate]</b> wildlife species without a permit or other lawful exemption, contrary to s92 (1) of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> killed/injured/tortured/molested <b>[delete as appropriate]</b> a wildlife species namely <b>[identify number and type of species]</b> , that being a species that is critically endangered/endangered <b>[delete as appropriate]</b> under Schedule 6 of this Act/under Appendix 1 of the Convention of International Trade of Endangered Species of Wild Fauna and Flora <b>[delete as appropriate]</b> .

### Dealing in a live species

CHARGE COUNT ONE	Dealing in a specified critically endangered/endangered <b>[delete as appropriate]</b> live wildlife species, without a permit or other lawful exemption, contrary to s92 (3) of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> was dealing in a live wildlife species namely <b>[identify the quantity and type of the species and identify the nature of the conduct that amounts to 'dealing' under the definition]</b> , that being a species that is critically endangered/endangered <b>[delete as appropriate]</b> under Schedule 6 of this Act/under Appendix 1 of the Convention of International Trade of Endangered Species of Wild Fauna and Flora <b>[delete as appropriate]</b> and at the time of doing so, did not have a permit or other lawful exemption granted under this Act.

### Possession of a Live Species or Trophy

CHARGE COUNT ONE	Being in possession of a specified critically endangered/endangered <b>[delete as appropriate]</b> live wildlife species/wildlife trophy <b>[delete as appropriate]</b> without a permit or other lawful exemption, contrary to s92 (4) of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> was found in possession of a live wildlife species/trophy <b>[delete as appropriate]</b> namely <b>[identify the quantity and type of the species/trophy]</b> , that being a species that is critically endangered/endangered <b>[delete as appropriate]</b> under Schedule 6 of this Act/under Appendix 1 of the Convention of International Trade of Endangered Species of Wild Fauna and Flora <b>[delete as appropriate]</b> and at the time of doing so, did not have a permit or other lawful exemption granted under this Act.

### Manufacture

CHARGE COUNT ONE	Manufacturing an item from a specified critically endangered/endangered wildlife trophy <b>[delete as appropriate]</b> , without a permit or other lawful exemption, contrary to s92 (5) of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> manufactured an item namely <b>[insert nature of the item]</b> from a wildlife trophy namely <b>[identify the nature of the trophy]</b> , that being a trophy of a wildlife species that is critically endangered/endangered <b>[delete as appropriate]</b> under Schedule 6 of this Act/under Appendix 1 of the Convention of International Trade of Endangered Species of Wild Fauna and Flora <b>[delete as appropriate]</b> and at the time of doing so, did not have a permit or other lawful exemption granted under this Act.

**s95 Offences in Relation to Wildlife Species and Trophies That Do Not Fall Under CITES Appendix 1 or Schedule 6 of the WCMA**

**Minimum Fine: 1,000,000 Ksh and/or 12 Months Minimum Imprisonment**

**e.g. Sea Shells, Possession of Crabs, Fish, etc.**

POINTS TO PROVE	ANCILLARY POWERS Section 2 page 43
<p>Date and Location</p> <p>The accused killed, injured, tortured or molested that species OR attempted to do any of the above <b>or</b></p> <p>The accused was 'dealing' in a trophy of that species <b>or</b></p> <p>The accused was 'dealing' in that live species <b>or</b></p> <p>The accused was in possession of a live species or a trophy of that kind <b>or</b></p> <p>The accused was manufacturing item from a trophy of such a species <b>and</b></p> <p>In all of the above, the accused acted without any permit or authorisation</p>	<p>s110 Seizure, confiscation, inspection, productions</p> <p>s105 Forfeiture</p> <p>s108 Restraint order or other redress [Environment and Land Court]</p> <p><b>Key definitions:</b></p> <p><b>Trophy:</b> bone claw, egg, feather, hair, hoof, skin, tooth, tusk of <b>any</b> animal <b>and</b> any bark, branch, leaf, sip or extract of <b>any</b> plant species, or any other durable portion, whether processed, added to or changed which is recognisable as such</p> <p><b>Dealing:</b> applies to trophies <b>and</b> live species means 'to sell, purchase, distribute, barter, give, receive, supply, cut, carve polish, preserve, clean, mount prepare or transportation or conveying or to <b>be in possession with intent to supply</b> to another or to an act in preparation of any of the above</p>

**Agencies:** KWS, NPS, ODPP, FRC, ARA, Judiciary, NIS, Kenya Fisheries Service

***Evidence likely to include but not limited to:***

Eyewitness evidence, arresting officer, I.O. photographs and a national museum report or government analyst report or expert report on the nature of the trophy.

See Annex C on the issue of expert reports. It is not a requirement that only a government analyst can give expert evidence. Any expert may do so but must cite his qualifications, experience, methodology and basis for conclusions. Further he must satisfy the court as to the integrity of the exhibit and continuity in relation to receipt and return to and from the I.O.

**On possession and possession with intent to supply – see notes under s92 above**

### *Killing/hunting/torturing/molesting*

CHARGE COUNT ONE	Killing/injuring/torturing or molesting (or "Attempting to") <b>[delete as appropriate]</b> a wildlife species without a permit or other lawful exemption, contrary to s95 (a) of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> killed/injured/tortured/molested/attempted to kill/injure/torture/molest <b>[delete as appropriate]</b> a wildlife species namely <b>[identify number and type of species]</b> .

### *Dealing in a trophy*

CHARGE COUNT ONE	Dealing in a wildlife trophy without a permit or other lawful exemption, contrary to s95 (b) of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> was dealing in a wildlife trophy namely <b>[identify the nature of the trophy and identify the nature of the conduct that amounts to 'dealing' under the definition]</b> , and at the time of doing so, did not have a permit or other lawful exemption granted under this Act.

### *Dealing in a live species*

CHARGE COUNT ONE	Dealing in a live wildlife species, without a permit or other lawful exemption, contrary to s95 (c) of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> was dealing in a live wildlife species namely <b>[identify the quantity and type of the species and identify the nature of the conduct that amounts to 'dealing' under the definition]</b> , without a permit or other lawful exemption granted under this Act.

### *Possession of a live species or a trophy*

CHARGE COUNT ONE	Being in possession of a live wildlife species/wildlife trophy <b>[delete as appropriate]</b> without a permit or other lawful exemption, contrary to s95 (d) of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> was found in possession of a live wildlife species/wildlife trophy <b>[delete as appropriate]</b> namely <b>[identify the quantity and type of the species/trophy]</b> , without a permit or other lawful exemption granted under this Act.

### *Manufacture*

CHARGE COUNT ONE	Manufacturing an item from a wildlife trophy, without a permit or other lawful exemption, contrary to s95 (e) of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> manufactured an item namely <b>[identify the item]</b> from a wildlife trophy namely <b>[identify the nature of the trophy]</b> without a permit or other lawful exemption granted under this Act.

## OFFENCE UNDER THE FISHERIES DEVELOPMENT AND MANAGEMENT ACT 2016

### *Endangered or threatened fish*

<p><b>s45 (3) Offences in Relation to Endangered or Threatened Fish</b></p> <p><b>Industrial Fishing - Maximum Fine: 250,000 Ksh and/or 3 Years Maximum Imprisonment</b></p> <p><b>Artisanal Fishing - Maximum Fine: 50,000 Ksh OR 6 Months Maximum Imprisonment</b></p> <p><b>USE WCMA – s95 and s92 as amended - these would be of equal application and calls for stronger penalties</b></p>	
POINTS TO PROVE	ANCILLARY POWERS
<p>Identity of the accused</p> <p>Date and location of offence</p> <p>Identify the species of fish whether alive or dead</p> <p>The accused persons engaged in fishing for, catching, possessing, transporting, buying or selling any species of that fish</p> <p>Confirmation that species of fish is 'endangered or threatened' under national law and/or international convention to which Kenya is signatory (see Constitution Article 2 (6)). i.e. CITES appendices are applicable under the Constitution</p> <p>Absence of a permit or lawful authorisation e.g. a CITES permit</p> <p><b>Also charge under WCMA s92 or s95 that can apply to live or dead wildlife species</b></p>	<p>s186 Forfeiture, upon conviction, anything used in the connection with the commission of the offence. This includes, the vessel itself, fish or fish product, storage facility and, where fish has been sold under s166, the proceeds of sale</p> <p>s187 Any vessel or other property or security forfeited under this Act becomes the property of the State and can be retained, leased or sold by the State</p> <p>s188 Deprivation of monetary benefits, upon conviction, the court can inquire into pecuniary benefit acquired or saved by the accused (summarily and without pleadings) and, upon reliable expert evidence, impose a fine equal to the court's finding of that pecuniary benefit, in addition to any other maximum penalty imposed</p> <p>s189 Costs incurred by State, upon conviction, the court can order the operator and charterer of a fishing vessel to jointly and severally bear the cost or expenditure incurred in connection with prosecution, seizure of a fishing vessel (including cost of pursuit of the vehicle) and repatriation of the master or crew of any vessel seized</p> <p>s191 Upon conviction, court can order restitution for any loss or damage caused by the accused, in addition to any fine. This includes the cost of detection, investigation and prosecution of the offence as well as detention and storage of any item</p> <p>s195 Banning order 5 years ban from boarding or remaining on board any vessel within Kenyan fishery waters</p>

**Agencies:** KWS, Kenya Fisheries Service, NPS, ODPP, Kenya Marine Fisheries Research Institute as they can work together with NMK

***Evidence likely to include but not limited to:***

Expert evidence to confirm the species of fish in question or to give evidence re: fishing gear that may be relevant to that particular type of fish or fishing.

Eye witness testimony.

Certificate evidence (s172) and presumptions regarding admissibility.

Certificate as to location of evidence (e.g. the vessel) (s175) and GPS coordinates also recommended.

Electronic location evidence re: mobile transceiver unit (s176).

Photographic evidence and presumptions on admissibility regarding time and place photo was taken (s177).

s194 – **each day of a continuing offence shall be considered a separate offence** – relevant for drafting of charges.

CHARGE COUNT ONE	Fishing, catching, possessing, transporting, processing, buying or selling <b>[delete as appropriate]</b> of an endangered species of fish contrary to s45 (2) as read with s45 (3) of the Fisheries Management and Development Act (35 of 2016).
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> , fished/ caught/ possessed/ transported/ processed/ bought, sold <b>[delete as appropriate]</b> an endangered or threatened species fish namely <b>[identify the species]</b> .

**s46 Fishing for Marine Mammals/Failing to Release A Marine Mammal**

**Maximum fine: 500,000 Ksh and/or 3 Years Maximum Imprisonment**

**If the Mammal Appears Under Schedule 6 of the WCMA or Under CITES Appendix 1  
Charge Under WCMA s92 (1) as Amended in 2019**

POINTS TO PROVE	ANCILLARY POWERS
<p>Identity of the accused</p> <p>Date and location of offence i.e. within Kenya fishery waters</p> <p>Identify the species of marine mammal</p> <p>That the accused either fished for that marine mammal <b>or</b></p> <p>Used a Kenyan port for the purposes of equipping or supplying a vessel <b>and</b></p> <p>That vessel was intended to be used for marine mammal fishing <b>or</b></p> <p>Having caught a marine mammal, then failed to release it immediately</p>	<p>s186 Forfeiture, upon conviction, anything used in the connection with the commission of the offence. This includes, the vessel itself, fish or fish product, storage facility and, where fish has been sold under s166, the proceeds of sale</p> <p>s187 Any vessel or other property or security forfeited under this Act becomes the property of the State and can be retained, leased or sold by the State</p> <p>s188 Deprivation of monetary benefits, upon conviction, the court can inquire into pecuniary benefit acquired or saved by the accused (summarily and without pleadings) and, upon reliable expert evidence, impose a fine equal to the court's finding of that pecuniary benefit, in addition to any other maximum penalty imposed</p> <p>s189 Costs incurred by State, upon conviction, the court can order the operator and charterer of a fishing vessel to jointly and severally bear the cost or expenditure incurred in connection with prosecution, seizure of a fishing vessel (including cost of pursuit of the vehicle) and repatriation of the master or crew of any vessel seized</p> <p>s191 Upon conviction, court can order restitution for any loss or damage caused by the accused, in addition to any fine. This includes the cost of detection, investigation and prosecution of the offence as well as detention and storage of any item</p> <p>s195 Banning order 5 years ban from boarding or remaining on board any vessel within Kenyan fishery waters</p>

**Agencies:** KWS, Kenya Fisheries Service, NPS, ODPP, Kenya Marine Fisheries Research Institute as they can work together with NMK

***Evidence likely to include but not limited to:***

Forensic/expert evidence regarding the species of mammal.

Evidence from port authorities as to nature of vessel and possibly experts to establish circumstantial evidence that the type of vessel or equipment on board was for use of sea mammal fishing e.g. whale hunting.

Certificate evidence (s172) and presumptions regarding admissibility.

Certificate as to location of evidence (s175) and GPS coordinates recommended.

Electronic location evidence re: mobile transceiver unit (s176).

Photographic evidence and presumptions on admissibility regarding time and place photo was taken (s177).

s194 – **each day of a continuing offence shall be considered a separate offence** – relevant for drafting of charges.

CHARGE COUNT ONE	Fishing for marine mammals' contrary to s46 (1) or Failing to release a marine mammal contrary to s46 (2) <b>[delete as appropriate]</b> of the Fisheries Management and Development Act (35 of 2016).
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> , fished for marine mammals namely <b>[identify species]</b> ; <b>or</b> Having caught a marine mammal namely <b>[identify the species]</b> , failed thereafter to immediately release that marine mammal.

# OFFENCES RELATING TO IMPORT/EXPORT OF FISH/FISH PRODUCTS



# OFFENCES UNDER THE WILDLIFE CONSERVATION AND MANAGEMENT ACT 2013 AS AMENDED

*Import/export offences under WCMA*

<p><b>s99 Illegal Import/Export/Introduction of a Wildlife Species or Wildlife Product</b></p> <p><b>If Critically Endangered/Endangered Under Schedule 6 or CITES – Minimum 100,000,000 Ksh and/or Minimum 20 Years Imprisonment</b></p> <p><b>For All Other Species Or Trophies – Minimum 20,000,000 Ksh and/or Minimum 10 Years Imprisonment</b></p> <p><b>See s103 for Corporate Liability under the WCMA Section of this Guide</b></p>	
POINTS TO PROVE	ANCILLARY POWERS
<p>Date and Location</p> <p>Identify the wildlife specimen or product in question</p> <p>“Product” is defined under Black’s legal dictionary as something that is at a finished stage e.g. carved ivory</p> <p>The absence of a permit allowing any of the activities below <b>and</b></p> <p><b>Under:</b></p> <p>s99 (1) is that the accused knowingly imported, exported or re-exported a <b>wildlife specimen</b> or its product. “Specimen” is defined as a portion or quantity of wildlife material for use in testing, examination, education, study or research</p> <p><b>Offences under s99 (2)</b></p> <p>The accused knowingly</p> <p>a) Imported/ introduced that <b>species</b> into or out of Kenya <b>or</b> Exported or Re-Exported <b>or</b></p> <p>b) Took that <b>species</b> within Kenya OR upon Kenya’s territorial waters <b>or</b></p> <p>c) Took that <b>species</b> on to the high seas <b>or</b></p> <p>d) Was in possession of or was selling/delivering/ carrying/ transporting or shipping by any means any <b>species</b> that had been carried on high seas or within Kenya’s territorial waters <b>or</b></p> <p>e) Had Delivered/received, carried transported or shipped that <b>species</b> within Kenya <b>and</b></p> <p>Was doing so for commercial purposes <b>or</b></p>	<p><b>For the purposes of s99 (2), ‘species’ applies to all ‘wildlife’ which includes, all animals and plants and even micro-organisms as defined under the definition of ‘wildlife’</b></p> <p>s105 Forfeiture</p> <p>s108 Restraint order or other redress [Environment and Land Court] e.g. an injunction</p> <p>s110 Seizure, confiscation, inspection, production</p>

(f) Was selling or offering that **species** for sale in a commercial transaction within or outside Kenya **or**

(h) The Accused was acting in violation of the rules and regulations that govern that particular species

**Agencies:** KWS, Kenya Fisheries Service, NPS, ODPP, INTERPOL, Immigration Services, MFA and Kenya Maritime Authority who can advise on International Maritime Organisation Regulations. Also, KRA, KWS, Cybercrime unit of CID (for offers of sale overseas via internet), AGO, Registrar of Companies, ARA

***Evidence likely to include but not limited to:***

Eyewitness evidence, arresting officer, I.O, expert witness as to the nature of the item.

