



REPUBLIC OF KENYA



KENYA LAW
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**Nkuruna v Republic (Criminal Appeal E006 of 2022)
[2023] KEHC 18288 (KLR) (30 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18288 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CRIMINAL APPEAL E006 OF 2022**

F GIKONYO, J

MAY 30, 2023

BETWEEN

TIPAPA NKURUNA APPELLANT

AND

REPUBLIC RESPONDENT

*(From the Ruling of Hon. A.N. Sisenda(R.M) in
Narok CMCR No. E190 of 2022 on 24th May 2022)*

JUDGMENT

Forfeiture of Instrumentality of Crime

1. The appellant was among two others charged with the offence of removing forest produce without authority contrary to section 67(1) (e) as read with section 68(1)(e) of the [Forest Conservation and Management Act](#) No 34 of 2016.
2. The particulars of the offence were that on March 10, 2022 along Ntulele-Musiro road in Narok East Sub-county within Narok County, the appellant and two others were arrested while driving motor vehicle Toyota pro box white in colour, registration number KCZ 766F while transporting eleven bags of charcoal valued at Kshs 16,000 without authorization from the chief conservator of forest, Kenya.
3. The appellant and the two others pleaded guilty to the offence. Facts were read to them. The vehicle and charcoal was produced as exhibits 1 and 2 respectively. They still pleaded guilty. The trial court took note of their mitigation and considered the same in the sentence
4. The trial court noted that the charge as drafted was not supported by the facts. The charge was therefore reduced to transportation of charcoal without a permit contrary to section 14(1) as read with section 20 of the [Charcoal Rules 2009](#).



5. The trial court fined the appellant Kshs 5,000/= in default to spend one month in prison. The two other accused persons were discharged under section 35(1) of the Penal Code as they were only passengers in the motor vehicle.
6. Notice to show cause was issued to the owner of motor vehicle registration number KCZ 766F why the same should not be forfeited to the state.
7. On May 17, 2022, the appellant explained the events of the material date. The court gave a ruling to the effect that the appellant did not show sufficient cause as to why the vehicle should not be forfeited to the state. The vehicle was therefore forfeited to Kenya Forest Service.
8. The appellant being dissatisfied with the decision of the trial court to forfeit the vehicle to Kenya Forest Service has filed the appeal herein.
9. The petition of appeal dated June 6, 2022 has raised the following grounds: -
 - i. That the learned resident magistrate erred in law and fact by commencing forfeiture proceedings of the motor vehicle without proper notice being served upon the registered owner of the motor vehicle registration number KCZ 766F as required under section 389A of the Criminal Procedure Code.
 - a. That the learned resident magistrate erred in law and in fact by failing to inquire as to the ownership of the subject matter before making the order of forfeiture.
 - b. That the learned resident magistrate erred in law and in fact by failing to apply the doctrine of proportionality in ordering the forfeiture of motor vehicle registration number KCZ766F to the state.
 - c. That the learned resident magistrate erred in law and in fact by ordering the forfeiture of motor vehicle registration number KCZ766F without taking into consideration the defense of the appellant during the forfeiture proceedings.
 - d. That the learned resident magistrate erred in law and in fact by failing to take into consideration of the mitigation of the appellant that he was a first time offender and he was remorseful of his actions.
 - e. That the learned resident magistrate erred in law and in fact by failing to advance cogent reasons on how she arrived at her decision.
 - f. That the order of forfeiture contravened the appellant's right to property as enshrined under the Constitution, 2010.

Directions of the court.

10. The appeal was canvassed by way of written submissions. Both parties have filed.

Appellant's Submissions.

11. The appellant submitted that the ruling of the trial court wherein the motor vehicle registration number KCZ766F was forfeited to Kenya Forest Service was an error in law and fact as the court was not convinced beyond reasonable doubt as required in law.
12. The appellant submitted that regulation 14 of the Charcoal Forest (Charcoal) Rules, 2009(LN18/2009) as read with regulation 20 of the same regulation does not provide for a legal basis upon which the trial court forfeited the suit motor vehicle.



