



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CRIMINAL REVISION NO. 6 OF 2015

MUSILI MWANIKI SAMWEL

PATRICK KIVULA MUNYITHIA

PETER NGENGA MUSANGI

KYALO MUTINDA COSKEY APPLICANT

V E R S U S

REPUBLIC RESPONDENT

RULING

On 13th July 2015, the four convicts were charged in the Chief Magistrate's Court at Garissa, with removing forest produce contrary to Section 50(1)(a) as read with section 52(2) of the Forest Act No. 7 of 2005. The particulars of the offence were that on 10th July 2015 at around 11.30 hours within Madogo area at Bangale Forest Block Tana – North Sub County within Tana River County jointly removed 7 tons of forest produce (sand) valued at Kshs 1,400/= without a licence from Kenya Forest Service.

When the charge was read to them, they were all recorded to have pleaded guilty. They were thus convicted. Each was sentenced to pay a fine of Kshs 50,000/- each or in default to serve one (1) year imprisonment.

On 26th July 2015, a letter was received by the High Court Registry at Garissa signed by the four(4) convicts. The letter requested for review of sentence. In particular, paragraph two of the letter stated as follows:-

“The trial magistrate upon or after taking our plea of guilty, proceeded to convict and subsequently sentencing each and everyone of us to pay a fine of Kshs 50,000/= or serve one (1) year imprisonment, which sentence we urge the court to find that it is HARSH despite the fact that we had mitigated well but the trial court did not consider. For that reason we seek for a review of the said finding or sentence of the lower court”.

On receipt of the above request, this court ordered that service of the same and trial court record be effected on the Director of Public Prosecution Office in Garissa.

On 22/10/2015 when the matter came up before this court, all the convicts were present. I was informed that Peter Musangi and Kyalo Mutinda were still in custody.

Learned Prosecuting Counsel Mr. Okemwa who was present in court, left the matter to this court's discretion.

One of the convicts Kyalo Mutinda stated that he was merely hired as a casual worker, and that he was neither the owner or turnboy of the motor vehicle. He however did not disclose the identity of his hirer.

Under section 362 of the Criminal Procedure Code (cap.75) this court has review powers over any order or decision of a subordinate court in a criminal case, to correct an error, or make orders that would serve the best interests of justice. The convicts herein have come to this court claiming that the sentence imposed was harsh and excessive. The learned Prosecuting Counsel has left the matter to the discretion of this court.

The section under which the convicts were charged states as follows:-

52(1) Except under a licence or permit or a management agreement issued or entered into under this Act, no person shall, in a state, local authority or provisional forest –

a) fell, cut, take, burn, injure or remove any forest produce.

b)

(2) Any person who contravenes the provisions of subsection (1) of this section commits an offence and is liable on conviction to a fine not exceeding Fifty Thousand Shillings or to imprisonment for a term not exceeding six months, or to both such fine and imprisonment.

Under Section 2 of the Act, "**forest area**" is defined to mean any land declared to be forest land under Act. On the other hand "**forest produce**" is defined to include –

"bark, bird droppings, beeswax, canes, charcoal, creepers, earth, fibrewood, frankincense, fruit galls, grass, gum, honey, leaves, flowers, limestone, moss, murram, myrrh, peat, plants, reeds, resin, rushes, rubber, sap, seeds, spices, stones timber, trees, water, wax withies, and such other things as may be declared by the Minister to be forest produce for the purpose of this Act".

In my view, from the above provisions of the law the definition of forest produce is quite wide. In included the sand alleged to have been harvested.

However, though the definition of forests refers to any land containing a vegetation association dominated by trees of any size, the same definition says that forest area – "**means any land declared to be a forest land under this Act**".

The charge does not state that the area in question was declared a forest and how. It is to be noted under the Act that a forest can be National Government, Local (now County), or Community. In my view, the charge as drafted did not disclose an offence under the Act as it did not state that the area was declared a forest and how. It was fatally defective.

The sentence imposed by the learned magistrate was also the maximum fine for the offence. The default imprisonment sentence is 1 year while the Act provides 6 months imprisonment. In my view the sentence of fine of Kshs 50,000/= was harsh and excessive, for first offenders who pleaded guilty and did not waste court's time. The default prison term was higher than that allowed by law.

In view of the above reasons, I find that there is justification in this court exercising this court's jurisdiction in revision under section 362 of the Criminal Procedure Code (cap.75), in order to do justice.

I find the conviction unsustainable. The sentence imposed cannot also stand.

Consequently, in exercise of this court's revision powers, I quash the conviction and set aside the

sentences on all the convicts. For those in custody, I order that they be set at liberty forthwith unless otherwise lawfully held. For those who paid the fines, same be refunded to them.

Dated and delivered this 2nd day of December 2015.

GEORGE DULU

JUDGE