REPUBLIC OF KENYA

IN THE HIGH COURT

AT KAPENGURIA

MISC. CRIMINAL APPLICATION NO. E004 OF 2021

KENYA REVENUE AUTHORITY.....APPLICANT

-VERSUS-

JOSEPH NAMWAI LOTIKI.....1ST RESPONDENT

ANTHONY KATIO TABOSO.....2ND RESPONDENT

JOSEPH NAMWAI LOTIKI.....3RD RESPONDENT

-AND-

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS....INTERESTED PARTY

JUDGEMENT

1. Through the notice of motion dated 16th November, 2021, the Applicant, Kenya Revenue Authority, moved this Court seeking the following orders:

> **a. Spent;**
>
> **b. This Honorable Court be pleased to issue stay of execution orders on the orders of Honorable M. M. Nafula Principal Magistrate Kapenguria Law Courts in Kapenguria SPMCCR No. E1032 of 2021 for release of motor vehicle Registration Number KBD 383G Isuzu FRR issued on the 12th November 2021 pending the hearing and determination of this application;**
>
> **c. That this Honorable Court be pleased to review and set aside or discharge the orders of Hon. M. M. Nafula, PM in Kapenguria SPMCCR E1032 of 2021 issued on 12th November 2021;**
>
> **d. That this Honorable Court be pleased to make or grant any other order or relief as it may deem just and fair to meet the ends of justice.**

2. Gabriel Lonyiko, Anthony Kitio Taboso and Joseph Namwai Lotiki are named as the 1st to 3rd respondents respectively. The Office of the Director of Public Prosecutions is named as an Interested Party.

3. When the matter was placed before me on 16th November, 2021, I certified it urgent and allowed the second prayer of the notice of motion.

4. The facts of the case as gleaned from the Applicant's pleadings are that the 1st and 2nd respondents pleaded guilty in Kapenguria Senior Principal Magistrate's Court Criminal Case No. E1032 of 2021 to the charge of being in possession of restricted goods contrary to Section 200(d)(ii) of the East African Community Customs Management Act, 2004 (EACCMA). The 2nd Respondent who was faced with an additional charge of conveying restricted goods contrary to Section 199(b) as read with Section 199(iii) of EACCMA also pleaded guilty to that offence. Upon conviction, the 1st Respondent was fined Kshs. 50,000 in default to serve 6 months in prison. The 2nd Respondent was sentenced to a fine of Kshs. 30,000 on count two and in default to serve 6 months in prison.

5. It is the Applicant's contention that the sentences as passed are contrary to Section 200(d)(ii) of EACCMA which requires that upon conviction an accused person should be sentenced to a fine equal to 50% of the dutiable value. It is therefore the Applicant's assertion that

the sentences imposed on the 1st and 2nd respondents are illegal.

6. It is additionally the Applicant's case that the release of Motor Vehicle Registration No. KBD 383G to the 3rd Respondent contravened Section 215 of EACCMA. According to the Applicant, the motor vehicle was condemned as per the provisions of Section 215 of EACCMA and ought to have been forfeited and that the Trial Court was *functus officio* when it ordered the release of the vehicle to the 3rd Respondent.

7. Another ground upon which the Applicant seeks revision of the lower court's proceedings is that the Trial Magistrate failed to impose punishment on the 2nd Respondent in respect of the first count.

8. The application is supported by an affidavit sworn by Police Constable John Salim Bibo on the date of the application. The affidavit reiterates the grounds in support of the application.

9. The respondents opposed the application through their individual replying affidavits filed on 30th November, 2021. From those affidavits, it is the case of the 1st and 2nd respondents that the Trial Magistrate had discretion to pass the sentences she passed against them and no miscarriage of justice would be occasioned to the Applicant if the fines are upheld.

10. The 3rd Respondent's case is that the prosecution did not oppose the release of the motor vehicle to him by the Trial Court. His case is that once a motor vehicle has been produced as an exhibit, the court is possessed of unfettered powers to order the release of such motor vehicle. The 3rd Respondent further avers that no miscarriage of justice was occasioned to the Applicant as a result of the release of the motor vehicle.

11. On 9th December, 2021, the 3rd Respondent filed an application under certificate of urgency seeking the release of the detained motor vehicle to him. It is not necessary to discuss this application in detail since the determination of the Applicant's case will automatically resolve the 3rd Respondent's application. It is only important to note for the purposes of record that the Applicant opposed the 3rd Respondent's application through a replying affidavit sworn by Corporal Norah Rael Ekodir on 19th January, 2021.