13. The appellant submitted that no proper notice was served upon the registered owners of the motor vehicle number KCZ766F as required under section 389A of the *Criminal Procedure Code*. That at the time of arrest and commencement of forfeiture proceedings the motor vehicle was registered in the names of Farham Motors Limited as current owner. Further that during the trial the appellant unsuccessfully sought to bring to the attention of the court that he was not the registered owner but had a hire purchase agreement with Farham Motors Limited.
14. The appellant relied on the following authorities;
 - i. *Allan Kiama v Ndia Muthunya & others* CA42/1978.
 - ii. Regulation 14 and 20 of the *Charcoal Forest (Charcoal) Rules, 2009*[LN 186/2009].
 - iii. *Robert Wachira v Republic* [2016] eKLR.
 - iv. H.L (E) *Woolmington v DPP* 1935 AC 462 PP481.
 - v. *Peter Nyambura v Director of Public Prosecutions* [2018] eKLR.
 - vi. article 40(1) and 47 of the *constitution* of Kenya.

Respondent's submissions.

15. The respondent submitted that sufficient notice was given to the appellant.
16. The respondent submitted that on the day of notice to show cause on May 17, 2022, the appellant stated that he was the driver and owner of the subject motor vehicle. There was no objection from any party.
17. The respondent submitted that the appellant was taken through the due process and was granted a right to fair hearing to challenge the forfeiture of his vehicle.
18. The respondent submitted that the defense of the appellant was taken during the forfeiture proceedings but he did not give sufficient reasons as to why his vehicle should not be forfeited to the state.
19. The respondent submitted that the trial court noted the mitigation of the appellant that the motor vehicle had no previous records and he was a first offender.
20. The respondent submitted that the trial court gave clear reasons for the decision in the ruling.
21. In conclusion the respondent submitted that the forfeiture was proper, correct and regular. It was not a violation of the rights under article 47,50 and 40 of the *Constitution*. Therefore, they urged this court to dismiss the petition for lack of merit and an abuse of the court process.
22. The respondent relied on the following authorities;
 - i. The *UN Nations Convention against corruption* (UNAC).
 - ii. Section 64, 68 of the *Forest Conservation and Management Act*.
 - iii. *Peter Igeria Nyambura v Director of Public Prosecutions* [2018] eKLR.



Analysis and Determination

23. I have considered the petition of appeal and the rival parties written submissions. The correct question for determination is;
- i. Whether the forfeiture of motor vehicle registration number KCZ 766F should be lifted and vehicle released to the appellant.
24. It is discernible from the record, that, notice to the applicant, a third party and owner of the motor vehicle herein was issued under section 389A of the CPC by the court. I do note also from the record that arguments on forfeiture were made based on section 68 of the *Forest Conservation and Management Act* which provides that:

“

- “(1) Where a person is convicted of an offence of damaging, injuring or removing forest produce from any forest, the forest produce shall be forfeited to the owner.

The court may in addition to any other ruling order—

- (a) that such person pays to the forest owner, by way of compensation, a sum equal to the determined value of the forest produce so damaged, injured or removed and where the value cannot be estimated, ten thousand shillings for each offence;
 - (b) if it is proved to the satisfaction of the court that the person so convicted is the agent or employee of another person, that other person to pay by way of compensation to the forest owner, the value of the forest produce, unless after hearing that other person, the court is satisfied that the offence was not due to his negligence or default;
 - (c) The vessels, vehicles, tools or implements used in the commission of the offence be forfeited to the Service: Provided that the value of the forest produce shall be either the commercial value of the forest produce or the cost of restoring the damage caused to the forest as a result of the offence committed, whichever is higher.
- (2) Where a person is convicted of an offence of occupying or cultivating land in a forest area without a licence, the court may, in addition to any other penalty imposed under this Act, order such person to remove any buildings, enclosures, huts or crops within a period to be specified in the order, and if the person so convicted fails to comply with an order within the period so specified, the buildings, enclosures, huts or crops shall be deemed to be the property of the Service, the County Department responsible for forestry or the private forest owner, as the case may be, and may be disposed of as the Service, County Department responsible for forestry or the private forest owner may think fit:

Provided, however, that expenses incurred as a result of keeping in custody anything seized or detained under this section shall be borne by the person whose property is seized or detained.”



