



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL APPEAL NO. 27 OF 2017

[Consolidated with criminal appeal No.28 of 2017]

SIMON WAINAINA NJOROGI

JOSEPH MACHARIA MUTURI.....APPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in criminal case No.275 of 2016 of the

Chief Magistrate's Court at Busia by Hon. M.A Nanzushi – Senior Resident Magistrate)

JUDGMENT

1. SIMON WAINAINA NJOROGI and JOSEPH MACHARIA MUTURI, the appellants, were convicted of the offence of illegally transporting **Osyris Lanceolata** (sandalwood) an endangered species contrary to section 92 as read with section 99 (2) (d) and the 6th schedule of the Wildlife Conservation and Management Act, 2013.

2. The particulars of the offence were that on the 7th February 2016 at **BUSIA** Township along Kisumu-Busia within **BUSIA** County were jointly found illegally transporting 3.44 tons of **Osyris Lanceolata** (East Africa sandalwood) valued at Kshs. 6.88 million on board motor vehicle registration number **KBY 976G** Isuzu FRR.

3. The appellants were each sentenced to pay a fine of Kshs.20 million or serve life imprisonment. They have appealed against both conviction and sentence.

4. The 1st appellant was in person while the 2nd appellant was represented by Mr. R.E Nyamu, learned counsel. The 1st appellant raised five grounds of appeal while the 2nd appellant raised ten grounds of appeal. I have summarized all the grounds as follows:

- a) That the learned trial magistrate erred in law and in fact by failing to appreciate that the appellants' rights to fair trial were breached.
- b) That the learned trial magistrate erred in law and in fact by convicting the appellants on insufficient evidence.
- c) That the learned trial magistrate erred in law and in fact by disregarding the entire defence.
- d) That the learned trial magistrate erred in law and in fact by meting out harsh sentences.

5. The state opposed the appeal through Ms. Ngari, the learned counsel.

6. The facts of the prosecution case were briefly as follows:

The two appellants were arrested along Kisumu- Busia road while on board motor vehicle **KBY 976G**. Inside the lorry, it was found to have had a consignment of sandalwood contrary to the documents that showed that they were transporting Bidco products. They were charge with the offence.

7. The 1st appellant contended that it was the 2nd appellant who loaded the lorry and locked it while he was asleep. He realized what he was transporting after his arrest. The 2nd appellant on the other hand testified that they proceeded to Tanzania where they loaded some firewood. They then proceeded to Busia where they were arrested.

8. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO vs. REPUBLIC [1972] EA 32**.

9. It was contended for the appellant that the provisions of Article 50 (2) (h) was breached. This Article provides as follows:

(2) Every accused person has the right to a fair trial, which includes the right—

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

This contention is premised on the fact that some hearing were conducted in the absence of the counsel for the appellants. The issue of legal representation at the expense of the state was settled by the Court of

Appeal in the case of **KARISA CHENGO, JEFFERSON KALAMA KENGHA & KITSAO CHARO NGATI vs. REPUBLIC [2015] eKLR** this is what the Court of Appeal said:

We are of the considered view that in addition to situations where ‘substantial injustice would otherwise result.’ persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense. We would not go so far as to suggest that every accused person convicted of a capital offence since the coming into effect of the new Constitution would automatically be entitled to a re-trial where no such legal representation was provided. The reasons are that, firstly, the provisions of the new Constitution will not apply retroactively, and secondly every case must be decided on its own merit to determine if there was serious prejudice occasioned by reason of such omission.”

It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. The Constitution is crystal clear that an accused person is entitled to legal representation at the State’s expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. This Court in the David Njoroge Macharia case (supra) seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases where substantial injustice might ‘otherwise result’ and to include all situations where an accused person is charged with an offence whose penalty is death. This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. However, substantial injustice only arise in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise. [Emphasis added]

In the instant case I make a finding that the appellants’ case did not fall in the category where mandatory legal representation at the expense of the state would be provided. Secondly, the appellants informed the trial court that they were to proceed without representation. This ground therefore lacks merit.

10. **David Sendera (PW5)** testified that he was on mobile patrol. They intercepted motor vehicle registration number **KBY 976G** Isuzu lorry. There was a report which had been made of the misuse of the same. The two appellants were inside and they took it to Busia police station. The appellants informed him that they were carrying Tesia Super Market goods. It was however, when it was opened, found to be loaded with some sandalwood. The evidence of **PC Philip Rotich (PW2)** and who was the investigating officer was that the appellants gave him a consignment note allegedly from Swan Carriers. It showed that the lorry was ferrying Bidco products. It however turned out that it was carrying some sandalwood.

11. On 28th January 2016, **Hannah Wambui Kabiru (PW1)** reported at Busia police station that her lorry registration number **KBY 976G** was missing. This was after she lost communication with the appellants who had informed her that they were transporting some goods to Busia.

12. **Wycliffe Mauta (PW3)** testified that he is a wood technologist. He said he confirmed what the appellants were transporting was sandalwood due to colour, smell and wood texture.

13. The appellants gave two versions of their defence. According to the 1st appellant who was the driver of the motor vehicle registration number **KBY 976G** Isuzu lorry, he was called to go to Magadi for undisclosed luggage destined for Busia. The second appellant took the key and went to load. He remained in the vehicle asleep until loading was over and the lorry locked. He drove up to Busia where they were arrested. On the other hand the 2nd appellant said that they were going for tomatoes in Magadi. However on reaching Magadi, they were asked to go and collect another luggage in Tanzania. In Tanzania they loaded firewood. All along, he said, he knew they were carrying firewood.

14. The learned trial magistrate considered the defence of the appellants and dismissed it and rightly so after analyzing it together with the evidence on record. There was overwhelming evidence against each of the appellant.

15. Section 92 of the Wildlife Conservation and Management Act, 2013 states:

Any person who commits an offence in respect of an endangered or threatened species or in respect of any trophy of that endangered or threatened species shall be liable upon conviction to a fine of not less than twenty million shillings or imprisonment for life or to both such fine and imprisonment.

Whereas section 99 (2) (d) of same Act provides:

(2) Without prejudice to the generality of the foregoing, no person shall—

(d) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of paragraphs (b) and (c) ;

(3) Any person who contravenes any provisions of this section commits an offence and shall be liable upon conviction for category A wildlife to a fine of not less than ten million shillings or to imprisonment for not less than five years and for other wildlife categories to a fine of not less than one million shillings or to imprisonment of not less than two years or to both such imprisonment and fine.

It was prejudicial for the prosecution to charge the appellants under two penal sections in one charge. They ought to have elected which of the two sections to proceed with. Since they failed to do so, the court ought to have opted to mete out the punishment with the lesser sentence provided for, in view of the two sentences available. I therefore set aside the life sentence and substitute it with a sentence of two years imprisonment to run from when they were sentenced by the trial court.

DELIVERED and SIGNED at BUSIA this 29th day of May, 2018

KIARIE WAWERU KIARIE

JUDGE