REPUBLIC OF KENYA

IN THE HIGH COURT OFKENYA AT KITUI

CRIMINAL APPEAL NO. 2 OF 2015

CONSOLIDATED WITH HCRA NO. 3 OF 2015

(Being an appeal against a conviction and sentence in Senior Resident Magistrates Court at Mutomo on 4th day of August 2015 by Hon. J. Nyakundi PM)

1.MUTIA MWALIMU.....1ST APPELLANT

2.MUTUNGA MWALAVI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. **Mutia Mwalimu** (1st Appellant) and **Mutunga Mwalavi** (2nd Appellant) were charged as follows;

Count 1

Cutting /Removing Forest Produce Contrary to **Section 52 (1) (g) (2) as read with Section 54 (1) (e) (2) of the Forest Act NO. 7 of 2005.**

2. Particulars of the offence being that on the **3rd day of August**, **2015** at about **6.30 p.m** at **Kadiaga area**, **Kalambani Sub Location** of **Mutha Location** in **Mutomo Sub County** within **Kitui County**, without a valid permit from Kenya Forest Service Department cut and removed forest produce namely trees along **River Thua Line.**

3. **Count 2**

Destroying trees for charcoal production without a lawful authority contrary to **Section 15 as read with Section 15 (A) of Kitui County Charcoal Management Act of 2014.**

Particulars of the offence being that on the **3rd day of August 2015,** at about **6.30 p.m**. at **Kadiaga area**, **Kalambani Sub location** of **Mutha location** in **Mutomo Sub County** within **Kitui County**, without a lawful authority destroyed trees for charcoal production along **River Thua Line**.

4. On being arraigned in court they were **convicted** on their own **Plea of guilty** and **Sentenced** thus;

> **Count 1- to pay a fine of Kshs. 50,000 in default to serve 1 year imprisonment**
>
> **Count II- to pay a fine of Kshs. 200,000 in default to serve 3 years imprisonment.**

5. Aggrieved by the decision of the court, the 1st Appellant appealed on grounds that the sentence imposed was severe and sought leniency.

6. The 2ndAppellant on the other hand appealed on grounds that being a first offender he was shocked, confused and could not fully comprehend the trial process and was unaware of the consequences of the charges to which he pleaded. That he is disabled, both legs having been amputated due to chronic diabetes and his wife is jobless therefore he is the one his family depends on.

7. The Appellants canvassed the appeal by way of written submissions. The 1st Appellant sought the Court's leniency on the ground that he

had siblings who depend on him.

8. The 2nd Appellant denied having committed the offence arguing that he was found on his land that is next to the farm of one **Kalulu Ngambi** who was cutting down trees. He was taken to the police station as a witness to the act of destruction of trees but was shocked to be charged.

9. The state through **learned counsel, Mr. Mamba** opposed the appeal. He submitted that the appellant had no permit from the Kenya forest services. That they pleaded guilty and were fined, and the language having been translated they could not plead ignorance.

10. This being the first appeal I am duty bound to reexamine afresh what transpired before the trial court.

11. This is a matter where the appellants admitted having committed the offence. **Section 348 of the Criminal Procedure Code** provides thus;

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

12. The law is clear, a person who pleads guilty to the charge would not be expected to appeal against the conviction. He can only question the legality of sentence. Up to the point of the appeal being heard the appellants exuded their ignorance of the law. It is the maximum of the law that:***"Ignorantia juris non excusat" - "Ignorance of the Law excuses no-one"***

13. However, this court has to satisfy itself that the plea was unequivocal.Whether or not a plea of guilty was unequivocal depends on whether the learned Magistrate took into consideration principles laid down in plea taking. The procedure of plea taking was set out in the case of **Adan –Vs- Republic (1973) EN 445, thus;**

> ***"The manner in which a plea of guilty should be recorded is:***
>
> ***(a) The trial magistrate or Judge should read and explain to the accused the charge and all ingredients in the accused's language or in a language that he understands.***
>
> ***(b) He should then record the accused's own words and if they are an admission, a plea of guilty should be recorded;***
>
> ***(c) The prosecution may 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;***
>
> ***(d) If the accused does not agree to the facts or raises any question of his guilt, his reply must be recorded and a change of plea entered but if there is no change of plea, a conviction should be recorded together with a statement of the facts relevant to sentence and the accused's reply. (Also see section 207 of the Criminal Procedure Code".***

