



**REPUBLIC OF KENYA**

**High Court at Kakamega**

**Criminal Appeal 108 of 2011**

**BENARD BUKHALA -----1<sup>ST</sup> APPELLANT**

**WYCLIFFE HIZOZO -----2<sup>ND</sup> APPELLANT**

**NICKSON KAZIANI -----3<sup>RD</sup> APPELLANT**

**MIHESO ERIC -----4<sup>TH</sup> APPELLANT**

**VERSUS**

**REPUBLIC -----RESPONDENT**

**(Appeal arising from the CM's Court Kakamega in Criminal case NO. 1141 OF 2011 delivered on 17<sup>th</sup> June, 2011[C. KENDAGOR, DMII PROF])**

**JUDGEMENT**

The Appellants, **BERNARD BUKHALA** (1<sup>st</sup> appellant), **WYCLIFFE HIZOZO** (2<sup>nd</sup> appellant) **NICKSON KAZIANI** (3<sup>rd</sup> appellant) and **MIHESO ERIC** (4<sup>th</sup> appellant) were charged as follows:

**“ILLEGAL CUTTING OF INDIGENOUS TREES IN A STATE FOREST CONTRARY TO SECTION 52 (1) (a) AS READ WITH SECTION 52 (2) OF THE FOREST ACT 2005 ACT NO. 7 PAGE 229 LAWS OF KENYA.**

The particulars of the offence were that on the 16<sup>th</sup> day of June, 2011 at Kakamega Forest in Kakamega central District within western province jointly were found cutting indigenous trees for charcoal burning without permit from the forester with an estimated value of Kshs.31,585/=.”

The appellants pleaded guilty before the lower court. They were convicted and fined Kshs.50,000/- or in default to serve six months imprisonment each.

The Appellants were aggrieved by the conviction and sentence and appealed to this court. Their appeals were consolidated and heard as one. This judgment is therefore in respect of the appeals No. 108, 110, 111 and 109 of 2011.

The Appellants raised several grounds of appeal which can be summarized as follows:-

- Plea was equivocal
- It was not clear whether the appellants understood the language used.
- The facts read out were contradictory and uncorroborated.
- Value and species of the tree not ascertained
- Defective charge sheet.
- Mitigation by the appellants was ignored.
- The sentence was harsh, vindictive and excessive

Mr. Akwala appeared for the Appellant while Mr. Limo appeared for the state. The submissions by Mr. Akwala expounded on the grounds of Appeal. Mr. Limo objected on the appeal. The appeal was opposed on the grounds that the plea was unequivocal and that there was a Kiswahili/English interpreter. That since the appellants pleaded guilty, they forfeited their right to a full trial and therefore matters related to a full trial cannot be raised. That the sentence imposed by the Trial Magistrate is what is provided for by the law.

As a first appellant court, I have considered the case before the lower court and drawn my own conclusions. I have also considered the submissions by Mr. Akwala for the appellant and by Mr. Limo for the state.

The plea was taken on 17.6.11. The charge was read and explained to the accused who replied to the same in Kiswahili and each went ahead to admit the facts and mitigated. The court record clearly reflects there was English/Kiswahili interpretation. The plea was therefore unequivocal.

I have considered the facts that were read out by the prosecution. The same are not contradictory. The facts support the particulars of the offence.

The value and the type of the trees are reflected in the charge sheet and in the statement of facts. Since the appellants pleaded guilty, they forfeited their rights to a full trial where all the particulars of the offence would have required to be proved.

**Section 52 (2)** creates the penalty for the offences under **Section 52 (1)** of the forest Act, 2005. **Section 52 (2)** of the said Act provides for a fine of not less than fifty thousand shillings or to imprisonment for a term of not less than six months or to both such fine and imprisonment.

The sentence imposed by the trial magistrate is therefore within the law and cannot therefore be described harsh, vindictive and excessive since there is provision for minimum sentence, the Trial Magistrate's hands were tied despite of the Mitigation offered by the appellants.

The charge sheet is not defective. Although I have noted that the charge sheet mentions "page 229" Laws of Kenya, no prejudice was suffered by the appellants (see Section 382 CPC).

However, taking into account the mitigation by the appellants and the value of the trees in question, this court is inclined to refer this case to the Probation Officer for investigation and report on whether the appellants are suitable for placement on Community Service Orders.

Section 3 (1) (a) of the Community Service Orders Act states as follows:-

*“where any person is convicted of an offence punishable with-*

*(a) Imprisonment for a term not exceeding three years, with or without the option of a fine; or*

*(b) Imprisonment for a term exceeding three years but for which the court determines a term of imprisonment for three years or less, with or without the option of a fine, to be appropriate, the court may, subject to this Act, make a community service order requiring the offender to perform community service.*

The case is therefore referred to the Probation officer for investigation and report.

*Delivered, dated and signed at Kakamega this 18<sup>th</sup> day of December, 2012*

**B. THURANIRA JADEN**

**J U D G E**