



**Njuguna v Republic (Criminal Appeal E065 of 2022)  
[2023] KEHC 19954 (KLR) (27 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19954 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CRIMINAL APPEAL E065 OF 2022**

**TA ODERA, J**

**JUNE 27, 2023**

**BETWEEN**

**NAOMI NJAMBI NJUGUNA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. M.W Kamau (RM) in Molo CMCR E 482 of 2022)*

**JUDGMENT**

1. John Mwangi, Samson Mungai Mwangi and Martin Karama herein after referred to as convict 1, 2 and 3 respectively were jointly charged in Molo CMCR no. E482 of 2022 with the offence of removal of forest produce contrary to Section 64(1) (a) as read with Section 68(1) of the [Forest Conservation and Management Act](#) 2016.
2. The particulars of the offence were that on the 8<sup>th</sup> day of March 2022 in Londiani Sub-County within Kericho County, jointly and unlawfully removed forest produce namely 34 logs of cypress trees estimated to be valued at Kshs.1,988,280/=and removed the said produce the property of Kenya forest service by means of Motor Vehicle Registration No. KCB 430 D Isuzu lorry without a license or permit or management agreement issued by or entered into with the Kenya forest service.
3. Plea was taken on 9.3.22 when the 3 convicts pleaded guilty and the matter was reserved for facts 10.3.22. On 10.3. 22 the accused changed their minds and pleaded not guilty.
4. On 15.3.22 the appellant being the owner of the motor vehicle herein filed MISC application dated 15.3.23 in Molo Court seeking release of the said motor vehicle. Prosecution filed replying affidavit dated 23.3.22.the same was mentioned on 29.3.2022 and proceedings recorded in CR E482 of 2022. Prosecutor informed the court that he had talked with counsel for the convicts who had requested for time to file submissions. Matter was placed for mention on 31.3.22.



5. On 31.3.22 counseled the appellant herein prosecuted the application dated 15.3.22 and the convicts changed their pleas yet again to that of guilt. The convicts were each sentenced to serve 6 months' probation. Ruling for the application dated 15.3.22 were set for 21.4.22. The ruling was delivered and the orders sought were declined as they were premature and the owner of Motor Vehicle Reg. No. KCB 430 D was summoned to show cause why the lorry should not be forfeited to the state pursuant to Section 389A of the CPC.
6. On the said 21.4.22, Mr Murunga the learned counsel for the appellant sought a date for the notice to show cause by the owner of the lorry and the date of 27.4.22 . Come 27.4.22 the matter came up for notice to show cause and the prosecutor informed the court that Mr Murunga for owner of the vehicle was seeking a date for directions . The application was allowed despite the date having been fixed for notice to show cause. The matter was fixed for directions on 5.5.22.
7. On 5.5.22 one Miss Obura advocate appeared holding brief for Mr Murunga for the appellant and informed the court that Mr Murunga was on his way from Eldoret and sought that the matter be set aside to 2.00pm. The case was mentioned at 2.00pm but Mr Murunga was absent and the learned prosecutor sought another dated for notice to show cause at the same was fixed for 31.5.22.
8. On the same 5.5.22, Mr Murunga for the appellant appeared at 15.56pm and apologized to court for being late and sought review of the date and he was given 11.5.22 for notice to show cause. On 11.5.22 the matter did not proceed as the prosecutor did not have the police file and it was adjourned to 24.4.22.
9. On 25.5.22, the matter came up for notice to show cause and the prosecutor informed the court that Mr Murunga had called him and asked him to request that the file be place side to noon. Come 12.34pm the matter was mentioned again but Mr Murunga learned counsel for appellant was still absent and the leawr5ned prosecutor asked the court to proceed and forfeit the motor vehicle. The court proceeded to forfeit the vehicle to the state.
10. The appellant filed another application dated 8.6.22 through M/S Githui & Co advocates seeking setting side and review of the forfeiture orders and the orders being granted, that the applicant be given an opportunity to show cause why the vehicle should not be forfeited to the state.
11. The application was canvased and on 27.7.22 , a ruling on it was delivered setting aside the orders for forfeiture and the appellant was issued with fresh notice to show cause against the forfeiture of the motor vehicle pursuant to section 389 A of the criminal procedure code.
12. Both counsel and appellant appeared in court on for notice to show cause and the appellant through her counsel made arguments I response to the notice to show cause . The court found that she had failed to show sufficient s cause why the vehicle should not be forfeited and proceeded to forfeit the vehicle.
13. The appellant filed supplementary petition of appeal dated 16.3.2023 listing 7 grounds of appeal to wit;
  - a. That the learned trial magistrate erred in law in her interpretation and application of the provisions of section 389A of the Criminal Procedure Code, Section 64(1) and (2) and section 68 of the Forest Conversation and Management Act. Therefore, she arrived at the wrong conclusion of the law.
  - b. That the learned trial magistrate erred in the law and in the application of the principles of sentencing. In particular, the trial magistrate erred in failing to appreciate that the objective of the forfeiture is not deterrence but to make good any loss that may have been suffered by the Kenya Forestry service.