12. The Applicant filed submissions dated 3rd December, 2021 in support of its case and identified two issues for the determination of this Court. On the issue as to whether the Trial Court had discretion when imposing the impugned fines, the Applicant submitted that under Section 200(d)(iii) of the EACCMA, the Court had no option but to impose the statutorily provided fine of 50% of the dutiable amount or the default sentence of imprisonment. The Applicant further submitted that the Trial Court ought to have applied that which the EACCMA provides in its strict sense. The Applicant relied on the case of **Mount Kenya Bottlers Ltd v Attorney General & 2 others [2019] eKLR** to support of the argument that when dealing with tax statutes, there is no room for intendment and tax laws ought to be interpreted strictly.

13. The second issue flagged by the Applicant is whether Motor Vehicle Registration No. KBD 383G should have been released to the 3rd Respondent. On this issue, the Applicant submitted that Section 211(1) of EACCMA renders a vehicle or a vessel liable to forfeiture if it was used in conveyance of any goods liable to forfeiture under EACCMA. It was also submitted that Section 215 of EACCMA provides for the procedure to be followed once a thing is liable to forfeiture. According to the Applicant, the Trial Magistrate became *functus officio* the moment the 1st and 2nd respondents were convicted and the Court lacked jurisdiction to make further orders.

14. The Applicant further argued that by virtue of Section 217 of EACCMA, it did not matter that the owner of the motor vehicle was not charged with any offence. The Applicant relied on the holding in **Republic v Hassan Shaban Mshana [2014] eKLR** in support of the argument that upon conviction, the motor vehicle and the goods stood condemned for forfeiture. It was further the Applicant's contention that the court's role ends after making an order for the release of the forfeited goods to the Applicant and not to anyone else.

15. The Applicant closed the written submissions by arguing that the Trial Court erred in law by not making a finding as to the 2nd Respondent's guilt or otherwise in regard to the first count hence the offence remains unpunished.

16. When the matter came up for hearing on 8th February, 2022, Mr. Makori who was appearing for the Interested Party and holding brief for the Applicant argued that the release of the motor vehicle to the 3rd Respondent did not follow the procedure laid down in Section 215 of the EACCMA. He submitted that had the Trial Court followed the law, the 3rd Respondent would have been afforded an opportunity to state his case.

17. The only issue identified by the 1st and 2nd respondents in their submissions dated 7th December, 2021 is whether the sentences imposed upon them by the Trial Court were too lenient. On this, they submitted that sentencing falls within the discretion of the trial court and that the sentences imposed on them were based on their remorsefulness and the fact that they were first offenders. They relied on the case of **Director of Public Prosecutions v Francis Ochieng Onyango [2020] eKLR** in support of the proposition that sentencing is within the discretion of the trial court. They consequently urged this Court not to interfere with the orders of the Trial Court issued on 12th November, 2021.

18. In submissions filed on 3rd December, 2021, the 3rd Respondent identified two issues for the determination of this Court. On the first issue as to whom the motor vehicle should be released, the 3rd Respondent relied on Section 177 of the Criminal Procedure Code to submit that the motor vehicle ought to be returned to him as the person who appeared to the court to be the owner of the motor vehicle.

19. On the second issue as to whether the motor vehicle should be forfeited to the Applicant, the 3rd Respondent submitted that under Section 211(2) of EACCMA the vehicle having been found conveying restricted goods is not to be forfeited but instead the master of the vehicle is liable to pay a fine. Further, that since the said motor vehicle was not produced in court as evidence, it did not form part of the goods as per

Section 210 of EACCMA.

20. The 3rd Respondent rebutted the Applicant's submission that forfeiture of the motor vehicle was provided for under Section 217(1). He submitted that since the Applicant was present in court when the motor vehicle was omitted from the list exhibits, it cannot then approach this Court to invoke Section 217(1) as the motor vehicle was not among the goods produced as exhibits. The 3rd Respondent relied on the case of **Adan Samow Eymoi v Republic, HCC Misc. No. 58 of 2015** to urge this Court to dismiss the application and uphold the orders of the Trial Court.

21. The Interested Party indicated to the Court during the hearing of the application that it was adopting the Applicant's position in the matter.

22. Upon taking into account the application, pleadings and submissions by all parties, the following issues arise for determination in this matter:

i. Whether the sentences passed by the Trial Court against the 1st and 2nd respondents are legal; and

ii. Whether the Trial Magistrate contravened the law in releasing Motor Vehicle Registration No. KBD 383G to the 3rd Respondent.

