



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Mbugua (Criminal Appeal E087 of 2022)  
[2024] KEHC 6656 (KLR) (7 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 6656 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL APPEAL E087 OF 2022  
RN NYAKUNDI, J  
JUNE 7, 2024**

**BETWEEN**

**REPUBLIC ..... APPELLANT**

**AND**

**BONFACE KAMAU MBUGUA ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. N. Wairimu (SPM)  
in Eldoret CMCCR No. 2117 OF 2021, delivered on 26/8/2022)*

**JUDGMENT**

1. This is appeal by the State against the acquittal of the Respondent, Bonface Kamau Mbugua, by the Chief Magistrate Court at Eldoret, (Hon. Naomi Wairimu) for the offence of cutting and removing forest produce without authority contrary to Section 64 (1) (a) as read with Section 64 (2) of the [Forest Conservation and Management Act](#) No. 34 of 2016, Laws of Kenya. The particulars of the offence is that the Respondent on 18/6/2021 at around 0000hrs at Nabkoi State Forest, Burnt Block, Sub-compartment 9 E in Kesses Sub-County within Uasin Gishu County, jointly with others not before Court, unlawfully was found to have cut forest produce namely nineteen cypresses lusitanica (cypress) trees and cut into 36 logs, all valued at Kshs.399,00/= the property of Kenya Forest Service, and removed the said forest produce by means of motor vehicle registration number KAC 529 G Isuzu lorry, blue in colour without permit from the said Kenya
2. The Respondent was also charged with a second count of being present in a state forest without authority contrary to Section 64 (1) (b) as read with section 64 (2) of the Forest Conversation Management Act No. 34 of 2016 Laws of Kenya. The Particulars of the offence being that on 18/6/2021 at 0000hrs at Nabkoi Forest, in Kesses Sub-County. Within Uasin Gishu County jointly with others not before the Court was found unlawfully present there in the said Nabkoi State Forest without permission from the said Kenya Forest Service.



3. Being dissatisfied with the said judgement the Appellant lodged an appeal on the following grounds: -
  1. That the learned Magistrate erred in law and fact by acquitting the accused person whereas there was overwhelming evidence in support of the prosecution case.
  2. That the learned Magistrate erred in law and fact by mis interpreting the provision of Section 64 (1) as read with Section 64 (2) of the [Forest Conservation and Management Act](#) No. 34 of 2016 Laws of Kenya.
  3. That the learned Magistrate erred in law and fact by failing to find that the prosecution had proved its case beyond reasonable doubt by advancing and relying on theories rather than relying on the evidence that was adduced.
  4. That the learned Magistrate erred in law and fact by failing to convict the accused person in light of the overwhelming evidence provided by the prosecution.
  5. That the learned Magistrate erred in law and fact by failing and ignoring the fact that the accused person was found in the forest at 00:00 hours contrary to the time guidelines of the forest that permits members of the public to access the forest between 6:00 am and 6:00 pm without authority.

### **The Evidence**

4. PW 1 Morris Otieno Okello Forest Ranger No. 03098 from Nabkoi Forest Station testified that on the 18/06/2021 at about 1800hrs he was on patrol with Stephen Kiprotich Kibyegon at Nabkoi sub compartment 9 E when they heard the sound of a vehicle and saw lights coming from the forest. They tried to stop the driver but he refused to stop. That's when they decided to shot 2 tyres and the vehicle stop then the driver alighted who identified himself as the respondent owner of motor vehicle registration no KAC 529G Isuzu blue in colour. They arrested him, searched the motor vehicle and found 36 logs of cypress. He further stated that the Cyprus stumps were from Nabkoi forest and identified photos of the tree stamps which were later produced as Exhibit 1 (a) to (e). The photos also showed the motor vehicle KAC 529G.He further told the Court that the respondent did not have a permit.T
5. PW2 Stephen Kibyego Kiprotch evidence collaborated that of PW1. He only added that there are restrictions on getting into the forest and only guards are allowed access and that members of public access it between 6am and 6 pm.
6. PW3 Nathan Sky Simwa a forest manager at Ainabkoi forest station Uasin Gishu County produced an expert report on tree valuation which was produced as exhibit 3. In his testimony, he stated that he assessed the 36 logs that were in the lorry and sent the report to Kondoo police station. He further told the Court that the logs were 105 cubic meters and were valued at Kshs. 399,000/-
7. PW4 No 57770 Senior sergeant Osman Mohammed told the trial Court that on the 18/6/2021he was at the station when forest officers brought the respondent with truck registration number KAC 529G with 19 Cyprus trees cut into 36 pieces of log. He further stated that he visited the scene where the 19 trees had been cut.
8. PW5 No 73537 PC Kipngetich Kitur told the Court that he processed the photos and certified them. The photos were showing the forest where trees had been cut and the vehicle registration no KAC 529G Isuzu NKR being used to ferry the photos. He produced the certificate as exhibit 4



