REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
Criminal Appeal 164 of 2003
BETWEEN

JOHN MUNGIIRA ……. APPELLANT

AND

REPUBLIC …….. RESPONDENT

(Being an appeal from original conviction and sentence in Tigania District

Magistrate's Criminal Case No. 161 of 2003 (Mr. D.J. Nyagah) dated 6.8.2003)

JUDGMENT OF THE COURT

The appellant herein, John Mungiiria was tried and convicted on one count of removing forest produce contrary to section 8(1) of the Forest Act, Cap 385 Laws of Kenya. The particulars of the charge are that on the **18th day of January 2003 at Miathene Location in Meru North District within the Eastern Province without lawful excuse he removed Mukui trees from Keiga forest to wit 9 pieces of logs without authority from the forest officer.** The appellant was fined Kshs. 7,000/= in default six months imprisonment. In addition, the power saw, which was produced as P exhibit 2 was forfeited to the Government.

The appellant appealed against both conviction and sentence. In his Memorandum of Appeal (which should be Petition of appeal) the appellant set out the following grounds of appeal:-

1. The trial magistrate erred in law and in fact in holding that the appellant removed the Mukui tree logs from the forest whereas there was no evidence adduced to prove this.

2. The trial magistrate erred in law and infact in failing to see that going by the evidence of the Assistant Chief and Forest Patrolman only possession could have been proved but not removal.

3. The trial magistrate erred in law and in fact by failing to consider defence evidence.

4. The judgment and sentence of the learned trial magistrate was against the weight of evidence.

The facts of this case can be gleaned from the evidence of PWI – Robert Thuranira a forest patrolman, PW2 – Jeremiah Kabarua, Assistant Chief of Kiandui Sub-Location and PW3 – No. 55283 Police Constable John Mbae as well as PW4, John Oyaro Nyambok, the forest officer. PWI stated that on 18.1.2003 he and others were on patrol at Kiandui area when they came upon the appellant splitting timber on Kabeti's shamba. The appellant was with two others and they were using a power saw. That the Mukui logs that were being split had been removed from the forest. When the appellant saw PWI and the

others he dropped the power saw and ran away. The power saw was then taken by PWI. The matter was reported to the police. The nine logs were also later transported to Miathene Police Post. Though the appellant ran away but was later arrested.

PW2, the Assistant Chief of the area where the logs were found by PWI testified that on 14.1.2001 at about noon, he received a report from one Robert Mwenda (not called as a witness) that some trees had been felled at Keiga Forest the previous night. PW2 then mounted a search during which some nine Mikui logs were found at Kabeti's shamba.That before the logs were found PW2 and others involved in the search had followed some tyre marks to the shamba of Kabeti. At Kabeti's shamba, PW2 found the appellant and two other people who were unknown to PW2, splitting the timber with the use of a power saw. PW2 also testified that when they made the discovery of the nine Mikui logs, the logs had been covered with gruvellia branches. The appellant and the other two men abandoned the power saw and ran away. PW2 together with PWI took away the power saw to Miathene Police Post.

In cross-examination, PW2 told the court that before they discovered the appellant and the nine Mukui logs, they had gone into the forest where they established that some Mukui trees had been felled only a few days previously. He also testified that Kabeti on whose shamba the logs were discovered was the appellant's sister.

PW3, PC John Mbae stated that on 18.1.2003 at about 5.00pm while he was at Miathene Police Post, the appellant was escorted to the police post. He re-arrested the appellant and later visited the scene from where they recovered the nine logs. Both the nine logs and the power saw were tendered in evidence as P exhibit 1 and P exhibit 2 respectively after the same had been seen by the court at the police post.

In cross-examination, PW 3 further testified that when he saw the nine Mukui logs at Kabeti's shamba, the logs were covered with fresh gruvellia leaves and that there was no evidence that the logs could have been cut from trees on Kabeti's shamba.

PW4, John Oyaro Nyambok, a forest officer at Maua testified that on 20.1.2003 while he was in his office at Maua, he received a report from two forest guards from Tigania that some trees had been felled from Keiga forest. He then took a landrover and a tractor and went to the scene. He was accompanied by two forest guards, Thuranira PWI and another. On arrival at Kabeti's home, they found nine logs of the Mukui tree which is normally found in the forest. He was also led into the forest where he confirmed the felling of the Mukui trees. He was satisfied that the nine logs had been removed from the forest where he saw stumps of the Mukui trees that had been felled.

The appellant gave his evidence from the dock and called two witnesses. His evidence was that he had been framed and that he was not at the place where it was alleged the logs had been found. He explained his arrest by alleging that he had a grudge with the assistant chief, PW2, because of a land case.

DWI, Grace Kabeti denied that the logs were found in her home as alleged and further denied that the appellant was found in possession of the logs. She also testified that she did not see the appellant that day. She also stated that perhaps the appellant was framed because of a land case with PW2. In cross-examination, DWI admitted that her home is not far from Keiga forest but she denied that on 18.1.2003 the forest guards and assistant chief went to her home.

DW2, Julius Nturibi, a neighbour of the appellant testified that on 28.1.2003, the appellant was arrested while the two of them were walking from Kianjai Market. DW2 further told the court that he was not with the appellant on 18.1.2003.