- c. That the learned trial magistrate erred in law in failing to appreciate that the penal consequences set out at section 64 and 68 of the *Forest Conservation and management Act* are sequential and profiled and they are meant fulfil specific penological objective.
  - d. That the learned trial magistrate erred in law in making a finding which was far removed from the objectives of sentencing and taking retribution and deterrence as the overriding objectives under section 64 and section 68 of *Forest Conservation and management Act*.
  - e. That the learned trial magistrate erred in law in finding that the appellant was aware of the commission of the offence and she was an active participant thereof when no evidence was tendered by the prosecution to prove knowledge or active participation of the appellant in the offence.
  - f. That the learned trial magistrate erred in law in shifting the burden of proving knowledge of commission of the crime to the appellant whereas under *the constitution*, *Evidence Act* and *Forest Conservation and Management Act*, the legal burden of proof lies in the prosecution.
14. The appellant prays that this appeal be allowed and the court makes the following orders:
- i. That the orders of forfeiture of motor vehicle registration NO.KCB 430D Isuzu Lorry made be vacated and further order that motor vehicle registration No.KCB 430D Isuzu Lorry be released to the Appellant.

### **Submissions by appellant**

15. The appellant submitted that section 68 of the Forest Management and Coordination Act is titled compensation for loss or damage and provides for further remedies that the court may grant upon conviction of an accused person .also that the compensation is to the owner of the forest and not the state. It was further submitted that Section 68 (1) (a) of the said Act provides for monetary compensation for damaged produce by either the accused or the principal. Appellant also submitted that forfeiture is provided for under section 68 (1) (c) of the said Forest Act. Also that section 389 A of the Criminal Procedure Act which provides for the procedure for forfeiture must be read together Article 24 of *the constitution* which provides for limitation of fundamental rights and freedoms.

Limitation of right and fundamental freedom.

24.

- (1) A right or fundamental freedom in the Bill of Rights not be limited except by Law and then only to the extent that limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking account all relevant factors, including -
  - (a) the nature of the right or fundamental freedom;
  - (b) the importance of the purpose of the limitation;
  - (c) the nature and extent of the limitation;
  - (d) the need ensure that the enjoyment of rights fundamental freedoms by any individual does not prejudice the right and fundamental freedoms of others; and
  - (e) the relation between the limitation and its purpose whether there are less restrictive means to achieve purpose.



