



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Criminal Appeal No. 297 of 2004

JANE GATHONI .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, Jane Gathoni was charged with others with the offence of **disobeying a lawful order contrary to Section 131** of the **Penal Code**. The particulars of the offence were that on the 6<sup>th</sup> of November 2004 at Nengetia area Narok District the appellant jointly with others was found to have disobeyed the **Chief's Order No. 2 of 2003** issued by the Chief of Olkurto location Mr Motian by transporting 200 pieces of white podo beams in motor vehicle registration number KAQ 541Z Scania without authority of the Narok District environmental committee, such orders having been issued under the **Chief's Authorities Act, Section 10(g)** of the **Laws of Kenya, Cap 128** which empowers the Chief to control the destruction of the environment. When the appellant was arraigned before the trial magistrate's court she pleaded guilty to the charge. She was fined Kshs 3,000/= or in default she was to serve five months imprisonment. The 200 podo beams were forfeited to the State and ordered to be surrendered to the Ewaso Ngiro Development Authority for their public programmes. The appellant was aggrieved by her conviction and appealed to this court.

In her petition of appeal, the appellant raised several grounds challenging her conviction basically on the ground that she had been charged and convicted under an offence which was not known to the law. At the hearing of the appeal, Mr Koech for the State conceded to the appeal. He stated that the appellant had been charged with an offence which was not known in law. Mr Kahiga for the appellant, in the face of the concession of the appeal, had nothing to say.

I have carefully considered the proceedings that were undertaken by the trial magistrate that resulted in the conviction of the appellant. The appellant was charged under **Section 131 of the Penal Code** which provides as follows:

***“Everyone who disobeys any order warrant or command duly made, issued or given by any court, officer or person acting in any public capacity and duly authorized in that behalf, is guilty of a misdemeanour and is liable, unless any other penalty or mode of proceedings is expressly prescribed in respect of the disobedience, to imprisonment for two years”.***

The provisions of this section are made under **chapter XIII** of the **Penal Code** which is titled ***“miscellaneous offences against public authority”***. In my opinion, this section of the penal code applies to situations where public peace and harmony is at risk and does not relate to a situation where timber is being transported by a motor vehicle on a public road. From the facts of the case which were stated to the court by the prosecutor, it was clear that the appellant was being charged for disobeying a decision of the Narok District Environment Committee. This committee is set up under the **Environmental Management and Co-ordination Act** which came into effect 2000. The **said Act** provides for remedies and punishments against persons who have breached the provisions of the **said Act**. The Narok District Environment Committee should have therefore invoked the provisions of the **said Act** to deal with the situation that they were confronted with as in the case of the appellant.

However they chose to use the wrong provision of the penal code to charge the appellant. Furthermore a

decision of the Narok District Environment Committee cannot result in a person being arrested, charged and convicted for breaching the said decision. **Section 77 (8) of the Constitution of Kenya** is clear in that regard. It provides that no person shall be convicted of a criminal offence unless that offence is defined and the penalty thereof prescribed in written law. In the circumstances of this case therefore Mr Koech was right in conceding to the appeal. The appellant breached no existing law. She was charged for a non-existent offence and therefore ought not to have been convicted in the first place.

I therefore allow her appeal set aside her conviction and sentence. The fine that the appellant paid is hereby ordered refunded to her. The 200 podo beams which were forfeited to the State are ordered returned to the appellant. It is so ordered.

**DATED at NAKURU this 10<sup>th</sup> day of March 2006.**

**L. KIMARU**

**JUDGE**