REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL SUIT NO. 10 OF 2005

STEPHEN KWENYA KANYI……ACCUSED

Versus

REPUBLIC……..……ACCUSED

REVISION

Proceedings in the Chief Magistrate's Court at Nyeri, Criminal Case No. 3028/05 having been brought to me by the Chief Magistrate under Section 363(2) of the Criminal Procedure Code, vide his letter Ref. No. JUD/NYI/HC/(25) dated 29th July 2005, this revision is done under Section 364 of the Criminal Procedure Code.

The Accused was charged with the offence of Transporting Forest Produce Contrary to Section 11(1)(a) as read with Section 14(2)(c) of the Forest Act, Cap. 385 Laws of Kenya. Particulars alleged that on the 30th day of June 2005 at about 3.30 a.m. along Nyeri Nyahururu road within Nyeri District, Central Province, the Accused Person was found transporting 40 bags of charcoal in motor vehicle Reg. No. KTM 848 without permit.

When the Accused person was taken to court and arraigned before Senior Resident Magistrate, Mrs. R. A. A. Otieno, a plea of guilty was entered after the Accused had replied:

"It is true"

That was on 5th July 2005 and for the facts, the prosecutor simply said "Facts as charged."

Her application for adjournment to another date to enable the court view the exhibit then said to have been at Mweiga, was granted for a mention on 6th July 2005.

On that date, 40 bags of charcoal were brought on a motor vehicle registration No. KTM 848 Toyota Pick Up and was viewed by the court, the Accused person stating;

"It is true the charcoal and motor vehicle is what I was arrested with."

Following that statement by the Accused on 6th July 2005, the learned trial magistrate recorded:

"Ct. Accused convicted on his own plea of guilty.

Accused fined Sh.80,000/- or 5 months

imprisonment in default.

Exhibits to be forfeited to State, including motor vehicle ref. No. KTM 848 Toyota Pick Up Blue in colour.

R.I.A. 14 days

R.A.A."

With that done, the learned trial magistrate became "Functus Officio". Proceedings which she therefore came to conduct later under the heading: "Later Coram as before"

became irregular or improper proceedings. What Mr. Philip Wachira, who claimed to be the owner of the already forfeited motor vehicle, told the trial magistrate, whether in the presence of the Accused and the Prosecutor or not, could only properly have been said before the order for forfeiture was made. Further the owner of the motor vehicle had no locus standi to complain about the quantum of the fine in the proceedings. It was only the Accused who had the locus to talk about the sentence and ought to have been given the opportunity, which he was denied, to mitigate before the fine was imposed.

The learned trial magistrate having become "functus officio" as stated above, the orders she had made up to the point of sentence and forfeiture could only be altered or changed upon an appeal or revision. When she therefore lifted the forfeiture order which she had made and went on to order release of that motor vehicle, that order was irregular and improper. When she reduced the fine imposed from Ksh.80,000/= to Ksh.10,000/= with two months imprisonment in default, that order was irregular and improper. That being the position the orders lifting the forfeiture of the motor vehicle and reducing the fine and sentence cannot stand and the same are hereby set aside.

That means that the original orders where the Accused Person was fined Kshs.80,000/= and in default five months imprisonment are restored. It also means the orders forfeiting the motor vehicle to the State are restored.

But this revision does not end there. It concerns all the proceedings in the case from the beginning on 5th July 2005 to the end on 6th July 2005. Was a finding, sentence or order of the trial court in the proceedings illegal or improper or were the proceedings irregular? Those are the questions this revision addresses itself to. In doing so, this court under Section 364 of the Criminal Procedure Code, may:-

"(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by Sections 354, 357 and 358, and may enhance the sentence:

(b) in the case of any other order other than an order of acquittal, alter or reverse the order."

Where a subordinate court has failed to pass a sentence it ought to have passed, this court has power to pass that sentence under the written law creating the offence concerned – provided the High Court does not convert a finding of acquittal into one of conviction.

This revision is not being entertained at the insistence of a party who could have appealed. As I stated earlier, the process was commenced under Section 363 of the Criminal Procedure Code. But it should be realized that the process could as well have started under Section 362 of the Criminal Procedure Code by the High Court itself. It has power to do so on its own and all this is in the exercise of the High Court's inherent power to supervise proceedings in subordinate courts or tribunals to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court or tribunal.

