



**Njeri v Republic & another (Criminal Miscellaneous Application
E259 of 2020) [2024] KEHC 13049 (KLR) (Crim) (28 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13049 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL MISCELLANEOUS APPLICATION E259 OF 2020
LN MUTENDE, J
OCTOBER 28, 2024**

BETWEEN

MARGARET GATHONI NJERI PROSECUTION

AND

REPUBLIC 1ST RESPONDENT

FREDRICK NJUGUNA KAMERU 2ND RESPONDENT

RULING

1. Fredrick Njuguna Kameru, the 2nd Respondent, was indicted for being in possession of an alcoholic drink that did not conform to the prescribed standard of distillation and packaging in contravention of Section 27 (1) (b) as read with Section 27(4) of the *Alcoholic Drinks Control Act* No. 4 of 2010.
2. According to the facts presented by the Prosecution, he was driving motor vehicle Registration No. KCA 516X which was stopped by Police Officers from Muthangari Police Station, and, upon being searched some 300 litres of ‘Changaa’ were found in the boot.
3. Upon being arraigned, the 2nd Respondent admitted the charge at the outset and was convicted. He was sentenced to pay a fine of Ksh. 100,000/- and, in default he was required to serve one (1) year imprisonment. A further order was made forfeiting the motor-vehicle to the State pursuant to the *Alcoholic Drinks Control Act*.
4. It was upon this basis that Margaret Gathoni Njeri (Applicant) brought the instant application dated 8th October, 2020, the prayers being that:
 1. That this Honourable court be pleased to issue stay of forfeiture of motor vehicle registration number KCA 516X, an order issued on 1 October, 2020 by the Honourable Chief Magistrate C.K. Mwaniki in Criminal Case Number PCR EO38 of 2020.



2. That this Honourable court be pleased to revise the forfeiture order by the Hon. Chief Magistrate C.K Mwaniki made on 1st day of October 2020 forfeiting the motor vehicle KCA 516X to the State contravening the applicant's constitutional rights.
3. That this Honourable court do exercise its discretion and order the 1^a Respondent to release the motor vehicle to the Applicant forthwith in the best interest of justice.
4. That costs of this Applicant be provided for.
5. The application is premised on grounds that the legal and registered owner of the motor-vehicle Registration Number KCA 516X Toyota which was used by the 2nd Respondent was forfeited without proper procedure as the applicant was not aware of the proceedings. That it is fair and just that the motor-vehicle be released to the registered owner, the applicant herein, to prevent irreparable damage which will be occasioned, up to the lose the said vehicle.
6. The matter having been filed under certificate of urgency was place before Lesiit J. (As she then was) who certified it as urgent and granted the orders staying forfeiture of the subject motor-vehicle pending hearing and determination of the application.
7. Following directions by the court, the applicant through the firm of R.A.C. & Associates filed submissions. It is urged that Section 389 A of the Criminal Procedure Code (CPC) dictates that diligence must be exercised in order to determine the legal ownership of property that is presented before court which calls for issuance of a notice to the owner of the goods or things, to allow the owner to show cause on why the same should not be forfeited; which did not happen in the instant case.
8. Further, that Article 47(l) of *the Constitution* would also bar the court from making orders without the owner being heard. That it was not established if the 2nd Respondent was a servant, agent or employee of the applicant which would warrant some sort of preparatory interest between them being sorted out. Reliance was placed on the case of Peter Igeria Nyambura Vs. Republic (2018) eKLR where the court stated that:

“*The constitution* guarantees the right to a fair trial by an impartial and independent court or tribunal established by law (see Article 50 (1) of *the constitution*). In accordance with Article 50 the right to a fair hearing and due process is a fundamental anchor in the administration of justice. Under Article 47(1) every person has a right to a fair administrative action.

It is also provided under Article 31 of *the constitution* that every person has the right to privacy which includes the right not to have their possession seized. This is also in line with the provisions of Article 40 on the protection of the right to property.

The importance of this is for the trial courts while adjudicating disputes involving right to private property the dictates of *the constitution* should mirror throughout the proceedings. In particular the decision on forfeiture should adhere to Article 47(1) on fair administrative action.

It is a fundamental notion of justice that the guilty should be punished and the same law protects the innocent and law abiding citizens. It is necessary to avoid prejudice to the administration of justice in particular proceedings on forfeiture.”
9. That the court failed to establish legal ownership of the vehicle and unlawfully forfeited it to the State. That the court failed to do diligence to establish the legal owner of the motor- vehicle subject to proceedings and proceeded to make a final decision of forfeiture causing prejudice, pain, suffering and



irreparable damage to the applicant. In this respect reliance was placed on Embankment Investment Limited Vs. Republic, Kajiado Criminal Misc. Appl. No. 15 of 2018, where the court stated that:

“...If courts allow forfeiture as an automatic penalty after conviction an innocent owner who has no defence to such proceedings will be prejudiced...”