23. It is important to observe at this point that this Court's power of revision emanates from Section 362 of the Criminal Procedure Code. The Constitution, has also, through Article 165(6) given this Court supervisory jurisdiction over subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function.

24. The 1st and 2nd respondents were in the first count charged with the offence of being in possession of restricted goods contrary to Section 200(d)(ii) of the EACCMA.

25. Section 200(d) of the EACCMA provides as follows:

200 A person who—

…

d. acquires, has in his or her possession, keeps or conceals, or procures to be kept or concealed, any goods which he or she knows, or ought reasonably to have known, to be

(i) prohibited goods; or

(ii) restricted goods which have been imported or carried coastwise contrary to any condition regulating such importation or carriage coastwise; or

(iii) uncustomed goods, commits an offence and shall be liable on conviction to imprisonment for a term not exceeding five years or to a fine equal to fifty percent of the dutiable value of the goods involved, or both.

26. The 2nd Respondent was additionally charged in the second count with the offence of conveying restricted goods contrary to Section 199(b) as read with Section 199(c)(iii) of the EACCMA. Section 199(b) & (c)(iii) read as follows:

A master of any aircraft or vessel, and any person in charge of a vehicle, which is within a Partner State and—

…

(b) which has in it, or in any manner attached to it, or which is conveying, or has conveyed in any manner, any goods imported, or carried coastwise, or intended for exportation, contrary to this Act; or

(c) from or in which any part of the cargo of such aircraft, vessel or vehicle has been thrown overboard or staved, in order to prevent seizure commits an offence and shall be liable-

…

(iii) in the case of the person in charge of a vehicle, to a fine not exceeding five thousand dollars and the vehicle and goods in respect of which such offence has been committed shall be liable to forfeiture.

28. It is the Applicant's case that the provisions under which the 1st and 2nd respondents were charged provided fixed sentences for which they were liable to face upon conviction. The Applicant argues that the sentence of a fine of Kshs. 50,000 in default 6 months' imprisonment passed on the 1st Respondent and that of a fine of Kshs. 30,000 in respect of count two for the 2nd Respondent were not in tandem with the sentences provided for these offences. It is the Applicant's position that the use of the word *"shall"* makes the provisions of Section 200(d)

(ii) mandatory.

28. The 1st and 2nd respondents on their part argued that sentencing is within the discretion of the trial court. They therefore urged the Court not to disturb the sentences imposed on them.

29. The question as to whether the Trial Magistrate imposed the correct sentences will be resolved by determining whether Section 200(d)(ii) of EACCMA is couched in mandatory terms as submitted by the Applicant. In **Caroline Auma Majabu v Republic [2014] eKLR**, the Court of Appeal addressed itself to the use of the words *"shall"* and *"liable"* in Section 4(a) of the Narcotic Drugs and Psychotropic Substance Control Act and held that:

> **"In our view, the word "shall" is used in relation to the guilt of the offender and the word used in relation to the sentence is "liable". The Concise Oxford English Dictionary 12th Edition defines the word "liable" as**
>
> > **"(i) Responsible by law, legally answerable, (liable to) subject by law to;**
> >
> > **(ii) (Liable to do something) likely to do something;**
> >
> > **(iii) (Liable to) likely to experience (something undesirable).**
>
> **Black's Law Dictionary defines "liable" as Responsible or answerable in law; legally obligated, Subject to or likely to incur (a fine, penalty etc.)**
>
> **Applying the above definition, the use of the word "liable" in section 4(a) of Narcotic Drugs and Psychotropic Substance Control Act merely gives a likely maximum sentence thereby allowing a measure of discretion to the trial court in imposing sentence with the maximum limit being indicated. It should be noted that sentencing is an exercise of judicial discretion, and therefore provisions which provide for mandatory sentence compromise that discretion, and are the exception rather than the rule. Thus, where applicable the mandatory sentence must be expressed in clear and unambiguous terms…**
>
> **In the case of section 4(a) of the Narcotic Drugs and Psychotropic Substance Control Act, the provisions does not contain such clear and unambiguous language with regard to mandatory sentence. In our view, this leaves room for judicial discretion and we would be reluctant to adopt an interpretation that would defeat or muzzle the exercise of such judicial discretion. With respect, we must depart from the finding in Kingsley Chukwu v R (supra) as the same was made per in curium. Both the trial magistrate and the learned Judge misdirected themselves in holding that the sentence was mandatory, and failing to exercise their discretion by addressing the appellant's mitigating circumstances. An error of law was thereby committed which justifies the intervention of this Court."**