9. After the close of the prosecution's case, the trial Court made a determination that the accused had a case to answer. He was put on his defence and gave unsworn testimony.
10. DW1 testified that he is a businessman and that on 18/6/2021 at midnight he was on his way home between Kapsabet road, he was on a lorry when he met Forest Rangers who stopped him and told him to take the vehicle to their police station. He told the Court that he found a tractor with logs and they loaded the logs on his vehicle, the tractor was New Holland. He further told the Court that the road where he was passing goes through the forest but people use it. He stated that he does not know the road well, it stretches to 10 kms and there are people who keep animals and others who cultivate land. He further testified that the allegations made against him are false and that he did not cut trees and had no logs when he was arrested.
11. The appeal was canvassed vide written submissions. The Appellant filed its submissions on 10/1/2023 while the Respondent did not file any.

### **The Appellant's Submissions**

12. Prosecution Counsel, Mr. Fedha submitted that the prosecution discharged its duty of proving the case beyond reasonable doubt. Evidence was tendered by first-hand witnesses and it was overwhelmingly implicating the Appellant herein and that nothing was tendered to shake it. Counsel maintained that the trial Court erred in law and fact by acquitting the respondents whereas there were overwhelming evidence in support of the prosecution case.
13. Counsel further submitted that all the prosecution witnesses were able to identify the respondent as the one who cut the trees and removed them from the forest and was found in the state forest without authority, the photos of the vehicle that the respondent used to ferry the trees, the photos of the place in the forest where the trees was cut and certificate certifying the photos were produced hence the prosecution proved the case beyond reasonable doubt.
14. Counsel also cited Section 64 of the *Forest Conservation and Management Act* No. 34 of 2016 on prohibition activities in forests. Counsel argued that there was overwhelming evidence that the respondent was found in the forest, with forest produce that is Cupressus lusitanica (Cyprus trees) cut into thirty six logs valued at Kshs 399, 000/- at night and he failed to produce a permit from the Kenya Forest Service. Counsel submitted that to further prove that the respondent committed the offence, he failed to stop when stopped by Kenya Forest Officers who had to use force to restrain him by shooting at the tyres of the motor vehicle he was using to ferry the forest produce.
15. Counsel also cited Section 64 (1) (b) of the *Forest Conservation and Management Act* No 34 of 2016 and stated that it is very clear on the time in which members of the public are permitted to access the state forest.
16. Counsel argued that all the elements in respect to count 1 and count 2 were proved beyond reasonable doubt as per the sections highlighted above.
17. With regard to the issue of sentence, Counsel submitted that the law provides that anyone who commits the offence is liable on conviction to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding 6 months or to both such fine or imprisonment. Counsel urged that in meting out the sentence the Court should consider the value of the forest produce.
18. In the end, Counsel urged the Court to dismiss the acquittal of the Respondent in the lower Court and convict the respondent accordingly.