14. When the Appellants were arraigned in court the plea was recorded thus:

> ***"Count 1***
>
> ***Accused 1 – It is true***
>
> ***Alternative count – It is true***
>
> ***Count II***
>
> ***Accused 2- It is true***
>
> ***Alternative count – It is true***
>
> ***Court- Plea of guilty entered in all counts."***

15. After the Appellants admitted the charge as presented the prosecutor addressed the court by stating that;

> **"facts as per charge sheet. 3 pages photographs Ex. 1 (a) (b) and (c)".**

The Appellants were not given the opportunity of agreeing, disputing or explaining the facts. Whether or not they understood what the prosecution stated regarding facts cannot be discerned by this court.

16. Prior to a court sentencing an accused person it is just for it to grant him the opportunity to give evidence in mitigation that informs the court on which sentence to pass. ***(See section 216 of the Criminal Procedure Code*)** The Appellants were not accorded the opportunity to do so.

17. A plea that is taken by a court must be unequivocal. If it is not the appellate court must interfere with it. The criteria for interfering with a plea of guilty was stated in the case of **Laurent Mpinga –Vs. R (1983) TLR 177 thus;**

> ***"That even taking into consideration the admitted facts, the plea was imperfect, ambiguous or unfinished and for that reason, the lower court erred in law in treating it as a plea of guilty.***
>
> ***(2) That the Appellant pleaded guilty as a result of mistake or misapprehension.***
>
> ***(3) That the charge laid at the appellant's door disclosed no offence known to law; and***
>
> ***(4) That upon the admitted facts the appellant could not in law have been convicted of the offence charged".***

18. Looking at the 1st count, the Appellants were charged contrary to **Section 52 (1) (g) (2) as read with section 54 (1) (e) (2) of the Forest Act, NO. 7 of 2007** that provides thus;

> ***"(1) Except under a licence or permit or a management agreement issued orentered into under this Act, no person shall, in a State, local authority or provisional forest—***
>
> ***(g) enter any part thereof which may be closed to any person;***
>
> ***(2) Any person who contravenes the provisions of subsection (1) of this section commits an offence and is liable on conviction to a fine of not less than fifty thousand shillings or to imprisonment for a term of not less than six months, or to both such fine and imprisonment.***
>
> ***54. (1) Any person who—***
>
> ***(e) makes or is found in possession of charcoal in a state, local authority or provisional forests, in private forest or farmland without a licence or permit of the owner as the case may be, commits an offence and is liable on conviction to a fine of not less than fifty thousand shillings or to imprisonment for a term of not less than one year, or to both such fine and imprisonment.***
>
> ***(2) A person who wilfully or maliciously sets fire to any private, provisional, local authority or state forest commits an offence and is liable to a fine of not less than two hundred thousand shillings, or to imprisonment for a term of not less than one year, or to both such fine and imprisonment,"***

The particulars of the offence as drawn do not disclose the ingredients of the offence as provided in the charge.

19. The Second Count – the Appellants were stated to have contravened **Section 15A** of the **Kitui County Charcoal Management Act of 2014** that provides thus:

> ***"15. Any person who, without lawful authority;-***
>
> ***(a) Marks any forest produce, or affixes upon any forest produce, a mark ordinarily used by a forest officer to indicate that the forest produce is the property of the County Government, or that it mayor has been lawfully cut or removed;"***

20. Particulars of the offence as stated in the charge sheet do not support the alleged offence.

21. It is for this reason that the prosecuting officer should have stated the facts of the case so that it could be established if the facts could sustain the charge.

22. Otherwise the admitted purported facts were imperfect. There is no way the Appellants could have understood what they were alleged to have done. In the premises the plea was equivocal. Consequently I do quash the conviction and set aside the sentence meted out.

23. This is a matter where the appellants should have been retried. However, I do note that the Appellants have been incarcerated for a period of 2 ½ years. It will be unnecessary to order a retrial. **Therefore both the Appellants shall be released forthwith unless otherwise lawfully held.**

24. It is so ordered.

Dated, signed and **delivered** at **Kitui** this **20th** day of **March, 2018.**

L.N. MUTENDE

JUDGE