



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI LAW COURST**  
**CRIMINAL APPEAL NO. 333 OF 2010**

**DAVID MUIGAI MACHERU..... APPELLANT**

**VERSUS**

**KENYA FOREST SERVICE.....1<sup>ST</sup> RESPONDENT**

**KENYA REVENUE AUTHORITY .....2<sup>ND</sup> RESPONDENT**

**THE HON. THE ATTORNEY GENERAL .....INTERESTED PARTY**

**JUDGMENT**

This matter has a long and chequered history.

The appellant, **DAVID MUIGAI MUGERU**, was charged with the offence of Being in Possession of Sandalwood, a protected tree species, **contrary to Section 34 (1) and (2), as read with Section 54 (8) (d) and Section 55 (1) (c) of the Forest Act; and Gazette Notice No. 3176 of 4<sup>th</sup> April 2007**. The said charges were preferred against the appellant on 12<sup>th</sup> January 2010. He pleaded “Not Guilty”.

About a month later, on 9<sup>th</sup> February 2010, the Attorney General submitted a *Nolle Prosequi*. After the trial court entered the said *Nolle Prosequi*, the proceedings against the appellant were duly terminated.

However, the sandalwood together with the truck on which the said wood was being transported, was not released to the Appellant. That prompted the Appellant to seek orders for the release of the sandalwood and the truck.

The application was premised on the fact that there was no case pending against the Appellant in relation to either the truck or the sandalwood.

Having given due consideration to the application, the learned trial magistrate held that the Applicant had failed to produce compelling evidence that the sandalwood in issue was sourced from outside Kenya. Indeed, the trial court made a finding that;

***“the sandalwood originated within this country and that therefore it was subject to the Laws of this country. . .”***

The court went on to hold that the Director of Forest Services could not give to anybody, the authority to transport or to export sandalwood, as the same was a proscribed forest produce.

In those circumstances, the trial court proceeded to order that the truck be released to the Appellant. But, in the same vein, the trial court ordered that the sandalwood be destroyed.

The order for the destruction of the sandalwood was made by the court;

***“As a small token to conservation.”***

That order for the destruction of the sandalwood prompted the Appellant to move to the High Court, seeking a reversal thereof.

This court first heard that matter on 31<sup>st</sup> March 2011. And, on 14<sup>th</sup> of June 2011, the court set aside the orders for the destruction of the sandalwood. The court went further, to order that the sandalwood be released to the Appellant.

When the orders were served upon the Kenya Forest Service, they declined to release the sandalwood. Instead, they filed an application for the reversal of the orders dated 14<sup>th</sup> June 2011.

The Kenya Forest Service also asked that the whole issue be considered afresh, because, in their considered view, the issue in question involved a substantial constitutional matter.

As far as the Kenya Forest Service was concerned, the provisions of the Criminal Procedure Code, which this court had relied upon when ordering that the sandalwood be released, were inconsistent with the Constitution.

It was the feeling of the Kenya Forest Service that they were entitled, as a matter of right, to have been accorded a hearing before the court could properly determine whether or not to order the release of the sandalwood.

Having been served with the application, the Appellant, the Kenya Forest Service and the Attorney General consented to the setting aside of the Judgment dated 14<sup>th</sup> June 2011.

This court was informed that that consent stemmed largely from the fact that there was no proof that the Kenya Forest Service had been served with a Hearing Notice for the hearing of the Appeal, when it first came up for hearing.

On the basis of the consent, which was well-founded, this court set aside its Judgment dated 14<sup>th</sup> June 2011.

Thereafter, the appeal was canvassed afresh.

This judgment is founded upon the said “fresh” hearing of the appeal.

It is the appellant’s contention that if this court were to hold that the appellant had been holding the sandalwood illegally, that would imply that the appellant was being convicted without a trial. In effect, that would, in the opinion of the appellant, mean that the *nolle prosequi* was being effectively overturned.

For that reason, the appellant submitted that the orders for the destruction of the sandalwood did not have any legal backing. I was therefore asked to overturn it.

The appellant emphasized that he was the owner of the sandalwood. He also pointed out that the said goods were cleared by the Kenya Revenue Authority.

Thereafter, the Kenya Revenue Authority, who had been a party to these proceedings, asked to be excused from the said proceedings. In the circumstances, the Appellant submitted that the Kenya Revenue Authority had no issues with the goods.

In answer to the appeal, the Kenya Forest Service (the 1<sup>st</sup> Respondent herein) submitted that the status of sandalwood is not in dispute. As far as they are concerned, the appellant had conceded that the sandalwood was proscribed. The said legal status of the sandalwood was spelt out in **Section 34 of the Forest Act**, as well as in **Gazette Notice No.3176 of 13<sup>th</sup> April 2007**, wherein the Presidential ban of the product was published.