Evidence from KRA/Immigration regarding the rules/regulations and nature of any breach and/or manner of importation/exportation and absence or alteration or fraud relating to any documentation governing the import or export. Re: the commercial nature under sub-sections e) and f), evidence of bank transfers/MPESA/mobile phone downloads/SMS may be vital.

***Import/export***

CHARGE COUNT ONE	Importing/exporting <b>[delete as appropriate]</b> a wildlife species without a permit contrary to s99 (2) (a) as read with s99 (3) (a)/s99 (3) (b) <b>[delete as appropriate depending on status of species]</b> of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> was engaged in the importing/exporting <b>[delete as appropriate]</b> of a wildlife species namely <b>[identify nature and quantity of species involved]</b> without a permit issued by the Kenya Wildlife Service.

***Taking a species within Kenya's territorial waters***

CHARGE COUNT ONE	Taking a wildlife species within Kenya or Kenya's territorial waters <b>[delete as appropriate] without a permit</b> , contrary to s99 (2) (b) as read with s99 (3) (a)/s99 (3) (b) <b>[delete as appropriate depending on status of species]</b> of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> took a wildlife species, namely <b>[identify nature and quantity of species involved]</b> to a place within Kenya <b>[state location]</b> <b>or</b> within territorial waters of Kenya [give particulars] without a permit issued by the Kenya Wildlife Service.

### *Taking a species on to the high seas*

CHARGE COUNT ONE	Taking a wildlife species upon the high seas without a permit, contrary to s99 (2) (c) as read with s99 (3) (a)/s99 (3) (b) <b>[delete as appropriate depending on status of species]</b> of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> took a wildlife species, namely <b>[identify nature and quantity of species involved]</b> upon the high seas <b>[give particulars if possible e.g. grid references]</b> without a permit issued by the Kenya Wildlife Service.

### *Engaging in commercial activity*

CHARGE COUNT ONE	Engaging in commercial activity concerning a wildlife species without a permit, contrary to s99 (2) (e) as read with s99 (3) (a)/s99 (3) (b) <b>[delete as appropriate depending on status of species]</b> of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on <b>[date]</b> at <b>[location]</b> delivered/received/carrying/transported/shipped <b>[delete as appropriate]</b> , by county commerce <b>[specify]</b> a wildlife species, namely <b>[identify nature and quantity of species involved]</b> for commercial purposes, without a permit issued by the Kenya Wildlife Service.

### *Sale/offer of sale for commercial purposes*

CHARGE COUNT ONE	Selling/offering for sale <b>[delete as appropriate]</b> a wildlife species for commercial purposes, within or outside Kenya <b>[specify]</b> , contrary to s 99 (2) (f) as read with s99 (3) (a)/s99 (3) (b) <b>[delete as appropriate depending on status of species]</b> of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> sold/offered to sell <b>[delete as appropriate]</b> , a wildlife species namely <b>[identify nature and quantity of species involved]</b> to another for commercial purposes, without a permit issued by the Kenya Wildlife Service.

### *General violation of rules and regulations*

CHARGE COUNT ONE	Violating Rules and Regulations pertaining to a listed wildlife species contrary to s 99 (2) (h) as read with section s99 (3) (a)/s99 (3) (b) <b>[delete as appropriate depending on status of species]</b> of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> , knowingly violated rules and regulations pertaining to a listed wildlife species, namely <b>[identify nature and quantity of species involved]</b> by <b>[give particulars of the regulations breached]</b> .

**s99 (4) Knowingly or Recklessly Aiding or Abetting an Offence Relating to Import/Export of Wildlife Specimens or Wildlife Products**

**If Critically Endangered/Endangered Under Schedule 6 or CITES – Minimum 100,000,000 Ksh and/or Minimum 20 Years Imprisonment**

**For All Other Species or Trophies – Minimum 20,000,000 Ksh and/or Minimum 10 Years Imprisonment**

POINTS TO PROVE	ANCILLARY POWERS
Date and Location	s110 Seizure, confiscation, inspection, production
Identify the wildlife specimen or product or species in question	s105 Forfeiture
Identify the criminality under s99(2) that has occurred	s108 Restraint order or other redress [Environment and Land Court] e.g. an injunction
Identify how the accused assisted/aided/abetted that offence	
That the accused did so 'knowingly' or 'recklessly'	

**Agencies:** KWS, Kenya Fisheries Service, NPS, ODPP, Customs and KRA, Ports Authority, Maritime Police, KRA

***Evidence likely to include but not limited to:***

Evidence from customs, the documentary evidence relating to a consignment and correspondence entered into between the accused and others involved in the enterprise will be relevant alongside other evidence such as financial records.

This offence could be used against agents, ports and borders officers and brokers as an example and is potentially extremely powerful.

CHARGE COUNT ONE	Knowingly or recklessly aiding and abetting an offence under s99 (2) (a) to (h) <b>[specify which particular sub-section]</b> of the Wildlife Conservation Management Act 2013 contrary to s99 (4) as read with s99 (3) (a)/s99 (3) (b) <b>[delete as appropriate depending on status of species]</b> of the same Act.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> , knowingly or recklessly aided and abetted <b>[delete as appropriate]</b> , an offence under s99 (2) of the Wildlife Conservation Management Act 2013, namely <b>[identify the nature of the offence, for example: the export of a wildlife product without a permit issued by the Kenya Wildlife Service]</b> .

## OFFENCES UNDER THE FISHERIES DEVELOPMENT AND MANAGEMENT ACT 2016

### *Import/export/transhipment under FDMA*

#### **s53 Permitting and/or Import/Export/Tranship/Take or Possessing Fish or Fish Products Contrary to The Laws of Another State**

**Industrial Fishing - Maximum Fine: 5,000,000 Ksh and/or Five Years Maximum Imprisonment**

**Artisanal Fishing - Maximum Fine: 100,000 Ksh and/or 6 Months Maximum Imprisonment**

POINTS TO PROVE	ANCILLARY POWERS
<p>Identity of the accused</p> <p>Date and location of the offence as either within Kenya or within Kenya's fishery waters</p> <p>The accused either on their own account or any other capacity</p> <p>(a) Caused or permitted a person acting on his or her behalf, or</p> <p>(b) Used or permitted a vessel to engage in fishing or related activity, to take, import, export, tranship, land, transport, sell, receive, acquire or buy any fish or fish product taken, possessed, transported or sold</p> <p>(c) Identify which violation of any law or regulation of another State or of international conservation and management measures, has occurred, in line with section 31 of this Act  <b>i.e. you need a predicate offence namely proof that it is an offence in another jurisdiction</b></p> <p><b>Exception:</b></p> <p>This section does not apply to fish taken on the high seas contrary to the law of another State where Kenya does not recognise the jurisdiction of that State over those fish except to vessels flying Kenya's flag or to areas where the boundaries are disputed or not clear</p>	<p>s186 Forfeiture, upon conviction, anything used in the connection with the commission of the offence. This includes, the vessel itself, fish or fish product, storage facility. Where fish has been sold under s166 (perishable goods, money into central account pending court outcome), the proceeds of sale</p> <p>s187 Any vessel or other property or security forfeited under this Act becomes the property of the State and can be retained, leased or sold by the State</p> <p>s188 Deprivation of monetary benefits, upon conviction, the court can inquire into pecuniary benefit acquired or saved by the accused (summarily and without pleadings) and, upon reliable expert evidence, impose a fine equal to the court's finding of that pecuniary benefit, in addition to any other maximum penalty imposed</p> <p>s189 Costs incurred by State, upon conviction, the court can order the operator and charterer of a fishing vessel to jointly and severally bear the cost or expenditure incurred in connection with prosecution, seizure of a fishing vessel (including cost of pursuit of the vehicle) and repatriation of the master or crew of any vessel seized</p> <p>s191 Upon conviction, court can order restitution for any loss or damage caused by the accused, in addition to any fine. This includes the cost of detection, investigation and prosecution of the offence as well as detention and storage of any item</p>

<p>The offence doesn't have to be an offence in Kenya. Such a prosecution is about Kenya honouring its international obligations and prosecuting a criminal who effectively brings his 'proceeds of crime' (from another country) into Kenya waters. CITES is applicable here but also consider offences of import/export under WCMA, East Africa Community Customs and Management Act. Also consider Immigration Act Offences.</p>	<p>s195 Banning order 5 years ban from boarding or remaining on board any vessel within Kenyan fishery waters</p> <p><b>Illegal fishing</b> includes:</p> <ul style="list-style-type: none"> <li>(a) Activities conducted by national or foreign vessels in waters under the jurisdiction of a state without the permission of that state, or in contravention of its laws and regulations.</li> <li>(b) Activities conducted by vessels flying the flag of states that are parties to a relevant regional fisheries management organization but operate in contravention of the conservation and management measures adopted by that organization and by which those states are bound or relevant provisions of international law.</li> <li>(c) Activities carried out in violation of national laws or international laws or international obligations, including those undertaken by co-operating states to a relevant regional fisheries management organization.</li> </ul>
<p><b>Agencies:</b> KWS, Kenya Fisheries Service, NPS, ODPP, INTERPOL, Immigration Services, MFA and Kenya Maritime Authority who can advise on International Maritime Organisation Regulations. Also, KRA and AGO for mutual legal assistance</p>	
<p><b>Evidence likely to include but not limited to:</b></p> <p>Certificate evidence (s172) and presumptions regarding admissibility. Certificate as to location of evidence (s173) and GPS coordinates recommended or other electronic location evidence re: mobile transceiver unit (s176), any other instruments used in the commission of the offence. Expert reports, eye-witness testimony.</p> <p>Photographic evidence and presumptions on admissibility regarding time and place photo was taken (s177).</p> <p>s194 – <b>each day of a continuing offence shall be considered a separate offence</b> – relevant for drafting of charges.</p>	

CHARGE COUNT ONE	Engaging in prohibited activities relating to fish or fish products taken contrary to the laws of another State contrary to s53 (1) of the Fisheries Management and Development Act (35 of 2016).
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> , took part in prohibited activities related to fish taken contrary to the laws of another State namely <b>[insert particulars e.g. using or permitting a vessel to engage in fishing or related activity, to take, import, export, tranship, land, transport, sell, receive, acquire or buy any fish or fish product taken, possessed, transported or sold in violation of any law or regulation of another State or of international conservation and management measures in line with section 31 of this Act]</b> .

**s55 Exporting of Live Fish Contrary to the Regulations****Maximum Fine: 500,000 Ksh and/or 3 Years Maximum Imprisonment**

**See also the new s99 and s92 of the WCMA as amended in 2019 which covers 'wildlife species' that includes 'fish' and, under s92 (3) as amended includes 'live wildlife species' under 'dealing'**

POINTS TO PROVE	ANCILLARY POWERS
<p>Identity of the accused</p> <p>Date and location of offence</p> <p>Identify the species and quantity of live fish</p> <p>The accused persons exported live fish from Kenya contrary to the regulations</p> <p>Identify the regulations in question</p> <p><b>Where this concerns an endangered species under WCMA, use the WCMA instead</b></p> <p><b>Export</b> in relation to fish or fish products means to:</p> <p>(a) Send or take out of Kenya; or</p> <p>(b) Carry or transport anything out of the country</p>	<p>s186 Forfeiture, upon conviction, anything used in the connection with the commission of the offence. This includes, the vessel itself, fish or fish product, storage facility and, where fish has been sold under s166, the proceeds of sale</p> <p>s187 Any vessel or other property or security forfeited under this Act becomes the property of the State and can be retained, leased or sold by the State</p> <p>s188 Deprivation of monetary benefits, upon conviction, the court can inquire into pecuniary benefit acquired or saved by the accused (summarily and without pleadings) and, upon reliable expert evidence, impose a fine equal to the court's finding of that pecuniary benefit, in addition to any other maximum penalty imposed</p> <p>s189 Costs incurred by State, upon conviction, the court can order the operator and charterer of a fishing vessel to jointly and severally bear the cost or expenditure incurred in connection with prosecution, seizure of a fishing vessel (including cost of pursuit of the vehicle) and repatriation of the master or crew of any vessel seized</p> <p>s191 Upon conviction, court can order restitution for any loss or damage caused by the accused, in addition to any fine. This includes the cost of detection, investigation and prosecution of the offence as well as detention and storage of any item</p> <p>s195 Banning order 5 years ban from boarding or remaining on board any vessel within Kenyan fishery waters</p>

**Agencies:** KWS, Kenya Fisheries Service, NPS, Customs and KRA, ARA, MLA (AGO), Coastguard, Navy, Ports Authority if export by sea; Airport authority if by air. Veterinary Services.

***Evidence likely to include but not limited to:***

Expert evidence as to the species of fish and for sentencing, the value.

Certificate evidence (s172) and presumptions regarding admissibility.

Certificate as to location (s175).

Electronic location evidence re: mobile transceiver unit (s176).

Photographic evidence and presumptions on admissibility regarding time and place photo was taken (s177).

**Note:** s194 – each day of a continuing offence shall be considered a separate offence – relevant for drafting of charges.

CHARGE COUNT ONE	Exporting of live fish contrary to s55 (1) as read with s55 (2) of the Fisheries Management and Development Act (35 of 2016).
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> , exported live fish namely <b>[insert species and quantity]</b> from Kenya without authorisation.

<p><b>s60 Selling or Exporting Adulterated or Contaminated Fish/Fish Products</b>  <b>Maximum fine: 1,000,000 Ksh and/or 10 Years Maximum Imprisonment and Forfeiture of the Fish</b>  <b>Consider WCMA Bushmeat Offences</b></p>	
POINTS TO PROVE	ANCILLARY POWERS
<p>Identity of the accused</p> <p>Date and location of offence</p> <p>That the accused was engaged in selling/exporting fish/fish products And</p> <p>Fish/fish products were adulterated</p> <p>And/or contaminated with a poisonous or harmful substance or pathogenic microorganisms or</p> <p>Otherwise did not meet applicable inspection standards (identify the standards!) Or</p> <p>Those fish or fish products were injurious to human health And</p> <p>The when selling or exporting, the accused knew it was for human consumption</p>	<p>s60 (2) Forfeiture of the fish or fish products itself</p> <p>s186 Forfeiture, upon conviction, anything used in the connection with the commission of the offence. This includes, any vehicle or vessel used to transport the fish or fish product, any storage facility and, where fish has been sold under s166 (perishable goods, money into central account pending court outcome), the proceeds of sale</p> <p>s187 Any vessel or other property or security forfeited under this Act becomes the property of the State and can be retained, leased or sold by the State</p> <p>s188 Deprivation of monetary benefits, upon conviction, the court can inquire into pecuniary benefit acquired or saved by the accused (summarily and without pleadings) and, upon reliable expert evidence, impose a fine equal to the court's finding of that pecuniary benefit, in addition to any other maximum penalty imposed</p> <p>s191 Upon conviction, court can order restitution for any loss or damage caused by the accused, in addition to any fine. This includes the cost of detection, investigation and prosecution of the offence as well as detention and storage of any item</p>
<p><b>Agencies:</b> KWS, Kenya Fisheries Service, NPS, ODPP, Kenya Marine Fisheries Research Institute or NMK or NEMA to identify the nature of the contamination and possible impact.</p>	
<p><b><i>Evidence likely to include but not limited to:</i></b></p> <p>Forensic/expert evidence regarding the contamination/adulteration which must also address the possible impact on humans upon consumption. Eye witness evidence as to sale etc.</p> <p>Proof of transaction or exportation documents e.g. health certificate, export permit etc.</p> <p>Certificate evidence (s172) and presumptions regarding admissibility.</p> <p>Photographic evidence and presumptions on admissibility regarding time and place photo was taken (s177).</p> <p>s194 – <b>each day of a continuing offence shall be considered a separate offence</b> – relevant for drafting of charges.</p>	

CHARGE COUNT ONE	Selling/Exporting adulterated/contaminated fish or fish products contrary to s60 of the Fisheries Management and Development Act (35 of 2016).
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> , was found knowingly and wilfully selling/exporting adulterated/contaminated fish/fish products for human consumption.
CHARGE COUNT ONE	Selling/Exporting fish or fish products that were injurious to human health, contrary to s60 of the Fisheries Management and Development Act (35 of 2016).
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> , was found knowingly and wilfully selling/exporting fish/fish products for human consumption and those fish or fish products were injurious to human health.

