



**Musyoka v Republic (Criminal Appeal E009 of 2023)  
[2024] KEHC 17245 (KLR) (25 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 17245 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CRIMINAL APPEAL E009 OF 2023  
TM MATHEKA, J  
JUNE 25, 2024**

**BETWEEN**

**ERICK MUSYOKA ..... APPELLANT**

**AND**

**THE REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The appellant Eric Musyoka was charged with two others with the offence of dealing in wildlife trophy contrary to section 92(2) of the Wild Conservation and Management Act 2013. Particulars were that Kennedy Kilunda Kioko, Eric Musyoka and Bernard Mutie Nzinga on 21st day of September 2022 at around 2000hrs on different location at Nthongoni area within Kibwezi sub county in Makueni county jointly with others not before court were found dealing with East African sandal wood weighing approximately 450kgs without a permit from the director general of Kenya Wildlife Service.
2. On 23/09/2022 he pleaded not guilty.
3. The three of them were given bond. His co-accused were able to get sureties and were released on 22/11/2022.
4. On 25/12/2022 the appellant decided to change plea.
5. He stated “naomba nisomewe mashtaka tena”.
6. The charge was read and he stated: “ni kweli” and a plea of guilty was entered. Facts were read on 25/12/2022. The record states:

On 20/09/2022 at 8:00 one CPL Kyaka Njeri of KWS headquarters got intelligence information of some suspects who wanted to sell sandal wood at Kibwezi area and on 21/09/2022 the said officer and other KWS officers laid an ambush and at around 8:00 pm they encountered the 1st accused who was selling sandalwood of weight kg 100 and they



also found two other accused who were found in possession of 275kg of sandalwood, the 2nd accused person was in company of the 3rd accused person all of them were arrested, the sandalwood was recovered and kept as an exhibit they had no license. They were all arrested and charged. The sandalwood was analyzed and it was confirmed it was sandalwood. I produce the weighing certificate as exhibit 1, analyst report as exhibit 2 and the exhibit memo form as exhibit 3 and the sac of sandalwood of 450 kg sandal wood produced as exhibit 4.

7. The appellant stated that the facts were correct, he was convicted as a 1st offender and in mitigation stated that sandalwood grew in his shamba and he used it without being aware it was an endangered species.

8. The prosecution stated:

The plant in question is an endangered species it takes 40 years to grow, the demand for sandalwood is high and is exported the plant was cut from the root and we urge the court to give a maximum sentence as a deterrence measure.

9. There was a presentence report filed by PACs. It recommended a non-custodial sentence on the finding that the accused person was not aware of the fact that the sandalwood in his farm was an endangered species.

10. The court stated:

“I have considered the charge, the mitigation and the plea by the prosecution, I have also considered the presentence report. Indeed, the plant the 2nd accused was found in possession of is an endangered species, the accused had no license even though he claims to have cut it from his home which he has not proved. I therefore find the offence serious which calls for a deterrent sentence n therefore the 2nd accused is sentenced to 7 years in jail.

Right of appeal, 14 days.”

11. Aggrieved he filed this appeal on 17/01/2023. He submitted on the following grounds that:

1. The accused did not understand the nature and consequences of the case before him pursuant to Article 50(3) of [the Constitution](#) of Kenya 2010,
2. The accused person was not assigned an advocate by the state pursuant to Article 50(2) of [the Constitution](#) of Kenya occasioning an injustice and unfair hearing.
3. The accused person was not dealing with the African sandal wood but was in a company of the accused 3
4. The accused person was not criminally responsible for the alleged offence. The buck stops with the KWS.
5. The alleged offence was not properly investigated. The ODPP and CID were not involved.

12. He submits that the court did not explain the charge in the language he understood – on the elements of the charge– that even in giving the facts of the case – the material facts were not laid out to him.