Secondly, the 1<sup>st</sup> Respondent pointed out that the issue that was before the trial court was whether or not under **Section 177 of the Criminal Procedure Code**, the sandalwood could be released to the appellant.

In its view, the determination under **Section 177** was not about the guilt or innocence of a person to whom the property should be released. The 1<sup>st</sup> respondent believes that a determination under that legal provision was pegged only on the question as to whether or not the person was entitled to have the property released to him.

Therefore, it was submitted that the court ought to look at much more than the fact that the criminal proceedings had been terminated.

I was invited to hold that the *bona fides* of the appellant was a relevant issue.

Secondly, I was invited to find that there was an element of Public Interest, which the court had to take into consideration.

It was the submission of the 1<sup>st</sup> Respondent that the trial court was right to have ordered for the destruction of the sandalwood, as a token to conservation.

Conservation matters were said to be much more than a trifle. They were described as matters of great public interest.

Indeed, the Forest Act itself was said to be anchored on the need for conservation. And the public's interest in conservation was said to be secured by the Kenya Forest Service.

In its duties, the Kenya Forest Service is concerned with both the criminal element as well as the protection element of forest produce.

And as sandalwood was a protected species, Kenya Forest Service submitted that the decision to destroy it was founded on the need to protect the species, regardless of the innocence or guilt of the person laying claim to it.

If the sandalwood were to be released to the appellant, Kenya Forest Service believes that that would not only go against the foundation of the law, but would also send the wrong message about what ought to be done in respect to protected species.

The sandalwood was described as contraband, which therefore ought not to be released to the appellant, regardless of the termination of the criminal charges.

On his part, the Attorney General conceded the appeal. He said that **section 177 of the Criminal Procedure Code** comes into play only when criminal proceedings were concluded, whether by an acquittal or a conviction; and only if the exhibits had been produced before the trial court.

In this case, the appellant had been earlier charged before 2 other magistrate's courts. The appeal itself arose from the decision made by the 3<sup>rd</sup> court.

As the sandalwood had never been produced before the trial court, the Attorney General submitted that it was wrong for the trial court to order that it be destroyed.

Mr. Mulati, learned state counsel, submitted that since sandalwood was a proscribed item, the procedure for its protection should be in accordance with the law. In other words, the person in possession thereof should be arrested and charged. The sandalwood ought to then be produced before the trial court. Thereafter, the trial court would have jurisdiction to order that the sandalwood be destroyed.

When the sandalwood was not produced before the trial court, the Attorney General feels that the said court should not have ordered for its destruction.

In effect, the Attorney General's position was completely at variance with the position taken by the Kenya Forest Service.

In reply, Mr. Maina, the learned advocate for the appellant submitted that sandalwood was not contraband. The ban against it is simply for a limited period of time, as the Gazette Notice banning it lapsed on 14<sup>th</sup> February 2012.

Furthermore, the Forest Act was said to only govern forests in Kenya. Therefore, if Uganda or Tanzania did not undertake similar measures in regard to their forest produce, Kenya could not play the role of "Big Brother".

The appellant insists that the sandalwood was harvested outside Kenya. Therefore, he argues that his property should not be taken away just to please conservationists. His view is that Kenya could have stopped the sandalwood from entering within its territory. Instead, the Kenya Revenue Authority sought and was paid Duty for the produce.

This court fully appreciates the important role played by forests in the socio-economic and biological diversity of the country. Forests play a crucial role in the protection of water catchments as well as in the process of moderating the climate by absorbing greenhouse gasses.

Forests also provide the main locus of Kenya's biological diversity and the major habitat for wildlife.

From our forests, the majority of Kenyan people derive wood fuel. We also derive essential raw materials for wood-based industries.

Therefore, there can be no doubt that we all must play our respective roles in the establishment, development and sustainable management of our forests. Conservation is one way of undertaking sustainable management of forests.

Pursuant to **Section 33 of The Forests Act**, the President of the Republic of Kenya is empowered to declare any tree, species or family of tree species to be protected in the whole country or in specific areas within the country.

The President would normally act on the basis of advice given to him by the Board of the Kenya Forest Service. Having been so advised, the President would publish an order in the Gazette.

It is in that process that the President published an order in Gazette Notice No. 3176 of 1<sup>st</sup> April 2007.

Pursuant to that Notice, East African Sandalwood- Msandali, was declared a protected tree species for a period of 5 years, with effect from 14<sup>th</sup> February 2007.

It is because of that order that the appellant was charged with the offence of Attempting to Export a protected tree species **contrary to section 34 (2) as read with section 54 (1) (A) of the Forests Act**.

The particulars of the charge were that the accused persons;

***“On the 20<sup>th</sup> day of February 2009 at Mulolongo Weighbridge in Machakos District within Eastern Province, were jointly found attempting to export a protected tree species namely 20 tons of East African Sandalwood valued at KShs.10 million, the property of Kenya Government”.***

As already indicated earlier herein, the Attorney General had the criminal proceedings terminated against the appellant. The said termination of proceedings was effected before the sandalwood was produced before the trial court.

