REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NOS.1, 2, 3, 4, 5 & 6 OF 2016

(An Appeal arising out of the conviction and sentence of Hon. G.H. Oduor - SPM delivered on 24th December 2015 in Limuru SPM CR. Case No.1141 of 2015 &

CR. Case No. 1140 of 2015)

ANTHONY NJOROGE GATOHO……..……..
1ST APPELLANT

MOSES NJUGUNA GATHAKU……..2ND APPELLANT

EDWIN SIMIYU
WEKESA…….3RD APPELLANT

DANIEL NJOROGE
MWANGI…….4TH APPELLANT

ISAAC KIBE NDUNGU……
5TH APPELLANT

SAMUEL NDUNGU GITHOME……..…….
6TH APPELLANT

VERSUS

REPUBLIC…….....RESPONDENT

JUDGMENT

The Appellants were charged in two separate cases for the same offence of **illegal dumping of waste into a Government forest** contrary to **Section 54(8)(b)** & **Section 55(1)(c)** of the **Forest Act, 2005**. The particulars of the offence were that on 23rd December 2015 at 4.00 p.m. and 11.00 p.m. respectively, at Kinale Forest within Kiambu County, the Appellants, were jointly found illegally dumping waste material, namely rotten mangoes, by using motor vehicles Registration Nos.KBY 509W Foton Lorry and KBQ 129Z Mitsubishi Lorry without the permission from the Director of Kenya Forest Service. The 1st and 2nd Appellants were further charged with **failing to comply with a lawful demand given by a forest officer** contrary to **Section 54(1)(c)** of the **Forest Act**. The particulars of the offence were that on the

same day and in the same place at about 4.00 p.m., the Appellants failed to stop after being ordered to do so by forest officers who were wearing their official uniform. When the Appellants were arraigned before the trial magistrate's court, they each pleaded guilty to the charge. They were each ordered to pay a fine of Kshs.3 million or in default they were sentenced to serve ten (10) years imprisonment. The motor vehicles that the Appellants used in committing the offence were ordered forfeited to the State. The Appellants were aggrieved by their conviction and sentence. They have duly filed an appeal to this court.

Although the Appellants filed separate appeals, their petitions of appeal raised more or less similar grounds of appeal. They were aggrieved that they had been convicted without being given a chance to mitigate. They took issue with the fact that the trial court did not warn them of the seriousness of the charges that they were facing and the consequences thereof if they pleaded guilty. They were aggrieved that the plea that was taken by the trial magistrate was equivocal and thus the facts narrated by the prosecution in support of the charge did not support the charge.

During the hearing of the appeal (the appeals were consolidated and heard together as one), Mr. Thuita for the Appellants amplified the grounds of appeal. He submitted that the trial court failed to give the Appellants a chance to mitigate. He relied on the decision of **John Muendo Musau –vs- Republic [2013] eKLR** and **Willy Kipchirchir –vs- Republic [2015] eKLR**. He stated that the trial court should have warned the Appellants of the serious nature of the offence. He explained that the Appellants were under the mistaken belief that the charge they were facing was a simple one. If they had been warned of the consequences of pleading guilty to the charge, they would have reconsidered the plea. In that regard, he relied on the decision in **Kennedy Odhiambo Nyangile –vs- Republic [2014] eKLR**. He further submitted that the facts in support of the charge were not properly set out by the prosecution. In the circumstances therefore, the particulars of the charge presented to the court did not tally with the charge brought against the Appellants. In the premises therefore, he urged the court to allow the appeal and order a retrial.

Ms. Atina for the State opposed the appeal. She submitted that the Appellants were convicted on their own plea of guilty. She urged the court to uphold the provisions of **Section 348** of the **Criminal Procedure Code** which bars the Appellants from challenging their conviction on appeal. She reiterated that the plea of guilty recorded by the trial court was unequivocal. It was clear. The charges were read to the Appellants in Kiswahili, a language they professed to understand. They understood the charges they were facing. They confirmed the particulars of the charges when they were read to them. While conceding to the fact that the Appellants were not given an opportunity to mitigate, she submitted that such failure to accord the Appellants the chance to mitigate did not prejudice them because they were sentenced to serve the minimum sentence provided by the law. She explained that there was no legal requirement for the trial court to warn the Appellants of the serious nature of the offence. Ignorance of the law is not a defence. The Appellants were presumed to know the law. The sentence imposed by the trial court was legal. She urged the court to dismiss the appeal.

