



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 114 OF 2017

CORAM: D.S. MAJANJA J.

BETWEEN

JAMLICK MURIUKI MARETE alias

MWARAMA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of

Hon C. A. Mayamba, SRM dated 4th July 2017 at the

Senior Resident Magistrate's Court at Githongo

in Criminal Case No. 228 of 2017)

JUDGMENT

1. Before the subordinate court, the appellant, **JAMLICK MURIUKI MARETE alias MWARAMA** faced two counts of offences under the ***Wildlife Conservation and Management Act, 2013*** (“the Act”). In the first count, he was charged with carrying out logging in a national reserve contrary to **section 102(1)** of the Act. It was alleged that on 12th April at around 1.00am at Nthemwe forest, Mt Kenya National Reserve in Imenti South Sub-County within Meru County, he was found logging 102 pieces of Red Cedar timber frames loaded in a Land Rover registration number KAA 007W green in colour in Mt. Kenya National Reserve.

2. In the second count, the appellant was charged with illegal entry in a protected area without a permit contrary to **section 102(1)(a)** of the Act. It was alleged that on 17th April 2016 at around 1.00am at Nthemwe forest, Mt Kenya National Reserve in Imenti South Sub-County within Meru County, he was found in Mt Kenya National Reserve, a protected area without a permit from the director Kenya Wildlife Service.

3. The appellant was convicted on the first count and acquitted on the second one. He was ordered to pay a fine of Kshs. 200,000/- and in default to serve 2 years’ imprisonment. He now appeals against conviction and sentence.

4. It is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see ***Okeno v Republic [1972] EA 32***).

5. Ranger Zablon Mutegei John (PW 1), Ranger Wilbroda Nanjala Ngombiri (PW 2) and Ranger Onesmus Mbaki Musila (PW 4) testified that they were following intelligence reports that a motor vehicle had entered into the forest. On 16th April 2016, they went into the forest and found a green Land Rover motor vehicle registration number KAA 007 loaded with 102 pieces of red cedar poles which had been cut using a power saw. According to PC Geoffrey Cheruiyot (PW 3), PW 1 and PW 2 reported the incident at Githongo Police Post. They brought the vehicle and the poles to the post. PW 3 testified that the accused was later arrested by the Commanding Officer, Kariene Police Station. He told the court that the accused did not report the loss of any motor vehicle. In cross-examination, he stated that the appellant’s advocate came to look for the vehicle on 18th April 2016. PW 4 produced photographs of the vehicle, cedar poles and the forest in evidence.

6. When put on his defence, the appellant denied the offence. He denied that he was called Mwarama. He recalled that on 17th April 2016, he found his vehicle KAA 007W missing so he went to report the incident at Kinoru Police Post, OB No. 04/17/4/2016 but at the time he did not know the vehicle was implicated in the offence. He was arrested on 22nd February 2017. Corporal Catherine Njoka (DW 2) of Kinoru Police Post testified that on 17th April 2016, the appellant reported that his vehicle had been stolen on the night of 16th and 17th April 2016.

7. Counsel for the appellant submitted that PW 1, PW 2 and PW 3 did not see the appellant in the forest or even drive in the forest. He noted that the power saw used was not produced in court and the prosecution did not explain why the appellant was charged almost a year after the offence.

8. The respondent opposed the appeal on grounds that it was not disputed that the appellant's motor vehicle was found in the forest loaded with red cedar poles. Counsel for the respondent submitted that the report of the theft was an afterthought and that the appellant only intended to divert attention from himself.

9. Having evaluated the evidence, I find that the trial magistrate misdirected himself in the manner he dealt with the evidence. The testimony of PW 1, PW 2 and PW 3 was clear that a motor vehicle registration number KAA 007W was found in the forest with red cedar logs. No evidence was led by the prosecution to show that the vehicle belonged to the appellant. PW 1 testified that the appellant was arrested after police officers carried out investigations. The police officers were never called to show how they reached the conclusion that the appellant was the owner of the vehicle. No logbook or certificate of search for the vehicle was produced in evidence. No report was shown proving that the appellant reported that the vehicle was stolen and thus connecting him to the offence. Since the police did not testify, any information from them was hearsay. In the circumstances, the trial magistrate ought not to have put the appellant on his defence as the prosecution did not establish the owner of the vehicle. By putting the appellant on his defence, the trial magistrate was, in effect, putting the burden of proof on the appellant which is contrary to the fundamental principle of criminal law.

10. For the reasons I have stated, this appeal is allowed. The conviction and sentence are quashed. The appellant is set free unless otherwise lawfully held.

DATED and DELIVERED at MERU this 6th day of June 2018.

D.S. MAJANJA

JUDGE

Mr Wamache, Advocate for the appellant.

Mr Kiarie, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.