**See also s66 under the section on aquaculture – this contains a provision on import or export of live fish.**

## OFFENCES RELATING TO ILLEGAL FISHING



## WITHIN A MARINE PROTECTED AREA – OFFENCES UNDER WCMA 2013 AS AMENDED IN 2019

ELEVENTH SCHEDULE OF WCMA – PROTECTED AREAS	
Marine Parks	Marine Reserves
Mombasa Marine National Park	Malindi Marine National Reserve
Watamu Marine National Park	Watamu Marine National Reserve
Mpunguti National Park	Mombasa Marine National Reserve
Malindi Marine National Park	Mpunguti Marine National Reserve
	Kiunga Marine National Reserve
	Diani-Chale Marine National Reserve

Where the offence clearly occurs within a protected area, consider WCMA offences. These should generally be used for small scale fishing but where on occasion a larger vessel is involved, the sections on corporate liability **must** be considered (s103).

Also pay close attention to the species of fish being caught. If the fish are of an endangered or critically endangered species, charge under s92 of the WCMA.

Kenya's marine protected areas are under threat. They must be protected, and this means a robust application of the law, even where the fishing within appears small scale.

<b>s102 (g) Undertaking Extractive Activity in a Protected Area</b> <b>Minimum Fine: 200,000 Ksh and/or 2 Years Minimum Imprisonment</b>	
POINTS TO PROVE	ANCILLARY POWERS
<p>Identity of the accused</p> <p>Date and location of offence i.e. within a protected area</p> <p>‘Protected area’ is defined as “a clearly defined geographical space recognised, dedicated and managed through legal or other effective means to achieve long term conservation fo nature with associated ecosystem services and cultural values”</p> <p>See the Eleventh Schedule (extract below) as well as KWS records of conservancies, sanctuaries and other ‘protected areas’ not listed in the statute</p> <p>Fishing would constitute an ‘extractive activity’</p> <p>Absence of any lawful authority or exemption under the Act</p>	<p>s105 Forfeiture (boats, fishing gear etc.)</p> <p>s110 Seizure, confiscation, inspection, production of documents</p>
<b>Agencies:</b> KWS, NPS, ODPP	
<b>Evidence likely to include but not limited to:</b> <p>Eyewitness evidence, arresting officer, I.O. statement from KWS confirming the status of the area as a marine protected area and absence of authorisation is desirable. Photographs. Investigations in to the company (if there is one) may be vital.</p> <p>Answers on interview.</p> <p>GPS location or exhibit of map marking where the fishing was taking place.</p>	
CHARGE COUNT ONE	Undertaking extractive activity in a protected area, contrary to s102 (g) of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> , on the <b>[date]</b> , at <b>[location]</b> carried out extractive activity in a marine protected area, namely <b>[identify the area]</b> without authorisation.

<p><b>s102 (f) Conveying Weapons into a Protected Area</b></p> <p><b>Minimum Fine: 200,000 Ksh and/or 2 Years Minimum Imprisonment</b></p>	
POINTS TO PROVE	ANCILLARY POWERS
<p>Identity of the accused</p> <p>Date and location of offence i.e. within a protected area</p> <p>‘Protected area’ is defined as “a clearly defined geographical space recognised, dedicated and managed through legal or other effective means to achieve long term conservation for nature with associated ecosystem services and cultural values”</p> <p>See the Eleventh Schedule (extract below) as well as KWS records of conservancies, sanctuaries and other ‘protected areas’ not listed in the statute</p> <p>The accused conveyed into that area <b>or</b> was found in possession therein of any firearm, ammunition, arrow, SPEAR, trap or similar device (e.g. cages)</p> <p>Absence of any authorisation</p>	<p>s105 Forfeiture (boats, fishing gear etc.)</p> <p>s110 Seizure, confiscation, inspection, production of documents</p>
<p><b>Agencies:</b> KWS, NPS, ODPP</p>	
<p><b>Evidence likely to include but not limited to:</b></p> <p>Eyewitness evidence, arresting officer, I.O. statement from KWS confirming the status of the area as a marine protected area and absence of authorisation is desirable. - Photographs.</p> <p>Investigations in to the company (if there is one) may be vital. Answers on interview.</p> <p>GPS location or exhibit of map marking where the fishing was taking place.</p>	
CHARGE COUNT ONE	Conveying of/Possession of a prohibited item into/in a protected area, contrary to s102 (f) of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> , on the <b>[date]</b> , at <b>[location]</b> , being a protected area, was found in possession of/conveyed into that protected area <b>[delete as appropriate]</b> a firearm/ammunition/arrow/trap/snare/spear/similar device <b>[identify]</b> , <b>[delete as appropriate]</b> without authorization.

**s97 Subsistence Hunting of a Species That Is Not Critically Endangered or Endangered Under Schedule 6 or CITES**

**Minimum Fine: 30,000Ksh and/or 6 Months Minimum Imprisonment**

POINTS TO PROVE	ANCILLARY POWERS
Identity of the accused	s105 Forfeiture (boats, fishing gear etc.)
Date and location of offence i.e. with a protected area	s110 Seizure, confiscation, inspection, production of documents
The accused was hunting (i.e. fishing) therein. Where the species concerns a turtle, consider the species and charge potentially under s92 and 95 instead	<b>Definitions:</b>
That hunting was for the purposes of feeding himself or his immediate dependants	<b>‘Subsistence hunting’</b> means hunting for the purposes of daily consumption by an individual or their direct dependents
This offence is <b>not</b> limited to protected areas	

**Agencies:** KWS, NPS, ODPP, Judiciary

**Evidence likely to include but not limited to:**

Eyewitness evidence, arresting officer, I.O. statement from KWS confirming the status of the area as a marine protected area and absence of authorisation is desirable.

Photographs. Investigations in to the company (if there is one) may be vital. Answers on interview. GPS location or exhibit of map marking where the fishing was taking place.

The **quantity** of fish will be relevant to establishing the purpose, whether for subsistence or for commercial trade. As to whether the person had ‘hunted’ the fish, it will be important for first on scene to identify matters like - if the fish were fresh e.g. if the blood was fresh, the proximity of the accused to the fish when found the alternative is to charge with possession of a trophy under s95.

CHARGE COUNT ONE	Engaging in hunting for the purposes of subsistence, contrary to s97 of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> , on the <b>[date]</b> , at <b>[location]</b> , was engaged in subsistence hunting of an animal, namely <b>[identify the animal]</b> .

# OFFENCES UNDER THE FISHERIES DEVELOPMENT AND MANAGEMENT ACT 2016

## Foreign fishing vessels

### s125 Illegal Entry of a Foreign Fishing Vessel Into Kenyan Fishery Waters/Illegal Fishing by a Foreign Fishing Vessels In Kenyan Fishery Waters/ Illegally Taking Part in Fishing Activities Using a Foreign Vessel

**Maximum Fine: 50,000,000 and/or 1 Year Minimum Imprisonment**

*Note: The penalty is low. Seek forfeiture and for procedure see s389 A Criminal Procedure Code and consider s92 and s95 of the WCMA as amended to prosecute for any hunting and any 'catch'. Also see s103 WCMA for corporate liability and consider immigration offences*

POINTS TO PROVE	ANCILLARY POWERS
<p>Identity of the accused</p> <p>That the accused was the 'master' and/or 'operator'</p> <p>Date and location of offence</p> <p>Identify the vessel as a 'foreign vessel'</p> <p>The accused persons used that vessel to enter the Kenyan fishery waters except for a purpose recognized by international law or relevant law of Kenya;</p> <p>Fished within the territorial sea of Kenya;</p> <p>Used for fishing or fishing-related activities in the fisheries water without lawful authority</p> <p><b>Definitions to consider:</b></p> <p><b>Foreign fishing vessel</b> means any fishing vessel other than a Kenya fishing vessel and includes any support vessel, notwithstanding that the vessel may be registered or licensed or required to be registered or licensed in Kenya pursuant to this Act or under the Merchant Shipping Act and Kenya Maritime Act</p> <p><b>Kenya fishery waters</b> includes all maritime zones declared in the Maritime Zones Act, Cap. 250 internal waters, Lakes, riverine systems and any other waters</p>	<p>s186 Forfeiture, upon conviction, anything used in the connection with the commission of the offence. This includes, the vessel itself, fish or fish product, storage facility and, where fish has been sold under s166, the proceeds of sale</p> <p>s187 Any vessel or other property or security forfeited under this Act becomes the property of the State and can be retained, leased or sold by the State</p> <p>s188 Deprivation of monetary benefits, upon conviction, the court can inquire into pecuniary benefit acquired or saved by the accused (summarily and without pleadings) and, upon reliable expert evidence, impose a fine equal to the court's finding of that pecuniary benefit, in addition to any other maximum penalty imposed</p> <p>s189 Costs incurred by State, upon conviction, the court can order the operator and charterer of a fishing vessel to jointly and severally bear the cost or expenditure incurred in connection with prosecution, seizure of a fishing vessel (including cost of pursuit of the vehicle) and repatriation of the master or crew of any vessel seized</p> <p>s191 Upon conviction, court can order restitution for any loss or damage caused by the accused, in addition to any fine. This includes the cost of detection, investigation and</p>

<p>including intertidal, inland and riverine over which Kenya exercises or claims jurisdiction</p> <p><b>Master</b> means any person in command of or in charge of apparently in command of the vessel, aircraft or vehicle but does not include a pilot on board a vessel solely for the purposes of navigation</p> <p><b>Operator</b> means any person responsible for the operations of directs or controls a vessel including the owner, charterer and master of the vessel</p> <p>Territorial Sea as defined in the Maritime Zones Act</p>	<p>prosecution of the offence as well as detention and storage of any item</p> <p>s195 Banning order 5 years ban from boarding or remaining on board any vessel within Kenyan fishery waters</p> <p><b>Illegal fishing includes:</b></p> <p>(a) Activities conducted by national or foreign vessels in waters under the jurisdiction of a state without the permission of that state, or in contravention of its laws and regulations</p> <p>(b) Activities conducted by vessels flying the flag of states that are parties to a relevant regional fisheries management organization but operate in contravention of the conservation and management measures adopted by that organization and by which those states are bound or relevant provisions of international law</p> <p>(c) Activities carried out in violation of national laws or international laws or international obligations, including those undertaken by co-operating states to a relevant regional fisheries management organization</p>
<p><b>Agencies:</b> KWS, Kenya Fisheries Service, NPS, ODPP, Kenya Coastguard, Navy, Immigration Services, KRA. Note – if summoning a witness from the Navy, be sure to consider the chain of command in issuing notices. ARA may also be useful</p>	
<p><b>Evidence likely to include but not limited to:</b></p> <p>Certificate evidence (s172) and note the presumptions regarding admissibility.</p> <p>Stowage of gear may be evidence of fishing. DNA or expert evidence from fish found in the vessel may be helpful to show they have been fishing elsewhere.</p> <p>Certificate as to location of evidence (s175).</p> <p>Eye witness testimony.</p> <p>Electronic location evidence re: mobile transceiver unit (s176).</p> <p>Photographic evidence and presumptions on admissibility regarding time and place photo was taken (s177).</p> <p>Documentary evidence such as log books, registration documents, certificates etc.</p> <p>Evidence of any flag being displayed, nationalities of crew etc. may be relevant. A company's search may be necessary to show the country of ownership.</p>	

s194 – **each day of a continuing offence shall be considered a separate offence** – relevant for drafting of charges.

See s192 for pursuing a **civil claim** against an owner of a vessel.

WCMA allows for corporate liability (criminal).

Expert reports if a WCMA offence has occurred under s92 (critically endangered or endangered species).

CHARGE COUNT ONE	Illegally entering a foreign fishing vessel into Kenyan Fishery Waters/Illegal fishing by a foreign fishing vessel in Kenyan Fishery Waters/Illegally taking part in fishing activities using a foreign vessel <b>[delete as appropriate]</b> contrary to s125 of the Fisheries Management and Development Act (35 of 2016).
PARTICULARS OF OFFENCE	<p><b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b>, being the master or operator <b>[delete as appropriate]</b> of a foreign fishing vessel <b>[identify the vessel]</b> entered into Kenya fisheries waters</p> <p>a) For purposes not recognised by international law or relevant laws of Kenya or;</p> <p>b) And fished within the territorial sea of Kenya without lawful authority or;</p> <p>c) And used that vessel for fishing related activities in the fisheries waters without lawful authority.</p> <p><b>[delete as appropriate a) b) or c)]</b></p>

s127 Transshipment at Sea	
Minimum Fine: 10,000,000 Ksh and/or 10 Years Minimum Imprisonment	
POINTS TO PROVE	ANCILLARY POWERS
<p><b>Transshipment</b> means the transferring of fish or fish products to or from any vessel whether or not the fish or fish products have first been taken on board the vessel from which the fish is passed</p> <p>i.e. moving fish from vessel to vessel</p> <p>Identity of the accused</p> <p>Identify the vessels involved</p> <p>Date and location of offence i.e. within Kenya fishery waters</p> <p>The accused was the master and/or operator of a vessel</p> <p>That the accused carried out transshipment at sea</p>	<p>s186 Forfeiture, upon conviction, anything used in the connection with the commission of the offence. This includes, the vessel itself, fish or fish product, storage facility and, where fish has been sold under s166, the proceeds of sale</p> <p>s187 Any vessel or other property or security forfeited under this Act becomes the property of the State and can be retained, leased or sold by the State</p> <p>s188 Deprivation of monetary benefits, upon conviction, the court can inquire into pecuniary benefit acquired or saved by the accused (summarily and without pleadings) and, upon reliable expert evidence, impose a fine equal to the court's finding of that pecuniary benefit, in addition to any other maximum penalty imposed</p> <p>s189 Costs incurred by State, upon conviction, the court can order the operator and charterer of a fishing vessel to jointly and severally bear the cost or expenditure incurred in connection with prosecution, seizure of a fishing vessel (including cost of pursuit of the vehicle) and repatriation of the master or crew of any vessel seized</p> <p>s191 Upon conviction, court can order restitution for any loss or damage caused by the accused, in addition to any fine. This includes the cost of detection, investigation and prosecution of the offence as well as detention and storage of any item</p> <p>s195 Banning order 5 years ban from boarding or remaining on board any vessel within Kenyan fishery waters</p>
<p><b>Agencies:</b> KWS, Kenya Fisheries Service, NPS, Customs and KRA, ARA, AGO (if MLA required), Coastguard, Navy.</p>	
<p><b>Evidence likely to include but not limited to:</b></p> <p>Eye witness evidence.</p> <p>Certificate evidence (s172) and presumptions regarding admissibility.</p> <p>Certificate as to location (s175).</p> <p>Electronic location evidence re: mobile transceiver unit (s176).</p> <p>Photographic evidence and presumptions on admissibility regarding time and place photo was taken (s177).</p> <p><b>Note:</b> s194 – each day of a continuing offence shall be considered a separate offence – relevant for drafting of charges.</p>	

CHARGE COUNT ONE	Engaging in transshipment activity at sea contrary to s127 (1) as read with s127 (2) of the Fisheries Management and Development Act (35 of 2016).
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> , carried out a transshipment activity at sea, namely <b>[insert particulars e.g. transferred x quantity of fish from vessel a to vessel b]</b> .

