



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA. NO. 245A OF 2017

JACKSON MAITHYA MUSAU APPELLANT

-VERSUS-

REPUBLICRESPONDENT

JUDGMENT

INTRODUCTION

1. The Appellant was charged with offence of:-

COUNT 1: Harvesting and transporting sand outside the stipulated hours contrary to Section 30 (1) as read with Sub-Section (2) of the Makueni County Sand Conservation and Utilization Act, 2015.

2. Particulars being that on the 13th August, 2015 at Isuuni River, Kyuu Location in Mbooni West District within Makueni County, jointly with others not before court being the driver of motor vehicle Reg. No. KBQ 905P Make Isuzu FSR Lorry was found transporting sand outside the specified hours of between 6.00 a.m. to 6.00 p.m.

3. COUNT 2: Transporting sand without a valid license issued by the Makueni County Sand Conservation and Utilization Authority Contrary to Section 20(1) as read with Section 26 (1) (a) (ii) of the Makueni County Sand Conservation and Utilization Act.

4. Particulars being that on the 13th August, 2015 at Isuuni River, Kyuu Location in Mbooni West District within Makueni County, jointly with others not before court being the driver of motor vehicle Reg. No. KBQ 905P Make Isuzu FSR Lorry was found transporting sand without a valid license issued by the Makueni County Sand Conservation and Utilization Authority.

5. After considering mitigation the Appellant was sentenced to pay fines Kshs.100,000/= and Kshs.10,000/= for Count 1 and Count 2 respectively.

6. Being aggrieved by the above decision, the Appellant lodged appeal and set out 11 grounds of appeal namely:-

1. THAT the learned Magistrate erred in both law and fact by totally and/or substantially failing to consider the evidence and submissions propounded by the Defense.

2. THAT the learned Magistrate erred in law and fact by misapplying the law to the facts of the case and failing to distinguish whether or not the Makueni County Sand Conservation and Utilization Act, 2015 was applicable to the Appellant.

3. THAT the learned Magistrate erred in law and fact by misapplying and contradicting the facts as presented by the Appellant and giving due consideration to the prosecution case whereas the same was replete with gaps and inconsistencies.

4. THAT the learned Magistrate erred in law in shifting the burden of prove to the Appellant whereas the same had not been discharged.

5. THAT learned Magistrate erred in law and in fact by holding that the Appellant was caught at Isuuni River within Makueni County and/or was harvesting sand from the said River contrary to the evidence tendered by the Defense and despite the abject weakness of the evidence by the prosecution.

6. THAT learned Magistrate erred both in law and fact by disregarding the evidence by the Appellant that he was not at any time within the Jurisdiction of the Makueni County.

7. THAT learned Magistrate erred in law and in fact by giving too much credence and emphasis to the prosecution witnesses and the evidence whereas the same fell short of the burden of proof of beyond reasonable doubt.

8. THAT learned Magistrate erred in law and fact by failing to appreciate or comprehend the issues for consideration thereby framing the wrong issues for determination.

9. THAT learned Magistrate erred in law and fact by misapplying, misapprehending and going beyond the scope of the penal consequences and the fines contemplated under the Makueni County Sand Conservation and Utilization Act, 2015.

10. THAT learned Magistrate erred in law and fact by sentencing and/or condemning the Appellant to pay Kshs.100, 000/= and Kshs.10, 000/= for Count 1 and Count 2 respectively.

11. THAT learned Magistrate erred in law and fact by failing to objectively consider the issues canvassed before her thereby arriving at an unjust decision.

7. The parties agreed to canvass appeal via written submission but only Appellant filed and served.

8. The duty of the first Appellant Court is to analyze and evaluate evidence and arrive at its own conclusion.

APPELLANT SUBMISSIONS

9. The submitted that, the duty of the court of appeal has been established in a long line of cases. The position is that the court ought to subject the evidence tendered in the trial court to fresh scrutiny and subsequently determine whether the said court erred in both law and fact in arriving at the impugned decision.

