REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 24 AND 25 OF 2013

(CONSOLIDATED)

BETWEEN

GEORGE S. MMASI.....1ST APPELLANT

ANGELLA MMASI..... 2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence by Hon. P. Achieng PM, delivered on 17th December, 2012 in Kakamega CMC Cr. Case no. 123 of 2012)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGEMENT

Introduction

1. The appellants herein George S. Mmasi and Angela Mmasi were charged jointly in count I with the offence of ***illegal removal of forest produce contrary to section 52(1)(a) as read with section 55(1)(c) of the Forest Act number 7 of 2005***. The particulars of the offence are that on the 18th day of January 2012 at Mashindu Market Kakamega Central District within Western Province, jointly with another not before court were illegally found removing 10 bags of charcoal by motor vehicle registration number KAD 928N Peugeot Pick-up 504 sky blue in colour without permit from the forester.

2.In count II, they were charged jointly with ***illegal transportation of forest produce contrary to section 54(1(c) as read with section 54(1) (e) of the Forest Act, number 7 of 2005,*** the particulars being that on the 18th day of January, 2012 at Mashindu Market Kakamega Central District within Western Province jointly with another not before court, were found transporting ten (10) bags of charcoal by motor vehicle registration number 928N Peugeot Pick-Up sky blue in colour without permit from the forester.

3. Upon conviction the appellants were sentenced on count I to pay a fine of kshs.50,000/- in default 6 months. The learned trial magistrate made a finding that the offence in count II was subsumed under count I. The appellants were dissatisfied with both conviction and sentence and accordingly brought this appeal.

The Appeal

4. The appellants' appeal is premised on the following grounds:-

a. That the learned trial magistrate grossly erred in passing a sentence that was irregular and excessive.

b. That the learned trial magistrate's evaluation of the evidence before her was wanting.

c. That the learned trial magistrate grossly erred in not holding that the particulars of the charge did not disclose any offence.

d. That the learned trial magistrate grossly erred in shifting the burden of proof on the appellants.

e. The failure to call the investigating officer was fatal to the prosecution's case.

f. That the trial magistrate erred in convicting the appellants when there was no evidence directly linking the appellants to the offence.

g. The learned trial magistrate grossly erred in relying on contradictory, non-corroborative and unreliable evidence by the prosecution witness.

h. The learned trial magistrate erred in discharging the evidence of the appellant (sic).

i. The learned trial magistrate erred in not considering the accused's mitigation before passing sentence.

j. The learned trial magistrate grossly erred in considering facts which were irrelevant and leaving facts that were pertinent to the case.

5. It is the appellants' prayer that the conviction be quashed and sentence set aside and they be acquitted of the offence.

6. This is a first appeal, and in the circumstances, this court is duty bound to reconsider and evaluate the evidence afresh with a view to reaching its own conclusions in the matter. It is to be noted however, that this appellate jurisdiction to reconsider and evaluate the evidence afresh must be exercised with caution for the simple reason that this court has no opportunity to see and hear the witnesses as the trial court did. Nonetheless, this court must do its duty and subject the whole of the evidence to an exhaustive analysis in order to confirm whether the conclusions reached by the learned trial magistrate can be supported. Generally see ***Okeno versus Republic [1972] EA 32.***

The Prosecution Case

7. PW1, number 8983, forest Ranger Simon Langat and PW2 number 8653, Forest Ranger, Andrew Ogutu as well as PW4 Joel Kibe all work as Forest Rangers with the Kenya Wildlife service. On 18th Janary, 2012 at about 6.00pm, PW1 and PW2 were informed by their boss Joel Kibe, PW4 that certain persons were transporting charcoal from Kakamega Forest. The two rangers swung into action immediately and went to Shamberere – Kambi ya Mwanza Road where it was alleged the motor vehicle transporting the vehicle was. On arrival on the said road they found motor vehicle registration number KAD 928N parked by the roadside. Inside the vehicle were 10(ten) sacks of charcoal. The two appellants were also inside the vehicle which had no driver at that moment. Both PW1 and PW2 questioned the appellants who confirmed that they wer taking the ten (10) sacks of charcoal from Shamberere to Kakamega when they ran out of fuel. The appellants also told PW1 and PW2 that the driver of the motor vehicle had gone to buy some fuel for the car. The appellants also confirmed that they did not have any permit to move the charcoal, whereupon the two rangers took both the motor vehicle and the appellants to Kakamega Police Station.

8. From the evidence on record, the motor vehicle belonged to St. Cecilia Primary School, although, nobody from the school was called to testify.

9. PW3, number 92626 PC Alphaxad Ndegwa of Kakamega Police Station who recorded statements from PW1 and PW2. He also took photographs of the motor vehicle together with the 10(ten) sacks of charcoal. While the vehicle was released to the owner the 10(ten) sacks of charcoal were retained. PW3 testified that while the appellants were escorted to the police station on the very day they were arrested, the motor vehicle was taken to the station on the following day and later handed over to the school.

10. PW4 was number 7374 Joel Kibe of Kenya Wildlife Service, stationed at Kakamega Forest National Reserve. He testified that he was the one who had received the tipoff about the vehicle in which the 10(ten) sacks of charcoal were being transported. He also testified that when the appellants were questioned about the charcoal, they told the officers they bought the charcoal from the forest and were now transporting it to their hotel in Kakamega and since they had no permit to move the charcoal, they were charged with the two counts.

