

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 23 OF 2015

STEPHEN KAMIRI KIMARUA.....1ST APPELLANT

JACOB CHEGE MWANGI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against Conviction and Sentence in Criminal Case Number 479 of 2014,

Republic vs Stephen Kamiri Kimarua & Jacob Chege Mwangi at Nyeri,

delivered by V.O. Chianda S.R.M. on 30.4.2015).

JUDGEMENT

Stephen Kamiri Kimarua and **Jacob Chege Mwangi** were convicted of the offence of felling/cutting forest produce without a permit contrary to Section 52 (1), 2 (a), (2) of the Forest Act^[1](hereinafter referred to as the Act) in in Criminal Case Number 479 of 2015. However, counsel for the appellant clarified to the court that only **Stephen Kamiri Kimarua**, who was the first accused in the lower court lodged this appeal and that his co-accused, though named in the petition of appeal as the second appellant never appealed.

Thus, this appeal only relates to the said **Stephen Kamiri Kimarua** (hereinafter referred to as the appellant). The appeal is against both conviction and sentence.

It is important to point out that the original petition of appeal was filed on 13th May 2015 and an amended petition was filed on 26th May 2015. I have carefully studied the record and no leave was sought and obtained to file the amended petition of appeal. This offends the provisions of Section 350 (2) (iv), & (v) of the Criminal Procedure Code^[2] which provides as follows:-

(iv) Save as provided in paragraph (i), a petition of appeal may only be amended with the leave of the High Court and on such terms and conditions, whether as to costs or otherwise, as the High Court may see fit to impose

(v) notice in writing of an application for leave to amend a petition of appeal shall be given to the Registrar of the High Court and to the DPP not less than three clear days, or such shorter period as the High Court may in any particular case allow, before the application is made; and an application for leave to amend a petition of appeal shall be made either at the hearing of the appeal or, if made previously, by way of motion in open court.

Clearly the above provisions were not complied with and my understanding of sub-rule (iv) cited above is that it is couched in mandatory terms. The words used are ‘*may only be amended with the leave of the court.*’ The procedure for effecting the amendment is spelt out in sub-rule (v). I find that the amended petition is not properly on record and I strike it off.

Further I note that the only amendment introduced by the impugned petition is only the case number in the lower court which was erroneously shown as **262** of **2014** instead of **479** of **2014**. None of the grounds has been amended. The said mistake is minor and does not affect the grounds of appeal in the original petition hence for the interests of justice I will determine this appeal on the basis of the original petition filed on **13.5.2015**.

In his aforesaid petition of appeal, the appellant has cited **7** grounds, namely:-

- i. That the prosecution was conducted by an unauthorized person contrary to Section 56 of the Act.*
- ii. That the alleged trees were not forest produce within the meaning of Sections 23, 34 and 25 of the Act.*
- iii. That the conviction was based on mens rea without actus reus.*
- iv. That the appellants were contractors and the obligation to take out a permit rests with the land owner.*
- v. That the learned magistrate ordered the first accused power saw to be forfeited to the state contrary to the law.*
- vi. The convictions were against the weight of the evidence.*
- vii. The proceedings and decision were contrary to law and procedure.*

In determining this appeal, this court has a legal duty to re-analyse, re-evaluate and assess the evidence adduced in the lower court so as to come up with its own conclusions bearing in mind that it did not have the benefit of seeing the witnesses testify.^[3]

In other words, the first appellate court must itself weigh conflicting evidence and draw its own conclusions.^[4] It is the function of a first appellate court to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.^[5]

The prosecution called **2** witnesses whose evidence is summarized below.

PW1: No. 54754 Sgt. Julius Aneka from Karaba Police Station testified that on 9.10.2014 he was at the Police Station together with **PW2** and a one **P C Kimtai** when they head power saw cutting trees. They went to investigate and found the appellant and his co-accused in the lower court had cut **3** griveria (sic) trees and split them into timber. They asked them for the permit and they said they did not have, they arrested them, confiscated the power saw, 3 Jerri cans with petrol, and a brown bag containing a tape measure, they took them into custody and when they went back for the timber, they found it missing. They later recorded statements and charged them in court.

PW2: No. 102381 James Kimutai's essentially collaborated the evidence of **PW1**.

