



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

HCCR APPEAL NO. 50 OF 2014

JAMES MUTHEE NDUNG’U APPELLANT -

- V E R S U S -

REPUBLICRESPONDENT

J U D G M E N T

The appellant JAMES MUTHEE NDUNG’U was charged in Nyeri Chief Magistrate’s Criminal Case No. 156/2012 with 2 counts under the **Forest Act. No. 7 of 2005.**

COUNT 1: CHARGE: ILLEGAL CUTTING AND REMOVAL OF FOREST PRODUCE CONTRARY TO SECTION 52(1) (a) AS READ WITH SUB-SECTION (2) THE FOREST ACT NO.7 OF 2005

PARTICULARS:

JAMES MUTHEE NDUNGU: on the 2nd day of May, 2011 at Kaburaini village in Nyeri county within the Republic of Kenya, jointly with others not before court, were jointly found cutting and removing forest produce to wit 105 logs of Cyprus trees all of a total value of Ksh. 200,000 without authority from the Director of Forests.

COUNT 11: ILLEGAL SAWING CONTRARY TO SECTION 54(1) AS READ WITH SUBSECTION (3) OF THE FOREST ACT NO.7 OF 2005

PARTICULARS:

JAMES MUTHEE NDUNGU: On the 2nd day of May, 2011 at Kaburaini village in Nyeri county within the Republic of Kenya, jointly with others not before court was found illegally sawing timber using tractor Reg. KUU 532 with a mobile bench saw and was found in possession of 460 pieces of timber valued at Ksh. 20,000/= with the authority from the Director of Forest.

At the end of the trial the appellant was found guilty and convicted of the offence of illegal sawing c/s 54(1) of the Forest Act as read with 54(3) of the same Act. He was sentenced to a fine Ksh. 500,000/= in default to serve 3 years’ imprisonment.

Through his advocate Ms. Mwai he filed the petition of appeal on 24/6/14 on the following grounds;

1. The learned trial magistrate erred in law and in fact in convicting the appellant for the offence of illegal sawing contrary to section 54(1) as read together with sub-section (3) of the Forest Act No.7 of 2005, without sufficient proof.

2. The learned trial magistrate erred in law and in fact in convicting the appellant against the weight of the evidence.
3. The learned trial magistrate erred in law in convicting the appellant with an offence that was not proved beyond reasonable doubt as required by the law.
4. The learned trial magistrate erred in law in sentencing the appellant to a harsh and excessive sentence in view of the mitigation advanced;

His prayers were that the appeal be allowed and he be set at liberty, or the conviction be set aside and the sentence set aside and/varied.

Ms. Mwai argued for the appellant that s.54(1) provides for five different offences for which a person will be liable to conviction or a fine not exceeding 100,000 in default 1-year imprisonment or to both fine and imprisonment, and s.54(3) provides for the offence of operating a saw mill contrary to the prescribed rules under the Act, for which upon conviction, one is liable to a fine of not exceeding Ksh 1 million in default less a term not exceeding 10 years imprisonment or to both fine and imprisonment. The appellant's argument is that the offence under s. 54(3) was not proved and the magistrate erred when he convicted and sentenced him.

The state opposed the appeal on the ground that the prosecution had provided sufficient evidence.

This court as the 1st appeal court has to duly to re-evaluate and analyze the evidence and arrive at its own conclusions.

Section 54 of the **Forest Act no 7 of 2005** provides;

Other offences

(1) Any person who—

(a) commits a breach of, or fails to comply with the provisions of, this Act;

(b) commits a breach of, or fails to comply with any of, the terms or conditions of a licence issued to him under this Act;

(c) fails to comply with a lawful requirement or demand made or given by a forest officer;

(d) obstructs a person in the execution of his powers or duties under this Act;

(e) makes or is found in possession of charcoal in a state, local authority or provisional forests, in private forest or farmland without a licence or permit of the owner as the case may be,

commits an offence and is liable on conviction to a fine of not less than fifty thousand shillings or to imprisonment for a term of not less than one year, or to both such fine and imprisonment.

Section 54(3) provides;

Any person who operates a sawmill in a manner contrary to that prescribed in rules made under this Act commits an offence and is liable on conviction to a fine of not less than five hundred thousand shillings, or to imprisonment for a term of not less than three years, or to both such fine and imprisonment.

As a first appellate court my role I am guided by the words of the Court of Appeal in in the case of **Thomas Mwambu Wenyi v Republic [2017] eKLR;**

The role of a first appellate court has been crystallized by a long line of case law. See **Patrick & Another versus Republic [2005] 2KLR 162**; in which the court held inter alia that: -

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate own decision on the evidence. 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 courts findings and conclusions; it must make its own findings and draw its own conclusions.”

