REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO.36 OF 2017

JULIETA LUVASIA ………………………………………………………. 1ST APPELLANT

SARAH MUSAMALI ……………………………...……..……………………. 2ND APPELLANT

VERSUS

REPUBLIC ……………………………………………...…………………… RESPONDENT

(from original conviction and sentence in Criminal Case No. 547 of 2017

of the Chief Magistrate's Court at Kakamega dated 1st March, 2017)

JUDGMENT

1. The appellants herein have appealed against both conviction and sentence imposed by the Chief Magistrate, Kakamega Law Courts. The appellants were facing two counts. In count 1 they were charged with cutting and removing forest produce without authority contrary to section 52(1)(a) as read with ***section 52(2)*** and ***section 55(1)(c)*** of the Forest Act No.7 of 2005. The particulars of the offence were that on the 20th February 2017 at Kakamega Forest in Kakamega County within the Republic of Kenya they unlawfully and jointly cut and removed forest produce namely one indigenous tree valued at Kshs.50,000/-, the property of Kenya forest Service without authority from the Director of Kenya Forest Service.

In count 2 they were charged with introducing logging equipment into a State forest without authority contrary to ***section 52(1)*** as read with ***section 52(2)*** of the Forest Act No.7 of 2005. The particulars of the offence were that on the same day, time and place as in count 1 they unlawfully and jointly introduced into the said forest logging equipment namely one panga each without permission from the Director of Kenya Forest Service.

2. The appellants had filed separate appeals but the appeals were later consolidated. The grounds of appeal as per their petitions of appeal are that:-

> (1) The learned magistrate erred in law and fact by convicting the appellant on a plea of guilty that was not unequivocal.
>
> (2) That the learned magistrate erred in law and fact by convicting the accused person on a charge sheet that was incurably defective.
>
> (3) That the learned trial magistrate erred in law and fact in failing to convict the appellants and sentencing them without conviction.

(4) The learned trial magistrate erred in law and fact in failing to consider the mitigation of the appellants.

3. The appellants had appeared before the Chief Magistrate on the 22nd February 2017 wherein the charges were read out to them. They pleaded guilty to the charges. After they mitigated to the court they were each sentenced to pay a fine of Kshs.50,000/- and in default to serve four months imprisonment in count 1 and a fine of Khs.3,000/- in default to serve one month imprisonment in count 2. Being aggrieved by both conviction and sentence they filed their respective appeals.

4. The advocates for the appellants, Mr Mukabwa appearing for the 1st appellant and Ms Shirika appearing for the 2nd appellant did not make any submissions in the case. When the matter came up for hearing on 22nd May 2017, the State conceded to the appeal and left the court to make a ruling.

5. The lower court's record indicates that when the appellants appeared before the trial magistrate the charges were read out to them in Kiswahili language. It is recorded that each one of them replied in kiswahili language that

"Its true"

6. The prosecutor then gave out the facts of the case to the effect that two Kenya Forest Service rangers were on patrol in Kakamega Forest when they found 4 women, among them the two appellants, cutting logs in the forest. Each of them had a bunch of logs. Four pangas were recovered. They were escorted to the police station. They were charged with the offense. The logs and pangas recovered from them were produced in court as exhibits. Upon being asked whether the facts were true, each of them replied that

"facts are true"

7. The magistrate was then required to enter a plea of guilty but wrote down in the court file

– "*PGE*"

The prosecutor then said that he had no records for the accused. The appellants mitigated. The 1st appellant said in mitigation that she pleaded for leniency as her husband was unemployed and that she was the bread winner for her family. The 2nd appellant mitigated that she was pleading for leniency as her husband was mentally challenged. The magistrate then proceeded to impose the sentence.

8. The procedure of taking pleas in subordinate courts is provided for under ***section 207*** of the Criminal Procedure Code and was re-stated in ***Adan vs Republic*** (1973) EA 446. The procedure as set out in that case is that the charge and the particulars should be read out to the accused person so far as possible in his own language, but if that is not possible then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all the essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally ***enter plea of guilty***. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny to alleged facts in any material respect, the magistrate should record a ***conviction*** and proceed to hear any further facts relevant to sentence. That the statement of facts and the accused's reply must be recorded.

9. The lower court record indicates that the proceedings in that case were conducted in Kiswahili language. The appellants replied to the charges and to the particulars of the charges in kiswahili language. They mitigated to the court in the same language. I then have no doubt that the proceedings were conducted in Kiswahili language that the appellants understood so well.

Secondly, the court record indicates that the charges were read out to the appellants and each of them replied that the charges were true. Facts were read out to the appellants who replied that the charges were true. There is then no doubt that the plea, up to that stage was properly taken.

However instead of the trial magistrate entering a "***plea of guilty***" he entered "***PGE***". It is not known what these abbreviations mean but I guess that they meant "***plea of guilty entered.***" However, a plea cannot be based on assumptions. This was properly captured by Justice Joel Ngugi in ***Simon Gitau Kinene vs Republic (***2016) eKLR where he stated that:-

> ***"… I do not think that a guilty plea should be left to any deductions or conjecture. It should be clear, unambiguous and unequivocal. It shall be even more so when the accused faces a serious charge capable of attracting a custodian sentence."***

10. The effect is that the magistrate failed to enter a plea of guilty as required by ***section 207*** of the Criminal Procedure Code. This was a misdirection on the part of the magistrate.

In addition to the magistrate failing to enter a plea of guilty, he did not enter a conviction. The appellants were in that case sentenced for offences of which they had not been convicted of. This was a further misdirection on the part of the learned trial magistrate.

The advocates for the appellants did not submit to the court as to how the charges were defective. I have checked on the charges and the relevant provisions of the law and I see no defect in the charges. The appeal would not have succeeded on that ground.

11. In the foregoing, the learned trial magistrate in this case failed to enter a plea of guilty and a conviction as required by ***section 207*** of the Criminal Procedure Code. The prosecution was right in conceding to the appeal. The plea taken by the trial magistrate on the 22nd February 2017 and the subsequent sentence imposed therein are hereby quashed.

12. Upon finding that the plea taken against the appellants was irregular, the question is whether I should order a re-trial in the case or I should discharge the appellants.

A re-trial will only be ordered where the interests of justice require it and if it is unlikely to cause injustice to the appellant. In ***Muiruri vs Republic*** (2003) KLR 552, the Court of Appeal when considering the issue stated as follows:-

> (1) Generally whether a re-trial should be entered or not must depend on the circumstances of the case.
>
> (2) It will only be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Other factions include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraigned of the appellant; whether the mistakes leading to the quashing of the conviction were entirely the prosecution making or not.

13. In ***Opicha vs Republic*** (2019) KLR 369, the Court of Appeal sitting at Nakuru stated that:-

> ***"Even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a re-trial should be ordered, each case must depend on its particular facts and circumstances and an order for re-trial should only be made where the interest of justice require it."***

14. The appellants appeared in court for plea on 22nd February 2017 when they were sent to prison to serve sentences for offences for which they have not been convicted of. They had served slightly over a month before they were released on bond pending appeal. I do not think that a re-trial will serve justice in the case. The proper order would be to discharge the appellants. I do thereby make an order that the appellants are hereby set at liberty.

Delivered, signed and dated at Kakamega this 20th day of July 2017.

J. NJAGI

JUDGE

In the presence of:

Mukabwa ……………………………………………….. for 1st appellant

…………………………………………………….…. for 2nd appellant

……………………………………………………….. for respondent

Paul ………………………………………… …………… court assistant

1st appellant …………………………………………….. present

2nd appellant ………………………………………………….. present/absent