REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 38 OF 2004

DOUGLAS MWADIMA……....……APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

R U L I N G

The appellant/applicant was convicted in Kangundo SRMCC 197/04 for the offence of transporting forest produce without a licence contrary to section 8(1) (a) (1) of the forest produce Act cap 385 Laws of Kenya. He pleaded guilty to the charge and he was sentenced to a fine of Kshs.15,000/= in default 12 months imprisonment.

He has filed an application for bail pending appeal dated 11.2.2004. Even without arguing the said application, the state counsel conceded that proper plea was not taken and the case be remitted back to the lower court for plea.

Counsel for appellants submits that the law under which the appellant was charged is non-existent and that the sentence meted is unlawful.

The appellant was charged under the Forest Produce Act cap 385 laws of Kenya. Such act does not exist. Cap 385 is the Forests Act. I believe that may have been a mistake on the part of the officer drafting the charge and the magistrate did not take note of it.

At the trial, the charge was read and explained to the appellant and he pleaded guilty. However the facts of the charge were never read to him.

The plea was therefore not properly taken.

From the particulars of the charge the appellant was found to be the driver of a motor vehicle. KAH 579V which was being driven along Kangundo Kivaa Road in Machakos district. He was allegedly transporting 110 bags of charcoal without a licence. Under section 8(1) (a) it is provided that “no person shall except under the licence of the Director of Foresty in a forest area or central forest, fell cut, take, injure or remove any forest produce.”

There is no indication that the appellant was found in gazetted forest area or central forest. The particulars show that he was driving on the road.

The particulars of the charge do not therefore disclose an offence.

The magistrate exceeded his jurisdiction by fining the appellant 15,000/= in default 12 months. If the charge before court was proper section 14 (2) (ii) provides the penalty of offence under section 8 of the Act to be estimated damage caused and where chief conservation cannot determine the value of such produce, or damage, such person shall be liable to a fine not exceeding Kshs.Kshs.10,000/= or to imprisonment for a term not exceeding 6 months imprisonment. The magistrate opted to impose fine but the fine imposed is illegal and unlawful as it is not provided for by the law.

Though the plea was improperly taken, the charge was defective, particulars do not disclose an offence, appellant is charged under a non existent law and I find that there is nothing for the court to review. The

proceedings are very brief and there is no need for the court to wait for preparation of record of appeal. The appellant is unlawfully held in prison and the court would be doing injustice to keep holding him in prison. The court will go ahead to quash the conviction, set aside the sentence and the appellant is set at liberty forthwith unless otherwise lawfully held.

Dated, read and delivered at Machakos this 25th day of February, 2004.

R. WENDOH

JUDGE