This being a first appeal, it is the duty of this court to re-evaluate and reconsider the facts and the law applicable to the case before reaching its own independent determination whether or not to uphold the conviction of the Appellants. In the present appeal, it was clear to this court that although the plea taken by the trial court was in accordance with the rules in **Adan –vs- Republic [1973] EA 445**, the Appellants appear not to have understood the consequences of pleading guilty to the charge. In the circumstance of this case, the trial court should have explained to the Appellants the charge brought against them and the consequences of pleading guilty to the said charge. In **Willy Kipchirchir –vs- Republic [2015] eKLR,** the court held as thus:

> "***From the foregoing, it cannot be gainsaid that a plea court in recording a plea of guilty must ensure that an accused person fully understands the offence which he is charged and the manner in which it is alleged that he committed the offence. In order for the accused to fully understand the charge preferred against him, the charge must be read and explained to him in a language that he or she understands and this language must be reflected in the court record. The duty of the court goes beyond just reading the charge to the accused. As emphasized by the Court of Appeal in Kariuki –vs- Republic (supra):***

"The trial court or Judge should read and explain to the accused the charge and all the ingredients in the accused's language or in a language he understands."

In Kennedy Odhiambo Nyangile –vs- Republic [2004] eKLR, the court held thus:

"Regarding the facts of the case, the court Judy Nkirote v Republic (Supra) observed that, "The facts of the prosecution case are supposed to give further details of what it is the accused person is accused of doing or failing to do which led to the circumstances which constitute the offence charged. The statements of facts given by the prosecution must be explained to the accused person by the court in order for the court to be certain that he has understood the facts. The accused is then given an opportunity to either admit or deny those facts. At that point the court should give the accused person an opportunity not merely to admit or deny but also to dispute the facts or explain the facts or add any relevant facts. If the accused person denies the facts then a plea of not guilty is entered. If he admits the facts then the court will enter a plea of guilty and convict him for the offence."

In the present appeal, it was clear to this court that the trial court did not, as is expected of it, clearly explain to the Appellants the nature of the charge facing them. In cases where an accused person will be sentenced to serve a minimum fine or custodial sentence that is harsh, apart from reading the charge in the language that the accused understands, the court taking plea is required to explain to the accused the consequences if such accused is convicted. In the present case, since the trial court was aware that the Appellants would be ordered to pay a minimum fine of Kshs.3 million or in default a prison sentence of ten (10) years imprisonment, a duty was placed on the court to explain to the Appellants that should they be convicted, they were likely to be sentenced in the manner provided by the law. If the Appellants were made aware of the consequences of pleading guilty to the charge and they proceeded to plead guilty to the charge, then this court would have no problem in upholding the conviction and sentence of the Appellants as the plea of guilty would have been unequivocal.

In the present appeal, the failure by the trial court to explain to the Appellants the consequences of pleading guilty to the charge (taking into account that they were pleading guilty to a charge which has serious penal consequences), means that the plea of guilty that was recorded by the trial court was not unequivocal. The trial court did not explain every element of the charge to the Appellants including the punishment that they were likely to suffer in the event that they were convicted. In the premises therefore, this court holds that the respective appeals filed by the six (6) Appellants are allowed, their convictions quashed and the sentences imposed upon them set aside. The order forfeiture is also set aside. However, the Appellants shall be retried. They shall appear before the Limuru SPM's Court on 25th April 2016 for the purposes of taking fresh plea in the retried case. The case shall be heard before another magistrate other than Hon. G.H. Oduor – SPM. It is so ordered.

DATED AT NAIROBI THIS 19TH DAY OF APRIL 2016

L. KIMARU

JUDGE