The prosecution called 5 witnesses. The accused when put on his defence gave a sworn statement and did not call any witness.

The case for prosecution is that on the 1/5/11, one Peter Muthee called P. W2 Mark Njoroge Mbutia, the owner of tractor Registration No. KUU 532 – and asked him, P W2 to split timber for him. They agreed that PW2 would go to Peter Muthee’s home and split timber for him the following day. (During his testimony PW2 identified the Muthee as the accused in the dock).

On 2/5/11, in the morning, P.W.2 sent his workers namely Anthony Kingori and his driver by the name Muthee with the tractor and the saw bench to split the timber ostensibly at Peter Muthee’s home. They left. About 3.00p.m. Kingori rang PW2 and told him that they had been found splitting timber, they had all run away and the tractor had been impounded and taken to Naromoru police station. P.W.2 searched for Muthee in vain until 10/2/12 when he traced the accused who was arrested and charged with the present offences.

Following the arrest of the accused PW2’s tractor was released to him vide a court order.

In his testimony P.W.2 said that the timber was being split at the accused person’s father’s the shamba, and that it was not the 1st time the accused had hired him to split timber for him.

Kingori who was P.W.2 confirmed that he was sent by his employer with the tractor KUU 532 to Kaburaini to split timber upon arrival they found the accused who showed him a chief’s authority letter allowing the accused to split the timber. They split timber up to 1.00p.m. when the forest guards came. The accused and all of them ran away leaving the split timber and the tractor. The driver of the tractor, also by the name Muthee, disappeared since that time and at the time of trial had not surfaced. Under cross examination King’ori indicated that there was a difference between the timber they had split and what had been produced as exhibit. That they were splitting cypress timber using the bench saw only. The timber he saw at the police station was a mixture of cypress and podo trees which had been split using a power saw. That there is big difference in the appearance of timber split using a bench saw and using a power saw. He said the timber belonged to the accused but they were splitting it at his father’s shamba. He did not know accused’s shamba though he said he had split timber for him three time before that. He also said that some of the exhibits were missing at the police station specifically the off cuts they had split from the timber.

P.W.4 Daniel Ngatia Gathigia was the area Chief Kaburaini. He denied issuing any permit to anyone to split timber, and was not aware that anyone had cut down trees. That any one seeking a permit to fell trees would be referred to the agricultural officer on whose recommendations the forest officer would now issue a permit.

P.W.1 No. 01010 CPT Edward Mwathi was stationed at the County Forest Office. On 2nd May 2011, he was on duty when he was called by Zonal Officer Mr. Mathenge who informed him that there were some people sawing timber in a shamba near Naromoru Forest Station. He left for the scene with three other officers namely CPT Jeremiah Nyaga, Godfrey Mwangi and Lawrence Mwenda in Forest Department motor vehicle. They arrived at around 11.00a.m. As they were arriving they met a tractor and on seeing the Forest Dept. M/v the tractor driver diverted into a certain gate where the tractor stalled in the shamba.

Nobody was in the compound but they recovered timber – logs some of which were buried in saw dust

other in the shamba. The tractor KUU 532 was there and a bench saw. The driver of the tractor disappeared. They recovered 460 pieces of timber, 105 logs, 45 off cuts. The report was booked in O.B. at Naromoru police station. 200 pieces of timber and 70 logs were left at THE police station and rest others were taken to Muringato forest station.

At the time of hearing there were only 49 logs at police station. He could not explain the deficit. He told the court that the shamba where the logs were recovered bordered the forest, the compound was fenced with a gate and there was access to the forest. He claimed that the land where the timber was recovered belonged to one Samuel Ndungu. He never saw the accused at the scene.

P.W.5 No. 87876 PC Benson Koome from Naromoru Police Station was the investigating officer. He reiterated what the witnesses said, produced the exhibits. He said the accused was identified by the owner of the tractor as the person who had hired the tractor. The driver of the tractor was never traced.

In his defence the accused denied hiring the tractor to split timber and said his was a case of mistaken identity.

In arriving at its decision the trial court stated that it did not believe the arrest of the accused was a mistake because P.W.2 and P.W.3 knew him very well having split timber for him before. The court went on to say the charge was proved and found the accused guilty of the offence of operating a saw mill.

The Act defines a saw mill “as a set of machinery used to process and convert wood into saw timber”. “Operating a saw mill” would mean operating the set of machinery used to process and convert wood into saw timber.

Was there any evidence that the appellant was operating a saw mill?

The evidence of P.W.1 is that as they were arriving at the scene they saw a tractor, which upon the driver seeing them, he diverted to a certain compound where the tractor went and stalled.