At the close of the prosecution case the learned magistrate concluded that a *prima facie* case had been established and put the three accused person on their defence. However, the record does not show whether the Magistrate complied with the provisions of Section **211** of the Criminal Procedure Code. I took a step further and examined the original hand written record of the proceedings and confirmed that there is no record at all that the Magistrate complied with the provisions of Section **211** of the Criminal Procedure Code. The relevant part of the court record is reproduced below:-

Pros:- *I have closed the prosecution case.*

Court:- *A prima facie case sufficient to have accused placed on defence is found established.*

Court:- *Defence hearing on.*

Njengo:- *I Witness sworn evidence on 5/2/14*

Signed:- *V O. Chianda-Ag SRM*

In my view, the above omission is not fatal and can be cured under Section **382** of the Criminal Procedure Code which provides as follows:-

“Subject to the provisions hereinafter contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation under this code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

The appellant was represented by an advocate and no objection was raised as to the failure by the court to explain to the accused persons their rights under Section **211** of the Criminal Procedure Code and the counsel informed the court that the accused persons would give sworn defence and as the record shows, they proceeded and gave sworn defence. In my view, no prejudice was occasioned because the accused persons proceeded in a manner that suggests they were aware of their rights on how to proceed. A similar view was held by the Court of Appeal sitting in Nakuru in the case of **Patrick Ngesa Ogama vs Republic**.^[6] However, I must add that each case depends on its own circumstances and where there is a slight suggestion that the omission may have prejudiced an accused person, then such an omission can be fatal to the prosecution case.

The appellant gave sworn defence, and this to me confirms he was not prejudiced nor can it be said that injustice was occasioned. In his sworn defence, he said that he was given work by a lady called Salome Wairimu who showed her Gravellia trees to cut and he proceeded to the site with his son who was the second accused in the lower court. He stated that the police came when he was firing up the machine and had not started cutting the trees and he was arrested. He stated that he has a power saw permit but his employer was not there and that he was to cut trees on a private compound.

After analysing the prosecution and defence evidence, and the written submissions by the defence, the trial magistrate found that the offence was proved and convicted both accused persons and sentenced them to serve Community Service at Kaaraba Health Centre for **4** months and the exhibits were forfeited to the state.

Aggrieved by the said verdict, the appellant through his advocates appealed against the conviction and sentence citing the grounds stated earlier in this judgement.

Counsel for the appellant filed written submissions and sought to have the conviction quashed and sentence set aside. In brief, counsel for the appellant submitted that the ingredients of the offence were not proved, and in particular maintained that the trees were cut on private land.

Learned state counsel for the DPP also filed written submissions and urged the court to uphold both conviction and sentence.

I have carefully evaluated the prosecution evidence, the defence offered by the appellant, both submissions and the relevant law. The relevant Section of the Act under which the Appellant was charged are reproduced below:-

Sections 52, Prohibited activities in forests:-

52. (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;

(2) *Any person who contravenes the provisions of sub-section (1) of this section commits an offence and is liable on conviction to a fine of not less than fifty thousand shillings or imprisonment for a term of not less than six months or to both such fine and imprisonment*

From the above section for the offence to be proved, the following ingredients must be established, namely:-

i. absence of a licence or permit or management agreement issued or entered into under the Act,

ii. 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.

Whereas the evidence adduced related to numbers **(i)** and **(ii)** no evidence was adduced to show that the forest was a state, local authority or provisional forest. To appreciate the position better, it is necessary to refer to the definitions section of the Act.

Section 3 of the Act offers the following definitions for the above terms:-

'State forest' means any forest-

a. Declared by the minister to be a central forest, a forest area or nature reserve or 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 by 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 the 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 evidence to be adduced to confirm the forest fell under any of the above categories.

The prosecution never adduced sufficient evidence to support the conviction. In fact the evidence tendered did not meet the required test in law. The legal burden of proof in criminal cases never leaves the prosecution's backyard. **Viscount Sankey L.C.** in the celebrated case of **Woolmington vs. DPP**^[7] in a subtle and masterly fashion stated the law on legal burden of proof in criminal matters, that;

‘Through the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception...No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.’