16. Counsel also cited the case of Peter Igiria Nyambura v DPP (2018) eKLR where Sections 389A of CPC and section 68 of the Forest Management Act were interpreted . In that case it was held “My interpretation of Section 68(2) of the Forest Conservation and Management Act does not automatically allow for forfeiture of vessel, motor vehicle or article used in conveyance of forest produce. This inference can be logically drawn from the heading of Section 68 whose objective is compensation for loss or damage caused to the forest as a result of the offence committed. It is clear that there are other remedial measures to be considered by the court besides forfeiture. The right to forfeit private property must be a subject of both the constitution and the enabling statute. If there is a lacuna on the procedure on forfeiture in the primary Act the court should find recourse in section 389A of our code. ....As a form of punishment the principle of proportionality ought to apply. Proportionality is considered to be so important in criminal sentencing because it accedes with principles of fundamental justice. People have a sense that sentences scaled to the gravity of the offence are fairer than punishments which are not proportionate to the crime. It is a generally acceptable principle in criminal law that punishment must fit the crime. (See Andrew von Hirsch C proportionality in the philosophy of punishment 1992 16 Crime and justice 55,56)”
17. On proportionality, the South African case of Simon prophet vs the national director of Public prosecution was cited where it was held the consideration should be made of;-The relationship between the purpose of the deprivation and the person whose property is affected.The relationship between the purpose of the deprivation and the4 nature of the property affected and the extent of the deprivationCompelling reason is required where the property rights involved are ownership of land and corporeal movables.
18. It was submitted that the objective Section 68 of the Forest Management and Coordination Act is compensation and not punishment. Further that the appellant was not the accused person but the owner of the truck and that the convicts herein were given lenient sentence of 6 months community service. Counsel told the court that the court had a duty to establish the objective value of the forest produce and in addition to the conviction and sentencing of the convicts, direct that they compensate the respondent to the extent of the forest produce that was the subject matter. It was also submitted that the appellant has a right to benefit form least severe sentence under article 50(2) (p) of the Constitution of Kenya.
19. Counsel told this court that Section 68(1) (b) of the Constitution provides that the court must be satisfied that the offence was not due to the master’s negligence or default.
20. Also that the trial court did not legally address the burden of proof when she held that “the onus might be on prosecution to prove that the vehicle was used to do crime. However, the onus is on the applicant to prove that the vehicle was not used in the crime and it was then used without her blessing. It was submitted that the burden of proof of negligence of default was on prosecution under Section 107 of the Evidence Act. The case of Alice Wanjiru Ruhiu vs Messaic Assembly of Yaweh (2021) eKLR was cited. In that case, it was held “22. I also refer to The Halsbury’s Laws of England, 4th Edition, Volume 17, at paras 13 and 14: describes it thus:

“ The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the



party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”

(16) The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?”

21. It was submitted that here was no legal basis for forfeiture as it was not proved that the vehicle was used in crime with the knowledge of the appellant as was held in the cited case of Simon prophet (Supra). Also that it was not shown that the vehicle was specifically modified for commission of the offence.
22. Prosecution submitted that the forfeiture was proper and within section 68(1)(c) of the Act which provides for forfeiture of vessels ,vehicles and tools or implements used in commission of a crime. It was submitted that the driver of the appellant was convicted of the offence and the appellant was duly given notice to show cause why the vehicle should not be forfeited to the State. It was submitted that the procedure under Section 389 A (1) of the Criminal Procedure Code was complied with.
23. Prosecution further submitted that notice to show cause was served upon the appellant but she did not show up in court and hence the learned Trial Magistrate rightly exercised her discretion to order forfeiture of the said vehicle. The learned prosecution counsel asked this court to exercise its just judicial discretion in this matter.
24. It is not disputed that the convicts herein are driver and turnboys of the appellant of appellant’s Motor Vehicle Registration No. 1 KCB 430 D Isuzu Lorry which was found to be ferrying 34 logs of cypress trees valued at Kshs.1,988,280/= and they were charged with the offence of cutting and removing forest produce from a public forest without authority contrary to section 64(1) as read with section 64(2) and 68 (1) of the *Forest Conservation and Management Act* 2016. The said 3 were convicted and sentenced to 6 months community service.
25. This is a first appellate court and it has a duty to re-evaluate the entire evidence on record and arrive at its own conclusion bearing in mind that the trial court never had the advantage of hearing and seeing the witnesses as it was held in the case of Okeno vs. Republic [1972] E.A 32.
26. I have carefully reconsidered evidence on record the submissions by both parties and the law.