10. In the case of **David Njuguna Wairimu –Vs- Republic [2010] Eklr** the Court of Appeal held that;

“In Okeno Vs R [1972] EA. 32 the Court of Appeal for East Africa, laid down what the duty of the first appellate court is. Its duty is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision. In Okeno V-s R (Supra) the court said:- “It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions.”

11. On grounds 1-6 the appellant submits that, the Magistrate erred in both law and fact by misapplying the law to the facts of the case and failing to appreciate that from the outset it was of fundamental importance to determine whether the Makueni County Sand Conservation & Utilization Act, 2015 was applicable to the Appellant.

12. It was contended that, the defense of the Appellant was that he did not excavate sand at Isuuni River which is in Makueni County. According to his testimony, he excavated sand in Mbuani River which is in Machakos County.

13. It was submitted that, this was evidenced by the testimony of DW2 who testified that he was the chairman of a community based organization called Makyanda CBO and that they had dealt with the Appellant before whereof they sold sand to the Appellant. He was driving a lorry bearing registration number KBQ 905 P.

14. He told the court that the excavation was done at around 2.20 p.m. at Mbuani River. He produced exhibits to demonstrate his allegations. The court is referred to exhibits DEX-1, DEX-2, DEX-3, DEX-4(a) & 4 (b), DEX-5 (a) & (b), DEX-7 & DEX-8.

15. It is submitted that, the Magistrate completely disregarded the said exhibits and did not make a pronouncement on the consequence or effect of DW2’s testimony and the exhibits in so far the Appellant’s defense was concerned.

16. The foregoing evidence clearly cast a doubt on whether the Makueni County Sand Conservation & Utilization Act, 2015 was applicable in the circumstances.

17. The import of the Appellant’s evidence meant that the prosecution did not discharge both its legal and evidential burden wherefore a reasonable doubt was satisfactorily raised by the Appellant.

18. It is submitted that the Magistrate at page 53 of her judgment opined that;

“In as much as none of the prosecution witness saw the accused person harvesting the sand, and neither was the eye witness called, but the truth of the matter is that the accused person who was found transporting the sand from Isuuni River.”

19. PW1 during cross-examination (see page 48 of the record) testified as thus;

“I intercepted the lorry between Kali and Matunduni market. Mbuani is in Machakos County. I could not tell whether the lorry was heading to Machakos or Makueni.”

20. So that according to that testimony, it was imperative for the learned Magistrate to consider whether it was safe to conclude that the sand harvesting took place within Makueni County and most importantly at Isuuni River.

21. Accordingly, the court to make a finding there was no basis for the trial court to make a finding that the Appellant contravened Section 26 of the Makueni County Sand Conservation & Utilization Act, 2015 and therefore Count 1 was not proved beyond reasonable doubt.

22. In regard to grounds 7, 8, 9 10 and 11 of the Appeal, the same revolve around Count 2 of the charge sheet whereof the Appellant was found guilty, under Section 30 of the Act, of transporting sand beyond the contemplated statutory period of between 6.00 a.m. – 6.00 p.m.

23. The prosecution witnesses contradicted themselves on when the Appellant was arrested. PW1 told the court that the lorry was arrested at 7.30 p.m. while PW2 and PW3 in re-examination told the court that the vehicle was arrested at 8.00 p.m.

24. The learned Magistrate failed to make a finding that the contradiction raised doubts as to what time the vehicle was impounded and if 3 witnesses aboard the same vehicle gave contradictory evidence then the truthfulness of their allegations remained in doubt.

25. Further to the foregoing, the trial court unjustifiably disregarded the evidence of DW1 & DW2 in regard to the time lines.

26. There was therefore no basis at all for the Magistrate to make a finding that the Appellant contravened Section 30 of the Act. The prosecution did not discharge its legal burden of proof.

27. In the case of **Peter Wafula Juma & 2 Others –Vs- Republic [2010] Eklr** the Court held that;

“It is clear that the legal burden of proof in criminal cases is only one, and rests upon the shoulders of the prosecution; it remains constant throughout the trial and does not shift.”

