REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 267 & 268 of 2007

EVANS LUKA TARIMO…………………………....1st APPELLANT

JOHN NTAWUASA PURDUL……….…………..2nd APPELLANT

-AND-

REPUBLIC ……………………………………………RESPONDENT

(An appeal from sentence imposed by Principal Magistrate Mrs. J. Wanjala on 29th May, 2006 in

Criminal Case No.2354 of 2005 at the Nairobi Chief Magistrate's Court)

JUDGEMENT

The appellants herein were charged with the offence of cutting down indigenous trees contrary to s.334(c) of the Penal Code (Cap. 63, Laws of Kenya). The particulars were that ***Christopher Lemayian*** (not an appellant), ***John Ntawuasa Purdul*** (2nd appellant) and ***Evans Luka Tarimo*** (1st appellant), on 23rd October, 2005 at Oldonyowas, in Chyulu National Park, Makweni District, within Eastern Province, jointly, wilfully and unlawfully cut down 700kg. of indigenous trees, namely East African sandalwood valued at Kshs.350,000/=, the property of the Government of Kenya.

After the trial had gone on for some time, the 1st appellant asked that the charge be read to him again; this was done, and he now pleaded guilty. The facts were then read out to him, as follows.

On 23rd October, 2005 at about 11.00am, Kenya Wildlife Service Rangers were on patrol in Kyulu National Park, when they received information that some persons had entered the said National Park, and were in the process of felling a tree belonging to the species of East African sandalwood. The rangers arrested the 1st appellant herein, within the said National Park, and they recovered tree portions already cut and set ready to be carted away. Investigations showed that sandalwood trees weighing 700kg, valued at Kshs.350,000/= had already been cut, within the National Park.

After the 1st appellant herein admitted the facts as read out, the Court treated him as a first offender, and recorded his mitigation statement.

The 2nd appellant also changed his plea, to one of the guilty, and admitted the facts as read out by the prosecution in respect of 1st appellant.

The learned Principal Magistrate convicted both appellants on their own pleas of guilty. She sentenced the two to a four-year prison term each.

The first appellant thus stated his grounds of appeal:

(i) he had pleaded guilty out of ignorance of Court procedure;

(ii) he is now aware of the seriousness of the offence with which he had been charged, and he is "very remorseful";

(iii) he was a first offender;

(iv) being in jail had deprived him of a schooling opportunity;

(v) the sentence imposed on him had been "inordinately harsh and severe";

(vi) he be considered for a non-custodial sentence.

The second appellant relied on similar grounds of appeal, save for the following more-individual one:

he has a wife and two young children who depend upon him, and who will suffer during his service of the four-year jail term.

In his submissions on appeal, 1st appellant said he was remorseful and deserved leniency. He said he had cut the indigenous trees in the performance of *a job which he had been given;* but he didn't know it was an offence.

The 2nd appellant's position was similar; he said: *"I didn't know the law. I was only doing a job, to get money. I was given the job by someone else. I seek pardon".*

Learned State Counsel, ***Mrs. Obuo*** noted that both appellants had changed their plea after three prosecution witnesses had given testimony. Both appellants had voluntarily elected to plead guilty; and the trial Magistrate had taken into account the relevant circumstances, as well as the mitigation statements, before imposing against each a jail term of four years, where the statute (Penal Code (Cap. 63, Laws of Kenya, s. 334)) provided for a maximum of fourteen years' imprisonment. Counsel urged that the four-year jail term imposed was by no means excessive, and was in any case, legal in all respects.

When can this Court, in its appellate capacity, interfere with the sentence imposed by a trial Court? The sentencing discretion is defined by law, and, certainly, a sentence which exceeds the prescribed maximum is an illegal one; but within the scope for lawful sentencing, the task falls to the trial Court to take into account all the relevant circumstances and to fix a sentence that, objectively perceived, carries merit. A skewed or unjustifiable perception of such relevant circumstances, may lead to a harsh and oppressive sentence which does not serve ends of justice; and such a sentence will be set aside by an appellate Count. Subject to such considerations, the standing of the trial Court's decision on sentence is, as thus depicted in the learned work by ***Mr. Momanyi Bwonwong'a***, *Procedures in Criminal Law in Kenya* (Nairobi; E.A Educational Publishers, 1994), at pp. 270-271:

"**Like findings of fact which are peculiarly within the province of the trial court, sentencing is essentially a discretion of the same court. Where the trial court has acted on correct principles and has taken all the relevant factors into account, unless the sentence imposed is manifestly excessive, it is not open to the appellate court to interfere with such a sentence. In *Wanjema v. R* [1971] E.A. 493 (HCK), the High Court stressed this aspect …stating that an appellate court should not interfere with the discretion which a trial court has exercised as to sentence unless it is shown that it overlooked some material factor, took into account some immaterial factors, acted on a wrong principle, or the sentence is manifestly excessive.**

"**An appellate court is not entitled to interfere with the sentence on the mere ground that if it had been trying the appellant it might have passed a somewhat different sentence."**

This Court must apply the foregoing principles, not only because they are well-established judicial directions, but also because they are eminently meritorious, as normative structures regulating the internal play among judicial fora occupying differing hierarchical stations.

When this Court applies the foregoing principles, it would have no basis for interfering with the four-year term of imprisonment imposed by the Magistrate's Court, out of the much longer term of fourteen years provided for by law. The appellants had, as the record shows, pleaded guilty out of choice; and their choice, judging from their own statements on appeal, in my judgement, very well coincides with the factual position: they *did* commit the offences charged. Even if the appellants committed the offences as they *served a different person* (who the prosecution office, in responsible discharge of constitutional obligation, ought to identify and to prosecute as well), they still fell foul of the law, and thus deserved the penalty meted out by the trial Court.

Consequently, I hereby dismiss the appellants' appeal, and uphold both conviction and sentence.

Since the appellants have said in Court that they committed the offences charged while in the service of *some other person or persons,* the Court recommends a careful investigation of their statement, and proper follow-up, by the prosecutorial body duly empowered.

For the purpose of the recommendation in the foregoing paragraph, the Deputy Registrar shall, by due protocol, have this judgement and its orders and recommendations brought to the attention of the Attorney-General.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 12th day of March, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Respondent: Mrs. Obuo

Appellants in person