10. That the *alcoholic Drinks Control Act* being silent on the issue of forfeiture, such an order can only be made in accordance to Section 389A of the CPC.

11. Submissions by the 1st Respondent were filed through Robert Mutuma learned Prosecution Counsel who concedes the application on the ground that there was no compliance with Section 389A of the CPC.

12. This court has been called upon to exercise its supervisory jurisdiction pursuant to the provisions of Section 362 of the CPC that provides thus:

The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying 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.

13. This matter having been brought to this court through an application, appropriate orders must be granted so as to ensure there is no illegality or irregularity as to what transpired.

14. The particulars of the offence indicate that the 2nd Respondent was in possession of 300 litres of Chang’aa that was in KCA 516K Toyota Fielder. The 2nd Respondent has not raised any issue with the merit of the case. He was sentenced pursuant to Section 27(4) of the Act.

15. The record of the trial court (facts) read as follows:-

“Facts as per charge sheet - They are that on 0/1/10/2020 at Congo stage at Kawangware; Police Officers from Muthangari stopped motor vehicle KCA 516X. Upon inspection of its boot they found 300 litres of changaa. They arrested the driver who was not licensed to transport the changaa. The changaa was packaged in polythene bags and sacks. I wish to produce the vehicle.

300 changaa – Exhibit 1 Motor vehicle KCA 516X- Exhibit 2”

16. Section 50 of the *Alcoholic Drinks Control Act* (Act) is in respect of authorized officers. It provides thus:

1. The Minister shall, upon recommendation by the respective District Committee, appoint for each district, any person or class of persons to be authorised officers for purposes of this Act.
2. The Minister shall issue a certificate of appointment to every person appointed under this section.
3. Notwithstanding the provisions of this section, the following officers shall be deemed to be authorised officers for the purposes of this Act—
 - a. Public health officers appointed under the *Public Health Act* (Cap. 242); and
 - b. Any other person upon whom any written law vests functions of the maintenance of law and order (Emphasis added)



17. Police Officers from Muthangari Police Station acting on statutory powers bestowed upon them stopped the subject motor vehicle and upon inspection found that it had carried what was referred to as chang'aa and admitted to be alcoholic drink. Both the substance and motor-vehicle were seized and the person who was in possession of both the alcoholic drink and the thing (the motor-vehicle being an inanimate object that is not living) that was the means of which the alcoholic drink was being transported hence used to contravene the law.
18. The offender was arraigned in court on the same day, 1st October, 2020, and orders forfeiting the alcoholic drink and the subject motor-vehicle made forthwith. Therefore, the question of any person applying for restoration of the items could not arise as provided in law. This therefore introduces the question of forfeiture.
19. The *Alcoholic Drinks Control Act* is silent on the question of forfeiture. The court having misdirected itself should have considered the law applicable in the question of forfeiture adopted.
20. Section 389A of the CPC which provides thus:
 - a. That any person within the limits of Kenya be brought up before the court to be dealt with according to law;
21. Basic Principles and laws of Kenya provide for and guarantee rights of its citizen. An individual cannot be condemned unheard. Article 47(1) of *the Constitution* provide that:

Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
22. Proceedings clearly indicate that the court granted the 2nd Respondent the opportunity to mitigate. This was pursuant to Section 216 of the CPC. To persuade the court to pass a proper sentence in the circumstances, the 2nd Respondent sought leniency and promised not to re-offend. But, in accordance with the Provisions of Section 389 A (2) the court was obligated to establish ownership of the motor vehicle and whether the owner was innocent of the offence committed. The thing can only be forfeited if the owner was responsible for the wrongful act.
23. For avoidance of doubt, the trial magistrate should have convicted, sentenced the 2nd Respondent, then given him fourteen (14) days within which to appeal. And, issued a notice for the intent to forfeit the subject motor-vehicle.
24. Section 364(1)(b) of the CPC provides that:
 1. In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—
 - a.
 - b. In the case of any other order other than an order of acquittal, alter or reverse the order.
CAP. 75 Criminal Procedure Code [Rev. 2015] [Issue 3] C44 – 102
25. From the foregoing, I find this a suitable case calling for reversal of the order of the subordinate court, since the trial court perpetrated an illegality by forfeiting the motor-vehicle Registration No. KCA 516X to the State without notice. In the result, I call the order to this court; which I accordingly quash and set aside. Consequently, I do hereby direct that the file be placed before the trial court with a view of complying with Section 389A of the Criminal Procedure Code.



26. Mention before the trial court on 6/11/2024 for further orders.

27. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT
NAIROBI, THIS 28TH DAY OF OCTOBER, 2024.**

L. N. MUTENDE

JUDGE