## Analysis and Determination

19. As a first appellate Court, this Court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial Court had the advantage of hearing and observing the demeanour of the witnesses. See *Okeno vs. Republic* [1972] E.A 32.
- a. The only issue for determination in my view is whether the Appellant proved its case beyond reasonable doubt.
20. Section 64 of the *Forest Conservation and Management Act*, 2016 which provides thus:
- “(1) Except under a licence or permit or a management agreement issued or entered into under this Act, no person shall, in a public or provisional forest –
- (a) fell, cut, take, burn, injure or remove any forest produce;
- (b) be or remain therein between the hours of 7 p.m. and 6 a.m. unless using a recognised road or footpath, or is taking part in cultural, scientific or recreational activities;
- (2) Any person who contravenes the provisions of sub-section (1) of this section commits an offence and is liable on conviction to a fine not exceeding one hundred thousand shillings or imprisonment for a term of not less than six months or to both such fine and imprisonment
21. From the above section for the offence to be proved, the following ingredients must be established, namely:-
- i. absence of a licence or permit or management agreement issued or entered into under the Act,
- ii. Must fell, cut, take, burn, injure or remove any forest produce,
- iii. The forest must be a state, local authority or provisional forest.
22. From a cursory perusal of the grounds of appeal, the Appellant has faulted the learned trial Magistrate for misapprehending the law and facts herein and thereby acquitting the accused person whereas there was overwhelming evidence in support of the prosecution case. On the offence of cutting and removing forest produce, the Appellant submitted that all the prosecution witnesses were able to identify the respondent as the one who cut the trees and removed them from the forest and was found in the state forest without authority, the photos of the vehicle that the respondent used to ferry the trees, the photos of the place in the forest where the trees was cut and certificate certifying the photos were produced hence the prosecution proved the case beyond reasonable doubt.
23. In her decision to acquit, the Respondent of the offence of cutting and removing forest produce, the trial Court considered PW1 and PW2’s evidence who both admitted that they did not witness the accused cutting down trees. The trial Court also noted that the accused person has discredited the photographic evidence adduced by PW5 on the grounds that the scene was not secured and the photographs were processed by person who could not tell which instrument was used to take the photographs. The trial Court also noted that the exhibits were photographed at Nabkoi Forest Police Station and not at the scene where the track was found .
24. From the record, both PW1 and PW1 testified that on 18/6/2021 at 1800hrs they were on patrol when they had the sound of a vehicle and saw lights coming from the Forest, they tried to stop the vehicle but they refused and they shot 2 tyre at the front and when the vehicle stopped the driver alighted and



- identified himself as Bonface Kamau Mbugua, the owner of the motor vehicle and they arrested him and asked him why he was in the area. Upon searching the vehicle they found 36 logs of Cyprus logs, the driver changed the wheel and the motor vehicle failed to start and they sent for a tractor which towed the lorry to the police station. They also produced photos showing that trees had been cut.
25. With regard to Count I it is my finding that the prosecution failed to prove beyond reasonable doubt that the accused person was found cutting and removing forest produce without authority. None of the prosecution witness saw the accused person cut and remove forest produce without authority. Looking at evidentiary value of the photographs adduced it is hard for this Court to categorically tell when the same were taken and who took the photographs for that matter. With said it is the finding of this Court that the same lack probative value in this instance. From the narrative, it was midnight when the offence was allegedly committed, a keen perusal of the photographs adduced will show that the same were taken at day time and thus one cannot be certain as to the exact scene of the crime. PW2 in fact told the Court that the motor vehicle has 36 pieces of Cyprus logs since it was in the middle of the forest, they suspected it had come from their forest but did not know where they had been cut but went back where the trees had been cut and confirmed. From the above it is clear that prosecution that was not able to discharge the evidentiary burden with regard to Count I. With that said the appeal with regard to the offence on Count I therefore cannot stand.
  26. With regard to Count II, whether the accused was found in a state forest without , the Appellant has argued that the same was proved as Section 64 (1) (b) of the *Forest Conservation and Management Act* No. 34 of 2016 and stated that it is very clear on the time in which members of the public are permitted to access the state forest
  27. In acquitting the Respondent, the trial Court observed that based on the same reasons adduced earlier, prosecution failed to prove that the accused was found in a state forest without authority.
  28. DW1, the accused person testified that on 18/6/2021, at midnight he was on his way home and while on a lorry when he met Forest rangers who stopped him and told him to take his vehicle to their police station. He told the Court that he found a tractor with logs and they loaded on his vehicle. He also told the Court that the road where he was passing goes through the forest but people use it.
  29. No evidence was offered to show that the forest in question was a public forest or a provisional forest within the meaning of the definitions given under Section 2 of *Forest Conservation and Management Act* No 34 of 2016. To me, this was a serious omission. For the prosecution to prove its case, it was necessary for evidence to be adduced to confirm the forest fell under any of the above categories. Be as it may the Court cannot tell exactly where the accused person was arrested. PW1 and PW2 both testified that they were on patrol and when they got to the plantation, they heard the sound of a vehicle and saw lights coming from the Forest.
  30. The prosecution never adduced sufficient evidence to support the conviction. In fact the evidence tendered did not meet the required test in law. The legal burden of proof in criminal cases never leaves the prosecution's backyard. Viscount Sankey L.C. in the celebrated case of *Woolmington vs. DPP* in a subtle and masterly fashion stated the law on legal burden of proof in criminal matters, that;  
  
‘Through the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception...No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.’



31. In light of the foregoing, it is my finding that the appeal herein lacks merit and is hereby dismissed.

32. Orders accordingly .

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 7<sup>TH</sup> DAY OF JUNE 2024**

In the Presence of

Mr. Mugun for the State

Appellant

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**R. NYAKUNDI**

**JUDGE**

