



**Kinuthia v Republic (Criminal Appeal 42 of 2016)  
[2024] KEHC 16484 (KLR) (18 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16484 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAROK  
CRIMINAL APPEAL 42 OF 2016  
F GIKONYO, J  
DECEMBER 18, 2024**

**BETWEEN**

**SAMWEL KINUTHIA ..... APPELLANT**

**AND**

**REPUBLIC ..... PROSECUTOR**

**JUDGMENT**

**Forfeiture of instrumentality of crime**

1. The appeal is on conviction, sentence and forfeiture of instrumentality of crime. See memorandum of appeal.
2. The appellant argued that he was charged with being in possession of forest produce yet he was convicted for transporting forest produce without a permit.
3. He also urged that, the plea was not unequivocal as the language used was not indicated.
4. He stated further that, he was convicted twice which makes the plea, conviction and the process a nullity.
5. He also argued that the sentence imposed on him was unlawful.

**Anlysis And Ditermination**

6. The court will evaluate the evidence, check the record, the law, submissions of the parties and facts of the case as required of first appellate court.
7. Contrary to the argument by the appellant, he was charged with transporting forest produce without a permit. The charge sheet is clearly amended and the proceedings, especially the facts read to him, show that the appellant was asked by the police when they stopped the lorry, whether he had a permit of



transporting the red cedar aboard the lorry. And, he had none prompting his immediate arrest and was charged for the offence. The ground therefore fails.

8. The record shows the language used to be English/Kiswahili. He responded appropriately to the charge and facts; and his participation in the proceedings depict a person who understood the language used. Trial courts ordinarily indicate English/Kiswahili as the interpretation of the proceedings for the benefit of the accused as well as the court. There is nothing to show that he did not understand the language used in the proceedings especially in the reading of the charge and facts.
9. He also claims that he was convicted twice. The record show that he pleaded to the charge once and a plea of guilty was duly entered. Facts were read to him but the exhibits had not been brought because the lorry developed radiator problems. The appellant insisted on responding to the facts despite the absence of exhibits because he felt that he has suffered enough in remand. He was convicted on those facts.
10. Later at 4:22 pm the facts were read again at the KFS yard and the exhibits were produced. Again, he replied that the facts were true. And was convicted on own plea of guilt.
11. The only careless mistake committed by the trial court was failure to review the record. Nevertheless, despite the venial but amusing mistake, the appellant was not convicted twice in law. The mistake did not cause any prejudice or amount to double jeopardy as the appellant claims.
12. The conviction was therefore, proper as was based on unequivocal plea of guilt.
13. The appellant did not demonstrate that the sentence was unlawful or inappropriate.
14. The outstanding major issue in the appeal is Forfeiture order. The appellant seeks that it be set aside on the ground that the owner of the vehicle was not given an opportunity to show cause why the vehicle should not be forfeited.

#### **The context of this issue**

15. On 17.9.2013, in sentencing the appellant, the trial recorded, amongst other things: -
  3. Owner of motor vehicle KBN 741S Mitsubishi lorry given 5 working days to show cause why motor vehicle should not be forfeited to KFS?

#### **Hearing on 26/9/13 on cause.**

Right of appeal 14 days.

16. On 19.9.2013, the trial court recorded and ordered that: -

‘In light of the Court of Appeal decision in Cr. App 61/2004 Muya -vs- Republic 1KLR 515 wherein the superior court considered a similar question under a similar provision and ordered forfeiture, it would be unnecessary to proceed under the Notice to show cause because under section 55(1)(c) of Act No. 7/2005 the court is required to make an automatic forfeiture. I therefore hereby forfeit motor vehicle KBN 741S Mitsubishi to Kenya Forestry Service.’
17. The million-dollar question is: Whether the trial court conducted a proper forfeiture proceeding.
18. No doubt the vehicle was used to transport forest produce without a permit. It was used in connection with or in the commission of crime. Such is an instrumentality of crime. In the circumstances, was it unnecessary to conduct a proper forfeiture proceeding?



## The constitutional scheme for forfeiture

19. The constitutional scheme for how to conduct forfeiture proceedings stems, inter alia, from the right to fair hearing: ‘Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.’ Art. 50(1) of *the Constitution*.
20. The idea of ‘...decided in a fair and public hearing...’ ‘...be resolved by the application of law...’ entails; a) procedural due-process requirements-principles of natural justice- which includes notification and an opportunity to be heard; and b) substantive resolution of the matter by application of the law on the facts.
21. The resolution and determination envisaged in article 50(1) of *the Constitution* is lawful adjudication process which must produce a determination with legal force made in accordance with *the Constitution* and the law. Observing, inter alia, the right to equal benefit and protection of the law-art. 27; right to fair trial- art. 50 of *the Constitution*. This kind of adjudicatory process and requirements of fair hearing, equal protection and benefit of the law are also ingrained in forfeiture of property in article 40(6) of *the Constitution* in the word ‘found’.
22. The trial court has the power to order forfeiture of any vessels, vehicles, tools or implements used in the commission of, or in connection with the offence, to the state or state organ specified in the specific statute. These are instrumentalities of crime and are forfeitable on that basis. But, the order of forfeiture is made, after the owner thereof-registered, beneficial or possessory- and any other person with legal interest in the property, has been given an opportunity to show cause why the item should not be forfeited. These are due-process requirements in the right to fair hearing which stem from *the Constitution*; article 40 and 50 thereof. The owner of, or the party with legal interest in the property which is subject of forfeiture, may be the accused or a third party.
23. The trial magistrate, at first, embraced these requirements. At a later instance, denied it citing judicial as well as statutory authority.
24. The relevant consideration here is that the forfeiture was ordered in 2013 after the promulgation of *the Constitution* of Kenya, 2010 which entrenches a robust Bill of Rights in its DNA. Thereby making it absolutely necessary to give any party with legal or equitable interest in the property subject of forfeiture, an opportunity to be heard in the forfeiture proceedings.
25. In the premises, the trial court erred in principle.
26. Accordingly, the order of forfeiture is hereby set aside for contravening the right to fair hearing, equal protection and benefit of the law.
27. In lieu thereof, the trial court is directed to conduct forfeiture proceedings by giving all interested parties an opportunity to be heard on why the vehicle should not be forfeited for being an instrumentality of crime. And, to apply the threshold of the law on forfeiture of instrumentalities of crime.
28. The file is hereby remitted back for that purpose. Any competent magistrate to conduct the forfeiture proceeding drawing upon the fact that the lorry is an instrumentality of crime.
29. The vehicle to remain in the custody of the Kenya Forest Service during the pendency of the forfeiture proceedings.
30. Orders accordingly.



**READ AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE  
APPLICATION THIS 18<sup>TH</sup> DAY OF DECEMBER, 2024**

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**HON. F. GIKONYO M**

**JUDGE**

In the presence of: -

1. Kiruti for the appellant
2. Ms. Rakama for DPP-Respondent
3. Abdi C/A