### s158 Unauthorized Use of Any Kenyan Port For Landing, Transshipping, Packaging Or Processing

**Maximum Fine: 1,000,000 Ksh and/or 5 Years Maximum Imprisonment**

POINTS TO PROVE	ANCILLARY POWERS
<p>Identity of the accused who was the operator, master or charterer of a vessel</p> <p>Date and location of offence i.e. within Kenya fishery waters</p> <p>Identify the vessel <b>and</b> that it was a 'foreign fishing vessel'</p> <p>Identify the designated Port</p> <p><b>The accused:</b></p> <p>Failed to give 48 hours' notice to an authorised officer of KeFs of intention to dock <b>or</b></p> <p>Failed to otherwise get authorisation from KeFS for use of the port <b>or</b></p> <p>Failed to present that authorisation to an authorised officer upon arrival at the port <b>and</b></p> <p>Used the port for the purposes of landing, packaging, processing, transshipping, refuelling, supplying or other port services</p>	<p>s186 Forfeiture, upon conviction, anything used in the connection with the commission of the offence. This includes, the vessel itself, fish or fish product, storage facility and, where fish has been sold under s166, the proceeds of sale</p> <p>s187 Any vessel or other property or security forfeited under this Act becomes the property of the State and can be retained, leased or sold by the State</p> <p>s188 Deprivation of monetary benefits, upon conviction, the court can inquire into pecuniary benefit acquired or saved by the accused (summarily and without pleadings) and, upon reliable expert evidence, impose a fine equal to the court's finding of that pecuniary benefit, in addition to any other maximum penalty imposed</p> <p>s189 Costs incurred by State, upon conviction, the court can order the operator and charterer of a fishing vessel to jointly and severally bear the cost or expenditure incurred in connection with prosecution, seizure of a fishing vessel (including cost of pursuit of the vehicle) and repatriation of the master or crew of any vessel seized</p> <p>s191 Upon conviction, court can order restitution for any loss or damage caused by the accused, in addition to any fine. This includes the cost of detection, investigation and prosecution of the offence as well as detention and storage of any item</p> <p>s195 Banning order 5 years ban from boarding or remaining on board any vessel within Kenyan fishery waters</p>

**Agencies:** KWS, Kenya Fisheries Service, NPS, KRA, ARA, Kenya Ports Authority.

***Evidence likely to include but not limited to:***

Evidence from port authorities as to nature of vessel and eye witness testimony as to the activities conducted on the port.

Certificate evidence (s172) and presumptions regarding admissibility.

Certificate as to location of evidence (s175) and GPS coordinates recommended.

Electronic location evidence re: mobile transceiver unit (s176).

Photographic evidence and presumptions on admissibility regarding time and place photo was taken (s177).

s194 – each day of a continuing offence shall be considered a separate offence – relevant for drafting of charges.

CHARGE COUNT ONE	Using a Kenyan Port without authority, contrary to s158 (1) as read with s158 (2) of the Fisheries Management and Development Act (35 of 2016).
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> , being the master, operator or charterer of a foreign fishing vessel <b>[identify the vessel]</b> , used a Kenya Port, namely <b>[identify the port]</b> for port services, without authority/without complying with notice requirements/without presenting authorisation for entry to an authorised officer <b>[delete as appropriate]</b> .

## OFFENCES RELATING TO SALE/EXPORT AND DEALING IN FISH AND FISH PRODUCTS



## OFFENCES UNDER THE FISHERIES DEVELOPMENT AND MANAGEMENT ACT 2016

### *Possession/trading in illegally acquired fish*

#### **s56 Possessing and Trading in Fish, Fish Products or Other Marine Resources Acquired Illegally**

**Maximum Fine: 500,000 Ksh and/or 3 Years Maximum Imprisonment**

**See also s92 and s95 of the amended WCMA- stronger penalties**

POINTS TO PROVE	ANCILLARY POWERS
<p>Identity of the accused</p> <p>Date and location of offence</p> <p>Identify the fish/fish product/marine resources</p> <p>The accused person was buying, selling, possessing, or otherwise trading those fish/products/resources <b>and</b></p> <p>The accused had clear cause to believe those items had been obtained in contravention of the Act i.e. circumstantial evidence as to the reasonableness of his belief will be highly relevant such as the absence of his own permit</p> <p><b>If the products involve endangered species, charge under WCMA instead</b></p>	<p>s56(2) All fish products <b>shall</b> be forfeited</p> <p>s186 Forfeiture, upon conviction, anything used in the connection with the commission of the offence. This includes, the vessel itself, fish or fish product, storage facility and, where fish has been sold under s166, the proceeds of sale</p> <p>s187 Any vessel or other property or security forfeited under this Act becomes the property of the State and can be retained, leased or sold by the State</p> <p>s188 Deprivation of monetary benefits, upon conviction, the court can inquire into pecuniary benefit acquired or saved by the accused (summarily and without pleadings) and, upon reliable expert evidence, impose a fine equal to the court's finding of that pecuniary benefit, in addition to any other maximum penalty imposed</p> <p>s189 Costs incurred by State, upon conviction, the court can order the operator and charterer of a fishing vessel to jointly and severally bear the cost or expenditure incurred in connection with prosecution, seizure of a fishing vessel (including cost of pursuit of the vehicle) and repatriation of the master or crew of any vessel seized</p> <p>s191 Upon conviction, court can order restitution for any loss or damage caused by the accused, in addition to any fine. This includes the cost of detection, investigation and prosecution of the offence as well as detention and storage of any item</p>

**Agencies:** KWS, Kenya Fisheries Service, NPS, ODPP, County Government (they assist in process and trade of fish products), Public Health, NEMA on processing, ARA

***Evidence likely to include but not limited to:***

The circumstances of the accused's handling or dealing of the products will be highly relevant to establish whether he had 'clear cause' to believe that they had been obtained illegally. E.g. his own absence of permits or receipts or purchase orders of the fish, absence of proper records etc.

Quantity of the fish or product will be relevant to establishing trade or supply. Street value of fish may also be good circumstantial evidence of the purposes for which the accused was handling the fish or products.

Certificate evidence (s172) and presumptions regarding admissibility.

Certificate as to location of evidence (s175).

Electronic location evidence re: mobile transceiver unit (section 176).

Photographic evidence and presumptions on admissibility regarding time and place photo was taken (s177).

s194 – **each day of a continuing offence shall be considered a separate offence** – relevant for drafting of charges.

CHARGE COUNT ONE	Buying, selling, possessing, or otherwise trading in fish, fish product or other fisheries resources <b>[delete as appropriate]</b> that were obtained contrary 56 to the Fisheries Management and Development Act (35 of 2016).
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> , bought sold, possessed, or otherwise traded in fish, fish products or other fisheries resources knowing or having reasonable cause to believe that they had been obtained in contravention of the Act.

# OFFENCES UNDER THE WILDLIFE CONSERVATION MANAGEMENT ACT 2013 AS AMENDED IN 2019

## Dealing in fish products under WCMA

<b>s98 (1) Dealing in the Carcass or Meat of Any Wildlife Species</b> <b>Minimum Imprisonment: 3 Years</b> <b>This Can Apply to Fish, Reptiles, Birds and Mammals</b>	
POINTS TO PROVE	ANCILLARY POWERS
<p>Identity of the accused</p> <p>Date and location</p> <p>Identify the carcass or meat. If <b>turtle meat</b> especially, the species may be critically endangered or endangered (Hawksbill, Olive Ridley, Green). Therefore, the offence <b>should</b> be charged under s92 for possession and/or dealing</p> <p>The accused was 'dealing' that meat</p> <p><b>Dealing</b> applies to trophies <b>and</b> live species and means 'to sell, purchase, distribute, barter, give, receive, supply, cut, carve, polish, preserve, clean, mount, prepare, transport or convey or <b>to be in possession with intent to supply</b> to another'</p> <p><b>'Wildlife'</b> includes animals, plants (s2 WCMA definitions) and the ordinary meaning of 'animal' includes aquatic species</p>	<p>s105 Forfeiture (boats, fishing gear etc.)</p> <p>s110 Seizure, confiscation, inspection, production of documents</p>
<b>Agencies:</b> KWS, NPS, ODPP, Kenya Fisheries Service, ARA, NMK	
<b>Evidence likely to include but not limited to:</b> <p>Eyewitness evidence, arresting officer, I.O. statement from KWS confirming the status of the area as a marine protected area and absence of authorisation is desirable if the offence takes place in a protected area – this would be an aggravating feature for sentence.</p> <p>Photographs. Investigations in to the company (if there is one) may be vital. Answers on interview.</p> <p>Large quantities are indicative of trading as would be storage facilities (e.g. a cool-box/freezer); evidence of transportation, M-PESA records/presence of cash/notebooks of customers/money owed.</p>	
CHARGE COUNT ONE	Dealing in the carcass or meat of a wildlife species, contrary to s98 (1) of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> , on the <b>[date]</b> , at <b>[location]</b> was dealing in the carcass or meat of a wildlife species, namely <b>[identify quantity and species and identify the nature of the conduct that amounts to 'dealing' under the definition]</b> without lawful authorisation.

**s98 (2) Purchasing the Carcass or Meat or Eggs of Any Wildlife Species**

**Minimum Fine: 1,000,000 Ksh and/or 1 Year Maximum Imprisonment**

**This Can Apply to Fish, Reptiles, Birds and Mammals**

POINTS TO PROVE	ANCILLARY POWERS
<p>Identity of the accused</p> <p>Date and location</p> <p>Identify the carcass or meat or eggs. If <b>turtle meat</b> especially, the species may be critically endangered or endangered (Hawksbill, Olive Ridley, Green). Therefore, the offence <b>should</b> be charged under s92 for possession or dealing ('dealing' also means to receive)</p> <p>The accused was purchasing or had purchased that meat, carcass or egg</p>	<p>s105 Forfeiture (boats, fishing gear etc.)</p> <p>s110 Seizure, confiscation, inspection, production of documents</p>

**Agencies:** KWS, NPS, ODPP, Kenya Fisheries Service, ARA

***Evidence likely to include but not limited to:***

Eyewitness evidence, arresting officer, I.O. statement from KWS confirming the status of the area as a marine protected area and absence of authorisation is desirable. Photographs. Evidence of financial transaction (i.e. the purchase), such as M-PESA records to show an exchange between the accused buyer and another.

CHARGE COUNT ONE	Purchasing the carcass or meat or eggs <b>[delete as appropriate]</b> of a wildlife species, contrary to s98 (2) of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> , on the <b>[date]</b> , at <b>[location]</b> purchased the carcass or meat or eggs <b>[delete as appropriate]</b> of a wildlife species, namely <b>[identify the species]</b> without lawful authorisation.

## OFFENCES RELATING TO AQUACULTURE



<p><b>s64 Depriving Communities of Traditional Access To Fisheries By Engaging In Aquaculture</b></p> <p><b>Maximum fine: 500,000 Ksh and/or 3 Years Maximum Imprisonment</b></p>	
POINTS TO PROVE	ANCILLARY POWERS
<p>Identity of the accused</p> <p>Date and location of offence i.e. within Kenya fishery waters</p> <p>Identify the traditional community fisheries (consult the County government)</p> <p>That the accused was carrying out aquaculture activity</p> <p>In doing so, he deprived members of a community access to the traditional fishing grounds</p> <p>The accused failed to engage in consultation with the affected local community's access to fishing grounds</p> <p>That failure occurred without good cause</p>	<p>s186 Forfeiture, upon conviction, anything used in the connection with the commission of the offence. This include equipment used in the obstruction of access, any vessel, storage facility etc</p> <p>s187 Any vessel or other property or security forfeited under this Act becomes the property of the State and can be retained, leased or sold by the State</p> <p>s188 Deprivation of monetary benefits, upon conviction, the court can inquire into pecuniary benefit acquired or saved by the accused (summarily and without pleadings) and, upon reliable expert evidence, impose a fine equal to the court's finding of that pecuniary benefit, in addition to any other maximum penalty imposed</p> <p>s191 Upon conviction, court can order restitution for any loss or damage caused by the accused, in addition to any fine. This includes the cost of detection, investigation and prosecution of the offence as well as detention and storage of any item</p>
<p><b>Agencies:</b> KWS, Kenya Fisheries Service, NPS, ODPP, County government, Beach Management Units, Local Administration and ARA</p>	
<p><b>Evidence likely to include but not limited to:</b></p> <p>Forensic/expert evidence regarding the traditional community fisheries e.g., community leaders, BMU's, county government, local NGOs and community leaders.</p> <p>Absence of an ESIA from NEMA would be good evidence of lack of consultation.</p> <p>Certificate evidence (s172) and presumptions regarding admissibility.</p> <p>Photographic evidence and presumptions on admissibility regarding time and place photo was taken (s177).</p> <p>s194 – <b>each day of a continuing offence shall be considered a separate offence</b> – relevant for drafting of charges.</p>	

CHARGE COUNT ONE	Depriving a community access to fishing grounds by engaging in aquaculture contrary to section 64 of the Fisheries Management and Development Act (35 of 2016).
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> , engaged in aquaculture activity namely <b>[identify activity]</b> that deprived <b>[name the community]</b> of its access to its traditional fishing grounds.

**s66 Engaging in the Following Without Written Permission of the Director General:**

**a) Introducing Exotic or Genetically Modified Fish, or**

**b) Transfer of Eggs or Fingerlings or Seed of Exotic or Genetically Modified Fish, or**

**c) Import or Export Live Fish for Aquaculture, or**

**d) Releasing into Fishery Waters Any Fish Other Indigenous Wild Fish**

**Maximum fine: 1,000,000 Ksh and/or 5 Years Maximum Imprisonment**

POINTS TO PROVE	ANCILLARY POWERS
<p>Identity of the accused</p> <p>Date and location of offence i.e. within Kenya fishery waters</p> <p>Absence of written permission of the Director General for any of the above activities.</p> <p>Under a) identify the fish as being exotic or genetically modified <b>and</b> the accused 'introduced them' into Kenya</p> <p>Under b) the transfer occurred within Kenya from one establishment to another (identify each) <b>and</b> the fish/ eggs/ fingerlings or seeds were genetically modified or exotic.</p> <p>Under c) <b>any</b> live fish were imported for the purposes of aquaculture</p> <p>Under d) identify the fish, confirm it is not indigenous <b>and</b> the accused released it into Kenya fishery waters.</p>	<p>s186 Forfeiture, upon conviction, anything used in the connection with the commission of the offence. This includes, the vessel itself, fish or fish product, storage facility and, where fish has been sold under s166, the proceeds of sale</p> <p>s187 Any vessel or other property or security forfeited under this Act becomes the property of the State and can be retained, leased or sold by the State</p> <p>s188 Deprivation of monetary benefits, upon conviction, the court can inquire into pecuniary benefit acquired or saved by the accused (summarily and without pleadings) and, upon reliable expert evidence, impose a fine equal to the court's finding of that pecuniary benefit, in addition to any other maximum penalty imposed</p> <p>s189 Costs incurred by State, upon conviction, the court can order the operator and charterer of a fishing vessel to jointly and severally bear the cost or expenditure incurred in connection with prosecution, seizure of a fishing vessel (including cost of pursuit of the vehicle) and repatriation of the master or crew of any vessel seized</p> <p>s191 Upon conviction, court can order restitution for any loss or damage caused by the accused, in addition to any fine. This includes the cost of detection, investigation and prosecution of the offence as well as detention and storage of any item</p>

**Agencies:** KWS, Kenya Fisheries Service, NPS, ODPP, Kenya Marine Fisheries Research Institute as they can work together with NMK to establish the nature of the fish (exotic or genetically modified)

***Evidence likely to include but not limited to:***

Forensic/expert evidence regarding the species of fish and whether it was exotic or GM.

Evidence from NEMA may be helpful in terms of establishing impact, especially where released into Kenya waters – s191 orders can be significant (see under ancillary orders).

Certificate evidence (s172) and presumptions regarding admissibility.

Certificate as to location of evidence (s175) and GPS coordinates recommended especially where the release into waters has taken place.

Photographic evidence and presumptions on admissibility regarding time and place photo was taken (s177).