30. Again in **Mohamed Famau Bakari v Republic [2016] eKLR,** the Court of Appeal while interpreting the use of the words *"shall be liable"* as used in Section 4(a) of the Narcotic Drugs and Psychotropic Substance Control Act held that:

> **"This Court … has reiterated that the word *"liable"* in section 4(a) of the Act merely provides for a likely maximum sentence and allows a measure of discretion to the court in imposing a sentence with a maximum limit being indicated."**

31. The decisions of the Court of Appeal are in line with the interpretation of the same words in other jurisdictions. For instance, in **Opoya v Uganda [1967] E.A. 752** the phrase *'shall be liable'* as used in various statues was analysed and the Court concluded that:

> **"It seems to us beyond argument that the words "shall be liable to" do not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words they're not mandatory but provide a maximum sentence only and while the liability existed the court might not see fit to impose it."**

32. The cited decisions align with my decision in **Republic v Fredrick Wandera Wesonga [2016] eKLR** where I interpreted the sentence provided under Section 185(1) of the Customs and Excise Act. The provision uses almost the same language with Section 200(d)(ii) of EACCMA. This is what I said of that provision:

> **"The penalty provided in Section 185(1) of the Customs and Excise Act use similar language with the penalty in Section 4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act save for the fact that in the Customs and Excise Act the inclusion of the value (three times) in the fine comes before the words "subject to a maximum of one million five hundred thousand shillings". That means whatever value of the uncustomed goods the Court cannot impose a fine in excess of 1.5 million shillings…**
>
> **In my view what Parliament intended to achieve was to ensure that the small scale offenders found in possession of uncustomed goods should not pay a fine exceeding three times the amount of duty and any other taxes payable on the goods. For instance, a suspect found with uncustomed goods whose duty is say Kshs. 10,000/= should not pay a fine exceeding Kshs. 30,000/= but can pay anything below that amount depending on the discretion of the magistrate upon applying the sentencing principles."**

33. Under Section 200(d) of EACCMA, the words used are "**shall be liable on conviction to imprisonment for a term not exceeding five**

years or to a fine equal to fifty percent of the dutiable value of the goods involved, or both."

34. The suggestion by the Applicant and the Interested Party that the use of the word *"shall"* in Section 200(d) of EACCMA requires the Court to impose imprisonment of five years or a fine equal to fifty percent of the dutiable value of the goods involved, or both, is erroneous since it overlooks the discretion granted to the sentencing court by the phrase *"liable"* used in the same provision. What that means is that an accused can be sentenced to a maximum of five years in prison or fined an amount equal to fifty percent of the dutiable value of the goods involved, or both. The provision leaves room for the trial court to impose a lesser sentence of imprisonment or fine or both.

35. Section 200(d) of EACCMA should be read in accordance with the interpretation of the Court of Appeal in **Caroline Auma Majabu (supra)** that **"the word "shall" is used in relation to the guilt of the offender and the word used in relation to the sentence is "liable"".** As already stated, the use of the term *"liable"* gives discretion to the trial court when considering the sentence to be imposed. It is therefore my finding that the sentences imposed on the 1st and 2nd respondents by the Trial Magistrate were lawful and no case has been made for the review of the sentences.

36. However, there is the aspect of the sentencing of the 2nd Respondent. All the parties are in agreement that the 2nd Respondent was charged with two counts and pleaded guilty to both counts. The failure by the Trial Magistrate to impose punishment on the first count offends the law on sentencing. Where an accused person is charged and convicted for more than one offence, there is need to impose a sentence on each offence-see **Director of Public Prosecutions v Peter Macharo Kombo & another [2019] eKLR**.

37. Having found the 2nd Respondent guilty on counts one and two, the Trial Magistrate ought to have imposed a separate sentence on each count. Each offence ought to have had its specific sentence. The error is one that is apparent on the face of the record and calls for the intervention of this Court by way of revision. An appropriate order shall issue at the conclusion of the judgment.

38. The next issue concerns the fate of the 3rd Respondent's motor vehicle. It is the Applicant's case that the Trial Magistrate erred in law by ordering the release of Motor Vehicle Registration No. KBD 383G to the 3rd Respondent. It is the Applicant's argument that upon finding the 1st and 2nd respondents guilty, the motor vehicle and the goods impounded were automatically forfeited by virtue of the provisions of sections 211(1), 215 and 217(1) of EACCMA.