The issues for determination are as follows:-

- i. Whether the trial magistrate erred in law in her interpretation and application of the provisions of section 389A of the criminal procedure code, Section 64(1) and (2) and section 68 of the *Forest Conservation and Management Act* and therefore, she arrived at the wrong conclusion of the law.
- ii. Whether the trial magistrate erred in shifting the burden of proof of knowledge of the commission of crime to the appellant against *the constitution* and the provisions, the *Evidence Act* and Forest Conservation Management Act.
- iii. Whether the trial magistrate wrongly exercised her discretion in ordering forfeiture of the motor vehicle.



27. On Whether the trial magistrate erred in law in her interpretation and application of the provisions of section 389A of the criminal procedure code, Section 64(1) and (2) and section 68 of the Forest Conservation and Management Act and therefore, she arrived at the wrong conclusion of the law. It was submitted that the trial court erred in interpreting the objective of Section 68 of the Forest Management and Coordination Act as a punishment as opposed to compensation. Further that sentencing must be proportional to the offence. The South African case of Simon Prophet vs National Director of Public prosecution case CCT 56/05 was cited. In the said case it was held that the following must be established ; -The relationship between the purpose of the deprivation and the person whose property is affected. The relationship between the purpose of the deprivation and the nature of the property affected and the extent of the deprivation. Compelling reason is required where the property rights involved are ownership of land and corporeal movables.
28. It was submitted that Article 24 of the constitution must be interpreted together with the rights under Article 40, 47 and 50 of the constitution .Article 24 of constitution provides for limitations of fundamental rights and freedoms including (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose. Article 24 , 40, 47 and 50 of the constitution must be read together with Article 69 (1) (a) and (b) and of the same constitution which enjoins the state to manage, protect and conserve the environment. Article 69. (1) of the constitution provides that ; The State shall—
- (a) ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits;
  - (b) work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya;
  - (g) eliminate processes and activities that are likely to endanger the environment;
29. It is clear from the foregoing that forfeiture of the implements or tools used in a crime is clearly provided for under section 68 (1) (c) of the Forest Management and Coordination Act. There is evidence that the vehicle herein was used in the commission of the crime and hence conviction of the convicts in Molo CMCR No. E482 of 2022. This is not disputed. Thus the vehicle was an instrument of crime. Section 68 of the Forest Management and Coordination Act provides for additional orders that the court may make in relation to the forest produce, compensation to the owner by a convict, compensation to the owner by master of the convict and forfeiture of the instruments of crime. The decision is entirely at the discretion of the trial magistrate.
30. It is trite law that the court can only interfere with the discretion of the trial court unless it was excessive or considered irrelevant factors as was held in the case of Bernard Kimani Gacheru v Republic, Cr App No. 188 of 2000 the Court of Appeal stated thus:
- “It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”



31. Prosecution submitted that the trial court correctly interpreted the said Section 68 of the Forest Management and Coordination Act provides that ‘
68. Compensation for loss or damage
- (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 pay 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:
32. Section 68 (1) (c) of Forest Management and Coordination Act was enacted to give effect to Article 69 of *the constitution*. There is thus nothing illegal or unconstitutional about the provisions for forfeiture under section 68 (1) of the Forest Management Coordination Act which are deterrent in nature. The value of the subject matter was Kshs 1,988,220/= and the Magistrate opted for forfeiture instead of compensation. This was reasonable and justifiable under Article 24 of *the constitution*. The Trial Magistrate Acted within her discretion under section 68 of Forest Management and Coordination Act.

