REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 20 OF 2016

CHRISTOPHER MUSYIMI MUTHUI .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the original conviction and sentence from Kithimani Senior Resident Magistrate's Court Criminal Case 393 of 2016 delivered by Hon. G. O. SHIKWE (RM) on 31st April, 2016)

JUDGEMENT

1. The appeal arises from the conviction and sentence of Honourable G. O. Shikwe Resident Magistrate in **Kithimani Principal Magistrate's Court Criminal Case No.393 of 2016** wherein the Appellant had been ordered to pay a fine of Kshs.300,000/= or in default to serve three years imprisonment.

2. The Appellant was aggrieved by the conviction and sentence and raised the following grounds of appeal:-

(a) The learned trial Magistrate erred in law and in fact in convicting the Appellant on his own plea of guilty of the charge of transporting forest produce without movement permit contrary to Section 52(1) (a) of the Forest Act No.7 of 2005 but sentencing him on a different charge.

(b) The learned trial magistrate erred in law and fact in failing to find and observe that the particulars of the charge did not support the offence the Appellant was charged with.

(c) The learned trial magistrate erred in law and fact by sentencing the Appellant to pay a fine of Kshs.300,000/= and in default to serve 3 years in prison a sentence that is not prescribed by the Forest Act No. 7 of 2005 for the offence the Appellant was charged with.

(d) The learned trial magistrate erred in law and fact in sentencing the Appellant for an offence he was not charged with.

(e) The learned trial magistrate erred in law and fact in failing to consider and appreciate that the Appellant had a valid firewood movement permit issued to the owner of the firewood and that the Appellant was merely a driver employed and contracted by the owner of the firewood.

(f) The learned trial magistrate erred in law and fact in failing to read and acknowledge that the penalty that was provided for under section 52(1) (a) as read with Section 52(2) and 55 (1) (c) of the Forest Act No. 7 of 2005 was a fine not exceeding Kshs.50,000/= or in default a term not exceeding 6 months in prison.

(g) The learned trial magistrate erred in law and fact in passing a sentence that was illegal harsh and excessive under the circumstances.

3. The Appellant therefore prayed that the conviction and sentence of the lower court be quashed and the Appellant be acquitted.

4. Parties herein agreed to canvass the appeal by way of written submissions. Counsel for the Appellant condensed all the seven grounds of appeal into one namely that the sentence passed by the subordinate court was unlawful and contrary to the provisions of the law. It was submitted for the Appellant that the sentence imposed by the trial court was outrageously, excessive and contrary to what is provided for under Section 52(2) of the Forest Act No. 7 of 2005. It was further submitted that the Appellant was at the material time in possession of the requisite licence issued by the County Government of Kitui which was produced as an exhibit and which should have enabled the trial court to excuse the Appellant but not to sentence him harshly.

Learned counsel for the Respondent conceded to the appeal and submitted that the sentence by the trial court was illegal and same should be set aside and substituted with the appropriate one provided by the law.

5. I have considered the submissions of the counsel for the Appellant and the Respondent. This being the first appellate court, I find that its duty is to re-evaluate and re-analyze the evidence adduced before the trial court and to come to an independent conclusion bearing in mind that it neither heard nor saw the witnesses testifying (see **OKENO =VS= REPUBLIC [1972] EA 32).**

It is noted that the there was no hearing in this matter before the trial court in that the Appellant is recorded to have admitted the charge as well as the facts and was thus convicted on his own unequivocal plea of guilty. The Appellant's Counsel has challenged the conviction and sentence and seeks that the same be set aside.

The record of the lower court reveals that the Appellant had been charged with an offence of transporting forest produce without a movement permit contrary to Section 52(1) (a) as read with Section 52(2) and 55(1) (c) of the Forest Act No. 7 of 2005.

