



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
Criminal Revision 4 of 2010
REPUBLICPROSECUTOR

-VERSUS-

FRANCIS KARANJA MWAURA.....RESPONDENT
LIONS CHARITABLE FOUNDATION.....INTERESTED PARTY

RULING

By a letter dated 11th February 2010, addressed to the Deputy Registrar, Lions Charitable Foundation (referred to as interested party) instructed the firm of Mwangi-Njenga & Co. Advocates to have orders in the matter Cr.C No. 48 of 2010 revised by the High Court.

The case pending before the lower court is R v Francis Karanja Mwaura (accused). It is said that the accused was the driver of motor vehicle registration No. KBJ 489B Mitsubishi Pickup which is owned by the interested party. The accused was charged with the offence of removing forest produce illegally without permission from the chief Conservatoire contrary to section 52(1) (a) as read with section 55(1) (c) of the Forest Act 2005.

The particulars state that on the 11th day of January 2010, at Matsangoni Forest, boundary in Malindi District, he was found removing 16 (sixteen) pieces of timber illegally from the said forest – the value of the timber is given at Ksh. 120,000/-.

When the matter came up in court on 15-1-10, Mr. Were advocate, applied on behalf of the owners of the motor vehicle, for its release, saying it was detained at Watamu Police Station yet it was an AMBULANCE, which was scheduled for various outreach programmes and he had a list of the various places. His argument was that the motor vehicle had been photographed together with the timber and the interested party undertook to avail it if needed before conclusion of the case. A copy of the logbook was also presented to the trial court to confirm ownership.

However the prosecutor informed the court that he was not aware of any photograph taken. The court at the time declined to release the motor vehicle as the accused was not even present in court. When the matter was revisited about four days, later, the prosecution objected to the release of the motor vehicle citing provisions of section 55 of the Forest Act which gives the court authority to repossess the vessel used in the commission of the offence, and more so because the accused had still not turned up in court. The trial magistrate upheld the objection taking into account that the court had unfettered authority to order for seizure of the vessel used in commission of the offence and may even order for forfeiture.

These are the orders now sought to be revised – Mr. Were Advocate, who wrote the letter maintains that the motor vehicle has already been photographed at Watamu police station by scenes of crime personnel and that forfeiture can only be ordered at the time of conviction and not before conclusion of the trial.

Section 55(1) of the Forest Act reads as follows:

“where a person is convicted of an offence ofremoving produce from any forest. The court may in addition to any other ruling order.

(c) ...any vessels, vehicles... used in the commission of the offence be forfeited to the service.”

In this instance the detention of the motor vehicle is manifold as is shown by the trial magistrate's ruling

- (1) the accused has not attended court during the application – the applicants are not the accused and accused had not made any commitment to produce the motor vehicle in court and the learned magistrate was reluctant to make orders in the absence of the accused – rightly so – the court needs to hear whether accused has any objection to the exhibit being released to another party before the trial commences.
- (2) It is being said from the bar that the motor vehicle has been photographed along with the offending load – the prosecutor had earlier told the lower court he was unaware of such a development. No copies of the purported photographs have been presented to this court to confirm what is being purported and to allow for release of the exhibit under such unclear circumstances would be tantamount to allow the horse to bolt from the stable before the race begins.
- (3) I agree that section 55(1) (c) of Forest Act provides for forfeiture upon conviction of the accused and not before the conclusion.

The seizure and detention is recognized under section 50 1(d) of the Act, as part of enforcement and is to be done by a Forest officer, who upon seizing such property, must forthwith report the seizure to the magistrate having jurisdiction over the area where the offence took place. The Act does not seem to restrict the magistrate as to what to do with the seized vehicle or vessel once it is detained and I think release thereof is solely at the discretion of the magistrate.

The upshot is that the magistrate M/s C. Ocharo has acted reasonably and within the legal confines and there is no reason for this court to interfere with her orders by way of revision.

The application for revision is dismissed.

Delivered and dated this 16th day of February 2010 at Malindi.

H. A. Omondi

JUDGE