13. He also submits that the court was required to inform him of his right to an advocate and to record the fact in the proceeding – and that the record should have shown that the accused was made aware of the consequences of not having counsel.
14. He submits further that from the record of facts he was not dealing as defined by law with the sandal wood. That the prosecutor’s case against him as the 2nd accused is that he was in the company of accused 3 and for that reason he could not have been held criminally liable for the offence. That the trial court was in error in determining that he, 2nd accused was found in possession of the plant. He blamed KWS for not raising awareness to those people on whose land sandal wood grows on it being a protected plant.
15. Finally, he submits that the offence was not properly investigated – that in this case KWS was the complainant, witness and investigating officer in contravention of Article 157 of the COK (2010), and 157(9) of the same Constitution of Kenya (2010). That in totality, no evidence was produced to show that he was in possession of the sandal wood.
16. The DPP submits in opposing the appeal that:

The appellant was properly convicted and sentenced. The appellant was convicted on his own plea of guilty to the charges hence under the provisions of section 348 CPC the appellant is only allowed to appeal only on the extent or legality of the sentence. The plea that was entered by the appellant was unequivocal since he understood the charges he was facing. He was given time to think and ponder before he was convicted and sentenced. The language which is indicated in the proceedings all through shows that it was Kiswahili and the appellant did not raise with the court if he did not understand the proceedings. From the proceedings the appellant was well communicating with the court in Swahili, thus the appellant clearly understood the proceedings even in his mitigation he was referring to sandal wood which was the subject of the charges against him hence that ground of appeal must fail.

17. With respect to the provision of counsel vide Article 50(2) of the Katiba – it is argued that the appellant never asked for counsel and in any event he was not eligible as those are provided for murder and robbery suspects.
18. With respect to the question of dealing – it is submitted that:

The appellant submits that he was not dealing with the sandalwood but denies he was in possession of it. The definition of dealing under section 3 states:

Deal” means-

- a. To sell, purchase, distribute, barter, give, receive, administer, supply, or otherwise in any manner deal with a trophy or live species;
- b. To cut, carve, polish, preserve, clean, mount or otherwise prepare a trophy or live species;
- c. To transport or convey a trophy or live species;
- d. To be in possession of any trophy or live species with intent to supply to another; or
- e. To do or offer to do any act preparatory to, in furtherance of, or for the purpose of, an act specified above; and



The facts of the case which were tendered, shows that the accused persons were found in possession of the 450kg of sandal wood in an attempt to sell to KWS officers who had disguised themselves as purchasers of the produce.

19. On issue of investigations, it is submitted that: Under the law, the KWS are the investigators and the prosecution done by ODPP. The ODPP approved the charges after confirmation that the evidence was sufficient hence, we submit that the case was well processed.
20. The issue for determination is whether the plea was unequivocal and whether the facts supported the charge.
21. I must begin with the issue of representation. The Legal Aid Act Cap 16A makes it mandatory for the trial court to inform an accused person of his right to counsel and to determine the issue whether or not a substantial injustice will occur if none is assigned. It states at Section 43: 43.Duties of the court

(1) A court before which an unrepresented accused person is presented shall—

- a. promptly inform the accused of his or her right to legal representation;
- b. if substantial injustice is likely to result, promptly inform the accused of the right to have an advocate assigned to him or her; and
- c. inform the Service to provide legal aid to the accused person.

At s. 43(1A) the act provides the guidance for making the

determination whether substantial injustice referred to in paragraph (1) (b) likely to occur, the court shall take into consideration—

- a. the severity of the charge and sentence;
- b. the complexity of the case; and
- c. the capacity of the accused to defend themselves.

22. One can see that the charge facing the appellant is severe in that upon a finding of guilt his starting sentence was 7 years' imprisonment as that is the mandatory minimum sentence. This appeal is evidence that had he been aware of that fact may be he would not have pleaded guilty.

23. The trial court whilst sentencing the appellant stated that the appellant had not proved that he had sandalwood growing in his shamba and he did not know that it was an offence to cut it, pointing to the possible justice gap I mentioned in HCCRA E018 of 2023 where more effort is in punishment instead learning new habits and unlearning bad ones, spreading information and knowledge and creating the movement required and set in our Constitutional values at article 10, through the application of Article 159(2) ( c) . The Act establishes community wildlife associations and

S.41. provides for the functions of community wildlife associations and wildlife managers

An association or wildlife manager approved by the Cabinet Secretary on the recommendation of the service in consultation with the county wildlife conservation committees shall:

- a. ensure that the association membership or the wildlife manager protects, conserves and manages wildlife conservancies and sanctuaries under their jurisdictions pursuant to their respective approved management plans;
- b. assist the service in combating illegal activities, including poaching and bush meat trade;



- c. keep the regional wildlife conservation area committee informed of any development changes and occurrences within their area that may adversely affect wildlife;
- d. assist in problem animal control through community wildlife scouts drawn from among their membership or employees; and
- e. do any other act that is necessary to enhance community participation in wildlife protection, conservation and management.