The Appellant's Case

11. At the close of the prosecution case, the two appellants were put on their defence. DW1,the second appellant herein who was the first accused in the court below testified that she had gone with her co-accused to Shanderema Secondary School on 18th January, 2012 and on their way from the school they boarded the subject motor vehicle which however ran out of fuel before they got to their destination. The driver of the motor vehicle parked the vehicle on the side of the road and went to buy fuel. As they waited for the driver's return they were arrested. She also testified that the number of charcoal sacks she saw was 20 and not 10 as alleged by the prosecution witnesses. The first appellant who testified as DW2 confirmed the testimony given by DW1. He also stated that the two of them were not aware that the motor vehicle was carrying charcoal nor did they know that it belonged to a school.

Appellants' Submissions

12. The appellants filed their written submissions on 23rd November, 2015 through their counsel M/S Anzoiya & company Advocates. It is appellants' contention that the particulars of the offence do not indicate from which forest the produce came and further that none of the witnesses alleged to have seen the appellants either singly or otherwise removing the charcoal from the forest. For the above reasons, the appellants urged this court to allow the appeal and set them free. The state relied on the evidence on record.

Issues for Determiation

13. The appellants were charged under the ***Section 52(1)(a) of the Forest Act No. 7 of 2005*** which states as follows:

> ***"(1) Except under a licence or permit or a management agreement issued or entered into under this Act, no person shall, in a state, local authority or provisional forest –***
>
> ***(a) fell, cut, take, burn, injure or remove any forest produce;"***

While section 55(1)(c) provides:

> ***"(1)Where a person is convicted of an offence of damaging, injuring or removing forest produce from any forest, the court may in addition to any other ruling order –***
>
> ***a)……..***
>
> ***b)…….***
>
> ***c) the forest produce be removed, and any vessels, vehicles, tools or implements used in the commission of the offence, be forfeited to the service: provided that the value of the forest produce shall be either the commercial value of the forest produce or the cost of repairing the damage caused to biodiversity as a result of the activities complained of."***

Analysis and Determination

14. The learned judge in the case of ***Stephen Kamiri Kimarua & another versus Republic [2015]eKLR*** in which the appellant was charged under the same section as the appellants herein outlined the ingredients that the prosecution should satisfy in order for an offence to be established. The learned judge stated:-

> ***"From the above section, for the offence to be proved, the following ingredients must be established, namely:-***
>
> ***i. absence of a license or permit or management agreement issued or entered into under the act,***
>
> ***ii. accused must fell, cut , take, burn, injure or remove any forest produce,***
>
> ***iii. the forest must be a state, local authority or provisional forest.***
>
> ***In my considered opinion, all the above must be proved for the offence in question to be proved. This is because the existence of the forest is a must and it has to be a state, local authority or provisional forest. The accused must fell, cut, take or remove the forest produce and lastly the absence of a licence or permit or a management agreement."***

15. The learned judge further analyzed the definition of a state forest, by citing section 3 of the Forest Act as follows:-

'State forest' means any forest-

> ***a. declared by the minister to be a central forest, a forest area or nature reserve on the commencement of this act and which has not ceased to be such a forest or nature reserve; or***
>
> ***b. declared to be a state forest in accordance with the provisions of section 23***
>
> ***'Provisional forest' means any forest which has been declared a provisional forest by the minister under section 26.***

'Local authority forest' means –

> ***a. any forest situated on trust land which has been set aside as a forest be a local authority pursuant to the provisions of the trust land act, (cap 289);***
>
> ***b. any arboretum, recreational park or mini-forest created under section 30 of the act;***
>
> ***c. any forest established as a local authority forest in accordance with provisions of section 24.***
>
> ***No evidence was offered to show that the forest in question was a state forest or a provisional forest or a local authority forest within the meaning of the above definitions. To me, this was a serious omission. For the prosecution to prove its case, it was necessary for the evidence to be adduced to confirm the forest fell under any of the above categories."***

16. Applying the above cited authority, which though not binding has correctly set out the law, I find that this appeal must succeed. In the first place, none of the prosecution witnesses testified to having seen the appellants removing the sacks of charcoal from the forest. Further, the forest itself was not named in the charge sheet, and the court cannot simply assume that because PW1, PW2 and PW4 stated that they worked with KWS Kakamega Forest, then the produce was removed from that forest. Thirdly, if there was any case against the appellants the same should have been pursued under count II, but in view of the fact that count I was not proved, count II can also not stand.

17. Even if, the charge sheet had mentioned Kakamega Forest, it would not have been sufficient to just mention Kakamega Forest. It is expected that Government officers know the areas where the work and in this case the Forest Act categorizes the forests into national county and even provisional forests. PW4, who was the in charge of the team that testified should have led the way in ensuring that he provided all the necessary details of the place from which the sacks of charcoal were allegedly removed or transported. The omission of these details, in my humble view, was fatal to the prosecution's case against the appellants.

18. Further, his court finds it strange that the police offices did not find it necessary to arrest and charge the driver of the subject motor vehicle after the school administration informed them that the driver had not been given any authority to carry charcoal in the vehicle and that the only authority he had was to ferry students. The least the prosecution would have done if they did not want to charge the driver was to call him as a witness. The court wonders whether there was something else that has not been revealed that may have influenced the investigating officer to leave the matter the way it was presented to court. Could there have been 20(twenty) sacks of charcoal as alleged by the appellants instead of the 10(ten) sacks shown to the court. It is also strange in this case that though photographs of the motor vehicle were taken, none of those photographs were produced in court. Was this part of the bigger scheme to withhold evidence from court?

19. In view of all the foregoing I find that the appellant's appeal has merit. I accordingly allow the same, quash the conviction and set aside the sentence. If the appellants had paid the fine the same shall be refunded to the depositor.

It is so ordered.

Judgment written and signed at Kapenguria

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Kakamega on this 26th day of October, 2018

J. NJANGI

JUDGE

In the Presence of:

Mr. Munyendo for Appellants

Mr. Ngetich for Respondent

George – Court Assistant