CHARGE COUNT ONE	Introducing an exotic or genetically modified fish into Kenya without authority, contrary to s66 (1) (a) of the Fisheries Management and Development Act (35 of 2016).
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> , introduced a species of fish that was exotic or genetically modified <b>[delete as appropriate]</b> without lawful authority.
CHARGE COUNT ONE	Transferring the eggs, seed or fingerlings or a genetically modified or exotic fish without authority, contrary to s66 (1) (b) of the Fisheries Management and Development Act (35 of 2016).
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> , transferred a species of fish that was exotic or genetically modified <b>[delete as appropriate]</b> , from one aquaculture establishment, namely <b>[identify]</b> to another, namely <b>[identify]</b> , without lawful authority.
CHARGE COUNT ONE	Import/export <b>[delete as appropriate]</b> of live fish without authority, contrary to s66(1) (c) of the Fisheries Management and Development Act (35 of 2016).
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> , imported/exported <b>[delete as appropriate]</b> a species of fish <b>[identify species and quantity]</b> without lawful authority.
CHARGE COUNT ONE	Introducing a non-indigenous species of fish into Kenya fishery waters without authority, contrary to s66 (1) (d) of the Fisheries Management and Development Act (35 of 2016).
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> , introduced a species of fish <b>[identify species and quantity]</b> that was not indigenous to Kenya, that location being within Kenya fishery waters, without lawful authority.

**s70 Using Drugs or Chemicals in Commercial Aquaculture Without Authority****Maximum fine: 500,000 Ksh and/or 5 Years Maximum Imprisonment**

POINTS TO PROVE	ANCILLARY POWERS
Identity of the accused	s186 Forfeiture, upon conviction, anything used in the connection with the commission of the offence. This include equipment used in the offence
Identify the aquaculture establishment	
Confirm that it was a commercial activity	
Identify the drug/chemical/antibiotic/ growth enhancement treatment	s187 Any vessel or other property or security forfeited under this Act becomes the property of the State and can be retained, leased or sold by the State
That the accused was using the drug/ chemical of growth enhancement treatment in his commercial aquaculture.	s188 Deprivation of monetary benefits, upon conviction, the court can inquire into pecuniary benefit acquired or saved by the accused (summarily and without pleadings) and, upon reliable expert evidence, impose a fine equal to the court's finding of that pecuniary benefit, in addition to any other maximum penalty imposed
Absence of written approval from the Director General	s191 Upon conviction, court can order restitution for any loss or damage caused by the accused, in addition to any fine. This includes the cost of detection, investigation and prosecution of the offence as well as detention and storage of any item

**Agencies:** KWS, Kenya Fisheries Service, NPS, ODPP, KMFRI, NMK**Evidence likely to include but not limited to:**

Expert evidence e.g. From KMFRI or NMK as to the nature of the chemical used and possible impact upon humans.

Certificate evidence (s172) and presumptions regarding admissibility.

Photographic evidence and presumptions on admissibility regarding time and place photo was taken (s177).

CHARGE COUNT ONE	Using a chemical/drug/antibiotic <b>[delete as appropriate]</b> in a commercial aquaculture establishment, without written approval, contrary to s70 (1) of the Fisheries Management and Development Act (35 of 2016).
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> , whilst engaged in commercial aquaculture, used there in a drug/antibiotic/ chemical namely <b>[insert type]</b> for the purposes of disease treatment/ growth enhancement <b>[delete as appropriate]</b> without written approval.

<p><b>s72 Interfering with an Aquaculture Establishment</b></p> <p><b>Maximum fine: 200,000 Ksh and/or 5 Years Maximum Imprisonment And Compensation</b></p>	
POINTS TO PROVE	ANCILLARY POWERS
<p>Identity of the accused</p> <p>Date and location of offence</p> <p>Identify the establishment</p> <p>That the accused interfered with or harvested the product of the establishment without written authority or placed an object in the water <b>or</b></p> <p>Otherwise obstructed the aquaculture operation <b>or</b></p> <p>Destroyed damaged, displaced any equipment lawfully being used by the aquaculture operation <b>or</b></p> <p>Altered the position of any equipment deployed lawfully <b>or</b></p> <p>Without lawful excuse caused the release of any product of the establishment</p>	<p>s72 (2) The court <b>shall</b> order compensation</p> <p>s186 Forfeiture, upon conviction, anything used in the connection with the commission of the offence. This include equipment used in the offence</p> <p>s187 Any vessel or other property or security forfeited under this Act becomes the property of the State and can be retained, leased or sold by the State</p> <p>s188 Deprivation of monetary benefits, upon conviction, the court can inquire into pecuniary benefit acquired or saved by the accused (summarily and without pleadings) and, upon reliable expert evidence, impose a fine equal to the court's finding of that pecuniary benefit, in addition to any other maximum penalty imposed</p> <p>s191 Upon conviction, court can order restitution for any loss or damage caused by the accused, in addition to any fine. This includes the cost of detection, investigation and prosecution of the offence as well as detention and storage of any item</p>
<p><b>Agencies:</b> KWS, Kenya Fisheries Service, NPS, ODPP, KMFRI, NMK, NEMA, ARA</p>	
<p><b>Evidence likely to include but not limited to:</b></p> <p>Forensic/expert evidence to prove damage/loss or cost e.g. NEMA.</p> <p>Exhibit the harvest (though note power under s166 if perishable – make sure properly photographed, inventoried and statements written if s166 is to be exercised.</p> <p>Eye witness statement.</p> <p>Certificate evidence (s172) and presumptions regarding admissibility.</p> <p>Certificate as to location of evidence (s175) and GPS coordinates recommended.</p> <p>Photographic evidence and presumptions on admissibility regarding time and place photo was taken (s177).</p> <p>s194 – <b>each day of a continuing offence shall be considered a separate offence</b> – relevant for drafting of charges.</p>	

CHARGE COUNT ONE	Interfering with an aquaculture establishment contrary to s72 (1) or Failing of the Fisheries Management and Development Act (35 of 2016).
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> , interfered aquaculture operation without written authority/lawful excuse (as applicable) in that <b>[specify the nature of interference i.e. interference/harvesting/obstructing/releasing/damaging]</b> .

**s68 Wrongfully Disposing Aquaculture Waste**

**Maximum Fine: 500,000 Ksh and/or 5 Years Maximum Imprisonment**

**If in a marine protected area, charge under s89 WCMA (heavier penalties minimum 2,000,000 Ksh or minimum 5 years or both). See also pollution charges below.**

POINTS TO PROVE	ANCILLARY POWERS
<p>Identity of the accused</p> <p>Date and location of offence</p> <p>The accused persons engaged in commercial aquaculture in Kenya and the accused did not ensure that aquaculture waste:</p> <p>(a) Did not cause an unsightly or offensive condition at the licence area <b>or</b>;</p> <p>(b) That he failed to secure or treat the waste in a manner designed to prevent it from being blown, washed or swept off the licence area <b>or</b>;</p> <p>(3) Having been notified by the Director General to take measures to restore the applicable area to the required standard, failed to so do</p> <p><b>Definitions to consider:</b></p> <p><b>Aquaculture</b> means the cultivation, propagation or farming of aquatic organisms, including fish, molluscs, crustaceans and aquatic plants whether from eggs, spawn, spat, seed or other means or by rearing fish lawfully taken from the wild or lawfully imported into Kenya, or by other similar process</p> <p><b>Aquaculture establishment</b> means any area, enclosure, premise or structure set up or used on land or in water for the purposes of aquaculture and includes any cage or raft or other system</p> <p>Where damage is caused to a marine protected area, see WCMA as well for an additional charge.</p> <p>Also see s93 of NEMA regarding discharge of pollutants</p> <p><b>Note:</b> cost or actual damage should be ascertained as this is relevant to sentencing</p>	<p>s186 Forfeiture, upon conviction, anything used in the connection with the commission of the offence. This includes, the vessel itself, fish or fish product, storage facility and, where fish has been sold under s166, the proceeds of sale</p> <p>s187 Any vessel or other property or security forfeited under this Act becomes the property of the State and can be retained, leased or sold by the State</p> <p>s188 Deprivation of monetary benefits, upon conviction, the court can inquire into pecuniary benefit acquired or saved by the accused (summarily and without pleadings) and, upon reliable expert evidence, impose a fine equal to the court's finding of that pecuniary benefit, in addition to any other maximum penalty imposed</p> <p>s189 Costs incurred by State, upon conviction, the court can order the operator and charterer of a fishing vessel to jointly and severally bear the cost or expenditure incurred in connection with prosecution, seizure of a fishing vessel (including cost of pursuit of the vehicle) and repatriation of the master or crew of any vessel seized</p> <p>s191 Upon conviction, court can order restitution for any loss or damage caused by the accused, in addition to any fine. This includes the cost of detection, investigation and prosecution of the offence as well as detention and storage of any item</p> <p>s195 Banning order 5 years ban from boarding or remaining on board any vessel within Kenyan fishery waters</p>

**Agencies:** ODPP, KWS, Kenya Fisheries Service, NPS, KFS (e.g. for mangroves), ARA, Department of Water, KFS (mangroves etc), NEMA, KEPHIS

**Evidence likely to include but not limited to:**

Aquaculture – examples may be organic matter that comes from farmed fish, waste water, excess feed products, by-products of processed fish, etc. Consult with Kenya Fisheries if in doubt.

Notification from the DG regarding measures to be taken.

Expert evidence as to the nature of the waste product and its effect upon the environment e.g. a report from NEMA (continuity of any exhibit such as a sample, needs to be maintained).

Certificate evidence (s172) and presumptions regarding admissibility.

Certificate as to location (s175).

Electronic location evidence re: mobile transceiver unit (section 176).

Photographic evidence and presumptions on admissibility regarding time and place photo was taken (s177).

Note: s194 – each day of a continuing offence shall be considered a separate offence – relevant for drafting of charges.

Also consider if NEMA issued a waste management plan– if so, there may be another offence to consider under EMCA.

CHARGE COUNT ONE	Wrongful disposal of aquaculture waste contrary to s68 (1) as read with s68 (4) of the Fisheries Management and Development Act (35 of 2016).
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> , whilst engaged in commercial aquaculture, failed to ensure that the aquaculture waste did not cause an unsightly or offensive condition at the licence area; <b>or</b> failed to secured or treat the aquaculture waste in a manner designed to prevent it from being blown, washed or swept off the licence area <b>[delete as appropriate]</b> .
CHARGE COUNT ONE	Failing to comply with a notice in respect of an aquaculture establishment, s68 (3) as read with s68 (4) of the Fisheries Management and Development Act (35 of 2016).
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> , whilst engaged in commercial aquaculture, failed to comply with a notice issued by the Director General of the Kenya Fisheries Service.

## OFFENCES RELATING TO POLLUTION



**s49 Polluting Kenyan Fishery Waters****Maximum fine: 5,000,000 Ksh and/or 10 Years Maximum Imprisonment****See s89 WCMA (Minimum 2,000,000 Ksh, minimum 5 years) but only in relation to a 'designated wildlife area'****See also s68 WCMA if this relates to aquaculture waste (section on aquaculture offences)****See also the new s95A under WCMA that refers to poisoning of wildlife species (which includes fish) and is not limited to 'protected areas'**

POINTS TO PROVE	ANCILLARY POWERS
Identity of the accused	s49 (2) Restoration cost
Date and location of offence (i.e. within Kenyan waters)	In addition to any fine or imprisonment, the accused <b>shall</b> be liable to pay compensation in respect of any resulting loss or damage <b>as well as</b> the full cost of restoring the affected habitat and fishery resources to their previous state
Identify the article or substance	s186 Forfeiture, upon conviction, anything used in the connection with the commission of the offence. This includes, the vessel itself, fish or fish product, storage facility and, where fish has been sold under s166, the proceeds of sale
That the article or substance was toxic, hazardous or held other harmful properties in relation to fish or the marine environment	s187 Any vessel or other property or security forfeited under this Act becomes the property of the State and can be retained, leased or sold by the State.
That the accused was responsible for directly or indirectly, deliberately introducing that substance to the marine environment	s188 Deprivation of monetary benefits, upon conviction, the court can inquire into pecuniary benefit acquired or saved by the accused (summarily and without pleadings) and, upon reliable expert evidence, impose a fine equal to the court's finding of that pecuniary benefit, in addition to any other maximum penalty imposed
The manner in which the pollutant was introduced to fishery waters	s189 Costs incurred by State, upon conviction, the court can order the operator and charterer of a fishing vessel to jointly and severally bear the cost or expenditure incurred in connection with prosecution, seizure of a fishing vessel (including cost of pursuit of the vehicle) and repatriation of the master or crew of any vessel seized
<b>Pollution</b> shall have the meaning assigned to it under the Environmental Management and Co-ordination Act, 1999	s191 Upon conviction, court can order restitution for any loss or damage caused by the accused, in addition to any fine. This includes the cost of detection, investigation and prosecution of the offence as well as detention and storage of any item
Also see s93 of NEMA regarding discharge of pollutants	s195 Banning order 5 years ban from boarding or remaining on board any vessel within Kenyan fishery waters
<b>Note:</b> cost or actual damage should be ascertained as this is relevant to sentencing	

**Agencies:** KWS, Kenya Fisheries Service, NPS, KFS (e.g. for mangroves), KMFRI, Coastguards, Pharmacy and Poisons Board, for oil spillages, contact Kenya Ports Authority, ARA, KMA, NEMA

***Evidence likely to include but not limited to:***

Expert evidence as to nature of the pollutant and its effect or potential effect upon the marine environment. This offence does not require evidence of actual harm as this may be very difficult to prove in our oceans; however, expert evidence as to its potential for harm is vital.

E.g. government chemist and possibly an ecologist or scientist from KWS to talk about impact. NEMA – impact assessment.

Certificate evidence (s172) and presumptions regarding admissibility.

Certificate as to location of evidence (s175).

Electronic location evidence re: mobile transceiver unit (s176).

Photographic evidence and presumptions on admissibility regarding time and place photo was taken (s177).

s194 – each day of a continuing offence shall be considered a separate offence – relevant for drafting of charges.

CHARGE COUNT ONE	Polluting Kenyan fisheries waters contrary to s49(1) as read with s49 (2) of the Fisheries Management and Development Act (35 of 2016).
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> , polluted Kenyan fisheries waters through the introduction/attempted to introduce <b>[delete as appropriate]</b> into the Kenya fishery waters a deleterious article or substance which may have toxic, hazardous or other harmful properties or effects in relation to fish or the marine environment., namely <b>[describe the substance]</b> .

**s89 Offence Relating to Pollution of Wildlife Areas but see s95A WCMA (see next page) where poisoning of a wildlife species occurs**

**Minimum Fine: 2,000,000 Ksh and/or 5 Years Minimum Imprisonment**

POINTS TO PROVE	ANCILLARY POWERS
<p>Identity of the accused.</p> <p>Date and location – ‘wildlife conservation area’ means a tract of land, <b>lake or sea</b> that is protected by law for purposes of wildlife and biological diversity conservation and may include a national park, national reserve, game reserve or sanctuary</p> <p>Identify the hazardous substance, waster or oil or pollutant</p> <p>That the substance was discharged into the area</p> <p>That the accused was responsible for the discharge, either willfully or recklessly</p> <p>Effect on the wildlife conservation area was detrimental</p>	<p>s89 (2) (a) Pay the full cost of clean-up of the habitat and ecosystem and removal of the pollutant</p> <p>s89 (2) (b) Clean up the polluted habitats and remove the effects of pollution to the satisfaction of the Service</p> <p>s89 (3) The court may direct the polluter to contribute to a wildlife conservation activity as compensation, restoration or restitution</p>

**Agencies:** KWS, NPS, ODP, NMK, KMFRI, NEMA

**Evidence likely to include but not limited to:**

Eyewitness evidence, arresting officer, government analyst **or** expert evidence confirming the nature of the substance and its effect – see s77 and s48 of the Evidence Act and Annex C of this guide.

The report does not **have** to be by a government analyst, rather under s77 there is a presumption that a person purporting to be a government analyst has the necessary qualifications. Care must be taken then with any other expert under s48 to ensure the statement stipulates his qualifications, experience, methodology used and conclusions and basis for conclusions in a detailed way. I.O. re: interviews, photographs.