28. The duty of the first Appellate Court has been established in a long line of cases. The position is that the court ought to subject the evidence tendered in the trial court to fresh scrutiny and subsequently determine whether the said court erred in both law and fact in arriving at the impugned decision. See the cases of **David Njuguna Wairimu –Vs- Republic [2010] Eklr the Court of Appeal and Okeno Vs R [1972] EA. 32 the Court of Appeal for East Africa.**

ON EVIDENCE

29. The prosecution called 3 witnesses. PW1 PC George Kamau (now deceased) formally of Mbooni Police Station testified that on the 13th day of August 2015 at 6.30 p.m., while he was preparing to go out on patrol, he received information from the OCS about a lorry which was harvesting sand at Isuuni River.

30. He proceeded to the scene tighter with is colleague and met a lorry of registration number KBQ 905P Isuzu which was loaded with sand. The driver did not produce a license and he escorted him to Mbooni police station.

31. On cross examination, PW1, testified that he intercepted the lorry between Kali and Mutondoni before it had reached Machakos – Mbooni road. He further testified that he got information from an informer that the lorry was loaded with sand at Isuuni River.

32. PW2 PC Micah Gatongori of Mbooni Police Station testified that on 13th day of May, 2015, he proceeded on patrol within Kali area. After passing Kali, he spotted a lorry of registration number KBQ 905P loaded with sand. The driver of the lorry did not produce a license. They arrested him and took him to Mbooni police station.

33. On cross examination, PW2 testified that they arrested two people but only one of them was arraigned in court. He further testified that they intercepted the lorry at Isuuni River and that there was no civilian on the scene.

34. PW3 PC Kennedy Otieno a CID Officer at Mbooni Police Station testified that on the 13th day of August 2015, he received information that there were people harvesting sand at Isuuni River.

35. He proceeded to the scene with his colleagues, and as they were approaching Mbuani market, they came across a lorry of registration number KBQ 905P which was ferrying sand. The driver of the lorry did not produce a license and so they escorted him to Mbooni Police Station.

36. On cross-examination, PW3 testified that the informer did not tell them how many people were harvesting sand. He further testified that he did not question the driver where he was taking the sand. PW3 further produced the photos of the lorry as exhibits in this case under Section 78(2) and (3) of the Evidence Act.

37. The accused person was put on his defense. He testified on sworn testimony with one witness. He testified that on 13th August 2015, he went to carry sand at Mbuani which is in Machakos County. He testified that there is a community based organization which sells sand and he paid Kshs.5,000/= to carry sand.

38. He halted the lorry with sand. After passing Mbuani market, he met police officers from Kikima Police Station who took him at Kikima Police Station after demanding for a bribe from him.

39. On cross-examination DW1 testified that he did not report to IPOA about the conduct of the police officers. He further testified that sand cannot be transported at whatever time.

40. DW2 Joseph Mwangangi testified that he is the secretary of Makyanda CBO which is registered from Machakos County and they derive their authority from WARMA to build sand dams.

41. He further testified that there are several streams at Mbuani and from time to time they sell authority from Nema to remove the excess sand and they get people whom they can sell sand to and issue them with receipts.

42. He produced the receipts for payment for the accused person. He further testified that the accused person's vehicle came from Kali to Mbuani where they carried sand from.

43. On cross-examination DW2 testified that the sand was harvested near Makueni County and that one can transport sand from Makueni to Machakos County. He further testified that they sell sand from 6.00 a.m. to 6.00 p.m.

ISSUES, ANALYSIS AND DETERMINATION

ISSUES

44. After going through the material before the court, I find the issues are;

- **Whether the prosecution proved its case beyond reasonable doubt? Was sentence lawful?**

ANALYSIS AND DETERMINATION

45. The relevant provisions of the **Makueni County Sand Conservation and Utilization Act, 2015 allegedly violated are;**

Section 20(1) which states; No person or agent shall transport sand from any part of the county, unless a valid license for such dealers business has been issued by the government, the license shall be deemed to be annual unless otherwise authorized by the Executive Committee member.

26. (1) Any person who harvests, sells and or Breach distributes sand except under and in accordance with, this Act commits an offence and is liable-

a. (ii) to a fine not less than 10,000 Kenya shillings and not exceeding 20,000 Kenya shillings or to imprisonment for a term not exceeding 3 months in default for the driver;

30. (1) Persons are allowed to harvest, extract, scoop harvesting and or transport sand between the hours of 6.00 a.m. to 6.00 p.m.