If his testimony is to be believed the tractor was coming from some unknown place headed some unknown place. It is only upon seeing them that the driver diverted it into the compound where and stalled and then ran away. He and his colleagues went into the compound. There was nobody there. Not even the accused of the person by the name Samuel Ndung’u. How then could he have arrived at the conclusion that the accused was operating a saw mill?

P.W.2 alleged that the accused called him and asked for the timber splitting work to be done for him. PW2 never went to where the alleged work was to be done. He cannot state with any certainty that his tractor was used to split timber in the home of the accused of the accused’s father. The fact that his tractor driver disappeared completely even when it was apparent that he was not a suspect and the accused had been arrested and charged, is suspect. According to PW1 the tractor was not found actually splitting the timber in the said compound.

If indeed, and it is conceded by the PW2 and his workman King’ori that the tractor split any timber, then it was the P.W.2, and his workers who were operating a saw mill and not the accused person. There is not a single piece of evidence that the accused at any one time operated the said machinery. It is P.W.2, his employee Kingori and his driver who ran away who were operating a saw mill.

PW2 never produced anything in court to show that he was authorized to operate the bench saw so that he could hire it out to anyone. That explains why the P.W.2’s driver made a disappearing act. And in any event, even if the accused person had asked P.W.2 to do some work for him there is no evidence at all that the accused was the one operating the sawmill.

PW3 alleged that he saw a permit from the chief. The Chief told the court that his court did not issue any permits and that they were issued from the forest office. PW3 was not telling the truth that he acted on the strength of a letter from the Chief. As persons whose work was basically about splitting timber or cutting

trees his employer would be expected to know the rules and to ensure they were complied with before sending his tractor out on nay job.

The prosecution also gave contradictory evidence regarding the exhibits. PW3 King'ori disowned the exhibits saying that they were not the same as what they were working with. Further that what the court was shown had been cut using a power saw and not a bench saw. The exhibits allegedly recovered and those produced were not the same.

On the sentence the law is clear. Under section 54(1) there is a minimum sentence of Ksh 50000/I/d 6 months' imprisonment of to both fine and imprisonment.

Under section 54(3) the minimum sentence is set as” a fine of not less than five hundred thousand shillings, or to imprisonment for a term of not less than three years”.

The trial magistrate, upon finding the appellant guilty of the offence under section 54(3) had limited discretion as the law provides a minimum sentence. However, what is curios is that neither the trial court, nor the prosecution and defence noted that the charge was defective as drawn. The charge reads;

Count 11: Illegal sawing contrary to **section 54(1) as read with subsection (3)** of the Forest Act no.7 of 2005

Particulars:

JAMES MUTHEE NDUNGU: On the 2nd day of May, 2011 at Kaburaini village in Nyeri county within the Republic of Kenya, jointly with others not before court was found illegally sawing timber using tractor Reg. KUU 532 with a mobile bench saw and was found in possession of 460 pieces of timber valued at Ksh. 20,000/= **with the authority from the Director of Forest.**

Section 54(3) provides a complete offence and its sentence and does not need to read with section 54(1), which provides its own five clear sets of circumstances which amount to an offence.

Secondly and more importantly the charge as drawn does not disclose any offence.

It says the accused acted with the authority of the Director of Forest. It is on the strength of this charge as drawn that the appellant was convicted and sentenced.

In **Samuel Muriithi Mwangi v Republic [2016]** the Court of Appeal relied on the case of **Ngui versus Republic [1984] KLR 729**, where it was held inter alia: -

“the first appellate court must reconsider the evidence, evaluate it itself and draw its own conclusions in order to satisfy itself that there was no failure of justice. It is not sufficient for it to merely scrutinize the evidence to see if there was some evidence to support the trial court's findings and conclusions.”

The court reminded itself of the decision the of the first appellate court in Okeno **versus Republic [1972] EA 323** and relied on the following passage.

“This is the evidence that was presented before the trial court. We are enjoined as the first appellate court to analyse it afresh and come to our own conclusion. It is the appellant's right as much as our obligation to undertake this task. As always we must bear in mind that the trial court had the benefit of hearing and seeing the witnesses and was therefore better placed to assess the witness's demeanor and disposition.

I have set out the evidence as placed before the trial court. I have analysed the same carefully. I have also considered the rival submissions and I find that

The trial magistrate erred in finding that charge had been proved against the appellant. The conviction was against the weight of the evidence and I do find that it was unsafe.

I therefore allow the appeal, set aside the conviction and sentence.

Unless otherwise legally held, the appellant is to be released from prison custody forthwith.

Dated, Delivered and Signed this 8th day of June 2017

Right of Appeal Explained

TERESIA MATHEKA

JUDGE

In the Presence of:

Ms. Mwai for Appellant

Appellant.....

Ms. Jebet for State

Court Assistant.....Harriet