39. The 1st and 2nd respondents did not submit on this issue. On his part, the 3rd Respondent submitted that Section 210 of EACCMA provides for goods liable for forfeiture which do not include vessels or vehicles. With regard to Section 211, the 3rd Respondent submitted that sub-section (2) exempted the lorry from being liable to forfeiture. The 3rd Respondent further submitted that in any event, the motor vehicle was not produced as an exhibit in court and was therefore not liable to forfeiture. Finally, it was the 3rd Respondent's case that the Trial Court and this Court ought to resort to Section 177 of the Criminal Procedure Code and release the vehicle to him.

40. Although the 3rd Respondent asserts that the motor vehicle in question was not produced as an exhibit, the typed proceedings clearly shows that the lorry was produced as Prosecution Exhibit No. 5. The 3rd Respondent's argument that the motor vehicle was not liable to forfeiture because it was not placed in the custody of the Trial Court by way of production as an exhibit is therefore unsustainable in the circumstances.

41. Section 211(2) of EACCMA provides for the forfeiture of any object used to transport or handle goods liable to forfeiture. It states:

> **211. (1) A vessel of less than two hundred and fifty tons register, and any vehicle, animal, or other thing, made use of in the importation, landing, removal, conveyance, exportation, or carriage coastwise, of any goods liable to forfeiture under this Act shall itself be liable to forfeiture.**

42. Sub-section (2) of Section 211 excludes from forfeiture "**aircraft or any vessel of two hundred and fifty tons register or more made use of in the importation, landing, removal, conveyance, exportation, or carriage coastwise, of any goods liable to forfeiture".** The aircraft or vessel can, however, be detained until the master of the aircraft or vessel has paid any fine imposed on him for carrying goods liable to forfeiture. The argument by the 3rd Respondent that his motor vehicle was not liable to forfeiture but he should have instead been fined as provided by Section 211(2) is therefore without merit. This is because the provision strictly refers to aircrafts and vessels exceeding a certain tonnage. Vehicles and other carriers are not covered by Section 211(2) of EACCMA. The 3rd Respondent's lorry was therefore liable to forfeiture by virtue of Section 211(1) of EACCMA.

43. The question is whether Section 211(1) of EACCMA provides for mandatory forfeiture of any carrier of goods liable to forfeiture. A reading of the provision which the Applicant cites in support of the argument for automatic forfeiture upon conviction shows that the words used are *"liable to forfeiture."* As already stated in this judgement, the use of the term *"liable"* leaves the decision of whether to forfeit or not in the hands of the trial court. That means the question of forfeiture squarely fell within the jurisdiction of the Trial Court. It is, however, important to note that whether the thing conveying the condemned goods will be forfeited will be determined by the circumstances of each case.

44. There was the argument by the Applicant that the procedure was not followed in the release of the motor vehicle to the 3rd Respondent. This argument was supported by reference to Section 215(1) of the EACCMA which provides that:

> **215. (1) Where any person is prosecuted for an offence under this Act and any thing is liable to forfeiture by reason of the commission of the offence, then the conviction of the person of the offence shall, without further order, have effect as the condemnation of the thing.**

45. The cited provision does not in any way provide the procedure for conducting forfeiture proceedings. The provision cannot also be read

to mean that upon conviction any thing liable to forfeiture by reason of the commission of the offence will be automatically forfeited. My understanding of Section 215 of EACCMA is that once a conviction has been entered, then there is no need for other proceedings to have the carrier of the goods liable to forfeiture condemned. The conviction by itself is sufficient. However, where a person steps forward to ask for the thing to be released to him, then the trial court has a duty to consider the application and make a determination hence giving life to the meaning of the words *"liable to forfeiture"* in Section 211 of EACCMA.

46. bIt is observed that there is no specific forfeiture procedure provided by EACCMA. In such a situation the fallback provision is Section 389A of the Criminal Procedure Code, Cap. 75 which provides as follows:

> **389A. Procedure on forfeiture of goods**
>
> **1. Where, by or under any written law (other than section 29 of the Penal Code), any goods or things may be (but are not 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.**

47. In addition to the above cited provision, the Sentencing Policy Guidelines published by the Kenyan Judiciary at pages 30-31 provide policy directions in regard to forfeiture as follows:

