



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT SIAYA**

**MISC. CRIMINAL APPLICATION NO. E003 OF 2022**

**CORAM: HON. R.E. ABURILL J**

**MOSES ASSANGA AMUKOLA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an Application for revision arising from the order of forfeiture of Motor Vehicle Registration No. KDB 024Y Isuzu Lorry made by Hon. C.I. Agutu, Senior Resident Magistrate, in Ukwala Principal Magistrate's Court Criminal Case No. E644 of 2021 on 28<sup>th</sup> December, 2021)***

**RULING**

1. The applicant herein is **Moses Assanga Amukola**. He brings this application for revision of the orders made in Ukwala SRM Hon. C.I. Agutu, Senior Resident magistrate on 28/12/2021 in **Cr. Case No. E644 of 2022** for forfeiture of motor vehicle Registration No. KDB 024Y to the State.
2. Facts leading to the said forfeiture are that the accused/convict in the aforesaid criminal case are Christine Ambeva and Samuel Omondi and John Owino. The three were jointly charged with the offence of being in possession of uncustomed goods contrary to **Section 200(d)(iii) as read with Section 210 (c)(c) and Section 213 of the East African Community Customs and Management Act, 2004**.
3. Particulars of the offence as per the charge sheet dated 28<sup>th</sup> December, 2021 were that **on the night of 26<sup>th</sup> December 2021 at Ugunja Township, Ugunja sub county within Siaya County, the 3 accused persons being occupants of motor vehicle registration No. KDB 024Y make Isuzu, were jointly found in possession of 49 bags of Magunye Sugar weighing 50 kilograms and Kanuli Sugar weighing 50 kilograms which were dutiable goods and on which duty of Kshs. 275,000/= had not been paid**.
4. The trial court record shows that the 1<sup>st</sup> accused went at large before the plea was taken hence her case was withdrawn under **Section 87(A) of the Criminal Procedure Code** on 19/1/2022. Surprisingly, the said accused is recorded to have reappeared before the trial court on 20/1/2022 and was "left to leave" (sic) with a warning.
5. The 2<sup>nd</sup> and 3<sup>rd</sup> accused Samwel Omoni & John Owino respectively, who pleaded guilty to the charge were convicted on their own plea of guilty on 28/12/2021 and were each sentenced to pay fines of Shs. 20,000/= and in default, to serve one-month imprisonment at Siaya G.K. Prison. The 49 bags of Manyuge Sugar and 1 bag of Kanuli Sugar and Motor Vehicle Registration No. KDB 024Y were forfeited to the State. It is that order on forfeiture of the motor vehicle Registration No. KDB 024Y that prompted this application for revision with the applicant claiming ownership of the forfeited motor vehicle, which vehicle he claims was a commercial vehicle used for hire. He has annexed copies of Logbook No. 2021022307517 showing the vehicle is a lorry truck, Isuzu make and his co-owner is Equity Bank (K) Ltd, the financier thereof. He also annexed a Loan Facility Agreement between him and Equity Bank Ltd dated 28/10/2020 for Shs. 3,275,000/= which was advanced to the applicant for the purchase of the subject motor vehicle.
6. The Applicant claims that not being a party to the criminal proceedings at Ukwala Law Courts, the trial court should have inquired into the ownership of the subject motor vehicle and given him an opportunity, as the owner thereof, to be heard before making the order for forfeiture. He claims that the motor vehicle being one for commercial hire, he had hired it out to Samwel Omondi who informed him that he was to transport cement when it was impounded and found to have been carrying uncustomed goods at Ugunja Town. The applicant further asserts that the vehicle is the applicant's only source of income hence it should be released to him as the loan obtained from the bank remains unserviced which is detrimental to his livelihood.
7. The Respondent did not file any response to the application which was argued *inter partes* orally after this Court ordered that the application be served upon the Office of Director of Public Prosecutions for *inter partes* consideration. Counsel however urged this Court to refer back the matter to the trial court should for issuance of Notice to Show Cause should this Court find that the order for forfeiture of the impugned motor vehicle was improperly made.

8. It is not in doubt that the application does not seek to reverse the Plea of guilty and conviction and sentences imposed on the two convicted persons in the trial court, who were found to be in possession of the uncustomed goods and who were occupiers of the subject motor vehicle. It is also not in dispute that the applicant herein was not a party to the criminal proceedings wherein orders of forfeiture which are being challenged were made.

9. The fact that the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons were found in possession of uncustomed goods which were forfeited to the State is also not being challenged. What the applicant is challenging is the Order of the trial court for forfeiture of the vessel (motor vehicle Registration No. KDB 024Y) which was found conveying or transporting the uncustomed goods.