NEMA may be required to establish impact.

CHARGE COUNT ONE	Pollution of a wildlife area, contrary to s89 of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> wilfully or recklessly discharged a hazardous substance, pollutant, waste or oil <b>[delete as appropriate]</b> in a wildlife conservation area.

**s95A Poisoning of Wildlife Species**

**Unlike s89, this offence is not limited to a protected area**

**Minimum Fine: 5,000,000 Ksh and/or 5 Years Minimum Imprisonment**

POINTS TO PROVE	ANCILLARY POWERS
<p>Date and Location</p> <p>Identify the substance used/discharged</p> <p>That the accused used/discharged that substance</p> <p>That effect of that substance was to poison <b>any</b> wildlife species</p> <p>The accused did so, knowingly or recklessly</p> <p>This offence is <b>not</b> limited to protected areas</p> <p><b>Note:</b> “recklessly” means that the risk of poisoning wildlife species was reasonably foreseeable, and the accused went on to take that risk when in all the circumstances it was unreasonable to do so</p>	<p>s110 Seizure, confiscation, inspection, productions</p> <p>s105 Forfeiture</p> <p>s108 Restraint order or other redress [Environment and Land Court]</p>
<p><b>Agencies:</b> KWS, NPS, ODPP, NMK, KMFRI, NEMA Government Chemist. Mutual Legal Assistance may be necessary – ODPP, AGO</p>	
<p><b><i>Evidence likely to include but not limited to:</i></b></p> <p>Eyewitness evidence, arresting officer, I.O. photographs and a national museum report or government analyst report or expert report on the nature of the substance used and its potential effect.</p> <p>NEMA and KMFRI may also be of assistance here. See Annex on the issue of expert reports. It is not a requirement that only a government analyst can give expert evidence. Any expert may do so but must cite his qualifications, experience, methodology and basis for conclusions. Further he must satisfy the court as to the integrity of any exhibit and continuity in relation to receipt and return to and from the I.O.</p>	

CHARGE COUNT ONE	Poisoning a wildlife species, contrary to s95A of the Wildlife Conservation and Management Act 2013.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> knowingly or recklessly used a substance, namely <b>[identify the substance]</b> whose effect was to poison a wildlife species namely <b>[identify the species and number if applicable]</b> .

# OFFENCES RELATING TO FISHERIES MANAGEMENT/LICENCING AND RECORD KEEPING



## Output > Catch

### Total Allowable Catch (TAC)

- Limits the maximum catch per species

### Landing fees

- Introduces payments per tonne of landed fish

### Individual (tradable) quotas

- Allocates shares of the Total Allowable Catch to individual fishermen/fishery enterprises

### Selectivity criteria (age/sex)

- Establishes minimum size criteria

## Input > Fishing effort

### Fishing licences and capacity restrictions

- Granting of fisheries licences
- Restrictions on fish production

### Technical restrictions

- Criteria to increase selectivity
- Bans on certain fishing practices

### Subsidies/taxation of inputs

- Fuel subsidies
- Support for modernization programmes

### Limits on the number of fishing days

- Number of days at sea
- Compliance with closed periods

**s39 (9) Contravening a Fisheries Management Plan**

**Industrial Fishing - Maximum Fine: 500,000 Ksh**

**Artisanal Fishing - Maximum Fine: 100,000 Ksh**

**For repeat offenders, a fine of not less than the previous fine plus 10% s194 (2)**

**If this occurs in a protected area under WCMA, pursue breach of management plan under s88**

POINTS TO PROVE	ANCILLARY POWERS
Identity of the accused	s186 Forfeiture, upon conviction, anything used in the connection with the commission of the offence. This includes, the vessel itself, fish or fish product, storage facility and, where fish has been sold under s166, the proceeds of sale
Date and location of offence	
That a management plan had been issued in accordance with s39	s187 Any vessel or other property or security forfeited under this Act becomes the property of the State and can be retained, leased or sold by the State.
The accused failed to comply with the management plan – identify the nature of the breach – for example, identify the vessel involved and the activity that it was engaged in such as fishing without a licence	s188 Deprivation of monetary benefits, upon conviction, the court can inquire into pecuniary benefit acquired or saved by the accused (summarily and without pleadings) and, upon reliable expert evidence, impose a fine equal to the court's finding of that pecuniary benefit, in addition to any other maximum penalty imposed
The accused person has failed to comply with that notice	s189 Costs incurred by State, upon conviction, the court can order the operator and charterer of a fishing vessel to jointly and severally bear the cost or expenditure incurred in connection with prosecution, seizure of a fishing vessel (including cost of pursuit of the vehicle) and repatriation of the master or crew of any vessel seized
See s88 WCMA if this occurs in relation to a marine park or marine reserve (breach of a management plan under the WCMA)	s191 Upon conviction, court can order restitution for any loss or damage caused by the accused, in addition to any fine. This includes the cost of detection, investigation and prosecution of the offence as well as detention and storage of any item
	s195 Banning order 5 years ban from boarding or remaining on board any vessel within Kenyan fishery waters

**Agencies:** KWS, Kenya Fisheries Service, NPS, ODPP, NEMA

***Evidence likely to include but not limited to:***

Certificate evidence (s172) and note the presumptions regarding admissibility.

Certificate as to location of evidence (s175).

Electronic location evidence re: mobile transceiver unit (s176).

Photographic evidence and note the presumptions on admissibility regarding time and place photo was taken (s177).

Fishing nets and other equipment used in the breach must be seized and properly exhibited.

**Note:** s194 – each day of a continuing offence shall be considered a separate offence – relevant for drafting of charges.

It is important that any previous convictions are brought to the attention of the court as this can elevate the sentence under s194.

CHARGE COUNT ONE	Contravening the provisions of a fisheries management plan contrary to s39 (9) of the Fisheries Management and Development Act (35 of 2016).
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> , contravened the provisions of a fisheries management plan issued under Gazette number <b>[insert]</b> namely by <b>[insert particulars of the breach]</b> .

**s40 (2) Contravening Gazetted Fisheries Management Measures**

**Industrial Fishing – Maximum Fine: 500,000 Ksh and/or 1 Year  
Maximum Imprisonment**

**Artisanal Fishing – Maximum Fine: 20,000 Ksh and/or 3 Months  
Maximum Imprisonment**

**Note: where a management plan does not exist, but measures are provided  
and are issued under this section, use this provision**

POINTS TO PROVE	ANCILLARY POWERS
<p>Identity of the accused</p> <p>Date and location of offence</p> <p>That management measures had been issued in accordance with section 40 of the Act</p> <p>The accused failed to comply with the management measures</p>	<p>s186 Forfeiture, upon conviction, anything used in the connection with the commission of the offence. This includes, the vessel itself, fish or fish product, storage facility and, where fish has been sold under s166, the proceeds of sale</p> <p>s187 Any vessel or other property or security forfeited under this Act becomes the property of the State and can be retained, leased or sold by the State</p> <p>s188 Deprivation of monetary benefits, upon conviction, the court can inquire into pecuniary benefit acquired or saved by the accused (summarily and without pleadings) and, upon reliable expert evidence, impose a fine equal to the court's finding of that pecuniary benefit, in addition to any other maximum penalty imposed</p> <p>s189 Costs incurred by State, upon conviction, the court can order the operator and charterer of a fishing vessel to jointly and severally bear the cost or expenditure incurred in connection with prosecution, seizure of a fishing vessel (including cost of pursuit of the vehicle) and repatriation of the master or crew of any vessel seized</p> <p>s191 Upon conviction, court can order restitution for any loss or damage caused by the accused, in addition to any fine. This includes the cost of detection, investigation and prosecution of the offence as well as detention and storage of any item</p> <p>s195 Banning order 5 years ban from boarding or remaining on board any vessel within Kenyan fishery waters</p>

**Agencies:** KWS, Kenya Fisheries Service, NPS, ODPP, NEMA

***Evidence likely to include but not limited to:***

Certificate evidence (s172) and note the presumptions regarding admissibility.

Certificate as to location of evidence (s175).

Electronic location evidence re: mobile transceiver unit (s176).

Photographic evidence and note the presumptions on admissibility regarding time and place photo was taken (s177).

Fishing nets and other equipment used in the breach must be seized and properly exhibited.

**Note:** s194 – each day of a continuing offence shall be considered a separate offence – relevant for drafting of charges.

It is important that any previous convictions are brought to the attention of the court as this can elevate the sentence under s194.

CHARGE COUNT ONE	Contravening the fisheries management measures contrary to s40 (2) of the Fisheries Management and Development Act (35 of 2016).
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> , contravened fisheries management measures issued under Gazette number <b>[insert]</b> namely by <b>[insert particulars of breach]</b> .

**s75 (4) Failing to Keep/Supply Accounts, Records, Returns or Assist in the Compliance of The Requirement of an Audit or Inspection**

**Maximum Fine: 300,000 Ksh and/or up 5 Year Maximum Imprisonment and Revocation of Licence**

POINTS TO PROVE	ANCILLARY POWERS
<p>Identity of the accused</p> <p>Date and location</p> <p>The accused was under obligation to keep records under s75 – see sub-section 2 e.g. this includes engaging in recreational fishing</p> <p>He failed to keep, furnish, provide or communicate accounts, records, data and returns when required under s75 (4) <b>or</b></p> <p>He failed to present those records upon request by an authorised person <b>or</b></p> <p>He failed to facilitate or assist with the requirements of an audit or inspection of any records, vessel, aquaculture establishment or other facility operating under this Act</p> <p>That the accused failed to provide/communicate records/returns or failed to assist in an audit</p>	<p>s75 (4) The accused's license <b>shall</b> be revoked</p> <p>s186 Forfeiture, upon conviction, anything used in the connection with the commission of the offence. This includes equipment used in the offence</p> <p>s187 Any vessel or other property or security forfeited under this Act becomes the property of the State and can be retained, leased or sold by the State</p> <p>s188 Deprivation of monetary benefits, upon conviction, the court can inquire into pecuniary benefit acquired or saved by the accused (summarily and without pleadings) and, upon reliable expert evidence, impose a fine equal to the court's finding of that pecuniary benefit, in addition to any other maximum penalty imposed</p> <p>s191 Upon conviction, court can order restitution for any loss or damage caused by the accused, in addition to any fine. This includes the cost of detection, investigation and prosecution of the offence as well as detention and storage of any item</p>
<p><b>Agencies:</b> KWS, Kenya Fisheries Service, NPS, ODPP</p>	

***Evidence likely to include but not limited to:***

Expert evidence may be required regarding the audit, officer from Fisheries to give evidence on what records should have been kept and any details of the audit communications and inspection will need to be properly exhibited.

s194 – **each day of a continuing offence shall be considered a separate offence** – relevant for drafting of charges.

CHARGE COUNT ONE	Failing to keep/furnish/provide/communicate <b>[delete as appropriate]</b> accounts or other records, contrary to s75 (4) of the Fisheries Management and Development Act (35 of 2016).
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> whilst under an obligation keep records under s75 of the Fisheries Management and Development Act (35 of 2016) failed to so do/fail to communicate those records <b>[delete if not appropriate]</b> when requested by the Director-General of the Kenya Fisheries Service.
CHARGE COUNT ONE	Failing comply with an audit contrary to s75 (4) of the Fisheries Management and Development Act (35 of 2016).
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> whilst under an obligation keep records under s75 of the Fisheries Management and Development Act (35 of 2016) failed comply or assist with the requirements of an audit or inspection undertaken by the Director-General of the Kenya Fisheries Service.

# **GENERAL OFFENCE UNDER FISHERIES MANAGEMENT AND DEVELOPMENT ACT 2016**



<p><b>s124 Engaging in Unlicensed Activities Under the Act</b></p> <p><b>Maximum Fine: 500,000 Ksh and/or 5 Years Maximum Imprisonment</b></p>	
POINTS TO PROVE	ANCILLARY POWERS
<p>Identity of the accused</p> <p>Date and location of offence i.e. within Kenya fishery waters</p> <p>Identify the species of marine mammal</p> <p>Identify the activity the accused was engaged in without a license</p>	<p>s186 Forfeiture, upon conviction, anything used in the connection with the commission of the offence. This includes, the vessel itself, fish or fish product, storage facility and, where fish has been sold under s166, the proceeds of sale</p> <p>s187 Any vessel or other property or security forfeited under this Act becomes the property of the State and can be retained, leased or sold by the State</p> <p>s188 Deprivation of monetary benefits, upon conviction, the court can inquire into pecuniary benefit acquired or saved by the accused (summarily and without pleadings) and, upon reliable expert evidence, impose a fine equal to the court's finding of that pecuniary benefit, in addition to any other maximum penalty imposed</p> <p>s189 Costs incurred by State, upon conviction, the court can order the operator and charterer of a fishing vessel to jointly and severally bear the cost or expenditure incurred in connection with prosecution, seizure of a fishing vessel (including cost of pursuit of the vehicle) and repatriation of the master or crew of any vessel seized</p> <p>s191 Upon conviction, court can order restitution for any loss or damage caused by the accused, in addition to any fine. This includes the cost of detection, investigation and prosecution of the offence as well as detention and storage of any item</p> <p>s195 Banning order 5 years ban from boarding or remaining on board any vessel within Kenyan fishery waters</p>
<p><b>Agencies:</b> KWS, Kenya Fisheries Service, NPS, Customs and KRA, ARA, Kenya Ports Authority</p>	
<p><b>Evidence likely to include but not limited to:</b></p> <p>Logs books, fish catch for example.</p> <p>Certificate evidence (s172) and presumptions regarding admissibility.</p> <p>Certificate as to location of evidence (s175) and GPS coordinates recommended.</p> <p>Electronic location evidence re: mobile transceiver unit (s176).</p> <p>Photographic evidence and presumptions on admissibility regarding time and place photo was taken (s177).</p> <p>s194 – <b>each day of a continuing offence shall be considered a separate offence</b> – relevant for drafting of charges.</p>	

CHARGE COUNT ONE	Engaging in an unlicensed activity contrary to s124 (1) or Using a vessel to engage in an unlicensed activity contrary to s124 (2) <b>[delete as appropriate]</b> of the Fisheries Management and Development Act (35 of 2016).
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on or about the <b>[insert date]</b> at <b>[location]</b> , engaged in an unlicensed activity namely <b>[identify the activity]</b> .

## RELEVANT OFFENCES UNDER THE PREVENTION OF ORGANISED CRIME ACT 2010

<b>s3 (c) Acting in Concert with Others in the Commission of a Serious Crime</b> <b>Maximum Fine: 500,000 Ksh and/or 15 Years Maximum Imprisonment</b>	
POINTS TO PROVE	ANCILLARY POWERS Section 4 page 50
<p>Date and Location</p> <p>Three or more people (do not have to identify each one)</p> <p>Accused did an act in concert with those others</p> <p>That act was to further the commission of a 'serious crime'</p> <p>For the purposes of obtaining a financial, material or other benefit or purpose</p> <p>A serious crime is one that carries more than 6 months imprisonment e.g. importation of ivory</p>	<p>s15 Property tracing</p> <p>s16 Restraint orders</p> <p>s17 Seizure and detention of cash</p> <p>s18 Forfeiture upon conviction</p>
<b>Agencies:</b> KWS, NPS, ODPP, Judiciary, FRC, AGO, Telecoms, Banking	
<b><i>Evidence likely to include but not limited to:</i></b> <p>Where a group is involved in poaching/trafficking, this offence may be appropriate.</p> <p>Eye witness evidence and telecoms/banking communications between the group may be evidence of association between the three or more individuals concerned.</p> <p>Video surveillance, covert evidence, digital and documentary evidence and potentially expert evidence regarding mobile phone/computer downloads.</p>	
CHARGE COUNT ON	Acting in concert with others in the commission of a serious offence, contrary to s3 (c) of the Prevention of Organised Crime Act 2010.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> , together with other persons unknown <b>[or name them]</b> , committed a serious offence, namely <b>[state the nature of the offence]</b> e.g. importation of ivory without a permit contrary to section.... for the purpose of obtaining material or financial benefit or other purpose.

