REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

Criminal Appeal 71 of 2006

ANJERICA KANANA……..……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(Being an appeal from criminal case No. 502 of 2006 before Mr. Godfrey Oyugi, Senior Resident Magistrate Court at Tigania dated 24.5.2006.,)

JUDGMENT

This is an appeal against conviction and sentence. Although the appellant pleaded guilty to the charge of removing forest produce contrary to Section 8(1) as read with Section 14(1) of the Forest Act, (Cap 385).

The particulars of the offence are that on 23rd March, 2006 at Kirima Ntigiri Forest Kigwewa location in Meru District, the appellant was found removing forest produce to wit, 60 timbers without a permit from the forester.

There are only two grounds of appeal which were argued as one. It was submitted that although the appellant pleaded guilty, the plea was not unequivocal as the prosecution failed to lead the facts forming the basis of the charge.

The appeal was conceded by learned counsel for the respondent, who urged the court to order a retrial, arguing that there was sufficient evidence and that although the exhibits have been forfeited, the same can be availed.

He also expressed the fear that the appellant may sue the State for the exhibits if she was not retried.

The application for retrial was opposed on the ground that the same will be futile on account of the forfeiture of the exhibits.

I have signed due consideration to these submission and take the following view of the matter. First under Section 348 of the Criminal Procedure Code no appeal is allowed where the appellant pleaded guilty and was convicted on that plea by the subordinate court, except as to the extent or legality of the sentence. That provision is not absolute.

See Ndede V R (1991) KLR 567. The appellant is, therefore, not precluded to appeal as she has done. The conviction and sentence is challenged on the ground that the plea was not unequivocal.

First the charge sheet is such a mess that I wonder that charges were read to the appellant. It states;

"*Removing forest produce contrary to Section 8(1) 9(11) as read with Section 14(1) of the Forest Act Cap 385 of the Penal Code"*.

After the plea was entered the prosecution was allowed time to produce the exhibits and to lead the facts of the case. On 24th May, 2006 the exhibits were produced in court, after several adjournments. The prosecutor told the court that;

"I urge the court to adopt the facts as per the charge sheet……."

The record then shows that the court appellant said;

"*The facts are correct"*

On that basis the appellant was convicted of "her own plea of guilty".

The case of Adam V R (1973) EA 445 and numerous other decisions have laid down the procedure to be followed by courts in recording a plea of guilty. In taking and recording a plea – whether a plea of guilty or a plea of not guilty every stage must be recorded and there is no short-cut such as what the court below in this appeal took.

By simply recording that "facts per charge sheet" both the prosecution and particularly the court was abdicating its role.

I believe the charge sheet was only with the prosecutor and the trial magistrate. The appellant could not possible have known what facts were contained in the charge sheet. The court ought to have demanded that the facts be narrated before requiring the appellant to plead to them.

I find that the plea was not unequivocal and the conviction, therefore, a nullity. Learned Counsel for the respondent has asked the court to order a retrial. A retrial will not be ordered if the same is not in the interest of justice or if it is likely to prejudice the appellant.

Counsel for the respondent confirmed that the exhibits, 60 pieces of timber were forfeited. But he assured the court that the same can be availed during a retrial. I did not expect counsel to expect the court to believe that assurance.

Without the exhibits which were the basis of the charge, it is highly unlikely that a fair trial can be had or that a conviction may result. In the result I come to the conclusion that the conviction was not based on a plea that was not unequivocal.

The appeal is allowed, conviction quashed and sentence set aside. The appellant shall be set at liberty forthwith unless, for any lawful reason, he is held.

DATED AT MERU THIS 30TH DAY MARCH, 2007.

W. OUKO

JUDGE