REPUBLIC OF KENYA

IN THE HIGH COURT

AT ELDORET

Criminal Appeal 143 of 2011

EVANS OBUDO::APPELLANT

And

REPUBLIC::RESPONDENT

(Being an appeal from the Judgment of A. Lorot Senior Resident Magistrate at Kapsabet Principle Magistrate's Court in Criminal Case Number 2405 of 2011 dated and delivered on 7th September, 2011)

JUDGMENT

The appellant, **Evans Obudo**, with two others **namely Laban Manene** and **Daniel Nyariki** (hereinafter "the co-accused") were jointly charged with two offences of transporting forest produce without a permit contrary to section 52 (a) (1) (b) as read with subsection 2 of the Forest Act No. 7 of 2005 and being in possession of forest produce contrary to section 54 (1)(b) of the same Act.

On his own plea of guilty, he was convicted and fined Kshs. 108,000/- on each of the counts and in default, 1 years imprisonment. The sentences were to run consecutively.

The appellant was dissatisfied with both his conviction and sentence and has appealed to this court against both conviction and sentence.

The particulars of the 1st count read as follows:-

"Laban Manene, Daniel Nyariki and Evans

Obudo on the 15th day of July, 2011, along

Songor - Kopere road were found jointly

transporting 135 bags of charcoal valued

at Kshs. 108,000/- using motor vehicle

registration No. KAR 825 P Mitsubishi

Canter without a permit from the Director

of Forest Service."

And the particulars of count II read as follows:-

"Laban Manane, Daniel Nyariki and Evans

Obudo on the 15th day of July, 2011 along

Songor - Kopere road were found jointly

being in possession of 135 bags of charcoal

valued at Kshs. 108,000/- without a permit

from the Director of Forest Service."

The record shows that the following facts were narrated by the prosecution:-

"On 18th July, 2011 around 12 midnight

Forest Guards from Nandi South Zonal

forest office under the command of

Sergeant Limo who was accompanied by

Corporal Lagat and F.G. Naibei were on

patrol along Songor - Kapere road. They

came across a motor vehicle registration

number KAE 825 P Mitsubishi lorry. They

stopped the same and upon conducting a

search, they confirmed that it was transporting

135 bags of charcoal. They required from the

three occupant all of who are present in court,

if they had a permit from Director Forest

Services. None had a permit to transport the same. The officers arrested all the three

suspects and ordered the driver to drive

towards Nandi Hills Police Station.

At the entrance of Nandi Hills Police Station,

the said lorry landed in a ditch prompting it to

be towed to the station yard later. The Deputy

Forest guard in the presence of the accused

persons did a count of the sacks. They all

established it was 135 bags of charcoal. The

three then were escorted to the court for plea.

I produce the lorry as exhibit (PEX.1). I also

produce the 135 bags of charcoal as

exhibit (P.EX2).”

After the appellant admitted those facts he said as follows in mitigation:-

“I admit the charges. I was with the charcoal.

I was an employee transporting for my boss.

I have a wife and 2 children. I had not discussed

the permit with 2nd accused. I am not the owner

of the charcoal. I know I had no permit. I am the one who obtained transport.”

At the hearing of the appeal, the appellant appeared in person and relied on his grounds of appeal. **Mr. Chirchir** for the Republic conceded the appeal on the grounds that the plea was not unequivocal and further that the appellant was treated differently from his co-accused in sentencing.

Having perused, re-considered and re-evaluated the proceedings which took place before the lower court, I am unable to detect any defect in the manner the appellant’s plea was taken. The Learned trial magistrate strictly followed the procedure spelt out by the Court of Appeal in **Aden -Vs- Republic [1973] E.A. 445.**

When called upon to mitigate, the appellant stated what I have set out above. It is plain that even in mitigation the appellant admitted transporting the charcoal without a permit. The fact that he denied ownership of the charcoal did not negate his plea. He clearly admitted transporting and being in possession of the charcoal without a permit from the Director of Forest Service.

Like the learned trial magistrate, I am satisfied that the appellant’s plea of guilty was clearly unequivocal. However in my judgment, the offence disclosed by the facts given by the prosecution was that transporting forest produce i.e. the 135 bags of charcoal. The second count of being in possession of the same bags of charcoal should have been charged in the alternative. In the premises conviction could only be in respect of one of the counts and not both. That being my view of the matter, the conviction of the appellant on the second count was not proper and the purported admission of the appellant was inconsequential. I quash the conviction of the appellant on the second count but dismiss his appeal against conviction on the first count.

With regard to sentence, I agree with the learned Senior State Counsel that there was no basis for treating the appellant more severely than his co-accused who had denied the charges and were fully tried. Indeed the fact that the appellant pleaded guilty should have been favourably considered when

determining the appropriate sentence to be meted out to him but no consideration seems to have been given to that fact. The appellant's co-accused, **Daniel Nyariki,** was fined Kshs. 20,000/- on the same count. Given the mitigating circumstances stated by the appellant and the fact that he pleaded guilty at the first opportunity, he did not in my judgment deserve a more severe punishment than his co-accused. In the premises, I am entitled to interfere. I allow the appeal against sentence. The fines of Kshs. 108,000/- on each count imposed upon the appellant by the lower court are hereby set aside; I substitute therefore a fine of Kshs. 20,000/- on count one (1). In default the appellant to serve six (6) months imprisonment.

DATED AND DELIVERED AT ELDORET

THIS 14TH DAY OF JUNE, 2012

F. AZANGALALA
JUDGE
Read in the presence of:-
The appellant and

Mr. Chirchir for the State.

F. AZANGALALA
JUDGE
14TH JUNE, 2012