10. I called for and have perused the trial court file and I am unable to find the provisions under which the forfeiture order was made as the trial Magistrate did not make any reference to such provisions. However, **Section 196(c) of the Customs and Excise Act** provides for forfeiture of a vessel found transporting the uncustomed goods and the order for forfeiture can be made under **Section 197 of the said Act** which provides that:

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

***(2) An aircraft, or a vessel of two hundred and fifty tons register or more made use of in the importation, landing, removal, conveyance, carriage coastwise or exportation of goods or other things liable to forfeiture under this Act shall not itself be liable to forfeiture but the master of the aircraft or vessel shall be guilty of an offence and liable to a fine of such amount as the court deems just; and the aircraft or vessel may be seized and detained until the fine is paid or security therefor given.***

***(3) Where an aircraft, vessel, vehicle, animal or other thing is liable to forfeiture under this Act, then the tackle, apparel, furniture and all other gear used in connection therewith shall also be liable to forfeiture therewith.***

11. I observe that the applicant not having been an accused person or party to the criminal proceedings, he had no right of appeal for the said proceedings. It follows that he is rightly before this court by way of revision as provided for under **Sections 362, 364 and 365 of the Criminal Procedure Code** which clothes this Court with powers of revision. The sections provide that:

***“362. Power of High Court to call for records  
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.***

***364. Powers of High Court on revision (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) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;***

***(b) in the case of any other order other than an order of acquittal, alter or reverse the order.***

***(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:***

***Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.***

***(3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.***

***(4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.***

***(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.***

**365. Discretion of court as to hearing parties** *No party has a right to be heard either personally or by an advocate before the High Court when exercising its powers of revision:*

***Provided that the court may, when exercising those powers, hear any party either personally or by an advocate, and nothing in this section shall affect section 364(2).***

12. Although section 365 of the Criminal Procedure Code gives this Court discretion to decide whether to hear the parties or not, I had to exercise that discretion judiciously by directing the applicant for revision to serve the Respondent for *inter partes* hearing so as to accord both parties an opportunity to be heard in a matter of this nature where the state is in possession of property being claimed by the applicant as his.

13. As earlier stated, Section 197 of the Customs and Excise Act provides *inter alia* that a vessel less than 250 tons register, and a vehicle, animal or other thing made use of in importation, landing, removal, conveyance. Carnage or exportation of goods liable to forfeiture under the Act shall itself be liable to forfeiture. In other words, forfeiture of a vessel used to ferry or convey uncustomed goods is legal.

14. Under **Section 203 (2)** of the said Act, the goods liable to forfeiture shall be condemned.

15. There is no doubt that the Vehicle Reg. No. KDB 024Y was found transporting the uncustomed goods which were forfeited upon conviction of the accused persons who were found in possession thereof and who pleaded guilty to the charge.

16. Nonetheless, the applicant who has demonstrated beyond doubt that he is the owner of the subject motor vehicle was not an accused person in the lower court. **Section 389A of the Criminal Procedure Code** provides for the procedure for forfeiture of goods and that procedure is very elaborate. The section provides that:

***“389A. (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.”***

17. What I gather from the above provision is that the trial court should have issued Notice to show cause upon the owner of the motor vehicle which was found transporting uncustomed goods and interviewed him before proceeding to make the final order for forfeiture of the state motor vehicle. This is so because there was no evidence that the vehicle in question was part of the uncustomed goods on which the charge was substantially predicated.

18. In addition, I hold the view that the provisions of the law for forfeiture of property are subject to the provisions of the Constitution which guarantees every person the right to be heard before decisions are made affecting them and the right to the protection of their property. It follows therefore that even if the law provides for forfeiture of such property, unless the person who is convicted is the owner of the subject property or vessel, any other person who lays claim to ownership thereof must be given the opportunity to be heard before such order is made.

19. The people who were found in possession of and transporting the uncustomed goods having pleaded guilty to the charge, and there being no evidence that they were owners of the motor vehicle that was transporting the uncustomed goods or that they withheld from the court information on who the owner of the subject motor vehicle was, it was incumbent upon the trial court to inquire into the ownership of the subject motor vehicle as the owner thereof, not being among the accused persons who pleaded guilty, had the right to be heard before the forfeiture order was made for the forfeiture of his motor vehicle.

20. What the trial court could have done was to invoke the provisions of **Section 389A of the Criminal Procedure Code** by calling upon the owner of the motor vehicle to appear and show cause why his motor vehicle should not be forfeited to the state. The situation would however have been different had the person charged been the owner of the forfeited motor vehicle. Failure to issue Notice to show cause and to hear the owner of the motor vehicle in issue amounted to an unlawful forfeiture.