### **Due process**

33. Before forfeiting a property the court must be careful to ensure that process of forfeiture is followed to protect the rights to property and fair trial and administrative action as guaranteed in Articles 40, 47 and 50 of *the Constitution*. The court must also ensure that any limitation of the said rights is reasonable and justifiable.
34. The Forest Management and Coordination Act (FCM Act) does not provide for a substantive procedure to be used in forfeiture of the instrument of crime to the owner of the forest. The general procedure used in forfeiture of instrument of crime is found in Section 389 A of the Criminal Procedure Code. Section 389 A of the CPC provides that ‘
- (1) Where, by or under any written law (other than section 29 of the Penal Code), any goods or things may be (but are snot obliged to be) forfeited by a court, and that law does not provide the procedure by which forfeiture is to be effected, then, if it appears to the court that the goods or things should be forfeited, it shall cause to be served on the person believed to be their owner notice that it will, at a specified time and place, order the goods or things to be forfeited unless good cause to the contrary is shown; and, at that time and place or on any adjournment, the court may order the goods or things to be forfeited unless cause is shown by the owner or some person interested in the goods or things:

Provided that, where the owner of the goods or things is not known or cannot be found, the notice shall be advertised in a suitable newspaper and in such other manner (if any) as the court thinks fit.



- (2) If the court finds that the goods or things belong to some person who was innocent of the offence in connexion with which they may or are to be forfeited and who neither knew nor had reason to believe that the goods or things were being or were to be used in connexion with that offence and exercised all reasonable diligence to prevent their being so used, it shall not order their forfeiture; and where it finds that such a person was partly interested in the goods and things it may order that they be forfeited and sold and that such person shall be paid a fair proportion of the proceeds of sale.”
35. In this case notice of forfeiture proceedings were properly issued to the appellant who admitted owning the vehicle and she was duly represented by counsel during issuance of the notice and the hearing of the said notice to show cause. I find that the due process was followed by the trial magistrate.

### **The burden of proof,**

36. On who bears the burden of proof, appellant submitted that the burden of proof was prosecution to show that that the appellant was negligent or defaulted on her part. Prosecution submitted that the appellant pleaded innocence and that it is her employees who were convicted. The prosecution has discharged its legal burden of proof by showing that the vehicle was used in the commission of crime as there is a conviction in the said Molo Chief magistrate’s court Criminal Case No E482 OF 2022 and the burden now shifts to the appellant to show that she did not know that the vehicle was being used in the offence and or that she did not authorize the use of same. This is the rationale behind the notice to show cause. I agree with the trial Magistrate that the evidential burden of proof that the appellant was not negligent or in default was on the appellant as the relevant fact were within her knowledge.

### **Discharge of the burden**

37. On whether the appellant discharged the evidential burden of proof , she told the court that she was not aware that the vehicle was being used in the commission of the offence neither did she authorize it as he had sent the driver to collect maize from Transzoia only to be informed by a forest officer that the driver had been arrested and the vehicle impounded. This is a vague explanation as no details of whom the maize was to be picked from in Kitale, delivery notes, expected return date of the vehicle and exact destination or place of parking as . I agree with the trial magistrate that the explanation given by the appellant was insufficient and points to negligence of the owner of the vehicle and hence the offence.
38. The forfeiture was thus conducted after a fair hearing upon compliance with the due process under section 68 of the Forest Management and Coordination Act and section 389 A of the Criminal Procedure code and thus there was no violation of Articles 40, 47 and 50 of the Constitution of Kenya .
39. I find no merit in the Appeal and it is dismissed.

**T.A. ODERA - JUDGE**

**27. 6.2023**

**JUDGMENT DELIVERED VIRTUALLY VIA TEAMS PLATFORM IN THE PRESENCE OF;**

Machoka Holding Brief for Githii for Appellant,

Mburu for the Respondent,

Court Assistant: BOR

**T.A. ODERA - JUDGE**

**27. 6.2023**



Machoka: We seek a copy of the judgment.

Order: Same be supplied.

**T. A. ODERA - JUDGE**

**27.6.2023**