The particulars of the charge were that on the 23rd day of March, 2016 at Yatta Police Station Roadblock in Yatta sub- County within Machakos County, without valid movement permit from state authority was found transporting indigenous firewood namely Mwange from Kitui forest using motor vehicle registration number KBS 352 T make Mitsubishi lorry to wit 3 tonnes of Mwange firewood.

The facts as presented by the trial court prosecutor were as follows:-

> "***On the 29th March, 2016 the accused was arrested at Yatta roadblock without a valid permit to transport Mwange firewood this was for a product ngumi. He had the product in KBS 352 T. He was arrested and charged. I wish to present the licence as exhibit."***

The Appellant upon admitting both the charge and facts was ordered to pay a fine of Kshs.300,000/= or serve three (3) years imprisonment.

As the sentence has been challenged by the Appellant, there is need to have a look at the provisions of the Forest Act No. 7 of 2005 that had formed the basis of the charge preferred against the Appellant.

> **Section 52(1) (a) provides:**
>
> "***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 fell, cut, take, burn, injure or remove any forest produce"***

Section 52(2) provides:

"***Any person who contravenes the provisions of subsection (1) of this Section commits an offence and is liable on conviction of a fine not exceeding fifty thousand (50,000) shillings or imprisonment for a term not exceeding six months, or to both such fine and imprisonment".***

Section 55 (1) provides:

"***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 the forest produce be removed and any vessels, vehicles, tools or implements used in the commission of the offence; be forfeited to the service."***

From the above provisions it is clear that in the event of a conviction arrived at by a trial court, the requisite sentence to be imposed is a fine of Kshs. 50,000/= or imprisonment for a term not exceeding six months or to both such fine and imprisonment. The record of the lower court indicates that the Appellant was ordered to pay a fine of Kshs.300,000/= or in default to serve three (3) years imprisonment. The sentence is clearly not one provided for under Section 52 (1) (a) as read with Section 52(2) of the Forest Act No. 7 of 2005. The sentence was manifestly excessive and outside the provision of the law. Hence the Appellant's counsel submissions that the sentence was unlawful and contrary to the provision of the law. Indeed learned counsel for the Respondent rightly conceded to the Appeal and submitted that the sentence imposed by the trial court was not in accordance with the provisions of the Forest Act No. 7 of 2005.

Learned Counsel for the Respondent has urged this court to substitute the sentence with the appropriate one as provided by the Act. That could have been the appropriate way to deal with the matter were it not for the fact that there are various discrepancies in the particulars of the charge and the facts that were read out to the Appellant. The record of the lower court reveals that the offence is alleged to have been committed on the 23/03/2016 whereas the facts read out by the trial prosecutor indicated that the offence took place on the 29/03/2016. It follows therefore that the facts as read out to the Appellant did not support the charge and particulars especially with regard to the date of the alleged offence. The trial court therefore appears to have gone into error as it failed to discern the discrepancy on the dates of the alleged offence on the particulars of the charge and facts. The discrepancy aforesaid, had the effect of vitiating the plea of guilt entered for the Appellant. It was therefore unsafe for the trial court to convict and sentence the Appellant. Again the trial court received a licence that had been issued to the Appellant's employer permitting the transportation of the said Mwange firewood. The licence document was produced as an exhibit before the trial court. The production of the said licence had the effect of qualifying the charge preferred against the Appellant. All these would have led the trial court to enter a plea of not guilty for the Appellant and proceed to conduct a trial. As such the request by the counsel for the Respondent for substitution of sentence is not merited as the conviction and sentence of the Appellant was unsafe.

6. In the result it is the finding of this court that the Appellant's appeal has merit. The same is allowed. The conviction by the trial court is quashed and sentence set aside. The Appellant is ordered to be set at liberty forthwith unless otherwise lawfully held. If any fine had been paid, the same is ordered to be refunded to the Appellant.

Dated and delivered at **Machakos** this 21st day of **December, 2017.**

D. K. KEMEI

JUDGE

In the presence of:-

Christopher Musyimi – the Appellant

Machogu - for the Respondent

Kituva - Court Assistant