With that in mind therefore, I proceed to look at the sections of the law under which the Accused person in this criminal case was charged. First is Section 11(1)(a) of the Forest Act which states:

“11(1) A magistrate, forest officer or Police Officer, the Chief Game Warden or a Senior Game Warden or Game Warden may:-

(a) demand from any person the production of an authority or licence for any act done or committed by that person in a Central Forest or forest area or unalienated Government land or in relation to any forest produce for which a licence or authority is under this Act or under any rules made thereunder, required:”

Section 14(2)(c) states:

“(2) Where a person is convicted of an offence whereby forest product has been damaged or injured or removed, the court shall in addition to any other penalty, order that person:-

(c) the forest produce removed and any tools or implements used in the commission of the offence be forfeited to the Chief Conservator of Forests.”

From the above provisions of the law, three problems arose in the proceedings before the learned Senior Resident Magistrate. Firstly, the plea of the Accused person as recorded, and has been quoted in this revision, was not unequivocal; and this was more so from the fact that facts of the case were not stated by the Prosecutor; the Accused having been charged under Section 11(1)(a) as read with Section 14(2)(c) and particulars alleging that the Accused was found transporting 40 bags of charcoal in a motor vehicle without a permit.

Secondly, Section 11(1)(a) and Section 14(2)(c) of the Forest Act under which the Accused Person was charged do not constitute an offence under that Act. Both sections are mere general statements of the law. Section 11(1)(a) merely identifies officers who may demand the production of an authority or licence for an act done or committed in a central forest or forest area or unalienated Government land and stops there. It does not create an offence. Similarly Section 14 (2)(c) does not create an offence. It is merely making provisions as to what should happen after a person is convicted of an offence. It cannot therefore be properly used as an offence to secure the conviction as it comes into play only after a conviction has been secured under a different and appropriate section of the Forest Act or rules creating an offence. It is only a penalty or punishment section.

However although Section 11(1)(a) does not in itself constitute an offence, it may be used to create an offence under Section 14(1)(c) if one of the officers identified in Section 11(1)(a) makes “a lawful requirement or demand” and the person to whom that requirement or demand is made fails to comply. That is an offence under Section 14(1)(c) and cannot be correctly said to be an offence under Section 11(1)(a) even if Section 11(1)(a) is read together with Section 14(2)(c). Section 11(1)(a) and Section 14(2)(c) read together create no offence under the Forest Act.

Moreover, if an offence is brought under Section 14(1)(c) particulars of that offence will not talk of that Accused having been found transporting anything without a permit. Properly that offence has to concern itself with the Accused’s failure to comply with officer’s requirement or demand under Section 11(1)(a).

In so far as the Prosecution intended to charge the Accused Person with an offence alleging the transporting of 40 bags of charcoal without a permit therefore, the Prosecution ought to have looked for the correct provisions of the Forest Act. The charge under Section 11(1)(a) as read with Section 14(2)(c) was misconceived, improper and fatally defective and ought not to have been entertained by the learned trial magistrate. Since she entertained it and went on to find the Accused person guilty, convicted him and sentenced him, the said finding of guilty, the conviction and the sentencing were each illegal and should not be allowed to stand.

Thirdly, looking at the fine imposed Ksh.80,000/= it is not clear how the learned trial magistrate arrived at that figure when neither Section 11(1)(a) nor Section 14(2)(c) talks of a fine or imprisonment. Being guided by Section 14(1) which apart from being an offences section, is also a penalty section for almost all offences under the Forest Act, it provides for a fine not exceeding Ksh.10,000/= or to imprisonment for a term not exceeding six months or to both and to the forfeiture of the Accused’s licence, if any. Then

subsection (2) comes in to add more teeth to the punishment provided under subsection (1) where the person is convicted of an offence whereby forest produce has been damaged or injured or removed. Subsection (2) does not have fines or imprisonment. The fine of Kshs.80,000/= was therefore also illegal in terms of the quantum and should not be allowed to stand.

From what I have been saying above therefore the conviction of the Accused Person is hereby quashed and the sentence imposed upon him set aside including the order for forfeiture of motor vehicle Reg. No. KTM 848 Toyota Pick Up.

The Accused Person, if in prison, be released forthwith unless lawfully detained in some other cause. If fine paid, same be refunded. If the above mentioned motor vehicle is still held by the State, the said vehicle be released to the owner with immediate effect.

Those are the orders of this court.

Dated at Nyeri this 29th day of July 2005.

J. M. KHAMONI

JUDGE