25. Accordingly, under section 68 of the *Forest Conservation and Management Act*, the trial court may in addition to other punishments order: -
- (c) The vessels, vehicles, tools or implements used in the commission of the offence be forfeited to the service:
26. Whereas the language in section 68 of the *Forest Conservation and Management Act* suggests that the overall objective of the section is to compensate for the loss or damage incurred during the commission of the offence, it bears repeating that the Act empowers the trial magistrate, in addition to imposing fine or imprisonment, or compensation, to order forfeiture of any vessel, motor vehicle or implement used in the commission of the crime. These are instrumentalities of crime and are forfeitable after the owner thereof has been given notice and opportunity to show cause why the item should not be forfeited. The requirement of hearing a party whose property is subject of forfeiture whether that party is the accused or a third party is a matter of fair hearing and section 68 (b) has embraced that imperative in the words ‘proved to the satisfaction of the court and unless after hearing that other person’. Accordingly, the section obligates the trial court to hear a third party who may be the principal or employer of the accused or the owner of an instrumentality of crime.
27. Some courts have taken the view that the expression ‘may in addition...order’ in the section, makes the additional orders on compensation or forfeiture discretionally. The school of thought posit that with sufficient cause being shown by the owner of the seized item, the statute provides for a discretion to return the article or vessel depending on the facts of each case to the owner. But, the formulation does not state what sufficient cause or reason would be in light of the law on forfeiture of instrumentalities of crime.
28. Another school of thought ascribe to the notion that, whereas the owner of property used in the commission of crime enjoys the procedural protections of fair hearing, to escape a forfeiture, the property owner must prove that there was no underlying offense, or that, if there was an offense, the property was not connected to it. The orientation is clear that, it is not a defense for owners to say that they were not involved in any criminal activity. It is also not enough to simply say you did not know that the property was used for criminal purposes. However, some nations have used legislation to soften this limitation by recognizing a so-called innocent owner defense, except, forfeiture of instrumentalities of crime may only be avoided, if the owner proves he had no knowledge of any wrongdoing and did all that was reasonably possible to prevent wrongdoing; which makes it virtually difficult for property owners to prove that they could not have been more cautious, which makes the innocent owner defense to be difficult to claim.
29. In light of the foregoing, it is my view, that, a proceeding in section 68 where principal-agent or employer-employee relationship between the accused and a third party has been claimed, mitigating explanations or evidence on whether the crime in which the vessel, vehicle or implement was used in the commission of a crime was incurred without willful negligence or any blameworthy on the part of the owner of the property may be important consideration. Nonetheless, the cornerstone of this jurisdiction is that the property was used in or in connection with the commission of crime.

Applying the test

30. The beginning point: the state bears the burden of proof at the hearing of an application for forfeiture that the subject motor vehicle was used in the removal of forest produce under section 64 of the Act, and should therefore be forfeited to the conservator forest. The opportunity to be heard under section 68 of the *Forest Conservation and Management Act* should be complimented by the procedure set out



in section 389 A of the [Criminal Procedure Code](#) on forfeiture; that is to say, forfeiture determination not to be done in a criminal proceeding unless the indictment or information contains notice to the owner of the vessel or vehicle. The state may seek the forfeiture of the property as part of the sentence in accordance with the applicable Act or section 24 of the [Penal Code](#) where the owner is the accused. It may also seek forfeiture in a proceeding subsequent to conviction. The latter is most suitable where a third party is involved as the owner of the property.

31. In this case, notice was duly given to the appellant to show cause why the motor vehicle herein should not be forfeited. He also appeared and made presentations. The trial court, therefore, conducted proper forfeiture inquiry and hearing.

Prosecution's burden

32. The question however, is whether the prosecution proved to the satisfaction of the court that the property ought to be forfeited?
33. Here, I find points stated by Nyakundi J in [Peter Igiria Nyambura v Director of Public Prosecutions](#) [2018] eKLR to be quite apt in a forfeiture determination: -

What do I see as the key elements in an application by the state seeking forfeiture in a criminal proceeding[s]?