The question that I need to address first is whether or not it was material that the sandalwood had not yet been produced as an exhibit before the trial court, by the time the court ordered that it be destroyed.

**Section 177 of the Criminal Procedure Code** provides as follows;

***“Where, upon apprehension of a person charged with an offence, any property is taken from him, the court before which he is charged may order –***

***(a) that the property or a part thereof be restored to the person who appears to the court to be entitled thereto, and, if he be the person charged, that it be restored either to him or to such other person as he may direct; or***

***(b) that the property or a part thereof be applied to the payment of any fine or any costs or compensation directed to be paid by the person charged.”***

Clearly, therefore, there is no requirement in that section, that the court before which the person is charged must have received the property as an exhibit before the court can give orders in relation thereto. Provided that some property was taken from the accused when he was apprehended, (whether such recovery was made before, at the time of, or after the actual arrest), the court before which he is charged can issue orders relating to the property.

There are instances when an accused will complain that police officers took away some of his property, which they did not cite in the charge sheet. In effect, the police had no intention to produce such property as exhibits before the trial court.

Even in such instances, the court will have jurisdiction to issue appropriate orders relating to the property.

In this case, the particulars of the charge indicated that the sandalwood which the appellant was transporting was the property of the Kenya Government.

However, the appellant insists that the sandalwood belongs to him.

Surely, if the property belonged to the government, the appellant could not have been compelled to pay Duty on it. Indeed, if the property belonged to the government, the appellant would most probably have also been charged with either theft or the handling of stolen property.

It therefore appears that the assertion of ownership, as cited in the charge sheet, was a bare statement, not backed with any substantive or tangible right.

It was not lost on this court that Mr. Mwaniki, the learned advocate for the Kenya Forest Service, termed the sandalwood as contraband.

The word **“contraband”** is defined by the **“Oxford Advanced Learner’s Dictionary”** as;

***“Goods brought into or taken out of a country illegally.”***

That would appear to support the appellant's contention that the sandalwood was not sourced locally.

But whether or not the sandalwood was contraband is a matter which could only be determined by a court of competent jurisdiction after the said court had received evidence and submissions.

However, before any evidence was led by the prosecution, the Attorney General had the case terminated. Therefore, the courts have not had the opportunity to adjudicate on the question as to whether or not the sandalwood was contraband.

Of course, I am fully aware of the fact that the charge preferred against the appellant was not premised on the contention that the sandalwood was contraband. The charge was in relation to the fact that the appellant was in possession of a protected species of sandalwood.

In order to prove that the sandalwood was of the protected species, the prosecution would have had to lead evidence. But because the proceedings were terminated before any evidence was led, it will now not be possible for proof to be tendered to prove that the sandalwood in question was of the protected species.

In the circumstances, there can be no basis, in law, for depriving the appellant of the sandalwood which belongs to him.

The release of the sandalwood would not constitute a dilution of the efforts to conserve forests in general, or sandalwood in particular.

I take the position that if any person is in possession of a proscribed item, he ought to be prosecuted to the end. If he was convicted, it would be almost obvious that the subject matter of the offence would be either forfeited to the state or would be destroyed.

But it is almost a contradiction in terms for the Attorney General to terminate proceedings, (resulting in the sustenance of the presumption of innocence on the part of the accused person), yet thereafter demand that the subject matter of the criminal case be either forfeited to the state or be destroyed.

Much as I appreciate the need for everybody to support the Kenya Forest Service in its noble role of conservation, I find that the order for the destruction of the sandalwood lacks the backing of the law. It is therefore set aside.

I direct that the sandalwood be escorted to the border, to ensure that it is exported into the United Republic of Tanzania. Let us bring to a close the numerous conflicts between the appellant and the law enforcement agencies, in relation to this one consignment. He has already been arrested and charged on 3 different occasions. And on all the said 3 occasions, there was no conviction.

Let the Attorney General work hand in hand with the Kenya Forest Service in such other cases, so that we do not have any other situations in which the Attorney General terminates proceedings, but the Kenya Forest Service nevertheless insists that the subject matter of the terminated proceedings be destroyed or forfeited.

Furthermore, let the Kenya Revenue Authority also be roped in, so that they do not demand and receive payment of Duty for items which are thereafter said to be contraband or otherwise unlawful.

We have a challenge to develop a seamless procedure that will aid Kenya in its efforts at conservation. Let the experience from this case be a valuable lesson in the development of a system that will strengthen conservation.

**Dated, Signed and Delivered at Nairobi, this 16<sup>th</sup> day of February, 2012.**

.....

**FRED A. OCHIENG**  
**JUDGE**