It is evident that they have a role to do any other act that is necessary to enhance community participation in wildlife protection, conservation and management. These other acts must in my view include dealing with the community understanding of what it means to preserve these endangered species through AJS mechanisms that will encourage this understanding while crafting means for punishment where necessary and learning.

- 24. That said the appellant would only have been able to deal with the charge properly with legal counsel. It is complicated and carries a mandatory minimum sentence. The court ought to have given him the opportunity to get legal counsel or determine whether he needed legal aid by dealing in accordance with s. 41 of the [Legal Aid Act](#).
- 25. The appellant is right that the trial court must determine the issue whether or not substantive injustice would occur and the record is to reflect the same. In this case the record does not show whether the appellant was informed of his right and whether the court indeed determined whether or not he required an advocate. There is no law that say that only murder or robbery with violence suspects are entitled to counsel. The trial court is expected by law to determine the issue of representation, and reflect it on the record.
- 26. On the facts of the case it is correct that the record shows the accused pleaded – “ni ukweli” to the charge itself, but the language of the court is not indicated. And though the language is not stated the record will show that the appellant communicated in Kiswahili ‘maelezo ni ya ukweli’ when the facts were read to him. He also spoke in Kiswahili even on the date he sought to change plea. One can safely conclude that the Kiswahili language was used.
- 27. From the facts of the case as stated, the KWS officers found one accused selling sandalwood, there were two accused who were in possession of more sandal wood. The facts specifically state that he 2nd accused was in the company of the 3rd accused. The facts do not state what the 2nd accused was doing. In Kiswahili it would be Mshatakiwa wa pili alipatikana akiwa na mshatiwa wa tatu or Mshatikiwa wa pili alikuwa na shtakiwa wa tatu or other variants that state that the 2nd accused was in the company of the 3rd accused. But they state that the 3rd accused and another were in possession of 275kg of sandal wood. If it was the 2nd accused who was in possession of the sandal wood together with the appellant why would the facts have to meander that far to state specifically that he was only in the company of the 3rd accused? It appears to me that with respect to the offence the appellant may have pleaded to the fact of being in the company of the 3rd accused who was the one in possession of 275kg of sandal wood.
- 28. The facts are really scanty. They do not tell how the sandal wood was recovered, where it was recovered, who it was being sold to, what happened to the buyer, were the three accused persons together, where exactly where they, how was the sandalwood packaged? To merely state that the appellant was in the company of another when the arrest was carried out is not enough. The facts needed to state his actual involvement.
- 29. On whether the matter was properly investigated, the appellant’s plea of guilty took away the opportunity for the court to determine whether or not that was the position as the hearing would have



brought out the said elements of investigations and whether it was well done. From the facts as read by the prosecutor it would be difficult to know the nitty gritty of the actions of the investigators.

30. All that said it is evident from the record that the court failed to inform the appellant of his right as required by s. 41 of the *Legal Aid Act*, and to determine whether substantial injustice would occur if the appellant proceeded without legal aid. That provision is couched in mandatory terms. The court by failing to so violated his right to legal representation, ultimately the right o a fair hearing, taking into consideration the seriousness of the offence, a sentence that would take away his liberty for at least 7 years in the first instance.
31. The facts are not clear as to what the appellant actually did with relation to the offence. They seem to suggest that his offence was merely being in the company of the 3rd accused.
32. A criminal charge must be so clear that an accused person without legal counsel would be seen to have understood it especially where he pleads guilty. A plea of guilt should be a cover for failure on the part of the Criminal Justice System to comply with its own rules especially the built in protective mechanisms to ensure just outcomes.
33. In this case, there are some doubts given rise to by the facts as presented or as recorded. Even in the light of the plea of guilt they render the plea to be unequivocal.
34. On the totality of the foregoing grounds I find that the conviction, even though on a plea of guilt was not unequivocal.
35. In the circumstances, the appeal succeeds. The conviction is quashed.
36. The sentence is set aside and the appellant is to be set at liberty unless otherwise legally held.

**DATED, SIGNED AND DELIVERED IN OPEN COURT ON 25/6/2024**

**MUMBUA T MATHEKA**

**JUDGE**

Present : Appellant, Ms. Nyakibia for State, Ms. Nelima/Ms. Elizabeth Court Assistant

**SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA**

**THE JUDICIARY OF KENYA.**

**MAKUENI HIGH COURT**

**HIGH COURT DIV**

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