REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 278 of 2009

JANE NYAMBURA NJUNG'E …….…….. APPELLANT

VERSUS

REPUBLIC …….RESPONDENT

(An Appeal from original conviction and sentence in Kajiado S.R.M.CR.C. NO.1401/2008 by Hon. W. N. Kaberia, Senior Resident Magistrate, dated 22nd September, 2009)

JUDGMENT

The appellant in this appeal was charged jointly with two other persons with the offence of being in possession of osyris lancoelata (East African sandal wood (sandal wood) contrary to **section 34(1) (2)** as read with **section 54(8) (d)** and **55(1) (c)** of the **Forest Act, 2005**.

According to the charge sheet, on the 26th November, 2008 at Namanga in Kajiado District the appellant and the two others were found to be in possession of 40 tones of sandal wood valued at Kshs.40m in a motor vehicle Registration No.T443ABU, trailer T716CJ. That the said sandal wood is a protected tree species under the presidential ban contained in **Gazette Notice No.3176** of **2007**.

The prosecution evidence was that an anonymous caller informed **PW3, Godfrey Muga** (Muga), a Revenue Officer with the Customs Department at Namanga that there was a truck parked within the ***"no man's land"*** which was suspected to be loaded with sandal wood.

Muga and other customs officials in the company of police officers identified the truck where it was parked with other trucks. Because the driver was not in it the police and customs officials guarded it over night. First to arrive was the 3rd accused in the charge sheet, **Daniel Muia** (Muia), a clearing agent. He offered to trace the driver. The driver came and the truck was opened by breaking the security seal in the presence of the officers from Kenya Wildlife Services, Forest Services, NSIS, Customs Department, Police Department. Samples of the contents were taken to Kenya Forest Research Institute (KEFRI) and examined by **PW1 Reuben Shanda**, who confirmed that the samples were sandal wood. The OCS Namanga Police Station (PW7) caused his officers **PW8 Job Panta** and **Sgt. Musobin** to arrest the owner of the consignment, Jane Nyambura Njunge, the appellant.

The investigating officer, **PW9, I.P. Japheth Kilungu** testified that in the course of his investigations the accused persons gave him some documents which in his opinion were genuine having confirmed their authenticity with the Customs Department at Busia border, the point of entry. He confirmed that he established that the truck had come from Uganda and the cargo was on transit to Tanzania. That evidence notwithstanding, he proceeded to charge the appellant and the other two persons in the charge sheet.

In her sworn defence the appellant told the court that she was engaged in the sandal wood trade between Uganda and Tanzania. That on this occasion she had harvested the sandal wood in Uganda and arranged to transport them after obtaining all the necessary clearance documents such as plant importation permit, phytosanitory certificate, the East Africa certificate of origin, among other documents. At Busia boarder she was cleared, the truck sealed by customs officials and it proceeded all the way to Namanga where it was detained and they were arrested and subsequently charged. The 2nd accused person in the charge sheet, a Tanzanian citizen, the truck driver has not appealed while the 3rd accused person, Muia, the clearing agent jointly charged with them was acquitted for lack of evidence.

After the prosecution closed its case, the learned trial magistrate **W.N. Kaberia, SRM** on his own motion under **Section 150** of the **Criminal Procedure Code** called for evidence from the in-charge, Kenya Revenue Authority, Busia to produce records relating to 22nd November, 2008 when the consignment is alleged to have passed through Busia. A verification officer, **Benedict Kisilu** appeared before the trial Magistrate on 10th June, 2009 as ordered. The upshot of his testimony was that all the documents the appellant relied on in the case were forged and that there was no evidence the truck ever crossed Busia border on the day it is alleged to have crossed.

In his judgment the learned trial magistrate made the following conclusions:

i) that **sections 34(2)** and **54(3) (d)** of the **Forest Act** provide for two distinct offences with different penalties.

ii) that for the above reason the charge was defective and contravened **section 137** of the **Criminal Procedure Code.**

iii) that the defect was not prejudicial to the appellant and could be ignored.

iv) that there was no evidence of where the sandal wood was harvested.

v) that for the foregoing reasons, the offence under **section 54(8) (d)** was not proved.

vi) that the appellant having failed to lead evidence as to the place of origin of the sandal wood, the only conclusion was that they were harvested in Kenya.

vii) that the documents produced by the appellant were fake.

After making these conclusions the learned magistrate found no evidence against Muia and acquitted him. However, upon convicting the appellant and the driver, the learned magistrate sentenced them to a fine of Kshs.50,000/= or in default to a term of three months imprisonment. The sandal wood was ordered to be forfeited to the Kenya Forest Services while the truck was released to the owner, Raymond Kimaru on the ground that it was merely on hire and there was no evidence that he knew the nature of the cargo it was transporting.

