



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KITUI**  
**CRIMINAL REVISION CASE NO. 4 OF 2016**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**KIMANI KAMAU.....ACCUSED/CONVICT**

**R U L I N G**

1. Following a letter dated **12<sup>th</sup> May, 2016** by **Hon. Maryann Murage**, Chief Magistrate, Kitui Law Courts, and pursuant to the provisions of **Section 363** of the **Criminal Procedure Code**, I did peruse the Lower Court record in this regard for purposes of satisfying myself of the correctness, legality and/or propriety of the findings and subsequent order or the learned Magistrates and to the regularity of the proceedings before court.
2. The essential point of the matter herein is that one **Kimani Kamau** was charged with the offence of being **Found in Possession of Charcoal in the County Farmland Without Permit** contrary to **Section 16(e)** of the **Kitui County Charcoal Management Act, 2014**. Particulars of the offence were that on the **7<sup>th</sup> day of April, 2016** at around **11.00 a.m.**, at **Kathivo area** along **Kitui Kabati Road** in **Kitui West Sub-county** within **Kitui County** was found with 70 bags of charcoal being loaded in vehicle registration No. **KCD 339J** without a **Kitui County Government Movement Permit**.
3. He was convicted on his own plea of guilty and fined **Kshs. 100,000/=** or in default to serve **one (1) year imprisonment**. An order was made forfeiting **70 bags** of charcoal to the County by **Honourable E. Boke**, Principal Magistrate. Thereafter another order was made by **Honourable R. Ombata**, Resident Magistrate releasing the motor-vehicle registration No. **KCD 339J** make **Isuzu FRR** that had carried the items to the owner, one **Fred Mwaura Kimani**.
4. Subsequently, the DCIO Kitui Central, **Mr. Daniel Nthuku** wrote a letter to the Chief Magistrate, Kitui Law Courts stating that the motor-vehicle registration No. **KCD 339J** make **Isuzu FRR Box Body** had been detained for allegedly carrying charcoal. The seal (Padlock) on the motor-vehicle was still intact. The CID Officers were allowed to break the seal and inspect the content which turned out to be **Sandal Wood** which is a prohibited forest produce. This information was confirmed by the County Executive for Environment and Energy, Kitui, **Mr. Mwinzi Jonah**. Suspects in the matter were **Kimani Kamau, Patrick Kingori** and **Fred Mwaura Kimani**. The National Police Service viewed what transpired to be conspiracy to defeat justice.
6. My duty in my supervisory capacity is to satisfy myself if what transpired was correct and/or legal.
7. The charge as framed was read to the Accused who admitted the truthfulness of the statement and particulars of the offence. Facts of the offence were presented. The record of the trial court is as follows:

***“On 7<sup>th</sup> April, 2016 at around 11 am environment officers from Kitui County were on patrol when they found motor vehicle KCB 339J parked. They suspected that it was carrying charcoal. They asked the owner to produce permit after confirming that he was carrying charcoal. They asked for permit but accused person had none. They were to arrest the driver and the loader but the loader ran away. Accused person was arrested and taken to Kitui, the motor vehicle is still at the road being guarded because the owner of the motor vehicle is still looking for the spare keys.”***

7. Looking at the record of the court, the court adjourned to enable the Prosecution avail exhibits. Later on the court resumed session and the record reflects as follows:

***“Mr. Elijah (County Prosecutor)***

***Facts are as earlier read, the motor-vehicle has been brought and is outside the court. I produce the 70 bags of charcoal and the motor-vehicle KCD 339J as exhibits. That is all.***

***E. BOKE (PM)***

***Accused:***

***Facts correct.***

***Court:***

***Convicted on own plea of guilty.”***

8. There is no indication if the trial court ever confirmed if indeed the motor-vehicle and exhibits had been availed. Further there is no indication if indeed, the trial Magistrate even inspected the exhibits to confirm whether or not it was 70 bags of charcoal. The exhibits were neither marked for identification nor as having been produced in court. The record does not show if the exhibits were taken into custody of the court. There is no order as to where the exhibits were to be kept on being produced prior to being forfeited to the County.

9. I have perused the exhibits register, there is no record indicating if the exhibits were produced and taken into consideration by the court. Therefore the order for release of the motor-vehicle was made in vain as the motor-vehicle was not produced in court.

**10. Section 364(2) of the Criminal Procedure Code provides thus:**

***“No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:***

***Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.”***

Having appreciated the alluded to provision of the law this court issued summons to the person who was Accused and convicted in the Lower Court in an attempt to hear him prior to an order being made against him. The matter was adjourned severally to give him the opportunity of being heard. However, the person who turned up was the owner of the motor-vehicle who claimed that the Accused person had disappeared.

11. This court gave an opportunity to the County Prosecuting Officer, **Elijah Kolite** to address the court who stated that he drafted the charge following information given by the Investigating Officer and Environmental Inspector one **Isaiya Mutunga**.

12. The learned State Counsel, **Mr. Njogu** representing the State notified the court that the motor-vehicle had in fact carried **97 bags** of **90 Kgs** each of **Sandal Wood** with only **two (2) bags** of Charcoal.

13. From the foregoing it is apparent that the proceedings in the circumstances were irregular and an abuse of due process. Subsequent orders that emanated therefrom were also illegal. The learned Magistrate did not have power to release a motor-vehicle that was not in possession/custody of the court.

14. In the result, I quash the conviction and set aside the sentence imposed. Orders that emanated therefrom which are illegal are also quashed. I therefore remit the matter to be determined by the subordinate court presided over by a Magistrate of competent jurisdiction other than **Honourable E. Boke**, Principal Magistrate and **Honourable R. Ombata**, Resident Magistrate. Mention on the **13<sup>th</sup> September, 2016**.

15. It is so ordered.

**Dated, Signed and Delivered at Kitui this 8<sup>th</sup> day of September, 2016.**

**L. N. MUTENDE**

**JUDGE**