21. I reiterate that there is no material on record to show that the 2<sup>nd</sup> and 3<sup>rd</sup> accused convicts or driver and occupants of the vehicle declined to give particulars of the owner of the motor vehicle or that they themselves were the owners of the said motor vehicle. Had there been proof of their being owners or their non-disclosure of the particulars of the owner thereof, then the order of forfeiture of the motor vehicle would have followed their conviction as stipulated in section 201 of the **Customs and Excise Duty Act** that:

***“201 where a person is prosecuted for an offence under this Act and anything is liable to forfeiture by reason of commission of that offence, the conviction of that person of that offence shall, without further order, have effect of condemnation of that thing.....”***

22. I therefore find that it was therefore irregular and improper for the trial court to order for forfeiture of the subject motor vehicle without inquiring into its ownership and issuance of Notice to show cause to the owner thereof who, as has been demonstrated, was not a party to the criminal proceedings. *see Kamau Muchiri & Another v Republic (1990) eKLR* where the Court was clear that:

***“The National Cereals and Produce Board Act and its regulations have no provisions for forfeiture and this is unlike the***

**repealed maize marketing Act which provided for forfeiture under section 43. It appears to me that failure to include such provisions in the new Act meant that no forfeiture should be ordered unless there are provisions in the Criminal Procedure Code is section 389A.(sic) But that section deals with the procedure for forfeiture only. The procedure under section 389A is to be followed where a written law authorises forfeiture and not otherwise.”[emphasis added].**

23. Furthermore, **Article 47 of the Constitution** guarantees every person the right to fair administrative action which shall be fair, just and expeditious. To fail to summon the owner of the motor vehicle and to accord him the opportunity to be heard before forfeiting the motor vehicle found transporting uncustomed goods is in breach of that fundamental right to fair administrative action as stipulated in **Article 47 of the Constitution** and **Section 4 of the Fair Administrative Action Act**.

24. The **East African Community Custom and Management Act, 2004** and the Customs Excise Act do not provide the procedure for forfeiture hence the application of section 389A of the Criminal Procedure Code. All these provisions of the law are nonetheless subject to the Constitution and the Bill of Rights hence courts must at all times interpret the provisions of the law with the constitutional guarantees in mind. In this case, I am satisfied that the complaint by the applicant is justified.

25. I find that the order for forfeiture of motor vehicle KDB 024Y made on 28/12/2021 was irregular and contrary to the law. I find the application for revision of the said orders merited. I allow the application for revision, I revise and set aside the order of forfeiture made on 28<sup>th</sup> December, 2021 by Hon C.I. Agutu, SRM.

26. On whether I should order for release of the subject motor vehicle to the applicant or revert the case back to the trial magistrate to issue Notice to show cause to the applicant herein, the Respondent’s Counsel, Senior Principal Prosecution Counsel Mr. Kakoi urged this court to revert the matter to the trial court to issue Notice to Show cause. However, no material has been placed before this court to show that the convicted persons owned the motor vehicle or that it was the applicant herein who had given the authority to the convicts to transport uncustomed goods.

27. The applicant has sufficiently demonstrated to this court that his motor vehicle registration number KDB 024Y was used for hire for commercial purposes. That in my view is sufficient reason to have the forfeiture order set aside. He also swore an affidavit which has not been controverted stating that he had hired out the vehicle to Samuel Omondi for purpose of carrying cement on 25/12/2021 and that he was neither aware of nor a party to the illegal activities of the said Samuel Omondi, the 2<sup>nd</sup> accused who was convicted for being in possession of the uncustomed goods and as the occupant of the subject motor vehicle at the material time.

28. Furthermore, it was the duty of the Prosecution counsel in the trial court to assist the trial court in ensuring that the procedure for forfeiture of the subject motor vehicle was followed. It is not for this court to assist the prosecution to restart court proceedings that were conducted and concluded with their full participation and blessings in the trial court. I find that that no prejudice will be occasioned to the Respondent State if the order reverting the matter to the trial court is declined. Accordingly, the request to remit the file to the trial court for NTSC proceedings is accordingly declined.

29. For the above reasons, I hereby allow the application dated 18<sup>th</sup> January, 2022, revise and set aside the forfeiture order made on 28<sup>th</sup> December, 2021 by Hon C.I. Agutu, SRM, Ukwala law Courts in Cr. CASE No. E644 of 2021 and order that the Motor vehicle Registration No. KDB 024Y be released to the owner thereof, Moses Assanga Amukola upon presentation of his identification and service of this ruling and order on the said Court or any other person or persons having possession of the said motor vehicle. I so order.

30. File closed.

**DATED, SIGNED AND DELIVERED AT SIAYA VIRTUALLY THIS 17TH DAY OF FEBRUARY, 2022**

**R.E. ABURILI**

**JUDGE**