REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

(Coram: Ojwang, J.)

CRIMINAL APPEAL NO. 434 OF 2010

1. ROTINA MKIKUYU

2. DAVID MASHAURI.....APPELLANTS

- VERSUS -

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of Resident Magistrate F. K. Munyi dated 30th July, 2010 in Criminal Case No. 486 of 2008

at Wundanyi Resident Magistrate's Court)

JUDGMENT

The appellants herein were charged with the offence of transporting forest produce without a movement permit, contrary to s. 52 (1) (a) as read with s. 55 (1) (c) of the Forests Act, 2005 (Act No. 7 of 2005). The allegation was that the appellants herein, on **24th December, 2008**, at Mwatate, along the Voi-Taveta Road in Taveta District, were found jointly transporting forest produce, namely sandalwood in the amount of 10 tonnes valued at Kshs. 10 million, in motor vehicle registration number KBA 978B, Fuso lorry, without a movement permit from the Director of Forestry.

The appellants herein were also charged with the offence of being in possession of forest produce subject to a Presidential ban, contrary to s. 34 (1) as read with s. 34 (2) of the Forests Act, 2005: it was alleged that, at the *locus* aforementioned, they were found being in possession of 10 tonnes of sandalwood valued at Kshs. 10 million which is subject to a Presidential ban.
After examining the evidence, the trial Court found that: the appellants herein had been found with a lorry, registration No. KBA 978B, which at the time was being driven by 2nd appellant herein, and on which 1st appellant was the conductor. The said lorry was conveying pieces of wood, confirmed by two forest officers (PW 1 and PW 2) to be sandalwood. It was PW 2's evidence that the pieces of wood were freshly cut at the time he saw them, which was the time the appellants herein were arrested. PW 2 estimated the pieces of wood to weigh 10 tonnes, and believed such a large quantity was more likely to have been cut from a forest than from a farm.

PW 3, **APC Kipchumba Bundotich**, in the company of other Police officers, visited the scene where the lorry carrying the sandalwood had overturned, and while there, the perfumed smell of the cargo made him

realize it was sandalwood. When PW 3 and his colleagues introduced themselves as Police officers, the appellants herein became uneasy, and started making telephone calls.

The appellants denied having transported sandalwood, saying that they had been hired to transport firewood from Mwatate sisal estate.
The learned Magistrate held that it was not practical or possible to cut firewood from just one tree-species, but the evidence (of PW 3) showed that the pieces of wood in question were from the same species; and he held that *"the pieces of wood were being transported for other purposes … than for firewood"*.

The Court thus expressed its ultimate finding:

"I find that the prosecution has proved its case beyond reasonable doubt as required. Both accused persons are found guilty of transporting forest produce without a movement permit contrary to section 52 (1) (a) of the Forests Act, 2005".

After acquitting the appellants herein on the second count, the learned Magistrate treated them as first offenders, took their statements in mitigation, and sentenced each to a seven-year term of imprisonment.

In the petition of appeal, the appellants stated as follows:

> *(i) the trial Court erred in law and fact by finding that they had a case to answer;*
>
> *(ii) the trial Court erred in law and fact in finding that the evidence adduced had proved the prosecution case.*
>
> *(iii) The trial Court had wrongly shifted the burden of proof to the appellants;*
>
> *(iv) The sentence imposed was harsh and excessive.*

Learned counsel **Mr. Onserio** represented the respondent when this matter came up for hearing on **19th November, 2010**, while the appellants appeared in person.

Mr. Onserio conceded to the appeal on sentence. Section 52 (1) (a) of the Forests Act, 2005 (Act No. 7 of 2005) thus provides:

"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 …."*

And sub-section (2) of that section provides for the relevant penalty, as follows:

> *"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 to imprisonment for a term of not less than six months, or to both such fine and imprisonment"*.

Mr. Onserio, while submitting that the appellants were properly convicted, urged that the sentences imposed were *"extremely harsh"*, and failed to take into account the fact that the unlawfully-transported forest products had been recovered; and also failed to consider the fact that the accused persons were not the principal offenders, but were only conveying the goods on behalf of somebody else. Counsel submitted that the *mens rea* attending the offence under the Forests Act had not been established — and so this should be taken as mitigation. Counsel relied on the aspect of the evidence which showed that the appellants herein, the driver and the conductor in charge of the lorry used to carry the pieces of wood, did not abandon the motor vehicle when it broke down: and he urged that this fact be taken to show that they

were ignorant of the unlawful nature of the transaction.

As it is clear that s. 52 (1) of the Forests Act imposes an outright prohibition of the *"removal of forest produce"* such as that which is the subject-matter herein, it follows that they had committed an offence under that Act, even though the Court had a discretion in the apportioning of sentence. The apportioning of sentence is a judicial function to be based on considered criteria, and on the circumstances of each case, subject to the terms of the enactment. The evidence shows a possible lack of awareness of the unlawfulness of the transportation of timber in this case; and shows clearly that the author of the mischief was not before the Court. A fair sentence in these circumstances, would take into account the conduct of the accused persons at the material time, and would pay regard to the limits to sentencing imposed by law. An appropriate sentence, in the view of this Court, would have been much closer to the lower limit than the upper limit.

Considering that the appellants have already been in jail since they were sentenced on **30th July, 2010**, for just over six months, I hold that they have already served jail term for a period long enough to convey the lesson of required compliance with the law. I hereby order that both appellants shall forthwith be released from prison, as they have served the requisite term.

Orders accordingly.

DATED and **DELIVERED at MOMBASA this 15th** day of **February, 2011.**

J. B. OJWANG

JUDGE

Coram: ***Ojwang, J.***
Court Clerk: ***Ibrahim***
For the Respondent: ***Mr. Onserio***
Appellants in person