



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAHURURU**

**CRIMINAL APPEAL NO.94 OF 2017**

(Appeal Originating from Nyahururu CM's Court Misc.Cr.No.3032 of 2015 by: Hon. A.P. Ndege – S.R.M.)

**DAVID KITHOME SENGA.....APPELLANT**

**- V E R S U S -**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

David Kithome Senga, the appellant was charged with another for the offence of being in possession of threatened and endangered species contrary to Section 47(1) as read with Section 85, 92 and 105(1)(a)(b)(c) (2) (3) of the Wildlife and Conservation and Management Act, 2013.

The particulars of the charge are that on 1/12/2015 at Kwa Haji Farm in Subukia Sub-County, jointly were found in possession of Flora East African Sandal Wood to wit 130kgs valued at Kshs.5,200/= without a license from the Director of Kenya Wildlife Services.

On 8/3/2016 when the appellant appeared before the court, he changed plea and admitted the offence. After the facts were read to him, he admitted and was convicted on his own plea. He was sentenced to a fine of Kshs.20,000,000/= in default, life imprisonment.

The appellant is aggrieved by both the conviction and sentence. The grounds of appeal are contained in the supplementary grounds of appeal and are as follows:

1. That the court erred by relying on the statement of Mr. Wambua;
2. That there was no expert evidence to prove that what was recovered was indeed sandalwood;
3. That the court erred by sentencing the appellant without people from Kenya Forest Services testifying;
4. That the court erred by not considering his defence;
5. That the court erred by sentencing the appellant before obtaining a pre-sentence report;
6. That the sentence was too harsh.

In his submissions, the appellant argued that he was not transporting the Sandalwood but that the wood was found in his home.

Ms. Rugut opposed the appeal arguing that the appellant pleaded guilty; that the plea was unequivocal; that he was not remorseful for what he had done and the court should not interfere with both conviction and sentence.

The appellant pleaded guilty to the offence and his grounds of appeal that the court relied on the statement of Wambua; that the court did not call for an expert report or that his defence was not considered are misplaced. Those grounds could only arise had the matter proceeded to full hearing.

The appellant was convicted on his own plea of guilty. Section 348 of the Criminal Procedure Code bars any appeal from a conviction where an accused was convicted on his own plea except as to the extent and legality of the sentence. The section reads as follows:

“No appeal shall be allowed in the case of an accused person who had pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.”

The above section was considered in the case of *Olel v Republic (1989) KLR 444* where the court held:

“Where a plea is unequivocal, an appeal against conviction does not lie. Section 348 of the Criminal Procedure Code (Cap 75) does not merely limit the right of appeal in such cases but bars it completely.”

From a reading of the above section and the decision, I understand them to mean that an aggrieved party has a right of appeal against conviction if the plea was equivocal. The question in this case is whether the appellant’s plea was equivocal. In the case of *Alexander Lukoye Malika v Republic [2015] eKLR*, the court identified the situations in which a conviction based on a plea of guilty can be interfered with and stated thus:

“A court may only interfere with a situation where an accused person has pleaded guilty to a charge where the plea is imperfect, ambiguous or unfurnished such that the trial court erred in treating it as a plea of guilty. Another situation is where an accused person pleaded guilty as a result of a mistake or misapprehension of the facts. An appellate court may also interfere where the charge laid against an accused person to which he has pleaded guilty disclosed no offence known in law. Also where upon admitted facts, the appellant could not in law have been convicted of the offence charged.”

The legal principles to guide a court in taking of a plea in a criminal case were annunciated in the decision of *Adan v Republic [1973] EA 443* where it stated:

- i. The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language which he understands;
- ii. The accused’s own words should be recorded and, if they are an admission, a plea of guilty should be recorded;
- iii. The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts, or to add any relevant facts;
- iv. If the accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered; and
- v. If there is no change of plea, a conviction should be recorded and a statement of facts relevant to sentence together with the accused’s reply should be recorded.

In this instance, the charge was read to the appellant and he answered in Kiswahili, ‘*nakubali*’. The facts were read to him and he replied, ‘*I agree*’. In his mitigation, he told the court that the wood was being used as firewood.

He has not denied that he was found in possession of the subject wood. He complained that he was not ferrying it. In fact, the facts reveal that a vehicle was nearby, not that he was transporting it. The fact that the appellant may not have known the value of the wood does not negate the plea because in Kenya, ignorance of the law is no defence to a criminal charge.

I find that the plea was unequivocal and the appellant was properly convicted.

As observed above, the other grounds cited are not relevant because the case did not go to full hearing.

I find no reason to interfere with the conviction.

As respects the sentence, Section 92 of the Wildlife and Conservation Act provides that once convicted of an offence relating to endangered and threatened species, one is liable upon conviction to a fine of not less than Kshs.20 million or imprisonment for life or to both such fine and imprisonment. That is what the court handed the appellant. In fact, the trial court observed that the sentence was unreasonable but felt bound by the law. In this case, the appellant pleaded guilty to the charge. He did not waste the court’s time. He did not have any previous convictions. He is remorseful. The court takes into account the fact that the value of the wood was Kshs.5,200/= though the same is an endangered species and the government has gone all out to try and protect the said wood from the likes of the appellant who casually destroy it and use it as firewood.

Since the case *Francis Karioko Muruatetu & another Pet.15 & 16/2015 (SC)*, the courts have generally steered away from the mandatory sentences which deprive the court of judicial discretion in sentencing a matter. In this case, the law provides for a stiff sentence of Kshs.20 million or life imprisonment. Not many people can afford the said fine. The court appreciates that the stiff sentence is meant to deter the offenders who do not care about our Wildlife or vegetation which is our very survival. However, the court ought to be allowed to exercise its discretion in sentencing even in a matter of this nature although the court must exercise the said discretion judiciously bearing in mind the public policy and public interest and the mischief that was meant to be cured when enacting the Act.

Having considered all the above factors, I will allow the appeal on sentence, set aside the sentence of Kshs.20 million in default, life imprisonment.

The appellant has already served 4 years imprisonment. I hereby sentence him to a fine of Kshs.1 million in default 8 years imprisonment. The sentence will run from 21/3/2016 when the trial court sentenced him. The appeal succeeds to that extent.

**Dated, Signed and Delivered at NYAHURURU this 11th day of March, 2020.**

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**R.P.V. Wendoh**

**JUDGE**

PRESENT:

Ms. Rugut for State

Eric – Court Assistant

Appellant – present in person