<b>s3 (d) Directing Another to Commit a Serious Offence</b> <b>Maximum Fine: 500,000 Ksh and/or 15 Years Maximum Imprisonment</b>	
POINTS TO PROVE	ANCILLARY POWERS Section 4 page 50
Date and Location	s15 Property tracing
Membership of an organised criminal group	s16 Restraint orders
An act of direction or instruction to commit a serious crime (i.e. carries more than 6 months)	s17 Seizure and detention of cash
Need to establish that the person is in a position of influence within that group	s18 Forfeiture upon conviction
Intention that his direction/ instructions will be acted upon	
<b>Agencies:</b> KWS, NPS, ODP, Judiciary, FRC, AGO, Telecoms, Banking	
<b>Evidence likely to include but not limited to:</b> s7 of POCA gives some guidance as to the type of evidence that might speak of membership: (a) he admits to being a member of an organised criminal group; (b) he is, upon reasonable ground, identified as member of an organised criminal group; (c) he resides in or frequently visits a particular organized criminal group's area and adopts the name, colours, symbol, style of dress and grooming, use of hand signs, language, tattoos or other representation associated with the organized criminal group or otherwise knowingly associates with members of such group; (d) he has been arrested more than once in the company of identified members of an organised criminal group for offences that are consistent with organised criminal group activity; (e) he ascribes to the ideologies, values, practices, oathing, mannerisms and general conduct of the organised criminal members; or (f) he knowingly receives any financial or material benefit from an organised criminal group. The direction or instruction may come in many forms and may require interrogation of computers/email accounts/intercept/SMS records. Circumstantial evidence of association with known suspects and possession of material relating to organised criminal activity may be relevant to proving both membership and intention. <i>See also offences of conspiracy.</i>	
CHARGE COUNT ON	Directing another in the commission of a serious offence, contrary to s 3( ) of the Prevention of Organised Crime Act 2010.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> , being a member of an organised criminal group, knowingly directed another to commit a serious offence, namely <b>[identify the offence or type of offence]</b> .

**s3 (m) Entering into Arrangements regarding Criminal Group Funds**  
**Maximum Fine: 500,000 Ksh and/or 15 Years Maximum Imprisonment**

POINTS TO PROVE	ANCILLARY POWERS Section 4 page 50
Date and Location	s15 Property tracing
Identify the funds in question	s16 Restraint orders
Establish they are 'criminal group funds' (see below)	s17 Seizure and detention of cash
Entry into an arrangement to retain or control criminal group funds on behalf of a third party	s18 Forfeiture upon conviction
Did so knowing that they were criminal group funds	
<b>Agencies:</b> KWS, NPS, ODPP, Judiciary, FRC, AGO, Telecoms, Banking	
<p><b>Evidence likely to include but not limited to:</b></p> <p>s2 of POCA states that 'criminal group funds' are those funds that may be used for the commission of or in furtherance of or in connection with acts of an organised criminal group; or the proceeds of acts committed by that organised criminal group or the resources of such a group. This is therefore potentially problematic in seeking to establish the nature of the funds, so it may be easier to consider offences under POCAMALA e.g. possession of proceeds of crime.</p> <p>It may be necessary to involve the FRC. There is no need to prove who the third party was, only that there was one.</p>	

CHARGE COUNT ON	Entering into an arrangement concerning criminal group funds, contrary to s3 (m) of the Prevention of Organised Crime Act 2010.
PARTICULARS OF OFFENCE	<b>[Name of the accused]</b> on the <b>[date]</b> at <b>[location]</b> , entered into an arrangement to facilitate the retention or control of criminal group funds, knowing that the funds were criminal group funds, namely <b>[identify the funds in question]</b> .

# ANCILLARY POWERS UNDER POCA

## PROPERTY TRACING - s15 POCA

<b>What is it?</b>	Power to compel any person to produce any document or record that identifies, locates, quantifies property or to require a bank or financial institution/trustee/cash dealer/custodian to produce all information/records etc. re: any business transaction by or on behalf of the person concerned
<b>Who?</b>	AG application (read DPP now)
<b>How?</b>	Application on notice
<b>Where?</b>	High Court
<b>Justification?</b>	Reasonable grounds to suspect that an OCG has committed, is committing or is about to commit a crime or is in possession of property belonging to an OCG
<b>NOTE: If that person obstructs the order, High Court can authorize the AG (DPP) or his officer to enter premises and take the documents/records – order will last 30 days unless High Court otherwise directs.</b>	

## RESTRAINT ORDERS - s16 POCA

<b>What is it?</b>	A temporary order to suspend dealings of a specified person or a person charged under POCA or 'any other specified person'
<b>Who?</b>	AG (DPP)
<b>How?</b>	Ex Parte Application
<b>Where?</b>	High Court
<b>NOTE: This order lasts 30 days unless the Court directs otherwise.</b>	

## SEIZURE AND DETENTION OF OCG CASH - s17 POCA

<b>What is it?</b>	Power to seize and hold cash that is imported or exported by an OCG
<b>Who?</b>	Any authorized officer i.e. Police, AG, Commissioner of Customs & Excise, or any other Person whom written law vest functions of law and order
<b>How?</b>	He can seize it immediately and then within 7 days must apply to the High Court
<b>Justification?</b>	Reasonable grounds to suspect cash belongs to an OCG
<b>How long?</b>	Lasts 60 days – renewable for further period of 30 days. Proceedings must be issued within 6 months or it will be released

**NOTE: Any cash seized must be deposited in a reputable bank by the officer. Proceedings must be issued within 6 months or it will be released.**

## FORFEITURE OF PROPERTY UPON CONVICTION – s18 POCA

<b>What is it?</b>	Power to order forfeiture of property to the State.
<b>Who?</b>	ODPP
<b>How?</b>	Upon conviction, application to the court.
<b>Where?</b>	Before the convicting court.
<b>Justification?</b>	Must show the property was used for or in connection with or received in payment for the commission of that offence

# RELEVANT OFFENCES UNDER FIREARMS ACT

## CAP 114

### **s4 Firearms Act Purchase, Acquisition or Possession of a Firearm or Ammunition Without A Certificate. Certificate in force at the time**

**PENALTY: between 7 years and 15 years or 5 years and 10 years depending on type of firearm**

POINTS TO PROVE	ANCILLARY POWERS
That the item is a firearm/ammunition within the definition of the Act	s36 (1) (b) (i) Forfeiture or disposal of firearm found in possession
The suspect either purchased/somehow obtained a firearm/ ammunition <b>or</b>	s36 (1) (b) (ii) Ban on future ownership of a weapon for a period not exceeding 10years, after release period
The suspect was in possession of firearm/ ammunition <b>and</b>	<b>Note:</b> that if the offence is due to neglect e.g. failure to renew the certificate; fine is 500 Ksh per day for every day or part thereof during which the default continues but fine should, in total, <b>not</b> be greater than the maximum fine provided under s4 (3) of the Act <b>or</b> imprisonment for 2 years (maximum) in default – See s4 (3)
Proof that there was no valid firearms certificate in force at the time <b>or</b>	
Suspect had possession of ammunition in the excess of authorized quantities (specify the quantity and specify the authorised amount under any permit) <b>or</b>	
He has a firearms certificate but there is non-compliance with the conditions attached to the certificate ( identify which conditions and how he is in breach)	
Knowledge that he was purchasing/acquiring a firearm or ammunition depending on sub-section selected for charge	

**Agencies:** National Police Service, Office of the Director of Public Prosecution, Judiciary

#### ***Evidence likely to include but not limited to:***

Eyewitness evidence (interviews/statements), government analyst (ballistic experts), exhibits (firearm or ammunition, expert opinions/certificates, photographs etc.), arresting officer, investigating officer.

CHARGE COUNT ONE	Being in possession of firearm/ammunition without a valid firearm certificate contrary to s4 (2) (a) as read with s4 (3) of the Firearms Act CAP 114 of the Laws of Kenya.
PARTICULARS OF OFFENCE	<b>[Name of Accused(s)]</b> on or about the <b>[date]</b> , at <b>[location]</b> , was found in possession of <b>[description of arm or ammunition]</b> without a valid firearm certificate.

CHARGE COUNT TWO	Illegal acquisition of firearm/ammunition contrary to s4 (2) (a) as read with s4 (3) of the Firearms Act CAP 114 of the Laws of Kenya.
PARTICULARS OF OFFENCE	<b>[Name of Accused(s)]</b> on or about the <b>[date]</b> , at <b>[location]</b> , acquired <b>[description of arm or ammunition]</b> without a valid firearm certificate.
CHARGE COUNT ONE	Being in possession of a quantity of ammunition in excess of that authorised under a valid firearm certificate contrary to s4 (2) (a) as read with s4 (3) of the Firearms Act CAP 114 of the Laws of Kenya.
PARTICULARS OF OFFENCE	<b>[Name of Accused(s)]</b> on or about the <b>[date]</b> , at <b>[location]</b> , at <b>[location]</b> , was found in possession of a quantity of ammunition, namely <b>[description of ammunition]</b> that was in excess of the quantity authorised under a valid firearm certificate.
CHARGE COUNT ONE	Failing to comply with the conditions of a firearm certificate, contrary to s4 (2) (b) as read with s4 (3) of the Firearms Act CAP 114 of the Laws of Kenya.
PARTICULARS OF OFFENCE	<b>[Name of Accused(s)]</b> on or about the <b>[date]</b> , at <b>[location]</b> , whilst in possession of a valid firearm certificate <b>[give issuing number]</b> failed to comply with a condition (or conditions) of that certificate, namely <b>[give particulars of that conditions that were not complied with]</b> .

### s4 A Firearms Act for AK47, G3, MP5

#### Possession of a Specified Firearm Without a License or

#### If Having a Licence, Unlawfully Allowing Another to Take Possession of it in Order to Advance the Course of Organised Criminal Activity

**Penalty: Life imprisonment**

POINTS TO PROVE	ANCILLARY POWERS
<p>Possession of item</p> <p>Proof that the item was a weapon within the definition of this section e.g. an AK47</p> <p>The absence of license <b>or</b></p> <p>If in possession of license, that the suspect has given permission to another to possess it or use it for organized criminal activity <b>and</b></p> <p>Where hired/given to another, he knew or reasonably ought to have known that the person to whom it is given intends to use it for organized criminal activity</p> <p>'Organised criminal activity' under POCA: commission of serious crime (penalty over 6 months imprisonment) by an organized criminal group (3 or more – see POCA)</p>	<p>s36 (1) (b) (i) Forfeiture or disposal of firearm found in possession</p> <p>s36 (1) (b) (ii) Ban on future ownership of a weapon for a period not exceeding 10years, after release period</p>

**Agencies:** National Police Service, Office of the Director of Public Prosecution, Judiciary

***Evidence likely to include but not limited to:***

Expert evidence may be required to prove the nature of the weapon. **Do not** need to prove the activity took place if proceeding under s4 A (1) (b). In giving it to another for use, need to link the weapon to the owner, i.e. statement re: ownership of license.

Fingerprint evidence on the weapon.

Unless caught in the act, circumstantial evidence of association between owner and the user/ possessor e.g. mobile phone evidence/M-Pesa payments etc. will be vital.

CHARGE COUNT ONE	Illegal possession of a specified firearm contrary to s4 A (1) (a) of the Firearms Act Cap 114.
PARTICULARS OF OFFENCE	<b>[Name of Accused(s)]</b> on or about the <b>[date]</b> , at <b>[location]</b> , was found in possession of <b>[description of the specified firearm]</b> without valid firearm certificate/permit/ lawful justification.

CHARGE COUNT ONE	Hiring or permitting another to possess/use a firearm/ammunition [delete] contrary to s4A (1) (b) of the Firearms Act Cap 114.
PARTICULARS OF OFFENCE	<b>[Name of Accused(s)]</b> on or about the <b>[date]</b> , at <b>[location]</b> , being licenced to <b>[possess, hold, trade in, or have custody]</b> of <b>[description of ammunition or firearm]</b> , hired it out, unlawfully permitted <b>[specify]</b> another, <b>[identify]</b> to <b>[take possession of or use]</b> that fire arm/ammunition to advance the course of organized criminal activity.

# RELEVANT OFFENCES UNDER THE EAST AFRICAN COMMUNITY CUSTOMS MANAGEMENT ACT 2004

## USE FOR CONCEALMENT/DOCUMENT OFFENCES ON IMPORT/EXPORT

### s202 Importation or Exportation of Restricted or Prohibited Goods in a Concealed Manner

**Maximum Fine: 50% of Value of Goods Involved or Imprisonment for 5 Years Maximum**

POINTS TO PROVE	ANCILLARY POWERS
Item prohibited or restricted (see Schedule 2)	s210 Forfeiture of the prohibited or restricted goods
s202 (a) Actual concealment of the goods <b>or</b>	s211 Forfeiture of the vessel
s202 (b) Packaged in a manner of packaging likely to deceive a customs officer <b>or</b>	s212 Forfeiture of the package
s202 (c) The entry/declaration does not correspond with the goods (i.e. a false declaration)	

**Agencies:** Kenya Revenue Authority, National Police Service, Office of the Director of Public Prosecution, Judiciary

#### ***Evidence likely to include but not limited to:***

Eyewitness evidence (e.g. statements of customs officers etc.), government analyst or other expert regarding the item concealed.

Exhibits officer re: the packaging (could be the customs officer), statement from KRA that it is a prohibited/restricted item; packaging, vessel, photographs, documents etc. arresting officer, investigating officer.

CHARGE COUNT ONE	Export/import of restricted or prohibited goods in a concealed manner contrary to s202 <b>[select to use sub-section a, b or c depending on the facts of the case]</b> .
PARTICULARS OF OFFENCE	<b>[Name of Accused(s)]</b> on or about the <b>[date]</b> , at <b>[location]</b> , imported/exported goods, namely <b>[describe the goods]</b> which were concealed/packaged in a manner likely to deceive a customs officer/did not correspond to the entry or application for shipment <b>[delete as appropriate depending on which sub-section selected]</b> .

## s203 (a) (b) or (c) - False Declaration in Relation to Importation or Exportation

**Maximum Fine: 10,000 USD or 3 Years Maximum Imprisonment**

POINTS TO PROVE	ANCILLARY POWERS
Date and location	s210 Forfeiture of the prohibited or restricted goods
The matter relates to Customs	s211 Forfeiture of the vessel
The Accused either:	s212 Forfeiture of the package
s203 (a) made an entry which was false or incorrect	
s203 (b) made or caused to be made a declaration/ certificate/application or any document that was false or incorrect	
s203 (c) refused to answer a question put to him under this Act or gave a false or incorrect reply	
For all three, that he knew his statement/declaration/ document was false	

**Agencies:** Kenya Revenue Authority, National Police Service, Office of the Director of Public Prosecution, Judiciary

### ***Evidence likely to include but not limited to:***

Eye witness evidence (e.g. statements of customs officers etc.), government analyst (national museums of Kenya).

Exhibits (prohibited/restricted item, packaging, vessel, photographs, documents etc.), arresting officer, investigating officer.

CHARGE COUNT ONE	Making a false entry contrary to s203 (a) of East Africa Community Customs Management Act 2004.
PARTICULARS OF OFFENCE	<b>[Name of Accused(s)]</b> on or about the <b>[date]</b> , at <b>[location]</b> , knowing that matter related to Customs, knowingly made a false entry in relation to that Customs matter, namely <b>[particulars]</b> .

CHARGE COUNT ONE	Making or causing to be made a false declaration, certificate, application or document [specify which] contrary to s203 (b) of East Africa Community Customs Management Act 2004.
PARTICULARS OF OFFENCE	<b>[Name of Accused(s)]</b> on or about the <b>[date]</b> , at <b>[location]</b> , made/caused to be made a declaration/ certificate/ application/ document <b>[delete as appropriate]</b> relating to a matter concerning Customs, knowing it to be false/incorrect <b>[delete as appropriate]</b> .