Thus, ingredients of the offences facing the accused were never proved at all. In my view, whatever is thought to be the purpose of criminal punishment, one fundamental principle seems to have evolved in the jurisprudence of the common law legal tradition; that, before an accused person can be convicted of a crime, his guilt must be proved beyond reasonable doubt. Perhaps the most eloquent statement of reason for this is to be found in the opinion of **Brennan J** in the United States Supreme Court decision in **Re Winship**^[8] where the court stated:-

“The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction.....Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned”

The existence of the principle of proof beyond reasonable doubt is unchallenged in the common law world. In the English common law, it was elegantly affirmed by the House of Lords in the celebrated judgement of **Viscount Sankay** in **D.P.P vs Woolmington** cited above. The United States Supreme Court in the above cited case of **Re Winship** held that the reasonable doubt rule has constitutional force under the due process provisions of the United States Constitution.

Guided by the above authorities, and having evaluated the evidence adduced in the lower court and considering the sworn defence of the appellant, I am satisfied that the prosecution never discharged the burden of proof to the required standard. In so concluding I have not only subjected the evidence on record to close scrutiny but also I have examined the defence advanced by the appellant.

In **Uganda vs. Sebyala & Others**,^[9] the learned Judge citing relevant precedents had this to say:-

“The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts”

The defence offered by the appellant raised serious doubts on the prosecution case. He said he was cutting trees on private land. Counsel for the state cited sections **23, 24, 25** of the Act which with tremendous respect I find totally irrelevant to the context within which they have been cited and more so the said sections have no application in the present case. Section **23** deals with creation of state forests. It provides as follows:-

23. *The Minister may, on the recommendations of the Board by notice in the Gazette declare-*

(a) any un-alienated Government land;

(b) any land purchased or otherwise acquired by the Government,

To be state land

The evidence adduce never mentioned whether the Minister ever acting on the recommendations of the Board as provided above ever declared the land in question to be state land. The said section has no application to the present case.

Section 24 deals with creation of local authority forests and the procedure of doing so is stipulated in paragraphs (a)-(d) of the said section. Again I find no relevancy at all on the contents of the said section with the present case.

Lastly, Section 25 of the said Act deals with Private and Farm Forestry. It provides as follows:-

1. A person who owns a private forest, including a forest in the course of establishment, on land owned by the person may apply to the Service for registration under this section.

2. The Board shall register a forest under subsection (1) where the forest meets the criteria prescribed in regulations made under this Act.

3.

4.

5.

The evidence adduced does not show that the appellant ever applied for registration as provided for above. Thus, I find absolutely nothing in the evidence to negate the defence of the appellant that indeed the activity in question which triggered the arrest was happening in a forest within the confines of the Act. In view of my finding as aforesaid I find that grounds **two** and **six** of the appeal have merits and the appeal succeeds on the said grounds.

I conclude that the evidence tendered was manifestly inadequate to support a conviction and that the finding was not premised on sound evidence. Having allowed the appeal on the above to grounds, I find no need to labour considering the other grounds.

In conclusion in view of my findings enumerated above, I find that the conviction was not supported by the evidence, hence **I allow the appeal, quash the conviction and set aside the sentence.** These orders will also apply to the second accused person in the lower court who did not appeal.

The only remaining issue for determination is the forfeiture of the power saw belonging to the appellant. It's not clear under what provisions of the law the learned Magistrate ordered the said forfeiture but having allowed the appeal; I find no reason or basis for the forfeiture order to remain in force.

Accordingly, I hereby invoke the provisions of Section **354 (3) (d) CPC** which provides that:-

354 (3) the court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may-

(d) 'in any appeal from any other order, alter or reverse the order'

Pursuant to the above provisions I hereby reverse the order issued in Criminal Case No. **479** of **2014** forfeiting the exhibits to the state and order that the said exhibits be returned to the appellant in this case forthwith unless otherwise lawfully held.

Right of appeal 14 days

Dated at Nairobi this 28TH day of October 2015

John M. Mativo

Judge

[1] Act No. 7 of 2005

[2] Cap 75, Laws of Kenya

[3] See Okeno vs Republic {1972} E.A, 32at page 36, Pandya vs Republic {1957}EA 336

[4] Shantilal M. Ruwala V. R (1957) E.A. 570

[5] see Peters V. Sunday Post (1958) E.A. 424

[6] Criminal Appeal No. 67 of 2005, JA Bosire JA , & Githinji JA)

[7] {1935} A.C 462 at page 481

[8] 397 US 358 {1970}, at pages 361-64, see also the more recent elaboration of the rationale of the principle in R VS Oaks 25 D.LR (4TH) 200 {1987} at pp 212-214

[9]{1969} EA 204