The conviction and sentence aggrieved the appellant who has preferred this appeal on nine (9) grounds, argued in four sets as follows:

(i) that the charge sheet was defective

(ii) that the trial court ignored the evidence that the truck was sealed with a genuine customs seal

(iii) that the learned magistrate erred in relying on the evidence of Bernard Kisilu and ignoring the evidence of the investigating officer

(iv) the learned magistrate erred in shifting the burden of proof on the appellant.

Learned counsel for the respondent did not support the conviction and sentence for the reason that the trial court was in error in calling **Bernard Kisilu** on its own motion to strengthen the prosecution case.

I have considered these submissions and the two authorities cited by counsel for the appellant, namely, **Joseph Lomis Echokule & 2 Others V R**, Criminal Appeal Nos.205 and 312 of 2006 and **Murimi V R** (1967) EA 542.

This being the first appeal this court is enjoined to examine the case as a whole, consider all the evidence produced at the trial before arriving at an independent conclusion. The appellant was charged under **section 34(1) (2)**

"*as read with*" **section 55(1) (c)** of the **Forest Act 2005**.

The former provides that:

> **"34(1) The President may, on the advice of the Minister, by order published in the Gazette, declare any tree, species or family of tree species to be protected in the whole country or in specific areas thereof, and the Minister shall cause this information to be disseminated to the public.**
>
> **(2) Any person who fells, cuts, damages or removes, trades in or exports or attempts to export any protected tree species or family of trees or vegetation thereof or abets in the commission of any such act commits an offence."**

The latter section states that:

> **"54(8) Any person who, in any forest area –**
>
> > **(d) extracts, removes or causes to be removed any tree, shrub or part thereof for export, commits an offence and is liable on conviction to a fine of not less than three million shillings or to imprisonment for a term of not less than ten years, or to both such fine and imprisonment."**

Sections **34(1) (2)** and **54(8) (d)** create two distinct offences and as the learned trial magistrate correctly pointed out the two could not be combined in one count as doing so rendered the charge sheet defective. After so finding the learned trial magistrate fell into error by holding that the defect was curable by **section 137** of the **Criminal Procedure Code**. The combined charges were prejudicial to the appellant in her defence.

Again the learned trial magistrate having found that there was no evidence to prove the charge under **section 54(8) (d)** as to where the sandal wood was harvested, it was erroneous for him to find that **section 34(2)** had been contravened relying on the evidence of **Bernard Kisilu**. I turn to consider that evidence which is clearly the only evidence upon which the learned trial magistrate based his decision.

The investigating officer **PW9 I.P. Japheth Kilungu** had told the court that:

> **"I don't know where the sandal wood was harvested. Accused persons gave documents. They alleged that the sandal wood had been imported from Uganda and was destined to (sic) Dar es salaam. I believed them because I went to Busia customs offices where the officers there confirmed that the lorry had passed there. The documents had duly been stamped and appeared to me to be genuine."**

In cross-examination he stated that:

> **"From my investigations the lorry was from Uganda. The documents presented to me were genuine. The cargo was on transit to Tanzania."**

With that evidence the prosecution closed its case and the trial court ruled that the appellant had a case to answer. The appellant gave her defence. Instead of the learned trial magistrate deferring the matter for judgment, he went out to look for more evidence perhaps on the realization that the prosecution evidence presented up to that stage did not meet the threshold of proof beyond any reasonable doubt.

Section 150 of the **Criminal Procedure Code** invoked by the learned magistrate allows a court at any stage of a trial to summons any person as a witness if his evidence appears to the court essential to the just conclusion of the case provided the prosecution and the defence counsel are given opportunity to cross-examine the witness.

Interpreting a similar provision in the **Tanzanian Criminal Procedure Code (S. 151)**, the Tanzania Court of Appeal in the case of **Muiruri v R** (1967) EA 542 held that the court will exercise the power to call an essential witness even if it results in strengthening the prosecution case. The court, however, warned that the provisions of **section 150** should be read with **sections 210** and **211** of the Criminal Procedure Code. The court said:

> **"We do not consider that section 151 was designed, nor should it be used to empower the trial court immediately after the prosecution has closed its case to call a witness in order to**

establish the case against the accused, except perhaps when the evidence is of a purely formal nature."

Trial magistrate must never be seen to be involved in the investigations of cases before them as was the case in this matter. Without the evidence of **PW9, Japheth Kilungu** the learned trial magistrate had no evidence to convict the appellant. For the errors committed by the learned trial magistrate I must interfere with the finding and conviction. The appeal is allowed, conviction quashed and sentence of Kshs.50,000/= or in default 3 months imprisonment is set aside with the result that the appellant is set at liberty forthwith or if the fine was paid the same to be refunded to her immediately.

Dated, Signed and Delivered at Nakuru this 28th day of July, 2010.

W. OUKO

JUDGE