REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

Criminal Appeal 232, 233 & 234 of 2008

ROBERT NJOROGE .....1ST APPELLANT

GERALD GITHINJI .....2ND APPELLANT

MERCY NJOKI .....3RD APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(Appeal from a Judgment of the Principal Magistrates Court at Kangundo

(Hon. S.A. Okato Ag. PM) dated 30th October 2008)

in

(PM'S CR.C. No. 695 of 2008)

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JUDGMENT

(As Consolidated on 18/5/2009)

1. The Appellants in this case, Robert Njoroge, Gerald Githinji and Mercy Njoki were all charged with the offence of being of possession of charcoal without a permit contrary to Rule 54 (1) (3) of the Forest Act, 2005. They appeared before the Ag. Principal Magistrate in Kangundo on 30/10/2008 and they pleaded guilty to the charge and were each sentenced to a fine of Kshs.50,000/= or in default 1 year in prison.

2. In their Appeals to this court, they have challenged their conviction and resultant sentence and in conceding to the Appeal, the learned Senior Principal State Counsel stated that the plea was not unequivocal because the language used in taking the plea was not recorded and the Appellants did not also plead to the facts that led to the charge.

3. I have had the advantage of reading the record of proceedings on 30/10/2008. On that day, one Fidelia was the court clerk and the languages used in interpretation were English, Kiswahili and Kikamba. The Appellants' preferred language is however unclear. Their names would point to a certain language not in the proceedings but that is neither here nor there; their language in taking the plea ought to have been properly recorded – See Adan vs R (1973) E.A. 445. I am aware that Abdullah J in Mutuku

vs R (1982) KLR 312 held that where a record of interpretation is made, a presumption arises that the accused person understood one of the languages. That may well be a reasonable presumption in other circumstances but in this case, three languages are listed but in the plea, none is recorded as the one used in taking the actual plea. I therefore agree that the plea was not unequivocal.

4. On the issue whether the Appellants pleaded to the facts, I do not see any error where the prosecutor states that the facts are in the charge sheet. In this case the Appellants were allegedly jointly found in possession of 200 bags of charcoal valued at Kshs.160,000/= without the authority of the District Forests Officer on 29/10/2008 at around 19.30 hrs along Kangundo-Tala Road. Those facts were clear enough and so the second ground to me, cannot be sustained.

5. Lastly, a 'retrial' is opposed but in Manji vs R (1966) E.A. – 343 it was held thus

"In general a retrial will be ordered only where the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence for the purpose of enabling the prosecution to fill up the gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered, each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it."

6. I adopt the above words as mine and in the instant case, the charcoal, subject of the charge was kept in safe custody and with no trial having taken place, the prosecution will not have the chance to close any gaps in the evidence to be tendered.

7. In the end, the Appeal is allowed, the Appellants' conviction quashed and sentence set aside but, they shall, be retried at Kangundo SRM's Court by a magistrate other than S.A. Okato Esq, Ag. PM. In the meantime the Appellants will appear before that court on a date to be determined and shall be in custody before then.

8. Orders accordingly.

Dated and delivered at Machakos this 22nd day of September 2009.

ISAAC LENAOLA

JUDGE

In presence of: **Mr O'Mirera for Republic**

Mr Kaluu h/b for Mr Musyoka for Appellants

ISAAC LENAOLA

JUDGE