



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

CRIMINAL APPEAL NO. 87 OF 2015.

RUTH KHAVAKALI ICHECHI)

SELLA IMINZA AKHONZI) ::::::::::::::::::::::::::::::::::: APPELLANTS.

OLIVE MALESI SKIMO)

VERSUS

REPUBLIC ::::::::::::::::::::::::::::::::::: RESPONDENT.

(Being an appeal from the conviction and sentence of R. Kimingi – CM, in Kakamega Chief Magistrate’s Court Criminal Case No. 2089 of 2015 delivered on 16th July, 2015.)

J U D G M E N T

1. The three (3) appellants herein were charged with the offence of logging in a National Reserve contrary to section 102 (1) (c) of the Wildlife Conservation and Management Act 2013.

The particulars of the charge were that on the 15th day of July, 2015 at around 1700hrs at Hondolo area inside Kakamega Forest National Reserve in Kakamega East Sub County, Kakamega County they were jointly found logging indigenous trees species in the said Reserve using panga (sic) without authority.

2. They were convicted on their own pleas of guilty. Each appellant was sentenced to pay a fine of Ksh. 200,000/= and in default to serve 2 years imprisonment.
3. The appellants being dissatisfied with the conviction and sentence filed separate but similar petitions of appeal. The appeals were consolidated and heard together as Kakamega High Court Criminal Appeal No. 87 of 2015.

4. Mr. Ondieki, learned counsel for the appellants raised the following grounds of appeal:-

1. *The plea was taken in a language the appellants did not understand;*
2. *The learned trial magistrate erred in law and in fact by accepting that facts of the case were as per the charge sheet when indeed there were no facts contained in the charge sheet;*
3. *The learned trial magistrate erred both in law and in fact by stating that the three logs are the ones the appellants were arrested with yet the appellants did not have the three logs and further that the logs were not produced as exhibits before the court;*
4. *The learned trial magistrate erred both in law and in fact by not considering the mitigation of the appellants in the case and meted out harsh sentences on (sic) the appellants.*

Appellants' submissions

5. Mr. Ondieki submitted that the plea was taken in a language that the appellants did not understand in that it was not indicated that a question was posed to the appellants on the language they understood. The record shows that after the charges were read out the appellants answered "It is true". If the plea was taken in Kiswahili language, the response they gave was supposed to be recorded in Kiswahili. It was further submitted that the Prosecuting Counsel stated that the facts were as per the charge sheet. Mr. Ondieki submitted that the charge sheet contains particulars not facts. He added that the alleged logs that the appellants had allegedly logged were not produced in court as exhibits although the record indicates that the appellants are the ones who said that the logs in court are the ones they were found with. There is no indication that the appellants accepted that the facts were true and this led to a miscarriage of justice.
6. Mr. Ondieki submitted that the court did not consider the appellant's circumstances and mitigation in that the 1st appellant (accused No. 3) was expectant, and that the 2nd appellant (accused No. 2) was over 60 years old. He explained that the 1st appellant in mitigation said that she was an orphan and she was expectant. The 2nd appellant explained that she was a widow and that is why she went to the forest. The 3rd appellant in mitigation said that she was 18 years old. In his view, the sentence of a fine of Ksh. 200,000/= and in default 2 years imprisonment was too harsh. The panga that the appellants were allegedly found using to log trees was not produced in court. He prayed that the appeals be allowed and sentence imposed on each appellant quashed.

Respondent's submission

7. Mr. Omwenga, learned Prosecuting Counsel conceded to the appeal. He submitted that the plea was not clear and unequivocal as it did not adhere to the principles laid down in **Adan vs. Republic [1973] EA 445**, where the court held that the plea should be read to the accused persons in a language they understand and the language used by the accused persons should be recorded in the language they responded in. He urged the court to allow the appeal.

Determination of the appeal

The issue for determination is if the plea herein was clear and unequivocal.

8. I am in agreement with both learned counsel for the appellants and the respondent that the plea herein was not clear and unequivocal. The record shows that after the appellants pleaded guilty to the charges facing them, the Prosecuting Counsel informed the court that the facts were as per the charge sheet. It is surprising that Mr. Omwenga who is a lawyer by profession would fail to read out the facts of the case thus rendering the proceedings invalid and thereafter turn up at the hearing of the appeal and concede to the same because of his failure to read the facts of the case before the trial court..
9. The learned trial magistrate failed to comply with the simple procedure of plea taking by failing to request the Prosecuting Counsel to read out the facts of the case to the appellants before convicting them on their own plea of guilt.
10. The court of appeal in the case of **John Muendo Musa vs. Republic [2013] eKLR** cited with approval the legal principles set out in the case of **Adan Vs. Republic [1973] EA 445**, on plea taking in the following words:-

"The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands.

(ii) The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded.

iii) The prosecution should 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.

(iv) If the Accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered.

(v) If there is no change of plea a conviction should be recorded and a statement of facts relevant to sentence together with the accused's reply should be recorded."

11. I have earlier on in this judgment outlined the procedure that was followed before the trial court. It did not pass muster. In view of the forgoing circumstances, I allow the appeal, quash the conviction and set aside the sentence imposed on each appellant. They shall be set at liberty unless otherwise lawfully held.

It is so ordered.

DELIVERED, DATED and SIGNED in open court at **KAKAMEGA** on this **26th** day of **May**, 2016.

NJOKI MWANGI.

JUDGE.

In the presence of:-

..... **for the Appellants.**

..... **for the Respondent .**

..... **Court Assistant**