CHARGE COUNT ONE	Making a false statement to a customs officer, contrary to s203 (c) of East Africa Community Customs Management Act 2004.
PARTICULARS OF OFFENCE	<b>[Name of Accused(s)]</b> on or about the <b>[date]</b> , at <b>[location]</b> , when required to answer a question put to him by an officer exercising his duties under this Act, made a statement, knowing that statement to be false, namely <b>[give particulars of the false statement]</b> .
CHARGE COUNT ONE	Failure to give information to a customs officer, contrary to s203 (c) of East Africa Community Customs Management Act 2004.
PARTICULARS OF OFFENCE	<b>[Name of Accused(s)]</b> on or about the <b>[date]</b> , at <b>[location]</b> , when required to answer a question put to him by an officer exercising his duties under this Act, refused to answer.

## RELEVANT CITIZENSHIP AND IMMIGRATION OFFENCES

**Note:** Charging offences under these sections should **never** be used as ‘holding charges’ given the confusion it raises in relation to sentencing and bail considerations, and the misleading signal it gives out to the Judiciary and the public. A limited number of relevant offences are identified below under the **Kenya Citizenship and Immigration Act 2011**.

Careful exhibit handling is essential in relation to the documentary evidence required; the suspect’s answers under caution/in interview will be significant and should be carefully recorded. Close working with immigration authorities is vital to ensure timely production of evidence of forgery/confirmation of non-residency etc.

Concerning repatriation, s26 A of the Penal Code refers to s8 of the now repealed Immigration Act; this should be amended accordingly to refer to s43 of The Kenyan Citizenship and Immigration Act 2011.

Offence	Points to Prove
<b>s53 (1) (b) Being Found in Kenya While an Order For Removal is in Force</b>  500,000 Ksh Maximum Fine and/or 3 Years Maximum Imprisonment  Repatriation s43 – see below	Evidence that the suspect left or had been removed from Kenya under order  Evidence that suspect is found Kenya  Proof that there is still an order for removal of that person
<b>s53 (1) (j) Unlawfully Entering or Being Present in Kenya</b>  500,000 Ksh Maximum Fine and/or 3 Years Maximum Imprisonment  Repatriation under s43 – see below	Evidence that the suspect is ‘in’ Kenya  Evidence of lack of residency/permit to reside/absence of lawful excuse

Offence	Points to Prove
<p><b>s53 (1) (m) Working Without a Permit/ Lawful Authority</b></p> <p>500,000 Ksh Maximum Fine and/or 3 Years Maximum Imprisonment</p> <p><b>s43 Repatriation – see below</b></p>	<p>Evidence that suspect is not a citizen</p> <p>Evidence that suspect has no permit or exemption under this Act allowing him to work</p> <p>Evidence that he is working, whether or not for profit or reward</p>
<p><b>s54 (1) (c) Use or Possession of a Forged Passport, Work Permit, Residence Permit, Visa or Registration or Other Forged or Altered Consent, Endorsement or Approval</b></p> <p>5,000,000 Ksh or 5 Years Maximum Imprisonment</p> <p><b>s43 Repatriation – see below</b></p>	<p>Evidence of use or possession</p> <p>The document is a passport, certificate of registration, visa, work permit, residence permit, pass, written authority, or other consent or approval</p> <p>The document is a forgery or has been altered/ issued without lawful authority <b>and</b></p> <p>The accused knew it was false/forged.</p>
<p><b>s54 (g) Presenting a Forged, Altered or False Document in Order to Obtain Passport/Registration/Visa/Work Permit/Residence/Pass or Other Written Authority</b></p> <p>5,000,000 Ksh or 5 Years Maximum Imprisonment</p> <p><b>s43 Repatriation – see below</b></p>	<p>Act of 'presentation' - difficult if done by post</p> <p>Evidence that the document has been forged/ altered</p> <p>Accused knew the document was forged and intended that the receiver be deceived by it <b>and</b></p> <p>Intention to obtain passport/registration/ visa/ work permit/ residence/ pass or other written authority</p>
<p><b>s54 (1) (m) (s83SLAA) Using A Passport, Pass or Authority That Was Issued to Another Person</b></p> <p>5,000,000 Ksh or 5 Years Maximum Imprisonment</p> <p><b>s43 Repatriation – see below</b></p>	<p>'Use' of passport/pass/authority</p> <p>That document had been issued to another</p>

## SAMPLE CHARGES UNDER KCIA

CHARGE COUNT ONE	Being unlawfully present in Kenya contrary to s53 (1) (b) as read with s53 (2) of the Kenyan Citizenship and Immigration Act 2011.
PARTICULARS OF OFFENCE (See Second Schedule of C.P.C.)	<b>[Name of Accused(s)]</b> on or about the <b>[date]</b> , at <b>[location]</b> , being subject to an order for removal from Kenya under s43 of <b>The Kenyan Citizenship and Immigration Act 2011</b> was found in Kenya while that order was still in force.
CHARGE COUNT ONE	Unlawful presence/entry in Kenya contrary to s53 (1) (j) as read with s53 (2) of the Kenya Citizenship & Immigration Act, 2011.
PARTICULARS OF OFFENCE	<b>[Name of Accused(s)]</b> on or about the <b>[date]</b> , at <b>[location]</b> , being of <b>[state the nationality of accused person]</b> nationality, was present in Kenya without valid authority or lawful immigration status.
CHARGE COUNT ONE	Unlawfully engaging in employment contrary to s53 (1) (m) as read with s53 (2) of the Kenya Citizenship & Immigration Act, 2011.
PARTICULARS OF OFFENCE	<b>[Name of Accused(s)]</b> on or about the <b>[date]</b> , at <b>[location]</b> , being of <b>[specify the nationality]</b> nationality, was found engaging in employment/ trade/occupation/profession <b>[delete as appropriate]</b> namely <b>[state nature of that work]</b> without lawful authorisation or exemption.
CHARGE COUNT ONE	<b>Knowingly using/being in possession [delete] a forged/altered immigration document, contrary to s54 (1) (c) (2) of the Kenya Citizenship &amp; Immigration Act, 2011.</b>
PARTICULARS OF OFFENCE	<b>[Name of Accused(s)]</b> on or about the <b>[date]</b> , at <b>[location]</b> , used/was in possession of <b>[delete as appropriate]</b> a forged/altered <b>[specify]</b> passport, work permit, residence permit, visa or registration or other forged or altered consent, endorsement or approval <b>[delete as appropriate]</b> <b>[if altered, specify “without lawful authority”]</b> .
CHARGE COUNT ONE	Presenting a forged, altered or false document in order to obtain passport/ registration/visa/work permit/residence/pass or other written authority <b>[specify]</b> contrary to s54 (1) (g) (2) of the Kenya Citizenship & Immigration Act, 2011.
PARTICULARS OF OFFENCE	<b>[Name of Accused(s)]</b> on or about the <b>[date]</b> , at <b>[location]</b> , knowingly presented a forged a forged, altered or false document in order to obtain passport/registration/visa/work permit/residence/pass or other written authority <b>[delete as appropriate]</b> .

CHARGE COUNT ONE	Presenting a forged, altered or false document in order to obtain passport/registration/visa/work permit/residence/pass or other written authority [specify] contrary to s54 (1) (g) (2) of the Kenya Citizenship & Immigration Act, 2011.
PARTICULARS OF OFFENCE	<b>[Name of Accused(s)]</b> on or about the <b>[date]</b> , at <b>[location]</b> , knowingly presented a forged a forged, altered or false document in order to obtain passport/registration/visa/work permit/residence/pass or other written authority <b>[delete as appropriate]</b> .

CHARGE COUNT ONE	Using a passport, pass or authority that was issued to another person contrary to s54 (1) (m) (2) of the Kenya Citizenship & Immigration Act, 2011 as amended by s83 of the Security Laws (Amendment) Act 2014.
PARTICULARS OF OFFENCE	<b>[Name of Accused(s)]</b> on or about the <b>[date]</b> , at <b>[location]</b> , used a <b>[identify document]</b> that had been issued to another, namely <b>[state name]</b> .

# SECTION 43 - ANCILLARY POWER OF REPATRIATION

<b>What is it?</b>	Power to remove a person unlawfully present in Kenya/prevent return
<b>How?</b>	<p>Court can recommend to:</p> <ul style="list-style-type: none"><li>a) Commissioner of Police <b>and</b> Prisons to remove either immediately or after completion of a sentence <b>if less than 12 months or</b></li><li>b) recommend to the Minister for Immigration for removal if sentence is <b>more than 12 months</b></li></ul>
<b>Who?</b>	Court of its own motion; Prosecution can invite
<b>Detention?</b>	Yes – can keep him in custody until departure in police, custody, prison or immigration facility

# RELEVANT OFFENCES UNDER PROCEEDS OF CRIME AND ANTI-MONEY LAUNDERING ACT 2009 (POCAMLACT ACT)

s4 Acquisition, Use or Possession of Proceeds of Crime	
Maximum Fine: 5,000,000 Ksh or 14 Years Maximum Imprisonment	
POINTS TO PROVE	ANCILLARY POWERS
Date and Location	s61 Confiscation Orders (upon conviction)
Possession, Acquisition or 'Use'	s68 Restraint Orders
If acquisition, the arrangement/or agreement	s75 Realisation of Property –
Identify the property	Civil Forfeiture
That property is a proceed of crime (see below)	These powers are beyond the scope of this guide; consult ODPP
<b>Agencies:</b> Attorney General, Director of Criminal Investigations, Office of the Director of Public prosecutions, Kenya Wildlife Service, Interpol, National Intelligence	
<b>Evidence likely to include but not limited to:</b> Documentary evidence, i.e. employment letter, business registration docs, bank statements, electronic evidence, expert advice, witness statements, photographic evidence, suspects statements.  Prosecutors are <b>not</b> required to prove that the property in question is the benefit of a <b>particular</b> or a <b>specific</b> act of criminal conduct, as such an interpretation would restrict the operation of the legislation. The prosecution must be in a position, as a minimum, to be able to produce sufficient circumstantial evidence or other evidence from which inferences can be drawn to the required criminal standard that the property in question has a criminal origin e.g. possession of a large quantity of elephant tusks. UK authority: R v Anwoir [2008] EWCA Crim 1354 (REF: UK Criminal Division of Court of Appeal).	
CHARGE COUNT ONE	Possession/use/acquisition of property from proceeds of crime contrary to s4 as read with s16 (1) of the POCAMLACT no 9 of 2009.
PARTICULARS OF OFFENCE	<b>[Name of Accused(s)]</b> on or about the <b>[date]</b> , at <b>[location]</b> was in possession/used or knowingly acquired <b>[delete as appropriate]</b> proceeds of crime namely (identify the property) e.g. 'ivory'.

### s5 Wilful Failure to Report Suspicious Transactions

**Maximum fine: 5,000,000 Ksh or 14 Years Maximum Imprisonment**

POINTS TO PROVE	ANCILLARY POWERS
That a transaction took place	s61 Confiscation Orders
That the person was in a position to report that transaction	s68 Restraint Orders
That the transaction was 'suspicious' (see definition)	s75 Realisation of Property
That the accused knew that the transaction was suspicious	Civil Forfeiture
That he failed to report it to the FRC within seven days of the transaction	These powers are beyond the scope of this guide; consult ODPP
<b>Agencies:</b> EACC, ODPP, AG, Police, KWS, Judiciary, FRC, Relevant regulatory Authority	
<b>Evidence likely to include but not limited to:</b> Documentary evidence, i.e. employment letter, business registration docs, bank statements, electronic evidence, expert advice, witness statements, photographic evidence, suspects statements.	

CHARGE COUNT ONE	Wilful failure to report suspicious transactions contrary to s5 as read with s16 (2) of POCAMLA.
PARTICULARS OF OFFENCE	<b>[Name of Accused(s)]</b> on or about the <b>[date]</b> , at <b>[location]</b> , wilfully and knowingly failed to report a suspicious transaction <b>[define e.g. deposit]</b> to financial institution <b>[identify]</b> .

## RELEVANT OFFENCES UNDER THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT 2003

s39 Bribery	
Maximum Fine: 1,000,000 Ksh and/or 10 Years Maximum Imprisonment	
POINTS TO PROVE	ANCILLARY POWERS
Date and Location	s51 Compensation
Accused was a Public officer	s55 Forfeiture of unexplained assets
He/she solicited or received a benefit	Ancillary powers are outside the scope of this book. Consult EACC/ODPP
Did so 'corruptly' within the meaning of this Act i.e. section 2 e.g. abuse of office	
<b>Agencies:</b> EACC, ODPP, AG, Police, KWS, Judiciary, Interpol, FRC	
<b>Evidence likely to include but not limited to:</b> Electronic Evidence, Treated money, Witness statements, M-PESA, Telecoms	
<b>Note:</b> suitable for officers or others working as an agent who abuse their position and take bribes to assist offenders in evading detection/concealing their criminal activities e.g. at ports and borders.	
CHARGE COUNT ONE	Corruptly soliciting/receiving a benefit contrary to s39 (3) (a) or (b) <b>[delete as appropriate]</b> of the Anti-Corruption and Economic Crimes Act 2003.
PARTICULARS OF OFFENCE	<b>[Name of Accused(s)]</b> on or about the <b>[date]</b> , at <b>[location]</b> , being a principal/agent namely <b>[describe principal/agent]</b> corruptly solicited/ received or agreed to receive a benefit <b>[describe benefit]</b> from <b>[name of complainant or if unknown, state "from a person unknown"]</b> in return for doing or not doing an act required of his public office, namely <b>[specify that act]</b> .

s46 Abuse of Office	
Maximum Fine: 1,000,000 Ksh and/or 10 Years Maximum Imprisonment	
POINTS TO PROVE	ANCILLARY POWERS
Accused is a Public officer	s51 Compensation
He conferred a benefit to himself or another	s55 Forfeiture of unexplained assets
Roles and responsibilities and duties of that office	Ancillary powers are outside the scope of this book. Consult EACC/ODPP
That he breached those roles responsibilities and duties	
That he did so in order to receive or confer that benefit	
<b>Agencies:</b> EACC, AG, Director of Criminal Investigations, ODPP, KWS, Judiciary, NIS	
<b>Evidence likely to include but not limited to:</b> Documentary evidence of the nature of his office and his duties/ roles/responsibilities, electronic evidence, witness statements.  There are powers under this Act to obtain disclosure, so any such investigation should be done in close working with the EACC or ODPP.	
CHARGE COUNT ONE	Abuse of office, contrary to s46 of the Anti-Corruption and Economic Crimes Act 2003.
PARTICULARS OF OFFENCE	<b>[Name of Accused(s)]</b> on or about the <b>[date]</b> , at <b>[location]</b> , employed as a public officer, namely <b>[describe public officer]</b> used his/her office improperly to receive or confer a benefit to another <b>[delete as appropriate]</b> namely <b>[describe the benefit]</b> .

### s47 Dealing with Suspected Property

**Maximum Fine: 1,000,000 Ksh and/or 10 Years Maximum Imprisonment**

POINTS TO PROVE	ANCILLARY POWERS
Date and Location	s51 Compensation
The accused is a Public Officer	s55 Forfeiture of unexplained assets
Identify the property	Ancillary powers are outside the scope of this book. Consult EACC/ODPP
The property was corruptly acquired	
He knew or had reasonable excuse to believe it had corruptly acquired	
The accused was involved in either retaining, receiving, holding, concealing, entering into transactions or causing such transactions to be entered into or using the said property	

**Agencies:** EACC, ODPP, AG, Police, KWS, Judiciary, FRC, NIS

***EEvidence likely to include but not limited to:***

Documentary evidence, i.e. employment letter, business registration docs, bank statements, electronic evidence, expert advice, witness statements, photographic evidence, suspects statements.

CHARGE COUNT ONE	Dealing with property corruptly acquired, contrary to s47 of the Anti-Corruption and Economic Crimes Act 2003, as read with s48 of the same.
PARTICULARS OF OFFENCE	<b>[Name of Accused(s)]</b> on or about the <b>[date]</b> , at <b>[location]</b> , knowingly or having reasonably grounds to believe that property had corruptly acquired namely <b>[identify property]</b> concealed/held/received/ entered into a transaction/used the said property <b>[delete as appropriate and give particulars]</b> .