(2) Any person who undertakes the activity not within and the specified time shall be liable of an offence, and shall, upon conviction, be liable to imprisonment for a term of two years or a fine of 200,000 Shillings or both.

46. On first count, the prosecution was bound to prove the ingredient of the offence thus, on the 13th August, 2015 at Isuuni River, Kyuu Location in Mbooni West District within Makueni County, jointly with others not before court being the driver of motor vehicle Reg. No. KBQ 905P Make Isuzu FSR Lorry was found transporting sand outside the specified hours of between 6.00 a.m. to 6.00 p.m.

47. The question which trial court was to ask itself is the where the locus in quo appellant and motor vehicle was at time of interception by the police. This is because the time lines prescribed in the Makueni county statutes applies only when sand is being transported within the county.

48. PW1, testified that he intercepted the lorry between Kali and Mutondoni before it had reached Machakos – Mbooni road. PW2 says that after passing Kali, he spotted a lorry of registration number KBQ 905P loaded with sand. PW1 during cross-examination (see page 48 of the record) testified as thus;

“I intercepted the lorry between Kali and Matunduni market. Mbuani is in Machakos County. I could not tell whether the lorry was heading to Machakos or Makueni.”

49. PW3 testified that, as they were approaching Mbuani market, they came across a lorry of registration number KBQ 905P which was ferrying sand.

50. The accused person testified on sworn that on 13th August 2015, he went to carry sand at Mbuani which is in Machakos County. He testified that there is a community based organization which sells sand and he paid Kshs.5,000/= to carry sand.

51. He halted the lorry with sand. After passing Mbuani market, he met police officers from Kikima Police Station who took him at Kikima Police Station after demanding for a bribe from him.

52. DW2 Joseph Mwangangi testified that he is the secretary of Makyanda CBO which is registered from Machakos County and they derive their authority from WARMA to build sand dams.

53. He further testified that there are several streams at Mbuani and from time to time they get authority from Nema to remove the excess sand and they get people whom they sell sand to and issue them with receipts.

54. He produced the receipts of payment of sand by the accused person. He further testified that the accused person's vehicle came from Kali to Mbuani where they carried sand from. He said Mbuani is in Machakos.

55. This testimony tally with that of PW1 and appellants defense that the motor vehicle was at Mbuani area at the time of arrest thus outside the scope of the provisions of the county statute applied herein.

56. Thus the ingredients of the offence under Count 1 were not proved beyond reasonable doubt.

57. In respect to Count 2, the particulars and thus ingredient to be proved were, **transporting sand without a valid license issued by the Makueni County Sand Conservation and Utilization Authority.**

58. The provisions of Section 20(1) of the county statute herein applied, will only affect a person; **transporting sand from any part of the county.** The requisite license would only require as aforesaid prescribed.

59. The Trial Magistrate at page 53 of her judgment opined that;

“In as much as none of the prosecution witness saw the accused person harvesting the sand, and neither was the eye witness called, but the truth of the matter is that the accused person who was found transporting the sand from Isuuni River.”

60. There was no evidence at all to show that the sand was being transported from any part of the Makueni County thus the trial court fell into error on relying on hearsay evidence of alleged informer to the effect that the sand was harvested from Isuuni River in Makueni County.

61. The court finds that that Count 2 was also not proved to the required standards.

62. In the case of **Peter Wafula Juma & 2 Others –Vs- Republic [2010] eKLR** the Court held that;

“It is clear that the legal burden of proof in criminal cases is only one, and rests upon the shoulders of the prosecution; it remains constant throughout the trial and does not shift.”

63. In sum the court finds that the appeal has merit and makes the following orders;

i. The appeal is allowed, conviction is quashed and sentence set aside.

ii. The fine paid in court shall be refunded to the Appellant.

SIGNED, DATED AND DELIVERED THIS 4TH DAY OF FEBRUARY, 2019 IN OPEN COURT.

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HON. C. KARIUKI

JUDGE