> **"12.8 Where the court is satisfied of the link between property and the offence committed as set out in the different provisions, and where the court is mandated by the law, it should, in addition to the general punishment meted out to the offender, order for forfeiture of the property.**
>
> **12.9 In all cases in which an order of forfeiture is applicable, the prosecutor should, at the earliest opportunity before sentencing, bring to the attention of the court any such property that is linked to the commission of the offence.**
>
> **12.10 Where the court has discretion to order forfeiture, it should be guided not to cause an injustice to a third party who is the owner of property that is linked to the commission of an offence in which he/she did not take part in and it is clear that he/she could not have reasonably been aware that the property would be so used."**

48. I have perused the proceedings and it is clear that the prosecutor produced as an exhibit the motor vehicle that had been used to commit the offences with which the 1st and 2nd respondents were charged and convicted. Upon conviction of the 1st and 2nd respondents there was no need for any other order for the motor vehicle to stand condemned.

49. In the circumstances it fell upon the 3rd Respondent to persuade the Trial Court not to forfeit the motor vehicle to the Applicant. I do not buy the argument by the Applicant that the Trial Court became *functus officio* upon passing the sentence. In the case at hand, the 3rd Respondent had stepped forward and identified himself as the owner of the motor vehicle in question. In such a situation the Trial Court was required to consider the application of the 3rd Respondent in order to determine if the motor vehicle was to be forfeited or not. It is during such post-sentencing proceedings that the claimant identifies the thing seized as his and demonstartes why it should not be forfeited to the revenue agency.

50. The right to a hearing is not only reserved for the person whose thing has been condemned. The tax collector is also entitled to demonstrate by pointing to the court record that the owner of the condemned thing intimately knew of the tax crime and that the thing used in the commission of the crime should therefore be forfeited. Where the prosecution intends to pursue the forfeiture of the aircraft, vessel, motor vehicle, animal or thing used to convey goods liable to forfeiture, it must adduce evidence during the prosecution of its case to support such forfeiture. It is only after both sides have been heard that the trial court can determine whether the aircraft, vessel, motor vehicle, animal, or other thing used to transport the goods liable to forfeiture should be forfeited.

51. A perusal of the proceedings before the Trial Court shows that the Court proceeded as if the motor vehicle was not condemned. Although the 3rd Respondent, had before the conviction and sentencing of the 1st and 2nd respondents applied for the release of the motor vehicle, that application was never heard. After the 1st and 2nd respondents pleaded guilty and were convicted and sentenced, the Trial Magistrate without prompting by any of the parties simply forfeited the sugar to the State and ordered the release of the motor vehicle that was ferrying the sugar to the 3rd Respondent. This clearly denied the Applicant an opportunity to state whether it was opposing the release of the vehicle to the 3rd Respondent, and if so, the reasons for the objection. This would have been in response to an affidavit or statement under oath by the 3rd Respondent seeking the release of the motor vehicle to him.

52. I have perused the record of the Trial Court and it is clear from the proceedings of 12th November, 2021 that the 1st Respondent was the

owner of the restricted goods and the 2nd Respondent was the driver of the lorry that was transporting the restricted goods. In the file there is an application dated 19th October, 2021 by the 3rd Respondent seeking the release of the motor vehicle to him. There is an affidavit in reply to the application which was sworn on 8th November, 2021 by Police Constable John Salim Bibo.

53. A perusal of the Applicant's affidavit in response to the 3rd Respondent's application for the release of the motor vehicle does not disclose any averment that the 3rd Respondent had anything to do with any of the offences for which the 1st and 2nd respondents were convicted. There was therefore no case made for the forfeiture of the lorry. Although the Trial Magistrate did not conduct proper proceedings before reaching the decision to release the motor vehicle to the 3rd Respondent, there is nothing on record to show that she exercised her discretion erroneously or reached the wrong decision. The Applicant was therefore not prejudiced by the decision of the Magistrate to order the release of the vehicle to its owner.

54. In view of what has been stated in this decision, the application for review partly succeeds to the extent that the sentencing of the 2 nd Respondent did not comply with the law. An order is therefore issued remitting the Trial Court file to the Trial Magistrate for the purpose of sentencing the 2nd Respondent in respect to the first count. The imposition of sentence on the first count should be done within two weeks from the date of this decision.

55. There being no other reason for the continued detention of the 3rd Respondent's motor vehicle registration number KBD 383G, an order is issued directing whoever is in custody of the motor vehicle to forthwith release the same to the 3rd Respondent.

DATED, SIGNED AND DELIVERED AT KAPENGURIA THIS 17TH DAY OF FEBRUARY, 2022

W. KORIR,

JUDGE OF THE HIGH COURT