- (a) The state must establish the requisite nexus between the property and the offence.
- (b) The court's determination may be based on evidence already on record including any plea and or adduced evidence accepted by the court as relevant.
- (c) If the court seeks to forfeit a specific property a notice of the order must be sent to any person who reasonably might appear to be a potential claimant with standing to contest the forfeiture in the proceedings.
- (d) This is more so when in practical terms the seized property would be in the hand of an agent, employee, or servant of the person with proprietary interest or right.

Ownership And Registration Of Probox

34. The evidence established that the appellant is the registered and beneficial owner of motor vehicle registration number KCZ 766F Probox. Similarly, it is not disputed that the accused herein one Tipapa Nkuruna was the designated driver of vehicle KCZ 766F. Therefore, arguments that the ownership and registration number of the vehicle in question was not determined is not defensible whatsoever. As at April 19, 2022, the vehicle was registered in the names of the appellant.

Instrumentality Of Crime

35. The state also adduced sufficient evidence in the trial and the forfeiture proceedings that the vehicle in question was used in the commission of crime under the Act and for which the driver was charged and convicted. It was an instrumentality of crime, thus, forfeitable. Therefore, the state established the direct nexus between the Probox and the commission of the offence.
36. From the record, it bears repeating that the trial magistrate conducted a hearing to satisfy herself about the standard outlined in section 389A of the [Criminal Procedure Code](#). She found that the appellant was the owner and driver of the said motor vehicle and had been charged and convicted of the



underlying offence for which the vehicle is forfeited. She stated that he cannot therefore fall under the exemption envisaged in section 389A of the CPC. Thus, she came to the conclusion that there was no sufficient cause shown not to forfeit the vehicle. In the circumstances, it is incorrect for the appellant to state that the trial court ordered forfeiture of the vehicle without giving any cogent reason.

37. I therefore do agree with Ms Torosi that the appellant was taken through the due process and granted a right to a fair hearing to challenge the forfeiture of his motor vehicle. The forfeiture proceedings were in accordance with the provisions of section 68 as read with section 389A of the Criminal Procedure Code. The forfeiture order was founded on proper lawful grounds.
38. From what I have discussed above, forfeiture issued was proper, correct and regular. Such forfeiture mandated in law and issued in accordance with the requirements of due process, is not a violation of right to fair administrative action, or fair hearing or property rights under article 47, 50 and 40 of the Constitution, respectively.

Conclusion and order

39. By way of conclusion, and in answer to the grounds of appeal, I find and hold the following: -
40. That the trial court formally and properly inquired as to the ownership of the subject matter before making the order of forfeiture. It issued the relevant notice to the owner and conducted a proper forfeiture proceeding.
41. The trial court applied the doctrine of proportionality in ordering the forfeiture of motor vehicle registration number KCZ 766F to the state. There was sufficient reason in law arising from the facts of the case to forfeit the vehicle. The vehicle was used in the commission of the offence under the law.
42. The trial court ordered the forfeiture of motor vehicle registration number KCZ766F after taking into consideration the defense of the appellant during the forfeiture proceedings. The trial court found the owner was also the driver of the said vehicle and had been charged with, and convicted of the underlying offence.
43. The trial court took into consideration the mitigation of the appellant that he was a first time offender.
44. The trial court gave cogent reasons on how she arrived at her decision.
45. The order of forfeiture was properly made following a lawful finding that the vehicle was used in the commission of crime, and therefore, an instrumentality of crime. Accordingly, I doubt a property found to be an instrumentality of crime enjoys protection of property rights under article 40 of the Constitution. The forfeiture order did not, therefore, contravene the appellant's right to property as enshrined under the Constitution, 2010.
46. Accordingly, this court finds no merit in the appeal and it is hereby dismissed.
47. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 30TH DAY OF MAY, 2023.

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F. Gikonyo M.

Judge

In the presence of:



1. Mr. Makori– CA
2. Tanyasis for appellant
3. Ms. Mwaniki for DPP**