In his judgment, the learned trial magistrate found that the prosecution had proved its case beyond any reasonable doubt against the appellant. He believed the evidence of both PWI and PW2 that tyre marks had led them to where they discovered the appellant and another splitting timber under camflouage of fresh grivellia branches which had been used to cover the nine Mukui logs. The learned trial magistrate made a finding that the nine logs were of Mukui tree as confirmed by all the four witnesses, namely PWI, PW2, PW3 and PW4.

I have myself carefully reconsidered the whole of the prosecution evidence and I am satisfied that the prosecution's case against the appellant was proved beyond any reasonable doubt. PWI and PW2 testified that when they discovered the appellant and his team splitting the logs, the appellant took off, leaving behind the power saw which they had been using to split the timber. That power saw was produced in court as P exhibit 2. In his unsworn testimony, and even during cross-examination, the appellant did not dislodge the prosecution's case that the power saw was his and that he abandoned the same at the scene on seeing the forest officer and the Assistant Chief. There is also the evidence of PWI, PW2 and PW4 that they went into Keiga forest and discovered freshly felled Mukui trees. They believed that the nine logs which were found in Kabeti's home that was not far from Keiga forest were from those Mukui tree stumps that the witnesses had seen in the forest. I have examined all this evidence and find no reason why I should depart from the findings of the learned trial magistrate.

DW2 alleged that because the appellant's home was far from her own home, it was not possible for the appellant to bring the logs into her home. The distance between the appellant's and Kabeti's homes was not in issue and DW2's allegation does not in my view hold water.

The appellant's counsel argued that the trial magistrate should have found the appellant guilty of possession but not by removal. With greatest respect to learned counsel for the appellant, I do not think that that line of argument was for the benefit of the appellant. Section 8(1) of Cap 385 under which the appellant was charged provides

as follows:-

> ***"8(1) Except as provided in this Act and subject to any rules made thereunder, no person shall, except under the licence of the Director of Forestry-***
>
> ***(i) fell, cut, take, burn, injure or remove any forest produce."***

Under section 2 of the Act, "forest produce" is defined as follows:-

> **"Forest produce" includes bark, beeswax, canes, charcoal, creepers, earth, fibres, firewood, fruit, galls, grass, gum, honey, leaves, limestone, litter, moss, murram, peat, plants, reeds, resin, rushes, rubber, sap, seeds, spices, stone, timber, trees, wax, withies and such other things as the minister may by notice in the gazette declare to be forest produce for the purposes of this Act."**

I have checked for the meaning of the word removal from Blacks Law Dictionary (7th Edition) and this is what it says:-

> **"Removal (n) (i) The transfer or moving of a person or thing from one location, position or residence to another."**

Considering the prosecution's evidence against the above definitions, I am satisfied that the case against the appellant was proved beyond any reasonable doubt. First there is evidence to confirm that some Mukui trees were felled within Keiga forest not far from where the nine logs were finally found by the forest patrolman, the assistant chief and the forest officer. There is also evidence that the nine logs were not found at the place where the Mukui trees were felled. There was further evidence that the nine logs had been moved by means of a vehicle from the point where the felling took place to the scene where the logs were found. The only defence that the appellant would have had would have been to produce a licence issued by the Director of Forestry. No such licence was produced by the appellant, thereby leaving the prosecution's evidence against him unshaken. No questions were put to PW4 in particular to show or prove that he, PW4, had licenced the appellant to remove the forest produce with which he was arrested. Nor was there any suggestion made to PW2 during cross-examination that PW2 was framing the appellant because of a land dispute between him and the appellant. Like the learned trial magistrate did, I also believe the evidence given by the prosecution witnesses and dismiss the appellant's contention that he was framed by PW2 over an alleged land dispute.

On further examination of the evidence, I agree with learned counsel for the appellant that the appellant was found in possession of the nine logs and the records also confirms that. However, it is not possible, at least in my view to separate the act of possessing the logs from the act of removing the same from the forest. One was as a result of the other, and at the time that the nine logs were found, they had already been removed by the appellant who was now exercising dominion over them. He was splitting the same with the intention of disposing of them as timber.

I have also considered the appellant's complaint that the prosecution's evidence was contradictory. Learned counsel for the appellant pointed out that there were inconsistencies between the evidence of PWI, PW2 and that of PW4 as to how the logs could have got to Kabeti's shamba. In my reading of the evidence of these various witnesses, I find no existence of such contradictions. In any event, PW4 only got a report of the removal of the logs after the event and in my view, he was right in saying that he did not know how the logs got to where they were finally found. It was PWI and PW2 who traced the tyre marks from the forest to where the logs were found and they too were right in saying what they said.

In the result, I find that the appellant's appeal has no merit. I am satisfied that the learned trial magistrate considered all the evidence adduced before him and applied his mind judicially in reaching the conclusions that he reached. I see no reason for interfering with those conclusions. The appeal is accordingly dismissed. Both the conviction and sentence by the learned trial magistrate are confirmed.

It is so ordered.

Dated and delivered at Meru this 28th day of July 2005. RUTH N. SITATI

JUDGE

28.7.2005