



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL APPEALS NOS. 127 & 128 OF 2011 (CONSOLIDATED )**

**WAMBUA KILONZO.....1<sup>ST</sup> APPELLANT**

**RAPHAEL MITAU KINGALYA.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. **Wambua Kilonzo, Raphael Mitau Kingalya** herein after “*the appellants*” were charged with two counts.
  - i. Transporting forest produce (firewood)) without forest movement permit contrary to Section 54(1) (a) of the Forest Act vide Kenya Gazette Supplement No. 88 of 2005. The particulars thereof being that on the 18<sup>th</sup> day of June, 2011 at around 8.00pm along Kitui – Mutomo road Wikililye sub-location in Kitui County jointly with another were found transporting forest produce namely firewood to wit 7 tonnes in a motor-vehicle registration number KAP 476C make Mitsubishi lorry without a forest movement permit valued at Kshs. 40,000/=.
  - ii. Failing to comply with the provisions of the Forest Act Contrary to Section 54(a) of the Forest Act No. 7 of 2005. Particulars thereof being that on the 18<sup>th</sup> day of June, 2011 along Kitui – Mutomo road, Wikililye Location Kitui County they were found transporting forest produce namely firewood to wit 7 tonnes in a motor-vehicle registration number KAP 476C make Mitsubishi lorry at 8.00pm in contravention of the permitted hours as from 6.00am to 6.00pm.
2. The appellants pleaded guilty to the charges and were sentenced. Each one of them was fined Kshs. 50,000/= or 6 months imprisonment in default, while count 2 was dismissed under Section 89(5) of the Criminal Procedure Code. The appellants have now appealed against the sentence imposed as due process of arriving at the sentence was not followed.
3. The appeal is premised on grounds that the learned magistrate erred in law by sentencing the appellants without convicting them and denying them their fundamental right of mitigation.
4. In his submission, counsel for the appellants **Mr. Kilonzi** submitted that the learned magistrate failed to comply with Section 207(2) of the Criminal Procedure Code by failing to convict the appellants prior to passing the sentence. He submitted further that no facts were presented after the appellants admitted the charge. Finally that they were not informed of their right of appeal which is a violation of their rights. He urged the court to quash the sentence and refund the fine paid.
5. The learned State Counsel, **Mr. Mwangi** conceded to the appeal. He stated that the law was not complied with as no facts were read to the appellants. He called upon the court to quash and set aside the sentence imposed.

6. From the proceedings, it is apparent that the plea was not properly taken. The charges on being read to the appellants, they admitted by stating :-

***“It is true”.***

The court then entered a plea of guilty. It then proceeded to fine each Kshs. 50,000/= and in default, six (6) months imprisonment.

7. An accused person is usually called upon to plead to the charge pursuant to the provisions of section 207 of the Criminal Procedure Code. Section 207 (2) of the Criminal Procedure Code provides thus;-

***“If the accused person admits the truth of the charge his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:***

***Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded”.***

It is therefore mandatory for the court to convict an accused person prior to passing sentence. Similarly, it is also a requirement for facts upon which the charge is founded to be presented for the accused for purposes of getting his response thereto. This was not done in the instance case; therefore the plea taken was equivocal.

8. Finally, it is also apparent that the appellants were not heard in mitigation prior to the sentence being passed. Failure to give the appellants an opportunity of addressing the court was fatal. The question that remains unanswered is what informed the court in reaching the decision to impose the penalty? What were the circumstances that led to the commission of the offence? This question remains unanswered.
9. In light of the magistrate having not followed the due process laid down, the sentence imposed was illegal. I therefore quash and set aside the sentence imposed. The fine paid in both cases shall be refunded to the depositors.
10. It is so ordered.

**DATED, SIGNED and DELIVERED at MACHAKOS this 16<sup>TH</sup> day of OCTOBER, 2013.**

**L.N. MUTENDE**

**JUDGE**